



REPUBLIC OF KENYA



**Edwin v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 1317 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E015 OF 2023
TA ODERA, J
FEBRUARY 6, 2024**

BETWEEN

DENNIS OMWERI EDWIN APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the conviction and sentence by Hon. P.K. Mutai
(SRM) in Kisii MCCR No. E406 of 2021 on 9th March 2023)*

RULING

1. The Appellant, Dennis Omweri Edwin, filed an undated Petition of Appeal challenging the decision of Hon. P.K. Mutai (SRM) in Kisii MCCR Case No. E406 of 2021 in Republic vs. Dennis Omweri Edwin.
2. The grounds of appeal are as follows: -
 1. That the Trial Learned Magistrate erred in both law and fact in finding that the prosecution had proved its case of robbery of violence beyond any reasonable doubt.
 2. That the Learned Trial magistrate erred in both law and fact by imposing a harsh and excessive sentence in the circumstances.
 3. That the Learned Trial Magistrate equally faulted in both law and fact by concluding that the prosecution had proved its case, there remains a serious doubt as to whether indeed the appellant was the person who had the alleged motor cycle and thus could not be safe to conclude that the appellant was indeed in recent possession of the alleged motorcycle.
 4. That the Learned Trial Magistrate further faulted in both law and fact by not withstanding that there was no evidence of the witnesses (any of the public members who had contacted the



police officers and any of the motor cycle operators) neither was there proof that the appellant was the one riding the motor cycle.

5. That the Learned Trial Magistrate equally faulted in both law and fact by relying on the presented photos of the alleged motor cycle as an exhibit.
6. That the Learned Trial Magistrate faulted in both law and fact by failing to appreciate that the details of the first report were not issued to the appellant.
7. That the Learned Trial Magistrate erred in both law and fact by failing to find that the circumstances at the alleged time of the said attack were not safe to allow proper identification of the attacker (PW1 said that it was his first time to see the accused before the court).
8. That the Learned Trial Magistrate erred in both law and fact to find that the prosecution evidence was riddled with glaring contradictions that were not safe to make a conclusion.
9. That the Learned Trial Magistrate equally faulted in both law and fact by not finding that the material witnesses were not summoned before court to give clarity on who was with the motor cycle and under which circumstances i.e. public members and the Bodaboda operators.
10. That the Learned Trial Magistrate further erred in both law and fact by failing to supply the appellant with proceedings in order to file his submissions upon making a request to court which amounts to gross violation.
11. That the Learned Trial Magistrate faulted in both law and fact to appreciate that there was no identification parade conducted.
12. That the Learned Trial Magistrate faulted in both law and fact by not finding that the investigation that was conducted was shoddy.
13. That the Learned Trial Magistrate equally faulted in both law and fact by not appreciating that the appellant was not identified by the complainant neither the witnesses.

[The grounds have been reproduced as they appear.]

3. The Appellant, without leave of Court as per Section 350[2][iv] of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, filed amended Grounds of Appeal. However, I note from the Court's record, that the same was served upon the Respondent before it filed its Submissions and therefore had sufficient time to respond to the same. Therefore, there cannot be said to have been any substantial prejudice on the Respondent.
4. The amended Grounds of Appeal were:
 1. That the Learned Trial Magistrate erred in both law and facts when maliciously conducted the proceedings in the instant case in cumbersome legal procedure in violation of Article 49(1) (a) of *the Constitution*, the language used by the prosecution witnesses to be sworn in is not indicated in record in violation of Section 89 of the CPC and Article 25(a)(i), 27(1)(2), 19(1) (2)(3) of *the Constitution*. The language used by the trial court to swear in the witnesses was not indicated whether it was English or Kiswahili or the witnesses took their oath under which language hence amounted to gross violation of the appellant's constitutional rights to fair trial.
 2. That the judgment of the court was a nullity as the trial proceeded without the court warning that I, the appellant, had a right to a fair and impartial trial as enshrined in *the Constitution* as per Article 50(2)(n) i.e. the right to be represented by the advocate.



3. That the Learned Trial Magistrate erred in law and fact in convicting the appellant despite the fact that he was detained in police custody for more than 24 hours.
 4. That the Learned Trial Magistrate equally faulted in both law and fact by failing to note that there was no identification parade conducted.
 5. That the Learned Trial Magistrate erred in law and fact in dismissing the appellant's defence.
 6. That the Learned Trial Magistrate failed to a word period served while in custody prior to conviction as per Section 333(2) of the CPC. (sic)
[The grounds have been reproduced as they appear.]
5. The Respondent opposed the Appeal. It filed a Notice of Enhancement dated and filed on 15.11.2023 seeking that the sentence entered against the Appellant be enhanced to death in conformity with Section 296(2) of the Penal Code.

Submissions

Appellant's Submissions

6. The Appellant filed his submissions of 3.11.2023. He submitted that he was detained in police custody for more than 24 hours contrary to Article 49(1)(f)(i) of *the Constitution*
7. His rights to a fair trial were infringed upon because it is not possible to tell which language between English and Kiswahili was used by the witnesses when testifying before the Trial Court; whether the language was explained to the Appellant; and whether it was established that he was proficient in both languages. Whilst he responded to the challenges in Kiswahili, there was no indication that the charges were read out to the Appellant in Kiswahili. He cited the case of AMO v Rep Criminal Appeal No. 44 of 2018 eKLR where the Court held that the trial was conducted casually since the trial magistrate omitted to indicate the language used when the evidence was given. He submitted that even though he cross-examined the witnesses, the same was not indicative of his understanding of what was happening in Court.
8. He submitted that Section 89 of the Criminal Procedure Code clearly states that the language used must be indicated in the court's record. He cited the case of Swahibu Simiyu and Another v Rep. Court of Appeal at Kisumu Criminal Appeal No. 243 of 2005
9. He submitted that in contravention to Section 333(2) of the Criminal Procedure Code, the Trial Court failed to consider the time he had spent in custody.
10. He submitted that the evidence of PW1 revolved on hearsay and should be dismissed by the court.
11. He submitted that PW2 was not able to identify him and only saw him in Court for the first time thereby raising a question as to how PW2 was able to identify him at all. PW3 and PW4 erred by showing the Appellant to the witnesses without first conducting an identification parade.
12. He challenged the inconsistencies as regards the age of PW2's injuries. He also challenged the evidence of PW5 as it did not speak to when PW2 was treated. He also submitted that the medical report was fabricated. He further relied on Section 104 of the Criminal Procedure Code as read with Section 48 of the *Evidence Act*. He relied on the cases of Maina Thiongo v Rep. High Court at Nyeri Criminal Appeal No. 83 of 2015; Samson Matoke Machoka v Rep. Court of Appeal at Kisumu Criminal Appeal No. 291 of 2012; Mutonyi v Rep. Court of Appeal Nairobi Criminal Appeal No. 92 of 1981 [1983] KLR



13. The Trial Court without good reason rejected the Appellant's defence.

Respondent's Submissions

14. The Respondent filed its Submissions on 29.11.2023. It submitted that the Prosecution submitted overwhelming evidence that it was the Appellant who was found with the stolen motorbike and used violence in the process of obtaining it.
15. The Appellant belatedly put up a defence of an alibi which he did not adduce or raise when cross-examining the witnesses. The Appellant also did not dispute being found with the motorbike and actually came close to admitting it when he asked PW2 if he had sold the motorbike.
16. The Appellant failed to give a reasonable defence as to how he came about the motorbike despite the overwhelming evidence that he was found with the motorbike in his house at Kehancha. The doctrine of recent possession was submitted as having been properly invoked and applied.
17. It submitted that an identification parade was not necessary as the Appellant was the one found with the motorbike.
18. It submitted that the offence committed was one punishable by death and as such the sentence meted out was lenient and urged the Court to enhance it to a death sentence.
19. It urged the Court to uphold the conviction.

Determination

20. I have considered the Petition of Appeal and the Notice of Enhancement, the Parties' submissions and considered the Trial Court's record.
21. Being a first appellate court, my duties are set out in *Okeno v Republic* [1972] EA 32, where the Court of Appeal set out the duties as follows: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and its own conclusion. (*Shantilal M. Ruwala vs. R.* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the finding and conclusion; it must make its own finding and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424

22. In *Kiilu & Another v Republic* [2005], the Court of Appeal stated:
 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”



23. The Appellant was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and an alternative count of handling stolen property contrary to Section 322(1)(2) of the Penal Code. He was arraigned in Court on 15.3.2021. He pleaded guilty before Hon. N.S. Lutta, to the main count.
24. Subsequently, on 16.11.2021, before Hon. S.K. Onjoro, he pleaded not guilty to the main and alternative counts.
25. The Prosecution called 5 witnesses.
26. PW1 was Abdi Oremo Ombui. He was the owner of Motorbike Registration Number KMKF 132Z having purchased it from Watu Credit. He gave his brother, Bilali Ogeto Oremo, the motorcycle. On 8.3.2021 at 8.00 p.m., his brother called him and informed him that he was taking someone to Kiogoro. He was hit with a blunt object and the motorcycle stolen. PW1 called the tracker company and reported the matter. The motorcycle was recovered and the accused was arrested in Kehancha. At the time of the robbery, he was in Nairobi. PW1 called him after PW1 regained consciousness.
27. PW2 was Bilali Ogeto Oremo. He testified that on 8.3.2021, at around 7.00 p.m., he was riding Motorcycle Registration No. KMKF 132Z belonging to his brother, PW1, from Galilaya to town. At Mwembe Junction, he got a client, Dennis Omweri, the Appellant herein, who wanted to be taken to Nyakoe. At the time he saw his face. He had KShs. 500/= and PW2 did not have change. He got change at Kiogoro and as he was riding to Nyakoe, he was suddenly hit. He fell down and woke up to find the Motorcycle gone. He reported to the police station and later proceeded to hospital. He was attacked before 9.00 p.m. and reported the matter at around the same time. He regained consciousness at around 9.00 p.m. and called PW1 and informed him of what had happened.
28. PW3 was PC Edward Simiyu. On 8.3.2021, he was at Kehancha Police Station when a representative from Watu Credit reported a stolen Motorcycle within the area. With 2 officers, they proceeded to Kehancha Town where they found the Accused locked inside and many people outside ready to kill the Accused. They broke down the door and the Accused tried to flee over the iron sheets. They shot in the air to disperse the crowd and arrested the Accused and took him into custody. He had used violence to rob PW2 and injured him in the process. They found him with the Motorcycle inside the house. They were able to find the Motorcycle because it was being tracked. He identified the Motorcycle as Registration Number 132Z Boxer Black. He arrested the Accused at midnight on 8.3.2021.
29. PW4 was PC Eddy Ouma. On 8.3.2021, at around 8.00 p.m., he received information from PW2 that he took a client from Kisii to Kiogoro using Motorcycle Registration No. KMKF 132Z Boxer Bajaj, black in colour. On reaching Kiogoro, the client hit him with an iron bar and he went down. The client fled with the Motorcycle. PW2 reported the robbery. His head was swollen. The Motorcycle was on loan and had a tracker. It was traced to Kehancha. They had received information from Kehancha Police Station of a suspect found with a Motorcycle. He issued PW2 with a P3 form. The owner of the Motorcycle recorded his statement and the Accused was taken to Kisii and he was charged. Notably, the Motorcycle was on loan. He took photographs and produced the photographs, a letter from Watu Credit and an insurance cover to seller with evidence of payment.
30. PW5 was Daniel Nyameino, a clinician at Kisii Teaching and Referral Hospital. PW2's report was prepared by MARARU who had since retired. He was acquainted with Mararu, knew his handwriting and signature. The Court allowed the Court to produce the P3 Form and the Accused had no objection. He noted blunt injuries on the side of PW2's head. The injuries were approximately 4 days old. He was treated and discharged. He classified the injuries as harm. He could not tell the exact time PW2 was examined. PW2 collected the P3 Form after 4 days.



31. The Accused was put on his defence on 12.1.2023. He gave his sworn testimony. He testified that on 7.3.2021, he was in Kehancha. He was a motor vehicle driver. He arrived at Sirare on 7.3.2021 and parked the vehicle. He drove it to Kehancha and arrived at 11.00 p.m. He parked the vehicle, took the key to the booking office. On his way to the house, he found 3 police officers from Kehancha in a land-cruiser and upon explaining where he was coming from, they arrested him. He was booked and, in the morning, ordered to pay cashbail. He had KShs. 17,300/= . One officer demanded KShs. 7,000/= but when the accused declined to pay, he was taken in. On 9.3.2021, he was ready to pay KShs. 1,000/= as cash bail. He called his wife and gave her the money for their children’s school fees. On 10.3.2021, he insisted on being taken to court. He was taken to Migori and finally Kisii Police Station at 5.00 p.m. He stayed in the cells till 12.10.2021(sic). He was taken to the Crimes Office to record a statement. He declined and one of the officers hit him with a stick. He recorded a false statement. He was arrested for violating the curfew regulations. He admitted the charges when taken to court because he thought he had been charged with violating curfew. He was later informed that he had pleaded guilty to robbery and he later recanted the guilty plea. He urged that he was innocent and prayed for an acquittal.
32. Looking at the Appeal, the issues for determination are:
1. Whether the Trial Court violated the Appellant’s rights to a fair trial in terms of:
 - i. Legal representation
 - ii. Language used during trial
 2. Whether the Appellant’s rights were violated for being held in custody for more than 24 hours before arraignment in Court
 3. Whether the conviction was safe.

Issue 1

Legal Representation

33. Articles 50(2)(g) and (h) of *the Constitution* provide thus:
- (2) Every accused person has the right to a 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 at State expense, if substantial injustice would otherwise result and to be informed of this right promptly.
34. At what point is the court required to inform an accused person of his right to legal representation? According to the Article 50(2) of *the Constitution*, it appears that an accused person should be informed of this right at the outset, hence the use of the word “promptly”. Black’s Law Dictionary, 9th Edition, defines prompt as “to incite, esp. to immediate action.” “Immediate” is defined as “occurring without delay; instant”.
35. The Court of Appeal in the case of *Karisa Chengo & 2 Others v Republic* [2015] eKLR, dealt extensively with the issue of legal representation. It recognized the right to legal representation as a fundamental right and cited numerous legal instruments and authorities in support of that. Of particular importance to our particular situation are the following words:

“...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 occasioned 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 provide 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 understood 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.

...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 rights was violated in the trial court. This Court in Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held 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 appellant by the State's failure to accord them legal representation. This ground must of necessity therefore fail.

36. Subsequently, the *Legal Aid Act* No. 6 of 2016 was enacted and it provides for the procedure and parameters within which State-funded legal representation will be given. Some Courts have gone forward to hold that where an accused person can afford legal representation may remove them from the said parameters. This is currently codified in the Section 36 of the *Legal Aid Act*, No. 6 of 2016.
37. The Court of Appeal in the case of David Njoroge Macharia v Republic [2011] eKLR defined what substantial injustice would look like. This has since been codified under Section 43 of the *Legal Aid Act*, No. 6 of 2016 which provides as follows:
 43. Duties of the court
 - 1A. In determining whether substantial injustice referred to in paragraph [1][b] likely to occur, the court shall take into consideration-
 - (a) the severity of the charge and sentence;
 - (b) the complexity of the case; and
 - (c) the capacity of the accused to defend themselves.
38. Section 43[4] of the *Legal Aid Act* provides that where an accused person is charged with an offence punishable by death, the Court shall order the Service to provide legal representation for the accused.



39. The reason of course lies in consequences of a conviction in such cases. We are talking of death or long prison sentences.
40. Looking at the Trial Court's record, the offence of robbery with violence is a capital offence punishable with death. There is no indication that the Appellant was informed of his right to legal representation, whether state-funded or otherwise. The Trial Court did not conduct an enquiry as to whether the Appellant could afford legal representation. The Appellant was convicted and sentenced to serve 20 years.
41. I find and hold that failure to inform the Appellant of his right to choose to have legal representation and to inform him of his right to legal representation derogated his right to a fair trial.
42. What then is the consequence of the said violation? I will go by the edicts of the Court of Appeal in the case of *Muiruri v Republic* [2003] KLR, 552 where the court held that a retrial would be ordered where the interests of justice dictate as much and if it is unlikely to cause injustice to the applicant. In addition, in the case of *Diriye v Republic (Criminal Appeal 115 of 2020)* [2022] KECA 24 (KLR) (4 February 2022) (Judgment), the Court of Appeal at Par. 29 held as follows:

“We are of a considered view that this is a fitting case for a retrial. The decision on whether or not to order a retrial largely depends on whether the trial of the accused was illegal or defective. Going by the record before us the proceedings before the trial court were not illegal but defective. It is in the interest of justice therefore that the appellant be subjected to a retrial to meet the ends of justice. See *Ouko v Republic* [2007] 2 EA 380, *James Ochomo Odionyi v Republic* [2016] eKLR and *M'Kanake v Republic* [1973] 1 EA 67.
43. It is clear that the proceedings herein were defective and thus this is a case fit for retrial.
44. There are several other issues raised by the Appellant that I would like to mention as I conclude:

Language used during trial

45. The Appellant submitted that he did not understand the language used during trial. However, while the on 15.3.21 the language used to take plea was not recorded, the Appellant took plea again on 15.11.21 and the record for that day indicates that plea was taken in Kiswahili and he responded in Kiswahili. He cross-examined the witnesses and even gave his own evidence. It is really hard to believe that he did not understand the language used the entire time. Neither did he inform the Court that he did not understand the language used. It is a weak attempt at challenging the trial process.
46. Indeed, the Court of Appeal faced with a similar situation, was of a similar view. In *Chumba v Republic (Criminal Appeal 34 of 2019)* [2023] KECA 1342 (KLR) (10 November 2023) (Judgment) held as follows:
47. 38.... We note from the record that the appellant on 3rd September, 2015 when plea was taken, the languages used by the court were English, Kiswahili and Nandi..... The appellant, who appeared in person before the court, pleaded not guilty to the charge, he cross-examined the prosecution witnesses and gave his unsworn testimony in Kiswahili. At no given time did he indicate to the court that he did not understand the language being used by the court or that he suffered any prejudice. The appellant cannot therefore be heard to claim that the proceedings were conducted in a language he did not understand. We are satisfied that the appellant understood the proceedings evidenced by his cross-examination of the prosecution witnesses as well as by the defence advanced at the trial court.” Appellant He also did not inform the Court that he did not understand the language used. It is thus unbelievable that he did not understand the language used the entire time.



Issue 2

48. On whether the Appellant's rights were violated for being held in custody for more than 24 hours, I have considered the Trial Court's record. The Appellant was arrested on 8.3.2021 and arraigned on 15.3.2021. Obviously, the timelines went beyond the 24 hours proscribed by *the Constitution*.

49. That said, it is evident that the Appellant's rights were violated. However, the remedy would not lie in an acquittal. The Courts have over time held that Article 23 of *the Constitution* provides for the variety of remedies that are available to such a person, upon moving the Court appropriately of course. In the case of *Hussein Khalid & 16 Others v Attorney General & 2 Others* [2019] eKLR, the Supreme Court held thus:

122. Consequently, without downplaying the Appellant's allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where it was stated that:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.” I find that the said violations per se cannot vitiate the trial

Issue 3

50. On whether the conviction was safe, I find that a consideration of the facts in totality, leads me to the inescapable conclusion that the conviction was not safe purely on account of the fact that the Appellant was not informed of his right to choose to have legal representation and Section 43 of the *Legal Aid Act* and Article 50 of *the Constitution* was not complied with.

51. I will not delve into the merits and demerits of the appeal based on the weight of the evidence, whether the Trial Court correctly invoked, application of the doctrine of recent possession and propriety of the sentence meted out. I say so as this would prejudice the retrial of the Appellant and otherwise violate provisions of Article 50 of *the Constitution* on a fair hearing.

52. The Appeal is therefore determined in the following terms:

1. The Appellant's right to a fair trial was violated by the Trial Court in the manner set out above.
2. The matter be and is hereby referred back to the Chief Magistrate's Court Kisii for hearing de-novo before any Court other than Hon. P.K. Mutai (SRM)
3. Mention on 15.2.24 before the chief magistrate Kisii for fresh plea.

DATED, DELIVERED AND SIGNED AT KISII THIS 6TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE



In the presence of:

The Appellant in Person

Mr. Koima for the Respondent

Oigo- Court Assistant

