



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.26A OF 2018

[Consolidated with Cr. Appeal NO. 38 Of 2019]

(From the original conviction and sentence in Criminal case No.14 of 2018 of the

Senior Principal Magistrate’s Court at Oyugis by Hon. J. S. Wesonga–

Senior Resident Magistrate)

1. FELIX OTIENO ONDIGO

2. JAMES OYUGI OSORO.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Felix Otieno Ondigo and James Oyugi Osoro, the appellants herein, were convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

2. The particulars in count one were that on the 5th January, 2018 at Kamagak West Location, Rachuonyo South District within Homa Bay County, jointly robbed Elphas Okeyo Otieno of property valued at Kshs.54,110 and immediately before the time of such robbery wounded the said Elphas Okeyo Otieno.

3. The appellants were sentenced to 15 years imprisonment. They were dissatisfied and appealed against both conviction and sentence. Initially each had filed separate grounds of appeal but later file joint supplementary grounds of appeal. Their grounds can be summarised as follows:

- a) The learned trial magistrate erred in law and in fact by failure to advise them on their rights to be represented by an advocate.
- b) The learned trial magistrate erred in law and in fact by relying on inadmissible confession.
- c) That the appellants were convicted on the basis of a defective charge.
- d) The learned trial magistrate erred in law and in fact by rejecting their defence without sufficient reasons.

4. The appeal was opposed by the state but no grounds or submissions filed.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.

6. It is now settled law that where there is a breach of the right of an accused person under Article 50(2) paragraph (g) of the Constitution, then the trial vitiated. The Article provides:

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;

Judge Mrima in the case of **BOO vs. Republic [2020] eKLR** discussed this issue extensively and observed as follows:

17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2) (h) of the Constitution given that in many instances the rights under Article 50(2) (g) and (h) of the Constitution are dealt with contemporaneously. 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. Put differently, the right under Article 50(2) (h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that 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.

I have nothing useful to add.

7. I have perused the record herein and I have found that the appellants were not informed of their right of representation by an advocate. The trial therefore amounted to a mistrial. In the interest of justice, I will not evaluate the merits of the other grounds. I therefore quash the conviction and set aside the sentence.

8. I make an order that the appellant to be released, within 7 days of this judgment, into police custody and be taken to Oyugis court for retrial by any other magistrate of competent jurisdiction other than Hon. J. S. Wesonga.

DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE