



**Anyega v Republic (Criminal Appeal E064 of 2021)  
[2022] KEHC 12231 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12231 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E064 OF 2021**

**RPV WENDO, J**

**JULY 27, 2022**

**BETWEEN**

**ROBERT ONDIEKI ANYEGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

- 1 **Robert Ondieki Anyega**, the appellant, was convicted by Hon. Mesa Principal Magistrate, on 7/7/2021 for the offence of trafficking in Narcotic Drugs contrary to Section 4(a) of the [Narcotic and Psychotropic Substances Control Act](#) No. 4 of 1994.
- 2 The particulars of the charge are that on 5/10/2019 at Maberia Town, along Isebania Migori Road in Kuria West, jointly with others not before the court, trafficked by transporting Narcotic drugs to worth 137.7 kgs of cannabis sativa with a street value of Kshs. 1,377,000/= using motor vehicle registration number KBZ 980S Toyota Vitz. He was sentenced to a fine of Kshs. 4,131,000/= in default, serve one year imprisonment. In addition, he was sentenced to serve five years imprisonment, less the six (6) months he was in custody during the trial.
- 3 The appellant was aggrieved by the whole judgment of the trial court and preferred this appeal filed in court on 16/11/2021. The grounds of appeal are as follows:-
  1. That the court erred by failing to comply with Article 50(2)(g) of [the Constitution](#) 2010.
  2. That the sentence was harsh and excessive
  3. That the offence was not proved as required by law.
  4. That the appellant was not positively identified as the perpetrator
  5. That his alibi defence was not rebutted.



4 The court gave directions that the appeal be canvassed through written submissions and both parties complied. The appellant submitted that the vehicle used in the crime belonged to PW2; that he was not arrested at the scene of crime and there is only circumstantial evidence against him; that the agreement allegedly made between the appellant and PW2 dated 5/10/2019, for hire of the vehicle was not produced in evidence in court and that the agreement dated 10/10/2019 was an afterthought and made up and that the conviction was based on insufficient evidence. The appellant also submitted that the alibi defence was not rebutted because the court made a blanket finding that was unsupported; that the fact that he was never found at the scene of crime supports his alibi; that the court erred by not complying with Article 50 (2) (g) and (h) of *the Constitution*; that the fact that he was charged with a very serious offence, the court should have complied with the said provision. He urged the court that since he has served a substantial part of the sentence, he should be acquitted.

5 As regards sentence, the appellant submitted that in light of his mitigation and probation officer's report, he should have been given a lighter sentence or placed on Community Service Order.

6 The prosecution counsel Mr. Omooria in opposing the appeal submitted that the evidence of PW2 placed the appellant at the scene as the driver of the motor vehicle and the person who was driving when stopped by police; that the alibi defence was an afterthought and the prosecution were never given an opportunity to test it and it was properly disregarded by the court.

7 Counsel also submitted that the trial magistrate did not comply with Section 169 Criminal Procedure Code because the judgment did not give the points for determination and the decision and reasons for the said decision. Similarly, that Article 50(2) (g) was not complied with; that the judgment was delivered on 15/5/2021 and the witnesses are readily available and the bhang ha s not yet been destroyed. He prayed that the court do order a retrial.

8 Having considered the above grounds, I think it prudent to deal with the allegation that the appellants rights under Article 50 (2) (g) and (h) of *the Constitution* were violated first because if the appellants grounds as found to be sustainable, then that ground alone may determine the appeal. Article 50 of *the Constitution* guarantees an accused person's right to fair trial. Article 50 (2) (g) and (h) provides as follows:-

“(2) 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 expenses, if substantial injustice would otherwise result, and to be informed of this right promptly.”

9 The court's have interacted with the above provision. Justice Mrima in *Chacha Mwita vs. Republic* No. 33 of 2019 held as follows:

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. Put differently, the right under Article 50(2)(h) of *the Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that 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*.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In *Pett vs. Greyhound Racing Association* (1968) 2 All ER 545 Lord Denning presented himself thus: -
- 10 It is not every man who has the ability to represent 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.
20. In Kenya, the Supreme Court in *Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others* [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of *the Constitution* stated as follows: -

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.
- 11 *Joseph Kiema vs. Republic* (2019) eKLR added his voice and held that the right to representation must be explained to an accused promptly which means before plea or soon thereafter so that the accused can decide whether or not to have counsel to represent him. The court also observed that the court must record that the right was explained to the accused. The court said:-
- 12 The court held that failure to comply with the said provisions renders the proceedings a nullity. J. Nyakundi in

.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the 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.....
- 13 I have perused the court record and no where on the record was the accused informed of his right to counsel, I find that based on Article 50(2)(g) and the various decisions referred to, the proceedings herein are a nullity and the conviction is quashed and sentence set aside.
- 14 As respects Article 50 (2)(h), the said right is not absolute as it requires the court to satisfy itself that injustice may result before the right can be enforced. At present, the State only provide free legal services to child offenders and murder suspects. The State has not fully operationalised a fund to provide free legal services for all accused persons.
- 15 Having quashed the conviction, the question is what should the court do. Should it order a retrial? The conditions precedent to the court ordering a retrial were aptly captured in the case of *Abmed Sumar vs. Republic* (1964) EALR 483. The court stated thus:-

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 interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)when this Court stated as follows:

...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

- 16 One of the requirements before a retrial can be ordered is that the witness will be available and the potentially admissible evidence is likely to result in a conviction. I have had an opportunity to review the evidence on record. PW2 testified that on 5/10/2018, the applicant hired his vehicle KBZ 980 S Vitz and that he intended to go and get shoes from Nairobi. They signed an agreement and the appellant whom he knew before and who had hired his vehicle before, paid him Kshs. 4,000/= leaving a balance of Kshs. 2,000/=. The agreement was produced in evidence. The appellant did not return the vehicle as agreed and PW2 started to look for the appellant who on being found, first lied that the vehicle was involved in an accident in Migori; that PW2 traced the vehicle at Isebania customs where it had been detained for transporting cannabis sativa.
- 17 PW1 and PW3 acting on information had stopped the said vehicle at Maberu but the driver defied and sped off, entered a rough road, got stuck got out of the vehicle and fled. They were not able to apprehend him but towed the vehicle to the police station. PW3 produced in evidence the agreement and Log Book produced by PW2 to prove ownership and also the exhibits found in the vehicle. PEX1 (e) to (f). I find that PW2'S evidence directly linked the appellant to the offence and I find that the potentially admissible evidence is likely to result in a conviction. Further to the above, the offence occurred in 2020, just over one year ago and witnesses were the owner of the vehicle and police officers. They are witnesses who can easily be traced. The prosecution counsel submitted that the exhibits are still available. The appellant was only convicted in July 2021 and so far he has only served one year out of the six (6) years and will therefore not be prejudiced.
- 18 Lastly, the offence with which the appellant was charged is so serious that it is only proper that he faces a proper trial and if found guilty, he should face the full force of the law. I find that this is a case that is suitable for the court to order a retrial which I hereby do. The appellant be released to Isebania Police Station for to be produced for plea before Kehancha Senior Principal Magistrate's Court on 1<sup>st</sup> August, 2022. Case be heard on priority basis.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

**Mr. Omooria** for the State.

Appellant present in person



