**Mwebia v Republic (Criminal Appeal E111 of 2022)**
**[2025] KEHC 1901 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1901 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**CRIMINAL APPEAL E111 OF 2022**

**LW GITARI, J**

**FEBRUARY 7, 2025**

**BETWEEN**

**KENNETH MWEBIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The appeal arises from the proceedings and Judgment in Nkubu Senior Resident Magistrate's Court Criminal Case No.E158/2021 where the appellant was charged with Robbery with Violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the charge were that on 2/4/2021 at around 2pm at Kieni Kia Ndege Market within Imenti South Sb-County within Meru County jointly robbed Douglas Mwenda Ksh.200/- and immediately after the time of such robbery used actual violence by using a knife and first to harm he said Douglas Mwenda. The appellant denied the charge and after a full trial he was convicted and sentenced to serve twenty years imprisonment. The appellant was he 2nd accused in the matter. He was dissatisfied with both the conviction, sentence and filed this appeal which as initially based on nine grounds which he later reduced to exist in his submissions. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

2. The respondent opposed the appeal and prayed that it be dismissed. The appellant relies on the following grounds:-

    1. That the learned trial magistrate erred in both matters of law and facts by failing to note that the appellant was not presented according to Article 50 (2) (g) (h) of the *Constitution*.

    2. That the learned trial magistrate erred in both matters of law and facts by failed to note that there was n enough light to identify the appellant herein at the scene of crime.

    3. That the trial court erred in both matters of law and facts by failing to note that there was grudge between the appellant and PW1.

4. That the trial court erred in both matters of law and facts by failing to note that the appellant was not found with any stolen property of the complainant.

5. That the learned trial magistrate erred in both matters of law and facts by failing to note that the key witnesses were not called.

6. That the learned trial magistrate erred in matters of law and facts by failing to take into consideration the alibi defence adduced by the appellant.

**The prosecution's Case:**

3. The prosecutions called our (4) witnesses. The complainant, Douglas Mwenda was called as PW1. He stated that on the material day any time, he headed home when he was accosted by two people. Accused 1 being one of them. That they led him to a solitary place where they assaulted him on the mother causing him to lose a tooth. It was his further evidence that he raised a distress call and one James came to his rescue. He stated that he was treated at a clinic at Igoji and reported the incident at the police station. He was thereafter further treated at Kanyakine Sub-County Hospital. The complainant stated that there were security lights as the spot where the accused attacked him and led him to a solidarity lace and that he was able to see and recognize the accused.

4. James Majau was PW2. He stated that on the material day and time he was headed home when he stumbled upon the accused assaulting the complainant. That he took over and watched. That when they were done, they passed through a place where there was lights and he was able to see and recognize them. He then went to check on the complainant whose tooth he said had been knocked out. That he then escorted the complainant whose tooth he said had been knocked out. That he then escorted the complainant home.

   The investigating officer, Godfrey Ondieki of Igoji Police station was PW3. He stated that the complainant identified the accused for him and effect an arrest. That he then conducted investigations and charged the accused before court.

5. Seberina Kaimathiri, a clinical officer at Kanyakine Sub-County Hospital was called as the last prosecution witness- PW4. She testified that the complainant was examined at the facility and his P3 form filled up. That he presented with a history of assault by persons known to him. That he was injured on the mouth and one tooth had been knocked out; he was swollen on the upper side of the eye, face was swollen. The clinician assessed he degree of injury as "grievous harm."

**Defence Case:**

6. Upon being put on their defence, the first accused (A1) tendered a sworn statement. He did not call any other witness. He denied the charges and stated that the complainant did not link him to the offence; that upon his arrest the police officer demanded for Ksh.4,000/- to secure his release which he was unable to raise and that he had worked for the officer who refused to pay him, imputing bad blood between him and the officer.

   The second accused (A2) on his part tendered an unsworn testimony. He too, did not call any other witness. He also denied the offence and stated hat at the material time he was at home. That he was not involved.

**Analysis and Determination**

7. I have considered the record of the learned trial magistrate, the grounds of Appeal and the submissions. I will first consider the first ground of appeal because if the ground is successful it may determine the appeal. The issue that arises for determination is-

   Whether the earned trial magistrate in law and facts by failing to comply with Article 50(2) (g) (h) of the *Constitution*.

8. The appellant was arraigned in Court n 26/4/2021 when the charge was read out to him and he pleaded not guilty. The trial magistrate then directed that the appellant be supplied with copies of witnesses' statement and the charge sheet at his own expense. The trial then commenced on 12/7/2021 with the appellant acting in person. The proceedings continued and terminated without the appellant having legal representation. Article 50 (2) (g) and (h) of the *Constitution* provides as follows:-

   > " Every accused person has the right to fair trial which includes the right-
   >
   > (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 state expense if substantial injustice would otherwise result and be informed of this this right promptly."

   As provided under this provisions the trial court is required to inform an accused person of this right promptly so that he make up his mind as to whether or not to procedure the services of an advocate or to apply for legal aid from the State. This is a right to fair trial which cannot be limited by dint of Article 25(c) of the *Constitution*. The article provides as follows:

   Despite any other provision in this constitution the following rights and fundamental freedoms shall not be limited-

   (c) the right to fair trial."

   In the Supreme Court of Kenya Petitioner No5/2015 *Republic v Karisa Chengo & 2 Others* 2017 eKLR while dealing with the issue of right to fair trial under Article 50 of the *Constitution* was stated: the right to legal representation under the said article is a fundamental ingredient of right to a fair trial and is to be enjoyed pursuant to the Constitutional edict without more"

9. The Article 50(2) (g) & h of the *Constitution* requires that the accused person be informed of this right. Presumably, it is the trial magistrate and Judge who is supposed to inform the accused person of the right at his first appearance in court. This is the reason why the drafters of the Constitution were careful to state that the accused person should be informed of this right promptly. This implies that the accused person should be informed of the right on is first appearance in the trial court where he appears as an accused person. The reason behind this is that a person may be unable to articulate his case due to certain factors. Lord Denning while affirming the essence of the right to legal representation stated in *Pett v Greyhound Racing Association*.

   > " It is not every man who has the ability to defend himself on his own. He cannot bring out points in his own favor or 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....."

It follows that the record of the court must demonstrate that the article was complied with by informing the accused of his right to legal representation. The response by the accused person must be noted so that if the accused cannot afford to engage an advocate, one may be appointed at the expense of the state.

10. From the record the court did not inform the Appellant of his right to legal counsel as required. Failure to comply with the said sub article renders the proceedings a nullity. On the other hand the right under Article 50 92) (h) of the *Constitution* an accused person would be entitled to legal representation assigned to him by the state at state expense if it is demonstrated that substantial injustice would result.

11. The court of appeal in the case of *David Njoroge Macharia v Republic* (2011) while considering what constitutes substantial injustice, stated as follows:-

> " Article 50 of the *Constitution* sets out the right to fair hearing, which includes the right of an accused to have an advocate if it is in the interest of ensuring justice.....
>
> Such case may be those involving complex issues of fact of 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', person accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses."

The supreme in the case of *Karisa Chengo* (*Supra*) also expounded on what substantial injustice would entail and stated-

> " In the above context, it is obvious to us that in criminal proceedings legal representation in important. However a distinction must always be drawn between the rights to representation at state expense specifically. Inevitably there will be instances in which legal representation at the expense of the state will not be accorded in criminal proceedings.
>
> Consequently in view of the principles already expounded above, it is clear that with regard to criminal matters in determining whether injustice will be suffered a court ought to consider in additional to the relevant provision of Legal Aid Act and stated various other factors which include: -
>
> i. The seriousness of the offence.
>
> ii. The severity of the sentence.
>
> iii. The ability of the accused person to pay for his own legal representation.
>
> iv. Whether the accused is a minor.
>
> v. The literacy of the accused.
>
> vi. The complexity of the charge.

12. In this case the Appellant faced a capital offence as Section 296 (2) of the *Penal Code* which provides for a mandatory death sentence. The Appellant did not have to demonstrate that he would suffer injustice. In view of the seriousness of the offence, the trial magistrate had the duty to promptly inform the Appellant of his right to legal counsel and the state expense for that matter.

The rights of the Appellant were grossly violated as he was not supplied with statement and was not informed of the right to legal representation at state expense. In the light of the violations, the proceedings before the trial magistrate were a nullity.

The next question is whether the court should order a retrial.

13. In Ahmed Sumar v Republic (1964) EA 483, the court laid down the principles to be considered when ordering a retrial where the original trial was found to be defective. The court stated that if the interest of justice so requires and if no preference is caused to the accused a retrial may be ordered. It further stated that the decision depends on the particular facts and circumstances of each case.

In the case of *Ahmed Sumar v Republic* (1964) EA 483;

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of the insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered."

See also the court of appeal in *Samuel Wairimu Ngugi v Republic* (2012) eKLR.

14. In the case the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the potential evidence, a conviction will result. The trial before the learned trial magistrate was a nullity.

15. The Appellant was convicted based on the evidence that he was identified by an eye witness who also identified him from an identification parade. The prosecution had a strong against the Appellant. It is well settled that justice marks two ways. Indeed the Article 159 of the *constitution* states that justice must be done to all irrespective of status. No injustice would be occasioned to the Appellant if a retrial is ordered.

16. In *Wilson Otieno v Republic* Cr. Appeal No. 55 of 1987, Court of Appeal, (unreported) stated that an order for retrial may only be made where the original trial was in the first place alleged or defective.

17. I have considered the fact that the appellant was charged with a serious offence. I also note that during the robbery, the complainant was wounded and suffered grievous bodily harm. In this case the trial was a nullity due to the violations of the rights of the appellant.

In *Pius Ohma & Another v Republic* (1993) KLR the Court of Appeal stated where the trial was illegal or defective a trial may be ordered. Taken all these decisions into consideration and I am well guided. It is in the interests of justice that a retrial be held since a defective trial is no trial. I therefore order as follows:-

1. The appeal succeeds on the first ground
2. I order that the conviction is quashed and the sentence is set aside.
3. There shall be retrial before another Magistrate at Nkubu Law Courts.
4. The appellants be remanded at Igoji Police Station and be produced in court as soon as possible, and not later than 10/2/2025.
5. The trial be heard and be concluded within ninety days.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY 2025.**

**L.W. GITARI**

**JUDGE**