



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO.41 OF 2016**

**BETWEEN**

**AGNES AUMA OLONY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence in original Ndhiwa SRM's Court Criminal Case No.378 of 2015 – Hon. Mary A. Ochieng Esq., dated 29<sup>th</sup> July, 2016)*

**JUDGMENT**

1. **AGNES AUMA OLONY** (the Appellant) was convicted on a charge of robbery with violence contrary to **Section 296 (2)** and sentenced to death. It was prosecution's case that on 19<sup>th</sup> September, 2015 at **KARADING** sub location in **NDHIWA** District of **HOMA BAY** County, jointly with others not before court, they robbed **SETH OKOTH OLALA** of cash Kshs.40,000/=, a pair of long trousers, T-shirt, safari boots and cell phone make Nokia all valued at Kshs.44,750/= and immediately after the time of such robbery chopped off his left thumb, and assaulted him.

2. The appellant denied the charge, and prosecution relied on the evidence of 6 witnesses to prove its case.

3. **SETH OKOTH OLALA** (PW1) operated a juggery business at Marea, and on 19<sup>th</sup> September 2015 at about 11.30 a.m., he was going to pick juggery at **PAULO OLONY'S** house with a boda boda rider named **NIMROD OKIRI OLALA**. However at **NDIRA KOKOTH** village the motor cycle could not pass.

4. PW1 saw **PAULO** and **MAMA AGNES OLONY** – both of whom were well known to him. There were two other men. **PAULO** had a panga which he used to cut PW1. The appellant and the other two men had rungus they used to assault him.

5. PW1 raised an alarm and he recalls **SAMUEL ADEDE** being among those who responded. The boda rider was present. The assailants took away his phone make Nokia 1616, a T-shirt, safari boots, Kshs.40,000/= which was in his pockets, and removed his trousers.

He explained that he had known appellant for over ten years saying “**she is the mother of SILAS OLONY. Silas is also known as PAUL.**”

Pw1'S injuries were classified as harm upon examination by PW4.

**6. NIMROD OKIRI OLALA (PW2)** was the boda boda rider who ferried PW1 to **NDIRA KOKOTH** village and confirmed that when they got to an area where a motor cycle cannot pass, PW1 alighted and was walking ahead of him. Suddenly the **appellant emerged from a bush – he recognised her and SILAS PAUL**, and stated that the appellant had a rungu. He saw the four people attacking PW1 and he raised an alarm. As people responded to this, the assailants fled. He saw PW1 being relieved of his pair of safari boots and blue trouser as these were removed from his body. He identified the trouser in court. He explained:-

**“I have known Agnes from my childhood; we have been staying in harmony with her.”**

**7. SAMUEL ADEDE (PW3)** was in his shamba at **NDIRA KAKOTH** village on 19<sup>th</sup> September 2015 at 11.30 a.m. when he heard someone crying for help. He ran towards the direction where the noise was coming from and saw four people who started running away – he recognised the appellant whom he had known for 5 months. He saw them assaulting PW1 who was lying on the ground. He had known PW1 for 3-5 months. He saw the appellant carrying away a blue trouser which he identified in court.

**8. CHIEF JARED WERE (PW5) of CENTRAL KABUOCH** received a call from **NIMROD (PW2)** about the incident that the appellant was among the people who had attacked PW1. He knew that PW1 was engaged in the juggery business.

9. Ten days later (on 29/09/2015) the appellant and her husband **JOSEPH OLONY** reported the very incident to him, saying that while her husband was away, PW1 tried to rape her in her homestead. He later realized that PW1 had been seriously injured, so he arrested appellant and another.

10. The appellant had been jointly charged with **SILAS OLONY** who is at large after escaping from custody.

11. In her defence, the appellant elected to remain silent and did not call any witnesses.

12. The trial magistrate in her judgment pointed out that appellant was well known to PW1, PW2 and PW3 who all confirmed seeing her take part in the attack. The prosecution also produced records to confirm that PW1 owned a Nokia 1616 phone a transaction script confirm the complainant had withdrawn Kshs.40,000/=. She thus made a finding that PW1 lost money and other items worth Kshs.44,750/= on the material date.

13. The trial magistrate also took into consideration the witnesses’ description of the attack on PW1 plus the medical evidence to hold that the complainant sustained injuries on the material date when he lost the money and other property.

14. The trial magistrate also observed that the attack took place in broad daylight - all the witnesses confirmed it was at 11.30 a.m. PW1 had known the appellant for a long time as he used to purchase juggery from the appellant and her son.

15. The trial magistrate also pointed out that PW1’s evidence that he was attacked while he was on his way to the **OLONY** homestead to buy juggery and this could not be explained as a deserved attack since there was no evidence of a pre-existing grudge between the appellant and the complainant.

16. The trial magistrate pointed out that the report made by appellant and her husband about the incident on allegations that PW1 had tried to rape the appellant, infact placed the appellant at the scene.

17. It was also observed that the evidence by prosecution was never challenged in any manner and it remained solid and uncontroverted.

The trial magistrate held that identification was free from error and the evidence proved a charge of robbery.

18. At the hearing of the appeal the appellant was represented by **MR. ODINGO**, while **MR. OLUOCH** appeared for the State.

19. The trial magistrate's findings were changed on grounds that the evidence presented at the trial was scanty and without understanding the case ab initio.

Further that the appellant was not accorded legal services as guaranteed by the constitution.

**20. MR. ODINGO** submitted that under **Article 159** of the **Constitution of Kenya** as well as **Article 50 (2)** the appellant had a right to get legal services, and she had the right to choose to be represented by an advocate of her own choice or be assigned one at the expense of the State. That without legal representation she did not realise the cost of opting to remain silent.

He also argued that the appellant was silent because she wanted her co-accused to be present before she could cross examine the witnesses.

21. It is also argued that the appellant was not allowed to communicate with any advocate or anyone who could assist her in her case and this violated her constitutional right.

Counsel urged this court to order for a retrial, saying even the medical evidence was not strictly dealt with under **Section 77 Evidence Act**.

22. In opposing the appeal Mr. Oluoch on behalf of the DPP submitted that the appellant did not challenge the evidence despite being given opportunity to do so. He conceded that whereas provision of legal services is advocated in the Constitution of Kenya – every latitude was in fact extended to the appellant as shown on 6<sup>th</sup> October, 2015 when plea was taken she was represented.

23. In any event she confirmed at the trial that she was ready to proceed and what is contemplated by **Article 50(2)** of the **Constitution** was met.

24. Mr. Oluoch also argues that since the appellant was released on bond she had an entire 6 months when she could have used the period engage the services of an advocate. Counsel describes the appellant's lament about violation of her constitutional rights as an afterthought and maintains that her refusal to participate in the trial on account of the absence of her co-accused (being her son) could not have stopped the proceedings.

**25. MR. OLUOCH** revisited the evidence which he described as corroborated and unchallenged. The appellant had elected to exercise her right to remain silent.

26. As for the medical evidence, Mr. Oluoch submitted that the ingredients of robbery with violence contrary to **Section 296 (2)** were satisfied and he urged this court to be guided by the decision in **JOHANA NDUNGU –VS- REPUBLIC – CRIMINAL APPEAL NO.116 OF 1995**.

27. In reply **MR. ODINGO** explained that the appellant did not challenge evidence of prosecution witnesses nor did she offer any mitigation because she was not informed about the consequences of remaining silent, so a retrial will not prejudice the prosecution case.

28. Apart from the manner in which the medical evidence was treated, the appellant did not in this appeal challenge the credibility of the evidence as presented to the trial court. **Section 77** of the **Evidence Act** provides various aspects of production of report by an expert witness into three broad categories namely:-

**“77 (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**

**(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**

**(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”**

29. Mr. Odingo did not explain exactly what the appellant was dissatisfied with, but if for argument sake it was that the ingredients of robbery are set out under **Section 296 (1)** in alternative terms as follows:-

**(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**

**(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death.”**

30. As regards the appellant’s refusal to participate in cross examination of witnesses in the absence of her co-accused, I do not think she finds refuge in any legal provisions. I have not come across any legislative provision requiring that where persons are jointly charged and one of the co-accused fails to attend court the trial shall be stayed until the missing person appears. If such a situation was to be entertained then cases where more than one person is charged would virtually come to a standstill and there would be endless collusion to stall cases. That argument, I am afraid has no legal leg to stand on.

31. From the record, at the close of prosecution case, trial magistrate explained to the appellant her trial rights under **section 211** of the **Criminal Procedure Code**, and it was upto her to elect how to proceed to conduct her defence.

32. She maintained her belligerent attitude and elected to say nothing – that was the pattern throughout the trial. I am certain the Criminal Procedure Code does not demand of a trial court to prevaricate and plead with an accused, urging:

**“Please say something, you know your vow of silence is near fatal to the outcome of your case. Tell me your story.”**

33. The trial magistrate is an umpire who can only spell out the rules of the game but not tell the player how and where to kick the ball. It is not the duty of the trial magistrate to cajole a reluctant accused person who has elected that their defence is best communicated through a loud silence. This limb of the appeal also fails.

34. This then leads us to the issue regarding legal representation as provided under the **Constitution 50** of the Constitution that:-

**“Every accused person has a right to a fair trial which includes the right –**

.....

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.....

**(g) to choose and be represented by an advocate and be informed of that right promptly.**

**(h) to have an advocate assigned to the accused person by the state at the state’s expense, if**

**substantial injustice would otherwise result and be informed of this right promptly.**  
(Emphasis mine)

35. In the case of **Karisa Chengo and 2 Others v Republic [2015] e KLR**, the Court of Appeal sitting at Malindi pointed out that the right to legal representation is universally acknowledged as a fundamental right embodied in **Article 14(3)(d)** of the International Covenant on Civil and Political Rights (“ICCPR”) which obligates State parties to assign legal assistance in any case where the interests of justice so require and without payment if the accused person does not have the means to pay for it. Similarly **Article 7(1)(c)** of the African Charter on Human and Peoples Rights (“ACHPR”) provides that:

***“Every individual shall have the right to have his case heard. This comprises...the right to defence, including the right to be defended by counsel of his choice...”***

36. The court emphasized the importance of legal representation as recognized by the African Commission in **Advocats Sans Frontiers (on behalf of Bwampanye) v Burundi, African Commission on Human Rights, Comm. No. 213/99 (2000)** when it observed that *legal assistance formed a fundamental element of the right to fair trial especially in cases where the gravity of the allegations brought against the accused and the nature of the penalty would demand that in the interest of justice the accused should have the benefit of the assistance of a lawyer at each stage of the case and place the accused and the State on equal footing.*

37. I can do no better than reproduce the observations made by the Court of Appeal in **David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007** that:

*“The counsel’s role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel’s participation was succinctly articulated by Lord Denning in his decision in **Pett-vs Greyhound Racing Association (1968) 2 ALL E.R 545, at 549.** He had this to say:*

*it is not every man who has the ability to defend himself on his own. He cannot bring out the points 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 been trained for the task.”*

38. It is clear that the Constitution has expressly provided that the right to a fair trial includes the right of an accused person *to have an advocate assigned to them person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.* This provision is therefore in accordance with the State’s obligation under **Articles 14(3)(d)** of ICPR and **Article 7(1)(c)** of the ACHPR, and its implementation will bring the State in compliance with its international and regional obligations.

39. Was there substantial injustice occasioned to the appellant? The appellant’s refusal to actively participate in the trial was not triggered by some fear or confusion at the prospects of the trial. Her co accused who was her son had escaped from lawful custody and she was using his absence to derail the trial. Had she been made aware that her belligerence would cost her not just her freedom, but her life, she would probably have participated appropriately in the trial. I am persuaded that she suffered prejudice and had assumed that the absence of her son would defeat the trial. I will therefore quash the conviction and set the sentence aside. I direct that there be a retrial before a magistrate other than the one who heard the matter. She shall appear before Ndhiwa SRM court for retrial directions on 21<sup>st</sup> December 2016

**Delivered and dated this 15th day of December, 2016 at Homa Bay**

**H.A. OMONDI**

**JUDGE**