REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 27 OF 2017

LEONARD KIPKEMOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence in Kericho

CM Cr. No. 129 of 2017 (Hon. B. R. Kipyegon (SRM) dated 28th July 2017)

JUDGMENT

1. The appellant was charged in Kericho Chief Magistrate's Court Criminal Case No. 129 of 2017 with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 5thday of March 2017 at Chepseon Centre in Londiani within Kericho County jointly with others not before court robbed Edmond Chepkwony Kshs. 5,000/- and immediately before the time of such robbery wounded the said Edmond Chepkwony.

2. The appellant was tried before B.R Kipyegon (SRM) and in the judgment dated 28thJuly 2017, the trial court found the appellant guilty of the offence of robbery with violence as charged. After considering the appellant's mitigation, the court proceeded to sentence him to death as stipulated under section 296(2) of the Penal Code.

3. Aggrieved by both his conviction and sentence, the appellant filed the present appeal. The original Petition of Appeal was filed before this court on 18thAugust 2017. However, a supplementary petition of appeal was filed and relied on at the hearing of the appeal, and the original petition of appeal is deemed to have been abandoned.

4. The Supplementary Petition of Appeal is dated 12th April 2018. It sets out some 13 grounds of appeal, which can be summarised as follows:

i. that the Magistrate convicted the appellant based on a defective charge sheet;

ii. that the Magistrate convicted the appellant on the basis of inconsistent and contradictory evidence;

iii. that the appellant was not provided counsel at state expense;

iv. that the trial court did not record the language used at the trial;

v. that the appellant was not properly identified by way of recognition;

vi. that the court admitted hearsay evidence of PW4 thereby shifting the burden of proof to the appellant.

vii. that the mandatory use of the death sentence is illegal.

5. This being a first appeal, I am required to re-evaluate the evidence and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing- see **Okeno vs R (1972) EA 32** and **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR.**

6. The prosecution called 4 witnesses. PW1 was Edmond Chepkwony, the complainant. It was his evidence that on 5th March 2017 at 11:00 p.m. after he closed the bar, he left to eat at Makuti butchery, a distance of 300 metres from the bar. There were solar security lights at the centre, as well as moonlight. As he walked to the butchery, he was stopped by 3 people whom he tried to dodge but they blocked him along the tarmac road. He recognized one, Leonard Kipkemoi, a man he knew very well, who was in a red jacket. It was his testimony that Leonard was a common figure and worker within the same centre. Leonard began to stab him on the right rib near the chest and three times on his right arm near his elbow. The other two men robbed him of Kshs. 5,000/-. He screamed and John Njoroge (PW2) came and tried to chase Leonard and later assisted him to get to the hospital. He was first taken to a clinic within Chepseon but later referred to Siloam Hospital for treatment.

7. On cross examination he stated that he knew the appellant very well as a person who used to ride a motor cycle in the centre. He did not recognise the other two men who were with Leonard.

8. PW2 was John Njoroge Ngethe. On 5th March 2017 at 11:00 p.m., he was closing someone's house and he met the appellant at the door. The appellant had greeted him and he had responded, and the appellant had told him that he had no problem with him. He was standing with the appellant when PW1 came to ask him to accompany him to a hotel. He left to go for a short call and after a short distance, he saw a struggle between the appellant and the complainant. When he asked what was happening the appellant did not speak but ran away. He tried to chase the appellant but abandoned this to attend to PW1 who had injuries. It was his evidence that there were electric lights from the streets and solar lights from the shops were on and he could therefore see everything.

9. On cross-examination, he stated that he was about 10 metres when he witnessed the incident and could not rescue the complainant. He had stood with the appellant under the lights and so he saw him properly.

10. PW3, Mike Kimutai Cheruiyot, was a clinical officer at Kericho County Referral hospital. He had taken the history of the complainant and his treatment chits from Siloam hospital. The complainant had sustained a lower chest injury and stab wound. He also had injuries on both elbows. The probable weapons used were sharp and blunt objects. He classified the injuries sustained as harm. PW3 produced the P3 form with respect to the complainant dated 8th March 2017 as Pexh 2.

11. PW4, No. 56437 PC Sammy Nzau testified that on 7th March 2017 while at Chepseon police station, a report had come of an attack on 5th March 2017 at 11:00p.m. The complainant had reported an attack by 3 men who injured him and robbed him of Kshs. 5,000/-. On 8th March 2017, members of the public in the company of the complainant arrested and brought the accused, the appellant in this appeal, to the police station. It was his testimony that the complainant identified and recognized only the appellant amongst the 3 attackers.

12. When placed on his defence, the accused elected to keep quiet. In its judgment, the Court analysed the prosecution evidence and after considering the totality of the evidence adduced, it noted that the accused had offered no plausible defence. The court concluded that the prosecution had proved the case against the appellant and proceeded to convict the accused under section 296(2) of the Penal Code.

13. Mr. Nyaingiri, learned counsel for the appellant, contended that the judgment of the trial court was based on a defective charge sheet, and that the particulars of the charge in the charge sheet did not state whether the appellant was armed with a dangerous weapon. Further, that the particulars of section 296(2) were not captured in the charge sheet, and the charge sheet was never amended as required under section 214 of the Criminal Procedure Code.

14. Mr. Nyaingiri submitted further that in view of the defective charge sheet, the trial court proceeded to make an analysis of the ingredients of robbery with violence which was based on the wrong legal reasoning. If the charge sheet was defective, the analysis would be on the wrong evidence.

15. The second argument advanced for the appellant was that the prosecution evidence was contradictory. Mr. Nyaingiri referred to the evidence of PW1 who stated that 3 persons attacked him and robbed him, while PW2 stated that it was only one person, the appellant. This contradiction was not resolved by the trial court.

16. It was Mr. Nyaingiri's submission further that the circumstances under which the incident occurred are a mystery. That the appellant was not identified and that PW1 only said he knew the appellant too well but did not say how he knew the appellant.

17. Counsel also argued that if there were blood stains on the shirt which the complainant was wearing, DNA analysis would have helped to link the appellant to the offence. The appellant had no defensive marks, and was not examined to show whether there was a confrontation.

18. Mr. Nyaingiri further submitted with regard to the P3 form that the doctor stated that the probable weapon causing injury was a knife. His submission was that there was no finding in the P3 form that the injuries caused to the complainant were caused by a knife.

19. With respect to the language used, it was submitted that it was not stated in the proceedings and it was not indicated the language in which the appellant responded. He submits that at page 5 the appellant stated that he understands Kiswahili, that PW1 gave evidence in Swahili, but that PW2, 3 and 4 gave evidence in English, a language that the appellant did not understand.

20. On the question of legal representation, Mr. Nyaingiri submitted that the appellant was not provided with a counsel in accordance with Kenya Gazette Notice No. 370 of January 2016 under which he was entitled to representation since he was a layman and he was facing the penalty of death.

21. As for the death sentence passed on the appellant, Mr. Nyaingiri submitted that it was no longer provided for as a mandatory sentence. His submission was that if the court should find that the conviction was merited, it should give a different sentence.

22. The state opposed the appeal. In his submissions, Learned Prosecution Counsel, Mr. Ayodo, submitted that the charge sheet was proper, and that it was in accord with section 137 of the Criminal Procedure Code with respect to what a charge sheet should contain. In any event, the issue of a defective charge sheet is raised very early in a trial, which was not done in this case.

23. Regarding the language used, his submission was that the appellant understood the charge and actively participated in the trial and cross examined the witnesses.

24. With respect to the appellant's submission on identification and analysis of the ingredients of robbery with violence Mr. Ayodo referred the court to page 12 of the judgment where the court analysed the prosecution evidence and noted that the ingredients of robbery with violence were proved by the prosecution. It was his submission that the evidence was clear that the complainant had been injured by the appellant, that the complainant recognised the person who injured him, and that his evidence was corroborated by PW2 as PW2 knew the appellant. PW2 testified that he had seen the appellant struggle with the complainant under the security lights and solar lights from the shops. This was a case of identification by recognition, with minimal room for error.

25. In response to the complaint that the appellant was not provided with legal representation, Mr. Ayodo submitted that the state only provides Counsel in the case of murder. It was also his submission that the appellant never indicated that he needed a counsel and he was able to represent himself.

26. As for the language used in the proceedings, the submissions of the state were that the record indicated that the language used was Kiswahili. With respect to the testimony of PW4, the record indicated that he was sworn in English but at page 8 and 9 the appellant cross examined PW4, a clear indication that he understood the testimony of PW4. The failure to indicate the language used was just an omission.

27. Mr. Ayodo submitted with regard to the contention that there were contradictions in the prosecution case that the appellant's Counsel did not point out the contradictions. The prosecution evidence was consistent and corroborative and clearly brought out the ingredients of the offence of robbery with violence.

28. To Mr. Nyaingiri's submission that DNA evidence should have been produced, the state's response is that there was sufficient prosecution evidence to prove the case before the court and the omissions of DNA does not affect the evidence given. As for the failure to call the Nyumba Kumi person who arrested the appellant, the state's position was that the witnesses who testified were enough to prove the prosecution case, and Mr. Ayodo relied in support on section 143 of the Evidence Act.

29. On the issue of the death sentence Mr. Ayodo submitted that the sentence is provided for in the Penal Code which has never been amended and is therefore not illegal. The trial court had therefore handed the appellant a legal sentence. Mr. Ayodo urged the court to find that the appeal lacks merit and to dismiss it.

30. In his response to the state's submissions, Mr. Nyaingiri observed that if the state provided legal representation only for murder cases, this was a contravention of Article 50 (2) (h) of the Constitution. As for the failure to call certain witnesses, his submission was that even if section 143 of the Evidence does not compel the state to produce any particular witness it would assist the court for it to do so.

31. I have considered the prosecution evidence on record, the judgment of the trial court, and the submissions by the parties. I believe that the following seven issues arise for determination:

i. Whether the charge sheet was defective;

ii. Whether the prosecution evidence was inconsistent and contradictory;

iii. Whether the appellant was properly identified by recognition;

iv. Whether the trial court admitted hearsay evidence and shifted the burden of proof on the appellant;

v. Whether the failure to provide the appellant with legal representation was a violation of his rights;

vi. Whether the failure to record the language of the court was a violation of the appellant's rights;

vii. Whether the mandatory use of the death sentence at the trial was illegal.

Defective Charge Sheet

32. It was submitted on behalf of the appellant that he was convicted on the basis of a defective charge sheet, which was never amended. This was because the charge sheet did not indicate that he was armed with a dangerous weapon, and the particulars of the section 296(2) are not captured in the charge. The state's response is that the charge sheet complies with section 137 of the Criminal Procedure Code. This section provides as follows:

137. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -

(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of

offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

33. I have considered the contents of the charge sheet in this matter. After setting out the offence charged as robbery with violence contrary to section 296(2) of the Penal Code, the particulars of the offence are set out as follows:

"Leonard Kipkemoi:On the 5th day of March 2017 at Chepseon Centre in Londiani within Kericho County jointly with others not before court robbed Edmond Chepkwony Kshs. 5,000/- and immediately before the time of such robbery wounded the said Edmond Chepokwony.

24. Section 134 of the Criminal Procedure Code provides that:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.

35. In **B N D vs Republic [2017] eKLR, Ngugi J** laid out the test to be followed in determining whether a charge sheet is defective. The Learned Judge stated as follows:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."

36. In its decision in **Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR** the Court of Appeal considered what should be contained in a charge sheet where an accused is to be charged with the offence of robbery with violence. It stated as follows:

"This issue has been dealt with by this Court before in Simon Materu Munialu vs Republic [2007] eKLR (Criminal Appeal 302 of 2005). This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:

'…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.

In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal." (Emphasis added)…

37. The court went on to cite the decision in ***Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR*** *and stated as follows:*

Similarly in Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR (Criminal Appeal No 353 of 2008) the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellants in the present appeal, that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:

> ***"Mr. Musomba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely "punishment of robbery". In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the Penal Code."***
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> ***The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:***
>
> ***'Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.'***
>
> ***We agree that this is the correct proposition of the law. Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor vs R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.***

38. In the present case, the appellant was charged with the offence of robbery with violence. The particulars of the offence stated that he was with others, and that he used violence on the victim. In my view, the charge in the present case was proper, and the challenge to the appellant's conviction on the basis of the charge sheet must fail.

Inconsistent and contradictory evidence

39. It was submitted on behalf of the appellant that he was convicted on the basis of contradictory evidence. The basis of this argument is that PW1 stated that 3 persons attacked him and robbed him, while PW2 stated that he saw the appellant struggling with the complainant. I have considered the evidence of PW1 and PW2. PW1 stated that he had been stopped by some 3 men, one of whom he recognised, and who began to stab him, while the other two robbed him of Kshs. 5,000/- and ran away. When he was stabbed, he screamed and Leonard, the appellant, ran away. PW2 then came and tried to chase the appellant, then went back to assist the complainant.

40. PW2's evidence was that he was closing someone's house when he met the appellant at the door. The appellant told him that he had nothing against him and they parted. The complainant then asked PW2 to accompany him to a hotel, and PW2 asked to go for a short call first. After he had gone a short distance, he saw PW1 struggling with the appellant. He went back and asked what had happened and the appellant ran away, and PW1 informed PW2 that he had been stabbed by the appellant. PW2 then tried to chase the appellant, but in vain.

41. The inconsistency here, according to the appellant, is the evidence of PW1 that he was attacked by 3 people, while PW2 saw only the appellant. It is correct that the trial court did not try to reconcile this contradiction, but I do not find that it was a material contradiction that caused prejudice to the appellant. The evidence of PW1 was that the two other people who robbed him in the company of the appellant ran away. He was left struggling with the appellant, who was stabbing him. PW2 saw the appellant because he turned when the complainant screamed, and he saw the appellant, whom he had met a little earlier and spoken to. In its decision in **Erick Onyango Ondeng' vs Republic [2014] eKLR** the court stated as follows with regards to the duty of a court when considering contradictory evidence.

> ***"The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32)."***

42. In **Peter Ngure Mwangi vs Republic [2014] eKLR**, the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, took the position that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The Court stated as follows:-

> ***"We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case."***

43. I am satisfied that the inconsistency in the evidence of PW1 and PW2 on the number of persons who robbed the appellant was not material and did not weaken the prosecution case. The inconsistencies can be reconciled as stated above, by the fact that the two other robbers ran away, leaving the complainant struggling with the appellant, who was stabbing him, and which explains why PW2 only saw one attacker. In my view therefore, this ground also has no merit.

Whether the Appellant was properly identified by way of recognition

44. It has been argued that the circumstances under which the incident occurred are a mystery, that the appellant was not identified and that PW1 only said he knew the appellant too well but did not say how he knows the appellant. The state's response is that the appellant was recognised by both the complainant and PW2, both of whom knew him well. PW2 had seen the appellant by the security lights and solar lights at the shops.

45. It is correct that a court has to be careful in considering evidence of recognition. In **Hassan Abdallah Mohammed vs Republic [2017] eKLR** it was stated that:

> ***"Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:***
>
> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***
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> ***8. In Nzaro vs Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.***

46. The factors to be considered with respect to recognition as set out in **R vs Turnbull & Others (1976) 3 ALL ER 549** must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

47. In this case, the complainant testified that the incident took place at around 11:00 p.m. at the Chepseon centre. There were security lights in the streets, and solar lights in the shops. There was also moonlight. PW1 had recognised one of his three assailants, who was known to him. It is correct that he did not state how he knew the appellant, but he stated that he was a common figure and worker in the town centre. The appellant was also known to PW2, to whom he had even spoken prior to the attack on the complainant.

48. I am satisfied that in this case, the appellant was recognised by prosecution witnesses who knew him well. The area where the incident took place was well lit. The appellant was a worker in the area, where PW1 and PW2 operated from. I am therefore unable to find any mystery in the manner in which the appellant was identified, and I find that the identification by recognition was safe. This ground of appeal must also fail.

Whether the Trial Magistrate admitted hearsay evidence and shifted the burden of proof to the appellant.

49. While the appellant has raised this ground and submitted that the conviction and sentence should be set aside on its strength, I have not been able to find in the submissions by Mr. Nyaingiri how the trial court admitted hearsay evidence or shifted the burden of proof. I note that the trial court relied on the evidence of PW1 and PW2, the complainant and the eye witness respectively. The evidence of PW4 was to narrate the findings of his investigations. In the circumstances, I find no merit in the allegation that there was reliance on hearsay evidence. As for the allegation that the burden of proof was shifted, I find that there is nothing in the judgment to support this contention. While the trial court observed that the appellant offered no explanation, having elected to remain silent, it is evident that the conviction was based on the prosecution evidence. Accordingly, this ground also fails.

Failure to provide the appellant with legal representation

50. The appellant has challenged his conviction on the basis of failure to accord him a counsel. It was argued on his behalf that this was in violation of his rights under Article 50(2) (h). Mr. Nyaingiri relied on **Kenya Gazette Notice No. 370 of January 2016** to submit that the appellant was entitled to representation since he was a layman and he was facing the penalty of death. The response from the state is that legal representation is provided only in cases of murder.

51. I will deal first with the response from the state, which I do not believe is the correct position in law. Article 50 (2) (h) of the Constitution provides for provision of legal representation by the state where substantial injustice would occur. Further, in its decision in **Republic vs Karisa Chengo & 2 Others [2017] eKLR**, the Supreme Court considered the issue of legal representation at state expense and stated:

> ***"[87] Article 50(2) (h) of the Constitution provides that "[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." It does not define what "substantial injustice" means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise***

result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

(88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, 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. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

52. One need not, however, resort to the Gazette Notice relied on by Mr. Nyaingiri, which provided for pro bono services to be offered in capital cases and cases of children in conflict with the law in the Magistrates Courts. As I observed in **Bernard Kiprono Koech vs Republic [2017] eKLR** in considering an argument similar to what is now before me:

"39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

43. (1) A court before which an unrepresented accused person is presented shall —

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."

53. I find that a similar situation obtains in the present appeal. The appellant was able to address the issues before the court, and to cross-examine witnesses. While the state must strive, through the Legal Aid Service, to provide legal representation in cases where substantial injustice may result, I am not satisfied that such substantial injustice resulted in the present case. This ground of appeal must also fail.

Failure to record the language of the court

54. The appellant argues that the language of the court was not indicated. That the appellant had stated that he understood Kiswahili, and that PW1 gave evidence in Kiswahili, while PW2, 3 and 4 gave evidence in English, which the appellant did not understand. The response from the state is that the language used was clearly stated in the proceedings as Kiswahili; that the other prosecution witnesses testified in Kiswahili, while PW4 was sworn in English but that the appellant cross-examined him, which was a clear indication that he understood the testimony of PW4.

55. The Court of Appeal has considered the duty of the trial court with respect to the language used in a trial in **Jason Akhonya Makokha vs Republic [2014] eKLR**. It observed as follows:

"19.The cardinal principles that we can draw from the above case law propositions are that, one, any Court of law taking a plea from an accused person has to ensure that the language of the Court and the language the accused person wishes to use to communicate with the Court is indicated on the record and where an accused person is not conversant with the language of the Court, he should be afforded the services of an interpreter; two, an unexplained violation of a constitutional right to language would normally result in an acquittal irrespective of the nature and strength of the evidence which might be adduced in support of the charge; save that each case has to be determined on its own facts and circumstances; three, that there was a reciprocal duty on the part of an accused person to indicate to the Court, for instance that he was not able to understand the language of the proceedings although this does not however lessen the duty of the Court of being satisfied that the accused was able to follow the proceedings; four, that where some doubt exist as to whether or not an accused person was accorded the services of an interpreter, the doubt must be resolved in his favour." (Emphasis added)

56. What does the record of the court in this case show? On 31st March 2017, it is indicated that the language used is Kiswahili. On 25th May 2017, the accused stated that he understands Kiswahili. PW1, PW2, and PW3 all testified in Kiswahili. It appears from the record that PW4 testified in English.

57. I must observe that the trial court had a duty to ensure that where evidence was given in a language other than what the accused stated he

understood, interpretation was provided. However, I also note that the appellant proceeded with the trial without indicating to the court that he did not understand the language of the court. It is also apparent that he understood the language used by PW4, for he proceeded to cross examine him, which indicates he understood his testimony. In the circumstances, I am satisfied that there was no prejudice caused by the failure to indicate the language used, that the appellant fully understood the proceedings, and there was no miscarriage of justice. This ground, accordingly, must also fail.

Whether the death sentence was illegal

58. It was argued for the appellant that the death sentence was no longer provided for, and so the trial court imposed an illegal sentence. This, however, is a misinterpretation of the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. What the Court held was that the mandatory nature of the death sentence is unconstitutional: the court has the discretion to impose a sentence other than death. However, as submitted by Mr. Ayodo, the death sentence remains in the Penal Code as the sentence for robbery with violence and murder and has not been repealed. The court has the discretion, however, to consider mitigating circumstances and impose a lesser sentence.

59. I have found that all the appellant's grounds of appeal that relate to his conviction are without merit, and therefore that his conviction was safe and is hereby upheld. The question is whether I should uphold the sentence or, as urged by Mr. Nyaingiri, reduce it.

60. In his mitigation before the trial court, the appellant stated that he should be given a non-custodial sentence as he has children to take care of.

61. In **James Kariuki Wagana vs Republic [2018] eKLR**, Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

62. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainant, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he stabbed the complainant. The report from the hospital shows that the complainant sustained a penetrating injury to the chest, probably caused by a knife. The complainant was admitted at the Siloam Hospital from the 5th to the 7th of March 2017.

63. While the nature of the robbery and the level of violence unleashed on the complainant does not rise to the level of the heinous crime that merits the death penalty, it is sufficiently serious to warrant long term imprisonment. The appellant stabbed the complainant in the chest, and it was only by divine mercy that he did not cause him a fatal injury.

64. In the circumstances, I will reduce the death penalty to a term of imprisonment for 20 years from the date of the sentence of the lower court, the 11th August 2017.

Dated Delivered and Signed at Kericho this 18th day of December 2018.

MUMBI NGUGI

JUDGE