



REPUBLIC OF KENYA



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**Awuor v Republic (Criminal Appeal E040 of 2021)
[2022] KEHC 16372 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E040 OF 2021
RPV WENDOH, J
DECEMBER 16, 2022**

BETWEEN

JUSTUS OOKO AWUOR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the Hon Senior Principal
Magistrate Migori, which was delivered on August 4, 2021.)*

JUDGMENT

1. This is an appeal from the judgment of the Hon Senior Principal Magistrate Migori, which was delivered on August 4, 2021.
2. The appellant Justus Ooko Awuor, was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*.
3. The particulars of the charge are that on August 18, 2020 at Aego village in Nyatike Sub County within Migori County, robbed Harison Otieno Songa of cash Kshs 1,000/= and at or immediately before or immediately after the time of that robbery, injured the said Harison Otieno Songa.
4. After a full trial, where the prosecution called six witnesses, and the appellant gave a sworn statement in his defence, the appellant was convicted and sentenced to suffer death.
5. The appellant is aggrieved by the said judgment and filed this appeal citing the following grounds;
 - (1) that the trial court erred when it failed to comply with article 50 (2) (g) and (h) of the *Constitution of Kenya*;
 - (2) that the offence of robbery with violence was not proved to the required standard.



6. Though the appellant had indicated that he would file submissions. The court allowed him two chances but he never filed any by the time I was writing this judgment. The prosecution counsel, Mr. Omooria, filed his submissions on September 11, 2022. He conceded the appeal for reasons that upon perusal of the proceedings, he confirmed that the trial court did not comply with article 50(2)(g) which requires that the court informs an accused of his right to counsel.
7. Counsel however, submitted as regards the other grounds of appeal that the offence of robbery with violence was sufficiently so proved. He relied on the decision of *Oluoch v Republic* [1985] KLR 549 where the Court of Appeal set out the ingredients of the offence of robbery with violence and what the prosecution needs to establish. He urged that the prosecution must be able to establish one of the three ingredients i.e. that the offender is armed with a dangerous or offensive weapon or instrument; or that the offender was in company with one or more other person or persons and thirdly, that after or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence to any person.
8. Counsel submitted that the testimony of the complainant (PW1), was that he was accosted at his home, the appellant was armed with a panga with which he assaulted PW1 as he demanded money; that he took Kshs 1,000/= that the complainant had.
9. It is the courts view that it should deal with the issue whether the trial court complied with article 50(2)(g) and (h) first before considering the other grounds of appeal. This is because if the court agrees with the appellant that indeed the appellant's rights were violated, then the appeal will be determined at that stage. Article 50(2)(g) and (h) of the *Constitution* provides as follows:-

“ 50(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 expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

10. The above provision guarantees an accused person's right to fair trial. Under sub article 5(2)(g) the trial court is required to inform an accused person of his right to counsel. This is important so that an accused can make an informed decision whether or not to procure the services of an advocate and if he can not afford, one, he may approach the Legal Aid Committee for appointment of counsel if he qualifies. Under the above provision, the court has to inform the accused of the said right promptly which means, before plea is taken or soon thereafter so that accused can prepare for his defence. The court in *Chacha Mwita v Republic* Criminal Appeal 33 of 2019 (Migori) discussed the said provision at length. The court said as follows:-

“ 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 v Greyhound Racing Association* (1968) 2 All ER 545 Lord Denning presented himself thus: -

"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."

In South Africa in *Fraser v ABSA Bank Limited* (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

"Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation...."

In Kenya, the Supreme Court in *Petition No 5 of 2015 Republic v 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: -

QUOTE

"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. In *Joseph Kiema v Republic* [2019] eKLR, J Nyakundi also considered Article 50 (2)(g) and stated as follows:-

".....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....."

From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under article 50(2)(g) of the *Constitution*.

That now leads to the other question as to what point in time should the right be explained to the accused person.

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).

12. It is clear that the trial court did not inform the appellant of his right to counsel. Under article 25 of the *Constitution*, the said right cannot be derogated. Guided by the cited decisions, failure to comply with the said provision renders the proceedings a nullity.
13. Article 50(2)(h), of the *Constitution* places a duty on the State to assign an advocate to an accused at the State expense, if substantial injustice would otherwise result. The issue was discussed in *David Macharia v Republic* [2011] eKLR where the court said:-

" Article 50 of the *Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with



the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”. Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses.”

14. In *Republic v Karisa Chengo & 2 others* [2017] eKLR where the Supreme Court said:-

“In the above context, 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 expenses 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 provision of *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; and
- (vi) the complexity of the charge against the accused.”

15. The court has to consider the complexity of the case, the seriousness or nature of the offence and ability of the accused to defend himself. Although the charges that the appellant faced were very serious and attract a death sentence, yet the appellant has not demonstrated that he could not afford counsel or that the case was so complex that he could not defend himself eg, language barrier and that he has suffered substantial injustice. It must therefore be demonstrated that injustice will result. In my view, the said right is therefore not absolute unless it is shown that injustice will result.

16. Having found that the right under article 50(2)(g) was violated, and the same cannot be derogated, the resultant proceedings are a nullity and I hereby quash the conviction and set aside the sentence. The other grounds fall by the way.

17. The prosecution counsel urged this court to order a retrial. In the case of *Ahmed Sumar v Republic* [1964] EA the Court of Appeal set out the criteria upon which a court may order a retrial. The court stated 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 interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

18. One of the criteria for ordering a retrial is that the potentially admissible evidence is likely to result in conviction. I have duly considered the evidence on record. The complainant testified that the person who attacked him injured him with a panga, took Kshs 1,000/= and that the person did not manage to escape from the scene. PW2 and PW3 corroborated PW1’s testimony. I find that the potentially admissible evidence is likely to result in a conviction.
19. Secondly, the appellant was charged with a very serious offence that attracts a death sentence upon conviction. The complainant was seriously injured and robbed and it is only proper that this case goes to full trial so that the truth is established and the culprit if found guilty, should face the full force of the law.
20. Thirdly, the appellant was convicted on August 4, 2021, about a year two months ago. He was sentenced to suffer death. He has not served a substantial part of the sentence. Ordering a retrial will not cause him any prejudice. The court has to also consider that the complainant was violated and his rights must also be considered too.
21. I find that there is good reason for the court to order a retrial which I hereby do.
22. In the end, I make the following orders: -
 - (i) The appellant be released to Macalder Police Station and be presented before the Chief Magistrate’s Court Migori on December 19, 2022 for plea and fresh trial.
 - (ii) Since it is a retrial, the matter be expedited. In the event the accused is convicted, the court must take into account the prison sentence served in this case.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 16TH DAY OF DECEMBER, 2022.

R WENDOH

JUDGE

Judgment delivered in the presence of:

Mr Maatwa for the State.

Appellant present in person.

Evelyne Nyauke – Court Assistant

