



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanjala v Republic (Criminal Appeal E056 of 2022)  
[2024] KEHC 7151 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7151 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E056 OF 2022**

**REA OUGO, J**

**JUNE 11, 2024**

**BETWEEN**

**OLIVER SIMIYU WANJALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the sentence of Hon. P.N. Gesora (CM)  
delivered on 2/6/2022 arising from Bungoma CMCRC No 056 of 2022)*

**JUDGMENT**

1. The appellant was charged with the offence of preparation to commit a felony contrary to section 308 (3) (b) of the *Penal Code*. The particulars of the offence were that on 11<sup>th</sup> January 2022 at 0320 hours at Chwele Market, Chwele location in Bungoma Central sub-county within Bungoma County jointly with others not before the court was found armed with a hacksaw, a torch, pliers and axe outside Serena Bar and Restaurant, the property of Elizabeth Chilanda Masika, with the intent to commit a felony therein to wit stealing.
2. The prosecution relied on the evidence of Elizabeth C. Masika (Pw1), Benta N. Wangila (Pw2), George W. Murunga (Pw3) and No. 65598 Patrick Maugeni (Pw4) to prove its case. The appellant gave sworn testimony during his defence.
3. The trial court upon considering the evidence by the parties, found that the appellant was preparing to break into the hotel and that if he could have succeeded, he would have committed a crime. The appellant was convicted and sentenced to 7 years imprisonment.
4. The appellant is dissatisfied with the judgment of the trial magistrate and has appealed to this court. The appeal is premised on the following grounds:



1. That the trial magistrate grossly erred in law and in facts to convict the appellant on contradictory, inconsistent and uncorroborated evidence, which meant that the witnesses were not credible.
  2. That the appellant's rights under Article 50(2) (j) of the Constitution were not accorded to him. The appellant was not informed of the offence he was facing because he was not served with witness statements, a charge sheet and the 1<sup>st</sup> report stipulated in the named article.
  3. That the whole of Article 50 of the Constitution of Kenya was not accorded to the appellant because most of the time when the witness came to court there was network lapse on the system.
  4. That whatsoever transpired in court, the appellant was not aware, he was just surprised by the conviction.
5. This Court, as the first appellate court, is enjoined to examine, analyze and evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In *Okeno vs. Republic* [1972] EA 32, the Court of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw 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 lower court's finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”

6. Pw1 testified that she is the owner of Serena Hotel at Chwele. On 11/1/2022 at 3:30 a.m. she received a call from Pw2. She explained that Pw2 is one of her workers who sleeps behind the bar. Pw2 informed her that she heard the door being cut and Pw1 called the OCPD and police officers arrived at the scene. Pw2 testified that on the material day she heard the door of the hotel being broken and sent the security guard a message. The guard came and shone his torch and asked the boys what they were doing. Pw2 testified that she knew the appellant and identified him. There was also security lighting and a torch light which made her see clearly. They recovered a torch, hacksaw, axe, pliers and open shoes. The police officers were called in and Pw2 went to record her statement. On cross-examination, Pw2 testified that the appellant was one of their customers. She saw him clearly and called his name as he jumped the fence.
7. The security guard (Pw3) testified that the accused person was known to him. On the night in question, he responded to Pw2's text message. He shone his light and saw the appellant cutting the padlock on the door of the bar, The appellant was wearing a sweater and when he saw Pw3 he ran away. The police officers came and made recoveries.
8. The investigating officer, Pw4, testified that on 11/1/2022 he was the duty officer at Chwele police station. He was informed by the OCPD, Mr. Muraya, that there was an offence being committed at Serena Bar at Chwele. They rushed to the scene and found Pw3 who led them to the pub. They were



shown the damaged padlock, an axe, hack saw, pliers, a torch and a pair of sandals. Pw2 told them that she saw the appellant. They searched for the appellant and found him at the video shop.

9. In his defence, Dw1 testified that on 11/1/2022 he was watching a football match when 2 police officers came and asked him to accompany them to the police station. He was arrested and charged.

## SUBMISSIONS

10. On whether the prosecution case was marred with contradictions, the appellant submits that from the evidence of Pw2 and Pw3, it was unclear whether the door was broken or the padlock cut. He also pointed out that while Pw2 claimed to have seen the appellant, the evidence of Pw4 was that Pw3 led them to the pub and they woke up the staff sleeping in the room, Pw2. He also submits that it was unclear whether the exhibits were recovered by Pw3 or Pw4. He cited the decision of *Dinkerrai Ramkrishna Padya v Rep App No 106 of 1990 EA CA 93* where the court held that it is difficult to distinguish who is telling the truth where evidence is contradicted.
11. On the issue of infringement of Article 50 of the Constitution, the appellant submitted that Articles 50 (2) (c), (g) (h) (j) and (k) of the Constitution were violated but failed to submit how the same were violated. The appellant submitted that the court session experienced network failure hence Article 50 of the Constitution was infringed.
12. The respondent submits that the witness testimonies were brief with no material contradictions whatsoever. Pw2 and Pw3 who were the material witnesses corroborated each other's testimonies. The minor contradiction as to who informed Pw1 about the breaking does not go to the core of the case, see *Philip Nzaka Watu v Republic* (2016) eKLR.
13. The respondents argued that the appellant was supplied with witness statements and the exhibits which the prosecution relied on were physically produced in court. The appellant was able to cross-examine the witnesses without any difficulties and has not demonstrated that he suffered prejudice because the trial was done via Skype

## Analysis And Determination

14. I have carefully considered the submissions by the parties and the issues raised in the appeal are: whether the appellant's rights under Articles 50 (2) (c), (g) (h) (j) and (k) of the Constitution were violated; whether the prosecution case was marred with contradictions; and whether the sentence was excessive.
15. The appellant was charged with the offence under section 308 (3) (c) of the Penal Code which provides as follows:

“ 308. Preparations to commit felony

(1) ...

(2) ...

(3) Any person who is found—

(a) having his face masked or blackened, or being otherwise disguised, with intent to commit a felony; or

(b) in any building whatever by night with intent to commit a felony therein; or



- (c) in any building whatever by day with intent to commit a felony therein, having taken precautions to conceal his presence, is guilty of a felony.
- (4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.”

16. However, before I consider the merits of the appeal, the appellant has alleged infringement of Articles 50 (2) (c), (g) (h) (j) and (k) of the [Constitution](#) which I shall first consider.

17. Article 50 (2) (c) of the [Constitution](#) provides that an accused person be afforded adequate time and facilities to prepare a defence while Article 50(2) (j) provides that the accused shall be informed in advance of the evidence the prosecution intends to rely on and have the reasonable access to that evidence. In this case on 17/1/2022 when the appellant was first arraigned in court, the trial magistrate that the appellant be supplied with witness statements. The appellant during the prosecution hearing was able to cross-examine the prosecution witnesses suggesting that he was able to do so because he had been supplied with witness statements. He also did not raise any issue regarding the supply of witness statements suggesting that the prosecution had complied with the trial magistrate’s directions. The charge was also read to the appellant in a language he understood. Therefore, there is nothing on record that suggests that the appellant’s rights under Article 50 (2) (c) and (j) of the [Constitution](#) were violated.

18. The appellant contends that the proceedings before the subordinate court violated Article 50(2) (g) of the [Constitution](#). It provides that every accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly. The respondent in their submissions did not offer any arguments on this issue despite the same.

19. I have carefully looked at the proceedings before the subordinate court and note that the trial magistrate failed to inform the appellant of his right under Article 50(2) (g) of the [Constitution](#). The consequence of failure to comply with Article 50(2) (g) of the [Constitution](#) renders the trial a nullity. This was the holding of Mrima J. in Migori High Court Criminal Appeal No. 44 of 2019, [NMT alias Aunty v Republic](#) [2019] eKLR. The Court stated:

14 .....what entails the right as provided in Article 50(2)(g) of the [Constitution](#). The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate.  
.....

16 ... The right to choose an Advocate of one’s choice as embodied in Article 50(2) (g) of the [Constitution](#) therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

17. The right under Article 50(2)(g) of the [Constitution](#) must be distinguished from the right under Article 50(2)(h)... The right under Article 50(2)(h) of the [Constitution](#) on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the [Constitution](#) on the other hand



deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation.... the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.....

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be who is under such a duty to inform the accused person of the right...
  29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later... A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required...
  34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?....
  37. ...upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity.
20. The offence which the appellant faced was a felony which is a serious offence. The trial court having failed to inform the appellant of his right under Article 50 (2) (g) of the Constitution, denied the appellant the right to choose to be represented by an Advocate of his choosing despite having to put up a defence for a serious offence. The subordinate court's failure to comply with Article 50 (2) (g) of the Constitution rendered the trial a nullity.
  21. The issue that remains to be considered is whether I should order a retrial. The applicable principles were enunciated in *Fatehali Manji v Republic* [1966] EA 343 where it was stated:

“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 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 is 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”
  22. The appellant was arraigned in court on 17/1/2022 and in this case, I find that an order of retrial would be most appropriate. Accordingly, the appeal is allowed, the appellant's conviction is hereby set aside and his sentence is quashed. I order a re-trial. I direct that the matter be heard de novo. The appellant shall appear before the Chief Magistrate on the 13<sup>th</sup> of June 2024 for plea. The Accused has a right of appeal within 14 days.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

**R.E. OUGO.**



## **JUDGE**

In the presence of:

Appellant in person- Present

Miss Matere For the Respondent

Wilkister/ Diana -C/A

