REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 113 OF 2014

BETWEEN

NEWTON INGOTSI ....APPELLANT

AND

REPUBLIC .... RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 114 OF 2014

BETWEEN

CLEOPHAS MUKAVANE......…………………………………… APPELLANT

AND

REPUBLIC ……………………………………...………… RESPONDENT

(Being appeals from original conviction and sentence of C. Kendagor – Ag. SRM. in Criminal Case No. 2330 of 2011 delivered on 04/09/2014 at Kakamega.)

JUDGMENT

Introduction:

1. **NEWTON INGOTSI, J A** and **CLEOPHAS MUKAVANE** were jointly charged before the Chief Magistrate's Court at Kakamega with the offences of robbery with violence and attempted robbery.

The charges were tailored as follows:-

CHARGE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS:- (1) NEWTON INGOTSI (2) J A (3) CLEOPHAS MUKAVANE:- ***On the 8th day of November, 2011 in South Kakamega District within Western province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed WANEKEKA HASSAN of one mobile phone make Nokia, cash Ksh. 300/=, NHIF card, NSSF card, college card, and receipts***

all valued at Ksh. 5,200/= and immediately before the time of such robbery used actual violence to the said WANEKEKA HASSAN.

<u>COUNT TWO</u>:-

CHARGE: ATTEMPTED ROBBERY CONTRARY TO SECTION 297(2) OF THE PENAL CODE.

PARTICULARS:- (1<u>) NEWTON INGOTSI (2) J A (3) CLEOPHAS MUKAVANE</u>:- ***On the 8th day of November, 2011 in South Kakamega District within Western province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus, and a stone attempted to commit a robbery to one DENNIS MAMANDI, and during the time of such attempted robbery threatened to use actual violence to the said DENIS MAMANDI.***

2. They all denied the said charges and the trial took place thereafter.

<u>The background of the appeals:</u>

3. The present appeals arose from the trial which eventually found the Appellants herein guilty as charged on both counts and accordingly convicted them. The Appellants were sentenced to suffer death whereas J A, a co-accussed who was then a minor during the commission of the offence, was sentenced to 3 years' probation.

<u>The Prosecution Case.</u>

4. The prosecution availed 9 witnesses in support of the charges. **WANAKEYA HASSAN WETOTO** testified as PW1. His wife **LUSIMU MIDEVA ZIPPORAH** testified as PW3. They informed the Court how a gang of three thugs broke into their room in the night of 08/11/2011 at Shivagala Area and stole several items. In the course of attack the thugs injured PW3 who was later on treated and discharged. Though it was dark as there was electricity blackout, PW3 explained how she managed to identify all the thugs which included the Appellants herein and one other. She further identified the thugs at Isulu Police Station the following day as the Accused persons were arrested later that same night. PW1 who had been ordered to lie facing down also testified that he had an opportunity and did identify the assailants. PW1 was the complainant in respect to count I.

5. **DENNIS MAMANDI** was PW2, a son to the owner of the house which PW1 and PW3 had rented one of its rooms. He occupied one of the rooms adjacent to that of PW1 and PW3. He testified on how the thugs attempted to forcefully enter into his room by breaking the door with a big stone but escaped when people raised alarm. He pursued them but later on returned only to find PW1 and PW3 having been robbed. He identified one of the attackers as the first Appellant herein.

6. The Area Assistant Chief testified as **PW4**. He was one **PATRICK MAMADI SALWA**. On being called by the owner of the house in which the attack had been carried out, PW4 rushed thereat and thereafter managed to arrest 4 suspects which he took to the police. They included the two Appellants herein and two others. Three of them were charged in Court. **ANGELINA MAMADI** testified as **PW5** and was the owner of the house in which PW1 and PW3 had rented a room and her son PW2 also lived. She also occupied one of the rooms and is the one who raised alarm thereby making the thugs escape. She called PW4 who quickly came to her rescue.

7. **SILAS SHITAKA ATIRA**, **PW6**, was one of the neighbours who answered the call for help from PW5's house and rushed thereto. He also volunteered and accompanied the Assistant Chief and witnessed four persons, including the Appellants herein being arrested. He stated that when they went to the suspects' homes, it was the Assistant Chief who entered in their houses and arrested them and who also brought out their clothes. **PW7** was **CHRISPINUS ALUSIOLA**

MAMADI, a student aged 19 years who was woken up by the screams from the main house. He quickly rushed there and confirmed the doors to PW1's room as well as that to PW2's rooms broken. He thereafter returned to his room and continued with his sleep.

8. The Clinical Officer who filled in the P3 Form for PW3 was one **ALICE LIHANDA** who testified as **PW8**. She produced the P3 Form in Court. She confirmed that indeed PW3 had been injured. She also produced the Treatment Book which she relied on during her physical examination to fill in the P3 form.

The Investigating officer testified as **PW9** and confirmed that PW4 brought four suspects to Isulu Police Patrol Base on 09/11/2011 at about 07.30 a.m. He was also accompanied by PW1 and PW2. He also availed several pieces of clothes which he had recovered from the suspects. On re-arresting the suspects, he booked them into the cells. He visited the scene and referred PW3 to hospital. He charged three of the suspects which included the Appellants herein on being identified by the complainants and released the fourth one as he was not identified as one of the robbers.

9. On being placed on their defences, the Appellants herein sustained their denial on the charges. The Appellants raised issues of grudges with PW4. The other Accused person, J A reiterated how he had been arrested. Upon the close of their respective cases, the Court delivered the judgment aforesaid.

<u>The Appeals:-</u>

10. NEWTON INGOTSI preferred Appeal No. 113 of 2014 whereas CLEOPHAS MUKAVANE preferred Appeal No. 114 of 2014. These appeals were consolidated with Appeal No. 113 of 2014 being the lead appeal. NEWTON INGOTSI then became the first Appellant and CLEOPHAS MUKAVANE was the second Appellant. J A, who was also found guilty as charged but sentenced to probation on account of being a minor during the time of commission of the offences did not prefer any appeal.

11. When the Appellants herein instructed M/s. K.S. OMBAYE & CO. ADVOCATES to appear for them in these appeals, the said Advocates, with the leave of this Court, filed Supplementary Grounds of Appeal to the initial grounds.

12. The appeals were orally heard before this Court where Mr. Ombaye Counsel appeared for the Appellants whereas Miss Omondi, Learned State Counsel appeared for the State. Miss Omondi opposed the appeals and prayed that they be accordingly dismissed.

<u>Analysis and Determination</u>:

13. As this is the appellate Court of first instance, its role is well settled. It was held in the case of **<u>Okemo vs. Republic (1977) EALR 32</u>** and further in the Court of Appeal case of **<u>Mark Oiruri Mose vs. Republic (2013)eKLR</u>** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
14. From the Petitions of Appeal, the Supplementary Grounds of Appeal and the submissions tendered, we have managed to distil the following issues for determination in this appeal. They are:

a. ***Whether the Appellants herein were properly and positively identified as the assailants;***
b. ***Whether the Appellants' rights under Article 50 (2) (b) of the Constitution were infringed;***

c. ***Whether the charges were defective;***

We shall hereunder deal with each issue separately.

a. **Whether the Appellants were properly and positively identified as the assailants**:

15.From the record before the trial Court, the robbery took place at night. It was on 08/11/2011 at around 11.00 p.m. Though the complainants' house was connected to electricity, on the said day and time there was a blackout hence it was dark. PW1, PW2 and PW3 testified that they relied on the light from the torches used by the assailants to identify them. Further, PW2 testified that he recognised the voice of the first Appellant herein whom he knew quite well. Whereas PW2 knew all the attackers as persons who lived within his neighbourhood, PW1 and PW3 had only recently moved into PW5's house as tenants. They confirmed to have been new in the area at the time of the attack. PW1 on being cross-examined by the second Appellant herein stated at **page 11 line 1** of the proceedings confirmed that:-

> ***"I do not know the distance since am new to your area.***
>
> ***It was night. There was someone who saw your description and said he had been with you earlier that evening at 7 p.m."***

On the same issue, PW3 in examination-in-chief stated:-

> ***"I used to see the accussed person in the area but I did not know them by name ...."***

16.Of equal importance is the issue of the time taken by the thugs in the attack. According to PW3, the thugs spent sometime at her place and she estimated it to be around 30 minutes. PW1 and PW2 did not indicate any possible time the ordeal took place.

17.But, how were PW1, PW2 and PW3 placed during the ordeal?

PW1 stated that three thugs entered his room and ordered him to lie facing down. He obliged. The thugs had torches which lit their small room quite well. He had his hands tied at the back. The thugs took time to ransack the house and took away his items. During that time the thugs interrogated his wife PW3 and even beat her using the blunt side of the pangas and the rungu. It was his evidence that while facing down, his head could see the sitting room and he managed to see all the attackers so well with the aid of the light from their torches. Further he stated that he managed to see the first Appellant well when he came so near his face and tied his hands at the back. He also stated on **page 8 lines 30-31** of the proceedings that:-

> ***"first accused was the one who was making the demands for the phone. He had covered his head such that only his face was visible ...."*** (emphasis added).

18. As the operation went on, PW1 lay on his bed with his face facing down. The bed had a mosquito net and was separated from the sitting room using a curtain. PW1 stated that:-

> ***".... he shone his torch inside the mosquito net.***
>
> ***He took my wallet, mobile phone ..... and still face down he tied me while I had the opportunity to see***
>
> ***very well. He, the first accused tied my hands at the back ...."***

PW1, in that state, however said he managed to see how each of the attackers were dressed including identifying the colour of their clothes and the shoes they wore. PW2 however described PW1 as "**in shock**" when he met him after the thugs had left.

19.**PW3** who was in the same room with PW1 confirmed that they were asleep when the thugs struck at around 11.00 p.m. Unlike PW1, she instead saw two people enter their room with torches who

demanded money and phones. According to her, one of the said people had three items with him being a panga, rungu and a torch while the other one had a panga and a rungu. The record however is unclear as to how that person carried the three items at one time. Further PW3 stated that since there was a blackout on that day, she was using the light from her phone torch prior to the attack, but did not indicate whether that torch was on when the robbers struck neither did she shed any light on the intensity of the light from that torch. She however stated that:-

> ***"I suddenly saw light in the house."***

20. PW3 went on to state that she was able to see the attackers from the light from the torches the attackers had and described one of them as tall and brown whereas the other one as dark and short. Regarding the manner in which they were dressed, she stated that:-

> ***" ... they both were dressed in a manner I could see their faces ...."***

The witness however did not clarify on what exactly she meant by that statement. Could it be that they had covered their heads but their faces were visible, were they hooded, did they have caps on etc. It therefore remains not clear how the two attackers were dressed given that PW1 had earlier on stated that the firstAppellant had covered his head but his face was visible. PW3 went on to further say that:-

> ***"I identified the tall one as he shone a torch towards the top of the net. I used to meet him before but because I am new in the area .... The shorter man did not talk, he just followed orders. He put the torch on the chair as he tied my husband. That enabled me to see him."***

21. Again, the foregone calls for interrogation. It remains unclear how PW3 managed to identify the tall person when he shone a torch towards the top of the net. Was it through reflection? Could it be that the torch instead shone on the attacker's face? In respect to the torch which the attacker allegedly placed on a chair as he was tying PW1, the positions of the chair as well as the attacker and which part of the attacker's body was shone remained very crucial. Was it on the face? If so, could the attacker have been able to tie PW1?

22. In respect to the second Appellant herein, PW3 stated that:-

> "***I then realized there was a third accused at the door using the torch light in the house. My house is small; it is separated by a curtain ...... had black clothes and black gumboots ...."***

When the thugs had left, PW3 thereafter stated as follows:-

> ***"I heard Denis scream once. They spent a while at Denis' house. Later I heard him chase them towards the gate. I took the opportunity to scream. Neighbours came and I told the crowd the description of the people. The Assistant Chief was in the crowd. <u>Someone in the crowd said he could identify the first accused having seen him a few hours earlier</u>."*** (emphasis added).

23. The foregone scenarios are what PW1 and PW3 found themselves in during that night. We wish to further take note of two issues. **First**, as PW1 and PW3 were new in the area, it is not clear for how long they had been there and how often PW3 used to see the assailants and if there was something in particular which could have easily made PW3 recognize the attackers as the people she used to see around. **Second**, PW3 stated that the house had a curtain. It may have separated the area where the bed was from the area which was described as the 'sitting room.' The room was described as a small one. With the mosquito net covering the bed, the darkness in the room and a curtain in place, it can be safely noted that visibility must have been difficult in such circumstances.

24. There was also PW2, Denis Mamadi. He confirmed that he recognized one of the attackers as the first Appellant herein. When he was woken up by the attack in PW1's room he carefully listened to the voices and recognised that of the first appellant which he was familiar with. According to him, he was in command of the group and was the one who issued instructions. After a struggle with the thugs who wanted to forcefully gain entry into his room, the gang escaped and he pursued them for a while before returning to his room. He stated that during the struggle, he managed to light his torch outwards and he saw the first appellant's face. He also stated that the first appellant hit him with a stone which he had in his hand. He however did not remember the type of clothes the first appellant was wearing.

25. But when PW2 was being cross-examined by the first appellant he stated as follows:-

> "***Accused 1:- Why have you said we were 'police'.***
>
> ***Witness:- When you entered I heard voices which just sounded like police officers. When I saw you is when I knew you were not police officers."***

It therefore can not be true that PW2 recognised the first appellant by his voice when he was still in the PW1's room and as he alleged during his examination-in-chief.

26. The struggle was no doubt intense as PW2 remained determined not to yield to the thugs having access to his room. The door to his room was eventually broken using a large stone which even obstructed PW2's movement.

He in particular stated that:-

> ***"It requires strength to carry it. I had a torch. I pushed the stone inwards inorder to close. I could not come out due to the stone's hinderance. As I tried to close the door is when I got the opportunity to light my torch outwards. I saw newton's face ...."***

27. PW2 also stated that the stone was such a heavy one that required real strength to move it. It was this stone he was struggling with at the door so as to close that door noting that the assailants were right outside there. He must have put in all his efforts in doing so. At what point in time then did PW2 get the opportunity to light his torch? Did he first leave the closing of the door and deal with his torch? Further, PW2 was inside his room and the stone obstructed the closure of the door, how then did he get the access to direct his torch outwards? Was that not obstructed by the door? How did he eventually come out of the room? And, were the assailants just standing outside just looking at how PW2 was trying to reach them? We are also reminded by the evidence of PW1 that the first appelalnt's face was covered whereas PW3 could not clearly describe how their heads were. As we ponder that we remain alive to the fact that the intensity of the light from PW2's torch was not described neither was the distance between PW2 and the attackers when PW2 shone his torch towards them. We thus note that the circumstances did not provide an environment for ease of identification on the part of PW2 given that he could not recognise any of the assailants by their voices.

28. Of equal importance in the matter is how the Appellants were arrested. It is the Assistant Chief (PW4) who arrested a total of 4 suspects the very night he was called by PW5, the owner of the house. It is not in doubt that PW4 was related to PW5. From the record, it is clear that when PW4 arrived at the scene he found several people having already gathered and was informed of what had happened. According to PW1, there was someone in the gathering who gave the first Appellant's description and alleged that he had been with him earlier on. This was confirmed by PW3. It however remains unknown to this Court who that person was and it seems he did not record any statement with the police. That evidence would have greately assisted the case had PW4 taken up the same with PW9, the Investigating officer.

29. PW4 on his mission to arrest the attackers was then accompanied by PW1, PW6 among others.

The group proceeded to the homes of those who had been mentioned as attackers and according to PW6, PW4 entered their houses and personally arrested them as they were waiting outside. It is not clear how the fourth suspect was arrested, but was later on released by the police for lack of evidence connecting him with the offences at hand. PW4 also recovered clothes and shoes and again it is not clear who identified the same. Could it be PW1? Was he then in such a position to positively identify them?

30. We find that apart from producing the various clothes and shoes as exhibits, the said items are common in the market and can be owned by anyone at anytime. The prosecution fell short of proving that the said items were the ones which the witnesses saw the assailants dressed in moreso given that none of the items was recovered while being worn by any of the suspects.

31. We also wish to point out that there was barely any adequate investigations which were conducted in the case. Apart from PW9 receiving the suspects from PW4 and booking them into the police cells and later charging them in Court, there were no steps taken to investigate the complaints with a view of linking the suspects with the commission of the offence. Even with PW1, PW2 and PW3 giving descriptions of the attackers, PW9 did not see the need to conduct any identification parades or attempt to lift any finger prints at the scene. PW9 even disowned the stone which had been identified by PW2 as what had been used by the attackers to gain entry during the attack.

32. Having analysed the factual circumstances, it is imperative that we now venture into the law on identification especially at night. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that 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 conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

In **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... 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."***

33. The above does not mean that there cannot be safe identification or recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***

> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*

> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

34. From the analysis of the evidence in this case and on the guidance of the various judicial decisions, we are unable to confirm that the identification of the Appellants herein was safe and free from error. We respectfully disagree with the learned Magistrate's finding that the Appellants herein were properly and safely identified as the perpetrators of the alleged offences.

b. **Whether the appellants' rights under Article 50 (2) (h) of the Constitution were infringed**.

35. **Article 50 (2) (h)** of the Constittuion states as follows:-

> ***"50 (2) Every accused person has the right to a fair trial which includes the right –***
>
> > ***(h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***

36. The Appellants argued that they were entitled to legal representation at state's expense in the trial Court pursuant to the said Article 50 of the Constitution given that their trials commenced when the current Constitution was in place. To their surprise, the State failed to provide such legal representation and neither were they informed of their right therefore violating the Appellant's right to a fair trial. On that breach, they submitted that they were entitled to an acquittal. Responding, Miss Omondi submitted that there was no such violation as the Appellants never raised the issue before the trial Court and that in the event they opined that their right was violated then the right procedure was to instead file a Constitutional Petition and not to raise the matter on appeal.

37. It is a fact that the Appellants were unrepresented during their trial. They however were represented by Mr. Ombaye Counsel during the hearing of this appeal. We did not hear Mr. Ombaye inform us that he was handling the appeal as a pauper brief. He must therefore have been adequately instructed. Further the Appellants are not on record as having informed the trial Court that they could not afford the services of a legal representative and as such needed the Court's intervention.

38. The importance of a Counsel's participation in a criminal trial was reiterated by the Court of Appeal in **David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007** where it delivered itself thus:-

> ***"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."*

39. According to the Constitution, the right to legal representation to an Accused person by the State and at the State's expense crystalises when substantial injustice would otherwise result. The Court of Appeal in the case of **David Macharia Njoroge vs. Republic (2011) eKLR** analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows:-

> ***"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigend 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. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

40. More recently, the Court of Appeal differently constituted in the case of **Karisa Chengo & 2 others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014** at Malindi had a detailed discussion on this right and in finding that the Appellants' right was not infringed for want of proof that the Appellants could not afford legal representation, the Court had this to say:-

> ***"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 occassioned 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 arises 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 <u>Moses Gitonga Kimani vs. Republic, Meru Criminal Appeal No. 69 of 2013</u>, 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."*

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.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under Article 261 of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under Article 19 of the Constitution.

As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in <u>Julius Kamau Mbugua v Republic Criminal Appeal No. 50</u>

<u>of 2008</u> has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail."

41. From the above analysis, we do find that since the Appellants have demostrated their ability to, and indeed engaged a Counsel in this appeal, it is sufficiently demostrated that they had the ability to so afford legal representation but opted not to. They further actively participated in their trials and subjected witnesses to intense examination. We hence find that no injustice was occassioned to them by the State's failure to accord them legal representation. This ground therefore fails.

c. **<u>Whether the charges were defective.</u>**

42. The Appellants argued that Count II was defective since the evidence did not support the charge at all. They further argued that the particulars of the charge did not show what was attempted to be robbed and to them it may have been something incapable of being robbed. The State in response thereto argued that the charge was rightly framed and invoked the provisions of Section 382 of the Criminal Procedure Code in the event this Court finds that the charge was truly defective as there was no miscarriage of justice to the Appellants.

43. **Section 134** of the Criminal Procedure Code provides for the ingredients of charges as follows:-

> ***"134, 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."***

The Eastern Africa Court of Appeal while commenting on a defective charge in the case of **<u>Yosefu and Another vs. Uganda (1960) EA 236</u>** held as follows:-

> ***"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."***

And, in the case **<u>Sigilai vs. Republic (2004) 2 KLR 480</u>**, it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law.

The offence should be disclosed and stated in a clear and unambigous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

44. The Charge complained of was tailored as follows:-

<u>COUNT II</u>:-

CHARGE:- ATTEMPTED ROBBERY, CONTRARY TO SECTION 297 (2) OF THE PENAL CODE.

PARTICULARS:- (1<u>) NEWTON INGOTSI (2) J A (3) CLEOPHAS MUKAVANE</u>:- On the 8th day of November, 2011 in South Kakamega District within Western province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus, and a stone attempted to commit a robbery to one DENNIS MAMANDI, and

during the time of such attempted robbery threatened to use actual violence to the said ***DENIS MAMANDI***.

45. From the charge above, it is clear the offence was disclosed and the particulars detailed how the Appellants allegedly attempted to commit a robbery upon the complainant one DENNIS MAMANDI. The time of the alleged offence as well as the place and what the assailants alleged did was clearly stated in the charge sheet. In the evidence before the trial Court, the prosecution adduced evidence which supported that charge; which evidence we have already dealt with.
46. As to the Appellants' contention that the charge did not indicate what the complainant was to be robbed of, we do state that, that argument respectfully can not be said to be sound. That is because it is clear that the assailants were in the process of gaining access to the complainant's house when they were resisted by the complainant and escaped when an alarm was raised. It would be indeed a very tall order to expect the prosecution to state what was to be stolen in the house had the assailants gained access into it. The charge was an attempted robbery.

47. In finding that the charge was not defective, we note that the Appellants clearly knew the charge they faced was one of attempted robbery. This is an offence known in law. The particulars were also clearly spelt out including the date and place of the attempted robbery, the act constituting the offence and the name of the complainant. The Appellants likewise took an active part in the trial and examined the said DENNIS MAMANDI accordingly. We hence find no merit in that the ground of appeal and do hereby dismiss the same.

CONCLUSION:

48. As we have found that the Appellants' identification was not proper and free from error, we do hereby allow the appeals, quash the conviction against the Appellants herein and accordingly set aside the sentences. The Appellants are forthwith set at liberty unless otherwise lawfully held. For avoidance of doubt, this judgment does not affect the convition and sentence imposed on one J A who did not prefer any appeal against the conviction and sentence. It is so ordered.

DELIVERED, DATED and SIGNED in open court at Kakamega this 24th day of July, 2015

R. N. SITATI **A. C. MRIMA**

JUDGE **JUDGE**

In the presence of

Mr. Ombwaye)................................. For 1st Appellant.

)................................ For 2nd Appeallant.

Mr. Omwenga .... For Respondent.

Mr. Langat .... Court Assistant.