



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO 120B OF 2017**

**JOSEPH MWAURA MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 488 of 2012 in the Senior Principal Magistrate's Court at Limuru by Hon G.H. Oduor (CM) on 1<sup>st</sup> March 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Joseph Mwaura was jointly charged with Peter Njuguna Njenga, George Kinyanjui Thaara, Francis Kimemia Wainaina, Joseph Mwaura Macharia, Samuel Ngugi Karuga and Protus Momanyi Kariuki (hereinafter called his Co-Accused persons (1), (2), (3), (5) and (6) respectively) for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. The particulars of the charge were that on the 27<sup>th</sup> day of May 2012 at Redhill village in Kiambu County, jointly with others not before court robbed James Nyoro Kibutiri (hereinafter referred to as "PW 1"), cash Kshs 45,000/= (forty five thousand only) and immediately before or immediately after the time of such robbery while armed with crude weapons namely hammer and jack knives, wounded him.
3. After his Co-Accused persons 1 and 2 absconded, the said Charge Sheet was substituted on 3<sup>rd</sup> December 2014 to reflect four (4) Accused persons. Subsequently, on 2<sup>nd</sup> March 2016, the Prosecutor informed the Trial Court that Co-Accused person 3 had died. This therefore left the Appellant herein, his Co-Accused persons 4 and 5 to proceed with the case.
4. The Learned Trial Magistrate, Honourable G.H. Oduor Chief Magistrate convicted them for the offence of robbery with violence and imposed on them the death sentence as was prescribed under the law.
5. Being dissatisfied with the said judgment, on 19<sup>th</sup> July 2017, the Appellant filed a Chamber Summons seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on five (5) Grounds of Appeal. On 19<sup>th</sup> March 2018, he filed his Written Submissions and Amended Grounds of Appeal. This time he relied on four (5) Amended Grounds of Appeal.
6. When the matter came up for hearing on the said 19<sup>th</sup> March 2018, the State tendered oral submissions.

**LEGAL ANALYSIS**

7. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.**

8. Having considered the Appellant's and State's Written Submissions, this court found the following issues to have been placed before it for determination:-

1. **Whether or not the trial was irregularly conducted;**
2. **Whether or not the Appellant's fundamental rights to a fair and impartial trial were violated;**
3. **Whether or not the Prosecution proved its case beyond reasonable doubt.**

9. The court therefore dealt with the said issues under the distinct and separate heads shown herein below.

## **I. RIGHT TO FAIR TRIAL**

### **A. PLEA TAKING**

10. Amended Grounds of Appeal No (1) and (3) were dealt with under this head.

11. The Appellant argued that the plea upon which he was convicted was equivocal. He pointed out that the manner in which his plea was recorded showed that the Learned Trial Magistrate was not sure if he faced a charge or charges and who he/she were in the court record. The State did not address itself to these submissions.

12. In the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR**, Wendoh J associated herself with the procedure for taking plea that was set out in the case of **Kariuki vs Republic[1954] KLR 809 and so does this court. It was stated as follows:-**

**“The manner in which a plea of guilty should be recorded is:**

**(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**

**(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**

**(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

**(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445”**

13. A perusal of the proceedings shows that the Learned Trial Magistrate recorded the following:-

**“The substance of the charges and every element thereof has been stated by the court to the accused persons in the language that he/she/they understand, who being asked whether he/she/they admits or denies the truth of the charge replies...”**

14. This court noted that the charge was read in a language that the Appellant understood whereupon he stated that the charges were **“Not true”**. There was no ambiguity in the manner the plea was taken and the way he pleaded to the same. His assertion that the Learned Trial Magistrate was not sure whether he was facing a charge or charges and who he/she/they were, was a red herring that was intended to distract this court from determining the pertinent issues herein. This was a general statement that caused him no prejudice. If he indeed suffered any prejudice by the charges being read in the manner they had been imprinted on the court file, then he did not demonstrate the same.

### **B. WITNESS STATEMENTS**

15. The Appellant submitted that the Learned Trial Magistrate adjourned the trial for fifteen (15) minutes to enable “them” be furnished with the Witness Statement of No 233309 CIP Ibrahim Omar (hereinafter referred to as “PW 3”) and the two (2) P3 Forms.

16. He contended that the time given was not sufficient to have enabled him prepare for his defence as is enshrined in Article 50(2) of the Constitution of Kenya, 2010 that provides as follows:-

**“Every accused person has the right to fair trial which includes the right to have adequate time and facilities to prepare a defence.”**

17. The state did not submit on this issue.

18. A perusal of the proceedings showed that on 13<sup>th</sup> June 2012, the Trial Court ordered that the Appellant and his Co-Accused persons be furnished with Witness Statements on payment (**sic**). When the matter came up on 8<sup>th</sup> October 2014, they all confirmed that they were ready to proceed with the hearing and the Trial Court proceeded to take the evidence of PW 1, No 93594 PC Vincent Makori (hereinafter referred to as “PW 2”) and “PW 3”.

19. The Learned Trial Magistrate adjourned the matter for fifteen (15) minutes so that he could be furnished with the documentation referred hereinabove by the Appellant herein. When the Trial Court reconvened, the Appellant's Co-Accused informed it that it had got all the

relevant documents and the hearing continued.

20. It was not clear from the said proceedings whether the Learned Trial Magistrate adjourned the matter *suo moto* or if it was at the behest of the Appellant's Co-Accused 1 who confirmed that he had received all the relevant documents. Appreciably, the Appellant did not inform the Trial Court that he had not received all the documents he wanted before proceeding with the hearing.

## **B. LEGAL REPRESENTATION**

21. The Appellant submitted that the Learned Trial Magistrate erred by failing to accord him the right of an advocate to represent him during the trial. He relied on the provisions of Article 50(2) (h) of the Constitution of Kenya that provides as follows:-

**“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.”**

22. In the case of **Cr Appeal No 497 of 2007 David Njoroge Macharia vs Republic [2014] eKLR**, the court therein explained that legal representation ought to be assigned to an accused person where substantive injustice would occur in complex issues of law or fact, where the accused is unable to conduct his own defence or where public interest requires that representation be provided.

23. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the cases of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** and in the case of **David Macharia vs Republic** (Supra) amongst many other cases.

24. In the case of **David Macharia vs Republic** (Supra), the Court of Appeal rendered itself as follows:-

**“Art 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 expense.”**

25. In the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic**(Supra),the Court of Appeal also stated as follows:-

**“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. 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.**

Again, this Court differently constituted in the case of **Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013**, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

**“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”**

Article 261 of the Constitution provides *inter alia*:-

**(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.**

**(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year**

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the

**Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."**

26. Accordingly, whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognisance of the aforesaid decision by the Court of Appeal that the right is progressive in nature and only hoped that the right to assign legal representation to **all** (emphasis court) accused persons will be realised progressively but sooner than later.

27. In the circumstances foregoing, this court did not find any merit to Amended Ground of Appeal No (1) and (3) and the same is hereby dismissed.

## **II. PROOF OF THE PROSECUTION'S CASE**

28. Amended Grounds of Appeal Nos (2), (4) and (5) were dealt with under this head.

29. The Appellant submitted that although PW 1 testified that the incident occurred during broad daylight, the fact that PW 1 did not identify him while he was in the dock was sufficient proof that PW 1 did not identify him as having been one of the persons who attacked him.

30. He pointed out that PW 1's wife, his grand daughter who PW 1 testified was the person who alerted a neighbor who in turn called the police and the G4S Security were not called as witnesses in this case which he argued left the Prosecution's case unproven.

31. He referred this court to the case of **Bukenya & Others 1972 EA 549** in which it was held that:-

**"The Prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the Prosecution's case".**

32. On its part, the State was emphatic that the Appellant and his Co-Accused persons were arrested inside PW 1's and consequently, the question of there having been mistaken identity did not arise. It added that PW 1's wife was not called as a witness because she was mentally challenged, a fact that was stated by PW 5.

33. This court carefully considered the evidence that was adduced during the trial and noted from PW 1's evidence which was corroborated by PW 2, PW 3 and PW 5 that the Appellant and his Co-Accused persons were arrested in PW 1's house. Although PW 1, who was elderly, did not see the faces of his attacker, PW 3 personally arrested the Appellant and his Co-Accused persons from PW 1's house. PW 5 also confirmed having found the Appellant and his Co-Accused persons at the verandah of PW 1's house and ordered them to surrender. PW 2 also went to the scene and confirmed that he found the Appellant and his Co-Accused persons in PW 1's house.

34. As the State correctly stated, the issue of mistaken identity could not have arisen. It was immaterial that PW 1's wife was not called to corroborate PW 1's evidence as the same was corroborated by PW 2, PW 3 and PW 5 who rushed to the scene after being alerted of the robbery. In addition, part of the money the Appellant and his Co-Accused persons had robbed PW 1 was recovered in the ceiling board of PW 1's house after the Appellant's Co-Accused person No (1) led the police officers where it had been hidden.

35. The Appellant and his Co-Accused persons were arrested early in the morning when the lighting conditions were favourable and free from error of identification by PW 1, PW 2, PW 3 and PW 5.

36. Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives discretion to the prosecution to decide the number of witnesses to prove a fact. It was therefore not mandatory for the Prosecution to have called PW 1's wife as a witness firstly because PW 5 stated that she was mentally challenged as can be seen hereinabove and secondly, PW 1's evidence was corroborated by PW 2's, PW 3's and PW 5's evidence. The case of **Bukenya vs Republic** was therefore not useful to the Appellant's case.

37. Notably, the Prosecution was able to demonstrate that all the ingredients in Section 296 (2) of the Penal Code obtained in this case. The same are that:-

**a. the offender must be armed with any dangerous or offensive weapon or instrument; or**

**b. the offender must be in the company of one or more other person or persons or;**

**c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

38. The Charge against the Appellant could be sustained if one any of the aforesaid ingredients were present. However, in this instant case, all the ingredients constituting the offence of robbery with violence were present showing the aggravated circumstances that obtained herein.

39. The Appellant was in the company of more than one (1) person, they robbed PW 1 and immediately before and during the incident they injured him, which was confirmed by a Registered Clinical Officer at Tigoni District Hospital, James Kabue, (hereinafter referred to "PW 4"). This proved the ingredients of robbery with violence contrary to Section 296(2) of the Penal Code.

40. Taking the aforesaid into consideration, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable

doubt and that the evidence that was adduced by the Prosecution witnesses actually displaced the Appellant's unsworn evidence. He did not therefore persuade this court to find that there was any malice on the part of the Prosecution witnesses to have implicated him in the offence herein. The Learned Trial Magistrate therefore acted correctly when he convicted the Appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

41. In the circumstances foregoing, this court found and held that the Amended Grounds of Appeal Nos (2), (4) and (5) were not merited and the same are hereby dismissed.

#### **DISPOSITION**

42. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 19<sup>th</sup> July 2017 was not merited and the same is hereby dismissed. Instead, this court hereby affirms the conviction as the same was lawful and fitting.

43. However, in view of the recent case of **Petition No 15 of 2015 Francis Muratetu & Another vs Republic** where the Supreme Court that found that the mandatory sentence under Section 296 (2) of the Penal Code was unconstitutional, this court hereby directs that this matter be referred back to the Senior Principal Magistrate's Court at Limuru Law Courts for re-sentencing, if need be. This matter shall be placed before the Senior Principal Magistrate of Limuru Law Courts on 10<sup>th</sup> July 2018 for his and/or her further orders and/or directions.

44. It is so ordered.

**DATED** and **DELIVERED** at **KIAMBU** this **26<sup>th</sup>** day of **June** 2018

**J. KAMAU**

**JUDGE**