



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 60 OF 2016**

**RAPHAEL MUSUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 529 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon G.M. Gitonga (RM) on 21<sup>st</sup> September 2015)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Raphael Musungu was charged with the offence of burglary contrary to Section 304 (2) and stealing contrary to Section 279(6) of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on 28<sup>th</sup> November 2014 at Sisal Estate Mwachabo location within Taita Taveta County broke and entered into the dwelling house of Ben Kabucha (hereinafter referred to as "PW 1") with intent to steal therein and did in fact steal from therein one (1) radio make Joc valued at Kshs 1,500/= , National ID Card and cash Kshs 2,500/= PW 1's property.
2. He had also been charged with the alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. The particulars of this charge were that on the aforesaid date and place, otherwise than in the course of stealing , dishonestly received or retained one (1) radio make Joc , two chargeable batteries make NOKIA B2-5C and Kshs 1,600/= knowing or having reason to believe that the same were stolen goods.
3. The Learned Trial Magistrate Hon G.M. Gitonga, Resident Magistrate convicted the Appellant on the alternative charge and sentenced him to seven (7) years imprisonment. At the time of sentencing, the Learned Trial Magistrate took into account that the Appellant was not a first offender because at the time, he was already serving five (5) years imprisonment in **Cr Case No 56 of 2015** having pleaded guilty to three (3) Counts of burglary that was committed on 17<sup>th</sup> February 2015.
4. Being dissatisfied with the said judgment, on 14<sup>th</sup> November 2015, the Appellant filed a Notice of Motion application seeking to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been filed and served. He relied on three (3) Grounds of Appeal.
5. On 19<sup>th</sup> April 2017, he filed his Written Submissions along with five (5) Amended Grounds of Appeal. His Further Written Submissions in response to the States' Written Submissions that were dated 25<sup>th</sup> July 2017 and filed on 25<sup>th</sup> July 2017 were filed on 17<sup>th</sup> October 2017.

6. When the matter came up in court on 17<sup>th</sup> October 2017, both the Appellant and counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written 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 demeanour”.**

8. It appeared to this court that the issues that had been placed before this court for determination were:-

**a. Whether or not the Charge Sheet as drawn was defective;**

**b. Whether or not the Appellant was denied fair trial for not having been assigned legal counsel to represent him;**

**c. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

9. The court therefore dealt with the aforesaid issues under the headings shown hereinbelow.

### **I. CHARGE SHEET**

10. Amended Ground of Appeal No (1) was dealt with under this head.

11. The Appellant submitted that the evidence that was adduced did not prove the charge thereby rendering the Charge Sheet defective. In its part, the State argued that PW 1 and Number 50755 PC Stephen Shikundi (hereinafter referred to as “PW 3”) confirmed that the Joc radio belonged to PW 1.

12. The responsibility to prove a case lies upon the Prosecution. It does not mean that a charge is rendered defective merely because prosecution witnesses adduce evidence that has no connection to the charge. The Appellant failed to demonstrate in which other way the Charge Sheet was defective or how the same caused him prejudice as was held in the case of **Njuguna vs Republic [2002] LLR NO. 3755 (CAK)** where the court therein held as follows:-

**“...the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him.”**

13. In the circumstances foregoing, Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

### **II. FAIR TRIAL**

14. Amended Grounds of Appeal Nos (2) and (3) were dealt with together as they were related.

15. The Appellant argued that his right to fair trial was infringed because he was not informed of the charges that faced him. On the other hand, the State submitted that the Charge Sheet bore all the facts relating to the offence that he faced. In this regard, it placed reliance on the provisions of Section 134 of the Criminal Procedure Code that provides as follows:-

**“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 such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

16. This court looked at the Charge Sheet of the main charge and noted that the same showed the date and place of the alleged offence, type of building that was broken into, the owner of the dwelling that was broken into, the purpose of entering the said dwelling place, the goods that were stolen, the owner of the stolen goods and the value of the stolen goods. In respect of the alternative Charge, the date and place where the Appellant was found with specified goods that belonged to the Appellant were shown in the said Charge Sheet.

17. A perusal of the proceedings shows that on 1<sup>st</sup> December 2014, the Appellant was arraigned in court and the Charges were read to him in Kiswahili, a language that he understood. He denied the charges and a plea of not guilty was entered. He could not have denied the charges if he same had not been read to him. This court was not persuaded to find that the Appellant’s right to fair trial in this regard was infringed upon.

18. In further arguing that he was not accorded fair trial, the Appellant pointed that his constitutional right to fair trial as enshrined in Article 50(2)(h) of the Constitution of Kenya 2010 was infringed upon as he was not assigned legal representation.

19. On its part, the State argued that the right to legal representation enshrined in Article 50(2)(h) of the Constitution of Kenya was not an absolute right and that the practise was to assign counsel to persons who had been charged with treason or murder.

20. It relied on the case of **David Njoroge Macharia vs Republic Cr Appeal No 497 of 2007** (eKLR reference not cited). In the said case of **David Njoroge Macharia vs Republic [2011] eKLR** the Court of Appeal held that:-

**“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). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**

**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.**

21. This limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it 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.”

22. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it was took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed as he had contended and his Written Submissions.

23. In the circumstances foregoing, Amended Grounds of Appeal Nos (2) and (3) were not merited and the same are hereby dismissed.

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

24. Amended Grounds of Appeal Nos (4) and (5) were dealt with under this head as they were also related.

25. The Appellant argued that PW 1 and PW 3 contradicted the Charge Sheet regarding the items he was alleged to have stolen. He was emphatic that it was PW 3 who gave the serial number and not PW 1 and that the said Serial Number was not indicated in the Charge Sheet contrary to Section 134 of the Criminal Procedure Code. He submitted that the Learned Trial Magistrate erred when he failed to consider his defence which could have created doubt whereupon benefit would have been given to him.

26. On its part, the State submitted that the actual Radio make Joc and the receipt, which had the Serial Number, to prove PW 1's ownership were produced before the Trial Court as exhibits and consequently, failure to have included the Serial Number in the Charge Sheet was not fatal to its case. It pointed out that in any event, the Appellant never claimed that the said Radio, which was found in his possession was his.

27. According to the evidence that was adduced in the Trial Court, no one saw the Appellant having broken into PW 1's house. However, Jared Oluoch (hereinafter referred to as "PW 2") confirmed having heard loud music playing from the Appellant's house and that PW 1 confirmed that that was his radio that had been stolen from his house.

28. As was rightly pointed out by the Appellant, the said receipt did not bear a serial number. However, he was silent on whether or not the said radio and radio battery belonged to him. Unlike PW 1, he did not present to court a receipt to prove payment. He merely stated that he was taken to Sisal Estate Police Post and they took out a radio from his pocket and Kshs 2,600/= which the police officers and another person he did not know said were stolen items. The Learned Trial Magistrate therefore acted correctly when he invoked the doctrine of recent possession in coming to the conclusion that the Prosecution proved its case beyond the required standard, which in criminal cases, is proof beyond reasonable doubt.

29. Indeed in the case of **Reuben Nyakango Mose & Another vs Republic [2013] eKLR**, the Court of Appeal addressed its mind to the said doctrine of recent possession and rendered itself as follows:-

**"...We have carefully considered the totality of the evidence as relates to recent possession and are satisfied that the two courts were entitled to reject the defences offered by the appellants. The stolen items were sufficiently described and identified by PW 1, PW 2 and PW 3 and were recovered so soon after the robbery that the trial court was entitled to draw an inference that the appellants stole the items."**

30. This court was, however, hesitant to say with certainty that the sum of Kshs 1,600/= that he was found with was part of the sum of Kshs 2,500/= that PW 1 said he had left under the cover of the mattress. This is because PW 1 did not allude to the fact of his house having been ransacked and if not, if he was the Appellant was in a position to have known where he hid the money.

31. Although this court was not certain that the sum of Kshs 1,600/= belonged to PW 1 as no serial numbers of the monies was presented before the court, this did not negate the fact that the Appellant had been found in possession of PW 1's radio. It was not necessary for the Prosecution to have proved that all the items in the Charge Sheet were found in the Appellant's possession for the reason that one item was sufficient to sustain a conviction against him.

32. In the circumstances foregoing, this court did not find merit in Amended Grounds of Appeal Nos (4) and (5) and the same are hereby dismissed.

#### **IV. SENTENCE**

33. Notably, the Appellant did not list the issue of whether or not the sentence that was meted upon the Appellant was harsh, severe and manifestly excessive in the circumstances of the case warranting interference by this court.

34. The Appellant was found in possession of PW 1's radio that was valued at Kshs 1,500/= and a sum of Kshs 1,600/= which this court could not verify with certainty that it belonged to PW 1. He was sentenced to seven (7) years imprisonment.

35. Section 322(2) of the Penal Code provides as follows:-

**"A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years."**

36. The Learned Trial Magistrate also considered the fact that the Appellant had pleaded guilty to burglary and sentenced to five (5) years imprisonment. This court did not have knowledge of the circumstances of the other cases. Under Section 304 (2) of the Penal Code, if a person is convicted of the offence of burglary, he is liable to imprisonment for ten (10) years.

37. It was the view of this court that sentencing the Appellant herein for seven (7) years merely because he had been sentenced to five (5) years for another offence was a gross miscarriage and travesty of justice considering the value of the goods that he had been found in possession of.

38. As the Appellant had already been sentenced, the Learned Trial Magistrate could not have considered a non-custodial offence for having committed the offence herein. However, he could have considered a lesser sentence. In a similar case, to wit **Beshick Mombo Mwake vs Republic [2016] eKLR**, this very court reduced a sentence of three (3) years the Learned Trial Magistrate herein had handed to the appellant therein for having stolen three (3) pieces of timber valued at Kshs 1,500/= to three (3) months.

39. As this court observed in that case, it hoped that the Learned Trial Magistrate will consider the Judiciary Sentencing Policy in his future decisions to avoid a miscarriage of justice. This court reiterates the same observation in this case.

### **DISPOSITION**

40. For the foregoing reasons, the upshot of this court's decision was the Appellant's Petition of Appeal that was lodged on 14<sup>th</sup> November 2015 was partly successful. Accordingly, this court hereby upholds the conviction as it was lawful and fitting but sets aside the sentence that was meted upon him by the Trial Court as the same was harsh, severe and manifestly excessive and replaces the same with a sentence of three (3) months imprisonment.

41. However, as the Appellant has already served his imprisonment sentence for slightly more than two (2) years, this court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

42. It is so ordered.

**DATED and DELIVERED at VOI this 19<sup>th</sup> day of December 2017.**

**J. KAMAU**

**JUDGE**

In the presence of:-

Raphael Musungu - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk