Elija v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 19765 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E041 OF 2021

OA SEWE, J

JUNE 30, 2023

BETWEEN

GIBSON ELIJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. E1058 of 2021 at the Chief Magistrate's Court, Voi (Hon. C.K. Kithinji, PM) dated 11th January 2022)

JUDGMENT

1. The appellant, Gibson Elija, was the accused person in Voi Chief Magistrate's Criminal Case No. E1058 of 2021: Republic v Gibson Elija, in which he was charged, in Count I, with Grievous Harm contrary to Section 234 of the *Penal Code*, Chapter 63 of the Laws of Kenya. It was alleged that on the 6th day of June 2021 at around 2100 hours at Tanzania Village in Voi Sub-County within Taita Taveta County, he unlawfully did grievous harm to Shaban Mwaitingo Hamisi.

2. He was also charged with a second Count of failing to register contrary to Section 6(1) as read with Section 14(1)(a) of the *Registration of Persons Act*, Chapter 107 of the Laws of Kenya. The particulars thereof were that on the 8th of July 2021 at Voi Police Station in Voi Sub-County within Taita Taveta County, he was found without an identification car, having attained the age of 18 years.

3. The appellant denied the charges and upon trial was found guilty and convicted of the offence of Grievous Harm contrary to Section 234 of the *Penal Code*, as charged in Count I and was accordingly sentenced to 12 years' imprisonment on 11th January 2022. No finding was recorded in respect of the second count and therefore it is not the subject of this appeal.

4. Being aggrieved by his conviction and sentence, the appellant lodged this appeal on 1st August 2022 upon being granted leave to appeal out of time. He put forth the following grounds of appeal:

(a) That the learned magistrate erred in law and fact when she convicted him and yet failed to observe that the offence of Grievous Harm was not proved;

(b) The learned magistrate erred in law and fact when she convicted him and yet failed to find that the investigations were shoddily done;

(c) The learned magistrate erred in law and fact when she relied on insufficient evidence to convict him;

(d) The learned magistrate erred in law and fact when she declined to adequately consider his defence statement.

5. The appellant thereafter filed Amended Grounds of Appeal with the leave of the Court (Hon. Ong'injo, J.) contending that:

(a) His right to a fair trial was violated since he was not informed of his right to legal representation by an advocate at State expense pursuant to Article 50(2)(h) of the *Constitution*.

(b) The learned trial magistrate erred in law and fact by failing to appreciate that he was not possessed of the necessary mens rea to commit the offence but acted in self defence.

(c) The learned trial magistrate erred in law and fact by failing to appreciate that the trial was marred with inconsistencies and as such could not safely sustain a conviction.

6. The appeal was canvassed by way of written submissions; and in respect of the first ground, the appellant submitted that, although the learned magistrate advised him on his right to legal representation, she did not advise him that he was entitled to legal representation at State expense. He added that the magistrate was duty-bound to interrogate whether he could afford to retain the services of an advocate, considering that the offence carried life imprisonment as the maximum sentence. He relied on Article 50(2)(h) and Section 42 of the *Legal Aid Act*, 2016 to underscore his submission that it was a matter of constitutional duty for the trial court to inform him of his rights at the earliest opportunity possible and indicate compliance in the record of proceedings.

7. The appellant further submitted that in criminal matters there is a distinction between unrepresented and represented accused persons and that fair trial can only be achieved where an accused person is represented. He relied on *Pett v Greyhound Racing Association* [1968] 2 AllER 545 at 549 in which it was held that:

> " It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man, 'you can ask any questions you like' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task."

8. The appellant also made reference to Articles 10(1) and (2) 25(c), 48, 159(2) and 165(3)(b) of the *Constitution* to bolster his submissions. He likewise relied on *Elijah Njihia Wakianda v Republic* [2016] eKLR for the proposition that:

> " The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

9. On mens rea, the appellant submitted that the Prosecution was under obligation to prove his intention to commit the crime, which was, in his view lacking. He made reference to the evidence of the complainant to demonstrate that he was intoxicated at the time and therefore could not make proper judgment of what he was saying or doing. He pointed out that his defence of intoxication was supported by the evidence of PW2, the complainant's son, and PW4, the investigating officer; and therefore ought to have been given sufficient weight by the trial magistrate. He added that he was merely acting in self defence after the complainant attacked him with a metal rod.

10. In respect of Ground 3, the appellant submitted that the Prosecution case was so marred with inconsistencies, and therefore that it was unsafe to sustain a conviction. He gave examples of the inconsistencies at paragraphs 46 to 52 of his written submissions and relied on *Philip Nzaka Watu v Republic* [2016] eKLR in urging the Court to find that the contradictions go the root of his conviction.

11. In Grounds 3 and 4, the appellant impugned the medical evidence as well as the sentence imposed on him. He submitted that the P3 Form indicated the degree of injury as Harm on page 2 thereof; and therefore that there was no basis for the charge of Grievous Harm. He added that it was imperative for the X-ray films and the X-ray report to be produced before the lower court to confirm the degree of injury; which was not done. He urged the Court to take a dim view of the omission and find in his favour.

12. The appellant made copious submissions on the sentence imposed on him, contending that it was both harsh and excessive. He made reference to the cases of *Pius Mutua Mbuvi v Republic* [2021] eKLR, *Daniel Ng'olua v Republic* [2021] eKLR and *Joseph Otieno Oketch v Republic* [2019] eKLR in which the sentence imposed in comparable circumstances was either set aside or significantly reduced. Thus, the appellant prayed that his conviction be quashed and the sentence set aside.

13. The appeal was opposed by Mr. Sirima, learned counsel for the State. Counsel relied on his written submissions filed on 2nd December 2022 wherein he identified the ingredients of the offence of Grievous Harm to be:

    (a) Proof of grievous injury;

    (b) Proof that the accused was the perpetrator.

14. Thus, Mr. Sirima urged the Court to find, on the basis of the evidence adduced before the lower court by the Prosecution's five witnesses, that all the ingredients of the offence charged were proved beyond reasonable doubt. On the alleged inconsistencies, Mr. Sirima pointed out that the offence occurred on 6th June 2021 and not 6th July 2021; and therefore that there was no variance between the information on the P3 form and the evidence of the complainant. He further pointed out that before the lower court, the appellant denied ever being near the complainant on the date in question; and yet on appeal he now contends that he acted in self defence. In counsel's view, this change of tact was an afterthought and an indication that he is not remorseful for his actions.

15. On the appellant's right to legal representation, Mr. Sirima submitted that the record of the lower court confirms that the appellant was duly informed of his right to legal representation; and that it was upon him to inform the court whether he was an indigent and in need of a state sponsored advocate. He further submitted that the appellant was given the opportunity to extensively cross-examine the witnesses; and therefore that he cannot now argue he was not accorded a fair trial. Counsel relied on *Kimanzi Mwanzia v Republic* [2021] eKLR to support his arguments in this respect.

16. As to whether the sentence was excessive, counsel urged the Court to take into account the nature and extent of the injuries suffered by the complainant; and that a metal brass had to be implanted on the

complainant's femur bone to fix the fracture. He relied on *Bernard Ochieng Opiyo v Republic* [2015] eKLR as to the circumstances in which an appellate court can interfere with the sentence imposed by a subordinate court. Thus he prayed for the dismissal of this appeal and noted that the lower court did not render a verdict on Count II. He consequently proposed that Count II be dismissed as no evidence was tendered in proof thereof before the lower court.

17. I have given careful consideration to the appeal and taken into account the submissions made herein by both the appellant and counsel for the respondent. As this is a first appeal, the Court is under obligation to re-evaluate the evidence adduced before the lower court with a view of coming to its own conclusions thereon. (see *Okeno v Republic* [1972] EA 32).

18. According to the complainant, Shaban Mwaitingo Hamisi (PW1), he was at his hotel on the 6th June 2021 at about 9.00 p.m. when the appellant went there and became rowdy. He tried to calm him down but instead the appellant turned against him and slapped him several times. He decided to arm himself with a metal rod to ward off the appellants blows but was overpowered by the appellant. The appellant got hold of the metal rod and hit him with it severally. In the process he suffered a fractured thigh bone. The following morning, he was taken to Moi Hospital where he was admitted for three days. A report of the incident was made to the local police station whereupon the appellant was arrested and charged.

19. Evans Kirangi Hamisi (PW2) is the complainant's son and was in the hotel with his father when the incident took place. He told the lower court as much. He explained that they were in the process of closing the hotel when the appellant went there and got into an exchange of words with his father. Before long, he saw the appellant slap his father several times prompting his father to arm himself with a metal rod for self defence, but the appellant snatched the metal rod from his father and hit him with it on the left thigh and knee. He confirmed that the complainant was taken to hospital the following day.

20. Florence Wanjala Kirumrai, a business lady and a resident of Tanzania Estate, testified that on 6th June 2021 at around 9.00 p.m. she left her husband, the complainant at the hotel to close up and went to their house that was adjacent to the hotel. She then heard some noise from the direction of the hotel and going to the scene she found the appellant slapping her husband outside the hotel. The appellant proceeded to assault her husband with a metal rod and injured the thigh of the left leg. She thereafter caused him to be taken to hospital where he was admitted for three days.

21. PC Christine Kithinji (PW4) testified on 16th November 2021. She confirmed that a report was made to Voi Police Station that the appellant went to the complainant's hotel while drunk and with a cup of alcohol in his hands and on being asked what he wanted he became rude and picked up a piece of metal from the complainant and hit him with it severally, thereby injuring the complainant on the left thigh. She recorded the statements of the witnesses after which she looked for and arrested the appellant and charged him accordingly. PW4 produced the metal rod as an exhibit before the lower court.

22. The last prosecution witness was Dr. Mustafa Masai (PW5) who filled the P3 Form in respect of the complainant. He told the lower court that he is an orthopaedic surgeon; and that upon examining the complainant, he noted that his left thigh was swollen and his lower leg deformed from the injury on the leg. An x-ray was taken which revealed a fracture of the left thigh bone. Surgery was performed for internal fixation with a metal implant. He later filled the P3 Form which he produced as the Prosecution's Exhibit 2.

23. On his part, the appellant told the lower court that sometime in 2020 he returned home for lunch and found his wife with her merry go round friends. In the course of their interaction he felt offended when one of the women said they had come to their financial rescue and yet he did not seem appreciative. He said he felt disrespected. He added that the woman proceeded to threaten him and said say there

would be a day he would remember her. He therefore asserted that he was framed by the family of the complainant in actualization of that threat.

24. The foregoing being the summary of the evidence adduced herein, the issues for determination are:

    (a) Whether the Prosecution proved their case before the lower court to the requisite standard; and if so, whether the sentence passed by the lower court was warranted.

    (b) Whether the appellant was accorded his right to fair trial in terms of legal representation;

25. Section 234 of the *Penal Code*, pursuant to which Count I was laid provides that:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

26. Accordingly, the questions to pose are whether indeed the complainant was assaulted, what was the nature and extent of the assault and whether the assault was unlawful. Lastly, the Court would want to ascertain whether it was proved beyond reasonable doubt that the appellant was the perpetrator of the offence.

27. From a consideration of the evidence adduced before the lower court, there can be no doubt that the complainant was assaulted as alleged. The incident happened in the presence of his son, PW2 and wife PW3 both of whom offered corroborative evidence before the lower court. They adduced uncontroverted evidence that the complainant suffered a fracture and had to be hospitalized for three days for treatment. Dr. Mustafa (PW4) also testified before the lower court in corrobotation of the complainant's evidence and produced the P3 Form that he filled on 5th July 2021. His evidence was entirely uncontroverted to the effect that the complainant suffered a fracture and had to undergo surgery to fix his broken left thigh bone. He also produced the hospital discharge documents to concretize his evidence.

28. I am therefore satisfied that indeed the Prosecution proved beyond reasonable doubt that complainant was assaulted on the night of 6th June 2021 and that he suffered grievous harm.

29. The next issue to consider is whether the assault was perpetrated by the appellant and whether it was unlawful. From the circumstances narrated by PW1, PW2 and PW3, the complainant was in the process of closing his hotel when the assailant went there and picked up a quarrel with the complainant. Their evidence shows that he was the aggressor, for he slapped the complainant severally for no apparent reason; and while it is true that the complainant fetched the metal bar with a view of warding off the blows, the appellant quickly overpowered the complainant and wrested the metal bar from him and with it he beat up the complainant severally before walking away.

30. It is however not lost on the Court that the incident occurred at night at about 9.00 p.m. It was therefore undoubtedly dark, thus bringing into question the aspect of whether in the circumstances the identification of the appellant was positive and free from the possibility of error. It is therefore imperative, in such circumstances, to bear in mind the caution expressed by the Court of Appeal in *Paul Etole & Another v Republic* [2001] eKLR that:

> " ...Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had

appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger..."

31. Similarly, in Maitanyi v R [1986] KLR 198 it was held that:

> " It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect; are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care."

32. Accordingly, and with the foregoing in mind, I have re-evaluated the evidence presented before the lower court and convinced myself that there was credible evidence connecting the appellant with the crime. The evidence of PW1 was that the incident occurred outside the hotel; and that he was in a position to recognize the appellant, having seen him before. The evidence of PW2 further shows that the scene was well lit by lights from the hotel as well as street lights. The evidence presented before the lower court also shows that was an opportunity for a calm conversation between the appellant and the complainant before the altercation; and therefore the witnesses had an opportunity to see and recognize the appellant. Thus, they had no difficulty in identifying the appellant as the culprit.

33. Indeed, this was a case of recognition as opposed to identification of a complete stranger. Such evidence has been found to be more reliable. Accordingly, in *Anjononi & Others v Republic* [1980] eKLR it was held that:

> " ...This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

34. It is therefore my finding that the evidence presented before the lower court was credible enough to prove beyond reasonable doubt that it was the appellant who caused grievous harm to the complainant on the night of 6th June 2021. That there was no justification for the assault is plain from the evidence of PW1 and PW2. They testified that the appellant picked a quarrel with the complainant when he asked him to leave to enable him close the hotel in compliance with the curfew that was then in force. This version was entirely uncontroverted because in his own sworn statement of defence the appellant opted instead to testify about an event that occurred in December 2020 involving his wife her friends during which an unnamed woman threatened him.

35. In arriving at the conclusion herein above, I have given due consideration to the assertion by the appellant that the evidence adduced by the Prosecution was riddled with inconsistencies and therefore was not sufficient to sustain a conviction. He pointed out for instance that:

(a) There was a variance between the evidence of the prosecution witnesses as to the date of the offence, and whether it was 6th or 7th June 2021; and,

(b) That the P3 Form indicated that the complainant was sent to hospital on 5th July 2021;

36. It is manifest from the submissions of the appellant, particularly at paragraph 48 that he missed the point. The offence was said to have occurred on 6th June 2021 and not 6th July 2021. The alleged contradiction was therefore of his own creation. PW5 was clear in his evidence that the P3 Form was filled much later, after the treatment of the complainant. The Discharge Summary produced before the lower court as one of the primary documents shows that the complainant was admitted at Moi County Referral Hospital on 7th June 2021 and was discharged on 9th June 2021. I therefore find no material contradiction in the evidence presented before the lower court.

37. But even if there indeed were such contradictions, it is now trite that in considering the total effect of such contradictions, the Court must bear in mind the provisions of Section 382 of the Criminal Procedure Code and determine whether the discrepancies are so fundamental as to cause prejudice to the appellant. Thus, in Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1992, for instance, the Court of Appeal expressed the view that:

> " An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".

38. Similarly, in *Philip Nzaka Watu v R* [2016] eKLR the Court of Appeal held that:

> " ...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

39. In this instance, having found that the appellant's submissions on the alleged contradictions were premised on misapprehension of the evidence, that ground is untenable and is hereby dismissed. The same applies to the appellant's attempt to discredit the medical evidence adduced by PW5. He wrongfully concluded that PW5 assessed the degree of injury as HARM, yet the P3 Form and the evidence of PW5 was to the effect that the degree of injury was classified as MAIM. In fact, in Section 4 of the Penal Code, grievous harm is defined thus:

> " grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;

40. The evidence of PW1, PW2, PW3 and PW5 left no doubt at all that the complainant was disabled by the injury and was thereafter unable to walk on his own. He had to undergo surgery to have his broken thigh bone fixed; and even thereafter, as at 11th November 2022 when the lower court passed its

sentence on the appellant, the complainant was still walking with the aid of crutches. Clearly therefore, the attempt by the appellant to assail the medical evidence was utterly futile.

41. Another plank of the appellant's submissions was his assertion that he lacked the requisite mens rea for the offence due to intoxication. It is however evident from the record of the lower court that he did not raise that defence before the lower court and therefore the learned trial magistrate had no opportunity to address it in her judgment. It is trite that, such an significant issue cannot arise for the first time on appeal without leave of the Court. The Court of Appeal made this plain in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR thus

> ...It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."

42. I therefore find no basis for considering the appellant's contention that he was not possessed of the necessary mens rea to commit the offence he was convicted of.

43. The appellant also challenged the sentence of 12 years' imprisonment that was imposed on him by the lower court. He submitted that it was both harsh and excessive, taking into account comparable authorities. In particular, the appellant made reference to the following cases:

    (a) *Pius Mutua Mbuvi v Republic* (*supra*), in which the complainant was cut with a panga and hit with a metal rod occasioning him a fracture of the right hand. The fracture was fixed with a metal implant. The sentence of two years imposed by the lower court was set aside on appeal and the accused set at liberty.

    (b) *Daniel Ng'olua v Republic* (*supra*), in which the complainant suffered injuries on his left temple, a bite on his left thumb and lip, a fine of Kshs. 100,000/= was imposed, in default of which the accused was to serve 3 years' imprisonment. The 3 years was later reduced to 12 months on appeal.

    (c) *Joseph Otieno Oketch v Republic* (*supra*), the complainant suffered severe burns all over her body. The trial court sentenced the offender to 7 years' imprisonment which was set aside on appeal.

44. The general position regarding appeals against sentence was well articulated in *Ogalo s/o Owuora v . Republic* [1954] 21 EACA 270, thus:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v Republic* [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we

would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."

45. Accordingly, the approach recommended in the The Judiciary Sentencing Policy Guidelines at Paragraph 23.9 is as follows:

> " The first step is for the court to establish the ... sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum ... sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/ transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."

46. Thus, quoting the Pistorius murder case, the applicant urged the Court to bear in mind that:

> " Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions...a non-custodial sentence would send a wrong message to the community. On the other hand, a long sentence would not be appropriate either, as it would lack the element of mercy..."

47. The record shows that the learned magistrate took into account the mitigating factors mentioned by the appellant and weighed the same against the grievous nature of the crime in issue. Having re-evaluated the circumstances, I would agree that the sentence was excessive, considering that the appellant was a first offender with two young children to look after. I would reduce the same to 7 years' imprisonment to be reckoned from the date of the appellant's arrest as it appears from the record, especially the proceedings of 9th November 2021 and 23rd November 2021 that he was unable to comply with the order for his release on bond.

48. As to whether the appellant's right to fair trial under Article 50(2)(h) of the *Constitution* was violated, I have given due consideration to his written submissions, including the case of *Pett v . Greyhound Racing Association* (*supra*) that the appellant relied on. I have likewise taken into account the response made by Mr. Sirima for the State. Indeed, Article 50(2)(g) and (h) of the *Constitution* stipulates that:

> " Every accused person has the right to a fair trial, which includes the right:-
>
> ...
>
> (g) to choose and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

49. A perusal of the record of the lower court shows, and this was acknowledged by the appellant, that the learned trial magistrate did in fact advise the appellant of his right to legal representation. This was promptly done on the date of plea on 15th July 2021, and the record reads:

> " Accused advised of right to legal representation by counsel of his choice."

50. Thus, it is manifest that there was compliance with Article 50(2)(g) of the *Constitution*. Nevertheless, the question to pose is whether that compliance was sufficient for purposes of Sub-Article(2)(h) of Article 50 in respect of which the appellant submitted that he was faced with a charge carrying the life sentence; and therefore that it was the constitutional duty of the trial magistrate to ensure he was not only informed of his right to legal representation but also to ensure compliance as legal representation is a fundamental element of the right to fair trial. It was for this reason that the appellant relied on *Elijah Njihia Wakianda v Republic* (supra) for the proposition that:

> " The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

51. The Supreme Court had occasion to consider the above Article in *Republic v Karisa Chengo & 2 Others* [2017] eKLR; had the following to say at paragraph [87] of its Judgment:

> " (87) Article 50(2)(h) of the *Constitution* provides that "[e]very accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result...." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment."

52. In the premises, there is a clear distinction between the right to legal representation in general and the right to legal representation at state expense. The Supreme Court made this vital distinction thus:

> " ...it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard

to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

i. the seriousness of the offence;

ii. the severity of the sentence;

iii. the ability of the accused person to pay for his own legal representation;

iv. whether the accused is a minor;

v. the literacy of the accused;

vi. the complexity of the charge against the accused;

53. In this regard, there is an elaborate framework to operationalize Article 50(2)(h) in the form of the *Legal Aid Act*, No. 6 of 2016. That framework puts an applicant, in this case the appellant, at the centre of the process; for Section 40 provides that:

(1) A person who wishes to receive legal aid, shall apply to the Service in writing.

(2) Where a person wishes to apply for legal aid the person shall apply before the final determination of the matter by a court.

(3) An application under subsection (1) shall be assessed, with respect to the applicant's eligibility for legal aid services in accordance with this Act."

54. Section 42 of the *Act* further recognizes that, for persons in lawful custody, the application for legal aid need not be made to the Court. It states that:

The officer-in-charge of a prison, police station, remand home for children or other place of lawful custody shall—

a. ensure that every person held in custody, is informed in language that the person understands, of the availability of legal aid on being admitted to custody and is asked whether he or she desires to seek legal aid;

b. maintain a register in which shall be entered the name of every person held there and the response of each such person when asked if he or she desires to seek legal aid; and

c. ensure that a legal aid application form is made by a person in their custody wishing to apply for legal aid and shall inform the Service of the application within twenty-four hours of the making of the application.

55. I therefore take the view that, although the lower court had the responsibility of informing the appellant of his right to legal representation at the expense of the State, it was incumbent upon the appellant to give an indication of his indigence and follow the procedure outlined in Section 42 above after having been informed of his right to legal representation by an advocate of his choice. Thus, I am far from persuaded that the appellant's right to legal representation at state expense was infringed. It must be borne in mind that due to scarcity of resources, it is not in every case that legal representation at the expense of the State is feasible; and therefore concerned indigence accused persons must pitch their respective cases for consideration as provided for in the *Legal Aid Act*.

56. In the result, I find no merit in the appellant's appeal against conviction. His sentence of 12 years' imprisonment is however reduced to a period of 7 years to be reckoned from the date of his arrest on 2nd July 2021.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE, 2023

OLGA SEWE

JUDGE