Wairimu v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 6134 (KLR) (9 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E012 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

WILLIAM GITITI WAIRIMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment in Nyeri CR 944 of 2016 delivered on 26/01/2021 by Hon. S. Adika – PM.

2. The appellant was charged with forgery contrary to Section 345 as read with 349 of the Penal Code the particulars being that on diverse dates between March 2011 and August 2012 in Nyeri Township within the Republic of Kenya, with intent to defraud, forged a document namely Members Daily contribution pending Biashara purporting to be genuine Biashara Sacco Society Limited – members Daily contribution pending Receipts signed by ALFRED NDIANGUI GICHOHI.

3. The appellant set forth the following grounds of appeal: -

    a. The learned magistrate erred in law and in fact for holding as she did(sic) that the prosecution had proved its case to the required standards.

    b. The learned magistrate erred in law and in fact for taking into consideration extraneous factors in his judgment which had not been brought forth in evidence.

    c. The learned magistrate erred in law and in fact for failing to find that the 'Accused' constitutional right of representation all through (sic) the trial were violated.

    d. The conviction was against the weight of evidence as the totality of the evidence did not establish the offence charged.

4. The appellant raised 3 issues: -

   a. Conviction against weight of evidence

   b. A right to fair trial through legal representation.

   c. Extateous matters considered.

Evidence

5. The appellant was arraigned in Court on 21/09/2016 before P. Mutua =- PM. Upon concluding preliminaries, PW1- Joseph Kamau Njamuku testified on 16/01/2017.

6. He stated that he was the chair of Biashara sacco Ltd, he knew the appellant who was employed as a field officer by Biashara Sacco Ltd. He stated that the Sacco received complaints that the appellant was receiving money and not remitting. He was suspended and investigation started. Upon conclusion of investigations the Appellant was dismissed for not submitting money collected for two named customers.

7. On cross examination, the witness stated that there were complaints even after he left employment. Some of the money was refunded. The summary dismal letter was issue to the Appellant. Cross examination dwelt on the dismissal and signing of firing letters.

8. PW-2 Caleb Mwangi Gichohi is an accountant with Boresha Biashara Sacco Ltd. stated that he knew the appellant who was collecting money from customers for loan repayment and was not remitting. He was to sign the receipt and daily contribution. He stated that the complainant was one Alfred Ndiangui. On cross examination he stated that he found the working at the organization. He stated was customer's money that had not been deposited. It was stated that no money was missing from the records. This was clearly because the monies remitted were all declared but those not declared were

9. PW3- Afred Gichohi testified that he operated a business. He knew the Appellant who was an employee of the Bishasra Sacco Ltd when he knew the Appellant when he was buying shares. He went to check his account and noted that the money had been misappropriated from his 3 accounts in his name, his wife Ann and his business name Commuter Services Company. He reported. The appellant had appropriated 6 other accounts. He stated that the transaction card that he was given as serial No. 31722 was forged.

10. He stated that their cards were supposed to be taken for verification monthly. The witness was not given his card. The officer had a forged card instead of a genuine one. The card he had showed Ksh. 14,500 /= instead of Ksh. 34,000/= a sum of Ksh. 18,500/= was not deposited. Thee witness lost 1.23 million to the accused. He stated that the money was collected form his work place.

11. A receipt could be issued at end of the month. He faithfully deposited his money. However, he lost Ksh. 1,230,000/=. He stated that other members also complained. On cross examination he stated that he found that he had lost money in march 2011-july nted thar h money was lost.

12. PW4 testified that the appellant was introduced as an officer collecting payments. They found with PW3 that their amounts were not tallying. The Appellant is said to have interfered with the share contribution. He did not remit a total of Kshs. 1,235,500 for her account, 500 for her account, PW3's account and their business cumulus services.

13. Her cards did not bear her signature, though they were supposed to do so. They only had the Appellant's signature. On cross examination she stated she was introduced to the Appellant in 2010 by Boresha Biashara Sacco. She testified that* initially, she was a teacher before she resigned. Alfred

Ndiangui was managing the shop. She had the original card that she retained at the shop. She stated that information on the card was not in tandem with what they used to contribute daily. She lost 401,500/=. They had filed suit claiming the money from the Appellant and the sacco. They wrote to the Sacco when they discovered the loss.

14. The magistrate was transferred. The new magistrate gave directions that the matter to proceed from where it reached upon transfer of Hon. C. Mburu.

15. On the resumed hearing PW5–PC Eli John Mwangi of DCI headquarters testified. H that he was a forensic documents examiner with 5 years' experience. He had a bachelor of Science degree and trained by Regional forensic laboratories Khartoum and in the UK. The witness produced exhibits A1 – F – 16. He concluded that questioned signatures A- A6 were of the same author. He concluded that both the questioned documents and known signatures of the Appellants were written by the Appellant. Cross examination was on whether the 2 sets of documents were of different prints.

16. PW6 - IP Mutwiri Geoffrey testified. He was the investigating officer, then based in DCI Wajir. The complainants had lost money which the Appellant took but failed to receipt the same. He and issued different documents. He produced as exhibits the cards and the reports. They stated that cards were forged and some were missing. Some cards were retained by the customer while the Appellant retained the rest. The signatures on several of the cards belonged to the accused. Some 45 cards were not taken for examination.

17. PW7 PC Daniel Makoko testified on 25/5/2019. He narrated on the arrest and charging.

18. On being put to defence, the Appellant chose to give sworn testimony. The Defence hearing was put off for some time until 4/3/2020 when the Appellant testified. He stated that he opened accounts for the complainant. He stated that Ndiangui could sign in the absence of the complainants. He stated that he indicated as per the collections and then give to Caleb Mwangi Gishohi. He stated no money was lost. He stated that as cards were retained by Alfred. He stated that he failed to remit money from some accounts but not the complainant's account.

19. Judgment was read on 26/1/2021. The Appellant was found guilty and sentenced to fine of Kshs. 30,000/= in default 6 months. He appealed from the conviction and not sentence.

Submission

20. The appellant filed submissions. They are totally not legible. The court had to scan, convert and magnify in order to read. In the 2-page submissions, thy The appellant stated that for forgery to be proved there must be 3 ingredients

    a. A documents

    b. Alteration

    c. Intend to defraud or deceive.

21. They raised issues that no audited accounts were produced. I have no idea what audited accounts are supposed to prove in this case. They relied on the case of Chilemba vs Republic, (1975) EA 90, in this regard it was held that where a public servant obtains payments from the government on the strength of false vouchers, such obtaining did not amount to obtaining money by false pretenses but that of stealing by a person employed in the public service.

22. They also relied on the case of Mbunde versus republic (1969) 475. They stated that the documents belong to the society and as such there was no prove of alteration. They prayed that the court overturns the decision and find that the same is contrary to section 345 of the Penal Code.

23. The Respondent filed submissions sitting that there was proof that the prosecution had proved its case beyond reasonable money. Their take was forensic analysis of signatures and results showed that this was done by the Appellant. They prayed I dismiss the Appeal.

Analysis

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

25. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

26. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first Appeal:

> " 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. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 lower court's findings and conclusions; it must make its own findings 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."

27. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters,such as this, where the burden lies on the prosecution at all times as doth: -

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by

him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

28. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth: -

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

29. This is equally stated in the Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14 as follows:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

30. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

31. Forgery is defined in Black's Law Dictionary II Edition as

> " The act of fraudulently making a false document of altering a areal one to be used as if genuine."

32. This is usually with intent to deceive The Court of Appeal in Joseph Mukuha Kimani v Republic (Criminal Appeal No. 76 of 83) [1984] eKLR held:

> " The prosecution must prove that:
>
> (a) the document was false; in the sense that, it was forged
>
> (b) the accused knew it was forged
>
> (c) the utterer intended to defraud.

33. In the case of KILEE v REPUBLIC [1967] EA 713 at p 717, it was stated that:

> "The false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: OMAR BIN SALEM v R[1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see SAMUELS v REPUBLIC[1968] 1."

34. In that regard, Mativo J in Caroline Wanjiku Ngugi v Republic [2015] eKLR held that:

> " Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-
>
> i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated or engraved.
>
> ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.
>
> iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.
>
> iv. Legal efficacy – the document or writing has to have some legal significance.
>
> v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer."

35. Therefore, there is need to prove that the person charged was indeed the one who put ink to paper and created the document deemed a forgery. This is further reaffirmed in R v Gambling [1974] 3 All ER 479 where the court held that:

> " ...'forgery is the making of a false document in order that it may be used as genuine.' This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine. [...]
>
> Given [...] that each application was 'false' was it made 'in order that it might be used as genuine'? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [..]
>
> In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court]."

36. Section 345 of the penal code provides. As follows:

> " Forgery is the making of a false document with intent to defraud or to deceive."

37. Further Section 349 of the Penal code provides as follows:-

> " Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

38. I agree with the Appellant that the cards may have belonged to the Sacco. However, some were a poor imitation. Secondly the date input into the card was meant to deceive that the complainant paid less money than they did. This was not stealing by servant as the money stolen was not inputted into the sacco. This was the complainant's money. Inspite of evidence by the complainants and forensic examiner, the appellant was interested in the civil aspect of the case and the manner of dismissal.

39. In the case of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR, Justice John Mativo, as he then was, posited as doth on expert evidence: -

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the

expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence". An expert report is therefore only as good as the assumptions on which it is based.

40. I have perused and re-evaluated the evidence of the expert. In view of the expert evidence remained un-impregnable and was consistent with evidence on record. The defence that the Appellant did not remit other people's money but did remit the Complainant's money does not cure the forgery. I find that forensic or Audited accounts are not necessary to determine non remittance from the complainant. Audited accounts go towards the governance, the going-concern basis and other statutory obligations. They do not cure forgery that was proved beyond reasonable doubt.

41. The Appellant knew or ought to have known the nature of the documents he was. Without putting him on any burden, the matters within the Appellant's knowledge. The law, that is Section 111 of the Penal Code *Evidence act* provides as follows: -

    1. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

       Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

       (1) Nothing in this section shall-

       a. Prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

       b. Impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

       c. Affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

    2. The signatures in the cards which showed there was little money paid. This was meant to deceive the Sacco that the complainant paid lesser money than he actually did.

42. In the circumstances I find that the burden of proof was property discharged to the required standards.

43. The Appellant raised breach of constitutional rights. I have not seen where there was any breach. I have perused the entire record and noted that the magistrates were very meticulous and gave all constitutional safeguards.

44. Justice Mativo's observation in Joseph Ndungu Kagiri v. Republic [2016] eKLR, come in Handy in respect here of the question of constitutional breaches during the trial:

> " The next issue for determination is whether failure by the prosecution to provide the accused persons with witness statements amounted to a violation of their constitutional rights to a fair trial. It is not disputed that the accused persons were not provided with witness statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue. Counsel for DPP Mr. Njue submitted that no prejudice was occasioned to the accused persons because the record shows that they ably cross-examined all the prosecution witnesses.
>
> *The Constitution* of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Article 50 which provides for the fundamental right to a fair hearing. Article 50 (2) (j) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.
>
> The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[13]The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated worldwide but, by the fact that under article 25 (c) of our constitution, it is among the fundamental rights and freedoms that may not be limited.
>
> The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In Thomas Patrick Gilbert Cholmondeley Vs. Republic,[14] (decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-
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> "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."
>
> Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *the Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of *the Constitution*. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of Natasha Singh v. CBI[15] where it was held as follows:-

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."(Emphasis added)

In R v Ward [16] the Court of Appeal in England was unanimous that:-

"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. [Emphasis Mine]

As pointed out earlier, although the Cholmondeley case was decided under the former Constitution, principles of disclosure are well entrenched in *the Constitution* of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

The case of R v Ward[17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defense."

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe [18] where the

Supreme Court of Canada observed, "The obligation to disclose was a continuing one and was to be updated when additional information was received."

I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in *the constitution* nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial."

45. In the case of Domenic Kariuki v Republic [2018] eKLR, Justice D K Kemei while agreeing with the above sentiments of justice Mativo stated as follows: -

10. While I so associate myself, it must be noted that rights go hand in hand with responsibilities. Nowhere in the court record is it revealed that the appellant asked for provisions of the documents and was denied. It is unclear why the appellant did not raise the issue at the earliest instance. Further, and as correctly submitted by the respondent, state funded legal representation is unavailable to the appellant bearing in mind that he was not facing a capital offence punishable by death. In this regard I am guided by the Court of Appeal finding in Karisa Chengo (supra) and Thomas Alugha Ndegwa V. Republic [2016] eKLR where the court held as follows:

"9. A determination of whether the appellant herein is entitled to legal aid, in view of the fact that *Legal Aid Act* commencement date was 10th May, 2016, is a novel issue. We will look at authorities from Kenya as well as other jurisdictions for jurisprudential guidance.

10. This Court in the case of DAVID MACHARIA NJOROGE V R, (2011) eKLR analyzed the applicability of Article 50 of *the Constitution* and held:

"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. 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."

In David Macharia Njoroge V R, (supra), this Court considered the right to free legal counsel at state expense for the first time in Kenya and expounded on the principle of "substantial injustice".

11. More recently, this Court in the case of KARISA CHENGO & 2 OTHERS V R, CR NOs. 44, 45 & 76 OF 2014, stated:

"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 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."

46. It follows that the appellant needed to raise the question of unconstitutionality early enough. The Appellant was represented. If any issue arose then the advocate should have, issue I do not find any constitutional right having been breached. The Appellant was well represented by an advocate who did not raise any issue of breach of constitutional nature. Ineffective representation by counsel is not the same as breach of constitutional imperatives.

47. Article 50 (2)g of *the constitution* provides as follows: -

> " to choose, and be represented by, an advocate, and to be informed of this right promptly"

48. The nature of Article is that it does not place the burden of compliance on any other party. She offence of forgery was proved beyond reasonable doubt. I dismiss the Appeal on conviction.

49. Though the Appellant was feebly raising the issue of sentence, he did not raise any ground. This must have been for good measure. The court gave the Appellant a slap on the wrist. In a matter where a sum of Kshs. 1,235,5000 was lost, a fine of only Kshs. 30,000/= was given. Had the prosecution sought for enhancement, thus could have been a real possibility.

Order

50. In the upshot of the foregoing, I make the following orders: -

    a. The Appeal from the judgment of Nyeri / CR 944 of 2016 is hereby dismissed for lack of merit.

    b. The file is closed.

DELIVERED, DATED and SIGNED virtually on this 9th day of May, 2024. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Miss Kaniu for the state

No appearance for the accused

Court Assistant - Brian