**Odionyi v Republic (Criminal Appeal 194 of 2018)**
**[2025] KECA 2291 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2291 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 194 OF 2018**

**DK MUSINGA, PO KIAGE & GV ODUNGA, JJA**

**DECEMBER 19, 2025**

**BETWEEN**

**JAMES OCHOM ODIONYI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the Judgment of the High Court of Kenya at Busia (Kiarie, J.) delivered on 13{{^th}} March 2018 in Criminal Appeal No. 3 of 2004)***

## JUDGMENT

1. The appellant was charged alongside one Lawrence Emojong before the Magistrates' Court at Busia with seven counts of robbery with violence contrary to section 296 (2) of the Penal Code. Lawrence Emojong (Emojong) was the 1st accused and the appellant the 2nd accused. According to the charge sheet, the offences occurred on the night of 18th and 19th November 2001.

2. In count I, the prosecution alleged that on the night of 18th and 19th November 2001 at Adungosi in Teso District, the appellant, while armed with an AK-47 rifle and clubs and in the company of others not before court, robbed Charles Opemi Oyala of cash and clothing worth Kshs. 5,205/= and used violence on him. In Count II, he was said to have similarly robbed George Otenge Opili of cash, a T-shirt, a bicycle and a wristwatch, all valued at valued at Kshs. 5,350/= and used violence on him at the time of the robbery. Count III alleged the violent robbery of Rose Amai Atieno of a torch and a candle worth Kshs. 110/=. Count IV alleged violent robbery of Charles Omoko Barasa of cash, a bicycle and personal effects worth Kshs. 5,380/=. Count V alleged violent robbery of Moses Chapa Manyuru of two bicycles valued at Kshs. 8,600/. Count VI alleged the robbery of Desterio Okapu Emokol of cash and a bicycle valued at Kshs. 4,002/= with violence. Count VII alleged the robbery of John Ekol of Kshs. 35,000/= and a bicycle valued at Kshs. 39,000/= with violence.

3. The prosecution's case was based on the testimony of nine witnesses. PW1, Charles Opemi Oyala, testified that at about 8.00 p.m. on the night of the incident he was walking home with George Opili (PW3) and a lady named Rose when they were attacked by a group of men, who ordered them to lie down, tied their hands and robbed them of money and personal items. He said he was able to recognise the appellant and Emojong because later that same night, the attackers beat a teacher and flashed a torch, thereby enabling him to see and recognise them. He stated that the appellant was the one holding the gun and that he had known him for about twenty years. He also testified that he made a report to the police and identified his attackers as Emojong, whom he described as having rasta (dreadlocks), and the appellant, who he identified by his nickname "Odioma". In cross-examination, he added that he was beaten during the incident and suffered a dislocation of the shoulder.

4. PW2, Rose Akauret, a girl aged 15 years, testified that she was asleep at about 9.00 p.m. when their door was hit repeatedly. Her parents screamed but the attackers broke in, tore her clothes, tied her hands behind her back and ordered her to accompany them. She stated that the attackers were six in number. They moved with her toward Adungosi and on the way accosted three more people. One of the attackers later untied her and ordered her to run home. PW2 stated that she could not identify any of the attackers, though she noted they had a bag and a whip.

5. PW3, George Opili, stated that he was walking home with PW1 and Rose when they were confronted by a group of people who tied them, tore their clothes and said they were taking them to the police station. Along the way, they met other people whom their attackers also robbed. They also went to several homes where further robberies were committed. PW3 stated that he identified the appellant because there was bright moonlight which enabled him to see both accused persons clearly. He also testified that the appellant wore the jacket stolen from PW1, making him easier to recognize, and that he had known the appellant for about a year. In cross-examination, he repeated that he knew both the appellant and Emojong as neighbours. He added that Rose flashed a torch at the appellant thus enabling him to see him, and that he recognized the appellant's voice when he spoke.

6. PW4, Charles Barasa, testified that he was attacked on his way home by a group of men, who beat him and tied his hands. They robbed him of Kshs. 180/=. He stated that he identified Emojong because Emojong flashed a torch on his face and had dreadlocks. He added that there was light at PW5's home which also helped him to see him. PW4 later attended an identification parade and identified Emojong.

7. PW5, Moses Chapa Manyara, testified that the attackers stormed his home, beat him up and demanded Kshs. 30,000/= which he did not have. They beat him unconscious and stole two bicycles. Although there had been a tin lamp in the house, the attackers put it out and therefore he was unable to identify any of them.

8. PW6, Margaret Ekesa, the wife of PW5, confirmed PW5's account. She also said she was unable to identify any of the attackers.

9. PW7, John Obarasa, testified that while at home on the night the incident in question took place, he heard his door being hit, though the attackers did not manage to break it. They then went to the children's house and took Rose (PW1), who returned home the following day.

10. PW8, Inspector Margaret Abayi, conducted the identification parade during which Emojong was identified as one of the attackers.

11. PW9, PC Samson Kiptoo, the investigating officer, stated that he received the robbery report the following morning. He said that Emojong was mentioned in the initial report, though he could not recall the name of the complainant. He added that he was already familiar with Emojong, who had dreadlocks, and that he thereafter arrested him.

12. In his sworn defence, the appellant denied any involvement in the robbery. He said that he was a farmer and acknowledged knowing PW1 for about five years because PW1 bought tomatoes from him, but denied knowledge of the other witnesses. He also stated that after he was arrested and taken to Adungosi Police Station, no one came forward to identify him.

13. The trial court found that the prosecution had proved all the seven counts of robbery with violence. It held that the attacks committed on the night of 18th and 19th November 2001 by a group of armed men involved assaults, tying up victims and stealing money, bicycles and household items. The court accepted the complainants' accounts that the attackers were armed, including with an AK-47 rifle, and that they used violence. It relied heavily on recognition evidence from PW1 and PW3 who said they knew the accused and identified them through moonlight, torchlight and close interaction during the robberies. It therefore found the recognition evidence credible and consistent. It rejected the defence claim that they were at home on the night of the alleged incident with their wives and noted that the said wives were not brought to court as witnesses. The trial court therefore concluded that all elements under section 296 (2) of the Penal Code were met in respect of counts I, II and V and accordingly convicted both Emojong and the appellant on the said counts. The court acquitted them on all the other counts. They were thereafter sentenced to death.

14. On first appeal vide Busia High Court Criminal Appeal No. 3 of 2004, the appellant contended that his conviction was unsafe because he had not been properly identified; key witnesses were not called; and the evidence adduced was insufficient. The High Court held that PW1 and PW2, who both knew the appellant beforehand and were with the robbers from about 8 p.m. to 4a.m. were able to positively recognize him under moonlight and torchlight. Their recognition was reinforced by voice identification and by the fact that PW1 named the appellant to the police at the earliest opportunity. The court noted that this evidence had not been challenged during cross-examination and found it credible and reliable.

15. The High Court rejected the appellant's complaint about missing witnesses, noting that he had not identified who they were or shown why they were material. It also dismissed his claim that the charge sheet was defective for lacking alias names, an occurrence book number and the OCS's signature, observing that these issues were raised only in submissions and did not form part of the original grounds of appeal. The court held that the alleged defects were merely formal and caused him no prejudice. It further rejected the appellant's alibi, finding it was dislodged by the prosecution's strong and consistent recognition evidence.

16. The court therefore agreed with the trial court's findings and upheld the conviction. Although it noted minor errors in the manner the magistrate pronounced sentence, including sentencing on a count in which the appellant had been acquitted and failing to leave subsequent death sentences in abeyance, it found that no prejudice had been occasioned and corrected the sentences accordingly. In the end, the High Court dismissed the appeal.

17. In this second appeal, the appellant contends that that the High Court erred in law by failing to appreciate that the witnesses did not adequately identify him and by upholding a sentence that he says was unconstitutional.

18. At the hearing of this appeal, the appellant was represented by learned counsel Ms. Raburu while the respondent was represented by Ms. Mutella, Assistant Director of Public Prosecutions. Counsel briefly highlighted their respective client's written submissions.

19. For the appellant, it was contended that he was not adequately identified by the prosecution, thus raising uncertainty regarding his alleged role in the offence. Counsel contended that both the High

Court and the trial court failed to apply the settled principles on visual identification and recognition. Relying on sections 107 and 109 of the *Evidence Act*, counsel posited that the burden lay on the prosecution to prove identity beyond reasonable doubt. To demonstrate the high caution required, counsel cited the classic decision in R v Turnbull & Others [1976] 3 All ER 549, where the court set out factors to be considered when evaluating identification evidence such as lighting, distance, duration of observation, prior knowledge of the accused and consistency of initial descriptions.

20. Counsel further relied on the decision of this Court in Cleophas Otieno Wamunga v Republic [1989] eKLR, wherein the Court warned that evidence of identification or recognition must be examined with the greatest care, particularly where the entire case turns on such evidence. According to counsel, these principles were not followed in the identification of the appellant. In this regard, it was submitted that although the trial court concluded that PW1 and PW3 positively identified the appellant who was the 2nd accused, their testimonies did not support that finding when examined closely. According to counsel, PW1's evidence focused primarily on the assailant with dreadlocks, who he consistently described as the person he saw during the attack. He did not clearly state that he was familiar with the appellant and when he claimed to have known the attackers for twenty years, he did not specify which accused he meant. Further, that in cross-examination PW1 confirmed that only Emojong had dreadlocks, yet he provided no explanation as to how he knew or recognized the appellant. It was further contended that PW1's reference to nicknames allegedly given to the police was contradicted by PW9, who testified that the arrest was based solely on the description of the man with dreadlocks and that only Emojong was identified through that description. According to the appellant, PW9 was clear that the police did not identify the appellant in the same way.

21. It was also submitted that PW3's evidence was similarly inconclusive. In this regard, counsel contended that PW3 stated that the appellant had worn a red jacket taken from PW1, yet his own recognition centered on Emojong whom he knew as a motorcyclist ('boda') for about a year. His reference to having seen the appellant at "the point" over the course of a year was said to be vague and lacked any detail about the nature of their acquaintance or how such familiarity translated into reliable recognition.

22. Additionally, it was contended that the identification parade conducted by PW8 only concerned Emojong. The appellant was neither included nor subjected to any identification procedure, a fact confirmed by PW4 who stated that he identified only Emojong. In the circumstances, and given that PW1 and PW3's recognition evidence hinged on the distinct appearance of Emojong's dreadlocks, and given that no witness explained how they identified the appellant, it was submitted that the appellant was never sufficiently or reliably identified to justify his arrest or subsequent conviction. It was therefore submitted that the High Court erred by upholding a conviction grounded on unreliable identification.

23. On sentence, counsel contended that the mandatory death sentence imposed for robbery with violence under section 296(2) of the Penal Code was unconstitutional. In this regard, counsel cited Francis Karioko Muruatetu & Another v Republic [2017] eKLR, where the Supreme Court held that mandatory death sentences violate the right to a fair trial by depriving courts of discretion to consider the individual circumstances of each offender. It was thus contended that despite the Muruatetu decision touching on cases of murder only, the same arguments and reasoning can apply to the present case whose penalty is as prescribed under section 296 (2) of the Penal Code. It was contended that the imposition of the death penalty was excessively severe, surpassing what is justified, given the circumstances of this case and taking into consideration that the appellant was never given a chance to present any mitigating factors.

24. To reinforce the argument that Muruatetu could apply to offences under section 296 (2) of the Penal Code, counsel cited the decision of William Okungu Kittiny v Republic [2018] KECA 851 (KLR)

wherein this Court held that the findings and reasoning of the Supreme Court on the mandatory nature of the death sentence applies mutatis mutandis to the mandatory death penalty for robbery with violence. It was further submitted that sentencing under section 296 (2) is a matter requiring judicial discretion and that a blanket mandatory sentence offends Articles 25, 26 and 28 of *the Constitution* as well as international human rights instruments to which Kenya is party, including the International Covenant on Civil and Political Rights.

25. It was further submitted that the trial court imposed sentence solely on the basis of the statute and did not give the appellant an opportunity to mitigate, contrary to the principles of fairness and individualized justice. According to counsel, the appellant's nineteen years in custody strengthens the plea for this Court to revisit the sentence in light of modern sentencing jurisprudence which recognises rehabilitation, restorative justice and reintegration as central objectives. In this regard, it was submitted that given the appellant's remorse and the lengthy period already served, this Court should consider a sentence that reflects both the interests of justice and the appellant's demonstrated readiness to rejoin society.

26. In the end, the appellant urged us to quash his conviction or in the alternative, review his sentence and substitute therefor an appropriate, lawful and proportionate penalty.

27. In response, counsel for the respondent contended that both the trial court and the High Court had properly analysed the issue of identification and found that the evidence amounted to clear recognition rather than mere first-time identification. In this regard, it was asserted that PW1 and PW3 remained firm even during cross-examination that both accused persons were well known to them as neighbours, and that the appellant himself admitted in his defence that he knew PW1. In counsel's view, this mutual familiarity strongly supported the trial court's conclusion that recognition was positive and safe.

28. Counsel further contended that because the case turned on recognition, the absence of an identification parade for the appellant was not fatal and did not undermine the prosecution's case. She contended that the High Court at paragraph 12 of the impugned judgment had revisited the issue and upheld the finding that the witnesses had adequate opportunity to recognise the appellant during the prolonged ordeal from 8.00p.m. to 4.00a.m., aided by moonlight and torches. Counsel maintained that the evidence on identification was consistent across witnesses and was never effectively challenged at trial by the appellant's then counsel.

29. On the issue of sentence, the respondent contended that the appellant's argument that the mandatory death sentence is unconstitutional could not be entertained because the issue was never raised before the High Court and a second appellate court cannot pronounce itself on matters that were not canvassed or determined by the first appellate court. Reliance for this was placed on Okinda v Republic [2025] KECA 3 (KLR), where this Court held that it lacks jurisdiction to determine the constitutionality of a sentence when the issue is raised for the first time on a second appeal.

30. On the merits of the ground regarding sentencing, it was further submitted that although the appellant invoked Francis Karioko Muruatetu & Another v Republic (Muruatetu I), the Supreme Court clarified in its 2021 Directions (Muruatetu II) that the decision applied only to sentences for murder and not other capital offences. It was emphasized that the Supreme Court reaffirmed this position in Wanga v Republic (Petition E030 of 2023) [2024] KESC 38 (2 August 2024) (Judgment), holding that mandatory and minimum sentences outside murder were unaffected by Muruatetu I. The respondent also cited Chogo v Republic (Criminal Appeal 185 of 2017) [2024] KECA 468 (KLR), where this Court held that the mandatory death penalty under section 296 (2) of the Penal Code remains valid and that Muruatetu I did not disturb mandatory death sentences for robbery with violence. A similar

position was reaffirmed in Ochieng & Another v Republic (Criminal Appeal 133 of 2019) [2025] KECA 13 (KLR).

31. In addition, the respondent contended that the appellant was in fact afforded an opportunity to mitigate, during which he expressed remorse, cited his status as sole the breadwinner for his family, and raised a medical condition, after which the trial court imposed sentence in accordance with statute. It was submitted that severity of sentence is a matter of fact under section 361 of the Criminal Procedure Code and therefore outside the scope of a second appeal.

32. Lastly, the respondent relied on Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR, wherein this Court observed that unless and until Parliament amends the law, courts are bound to impose the death penalty where it is prescribed. The respondent therefore urged the Court to find that the High Court properly upheld the sentence, that the mandatory death penalty under section 296 (2) remains valid, and that the appellant's grounds on sentence are therefore without merit.

33. We have considered the record, the rival submissions and the law. The mandate of this Court in a second appeal is restricted by section 361 of the Criminal Procedure Code to matters of law only. This Court will therefore not interfere with concurrent findings of fact unless it is shown that the courts below misdirected themselves; considered irrelevant factors; failed to consider material evidence; or reached plainly wrong conclusions. See Michael Ang'ara Paul v Republic [2021] KECA 1004 (KLR).

34. The issues that present themselves for determination in this appeal, in our view, are whether the High Court erred in holding that the appellant was properly identified at the scene of the robberies so as to sustain a conviction under section 296 (2); and whether it further erred by upholding a sentence that the appellant contends was unconstitutional.

35. As regards the issue on identification, the record shows that the prosecution's case rested principally on recognition by two complainants who remained in the company of their assailants for several hours, under conditions which both the trial court and the High Court found suitable for clear visual and audio observation. These complainants reported the identities of the attackers promptly to the police.

36. Indeed, the evidence of PW1 and PW3 who were the first victims accosted on the night in question was that the incident lasted from about 8.00 p.m. to 4.00 a.m. Their interaction with the assailants was prolonged and direct. PW1 testified that he saw the appellant armed with a rifle and he reported to the police the names or nicknames of the assailants the following morning. He also described the appellant who was guarding them while others attacked a teacher and stated that he knew the appellant beforehand. PW3 spoke of bright moonlight and the use of torches, close proximity, and extended captivity throughout the night, all of which afforded ample opportunity for recognition. He further stated that he recognized the appellant's voice.

37. On his part, PW9 confirmed that the initial report included information on the identities of the attackers and that the police relied on both physical descriptions and names in commencing their investigations. The fact that PW1 cited the appellant's nickname "Odioma" rather than his full name did not weaken the reliability of his identification. In Simiyu & Another v R, [2005] 1 KLR 192 at 195, this Court observed in part as follows:

> "...In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R v Kabogo s/o Wagunyu, 23 (1) KLR 50)..."

38. While giving his report to the police, PW1 identified Emojong as "Rasta" and the appellant herein as "Odioma," which he stated was his nickname. Having analyzed the entire record, we are convinced that the name "Odioma" referred to the appellant who had accosted and robbed PW1 and in whose company he remained between 8.00pm and 4.00am. In any case, and without prejudice to the foregoing, it is not uncommon for witnesses to know neighbours and acquaintances by nicknames. In our view, contemporaneous naming, even by nickname, is powerful evidence of recognition because it shows that the witness already associated the assailant with a known individual before any possibility of influence or suggestion. The use of "Odioma" therefore demonstrated proximity and familiarity and does not negate the clarity of PW1's recognition. PW1's use of the nickname "Odioma" did not detract from the reliability of his evidence. To the contrary, the fact that he gave his nickname at the earliest opportunity reinforces the conclusion that he recognized the appellant from the outset and identified him based on prior acquaintance, not an afterthought or suggestion.

39. The law on recognition is settled. Recognition, unlike first-time identification is generally more reliable where the witness knows the accused and the conditions permit a clear view. As stated in R v Turnbull & Others (supra), factors such as lighting, duration of observation, prior knowledge and any discrepancies between the initial report and later testimony must be considered. In the circumstances herein, both PW1 and PW2 had several hours to observe their assailants. They said that bright moonlight and the use of torches provided sufficient illumination. They also recounted that the assailants spoke repeatedly, thereby making voice recognition possible.

40. This Court has recognized voice identification as reliable where the witness is familiar with the voice. In Karani v Republic [1985] KECA 91 (KLR), this Court stated:

> " Identification by voice nearly always amounts to identification by recognition. Yet here as is any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification. In Mbelle v Republic, Criminal Appeal No 45 of 1984, Court of Appeal, Mombasa, the appellant said "Ni mimi' in response to the caller. This court held that the reception of the evidence of identification by voice was safe."

41. In the circumstances herein, the identification of the appellant and Emojong was by both recognition and voice identification. The fact that the police arrested Emojong on the basis of his distinctive dreadlocks does not detract from the recognition of the appellant. Witnesses may identify different assailants using different distinguishing features. What matters is whether each identification meets the legal standard of reliability. The High Court's finding that PW1 promptly identified the appellant by name or nickname and that PW3 corroborated this evidence through both visual and voice recognition accords with established jurisprudence.

42. We are equally unpersuaded by the argument that the identification was unsafe because the appellant did not participate in the identification parade. Recognition does not require an identification parade and where a witness already knows the suspect there is no need of an identification parade. The decisive question is whether the recognition was accurate and supported by favourable conditions. The evidence on record satisfies this test. We therefore find that the appellant was properly identified by both visual and voice recognition and this ground of appeal accordingly fails.

43. Turning to the issue of sentence, the record shows that the appellant did not raise any complaint regarding the constitutionality of the sentence in his appeal before the High Court. He cannot, therefore, be permitted to introduce that issue for the first time on second appeal. This Court when confronted with a similar situation in Okinda v Republic

(supra) held as follows:

> " Likewise, the appellant herein having raised the issue of the constitutionality of the sentence that was imposed against him, for the first time, this Court has no jurisdiction to entertain the issues of constitutionality of the sentence, including his complaint regarding the indeterminate nature of the sentence of life imprisonment."

44. However, and even if, for argument's sake, we were to assume jurisdiction to consider the issue, we would still find no basis for interfering with the sentence in light of the Supreme Court's Directions of 6th July 2021 (Muruatetu II) which unequivocally clarified that Muruatetu I applies only to sentences for murder under sections 203 and 204 of the Penal Code. Applying Muruatetu II, this Court in Chogo v Republic [2024] KECA 468 (KLR) held that:

> " Our reading of the Supreme Court's Advisory in Muruatetu 2 at paragraph 4 (a) is that the Supreme Court directed that the mandatory nature of the death sentence as provided for under section 204 of the Penal Code was declared unconstitutional, but that the order did not disturb the validity of the death sentence in all the other capital offences that attract a mandatory death sentence."

45. In conclusion, we find that the conviction of the appellant was sound in law and was supported by credible and corroborated evidence. The sentence meted against him was as prescribed by the law and therefore the High Court did not err by upholding both the conviction and the sentence. This appeal is therefore devoid of merit and is hereby dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.**

**D. K. MUSINGA, (PRESIDENT)**

**.....**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**