



REPUBLIC OF KENYA



KENYA LAW
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**Ojoo v Republic (Criminal Appeal 138 of 2016)
[2023] KEHC 255 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 138 OF 2016
REA OUGO, J
JANUARY 25, 2023**

BETWEEN

BENSON ODUOR OJOO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. C.L YALWALA (SRM) dated 2nd June 2016 at the Chief Magistrate's Court at Bungoma in Criminal Case No. 2128 of 2014)

JUDGMENT

1. The appellant, Benson Oduor Ojoo, was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* and sentenced to suffer death. The particulars of the charge were that on August 18, 2014 at Kabula trading center within Bungoma County jointly with others not before court being armed with offensive weapons namely metal bar robbed Moses Mulama his motor vehicle registration number KBH 175D Toyota GL that was grey in colour valued at Kshs 700,000/- and cash Kshs 11,800 and at the time of such robbery used actual violence to the said Moses Mulama Mafwabi.
2. The appellant filed his petition of appeal that is undated and subsequently a supplementary petition of appeal on September 19, 2022. Although several grounds of appeal have been raised for determination, the single decisive issue that will resolve this appeal is whether the trial magistrate complied with Article 50 (2) (g) of the *Constitution*. Article 50(2) (g) of the *Constitution* provides that every accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly. I have carefully looked at the proceedings before the subordinate court and note that the trial magistrate failed to inform the appellant of his right under Article 50(2) (g) of the *Constitution*. The consequence of failure to comply with Article 50(2) (g) of the *Constitution*



renders the trial a nullity. This was the holding of Mrima J in Migori High Court Criminal Appeal No 44 of 2019, *NMTalias Aunty v Republic* [2019] eKLR. The Court stated:

- "14what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate.
16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.
17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation.... the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.....
22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The Legal Aid Act No. 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -
43. A court before which an unrepresented accused person is
(1) presented shall-
- (a) promptly inform the accused of his or her right to legal representation;

.....



28. Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J in Joseph Kiema Philip (supra) stated as follows: -

.... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?.....

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law."

3. The trial court having failed to inform the appellant of his right under Article 50 (2) (g) of the Constitution, denied the appellant the right to choose to be represented by an Advocate of his choosing despite having to put up a defence for a serious offence. The subordinate court's failure to comply with Article 50 (2) (g) of the Constitution rendered the trial a nullity.

4. The issue that remains to be considered is whether I should order a retrial. The applicable principles were stated in the case *Fatehali Manji v Republic* [1966] EA 343 where the stated:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made



where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

5. Although there was overwhelming evidence implicating the appellant of the offence, I have taken into account that the appellant was charged in 2014 and the failure of the trial magistrate to comply with Article 50 (2) (g) of the *Constitution of Kenya* is glaring. I have also taken into account the fact that the appellant has been in prison for 6 years and was in remand custody for almost 2 years. In these circumstances, a re-trial may not be feasible.
6. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2023.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Respondent Absent

Wilkister C/A

