



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL 56 OF 2016

(From Original conviction and Sentence in

Criminal Case No. 196 of 2016 of the Principal Magistrate's Court at Wang'uru)

SIMON MBUTHIA MWANGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. In this case, the applicant is serving life sentence for offence of Robbery with violence contrary to **Section 296(2) of the Penal Code**. He states that he is a first offender and that is why he is praying that this court appoints an advocate to act on his behalf.

Appointment of advocates on behalf of accused person

Article 50(2) (h) of the Constitution provides:

“Every 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;”

2. *I have considered the application. The State did not oppose the application. The Court of Appeal in*

David Njoroge Macharia v Republic [2011] eKLR stated:-

“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added).....”

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 expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

3. Further in **Karisa Chengo & 2 others v Republic [2015] eKLR**

The Court of Appeal stated;

“This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is

charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

The decisions are binding to this court.

4. In regard to the above authorities, every case must be decided on its own merit and where such person is unable to afford legal representation. The applicant herein is a rice seller and as per the pre-bail report he dropped out of school in class seven and does casual jobs. He is not a person of means and should have an advocate to represent him. There will be no prejudice to the respondent and they have not opposed the application.

5. I will allow the application.

6. I make an order that the appellant be provided with services of an Advocate as he is entitled to get legal aid as provided under Section 43 of the Legal Aid Act. The order be served on the National Legal Aid Service for compliance.

Dated at Kerugoya this 23rd day of May 2019.

L. W. GITARI

JUDGE