Abdallah & 3 others v Republic & 3 others (Criminal Appeal 14, 15 & 16 of 2019 (Consolidated)) [2023] KEHC 3769 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3769 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 14, 15 & 16 OF 2019 (CONSOLIDATED)

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

SAMUEL ABDALLAH ..... 1ST APPELLANT

SAMUEL ABDALLAH ..... 2ND APPELLANT

ALFRED TABIRU ..... 3RD APPELLANT

JULIUS MUSUNGU ..... 4TH APPELLANT

AND

REPUBLIC ..... 1ST RESPONDENT

REPUBLIC ..... 2ND RESPONDENT

REPUBLIC ..... 3RD RESPONDENT

REPUBLIC ..... 4TH RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL 15 OF 2019

BETWEEN

ALFRED TABIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL 16 OF 2019

BETWEEN

JULIUS MUSUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Appeal from judgment of Hon. F Makoyo, Senior Resident Magistrate, SRM, in Butere SRMCCRC No. 80 of 2017, of 1st February 2019)

JUDGMENT

1. The appeals herein have never been consolidated, but the appellants have always been produced together, and the proceedings have always been conducted jointly. Consequently, I shall determine the 3 appeals together.

2. The appellants, Samuel Abdallah, Alfred Tabiru and Julius Musungu, I shall refer to them a the 1st, 2nd and 3rd appellants, respectively, for the purpose of this judgment, had been charged before the primary court, with the offence of robbery with violence, contrary to section 295, as read with 296(2), of the *Penal Code,* cap 63, Laws of Kenya. The particulars were that on 30th day of January 2017, at Butere Town, Butere Sub-County, within Kakamega County, jointly with others not before court, while armed with dangerous weapons, namely iron bars, pangas and clobbers, robbed Ishmael Ndula Mutuli, of cash Kshs. 1, 500, 000.00; and at the time of such robbery used actual violence and wounded the said Ishmael Ndula Mutuli. They pleaded not guilty to the charge, and a trial was conducted. 9 prosecution witnesses testified.

3. The complainant, PW1, Ishmael Ndula Mutuli, testified that he knew all the appellants prior to the incident. He said that he was attacked on January 30, 2017, as he was closing his shop at 9.00 PM. He stated that he did not see the 1st appellant among the persons who attacked him, although he had seen him buy cigarettes from his shop earlier, something which was unusual, but he was positive that it was the 3rd appellant and another who hit him. PW2, Joel Ajamwa Omwaka, knew all the appellants prior to the incident. He heard screams on January 30, 2017, at 11.00 PM. He ran out, and saw people surrounding PW1. When he rushed to assist PW1, he was assaulted by them. When he challenged them on why they were beating him, they stopped and ran away. He was not able to identify any of them. He later assisted to take PW1 and his wife to hospital. PW3, Kelvin Shikuku Omulama, knew all the appellants before the incident. He heard PW2 scream at 11.00 PM, on January 30, 2017. He went out to assist him, and saw PW1 and his wife were injured. He assisted to take them to hospital. He did not see the assailants. PW4, Moses Ayub Wambalo, did not testify on the events of January 30, 2017.

4. PW5, No. 78843 Police Constable Nicholas Koech, tracked the 1st appellant, using his mobile telephone number. He arrested him at Sabatia. PW6, Bramwel Andati, did not testify on the events of the evening of January 30, 2017, but said that he had seen the appellants during the day that day, and he also testified on the activities of the 1st appellant on the days after January 30, 2017. PW7, No. 230749 Superintendent of Police Monica Ong'ayo, was the investigating officer. She testified that the 1st appellant was arrested first, and led the police to the other appellants. The 1st appellant also made a confession, before Hon. Shimenga, Resident Magistrate, RM. She stated that the appellant was not tricked into confessing. PW8, Hon. Maureen Iberia Shimenga, RM, recorded a confession from the 1st

appellant, after he was escorted to her Chambers by the Officer Commanding Butere Police Station, a prosecutor, Ms. Tina Madowo, on February 21, 2017. His father was present. PW9, Cedrick Wanyama, was a clinician. He attended to PW1, on February 27, 2017, for the purpose of the P3 Form. He had a swelling on his left shoulder, and a cut wound on the left side of the head. X-ray films confirmed that he had a fracture. He opined that a blunt object was used to inflict the injuries. He classified the injuries as grievous harm.

5. The appellants were put on their defence. The 1st appellant made a sworn statement. He stated that he was arrested on January 17, 2017, and was in custody for 3 weeks and 5 days. He denied being presented before Hon. Shimenga at any time, and that she lied. He never made any confession. He said that he was taken to the CID office some time, and he found his father there, but he could not remember what the father said. The 2nd appellant also gave a sworn statement. He narrated about how he spent the whole day herding cattle, retreated home in the evening, and slept the night away thereafter. He was informed of the incident involving PW1 on 31st January 2017. He was arrested on February 1, 2017. The 3rd appellant testified that he was at work in Nairobi on January 30, 2017, and he was on night duty that day. He was arrested by the police at Ruiru on February 22, 2017.

6. In its judgment, the trial court found that all the appellants were party to the robbery on PW1, carried out on January 30, 2017, during which PW1 was injured, and his wife killed.

7. The appellants were aggrieved, and brought the instant appeals. In his memorandum of appeal, the 1st appellant states that he pleaded not guilty; his sentence to death was inconsistent with the Constitution; the confession was not proper; his rights under article 49(1) of the *Constitution* were violated; he was tortured by Flying Squad, which violated his rights under Article 50(2)(i) of the Constitution; his defence was not considered, and burden of proof was shifted to him; and his mitigation was not considered, and so was the fact that he was a first offender. On his part, the 2nd appellant avers that the charge was defective, for offending sections 134 and 214(2) of the *Criminal Procedure Code*, cap 75, Laws of Kenya; the provisions of article 50(2) of the *Constitution* were offended; the evidence was farfetched and unfounded; finger dusting was not done; the sentence imposed was excessive; and he was a first offender. The 3rd appellant avers that the death sentence was inconsistent with the Constitution; the confession was improper; article 49 of the Constitution was offended; his torture by Flying Squad was not taken into account and article 50(2)(i) of the *Constitution* was offended; defence was not considered, and burden of proof was shifted; and the fact that he was a first offender should have been considered at sentencing. The 1st appellant subsequently filed amended grounds of appeal, where he avers that the sentence imposed on him was harsh, the admissibility and credibility of the confession was not tested, his alibi defence was not considered, and the evidence was flimsy and inadequate.

8. Directions were given on October 24, 2019, for disposal of the appeal, by way of written submissions. Submissions were filed by the appellants, around the sentence being harsh and unconstitutional; the confession being discredited; the charge was not established beyond reasonable doubt; alibi defences not taken into consideration; identification was not positive; facts were not corroborated nor consistent; and article 50(2)(b)(c)(g)(j) of the *Constitution* were offended.

9. I will start with the alleged constitutional violations, as disposal on the issues around these provisions could determine the appeal finally, without having to consider the other issues or grounds submitted on.

10. Article 49(1)(f) of the *Constitution* is about being produced in court within 24 hours. This is a pre-trial issue, as opposed to a fair trial issue. It is a matter outside of the trial court, for it would be under the control of the police and the prosecution. The courts have held that pre-trial detention, before

production in court, should have no impact on the trial, unless the pretrial detention is unreasonably prolonged as to make the trial a farce. In this case, the appellants were held in pre-trial custody, before being arraigned, for about a week, from their testimonies and submissions. Placed before me together with the original trial court records is a miscellaneous file, Butere SRMC Cr. Misc. No. 15 of 2017. An order was made in that file, on February 21, 2017, for the holding of the suspects for 14 days, at the Butere police station, to facilitate investigations. Prima facie, there is evidence that the pre-arraignment detention beyond 24 hours was with permission of the court.

11. Article 50(2)(b)(c) of the *Constitution* is about an accused person being informed of the charge, with sufficient detail to answer to it; and being afforded time and facilities to prepare for defence. Article 50(2)(b) of the *Constitution* is about the accused being informed of the charge in sufficient detail to answer to it. What does "to be informed of the charge" mean or entail? Would having the charge read, and explained, to the accused upon arraignment, amount to sufficient information on the charge in sufficient detail to enable him answer to it? I do not believe that "to be informed of the charge" would mean reading and explaining the charge at arraignment. Article 50(2)(b) of the *Constitution* is about what happens at arraignment, when the charge is read to the accused person. Article 50(2)(b) of the *Constitution* requires that before the accused is asked to answer to the charge, he ought to have had information made available to him of the charge he faces, in sufficient detail, for him to be able to understand the charges, and to decide on how to plead or answer to them. That presupposes that by the time the charge is read to the accused, he would have been supplied with the documents bearing the charge, that is the charge sheet, so that he reads and understands the charge that he faces, or so that he can obtain advice on how to answer the charges, so that he is clear on what he faces, and he is guided on how to plead or to answer to the charge. Article 50(2)(b) of the *Constitution* is not complied with, through the mere fact of presenting the accused, and ambushing him with charges, and the provision is not complied with, by having the charges read to the accused before he is furnished with the charge document. What this requires is that an accused person ought not have charges read to him, before a copy of the charge document is supplied to him, so that he can consume its contents, and decide on how to plead or answer to the charge. Sufficiency of details would even suggest that some of the evidence ought to be availed to him at this stage, so that he is clear of the charge that he faces, and from the details, decide on how to answer to that charge.

12. In this case, it would appear that there was compliance. The accused were supplied with copies of the investigation diary, witness statements, copies of the P3 Form and the charge sheet. That was done on April 12, 2017and April 25, 2017. I takeMay 9, 2017to be the effective date when plea was taken, and by that time the appellants had been furnished with documents, which disclosed sufficient detail of the charge that they were facing, and which were adequate to inform the appellant on how to answer the charges.

13. Article 50(2)(c) of the *Constitution* is about the accused being afforded time and facilities to prepare defence. I have stated above, that the prosecution had supplied the appellants with most of the material that the prosecution was to rely on in their case. As at the May 9, 2017, when they pleaded to the consolidated charge, they had been supplied with all the documents, except the consolidated charge itself, which was furnished to them the same day. So, in terms of facilities, the prosecution had complied. As to whether they were denied space at the remand centre, where they could sit and prepare, I have no information, for there is nothing on record about that, and the appellants do not appear to have had voiced that to the trial court, if it was an issue. With regard to time, the hearing commenced on May 29, 2017, when the first witness took to the witness stand. The bulk of the evidence was disclosed to them on April 12, 2017. 2 other documents were supplied on April 24, 2017 and May 9, 2017. From that last date, they had 20 days to prepare for the trial, which I find was adequate, for persons who were in remand.

14. Article 50(2)(g), should be read together with 50(2)(h), of the *Constitution*. They are about an accused person being entitled to legal representation of one's choice, or at State expense, in case of being indigent, and being informed of those rights, in either case. Article 50(2)(g)(h) makes it a fair trial right for an accused person to be entitled to be informed of his right to choose an Advocate to represent him in the proceedings; and where he cannot afford one, to have one assigned to him, if substantial injustice would otherwise occur. The provision places a burden on the trial court, so that before it commences the trial, even before plea is taken, for trial commences when an accused person is arraigned for the reading of the charges to him, for he would require legal advice on how to plead, he should be informed of his rights, including that to appoint an Advocate of his own choice, and where he cannot afford one, to have one assigned to him at State expense. Whether or not an accused person can afford to appoint an Advocate of his own choice, is a matter to be addressed when he is first arraigned. Regarding whether substantial injustice would otherwise arise, it would appear that in any case where the accused faces a charge, whose penalty is mandatory death, or where his liberty is likely to be taken away for a long time, substantial injustice could arise, if he does not have the benefit of legal representation. Robbery with violence attracts mandatory death, and and where the principles stated in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) apply, it would mean a lengthy jail term. The penalty for murder clearly points to substantial injustice occurring, where the accused could face death or a long jail term, upon conviction, and should attract the benefit of article 50(2)(g)(h) of the *Constitution*, particularly where he is indigent. The severity of the charge and the penalty should be the trigger, for the trial court to inform the accused of those rights, and to especially consider whether the accused would have capacity to defend himself, in terms of being able to face and confront his accusers, or to instruct an Advocate of his own choice.

15. Article 50(2)(g)(h) of the *Constitution* should be read together with the provisions of the Legal Aid Act, No. 6 of 2016. The object of the Legal Aid Act is stated in the preamble, to be "An Act of Parliament to give effect to articles 19 (2), 48, 50 (2) (g) and (h) of the *Constitution* to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes." So, the *Legal Aid Act* is meant to operationalize article 50(2)(g)(h) of the *Constitution*. Article 50(2)(g)(h) of the *Constitution* and the Legal Aid Act are about access to justice, by providing legal aid services to indigent persons in Kenya. It is about inclusion, non-discrimination and protection of marginalized groups. See sections 3 and 4 of the *Legal Aid Act*. Section 43 of the *Legal Aid Act* imposes duties on the court, before whom an unrepresented person is presented, to comply with article 50(2)(g)(h) of the Constitution, by informing that person of his right to legal representation of his own choice, and where substantial injustice is likely to arise, to inform him of his right to be assigned an Advocate by the State, and where the accused requires legal aid, or is found to require such aid, inform the National Legal Aid Service to provide legal aid service to the accused person. According to section 43(1A) of the Legal Aid Act, that in determining whether substantial injustice is likely to occur, the court ought to take into account the severity of the charge and sentence, the complexity of the case, and the capacity of the accused to defend themselves.

16. Informing accused persons of their rights, under Article 50(2)(g)(h) of the Constitution, and assessing whether the accused require legal aid services from the National Legal Aid Service, are prerequisites for a fair trial, and are condition precedents before a trial is mounted. It should be noted that the rights under the *Legal Aid Act* should even be invoked right after the arrest of the suspects, and before their presentation in court, because the *Legal Aid Act* also operationalizes article 49 of the *Constitution,* on the rights of an arrested person, as section 42 of the Act provides for persons in lawful custody, and casts a duty on the officer in charge of the custodial facility where the person is held, to inform the person of availability of legal aid, and to facilitate applications by persons who may wish to access such

legal aid. These rights are constitutional imperatives, commanded by the Constitution. Trial courts have a duty to ensure that they are complied with, and failure to comply ought to automatically render the subsequent trial null and void, for violation of the Constitution.

17. Were these constitutional fair trial prerequisites applicable in this case? The offences were allegedly committed in 2017. The *Constitution of Kenya, 2010*, commenced on 27th August 2010; while the *Legal Aid Act* commenced on May 10, 2016. It would mean that, as at 2017, when the appellants were being arraigned in court, both the *Constitution* and the *Legal Aid Act* were in application, and the court, before whom they were produced, was bound by article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act*. The said court was obliged to comply with article 50(2)(g)(h) of the Constitution and section 43 of the *Legal Aid Act*, to inform the appellants of their right to legal representation of their own choice, and the right to legal aid from the State, in the event that they were indigent. The duty on the court was to assess whether the appellants were at risk of being exposed to substantial injustice, and to suffer lack of access to justice, on account of being indigent, or belonging to a marginalized or vulnerable group, and on account of the severity of the charges that they faced, and the sentence they were liable to be given, in the event of conviction.

18. So, what happened here? Were the constitutional prerequisites inarticle 50(2)(g)(h) complied with? The appellants were arraigned onMarch 3, 2017, before Hon. Makoyo, SRM, and the charges were read to them. The charge was described as holding then, as the prosecution was still awaiting further directions. The appellants were remanded. On March 10, 2017, the prosecution asked for more time, which was granted. On March 17, 2017, the prosecution was granted more time, on grounds that they intended to charge more suspects. On March 22, 2017, the prosecution indicated that it had concluded investigations, and undertook to supply the appellants with statements. The court granted them bond, and directed that they be supplied with statements. Hearing was fixed for April 12, 2017, when 7 witness statements were supplied, together with copies of the charge sheet, and P3 Form. There was a consolidation of charges, on May 9, 2017, before Hon. Makoyo, SRM, to bring in another suspect into the matter. The consolidated charge was read to them, in Kiswahili, they pleaded not guilty, the court reiterated the bond terms to them. The hearing commenced on May 29, 2017.

19. Plea was taken on 2 occasions, and the matter came up several times, before the hearing commenced. The issue of compliance with article 50(2)(g)(h) of the *Constitution*, and section 43 of the *Legal Aid Act*, did not arise. The court did not inform the appellants of their right to legal representation and to legal aid services by the State. The court did not consider whether there was a likelihood of the appellants suffering substantial injustice, along the lines of section 43(1A) of the *Legal Aid Act*, on account of severity of the charges and sentence, the complexity of the charge and the capacity of the appellants to defend themselves. Under the *Legal Aid Act*, the court has to be alive to issues around the indigence of the accused, their capacity to afford Advocates, whether they are marginalized, and, therefore, in need of being included, to avoid being treated in a discriminatory manner, on account of their social status. These are the factors that the court should consider and address whenever persons from the lower end of the social strata are presented to it for plea, with respect to charges that expose them to a death sentence or to long terms in jail.

20. As the fair trial principles in article 50(2)(g)(h) of the *Constitution* and section 43 of the *Legal Aid Act* were not complied with, the appellants were subjected to an unfair trial. Article 2(4) of the *Constitution* provides for what happens whenever an act violates the *Constitution*. It states that "... any act or omission in contravention of this *Constitution* is invalid." The omission or failure to comply with article 50(2)(g)(h) of the *Constitution* amounted to a contravention of that provision, and of the *Constitution*, and rendered the entire trial invalid. The failure to comply with section 43 of the *Legal Aid Act* meant that the objectives of that Act were not met, in terms of making justice accessible to

all, creating a level playing ground for all, ensuring that the indigent in society get to access the same facilities as persons who are not indigent, and that there was no discrimination and marginalization of those who cannot afford legal services.

21. The appellants also cite article 50(2)(j) of the *Constitution*. Article 50(2)(j) is about pretrial disclosure of evidence. It requires the prosecution to share the evidence, it intends to present in court, with the defence in advance, to facilitate the defence prepare for the case, to avoid ambush. That was not complied with, at the time plea was taken, but copies of the witnesses' statements, charge sheet and P3 Form were given to the appellants before the hearing commenced. So, there was compliance.

22. The discussion above clearly demonstrates that some of the constitutional fair trial rights were not honoured and complied with, which rendered the trial unfair. That would mean that the trial did not reach the constitutional threshold for fairness. The omission to comply with the *Constitution* sounds a death knell for any trial, given that the *Constitution* is the Supreme law in Kenya. Whatever it commands must be honoured and complied with, and there should be no second guessing. Article 2(4) of the *Constitution* renders invalid any act or omission which amounts to a violation or disobedience of provisions of the *Constitution*. The violations that I have discussed above, rendered invalid and a nullity the criminal proceedings, that were conducted against the appellants in Butere SRMCCRC No. 80 of 2017. That would mean the outcome of those proceedings was invalid and a nullity.

23. The appellants have raised other issues, but it would be academic to discuss the same, in view of the failure or omissions to comply with the constitutional dictates. More importantly, discussion of those other grounds could prejudice what the prosecution may choose to do with the matter after pronouncement of this judgment.

24. The promulgation of the *Constitution of Kenya, 2010,* completely changed the configuration for plea taking. The paradigm shifted, which is something that courts, presiding over a plea taking exercise, should come to terms with. Previously, it was enough to just have the charges read to the accused, have him plead to them, consider whether to release him on bond, and thereafter allocate a date for hearing. Caselaw later dictated that where the accused has difficulty understanding the 2 languages of the court, English and Kiswahili, the court would be obliged to find an interpreter, who would translate the charges to the accused in a language that he understands. Later, caselaw commanded a prior or advance disclosure of the prosecution case, by furnishing the documents to be used at prosecution to the accused. To that article 50 has added a host of other things that the court taking plea must do or observe. These are constitutional commands, and failure to comply with them would render the trial unconstitutional or not compliant with the *Constitution*. Bond is now available for all offences, to be denied only for compelling reasons. Advance disclosure of the case by the prosecution is now a constitutional requirement. The *Constitution* has done away with certain aspects of the presumption that everyone knows the law, and imposes a duty, on the court, presiding over plea-taking, to inform the accused of their legal rights, with respect to the right to be represented by an Advocate of their own choice, and, where the accused is indigent, to inform them of their right to an Advocate paid for by the State, where their case meets certain conditions. The plea taking exercise is now more loaded than before. The court has to go the extra mile, and assess whether the accused person, before it, is indigent or not, whether he or she has capacity to defend themselves or not, or whether they need an Advocate paid for by the State or not, and, if they do, set in motion the process for them getting such an Advocate.

25. So, what should I do in the circumstances? The usual practice is to declare a mistrial, and order a retrial. There are considerations that the court has to have for ordering a retrial. However, whether to order a retrial or not, should be looked at in view of the current constitutional dispensation, which gives the Director of Public Prosecutions unfettered discretion to determine whether or not to prosecute. That is stated in article 157(10), to effect that the "... Director of Public Prosecutions shall not require

the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority." In view of article 157(10), although I do have power to declare a mistrial, I doubt whether I have jurisdiction to order a retrial, as that should lie with the exclusive prosecutorial jurisdiction of the Director of Public Prosecutions, to determine whether a fresh prosecution is to be mounted or not.

26. The final order is that I hereby declare that there was a mistrial of the appellants, in Butere SRMCCRC No. 80 of 2017, for the reasons given above. I shall, however, not order a retrial, in view of article 157(10) of the *Constitution*, and I shall leave it to the Director of Public Prosecutions, to decide whether he should prosecute the appellants afresh or not. In case the Director of Public Prosecutions elects to prosecute the appellants afresh, the magistrate's court shall have the liberty to conduct a retrial. Consequently, the conviction of the appellants is hereby quashed, and the sentences are set aside. I direct that the appellants shall be handed over to the police, by the prisons' authorities, for presentation before the magistrate's court at Butere, at the earliest possible time, and at that presentation, the prosecution shall decide whether to have the appellants retried or not. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Samuel Abdallah, Alfred Tabiru and Julius Musungu, the appellants, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.