



REPUBLIC OF KENYA



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**Murokoi v Republic (Criminal Appeal E099 of 2022)
[2023] KEHC 26064 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E099 OF 2022
REA OUGO, J
NOVEMBER 28, 2023**

BETWEEN

SAMUEL MUROKOI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samwel Murokoi, the appellant herein was charged with the following offences; Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the *Penal Code*. The particulars of the offense are that, on the night of the 29th day of October 2022 and 30th day of October 2022 at an unknown time at Milimani area, Mihuu sub-location in Webuye East Sub-County within Bungoma County, the appellant broke and entered a dwelling house of Ann Wandera and did steal from therein the following valuables; one mattress, one blanket, one table, one bed sheet all valued at Kshs.5,000/- the property of Ann Wandera. The alternative charge was, “handling suspected stolen property contrary to section 322(1)(2) of the Penal Code. The particulars of the offence are, “on the night of 29th day of October 2022 and 30th October 2022 at an unknown time at Mlimani area, Mihuu sub-location in Webuye East Sub-county within Bungoma County, otherwise than in the course of stealing, the appellant dishonestly undertook retention of; one mattress, one table, one-bed sheet knowing or having reason to believe them to be stolen property.
2. The appellant pleaded guilty to both offences. The facts were read to him and he admitted the facts. His words were “maelezo ni ya ukweli (facts are correct.)” Thereafter he was convicted on his own plea of guilty and after mitigation, he was sentenced as follows; for count no. 1 the offense of burglary and stealing, seven (7) years imprisonment, and for handling suspected stolen property 14 years. The sentences are to run concurrently. Whilst sentencing the appellant the trial court noted that the appellant was a habitual offender as the pre-sentence report indicated that he had a previous conviction in Webuye Criminal Case No. 21 of 2018 where he had been convicted.



3. The appellant filed a petition of appeal on the 2nd of November 2022. He later amended his petition on the 18th of September 2023. In his amended petition he states that he is aggrieved and dissatisfied by the judgment of Hon. Menyekenye dated 15th November 2022 on the charge of burglary c/sec 304 of the Penal Code and section 279(b) of the *Penal Code* and that he appeals against the same. He avers that the sentence imposed against him was manifestly harsh and excessive. He is remorseful for the offense committed and seeks a reduction of the sentence. That the plea of guilty was obtained through deliberate deception in that the appellant was under arrest and without the benefit of proper legal advice induced by the arresting officer to admit to the humble request to be acquitted or the sentence reduced. The proceedings leading to the conviction of the appellant's conviction of the appellant's constitutional rights to a fair trial under Articles 50 (2) (g) (h) 49(1) (c) and section 193 of the Criminal Procedure Code. He is praying for leniency on the sentence. That he is rehabilitated and reformed a law-abiding citizen who shall keep peace within the country and is requesting mercy and leniency.
4. The appellant filed written submissions. He submits as follows; the sentence is harsh and excessive considering his mitigation. He seeks a reduction of the sentence. The correct procedure of taking a plea was not taken as the appellant was not given an opportunity to dispute or explain the facts or add any relevant facts which was not accorded to him. That the plea was taken by deception. After his arrest, he was taken into custody and he was not informed that the offence he had committed would attract a heavy penalty. Had the penalties been explained to him he would not have pleaded guilty. He therefore seeks to be released or sentence reduced. He further submits that his constitutional rights to a fair trial were violated since he was not given an opportunity to communicate with his advocate, to choose to be represented by an advocate of his choice, or to assign an advocate to represent him, he referred to Article 50 (2) (g) & (h). on Article 49 the appellant submitted that he has a right to communicate with an advocate and other person whose assistance is necessary. Under section 193 of the Criminal Procedure Code, he has a right to be defended. He ought to have been informed of his right to representation. He relied on the following case *Ogolla Owuor v Rep* (1954) EACA 270 to support his claim that the sentence was excessive. On the legality of the sentence, he relied on the case of *R v Shorhowsky* (1912) CCA 28TLR 263 which was cited in the *Wanjema v Rep* (1971) EA 493.
5. The appeal was opposed. Miss Omondi for the Respondent submitted that the appellant pleaded guilty to the charges and the facts were read to him and the exhibits produced in court. The appellant confirmed that the facts were true and thereafter the court proceeded to convict him on his own plea. Section 207 of the *Criminal Procedure Code* Cap 75 lays down the procedure to be followed when an accused person pleads guilty to an offense. The trial court did follow the said procedure. That an unequivocal plea was defined by the Court of Appeal in *Obedi Kilonzo Kevevo v Republic* [2015] eKLR. Reliance was made on the said case and a further submission was that after the charges were read to the appellant in a language he understands, he confirmed the facts, the facts disclosed the offense he was charged with and he was convicted on his own plea guilty. Reliance was also made on section 348 of the *Criminal Procedure Code* which states that "No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence." It was submitted that the appellant's appeal can only be on the legality of the sentences imposed. That there was no illegality in the sentences imposed.

Determination And Analysis

6. I have considered the submissions of the appellant, the respondent, and the proceedings before the trial court. The issues for determination from the grounds of appeal are; was the plea taken as per the provisions of the law, the effect of failing to comply with Article 50 (2) (g) of the *Constitution* and were the sentence harsh and excessive.



7. Section 207 of the Criminal defines the procedure for taking a plea. From the proceedings, the charge was read to the appellant in a language he understood and he admitted the charges and the facts were read to him and thereafter he admitted the facts and he was convicted on his plea of guilty. The appellant has raised the issue that the trial court failed to comply with the provision of Article 50 (2) (g). 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.
8. I have carefully examined t the proceedings before the trial 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:
 - 14..... what 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.
 - (1) A court before which an unrepresented accused person is 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.
9. 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 pleaded guilty to two serious offences. The charges the appellant was facing were serious with a penalty of 14 years imprisonment. The subordinate court's failure to comply with Article 50 (2) (g) of the Constitution rendered the trial a nullity.
10. 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.”
11. The appellant was convicted on the month of November 2022, about a year ago, there will be no injustice caused by ordering a re-trial. I now allow the appeal, quash the conviction, and set aside the sentence on the sole ground of non-conformity with Article 50(2)(g) of the Constitution. The appellant



shall be escorted to Webuye Police Station for the purposes of preparing a fresh charge sheet. He shall appear before the Senior Principal Magistrate Court in Webuye not later than 6th December 2023 for purposes of taking plea. Orders accordingly.

12. A copy of this judgment to be sent to the office of the ODPP for action forthwith.

DATED, SIGNED, AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 28TH DAY OF NOVEMBER 2023.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Respondent – Absent

Wilkister - C/A

