



REPUBLIC OF KENYA



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**Chegere v Republic (Criminal Appeal E065 of 2022)
[2023] KEHC 24023 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E065 OF 2022
RPV WENDOH, J
OCTOBER 19, 2023**

BETWEEN

MOSES MARWA CHEGERE APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon. J. Ongondo – Senior Principal Magistrate in Senior Principal Magistrate’s Court Criminal Case No. E 001 OF 2020 delivered on 8/6/2022)

JUDGMENT

1. On 8/6/2022 the appellant, Moseti Marwa Chegere alias Mukenya was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code by the Senior Principal Magistrate, Kehancha.
2. The particulars of the charge are that on 31/8/2020, at Sanchawa Village in Kuria East Sub County, jointly with others not before the court, while armed with pangas, swords, clubs robbed Cellin Nyange Marwa of a ploughing bull, (red) worth Kshs. 30,000/= and immediately before or after the robbery used actual violence on the said Cellin Nyange which resulted in her death.
3. In Count 2, the applicant was charged with causing grievous harm under Section 234 of the Penal Code in that on the same date and place, unlawfully did grievous harm to Jane Robi Marwa. He was sentenced to, Count 1 fifty (50) years imprisonment and Count 2, 30 years imprisonment. Sentences were ordered to commence on date of plea meaning they would run concurrently.
4. Aggrieved by the judgment of the trial court, the appellant the trial court, the appellant preferred this appeal based on the following summarised grounds:-
 1. That Article 50 (2) (g) and (h) were violated;



2. That the trial court erred in finding that the appellant was identified / recognised under the prevailing unfavourable conditions;
3. That the conviction was based on suspicion;
4. That the trial court erred by not considering his defence;
5. The appellant also filed written submissions in support of the grounds of appeal in which he argued that the witnesses did not demonstrate how they recognised him; that since it is only PW1 who claimed to have recognised him, the court should have admitted such evidence with great caution and ensure that its free from error. He relied on the decision of *Wamuyu vs. Republic* (1989) KLR 426 where the court reiterated the above. The appellant also submitted that he only available light at the scene was that of torches and hence not sufficient for identification. He urged that the circumstances were not favourable to positive identification. The appellant also relied on the case of *Sawe vs. Republic* (2002) KLR 364 where the Court of Appeal stated that suspicion however strong, cannot be a basis for conviction. His contention is that the investigations were shoddy and the case against him was not proved to the required standard.
6. The appeal was opposed and the prosecution counsel filed their submissions urging that the three ingredients required to be proved in a charge of robbery with violence were duly established; that on identification, the prosecution evidence; is that the appellant was the step brother of PW1, 2 and PW3 who grew up together as siblings and that they recognised him and even described how he was dressed, was corroborated by that of the Assistant Chief PW5 and PW6, the village elder. As to the motive of the attack, being it was said to be land and their deceased's father's property.
7. Counsel submitted on alleged breach of Article 50 (2) (g) and (h) of *the Constitution* but the applicant did not raise the said ground in his grounds or submissions.
8. This being a first appeal, this court's duty is to re-examine the evidence tendered before the trial court afresh, analyse and evaluate it and arrive at its own determinations. The court must however make allowance for the fact that it neither saw nor heard the witnesses testify. The court is guided by the decision on *Okeno vs. Republic* (1972) EA 32.
9. The prosecution case was that PW1 Jane Robi, aged sixteen (16) was asleep in the same hupuse with her sister Mary Gati (PW2), George Chegere PW3, Joseph Mwita and their deceased mother Celline on 30/8/2020 at about 11:00p.m when somebody demanded that they open the door. They did not open but raised alarm; that the person broke the door to the main house and climbed over the wall separating the sitting room and bedroom; that the person told them to shut up and PW1 was able to recognise him as their step brother; that he opened the door and three other people entered. He then called the deceased telling her that she had been using the father's property for 36 years and now was his turn; that the deceased replied that they were using the property as family but he started to cut her on the head, hands, buttocks. After he finished with the mother, he turned to PW1 because she was screaming. She was cut on both hands, head and leg. She then heard one of the people say that they should leave because the people were dead; that by then they had covered the others with a mattress; it was about 3:00a.m. PW4 Joseph Chacha Masake went to get a bull from PW1's home, knocked on the door but she told him that she could not open because they were injured; that he entered the house and raised alarm and people came and took them to hospital. She stayed in hospital for four months but the mother died. She said that the appellant had earlier threatened to kill the mother. She said that one person lit a torch as the appellant assaulted them.
10. PW2, aged fourteen (14) years also recalled that she was sleeping with the mother, PW1 George Chegere (PW3) and Joseph in one room when the main door to the house was hit with force and fell; that the



bedroom was also broken and she saw people enter and started to cut the mother. She was only able to identify the appellant, her brother as he cut the mother and told her to sleep well. She hid under the mattress; that one of the robbers had a torch; that Jane Robi raised alarm but was assaulted. After the brother left, she went to sleep on the bed and next day at 5:00 a.m, Mosomo came and PW1 asked him to assist them. She raised alarm and people came to assist them. PW2 found the mother was dead. She also noted the injuries sustained by PW1. PW2 also added that they used to live with the appellant but he used to threaten to kill their mother.

11. PW3 George Chegere aged ten (10) years a brother to PW1 and PW2 testified that Motonya broke the door; that he was with John and had panga and cut; that John had the torch and that the mother and PW1 were assaulted by the appellant. PW1 said that he saw the appellant pass over the wall and as he peeped from under the mattress.
12. PW4 Joseph Chacha Masaka recalled that he used to farm with PW1's mother deceased . He went to PW1's home at 5:00 a.m on 31/8/202, found the gate open. There were four houses in the compound. He went to the first and heard PW1 Speaking in a low voice and on enquiring what was happening, PW1 informed him how they were attached; PW1's younger siblings were unable to open the door and he had to go road to enter and found PW1's mother already dead while PW1 was in bed . He raised alarm and neighbours came to his aid. He also noted that one of his oxen had been stolen. He did not know who had attacked the complainant.
13. PW5 Samuel Mwita Chacha, the Assistant Chief of the area recalled the 1/9/2020 when he was woken up by screams. He went to the scene of screams, found PW4 who led him into the house where the deceased was already dead while PW1 had serious injuries. He called the Chief who in turn called police. Members of Public started to trace the thieves hoofs of the cow which was stolen but it was not traced. He said that two names were mentioned namely Mosesti and Sinda Robi.
14. PW6 John Ndirange Matiko is a village elder of Sanchagwa Village. On 1/9/2020 he heard an alarm at 5:30a.m. and went to the scene which was the home of late Matwa Chegere. He found PW1 injured but she could not speak; Villagers present said that before PW1 stopped talking she mentioned Mokenya, her brother as one of the culprits. He found the deceased's body under the bed with several cut wounds all over the body. He said that PW1 mentioned Mosesti as one of the robbers. PW1 was aware that the deceased had reported disputes between the Appellant and the deceased's and the family. He also said that on Sunday the appellant had had an altercation with the deceased.
15. PW7 Dr. Awinda Victor Omolo of Migori Referral Hospital produced the post mortem report regarding the deceased Seline Nyange. He found that the body had severe parlour and had turned greenish. It had multiple deep cut wounds on the head, left upper limb, left buttock, left and right lower limbs, a compound occupied fracture of the left ulna and radius and all edges of the wounds were smooth signifying that a sharp object was used; that the left temporal region had deep wounds reaching the intracranial space 4cm long, ear was cut ; left lower limbs had three deep cut wounds; arteries were cut, the nervous system was drained of intracranial fluid. The doctor formed the opinion that the cause of death was exsanguination or excessive bleeding which caused respiratory and cardiac failure secondary to deep cuts.
16. PW8 Nancy Mwita is the Clinical Officer who examined PW. She found that her left side was weak, had a scar on the right parietal side of the head which was stitched depressed injury to the skull, left upper limbs had healed scars; cut on the knees and the weapon used was sharp. She had been admitted from 1/9/2020 to 3/11/20220.
17. PW9 CPL Thomas Oloo produced Safaricom data which indicated that the accused was in the area when the offence was committed.



18. In his sworn defence the appellant generally denied committing the offence. He raised an alibi, that he was away in a mine in Tanzania on that day; that PW1 was his sister and deceased his step mother who took care of him and he had no grudge against any of them.
19. Although the appellant did not make any submissions on the ground that his Constitutional right to fair hearing under Article 50 (2) (g) and (h) were violated. The Respondent submit on it and this court cannot close its eyes to the ground. It must consider it.
20. Article 50 of the Constitution guarantees the accused person's right to fair hearing. It provides as follows:-
- “50(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 his right promptly.
21. Under Sub Article 2 (g) the court is under a duty to inform an accused of his right to appoint counsel of his own chance. The said right has to be explained the accused promptly, either before plea or soon thereafter but before the trial commences. In the *South African case of Mphukwa vs. S* (CA& R 360 /2004) (2012) ZAECGHC 6 (16 February, 2012), made reference to the comments of Goldstone J in *S vs. Radobi: S vs. Mbononi* (1988) 8 SA 191 (TPD) a decision which was quoted with approval by the supreme court of Appeal of South Africa in *Ramaite vs The State* (1958)/13 2014 (26 September, 2014).
- “... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid”.
22. In *Joseph Kiema Philip vs. Republic* (2019) eKLR it was held that the right has to be explained to the accused promptly meaning before plea or soon after plea but before the hearing commences to enable the accused adequately prepare his case. The court also noted that the court has to record that it has complied with the said provision. I have perused the court record and I find that neither did the court ever explain the right to choose counsel to the appellant that record it. Under Article 25 (c) of the Constitution, the said right cannot be derogated. The court did not explain the said right to the accused. As held in *Chacha Mwita vs. Republic* Criminal Appeal No. 33 of 2019, failure to comply with the said provision renders the proceedings null and void.

As to whether the trial court complied with Sub Article 2 (h) of the Constitution:

23. The law requires that an Accused be informed of his right to counsel at State expense provided that substantial injustice will not result. In the case of *Karisa Chengo vs. Republic* Criminal Appeal 15 of 2012, the Supreme Court said the Substantial injustice will result where the accused does not understand the language of the court; the complexity of the charge, the accused's ability to hire his own counsel; the likely sentence to be meted. In this case the court did not inform the Appellant of that right. How, presently, only an accused persons charged with murder or children in conflict with the law are entitled to automatic counsel at State expense. Otherwise other persons have to demonstrate



that ‘substantial injustice’ will result to them if counsel is not availed to him. In the circumstances the appellant has not endeavoured to do that. That ground fails.

24. Having found the proceeding to be a nullity, I hereby set aside the conviction and sentence. The next question then is whether this court can order retrial.

25. The case of Ahmad Sumar vs. Republic 1964 EALR 483 laid down the principles that a court may consider before ordering a retrial. The court said:-

“...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 insufficient 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;.....”

26. Some of the considerations set down in the above case is whether the potentially admissible evidence is likely to result in a conviction; whether there has been unreasonable delay and whether the appellant will suffer prejudice. In this case, I have considered the evidence of PW1, PW2, PW3, PW4 and PW5, this court is satisfied that the evidence is likely to result in a conviction. Further, the appellant faces a serious charges of causing grievous harm and murder and it is only fair that he faces the full force of the law for the court to determine whether he committed the offence. Lastly, the appellant was convicted on 8/6/2022 and was sentenced to serve thirty (30) years imprisonment in the same date. He has not served a substantial part of the sentence and no prejudice will be suffered if a retrial is ordered.

26. For the above reasons, I find that a retrial is favourable and I hereby direct that there be a retrial. The appellant be released to the OCS Kehancha Police Station to be produced before the Senior Principal Magistrate’s Court for retrial. The case be heard on priority the same being a retrial.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF OCTOBER, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Appellant Present

Ms. Emma / Phelix –Court Assistant

