REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 150 OF 2017

(From original conviction and sentence in Butere Senior Resident Magistrate's Court Criminal Case No. 19 of 2017)

TIMOTHY MOYI ASEKA........................APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. F. Makoyo, Senior Resident Magistrate, of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63, Laws, and he was sentenced to death. The particulars of the charge were that on the night of 27th December 2016 at an unknown time at Emasatsi Sub-Location in Khwisero Sub-County, within Kakamega County the appellant, while armed with a dangerous weapon, a *panga*, he robbed Festus Matakwa of a bag containing 12 t-shirts and 9 pairs of trousers, all valued at Kshs. 4, 500.00 and immediately before or after the time of the robbery wounded the victim..

2. At the trial court, five witnesses testified against the appellant. The complainant was on his way home alone at 7.00 PM on 30th June 2014 when he was attacked, from behind, by the appellant, who had a torch and was armed with a *panga*. He ordered him to sit down, beat him with the *panga*, cut him on his ear and he took his bag and escaped into the bushes, after good Samaritans came to his rescue after he screamed. There was evidence from a person who responded to the complainant's distress call, and a health officer, which indicated that the complainant had injuries on his head, face and shoulders. Several police witnesses also testified. The appellant, upon being put on his defence, denied the offence.

3. The appellant was aggrieved by his conviction and sentence, and lodged the instant appeal. In his petition of appeal, he averred that he was subjected to an unfair trial that did not meet the standards of Article 50(2)(g)(h) and (j) of the constitution, that the circumstances did not conduce to positive identification, that the trial court overly relied on evidence of the complainant when he had no light of his own, that the trial court did not give much thought to the conduct of the police of arresting and re-arresting him which was indication of doubt on their part, that the trial court should not have believed the complainant and PW2 yet the two of them did not pursue the assailant to his home, that the two eyewitnesses did not give a credible description of the appellant, that the evidence was inconsistent doubtful presumptuous and malicious, and that the burden of proof was shifted to him through rejection of his defence.

4. The appeal was argued on 9th December 2019. The case for the appellant was articulated in his written submissions, while the state was represented by Mr. Mutua. In the written submissions, the appellant raised issues relating to failure to prove the ingredients of the offence charged, inadequate identification, insufficient evidence on ownership of the exhibits, and inconsistences and contradictions in the evidence, and rejection of his alibi defence. In his response, Mr. Mutua stated that he was wholly relying on the court record.

5. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> "*An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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 magistrates' findings can 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.*"

6. I will now advert to the grounds raised in the appeal.

7. On inconsistencies and contradictions in the testimonies of the prosecution witnesses. According to the appellant, the complainant, PW1,

stated that he was busy with the complainant and did not bother with what the others persons who responded to the distress call, and, therefore, he could not have seen the appellant enter his compound. In the first place, that was the testimony of PW4 and not PW1. Secondly, the testimony of PW4 was quite clear as to what he saw and heard. The fact that he attended to the complainant did not mean that he was not able to take in everything else that was happening at the material time. He argues that PW4 said that the appellant had not come out of his compound to assist the complainant, but was boasting about what he had done. I understand that to say that the appellant was not a Good Samaritan, but the assailant, for he did not come out to join the rest in assisting the complainant but rather was boasting about what he had done, suggesting his culpability with respect to what had just happened. There was no contradiction there. I, therefore, do not see anything from what the appellant has pointed out that amounts to a contradiction or inconsistency.

8. The other ground raised was that the conditions for identification of the assailants were not positive. It was submitted that the incident happened at night, and that there was no other light apart from the torch light from appellant's torch and that the complainant had no torch of his own. The fact that the complainant did not have a torch of his own was not good enough ground to discount his evidence. What matters is how the torch in the hands of the appellant was used in the course of asking him to sit down and hitting him with a *panga*. According to PW4, the incident happened just at the gate to the appellant's compound and near that of PW4, and PW4 knew him, and saw him that night and he, PW4, had a torch. He said he saw appellant holding a *panga* and a bag, and that he had heard him bragging about what he had just done, and daring those around there. I do not think that the trial court fell into any sort of error in concluding that the appellant was properly identified. PW1 and PW4 were persons who said they knew him before the incident. Indeed, PW4 said that the appellant's compound was next to his own.

9. The appellant argues that the ownership of the exhibits or items stolen was not established. The record is clear, there were no recoveries and the state did not produce any of the stolen items, and, therefore, the issue of ownership of what was stolen is not relevant. What is critical is the testimony of the victim that items were stolen from them, so long as that testimony is cogent and the witnesses credible, reliable and believable. The mere fact that no recoveries were made and ownership of the alleged stolen items was not established, of itself, should not diminish the claim by PW1 that property was stolen from him.

10. On the issue of the defence not being considered, I note that the appellant gave an unsworn statement. The position in law is that an unsworn statement is worthless evidence. It was said in in *Odongo vs. Republic* [1983] KLR 301, that the unsworn statement of an accused person was not evidence.

11. On the question of the trial not meeting the standard in Article 50(2) of the Constitution, and especially paragraphs (g)(h) and (j), which state as follows:

> "*50. (1) …*
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> *(2) Every accused person has the right to a fair trial, which includes the right—*
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> *(a) …*
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> *(b) …*
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> *(c) …*
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> *(d) …*
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> *(e) …*
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> *(f) …*
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> *(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;*
>
> *(i) …*
>
> *(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
>
> *(k) …*
>
> *(l) ...*"

12. The appellant is taking issue with the failure by the court to inform him of his right to legal representation. Article 50(2) (g) of the Constitution requires that an accused person has a right to choose an advocate of his own choice to represent him in the matter, and it imposes a duty on the trial court to inform the accused person of that right. In *Jared Onguti Nyantika vs. Republic* [2019] eKLR, it was held that that is a fundamental issue in the trial process that an accused person is informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. The court emphasized that the accused person ought to be notified of that right at the earliest

opportunity, and failure to inform of the right was a denial of a right to fair hearing. The court linked Article 50(2) (g) with Article 25(c) which states that the right to fair trial shall not be limited. Similarly, it was stated in *Daniel Mpayo Ngiyaya vs. Republic* [2018] eKLR, with regard to Article 50(2)(g), that where an accused person faced a serious charge or sentence, the court is bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. The importance of legal representation, in general, cannot be gainsaid.

13. In *Joseph Kiema Philip vs. Republic* [2019] eKLR, the court highlighted the link between the Legal Aid Act, 2016 and the constitutional requirement that trial courts inform accused person of their right to represented by advocates of their own choice. It was pointed out that the objective of the Legal Aid Act, 2016, is to give effect to Article 50(2) (g) of the Constitution so as to facilitate access to justice and social justice. It was stated that section 48 of the Legal Aid Act, 2016, imposes duties on the court with respect to unrepresented persons, which include a duty to promptly inform him of his right to legal representation, if substantial injustice is likely to inform him of his right to an advocate to be assigned to him by the state and to inform the state to provide legal aid to the accused person. It was emphasized that trial courts, as a matter of constitutional duty and the interest of justice, must give the information to the accused person and make a preliminary enquiry at the earliest possible time to determine whether the accused person would require legal representation. The court stated that the trial record ought to indicate that the rights under Article 50(2) (g) (h) were communicated to the accused person.

14. In *David Njoroge Macharia vs. Republic* [2011] eKLR and *Karisa Chengo & 2 others vs. Republic* [2015] eKLR, although premised on Article 50(2) (h) of the Constitution, it was emphasized that one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of robbery with violence, which attracted a penalty of mandatory death sentence. The charge was a very serious one, for the life of the appellant was at stake were he to be found guilty, which would have required the court to inform him of his right to legal representation.

15. I am alive to the mantra that every citizen is expected to know the law, and that ignorance of the law is no defence, but, at the same time, it is not every accused person who is brought before the Kenyan courts who is aware of his rights with respect to fair hearings, including the rights set out in Article 50(2) (g). Most of the accused persons who come before these courts are ordinary persons of average or fairly low education, and who are not well exposed on matters to do with the law. In *Elijah Njihia Wakianda vs. Republic* [2016] eKLR, the Court of Appeal stated that the trial court should play the role of an educator of the accused person so far as these matters are concerned. The right to a fair hearing can only be actualized where the accused persons are made aware of their rights, for it is only after they are notified of and sensitized about those rights that they will be able to make informed decisions. That right includes the right to inform them that they can appoint an advocate to act for them in the proceedings, if they so wish, and that they have a right to choose an advocate of their own liking.

16. In this case, the appellant was not represented by an advocate. There is no indication from the record that he was ever informed of his right to be represented by an advocate in the proceedings, so that he could make a decision as to whether or not to appoint one of his own choice. The duty to inform an accused person is a constitutional and statutory imperative, stated in Article 50(2) (g) of the Constitution and section 48 of the Legal Aid Act. Failure to inform the appellant of that right violated his fair trial rights and amounted to injustice. A trial where fair hearing rights have been violated in this manner cannot possibly stand.

17. Article 50(2)(h) of the Constitution states that every accused person is entitled to be assigned to him an advocate by the state at state expense if substantial injustice would otherwise result and to be informed of that right promptly. The importance of this right was addressed in *Joseph Ndungu Kagiri vs. Republic* (supra), *Macharia vs. R* [2014] eKLR, among others. However, it has been held that the same is qualified and subject to the substantial injustice test. Not everyone, therefore, is entitled to an advocate at the state's expense, with each case being considered on its merit. In *Charles Maina Gitonga vs, Republic* [2018] eKLR, it was stated that legal representation at state expense is not an inherent right available to an accused person under Article 50 of the Constitution, adding that under section 36(3) of the Legal Aid Act, No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of trial.

18. In the instant case, I do note that the appellant has not sought to establish that he suffered substantial injustice by not being provided with legal representation at state expense. It has not been demonstrated that that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence. However, the sentence imposed by the statute, which defines the offence charged, is very stiff. There is also some complexity about robbery with violence, particularly when it gets to drawing the distinction between it and simple robbery. I believe, given those circumstances, an accused person facing a robbery with violence charge, would be entitled to be informed of their right to counsel paid for by the state, so that he can argue a case that his case was deserving.

19. The provision requires that a court informs the accused of his right to legal representation, in cases where an advocate at state expense would be necessary, if substantial injustice would result. The duty would arise where the case raises complex issues of fact or law, making it difficult for the accused to effectively conduct their own defence owing a disability or language difficulties or the nature of the offence. In the instant case, the appellant faced what is generally known as a capital charge, whose sentence is mandatory death. I note that the Supreme Court has recently, pronounced against such mandatory sentences, including death, and has held them unconstitutional, but the accused person in such case would still face, where a death sentence is ruled out, long periods in prison. The robbery with violence charge is also quite technical, especially when it comes to demarcating between it and simple robbery and other related minor offences. A person facing such a charge should, no doubt, be informed of his rights under Article 50(2) (h) of the Constitution. A trial, where sentence for the offence charged is marked out as mandatory death, is no ordinary one, and all precautions should be observed.

20. Article 50(2)(j) of the Constitution is about an accused person being informed in advance of the evidence the prosecution intends to rely on at the trial and the said evidence being made accessible to them. That would mean the accused persons being furnished with the charge sheet which is essentially the pleadings in the criminal matter, as well as the evidence itself. The evidence would be the statements of the witnesses to be presented at the trial and any documents that are proposed to be placed before the court. This should crucially be done before arraignment or at arraignment but before the accused takes the plea. A criminal trial commences when the pleadings are lodged in court, and the trial begins when the accused is presented in court for the purpose of taking plea. The evidence that the prosecution wishes to rely on should be given to the accused before he takes. It would assist him, after evaluating it, in deciding how to plead, and should he decide to plead not guilty the defence that he should mount, including the direction that his cross-examination of the witnesses should take.

21. The superior courts have severally stated the law on this. In *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR, for example, the Court of Appeal stated:

> "*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 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 a 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.*"

22. I have carefully perused through the record herein. I have noted that at the time of the taking of plea on 14th March 2017, Article 50(2) (j) was complied with, for the record indicates that the prosecution informed the court it had supplied the appellant with the investigation diary and with five witness statements, other documents were to be supplied thereafter. On 8th May 2017, the trial court directed that the appellant be supplied with a copy of the amended charge sheet, treatment notes and the P3 form. The hearing commenced on 14th June 2016. The record is no clear as to whether the documents were supplied, but the appellant was placed on record as saying that he was ready to proceed with the case, which suggested that he had been furnished with all the documents that he would have required to conduct his defence. I am, therefore, not persuaded that the appellant was not furnished with the prosecution evidence, and, therefore, there was no breach of Article 50(2) (j) of the Constitution.

23. The appellant faced a charge of robbery with violence. The said offence is created under section 296(2) of the Penal Code, which states as follows:

> "*296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*"

24. The offence is established where a robbery is committed accompanied by either of the three factors set out in the provision – that the robbers are more than one, or use actual violence on their victim, or are armed with offence or dangerous weapons. See *Simon Materu Munialo vs. Republic* [2007] eKLR. In this case the PW1 was positive that the person who attacked him was armed with a *panga*, and there was use of violence. PW4 confirmed that PW1 was hurt in the incident. PW1 further stated that he was robbed of items that were never recovered.

25. In view of the constitutional violations identified above, I conclude that the trial of the appellant was not fair. Constitutional prescriptions were not observed, yet the Constitution of Kenya is the basic law of the land. It is the foundation of everything. What it commands must be done. Disregard of the basic law is the first step in the descent to anarchy. I, accordingly, find that there was a mistrial. Consequently, I quash the proceedings that were conducted by the trial court, along with the conviction, and set aside the sentence imposed. I hereby direct that the trial file in Butere SRMCCRC No. 19 of 2017 be remitted to the Butere Senior Resident Magistrate's Court for the re-trial of the appellant. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE