



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NUMBER 69 OF 2012

JOSEPH NDUNGU KAGIRIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against ruling of the District Magistrate, Nyeri, in Criminal Case Number 254 of 2011, Republic vs. Simon Murage Mutahi & Another delivered on 18th April 2011).

JUDGEMENT

The principles to be kept in mind by a first appellate court while dealing with appeals are:-[\[1\]](#)

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

In addition to the above principles, I may add that the duty of a first appellate court was authoritatively summarized by the Supreme Court of India in the case of *K. Anbazhagan v. State of Karnataka and Others*,[\[2\]](#) as follows:-

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The

reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

I find it absolutely necessary to highlight the following background regarding this case. On 21st March 2011, the appellant herein **Joseph Ndungu Kagiri & another** were arraigned before the Chief Magistrates Court, Nyeri in criminal case no. 254 of 2011 charged with the offence of stealing contrary to Section 275 of the Penal Code.[3] The appellants co-accused in the said case faced an alternative count of handling stolen property contrary to Section 322 (2) of the Penal Code.[4] Both accused persons pleaded not guilty to the said charges and a hearing date was fixed for **28th March 2011, only six days away from the date the accused person were first arraigned in court.** Indeed, on the sixth day from the first court appearance, the prosecution was ready to proceed and even though the prosecutor is recorded at page 4 of the record of appeal informing the court that he had **two** witnesses, a total of **four** prosecution witnesses testified and the prosecution closed its case the same day and the court promptly ruled that the prosecution had established a *prima facie* case against both accused persons and put the accused persons on their defence on **"both"** counts. Ironically, only the first accused faced the alternative count, but curiously, the court placed both accused persons on their defence on **"both"** counts. The effect of this is that the appellant herein was put on defence **(a)** on a count he was not charged with and **(b)** the court put him in a totally illegal position of being called upon to defend himself against a charge he was never called upon to enter a plea. This illegality, is in my view so grave and unacceptable that it vitiates the entire proceedings.

The trial court proceeded to comply with the provisions of Section 211 of the Criminal Procedure Code[5] and both accused persons elected to give unsworn evidence and a date for defence hearing was fixed for **4th April 2011, seven days** after the prosecution closed its case, and **fourteen days after the first court appearance.** I must point out that if all went as planned, the entire trial was to be completed within a record of 14 days. It's important to point out that both accused persons were hither unrepresented.

It is also important to highlight key developments in the lower court. The record shows that on 4th March 2011 when the case came up for defence hearing, **Mr Wanyiri Kihoro**, counsel for the appellant herein appeared in court for the accused persons and sought an adjournment and asked to be provided with copies of the proceedings. The court granted the adjournment to 6th April 2011. On the said date, **Mr. Kihoro** applied to be supplied with witnesses statements made by the prosecution witnesses and applied for the four prosecution witnesses to be recalled for purposes of cross-examination. The court ordered that he be supplied with the prosecution witness statements but declined to allow the said witnesses to be recalled, a ruling that prompted this appeal.

Subsequently, the trial magistrate disqualified himself from the case and the file was placed before another magistrate and the record shows clearly that the provisions of Section 200 (3) of the Criminal Procedure Code[6] were never complied with. I will revert to this issue later. Nevertheless, the case is said to have proceeded and both accused persons were acquitted, a position confirmed by counsel for the DPP even though the judgement is not part of the record before me, possibly because the appeal relates to the ruling mentioned above.

Several issues fall for determination in this case. *First*, whether the speedy manner in which the trial was conducted in the lower court caused any *prejudice* to the accused persons. On this issue, considering the time frames mentioned above, an innocent observer can be easily be pardoned for praising the learned Magistrate and the prosecutio for the zealous manner and the remarkable speed with which the proceedings were hurriedly conducted. Within a record of **seven days** as stated above, the prosecution had closed its case, a rare achievement in this country by any standard. The defense hearing was fixed **within seven days** from the date the prosecution closed its case, another rare happening in practice and reality. This, to an innocent observer appears to be a perfect and religious observance of the provisions of article 50 (2) (e) of the Constitution of Kenya 2010 which guarantees an accused person the right to have

his trial begin and be concluded without unreasonable delay. However, this remarkable speed raises serious fundamental constitutional issues among them whether or not the appellants right to a fair trial was infringed and whether or not the provisions of the Criminal Procedure Code were violated.[7]

I now pose the following question. Was the appellant and his co-accused tried too *speedily*, in a way that equally undermined any sound conception of criminal justice? This, and many more questions are bound to arise. In other words, did the speedy manner in which the trial was conducted cause what **Brooks Holland** authoritatively describes as "*The Two-Sided Speedy Trial Problem.*"[8]

The two sided problem caused by speedy trials was ably discussed by **Shon Hopwood**[9] who while invoking the maxim "*justice delayed is justice denied*" considered the fuller picture of criminal justice. He postulates what he calls the flip side of the said maxim and argues that it poses an equal danger. This danger was ably brought out by *Martin Luther King, Jr.'s Letter from Birmingham Jail* where he wrote:- "*justice too long delayed is justice denied.*"[10] *Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice.*"

In my considered opinion, the speedy trial provided for in our constitution is not "*a rushed and unconsidered justice.*" No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system **that is not too fast, and not too slow, but just right.**[11] To me that is the proper meaning of the phrase "*to have the trial begin and conclude without unreasonable delay.*" The drafters of the constitution never anticipated a trial that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "*justice delayed is justice denied...*" ***is a rushed, unconsidered, un-procedural and unconstitutional trial that undermines sound criminal justice system.*** The effect is that such a trial is a sham and has absolutely no place in our constitutionalism.

In criminal trials, the quest for a shorter process isn't necessarily better. Issues or evidence which matters can be missed. Procedures designed to safeguard rights can be truncated and can lead to unfair trials, subsequent appeals and more costs and waste of valuable time as we have experienced in this matter. The effect is that such hurried trials are "*Not so efficient after all.*" Accused persons may be prevented from properly exercising their rights to put their case, a position entrenched in our criminal justice system, long upheld by common law and enshrined in article 50 of our constitution.

In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society.

The Supreme Court of India in *Rattiram v. State of M.P.*[12], a three-Judge Bench ruled thus:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."

And again:-

"Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused....."

I wholly associate myself with the above passage and find that the trial, the subject of this appeal was not "conducted in a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism." In other words, considering the flip side of the maxim *justice delayed is justice denied* the appellants right to a fair trial were seriously eroded to the extent that the trial was totally unfair as discussed below. My answer to the issue whether the speedy manner in which the trial was conducted in the lower court caused any prejudice to the accused persons is in the affirmative.

The next issue for determination is whether failure by the prosecution to provide the accused persons with witness statements amounted to a violation of their constitutional rights to a fair trial. It is not disputed that the accused persons were not provided with witness statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue. Counsel for DPP Mr. Njue submitted that no prejudice was occasioned to the accused persons because the record shows that they ably cross-examined all the prosecution witnesses.

The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is

guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).^[13] The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.

The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In *Thomas Patrick Gilbert Cholmondeley Vs. Republic*,^[14] (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with **Sub-Article 2(c)** which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it

was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of *Natasha Singh v. CBI*^[15] where it was held as follows:-

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person’s right to fair trial be jeopardized.” (Emphasis added)

In *R v Ward*^[16] the Court of Appeal in England was unanimous that:-

“The prosecution’s duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. [Emphasis Mine]

As pointed out earlier, although the **Cholmondeley** case was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

The case of *R v Ward*^[17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right **“to be informed in advance”** cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, **“to have adequate facilities to prepare a defense.”**

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in *R v Stinchcombe*^[18] where the Supreme Court of Canada observed, *“The obligation to disclose was a continuing one and was to be updated when additional information was received.”*

I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a **fair trial** and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel **Mr. Njue** for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution

witness's statements amounted to a violation of their constitutional rights to a fair trial.

The next issue for determination is whether the learned Magistrate erred by refusing the application to recall the prosecution witnesses for purposes of cross-examination. The relevant provision I believe is Section **150** of the Criminal Procedure Code^[19] which provides as follows :-

S.150 A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

Although, as worded, Section **150** seems to suggest that only the court has the right to recall, I am of the view that a court has inherent power to do justice to all, and if justice is going to be done by recalling a witness, I think the court will be within the law, if it allows the application for recall whether it is made by the prosecution or the defense.^[20] However, good reason(s) must be provided, and in this case counsel indicated that he wished to cross-examine the said witnesses. It will be recalled that the accused persons were unrepresented at the time the in question witnesses testified.

The power of the court to order the recalling of witnesses is not in dispute. The position is ably captured by the High Court of India in the case of *State of Jharkhand Vs Sanjay Mondal & Others*^[21] where it was stated that:-

"In the light of the aforesaid provisions, the trial court has power to summon any person to give evidence, if his/her evidence is essential for just decision of the case andthis Court has also power to take further evidence or to direct it to be taken, if the evidence is necessary to secure the ends of justice."

The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.

In my view Section **150** of the Criminal Procedure Code^[22] is intended to sub serve the ends of

justice by arriving at the truth.^[23] The provision though a discretionary one is hedged with the condition about the requirement to record reasons.^[24] The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the “majesty of the law.” Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge/Magistrate must always uphold the majesty of the law and ensure a fair trial always and must elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community. In this case, it was improper for the court to refuse the application to recall the witnesses, thereby occasioned grave injustice to the accused persons by locking out evidence that could have been brought out by the intended

cross-examination. This refusal was in my view to the detriment of the accused persons who hitherto had no legal representation.

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused.[25] Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of

the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.[26]

I find that there were good grounds for recalling the four witnesses. As mentioned above, the accused persons were unrepresented, the trial was hurriedly conducted, the accused persons were never given ample time to prepare their defence and also they were not supplied with the witnesses statements. There were serious breaches of the constitutional provisions which guarantee a fair trial as outlined earlier in this judgement. I therefore find there was no reasonable basis at all for the trial court to refuse the application to recall the said witnesses. In summary therefore, I am of the opinion that the appellant and his co-accused were not accorded a fair hearing at all. My answer to issue under consideration is in the affirmative.

The fourth issue raised in this appeal is whether the proceedings in the lower court are flawed because the trial Magistrate never complied with the mandatory provisions of Section 200 of the Criminal Procedure Code.[27] The record shows that the trial magistrate who heard the four witnesses disqualified himself from the case and subsequently the matter was handled by another magistrate.

On this issue, I find striking resemblance and useful guidance in the decision of **Justice Dulu** in the case of *Anthony Musee Matinge vs Republic*[28] where the learned judge stated as follows:-

“.....The legal requirement which has to be complied with while taking over proceedings from a previous magistrate by a succeeding magistrate is contained in Section 200 of the Criminal Procedure Code.[29] The relevant part of which provides:-

200 (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right. (Emphasis added).

The learned judge proceeded to say as follows:-

“The above provisions of law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re-summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality.”

Discussing the importance of complying with the provisions of Section 200 of the Criminal Procedure Code,[30] the Court of Appeal in *Ndegwa vs Republic*[31] *inter alia* stated as follows:-

i. No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is

the most sacrosanct individual in the system of our legal administration. (Emphasis added)

ii. *The statutory and time honored formula to the Magistrate making judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained.*

iii. *A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanor of witnesses.*

In *Moses Mwangi Karanja vs Republic* [32] the succeeding Magistrate recorded as follows:-

“Section 200 complied with.

Counsel- hearing can proceed from where we left”

The High Court observed that the trial magistrate fell short of the statutory requirement envisaged by the above section while in *Richard Charo Mbole vs Republic* [33] the Court of Appeal held that failure to comply with Section 200 of the Criminal Procedure Code [34] would in appropriate cases render the trial a nullity.

Emphasizing the same point, the Court of Appeal in the case of *Moses Mwangi Karanja* [35] cited above had this to say:-

*“The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was required of him with the provisions of Section 200 (3) of the Criminal Procedure Code [36] which as per Section 201 (2) was to apply mutatis mutandis in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mention in the judgment that section 200 was complied with is hollow without any evidence on record”- See also *Paul Kithinji vs Republic*. [37] (Emphasis added)*

In the present case the appellant and his co-accused was not informed of his rights under Section 200 cited above including the right to recall witnesses; this is a serious point of law which cuts deep into the rights of an accused person and the administration of justice and the need for courts to adhere to the rules of procedure governing criminal trials. I reiterate that this is a crucial point of law and in my view it prejudiced the rights of the accused persons as guaranteed under the law and it indeed it infringed on their rights to a fair trial. The upshot is that the proceedings were fatally defective, hence cannot be allowed to stand.

The next issue is the question of the appellants right to legal representation. Article 50 (2) (h) provides that every accused person has a 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.

The appellant and his co accused represented themselves for a considerable part of the proceedings and their advocate only came on record after the prosecution had closed its case. In criminal cases, where the state represents the victim, the accused person may at times be unrepresented. The parties, in such a setting are therefore uneven in the face of the legal system from which it is expected that justice will be achieved.

Article 50 (2) (h) provides that an accused person has a right to have an advocate assigned to him or her at State expense if substantial injustice would otherwise result. This provision places an obligation to the government, and the question that arises is what this portends for the courts.

In criminal trials, it makes a lot of difference if an accused person is represented or not. This is because of the complexities in the adversarial system that an accused person devoid of the requisite legal skills may find difficult to comprehend. In *Gideon vs Wainwright*[38] a U.S court made this point very clear when it held that the noble ideal of a fair trial before impartial tribunals in which every defendant stands equal before the law, cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer.

Lord Denning in the celebrated case of *Pett vs Greyhound Racing Association*[39] decried the state of unrepresented parties in court when he stated that:-

"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

So fundamental is the right to legal representation that the absence of which may result in injustice on the part of the accused person. This issue first came up for interpretation before the Court of Appeal in the case of *Macharia vs R.*[40] The court after reviewing the past and current law stated that 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."

It appears that 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.

In my view, the basic tests from the wording of article 50 is that the right is dependent on "*substantial injustice*" test. That in cases where *substantial injustice* would not occur, then there would be no basis for an accused person to insist on being granted legal representation at the state expense.

Not every accused person is entitled to legal representation at states expense. Each case is considered on the basis of its own merit. The nature of the offence that an accused person has been charged with is instrumental in deciding whether an accused person qualifies or not. In *Dominic Kimaru Tanui vs R*[41] and *W.M.M. vs Republic*,[42] the high court argued that legal representation is to be provided where the offence carries a death penalty.

A reading to the provisions of the constitution on the right to legal representation reveal that an accused persons entitlement to legal representation at the expense of the state is not automatic but qualified. In other words an accused person must prove that unless he or she is assigned an advocate by the State, *substantial injustice* would occur. The Constitution does not give the meaning of "*substantial injustice*". Similarly, it fails to enumerate circumstances under which an accused person is entitled to a state funded counsel. In order to define what *substantial injustice* is the courts have suggested some factors whose presence in a given circumstance may make one conclude that substantive injustice would occur should the trial proceed with the accused being unrepresented.

In *Dominic Kamau Macharia vs R*[43] the court explained that *substantive injustice* would occur in cases 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*. Substantial injustice may be said to be subject to three tests, **first**, the complexity of the case. This is discernible from the issues of fact and law which may not be comprehended by the accused. The second test relates to the seriousness or nature of the offence in question. A serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence. The third and final test relates to the ability of the accused person to conduct his own defence. Language difficulties experienced during the trial may be a perfect indicator of a accused persons' inability to conduct a defence.

Perhaps at this point, it's important to examine the provisions of the Legal Aid Act, 2016[44] which came into force on 10th May 2016. It is important to recall that the authorities cited herein were all decided before the enactment of the above act, but to me they still represent the correct interpretation of the relevant constitutional provisions. The case which gave rise to this appeal was determined before the said act was enacted. The said act was enacted to *inter alia* give effect to the provisions of the constitution, namely articles **19 (2), 48, 50 (2) (g) and (h)** and to facilitate access to justice and social justice and to provide for legal aid. Section **35** of the said act lays down the general principles of legal aid while section **36 (1)** provides for persons eligible for legal aid. Since the legislation does not operate retrospectively, it is not necessary for me to discuss whether or not the appellant qualified for legal aid under the said act.

Considering the above authorities and the facts of this case and the judicial interpretation of substantial injustice, I am not persuaded that the appellant herein has satisfied any of the tests stated above to demonstrate that *substantial injustice* was occasioned to him due to fact that he and his co-accused were unrepresented.

However, in my opinion, in order to fully comply with the provisions of article **50 (2) (h)** of the constitution, trial courts, as a matter of constitutional duty and in the interests of justice, ought to make a preliminary inquiry at the earliest opportunity possible and make a determination on the question whether or not an accused person would require legal representation at the state expense before embarking on the hearing. The trial court is under a constitutional duty to satisfy itself that substantial injustice will not be occasioned if the accused is not represented and to make a finding in that regard. Where the trial court finds that substantial injustice would be occasioned if a state funded counsel is not provided, it should also make a finding to that effect and make the appropriate orders.

For the reasons I have enumerated in this judgement and having considered the facts of this case, the authorities referred to in this judgement and the law, I find that appellant and his co-accused were not afforded a fair trial and that the entire proceedings were a sham and a gross violation constitutional provisions safe guarding a fair trial and the proceedings also violated the provisions of the Criminal Procedure Code. In fact I hold the view that trial was conducted in a manner that was prejudicial to the accused persons and caused injustice and grave prejudice to the appellant and his co-accused. Such proceedings cannot be allowed to stand.

As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, Republic vs. Simon Murage Mutahi & Another are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case.

Signed, Delivered and Dated at Nyeri this 26th day of July 2016.

John M. Mativo

[1] See *Ganpat v. State of Haryana* {2010} 12 SCC 59

[2] Criminal Appeal No. 637 of 2015

[3] Cap 63, Laws of Kenya

[4] *Ibid*

[5] Cap 75, Laws of Kenya

[6] *Supra*

[7] *Ibid*

[8] April 14, 2015 90 Wash. L. Rev. Online 31 available at <https://www.law.uw.edu/wlr/online-edition/the-two-sided-speedy-trial-problem/>

[9] "The Not So Speedy Act" 89 Wash. L. Rev. 709 (2014) at page 710

[10] Letter from Martin Luther King, Jr., 5–6, *original document available at* The Martin Luther King, Jr. Research and Educ. Inst., Stan. Univ., http://mlk-pp01.stanford.edu:5801/transcription/document_images/undecided/630416-019.pdf (emphasis added).

[11] See Wikipedia, *The Goldilocks Principle*, http://en.wikipedia.org/wiki/Goldilocks_principle (last visited Jan. 25, 2015).

[12] {2012} 4 SCC 516

[13] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[14] {2008} eKLR

[15] {2013} 5 SCC 741

[16] {1993} 2 ALL ER 557

[17] *Ibid*

[18] {1992} LRC (Cri) 68

[19] Cap 75, Laws of Kenya

[20] See *Boniface Githinji Ndereva vs R.* HCCR App No. 224 of 2011-Nyeri

[21] Cr. Appeal (DB) No. 201 of 2013:

[22] *Supra*

[23] See Supreme Court of India in the case of *Zahira Habibulla H. Sheikh & anr. v. State of Gujarat &*

ors., as reported in (2004)4 SCC 158 , especially at paragraph nos. 21, 35, 38, 44, 47, 48, 49, 51, 53, 58 and at relevant paragraph no.71 as under:

[24] Ibid

[25] Supra note 20

[26] Supra note 23

[27] Cap 75, Laws of Kenya

[28] {2012}eKLR

[29] Supra

[30] Supra

[31] {1985}Eklr 534

[32] High Court Criminal Case No. 151 of 2010

[33] Criminal Appeal No. 135 of 2004

[34] Supra

[35] Supra

[36] Supra

[37] Criminal Appeal No., 310 of 2008

[38] 372 US 335 {1963}

[39]

[40]HCCRA 12 o 2012, {2014}eKLR

[41] HCCRA 12 o 2012, {2014}eKLR

[42] CR App No. 72 of 2012, {2014}eKLR

[43] Supra

[44] Act No. 6 of 2016