



REPUBLIC OF KENYA



KENYA LAW
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**Marete & another v Republic (Criminal Appeal E196 of 2022)
[2024] KEHC 14744 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E196 OF 2022
LW GITARI, J
NOVEMBER 7, 2024**

BETWEEN

ALEX MARETE 1ST APPELLANT

DUNCAN MWENDA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellants herein were charged with the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence being that on the 20th day of August 2020 at Mariba village in Tigania Central Sub-County within Meru county, jointly with others not before the court, while armed with a c-line panga, robbed Gerevasio Rutere of his cash kshs. 5,000 (Kenya shillings five thousand only) and at the time of such robbery injured the said Gerevasio Rutere.
2. The Appellants pleaded not guilty to the said charge and the prosecution called five(5)witnesses to support its case.
3. By a judgment dated 1.12.2022, the trial court reached a determination whereby the appellants were sentenced to 15 years imprisonment. The appellants having been aggrieved by the said determination, have filed the appeal herein.
4. Appellant's Submissions
The 1st appellant had filed his grounds of appeal but they both filed joint submissions.
5. The Appellant submitted on amended grounds of Appeal that:



- i. That the trial Magistrate erred in Law and fact in convicting the Appellant when there was no sufficient evidence tendered against the appellants thus a miscarriage of justice.
- ii. That the learned trial magistrate erred in matters of law and fact by failing to note that there was no incident of robbery with violence but it was a normal fight that ensued in between the complainant and the appellants herein.
- iii. That the trial court magistrate erred in both matters of law and also a fact by failing to make findings that the crucial and vital witnesses were not summoned before the court to give their evidences.
- iv. That the trial court magistrate erred in law and facts by disregarding his defence in contravention of section 169(1) of the Criminal Procedure Code.

The appellants have signed these grounds of appeal and the submissions.

6. The appellant submitted that the prosecution had not proved its case beyond reasonable doubt. It is the Appellant's submission that the learned trial court relied on the prosecution witnesses adduced statements that were not well corroborated and were marred with inconsistencies. That in the first place Pw1 herein who is the complainant while on oath reiterated that on 20th August, 2020 he was from his farm heading to his home being in company of PW2 Peter Kobia and PW3 Cosmas Kairu. That at the time of the ordeal PW1 adduced evidence that he had Ksh.5000= stashed in his back pocket.
7. PW1 further adduced evidence that the said money was withdrawn from his pocket by the appellants. That at no given moment during the trial did the trial court test the authenticity of the amount of money PW1 alleges to have been robbed by the Appellants. That the incident occurred in presence of PW3 who never stated who or how the said money was taken and who took it. That in order to prove the fact that there was no any offence of robbery with violence which was committed against PW1, the appellants state that it was a case of assault which was changed to be a robbery with violence which attracts a severe sentence.
8. It is the Appellants' submission that the trial court ought to have appraised himself with the following issues on who saw the money being taken, whether the complainant informed anybody else about the alleged theft, and whether there is any corroborating evidence to connect the said appellants with the current offence.
9. The Appellants submitted that court is urged to scrutinize that vital omission was occasioned and accord the appellant an opportunity to be heard afresh to meet end of justice. That this instant court of Justice will bridge what was left out by the learned Magistrate of the trial court.
10. The Appellants further submitted that due to the nature of the offence alleged and the penalty it attracts once found guilty, it was incumbent for the trial court to be alive to that fundamental issue before striking a balance. That the evidence of PW3 testified that when he checked behind he could not tell who took the said money. That Meant that he never saw or heard at any point in his head concerned with the alleged robbery with violence. That justice should not only be done but seen to be done.
11. It is the Appellants' submission that the trial magistrate erred in both law and fact by convicting him on contradictory and inconsistent evidence contrary to Section 163 of the Evidence Act. That there was no incident of robbery with violence against the Appellant herein but it was a fight.
12. The Appellants submitted that the trial court magistrate erred in both matters of law and also a fact when he failed to grant the appellants herein an advocate assigned to the accused person by the state and at state expense.



13. It is the Appellant's submission that if substantial injustice would otherwise result and it is the accused persons right to be informed of the said right promptly. That the trial court failed to inform the appellant of that vital right which was a miscarriage of justice to a fair trial as enshrined under Article 50(1) (j) of *the Constitution* 2010.
14. The Appellants submitted that, that was an utter denial to a fair trial to the appellant as enshrined in *the Constitution* in article 50(2).
15. The Appellants submitted that he urged the court to adopt the appellant's submissions that there existed no incident of robbery occasioned to one Gervasio Rutere herein stated as PW1 but a fight instigated by him and thereafter changed his mind and thereby instituting a duel that never was.
16. It is the Appellants' submission that court should be alive of the fact that no commendable investigation was carried out in regards to the incident and PW5 the investigating officer just relied on unfounded fallacy with no basis borne by the witnesses. That he did not at all visit the scene of crime. That no information attached to the real issue was tendered to the trial court.
17. The Appellants submitted that PW5 was not credible and did not at all support the prosecution's case to found a just conviction. That he instead drove the trial court to unjustifiably convict the appellant herein.
18. The Appellants submitted that the trial magistrate erred in both matters of law and also fact by rejecting the appellants' defence which had sensitive information to support the court to change its mind. That the 1st accused informed the court that the fight was between the complainant and the accused person who was not before the court. That the gist of that said fight was to revenge the existing grudge between the two of them and lastly when the complainant visited the residence area of appellants that's when one Mbotela who is the 1st appellant's uncle managed to use his opportunity to revenge of what the complainant did to him.
19. It is the Appellant's submission that people tend to revenge when done wrong. That a few will walk away. The Appellant submitted that Mbotela began to craft a revenge on the complainant soon he was beaten up.
20. The Appellant submitted that the 2nd appellant narrated a similar story to that of the 1st Appellant and both are not denying that they were near the scene of crime. That only the appellants point to one Mbotela yet he never was arrested.
21. The Appellant submitted further that, that was an utter denial of a fair trial to the Appellant as enshrined in the Kenyan Constitution 2010 and article 50(2) of *the Constitution*.
22. The Appellant submitted that it was as though as the trial court magistrate had a premeditated mind to convict the Appellant. That without cause the magistrate failed to consider the facts of the case in the circumstance.
23. It is the Appellant's submission that once a grudge is introduced in a matter the court has a duty to investigate whether there was an existing grudge or not before the matter proceeds. The Appellant relied in the case of *RV Sukha Singh S/O Wazir Singh and others* (1939) 6 EACA 145.
24. The Appellant submitted that it was incumbent for the court to institute an inquiry before proceeding with the trial. That the trial court rather ended up believing a manufactured fallacy from PW1, PW2 and PW3 prosecution witnesses who were haunted with malice. That the trial court infringed the appellant's rights to a fair trial pursuant to Article 50(4) of the Kenyan constitution 2010.



25. The Appellants further submitted that there was no direct cogent convincing and compelling evidence to warrant the trial court to convict the appellants over the capital offence. That the evidence fell short of the standard required in a trial of that magnitude and the circumstantial aspects relied upon were disjointed incapable of sustaining a conviction of robbery with violence.
26. The Appellants submitted that the appeal ought to be allowed, the conviction be quashed and the sentence be set aside and the appellants be set at liberty in the interest of justice.

Respondent's Submission

27. The respondent submitted that the Appellant was charged and convicted with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. That at the trial the prosecution called 5 witnesses while the Appellant gave a sworn defense and called no witnesses. That on conviction the Appellants were sentenced to serve 20 and 15 years imprisonment respectively.
28. The respondent submitted further that the Appellants now seeks to appeal on the charge of robbery with violence.
29. It is the respondent's submission that the ingredients to be proved in the offence of robbery with violence has been set out in Section 296(2) of the Penal Code. That they have also been set out by various court cases. The respondent relied in the cases of Oluoch vs Republic (1985)eKLR and *Dima Denge Dima & Others vs Republic Criminal Appeal No. 300 of 2007*.
30. The respondent submitted that evidence was given by a total of 5 witnesses. That PW1 and PW3 testified that the 1st Appellant was in the company of two other people. That the three attacked PW1 and PW3. That the 1st Appellant was armed with a machete and which was used to assault PW1. That the use of the weapon was also corroborated by medical evidence submitted by PW4 on the injuries caused by the weapon. That there was actual violence also meted out by the Appellant as was evidenced by the witness testimonies and medical evidence.
31. The respondent submitted that the facts of the case also disclosed a theft of kshs.5,000.
32. The respondent further submitted that recognition was sufficiently proved. That the Appellant was known to the eye witnesses. As they are all related. That the offence took place at 6.00 pm and there was sufficient lighting.
33. The respondent submitted that in the Appellant defense he admitted to having been present at the scene of the offence and even having seen the complainant get injured and robbed. That the factors to be considered with respect to recognition were set out in R vs Turnbull & Others (1976) 3 All ER 549.
34. The respondent submitted further that the above 1st factors were well answered in the identification of the Appellants.
35. It is the respondent's submission that the offence of robbery with violence contrary to section 296(2) of the Penal Code was sufficiently proved. That the witnesses were factual and consistent even after being recalled and the burden of proof was properly discharged and the offence was properly proved and they stated that the appeal on conviction fails.
36. The respondent submitted that the Appellant submitted that the prosecution failed to call crucial witnesses. That the law on the number of witnesses to be called is found in section 143 of the *Evidence Act* Cap 80 Laws of Kenya.



37. The respondent further submitted that the legal principle was affirmed in *Keter v Republic* (2007)EA 135.
38. It is the respondent's submission that the issues that needed to be proved were that the offender is armed with any dangerous and offensive weapon or instrument. That the offender is in the company with one or more person or persons and that at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person. That the witnesses called were sufficient in proving those ingredients and there was no need to call more witnesses as submitted by the Appellant.
39. The respondent submitted that the Appellant has also put in an appeal on sentence submitted that the sentence of 20 years is harsh and excessive.
40. It is the respondent's submission that the offence of robbery with violence carries a mandatory death penalty. That the trial magistrate however considered the Appellant's mitigation and deviated from the mandatory sentence and gave the two sentences. That the trial magistrate considered the circumstances of the case and the mitigation of the Appellant. The respondent relied in the case of *Bernard Kimani Gacheru vs Republic* (2002)eKLR.
41. The respondent submitted that there were no immaterial considerations made, no wrong facts were considered and no material facts were ignored while arriving at the sentence to warrant the interference of the court. That they pray the appeal on the sentence also fails.

Analysis & Determination.

42. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.
43. This being a first appeal, this court is expected to review and analyse the evidence afresh in order to form an independent opinion and draw my own conclusions bearing in mind that I do not have the benefit of seeing and observing the witnesses. [See *Okeno v Republic* [1972] E.A. 32 and *Kiilu & Another v Republic* [2005] 1 KLR, 174].
44. The issues for determination as I can deduce are:
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the trial magistrate relied on uncorroborated and contradicting evidence tendered by prosecution witnesses.
 - iii. Whether crucial and vital witnesses were not summoned before court to give evidence.
 - iv. Whether the trial magistrate erred on matters of law and failed to consider his defense in contravention of section 169(i) of the Criminal Procedure Code.
 - v. Whether the Appellant right to fair trial was violated for failure to give him an advocate.

In this matter it is important to first deal with the issue of violation of the appellants' claim of violation of the right to fair trial.

Whether the Appellant right to fair trial was violated for failure to give him an advocate.

45. The Appellant submitted that the trial court magistrate erred in both matters of law and also a fact whenever it failed to grant the appellants herein an advocate assigned to the accused person by the state and at state expense.



46. In the case of *Bernard Kiprono Koech vs Republic* [2017] eKLR .The court held that:

Secondly, there is now a framework in place, which was not in place at the time of the appellant’s trial, under which an accused person can apply under section 40 of the [Legal Aid Act](#) No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

43.

- (1) A court before which an unrepresented accused person is presented shall —
 - (a) promptly inform the accused of his or her right to legal representation;
 - (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - (c) inform the Service to provide legal aid to the accused person.

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose.”

47. On the other hand Article 50 (2) (g) (h) of [the Constitution](#) provides as follows:-

“ 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.”

The right to fair trial is one of the rights fundamental rights and freedom which may not be limited, see Article 25(c) of [the Constitution](#), it states, “Despite any other provision in this Constitution the following rights and fundamental freedoms shall not be limited-

- (c) the right to a fair trial.”

The right to fair trial cannot be limited. The ‘Dakar Declaration and the Recommendations on the Right to a fair trial in Africa’ it stated as follows:

“The right to fair trial is a fundamental right, the none observance of which undermines all other human rights. Therefore the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.”



On the issue of rights to fair trial, the Supreme Court of India in the case of *Natasha Singh -v- CBI* (2013) 5 SCC 741, it was stated 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, no circumstances can a person’s right to fair trial be jeopardized.”

The same court it was stated that, “Fundamentally, a fair trial and impartial trial has a sacrosanct purpose. It is a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which should obstracise injustice, prejudice dishonesty and favourism.....

Decidedly, here has to be a fair trial and no miscarriage of justice and under no circumstances prejudice should be caused to the accused.....” See *Rattiram -v- State of MP* (2012) 4 SCC 516.

The court is enjoined to ensure that the right to fair trial is afforded to an accused person who appears before it for trial. Of importance is that where it is the court which is obligated by *the Constitution* or the statute to ensure that the accused person enjoys the right, it should not falter, it must jealously give the accused that right.

Article 50(2) (g) & (h) (supra) given the trial court the duty to inform the accused of his right to legal representation by an advocate and the right to be assigned an advocate by the State if substantial injustice would result. The accused is supposed to be informed of the right promptly. This must be taken to mean that he should be informed of the right as soon as he appears in court to stand trial.

I have perused the lower court record. I note that the learned trial magistrate did not comply with Article 50 (2) (g) & (h) of *the Constitution*. This inevitably means that the right of the appellants to fair trial was violated. In criminal trials it makes a lot of difference if an accused person is represented or not. This is because of the complex issues in adversanal system and an accused person is devoid of the requisite legal skills to comprehend matters that may arise in the trial. See *Greyhound Racing Association 372 Us 335* (1963) where it was stated;

“It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine witnesses.....”

The right to legal represental is fundamental as its absence, may lead to an injustice on the part of the accused person.

The Court of Appeal in *Macharia -v- Republic* HCRA 12/2012 stated as follows:-

“Article 50 of *the Constitution* sets out a right to fair trial hearing which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice..... 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.”

The Court of Appeal was of the view that accused person faced with capital offence should get legal representation.



In this case the rights of the appellants to fair trial was violated and therefore the proceedings were a sham and violated the rights of the appellant. The appellants were not afforded a fair trial. The trial court had a Constitutional duty to inform the appellant of their right to legal representation by a counsel and whether or not an accused would require legal representation as State expense before proceeding with case. The Supreme Court in the case of Republic –v- Karisa Chengo Petition No.5 of 2015 while dealing with various aspects of the right to fair hearing under Article 50 of *the Constitution* stated as follows:-

“ the right to legal representation under the said article is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the Constitutional edict without more.”

The *Legal Aid Act* No. 6 of 2016 is an Act of Parliament to give effect to Articles 19(2) 48, 50 (2) (g) and (h) of *the Constitution*. Section 43(1) of the Act provides that-

“ A court before which unrepresented person is presented, shall-

- a. promptly inform the accused of his or her right to legal representation.”

The Section places the responsibility of informing the accused of this right on the Judicial officers. The courts in Kenya being courts of record, the Judicial Officer, should put it on the record of the court that the accused was informed of this right and his reply thereto. The accused must be informed of this right by the Judicial Officer immediately he appears in court on his first appearance. The next issue that I should consider is what should be the consequence of none compliance with Article 50(2) (g) & (h) of *the Constitution*. The High Court has approached the question in two different ways. The first school of thought is that where there is derogation of the right, the entire proceedings and Judgment and sentence the trial court are vitiated and are null and void ab initio. The other school of that hold that where there is derogation of the right, it does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

I would associate myself with the second school of thought because the right to fair trial is one of the rights and fundamental freedoms which cannot be derogated see Article 25(c) of *the Constitution*. The whole proceedings were a nullity as trial court failed to comply with Article 50(2) (g) & (h) of *the Constitution*. It follows that since there was no trial, the court should order a retrial depending on the circumstances of the case. In Ahmed Sumar –v- Republic (1964) E.A 483 the Court of Appeal held that, “a retrial will be ordered only where the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiently of evidence or for purpose of enabling the prosecution to fill the gap in its evidence at the first trial.

The court further stated that a retrial should not be ordered unless the court was of the opinion that on the consideration of the admissible evidence a conviction would result. The other consideration is whether the witnesses who testified in the trial would be readily available.

In this case, the rights of the appellants to fair trial were violated. The proceedings were null and void. The offence was committed on 20/8/2020 the matter was concluded on 14/12/2022 when the sentence was passed. The witnesses were from the same locality. It is my view that it will be possible to conduct a retrial.

Conclusion:

1. The appeal is allowed the rights of the appellant to fair trial under Article 50(2) (g) (h) were violated.
2. The conviction and the sentence is set aside.



3. A retrial shall be conducted.
4. The appellants be released from prison and remanded at Nchiru Police Station. They be produced before the Principal Magistrate's Court Tigania for a retrial to be conducted. The retrial be heard and determined within three months.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

7/11/2024

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

7/11/2024

