



**Muthee v Republic (Criminal Appeal E012 of 2021)
[2022] KEHC 2989 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 2989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E012 OF 2021**

LW GITARI, J

MARCH 24, 2022

BETWEEN

ERICK MUNENE MUTHEE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This appeal was initiated by the Petition of Appeal dated and filed on July 29, 2021. The appeal is against the conviction and sentence of the trial court in Chuka CM Criminal Case No 53 of 2019.
2. The Appellant herein was initially charged with the offence of grievous harm contrary to Section 234 of the Penal Code. It was alleged that on January 1, 2019 at 2230hrs at Marimebu bar, Maara Sub-County within Tharaka Nithi County, with others not before court unlawfully did grievous harm to Miki Mwenda Kiruja.
3. The trial began and the prosecution called three witnesses (PW1, PW2, and PW3) before it applied for the amendment of the above charge on October 7, 2019. The prosecution's application was allowed, and the initial charge was subsequently substituted with the charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#).
4. As per the amended charged sheet, it was alleged that on January 1, 2019 at 2230hrs at Marimebu bar, Gituambani village, Maara sub county within Tharaka Nithi County, the Appellant jointly with others not before court robbed Mike Mwenda Kiruja of cash Kshs 4000/= and a mobile phone make ITEL valued at Kshs 3,000/= and immediately before or after the time of robbery wounded the said Mike Mwenda Kiruja.
5. The Appellant pleaded not guilty to the amended charge and the trial resumed with the prosecution seeking to recall PW1 for the Appellant to cross-examine him based on the amended charge of



robbery with violence. Thereafter, the prosecution only called PW4 before closing its case against the Appellant.

The Prosecution's Case

6. PW1 was Mike Mwenda Kiruja, the complainant herein. He stated that he knew the appellant since he was born and that they were born from the same clan. He recalled that on the material day, he had gone to Marimebu bar at around 7.00 p.m. He had gone alone and met his friend Mugendi at the bar. The appellant was also in the bar with the appellant's cousin and other people. PW1 alleges that the appellant was sitting near them that the accused could hear PW1's conversation with Mugendi. Mugendi then left the bar after receiving a phone call. Thereafter, the appellant asked PW1 why he did not tell Mugendi that he had a court case. PW1 sensed danger and decided to leave the bar after he noticed that the appellant, his cousin, and friend had surrounded him. The appellant then held PW1's coat and asked him to sit down. PW1 however managed to run away but the appellant and the other two followed him behind.
7. One of them held PW1's coat from behind and pulled him back. PW1 held the door frame of the bar. The one called Karani pulled off PW1's coat from his body and the one Kimathi moved in with a knife and stabbed PW1 on his buttocks making him to let go of the door frame. Karani started frisking the jacket pockets and Kimathi stabbed PW1 again on the neck and the left side ribs. It was PW1's testimony that the appellant participated in the attack by holding him down so that Kimathi and Karani could beat him up and that it is the appellant who took money and mobile phone from the trouser pockets of PW1. The owner of the pub then came, and the appellant and the two other attackers ran away. The bar owner called PW1's father and PW1 was first taken to Chogoria Mission Hospital for treatment and admitted and discharged on January 3, 2019. He then went to Chuka District Hospital where his P3 form was filled. He was later called by the police to identify if his assailants were among some people who had been arrested and he identified the appellant at the police station.
8. PW2 was Joseph Mwenda Mirebu, a clinical officer from Chuka District Hospital. He filled the P3 form for PW1 after he reported to have been assaulted by three people known to him on the material day. He found that PW1 had sustained stab wounds on his fore aspect of the neck, on the left side of his chest and on the back side of his right thigh. He produced PW1's P3 Form, his discharge summary from Chogoria Mission Hospital, and his treatment notes from Chuka District Hospital as P. Exhibits 3, 4 and 5 respectively. He formed the opinion that the degree of injury was grievous harm.
9. PW3 was Ashford Kiruja, the father of PW1. He corroborated PW1's testimony to the extent that on 2nd January 2019 at around 1.00 a.m., he received a phone call from Josiah Kirugaro, the owner of Marimebu bar. PW3 was informed that his son (PW1) had been stabbed at the bar. He visited the scene and found his son seated on the ground. He was bleeding profusely from the neck, left ribs and buttock area. PW3 called for a motor vehicle and rushed PW1 to Chogoria Mission Hospital where he was admitted.
10. PW4 was PC Elias Kinyua Mwaniki, the investigating officer in this case. He took over the case from corporal George Murithi. He re-stated the events of the material night that led to the subject incident as narrated by PW1. He testified that he visited the scene and later issued PW1 with the P3 form. He then produced in evidence a black jacket, a beige shirt, a black cap, and a black trouser as P. Exhibits 3, 2, 7, and 1 respectively.
11. This marked the close of the prosecution's case and the Appellant was placed on his defence.



The Defence

12. In his defence, the Appellant testified that he went to Malimebu Bar and found many people inside the club. He then bought a drink, gave his cousin a drink and then left and went home. He stated that the following day, he heard that there had been a fracas at the bar and that PW1 had been attacked. He was then arrested as one of those who attacked PW1 but denied committing the offence.
13. On cross examination, he conceded that he saw PW1, Kimathi and Karani in the bar. He admitted that Kimathi and Karani are both his friends but denied that he was with them on that day. According to the Appellant, PW1 is his cousin and had no reasons to implicate him in the incident as he had heard that it was Karani and Kimathi who had stabbed PW1.
14. The learned trial magistrate found the Appellant guilty of the offence of robbery with violence, convicted him accordingly and sentenced him to serve a jail term of twenty (20) years.

The Appeal

15. This appeal is based on the following grounds:
 - a. THAT the learned trial magistrate erred in law and fact in allowing the prosecution to amend the charge sheet substituting the offence of grievous harm to that of robbery with violence without cautioning the Appellant herein, who had no legal representation, of the seriousness of the fresh charge.
 - b. THAT the learned trial magistrate erred in law in failing to note that PW1 was not recalled for cross-examination upon the substitution of the charge despite the prosecution having made such an application.
 - c. THAT the learned trial magistrate erred in law in failing to make a finding that failure to recall PW1 for cross-examination rendered the proceedings defective and prejudicial to the Appellant.
 - d. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the circumstances prevailing at the time of commission of the alleged offence rendered the identification of the perpetrators of the offence difficult.
 - e. THAT the learned trial magistrate erred in law and fact in failing to find that the evidence of PW1 and PW4 was contradictory in so far as the description of the items recovered by the investigating officer is concerned.
 - f. THAT the learned trial magistrate erred in law and fact in failing to make a finding that there were serious gaps in the prosecution case.
 - g. THAT the learned trial magistrate erred in law in convicting the appellant in proceedings where crucial prosecution witnesses were not called to testify.
 - h. THAT the learned trial magistrate erred in law and fact in meting out a sentence that was inordinately harsh in the circumstances.
16. The appeal was then canvassed by way of written submissions.



The Appellant's Submissions

17. The Appellant filed his written submissions on 6th December 2021. It was his submission that after amendment of the charge sheet which introduced an offence that carries the death penalty, the trial court was obligated to caution the Appellant of the seriousness of the charge he was facing and inform him of his right to acquire legal representation. According to the Appellant, failure by the trial court to give the Appellant the said guidance hampered his right to a fair trial. On this submission he relies on Article 50 (2) (g) of *the Constitution* of Kenya 2010 which gives an accused person the right to legal representation by an advocate of his choice and to be informed of this right promptly.
18. The Appellant further submitted that the failure to recall the complainant after the charge sheet was amended gravely prejudiced the Appellant and resulted in an unfair trial. To buttress this position, the Appellant relied on the cases of *Jason Okumu Yongo v Republic* [1983] eKLR; *Daniel Chege Kamundia & 2 others v Republic* [2006] eKLR; *Lawrence Mwangi Wamuyu v Republic* [2017] eKLR; and *Kennedy Babu Gesora v Republic* [2010] eKLR.
19. It was further the Appellant's submission that the circumstances surrounding the incident were not favourable for the complainant to positively identify the Appellant as one of his attackers.
20. In addition, the Appellant submitted that his conviction was unsafe as the prosecution failed to prove the ingredients necessary to establish the offence of robbery with violence. According to him, there were inconsistencies and gaps in the evidence of the complainant which were not corroborated by the other prosecution witnesses.
21. Finally, it was the Appellant's submission that the sentence meted against him was harsh in the circumstances. The Appellant thus urged this court to quash the conviction, set aside the sentence, and order that the Appellant be set free.

Respondent's Submissions

22. On its part, the State opposed the appeal through its written submissions that were filed on January 17, 2022. It was the Respondent's submission that the Appellant understood the amended charge as the same was read to him in a language in which he understood to wit he denied the charge and a plea of "not guilty" was entered. According to the Respondent, there is no statutory or other obligation that required the trial court to caution the Appellant of the seriousness of the charge. It relied on the case of *Kennedy Ndiwa Bolt v Republic* [2002] eKLR to buttress this position.
23. On the issue raised on the failure to recall PW1 after the charge sheet was amended, it was the Respondent's case that it is not mandatory for witnesses to be recalled. It was its submission that the provisions of Section 214 of the *Criminal Procedure Code* are not couched in mandatory terms and as such witnesses may or may not be recalled. The Respondent further submitted that in any event, the Appellant was not prejudiced when the complainant was not recalled and as such, the same did not occasion a miscarriage of justice.
24. Subsequently, the Respondent submitted on the identification of the Appellant. It stated that the same was proper as the Appellant was known to the complainant and there was sufficient light at the scene of the crime to favour a positive identification. Further, it was submitted that the complainant did not have a judgment lapse from taking alcohol as he was having a conversation with his friend which the Appellant heard from where he was sitting. In addition, the Respondent submitted that the circumstances under which the Appellant was called by the police to identify the Appellant and



other accomplices was not an identification parade, as insinuated by the Appellant, but rather, it was an exercise by the police to confirm that they had arrested the right people.

25. On the issue on the alleged contradiction between the testimonies of PW1 and PW4 in respect to the description of the items that had been recovered, the Respondent submitted that the evidences were consistent and that there were no material contradictions to affect the credibility of the testimonies.
26. On the failure by the prosecution to call two witnesses who had been listed in the charge sheet, it was the Respondent's case the four witnesses called before the trial court were sufficient to prove the ingredients of the subject charge hence no gaps were left in the prosecution's case.
27. Finally, it was the Respondent's case that the sentence that was meted against the Respondent was fair considering that the complainant lost his property and, in the process, was inflicted with serious injuries on his person. The Respondent thus urged the court to dismiss the appeal for want of merit.

Issues for Determination

28. Having considered the grounds of appeal and the respective submissions of the parties herein, it is my view that the main issues for determination by this court are:
 - a. Whether the Appellant was accorded a fair trial;
 - b. Whether the prosecution proved its case beyond any reasonable doubt;
 - c. Whether the sentence meted was excessive in the circumstances.

Analysis

29. The duty of this court as the first appellate court is to subject the evidence to a fresh and exhaustive examination, draw its own findings and arrive at its own conclusion while bearing in mind the fact that the trial court had the advantage of hearing and seeing the witnesses. [See: *Okeno v Republic* [1972] EA 32]
30. In the light of this holding, I shall now proceed to analyse the issues raised in this appeal under the following heads.

Whether the Appellant was accorded a fair trial

31. Grounds of appeal no. 1, 2, 3 are dealt with under this head.
32. The Appellant contends that he was not afforded a fair trial on the basis that the trial court failed to warn him on the seriousness of the offence under the amended charge despite him not having legal representation.

The respondent relied on the case of *Kennedy Ndiwa Bett v Republic* [2002] eKLR to state that caution would only have been necessary if the accused intends to plead guilty to the charge. This authority was before the promulgation of the new Constitution. There is no doubt that *the Constitution* of Kenya 2010 under Article 50 introduced the elaborate rights of an accused person to fair trial. More importantly is the fact that the right to fair trial is one of the inalienable rights under *the Constitution*. Article 25 provides as follows:

“ Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;



- (b) freedom from slavery or servitude;
- (c) the right to a fair trial;and
- (d) the right to an order of habeas corpus.”

The appellant alleges violation of his right as the learned trial magistrate did not inform of his rights under Article 50(2) (g) of *the Constitution*. This provision provides that-

“Every accused person has a right to fair trial which includes the right –

“To choose and be represented by an advocate and to be informed of this right promptly.”

It is therefore important for this court to look at the record of the proceedings before the learned trial magistrate. The proceedings of 7/10/2019 show that the prosecutor informed the court, “that on 12/8/2019 when the complainant testified, he stated that he was stabbed and his money and mobile phone were stolen. He would wish to amend the charge sheet to robbery with violence.” The appellant did not object. The court allowed the application by the prosecution to amend the charge sheet. “The amended charge sheet read out to accused and he replies in Kimeru. ‘It is not true.’ Plea of not guilty entered. The question is, how was the learned trial magistrate expected to proceed upon the prosecution introducing a more serious offence with the amendment of the charge and in the light of the provision of Article 50(2) (g).

It is clear from the wording of the article that the appellant had a right to be promptly informed of the right to legal representation by an advocate and the right to choose to be represented by an advocate. The accused has the unfettered right to make that choice. There is no doubt that the court has a duty to promptly inform the accused of his right. The Article imposes a duty on the trial court to promptly inform the accused of the right. A look at the wording is necessary here, “to be informed of this right promptly.” A person accused should be informed of this right by the body before whom he is charged. The Supreme Court of Kenya while considering this provision stated as follows in *Petition No 5/2015 Republic v Karisa Chengo & 2 others* [2017] eKLR.

“the right to legal representation,..... under the said article is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the Constitutional edict without more.”

To give effect to this provision, parliament has enacted legislation to place the duty on the trial court as the body to inform the accused of this right. Section 43(1) (a) of *Legal Aid Act* provides:-

“A court before which an unrepresented accused person is presented shall: promptly inform the accused of his or her right to legal representation.”

The Constitution emphasis is the need for an accused person to be promptly informed of this right. The duty imposed on the court requires that the accused person to be informed of this right not later than at the time of plea taking and that is before the charge is read to him/her. This being a court of record, it goes without saying that the record must show that indeed the trial court informed the appellant of his right. See *Joseph Kiema Philip v Republic* [2019] eKLR where it was stated as follows:-

“..... It is paramount that the record of trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the State. It (the court



record) must show that the court did take the profile of the accused person before the trial commenced.”

As I have analyzed the record of the trial court above, it is clear that the learned trial magistrate failed to carry out her duty under Article 50 (2)(g).

It follows that the accused was not accorded a fair trial. I do not buy the submission by the State that the caution would only have been necessary if the appellant intend to plead guilty. The failure by the learned trial magistrate to promptly inform the appellant of his right violated the right of the appellant to fair trial. The derogation of the right under Article 50(2)(g) of *the Constitution* rendered the trial before the learned magistrate a nullity. The appellant was prejudiced a miscarriage of justice was occasioned. The question that follows is whether the court should order a retrial having found that the trial was legally null and void owing to the violation to fair trial. I will first consider the other issues which stand out for determination.

Whether the failure to recall PW1 after amendment of the charge was fatal to the case

33. The Appellant further contends that he was aggrieved when PW1 was not recalled after the charge sheet was amended from the offence of grievous harm to robbery with violence. This raises a point of law.

34. Section 214 of the *Criminal Procedure Code* provides that:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

- (i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

35. The Respondent contends that it is not mandatory for witnesses to be recalled, upon amendment/ substitution of a charge. According to the Respondent, the provisions of Section 214 of the *Criminal Procedure Act* are not couched in mandatory terms. The witnesses may or may not be recalled.

36. The intention of Section 214 of the *Criminal Procedure Code* was considered by the Court of Appeal in the case of *Josphat Karanja Muna v Republic* [2009] eKLR where the court held:

“...the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word.”



37. In this case, PW1, PW2, and PW3 had already testified in relation to the initial charge of causing grievous harm by the time it was amended to the subsequent charge of robbery with violence. The gravamen of the initial charge substantially changed as the amendment did introduce a fresh element into the offence, which is, whether the complainant was robbed by the Appellant.

It is interesting that the State is now urging the court to find that it was not mandatory for the witnesses to be recalled when the record shows the prosecutor had without prompting applied, “to recall PW1 for accused to cross-examine on the new charges of robbery with violence.”

This must have given the appellant an expectation that PW1 would be recalled. Under Section 214 of the *Criminal Procedure Code* (Supra) the learned trial magistrate had a duty to inform the appellant of his right to recall the witnesses who had already testified and particularly PW1 who was the star witness in the case. This again goes to the right to fair trial. The proviso to the section is no doubt couched in mandatory terms which call for strict compliance for there to be a semblance of a fair trial. The proviso is intended to ensure that the accused gets a fair trial and is not prejudiced in any way. Nothing was captured on the record of the trial magistrate to demonstrate that she complied with the proviso to section 214 (supra).

38. Considering the seriousness of the amended charge and severity of the sentence that the amended charge attracts, it was necessary for the Appellant to be given an opportunity to recall PW1 for purposes of cross-examination. Noting that recalling a witness is part of the right to a fair hearing, it is my view that failure by the trial court to fully comply with the second proviso of Section 214 of the *Criminal Procedure Code* occasioned prejudice to the Appellant in the circumstances of this case and thus rendered the trial defective.

Whether the prosecution proved its case beyond any reasonable doubt

39. Grounds of appeal no. 4, 5, 6 and 7 are dealt with under this head.
40. PW1 testified that he was accosted by the Appellant and two other men. PW1 also testified that one of the men who attacked him was armed with a knife which he used to stab him severally. Nonetheless, the incident occurred at night at around 2230hrs in a bar. I am mindful of the fact that the evidence on identification was given by a single witness, PW1. While the trial magistrate did not warn herself of the danger of relying upon a single witness in the identification of the Appellant as one of the perpetrators of the offence, this fact does not on its own render this evidence unreliable. In the case of *Maitianyi v Republic* [1986] eKLR the Court of Appeal reflected upon the following words that have been so often repeated and yet require repetition:

“Subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.”

41. In this case, PW1 and the Appellant knew each other as they come from the same clan. PW1 was therefore identifying a person who was not a stranger to him. In addition, the testimonies of the PW1 and the Appellant place them both at the bar on the material night. Furthermore, it was PW1’s testimony that the bar had its electricity lights switched on which provided sufficient light to identify those who attacked him. According to PW1, the Appellant was seated near where PW1 was sitting and could hear PW1’s conversation with his friend Mugendi. When Mugendi left, the Appellant, his friend and case surrounded PW1 and when he attempted to run away, the gave him a chase. In my view, these



factors and the surrounding conditions did not make the correct identification difficult. As such, the identification of the Appellant by PW1 is acceptable as safe and free from the possibility of error.

42. Having said that, I will not proceed to consider whether the charge was proved due to the fact that having found that the trial was a nullity owing to failure to re-call PW1, it will be prejudicial to rely on his evidence given in a charge of grievous harm to challenge the said evidence on a charge of robbery with violence. It cannot be said that the evidence does not support the charge when it was not supposed to prove a charge of robbery with violence in the first place. I will leave that determination at that for now. I must then address the question as to what orders I should make.

I have pointed out that the trial before the learned trial magistrate was a nullity and therefore null and void. Simply stated the trial was a sham and cannot be allowed to stand in law. The court of appeal in *Samuel Wabini Ngugi Republic* [2012] eKLR stated as follows:

“The law as regards what the court should consider on whether or not to order a retrial is now well settled. In the case *Ahamed Sumar v Republic* [1964] EALR 483 the predecessor to this court stated as concerns the issue of retrial in criminal cases as follows:-

“ It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this Judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

The defects in the proceedings was occasioned by the trial court. My analysis of the evidence of PW1 above may lead to a successful conclusion on the side of the State if properly prosecuted but I worry not to go to the merits of the case. The appellant was sentenced on 14/6/2021. The offence was committed in January 2019. At the time of the trial some known suspects were at large and some witnesses were not called.

In my view the appellant has not been in prison for a long period and it is possible to trace witnesses who had testified. The offence preferred against he appellant is serious as the complainant was grievously harmed in addition to the allegation of robbery.

It is in the interest of justice that this court orders a fresh trial. I therefore find that a retrial should be held before a different magistrate.

In conclusion:

I find that the appeal has merits. I orders as follows:

- 1) The trial before the learned trial magistrate was a nullity for failure to comply with Article 50(2)(g) of *the Constitution* and the mandatory provision of Section 214 of the *Criminal Procedure Code*.
- 2) I quash the conviction by the learned trial magistrate and set aside the sentence.
- 3) There shall be a retrial before a magistrate with competent jurisdiction to try the matter other than Hon. N. Kahara.



- 4) The appellant shall be released from prison and shall be produced before the Chief Magistrate's Court for plea to be taken by a magistrate with competent jurisdiction on 25/3/2022 as ordered under prayer (3) above.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF MARCH 2022.

L.W. GITARI

JUDGE

