REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 225 of 2011

ABILA SHIBWAYO CHACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 195 of 2010 in the Senior Resident* Magistrate's Court at *Mumias delivered by Hon. H. Wandere (PM) on 12th October 2011)

JUDGMENT

Background

1 **ABILA SHIBWAYO CHACHA**, the appellant herein has filed this appeal against conviction and death sentence on a charge of robbery with violence contrary toSection 295 as read with section 296 (2) of the Penal Code allegedly committed on 2nd February, 2010 against Stephen Okumu

The prosecution's case

2 The prosecution called 8 witnesses in support of the charge. **PW1, Stephen Okumu,** the complainant herein stated that on the material day at about 6.00 pm, his neighbor, the appellant whom he referred to as Alba, who was wearing dreadlocks, and was armed with a knife, together with another man attacked him in a sugar plantation farm and robbed him of a phone and Kshs. 500/-. **PW2, Athman Mulesi Oponga**, after answering the complainant's distress call was shown two young men who the complainant said had robbed him and he identified the appellant, whom he referred to as Alba, who was wearing dreadlocks, who was from the same neighborhood with him. **PW3 Hamisi Shitubi Wanzetse** after receiving complainant's report arrested the appellant and handed him over **PW4 PC Paul Bungei**, the investigating officer who stated that the complainant reported that he was robbed by Alba who was wearing dreadlocks he investigated the case and later charged the appellant.

3. When put on his defence, appellant conceded that he had dread locks at the time of his arrest. He however denied the offence and stated that he was arrested and charged for an offence that he did not commit.

4. *In a judgment* dated 12.10.11, appellant was convicted and sentenced to suffer death.

The Appeal

5. The conviction and sentence provoked this appeal. In the petition of appeal, the appellant raised 8 grounds of appeal.

6. When the appeal came up for hearing on 7.9.18, the appellant wholly relied on the written submission filed on 7.9.18.

7. Mr. Juma, learned State Counsel opposed the appeal and relied on the submissions filed on 11.8.17.

Analysis and Determination

8. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of**Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005**where the court stated as follows: -

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and written submissions for both parties.

11. In dealing with this appeal, I will address the 3 grounds that the appellant has raised in his submission as follows: -

1) ***That his rights under Article 50 (2)(g) (h) and (j) of the Constitution were violated***

2) ***That the language of the court is unknown***

3) ***That he was not positively recognized***

4) ***That his defence was not considered***

Violation of Article 50(2) (g), (h) and (j)

12. Article 50 of the Constitution states: -

(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 this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence

13. The appellant was did not chose counsel and was never availed counsel by the State throughout the proceedings. Article 50 (2) (h) provides that an advocate ought to be assigned at State expense if substantial injustice would otherwise result. This issue first came up for interpretation before the Court of Appeal in the case of ***David Njoroge Macharia v Republic [2011] eKLR.*** The Court after reviewing the past and current law stated that as follows:-

"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 court 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."

14. The Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are 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.

15. In my view, this is a case that ideally, legal representation ought to be provided at State expense if the accused cannot afford counsel.

15. However, the provisions of Article 50, part of which relate to the right to be provided with legal representation at State expense, are yet to be fully enforceable. This was indeed the basis of the decision in the case of ***John Swaka V DPP & 2 Others, Nairobi High Court, Constitutional Petition No. 318 OF 2011, [2013] eKLR***. I am therefore not convinced that there is any violation of the Constitutional rights of the appellant in not having been accorded legal representation at State expense given the above reasons.

16. Regarding supply of the prosecution evidence in advance, it is my considered view that this issue would have been better addressed by the trial court before which the investigating officer would have explained whether or not the evidence had been supplied.

That the language of the court is unknown

17. Section **198 of the Criminal Procedure Code** states:-

(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.

The court record shows that the proceedings of eth trial court were conducted in Kiswahili. Appellant has not alleged that does not understand Kiswahili. In any case, his lengthy cross-examination of the prosecution witnesses demonstrates that he understood the proceedings.

Was the appellant positively recognized?

18. This is a case of recognition since it is on record that the appellant was well known to the complainant and PW2 who are from the same neighborhood.

19. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in ***Anjononi and Others vs The Republic [1980] KLR***;

> ***"This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"***

20. That is not to suggest of course, that cases of misrecognition cannot occur (See ***Karanja & Anor vs. R [2004] KLR 140)*** and courts are still duty-bound to examine such evidence with great care.

21. Complainant stated that the incident occurred at about 6.00 pm and that he had recognized the appellant. PW2 who answered the complainant's distress call stated that he saw the appellant and another walking away from the scene of crime and that he had recognized him.

22. The offence was committed about 6.00 pm and since complainant and PW2 knew the appellant before the material date, I am convinced that the trial magistrate properly evaluated the evidence on record and came to the conclusion that the appellant had been satisfactorily and more reliably recognized since he was not a stranger to PW1 and PW2.

Was the defence by appellants considered?

23. From what is stated hereinabove, I find that the defence by the appellant was duly considered and rightfully rejected.

24. From the above analysis, I have come to the conclusion that: -

1) This appeal has no merit and it is dismissed

2) **In view of the Supreme Court's decision in *Francis KariokiMuruatetu& Another v Republic & 5 others [2016] eKLR* and *William Okungu Kittiny v Republic [2018]eKLR* *the appellant's case is remitted to Mumias Magistrate's Court for mitigation and re-sentence.***

DATED THIS 19th DAY OF September 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26th DAY OF SEPTEMBER 2018

WILLIAM M.MUSYOKA

…….

JUDGE

In the presence of-

Court Assistant- Eric/Polycarp

Appellant-Present

For Respondent- Mr.Juma