



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL MISC. APPLICATION NO. 17 OF 2011

ANN WAIRIMU KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 6th June 2011 in which Ann Wairimu Kimani, the applicant herein, beseeched this court to issue an order appointing an advocate to appear in her defence before the Senior Resident Magistrate’s Court, Nyeri, in **Nyeri S.R.M.C.Cr. Case No. 1171 of 2010**. The Motion is taken out under *Article 50(2) (g) (h)* of the Constitution. When the Motion came up for interpartes hearing, Mr. Makura, learned Senior State counsel appearing for the Republic/Respondent did not make any submissions in relation to the Motion.

I have considered the facts deponed in the affidavit of the Applicant which was filed in support of the Motion. The Applicant has deponed that she is currently facing a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code before the Senior Resident Magistrate’s Court, Nyeri. It is her submission that the case facing her is a serious one hence she needs counsel representation. She urged this court to assign her an advocate at the expense of the State under *Article 50 (2) (g)* of the Constitution. I think it is appropriate at this stage to critically examine the provisions of *Article 50* of the Constitution. The aforesaid Article provides as follows:

“50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial which includes the right:

(a)

(b)

(c) to have adequate time and facilities to prepare a defence,

(d)

(e)

(f)

(g) to choose, and be represented by, an advocate, and to be informed of this right

promptly,

(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.”

It quite obvious from the provisions of the Constitution that an accused person’s 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.’ In the case of **David Njoroge Macharia =Vs= Republic, Criminal Appeal No. 497 of 2007** (unreported), the Court of Appeal stated *inter alia* at page 18 as follows:

“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.”

The Applicant before this court is facing a charge of robbery with violence which attracts a death penalty under *Section 296 (2)* of the Penal code. The Applicant has averred that she is a lay person hence she cannot be expected to properly articulate her defence without the services of a trained lawyer. I am convinced by the powerful submissions of the Applicant that she is entitled to be assigned an advocate at the expense of the State. I hereby direct the Deputy Registrar of this Court to assign the Applicant an advocate to represent her during the hearing of the case.

Dated and delivered at Nyeri this 30th day of June 2011.

J. K. SERGON
JUDGE

In open court in the absence of the Applicant.