



**Mutwiri v Republic (Criminal Appeal E027 of 2024)  
[2025] KEHC 10331 (KLR) (Crim) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10331 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL APPEAL E027 OF 2024  
SC CHIRCHIR, J  
JULY 17, 2025**

**BETWEEN**

**FRANKLINE MUTWIRI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein was charged, tried and convicted of the offence of Robbery with Violence before the trial Court and Sentenced to Suffer Death. The particulars of the charge were that on 25.06.2024 at Kambi Otha area in Isiolo Sub-County within Isiolo County ,together with others not in court robbed and stole one mobile phone make TECHO POP 7 valued at Kshs. 14,000/= property of Halima Jirmo.
2. He was aggrieved by the outcome and has filed this appeal challenging both the conviction and sentence.

**Petition of appeal**

3. In his amended petition of appeal, he has presented the following grounds for consideration:
  - a. That the trial magistrate erred both in law and fact by failing to note that the charge sheet is defective since the particulars of the charge were invariance with the evidence before the court.
  - b. That the learned trial magistrate erred both matters of law and fact by convicting and sentencing the appellant to suffer death without noting that the light used to identify the appellant was not proved.



- c. That the learned magistrate erred law and fact by failing to inform the appellant his right or representation as enshrined under article 50[2] [g] [h] of the constitution, thus the appellant was not accorded a fair trial.
  - d. That the learned magistrate erred in both matters of law and fact by failing to note order that appellant to be taken to psychiatric to check if he is fit to stand trial.
  - e. That the learned magistrate erred in both matters of law and facts by failing to note that the sentence of death is harsh and excessive in the circumstances of this case.
4. The appeal was argued through the written submissions.

#### **Appellant's submissions**

5. It is the appellant's submissions that the charge sheet was defective as the particulars thereof were at variance with the evidence adduced; that there was a miscarriage of justice in that case the established at trial were different from that indicated in the charge sheet. It is further submitted that the incident occurred at 7:30 p.m and there was no evidence showing that there was sufficient illumination for purposes of identification.
6. The appellant further submits that he was not informed of his right to legal representation, notwithstanding the fact that he faced an offence which attracted a death sentence in the event of conviction.
7. On the sentence he argues that the sentence of death meted out was harsh, excessive and unconstitutional as ran afoul Article 27 and 28 of the Constitution.

#### **Respondent's submissions**

8. It is the respondent's submissions that the charge sheet complied with section 137 of the Criminal Procedure code; that the contradictions referred by the appellant were minor and did not affect the substance of the charge.
9. On whether the appellant was positively identified, the respondent argued that the complainant identified him while PW2 gave chase and arrested him. He was also arrested on the scene immediately, and this ground of appeal has therefore no merit.
10. The respondent admits that the record does not indicate whether the appellant was informed of his right to legal representation by the state, that the right to legal representation by the state is not absolute; that there was no evidence that that the appellant suffered substantial injustice for want of legal representation ; that he examined witness and there was nothing complex about the case.
11. On the sentence, it is the respondent's submission that there is no reason for this court to interfere as the trial court took into consideration the mitigation, and the sentence is mandatory.

#### **Analysis of the Evidence and determination**

12. The duty of this court, as the first appellate court is to review the evidence, do its own evaluation and arrive at its own findings. [see : Okero v Republic [1972] E. A 32]
13. Upon consideration of the lower court record , the grounds of Appeal and parties' submissions , Am of the view that the following issues arise for determination:
  - a. Whether the charge sheet was defective.



- b. Whether the right to fair trial was violated
  - c. Whether the appellant was positively identified.
  - d. Whether the sentence was excessive.
14. It is the Appellant’s case that there was inconsistency between the evidence of the complainant and the particulars of the charge sheet. While the charge sheet records a theft of a mobile Phone Techno Pop7 valued at Kshs. 14,000 the complainant’s testimony was that a phone and Kshs 3,500/= were stolen.
  15. The test to be applied when determining whether a charge sheet is defective was addressed in the case of *Obedi Kilonzo Kevevo v Republic* [2015] [2015] KECA 127 [KLR] where the court of appeal held: ....“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.”[ Emphasis added]
  16. The Appellant herein was charged with the offence of robbery with violence and was tried and convicted of the charge. Whether in the process he also stole Kshs. 3,500/= is immaterial to the totality of the charge. The end result was case of robbery with violence. What is material in a robbery with violence is the act of robbing and be in the company of one other person or before , during or after uses violence on the victim.
  17. Further in *Peter Ngure Mwangi – v- Republic* [2014] eKLR where the court while citing with approval the decision in *Peter Sabem LeituV R, CR.A No. 482 of 2007 [UR]* stated “The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial?
  18. I am satisfied that the appellant understood that he was facing a robbery with violence charge and was convicted of the same charge. He suffered no prejudice as a result, there was no miscarriage of justice and it never infringed on his right to fair trial this ground of appeal is unmerited.

### **Whether the appellant’s Right to Fair Trial was violated**

19. The right of fair trial pursuant to Article 50 of *the Constitution* includes the right of the accused person “to choose and be represented by an advocate and to be informed of this right promptly.” [ see Article 50 [2] [g]].A perusal of the record shows that the appellant was unrepresented, and is silent on whether the appellant was informed of his right to legal representation.
20. It suffices to point out pursuant to the provisions of Article 25 of *the constitution* , the Right of Fair trial is non- derogable right. In view of the provisions of Article 25 therefore, trial courts must forever remain alive to Article 50 as its infringement may and often lead to nullification of the entire trial process. And the only way a trial court can demonstrate compliance is by putting it on record. In *Joseph Kiema Philip v Republic* [2020] KEHC 5392 [ KLR], the court held : “it is paramount duty that the record of the trial court should demonstrate that the accused was informed of the his right to legal representation and whether or not in that case he cannot afford an advocate one may be appointed at the expense of the state.....”
21. On the consequences of the failure to comply, I associate myself with the views of Justice A C. Mrima in *Chacha Mwita v Republic* [2020] KEHC 5392 [ KLR] Where he states that “where the right were under Article 50[2] [h] is qualified, that is the say Accused is entitled to legal representation at the state’s expense if substantial injustice would otherwise result, article 50 [2] [g] is not qualified and therefore mandatory”. The judge then went on to find that “ derogation of the right under Article 50



[2] [g] renders the trial a nullity “qualifying the provisions of Article 50[2] g of *the constitution* will be tantamount to amending *the constitution* through the back door.”

22. The appellant herein faced a death sentence upon conviction and indeed that was the sentence that was eventually meted out. The trial court being alive to the potential sentence the Appellant was facing, was under the mandatory obligation to inform the appellant of his right to legal representation. It is my finding that failure to inform the Appellant was an infringement to his right to fair trial, rendering the entire trial a nullity.

#### **Whether a Retrial should be ordered**

23. The factors to consider when determining the question of a a retrial are well settled. In the case of *Muiruri v Republic* [2005] KECA 171[KLR] the court stated: “generally whether a retrial should be ordered or not depend on the circumstances of the case. It will only be made where the interest of justice require it and it is unlikely to cause injustice to the appellant other factors include illegalities or defeats in the original trial, length of time having lapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making of the counts.....”
24. In the present case, the mistake was committed by the court; the appellant was arrested on 25/06/24, which was just a year ago; the offence is serious, and it is in the interest of justice that the victim of the crime her day in the court too. The above circumstances favour an order of Retrial
25. In conclusion I hereby proceed to make orders as follows;
- a. The appellant conviction at the trial court is hereby quashed and sentence set aside.
  - b. The appellant shall be retired at the Chief Magistrate’s Court at Isiolo.
  - c. The appellant to be presented to the Chief Magistrate at Isiolo for plea taking not later than 14 days of his judgement.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17<sup>TH</sup> DAY OF JULY 2025.**

**SOPHIE CHIRCHIR**

**JUDGE.**

In the presence of:

Roba Katelo- Court Assistant

Frankline Mutwiri- The Appellant

Mr. Ngetich for the Respondent.

