REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 57 OF 2017

JOHN KIOKO MWIKYA ALIAS MBISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable L Kaittany - SRM dated 3rd May, 2017 in Machakos Criminal Case No. 1031 of 2011)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOHN KIOKO MWIKYA ALIAS MBISI.....1ST ACCUSED

JOHN WAMBUA MUTUKU.....2ND ACCUSED

JUDGEMENT

1. The appellant, **John Kioko Mwikya alias Mbisi**, was charged together with his co accused, **John Wambua Mutuku**, were charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 1031 of 2011 with the offence of Robbery with Violence contrary to section 296(2) of the ***Penal Code***. The particulars were that the accused on the 17th day of April, 2011 at Mwendandu area within Eastleigh Estate, Machakos Township, in Machakos District, within Eastern Province, jointly with another, not before the court, while armed with dangerous weapons, namely knives and *rungus*, robbed **Urbanus Kioko Musila** of his Nokia Phone, a par of Sport shoes, a cap, belt and cash Kshs 8,800/-, all valued at Kshs 13,570.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said **Urbanus Kioko Musila**.

2. After hearing the case, the Learned Trial Magistrate convicted the appellant herein while acquitting his co-accused and proceeded to sentence the appellant to what she deemed the minimum sentence, which was death.

3. Aggrieved by the said decision the appellants have preferred this appeal based on the following grounds:

> **1. The trial court erred in law and fact by convicting and sentencing the appellant when there was no evidence to support the charge.**
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> **2. The trial court erred in law and fact by convicting and sentencing the appellant on inconsistent, doubtful and contradictory evidence.**
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> **3. The trial court erred in law and fact by convicting and sentencing the appellant when there was no identification done to establish the Appellant as the perpetrator.**
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> **4. The trial court erred in law and fact by convicting and sentencing the appellant by relying on the evidence of the Complainant alone and failing to call for independent witness.**

5. The trial court erred in law and fact by holding that the prosecution had proved its case against the Appellant beyond reasonable doubt.

6. The trial court erred in law and fact by convicting and sentencing the appellant on defective charges.

7. The trial court erred in law and fact by convicting and sentencing the appellant on charges which were not supported by the particulars of the offence.

8. The trial court misdirected itself by failing to inform the accused person his right to have an advocate assigned to him by the State and at state expense if substantial injustice would otherwise result and in particular where an accused is charged with capital offence.

9. The trial court erred in law by failing to assign or cause an advocate to be assigned to the accused at state expense and thus violated the accused right as guaranteed under Article 50(2)(h).

10. The trial court erred in law and fact in finding that the appellant herein was in the company of one John Mutuku at the time of committing the alleged offence who was co-charged with the appellant herein after it had acquitted him.

11. The trial court erred in law and fact in holding the evidence of the complainant that the appellant committed the offence using weapons and no weapons were reported and/or mentioned in the occurrence book at the time of reporting the alleged incident.

12. The trial court erred in law and fact in failing to appreciate that no weapons were recovered from the appellant herein and/or produced in court in support of the charges preferred against the appellant.

4. At the trial, the prosecution called 5 witnesses.

5. According to the complainant, **Albernus Kioko Musila,** who testified as PW1, on 17th April, 2011 he had gone to Nairobi to buy some goods and arrived back in Machakos at about 4pm and proceeded to his place of work at Grogan Area where he worked till 8pm when he closed for the day. Upon reaching Eastleigh Estate at a place called Mwenda, he met three people including the appellant, his co-accused and a third person whom he did not know. According to him, he knew the appellant and his co-accused as **Mbisi John Kioko** and **John Wambua** respectively.

6. The complainant testified that the said people grabbed him and stole his Nokia 1680, Green Cap worth Kshs 150/-, one belt black worth Kshs 120/=, cash Kshs 8,800/= and sports shoes all worth Kshs 13,570/-. In the process, he sustained injuries in his mouth and left eye and his whole face was swollen. The following morning, he reported the incident to the police and sought treatment at Machakos General Hospital. Later the appellant and the co-accused were arrested.

7. According to the complainant he was able to identify the three persons because there was a bulk security light 10 metres in radius which clearly illuminated the place. It was his evidence that three assailants approached from the front and while the appellant was carrying a *rungu*, his co-accused had a knife while the third person held him and pulled him to the ground. Upon meeting the said persons, the appellant struck him with the *rungu* on the left hip as a result of which he fell down. When he attempted to scream, the co-accused struck him with a fist in his mouth while the third person pinned him onto the ground. The appellant threatened him that if he screamed, he would kill him.

8. According to the complainant the appellant was well known to him as he was his neighbour in Eastleigh and Kiima Kimwe and he had known the appellant since he was a young boy when they were in the same Primary School. He also knew the co-accused who used to play soccer with his uncle between the year 2002 and 2003. It was his evidence that he had known both the two accused for more than 10 years and that he gave their particulars to the police. According to him, some of his properties were recovered but he never saw the weapons which the said assailants had. He however admitted that he was scared.

9. **Patrick Muteti**, testified as PW2. According to him, on 17th April, 2011 he was sleeping in his house when at around 10.30 pm, he was woken up by the complainant who informed him that he had been beaten and robbed by the accused persons and a third person. According to PW2, he knew both the accused as they were neighbours. It was his evidence that the complainant's face was bleeding and the complainant informed him that he had pain on the hip and could not walk well. PW2 then administered first aid to the complainant and the following day took him to Machakos Police Station and Machakos General Hospital where he was treated and discharged.

10. According to PW2's evidence, he had known the appellant since childhood since they went the same primary school. It was his evidence that the complainant showed him the place where he had been attacked the following morning and that the place has a huge bulk security light. They also went to the Chief's Office and thereafter reported to the police station but their statements were not recorded till 11th May, 2011. He testified that the complainant had informed him that he was unable to remember the last assailant.

11. PW3, **Sgt Elapher Colan** was on 20th June, 2011 on patrol in Kathemboni when they received information about a gang that was terrorising residents which information was booked in the OB. It was his evidence that the complainant reported that he had been attacked by the two accused persons whom he could identify. According to PW3, they summoned the area policing officers and village elders and on 20th May, 2011 the appellant was arrested at Kathemboni in a miracle shop after he had been cited by community policing agents. It was his evidence that the complainant was robbed of his shoes, money and other valuables though he did not make any recoveries.

12. PW4, **Dr Kimuyu Judy**, testified that she filled in the P3 form for the complainant who reported with a history of having been attacked. It was her evidence that the complainant sustained blunt injury to the face with bruises. He also had blunt injury on both hips which injuries

were 11 days old. She classified the injury as harm and produced the P3 form as exhibit. It was her evidence that she examined the complainant 11 days after the incident.

13. PW5, **PC James Ngila** was instructed by the OCS on 18th April, 2011 in the matter in which the complainant had reported that he had been attacked by three men, 2 of whom he knew. PW5 recorded his statement, issued him with a P3 form and referred him to go to hospital for treatment. According to PW5, the complainant reported that he had been robbed during the attack. Later the accused were traced, arrested and charged. However, no recovery was made.

14. He testified that he visited the scene of the attack which was at a shopping centre besides the road and though the place is not as bright as daytime, there were bright security lights thereat. He however stated that at the time of his visit the lights were not on since it was during daytime. According to him, the appellant was arrested with the help of community policing on 20th May, 2011 and charged with the offences in question.

15. According to PW5, parade was unnecessary since the appellant was known to the complainant as they were from the same village and were age mates.

16. Upon being placed on his defence, the appellant gave sworn testimony. It was his evidence that he was in his farm when he left to go and take coffee. He was then arrested and taken to Katoloni and the following day he was taken to the crime office where he was beaten and asked to admit that he had stolen from the complainant. Earlier, a week prior to his arrest, the complainant had gone to his farm and warned him that he would put him where he would get out. Though he informed his mother and brother about this, he did not report to the police as his mother, since deceased, said that she would take up the matter. According to him, the complainant was not his neighbour and he did not know him before.

17. It was submitted on behalf of the appellant through his counsel, **Mr Nthiwa**, that the court relied wholly on the evidence of the appellant without inquiring into whether there was an independent witness who would have clarified or corroborated the evidence of the complainant. Further, though the complainant informed the court that there were weapons used during the incident, being a *rungu* and a knife, PW5, the investigation officer testified that the Occurrence Book in which the alleged offence was reported did not mention the use of a knife. Further to this, PW 3, who is the arresting officer further confirmed to the trial court that he did not make any recoverable with the accused persons. Those circumstances, it was submitted, begs the question, whether PW1 really told the truth under oath when he informed that there were weapons used in the commission of the alleged offence. According to the appellant, doubt is cast on the integrity of PW1 and how credible his evidence is considering his contradictory and inconsistent evidence as regards the persons who allegedly committed the crime herein in light of the complainant's evidence in cross-examination that he contemplated on the faces of the accused persons herein.

18. According to the appellant, it was imperative for the trial court to call for additional evidence and more specifically an independent witness who could corroborate the evidence that it was indeed the appellant and his co-accused herein who committed the offence. The trial magistrate conceded to the fact that the prosecution's case heavily relied on the evidence of PW1 and not any other witness. Having noted the above, it was imperative for the trial court to make a finding that an identification parade ought to have been conducted once doubt had been created on identity of the persons who committed the offence. Failure to conduct the identification parade with the complainant having conceded to having contemplated the faces of the perpetrators and proceeding to convict and sentence the appellant herein is a grave error on the part of the trial court therein.

19. According to the appellant, the prosecution failed to prove their case beyond reasonable doubt as there was really no evidence and that particularly in a serious offence such as murder, the Honourable court ought to have fully satisfied itself that a case with sufficient evidence was presented before it to make an inference of guilt. With the contradicting evidence and lack of material evidence, the trial court ought not to have convicted the appellant herein on the evidence of the complainant alone. In support of his case the appellant relied on the South African case of ***Ricky Ganda vs. The State [2012]* ZAFSHC 59, Free State High Court, Bloemfontein** as considered and cited with approval by the court in the Kenyan case of **Philip Muiruri Ndaruga vs. Republic [2016] eKLR** where it was stated as follows:

> ***"The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt…*** **To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him…"**

20. Due to the foregoing and the fact that the appellant's co-accused whom the complainant stated he identified in commission of the offence was acquitted by the court after informing the court that he was not even at the scene as at the time of commissioning of the offence, it was submitted that in the absence of an identification parade, there was no evidence obtained and presented before the court confirming that the appellant and his co-accused at the trial court indeed committed the alleged offence.

21. It was therefore submitted that it was not proper for the court to proceed to convict and sentence the appellant herein as the prosecution failed to prove its case beyond reasonable doubt.

22. Based on Article 50 of the Constitution, it was submitted that though the appellant herein faced a capital offence of robbery with violence he did not have the benefit of legal representation afforded to him throughout the proceedings. In this regard the appellant relied on **Macharia vs. Republic HCCRA 12 of 2012 [2014] eKLR** as considered and cited with approval by the court in the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR** and submitted that the Appellate court therein condemned the trial court for its failure to inform the accused person of his right to be represented with an advocate and for failure by the state to appoint an advocate for the accused person therein. It was submitted that in **Joseph Ndungu Kagiri vs. Republic** (supra) the court found that though the **Legal Aid Act 2016** came into

force on the 10th day of May 2016, after the promulgation of the Constitution which provides for the right to legal representation, the decision in **Macharia vs. Republic (supra)** though decided before the enactment of the ***Legal Aid Act***, represented the correct interpretation of the relevant constitutional provisions.

23. According to the appellant, based on **Macharia vs. Republic (supra),** substantive injustice would occur in cases such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. Substantial injustice, it was therefore submitted may be said to be subject to three tests: **first,** the complexity of the case which is discernible from the issues of fact and law which may not be comprehended by the accused; secondly, the seriousness or nature of the offence in question since a serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence; and thirdly, the ability of the accused person to conduct his own defence since language difficulties experienced during the trial may be a perfect indicator of a accused persons' inability to conduct a defence.

24. It was submitted that all the said three tests were met in our present case to cause the appellant herein substantial justice. The gravity of the offence already and as a matter of fact through the judgement delivered has deprived the appellant herein of his right to life which is substantial injustice. Since the appellant herein informed the trial court during his testimony that the complainant had approached him in his farm and threatened him that he 'would put him somewhere he could not get out', it was submitted that it was just not enough for the trial court to record the same and leave it unexplained. Since the appellant was unrepresented, the trial court being a court of justice ought to have enquired further to know the truth and the failure to do so is a great miscarriage of justice.

25. It was submitted that the appellant herein was quite unable to conduct his defence and that the proceedings in the record of appeal confirm that the appellant herein did not conduct his defense but instead only informed the court that he was arrested while going to take coffee and informed the court what transpired on the day of arrest. He never gave an account of what happened on the fateful day of 17th day of April 2011 when the alleged offence was committed. The trial court further did not inform the appellant herein to testify on the said date of day of commission of the alleged offence. It was therefore submitted that this was gross miscarriage of justice which deprived the appellant of his right to liberty. The Court was therefore urged to find that failure to accord the appellant herein an advocate at State expense and to inform him of this right caused him substantial injustice.

26. The court was urged to take judicial notice of the fact that the appellant herein was charged alongside another co-accused namely John **Wambua Mutuku** who was acquitted by the trial court therein. According to the appellant, the main reason why the co-accused was acquitted is because he pleaded the defense of alibi. In essence, neither the appellant herein nor his co-accused at the trial court were at the scene of the offence as at the time of commission of the same. The complainant informed the court that the two committed the offence together. PW 1 informed the court that the appellant herein held a rungu and his co-accused who was discharged held a knife at the time of committing the offence. The trial court proceeded to convict and sentence the appellant on the strength of the evidence of PW1 who informed the court that the offence was committed using weapons and which weapons were never recovered and/or produced in the said court. It cannot be said that any of the weapons even existed before the time of the commission of the alleged offence since according to PW 5 who is the investigating officer a report was made on the 18th day of April 2011 and which report was indicated in the Occurrence Book did not give any indication of a knife or any weapon.

27. It was therefore submitted that there were serious doubts, gaps, inconsistencies and gaps in the prosecution's case. Further to this, substantial injustice has been occasioned on the appellant herein as a result of the proceedings against the appellant for failure by the trial court to inform the appellant herein of this right to legal representation and failure to accord him legal representation as required by the supreme law of the land in Article 50(2)(h) of the Constitution.

28. This court was therefore urged to interpret the same in favour of the appellant, give him the benefit of doubt and proceed to acquit him.

29. On behalf of the Respondent, it was submitted through the Learned Prosecution Counsel, **Ms Mogoi**, that PW1 had no doubt as to the fact that the Appellant was one of the individuals who attacked him and that the circumstances of his identification are clear and they don't leave room for mistaken identify in view of the fact that PW1 was at a well-lit place and the three approached him from front hence he had enough time to observe them before the attack. PW1 maintained his narrative of who attacked him and that the Appellant was the one who had struck him with a rungu from the first person (PW2) he told, to the police officers and even the history at the P3, he clearly indicated that he was able to identify some of his attackers. It was submitted that PW1 testified in court as to the role each individual played especially the Appellant who was the first to struck him with a rungu on the hip making PW1 to fall down and was immediately attacked by his accomplishes.

30. It was submitted that there was no need for the investigating officer to conduct an identification parade since the identification of the Appellant by PW1 was one of recognition. There was light at the scene and the circumstance were conducive and sufficient for PW1 to have made clear and positive identification of the individual who had attacked him. PW1 had given out the name of the Appellant as from the time of reporting hence it can be concussively said that the identification of the Appellant was safe hence the ground of Appeal on identification must fail.

31. Since PW1 had no differences with the Appellant before and the same was confirmed by the Appellant in his defence that he had no grudge against PW1, there no reason why PW1 would point at the Appellant falsely as one of the robbers who attacked him.

32. According to the Respondent, the Appellant's defence was a mere denial that did not create doubt in the prosecution's case. The alleged threat by PW1 was not substantiated and was an afterthought since the same never came out during cross-examination and even in his defence, the Appellant could not state the reason for the threat. The Appellant further testified that he did not know PW1 before hence there was no reason at all for PW1 to issue such threats or fabricate the case against the Appellant. There was no apparent reasons as to why PW1 would want to give false testimony against the Appellant.

33. It was submitted that PW5 produced a P3 form which he filed on behalf of PW1 which corroborated the evidence of PW1 that the

attackers were not only armed and used threats on him but also inflicted physical injuries on PW1 during the robbery hence supporting the offence of robbery with violence. Further, the fact that the Appellant was in the company of others, they were armed with a rungu and knife and the fact that they also caused physical injury on PW1 aggravated the offence to one of robbery with violence and the evidenced on record points to no other offence other the one Appellant was charged with. It was therefore submitted that the trial Court was right in finding the Appellant guilty of the offence as charged. To the Respondent, the prosecution's evidence was consistent, direct, clear and without any doubt whatsoever that the Appellant committed the offence of robbery with violence.

34. It was therefore submitted that the trial Court in reaching its decision, did analyze and evaluate the evidence tendered by the prosecution and the evidence tendered by the defence and after evaluation of the weight of the same, it formed an opinion that the prosecution had proved its case beyond reasonable doubt and that the defence evidence did not shake or create doubt on the prosecution's case hence the decision to find the Appellant guilty and sentenced him.

35. In view of the foregoing, the Respondent urged this Court to uphold the conviction of the Lower Court. However, in view of **Supreme Court Petition No. 15 & 16 of 2015, Francis Muruatetu and Anor. Vs Republic,** and in view of the trial Court's sentiments that the Courts hands were tired in respect of the mandatory sentence of the offence as prescribed in law, this court was urged to direct that this matter can be placed before the trial for hearing of mitigation and sentencing.

Determinations

36. This being a first appeal, the court is expected to analyse and evaluated afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where 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."**

37. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

38. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal 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.**
>
> **2. 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; 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.**

39. In this case, the complainant's case in summary was that on 17th April, 2011, he was walking from his place of work when at 8.00pm at a place called Mwenda, he was confronted by three people amongst whom was the appellant with his co-accused who was acquitted and a third person whom he did not know. The three who were armed violently attacked and robbed him of his Nokia 1680, Green Cap worth Kshs 150/-, one black belt worth Kshs 120/=, cash Kshs 8,800/= and sports shoes all worth Kshs 13,570/-. In the process, he sustained injuries in his mouth and left eye and his whole face was swollen. According to him, he was well acquainted with the appellant and the co-accused having gone to the same school with the appellant while the co-accused played football with his uncle. It was in fact his evidence that he had known the assailants for more than 10 years.

40. That being the complainant's case, I agree that there was no need to conduct an identification parade as this was a case of recognition rather than identification. In **James Murigu Karumba vs. Republic [2016] eKLR,** it was held by the Court of Appeal based on ***Suleiman Juma alias Tom – v- R (2003) eKLR; (2003) KLR 386*** that:

> **"Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."**

41. In **Robert Mwangi Njoroge vs. Republic [2015] eKLR** the Court of Appeal held that:

> **"With greatest respect to the two judges of the High Court, it is our view that this conclusion was erroneous as the High Court ought to have found that where there is recognition then there is no need for an identification parade. Indeed, recognition and identification are mutually exclusive and it can never be that a case is made much stronger by both identification and recognition as the learned judges seemed to have been saying in the appeal before them."**

42. However, the only evidence against the appellant was that of recognition. The Court of Appeal in the case of **Wamunga vs. Republic (1989) KLR 426** stated as under; -

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

43. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

44. In **R vs. Turnbull & Others (1976) 3 All ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> **"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

45. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs. Republic (unreported)** had this to say on the evidence of recognition at night: -

> **"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."**

46. This court appreciates that unless proof of commission of a particular offence requires a plurality of offenders, there is nothing inherently wrong with one accused being acquitted while the other(s) being convicted. In this case however, the evidence was based on recognition. The learned trial magistrate did not distinguish between the evidence adduced against the appellant from that adduced against his co-accused in order to arrive at a different finding as regards the appellant. In fact, that distinction was not possible considering the fact that the evidence against both was nearly the same. It was, for example not found by the court that the evidence against the appellant was much stronger than the evidence against his co-accused. To the contrary, it would seem that, in the absence of any express finding as regards the strength of the prosecution case, the only reason why the appellant was convicted was due to the fact that the learned trial magistrate deemed his defence to have been weaker. It is, however, trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence as was held in **Sekitoleko vs. Uganda [1967] EA 531.**

47. I therefore agree with **Lesiit** and **Ochieng', JJ** in **Karanja vs. Republic [2005] eKLR** that:

> **"the learned trial magistrate misdirected herself by indicating that the Appellant had an obligation to call witnesses to prove his defence. We agree with the Appellant that by adopting that stance, the learned trial magistrate seems to have convicted him on the basis of a weakness in the defence case, as opposed to the affirmative proof of the prosecution case. It must always be borne in mind that an accused person has no obligation at all to prove his innocence. He may well choose to say absolutely nothing, by way of his defence. That notwithstanding, the trial court could not convict him unless the Prosecution proved its case beyond reasonable doubt."**

48. The appellants further contended that his rights to a fair trial under Article 50(2)(h) of the Constitution were infringed. Article 50(2)(h) of the Constitution provides for the right of an accused person; -

> ***"(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;***

49. The appellants argued that though he was entitled to legal representation at state's expense in the trial court, the State failed to provide such legal representation and neither was he informed of his right. He argued that since his right to a fair trial was violated then he is entitled to an acquittal. It is true that the appellant was unrepresented during his trial. He was however represented by Counsel during the hearing of this appeal. Just like **Mrima, J** noted in **Lawrence Ombunga Otondi & Another vs. Republic [2016] eKLR**, I did not hear the said counsel say that he was handling the appeal as a pauper brief. He must therefore have been adequately instructed. Further the appellant is not on record as having informed the trial court that he could not afford the services of a legal representative and as such needed the court's intervention. The importance of a Counsel's participation in a criminal trial was reiterated by the Court of Appeal in **David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007** where it delivered itself thus:-

> **"The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett-vs Greyhound Racing Association (1968) 2 ALL E.R 545, at 549. He had this to say:**
>
> **'it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue –tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task."**

50. According to the Constitution, the right to legal representation to an Accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of **David Macharia Njoroge vs. Republic (2011) eKLR** analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows: -

> **"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigend to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**
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> **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. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."**

51. The same court differently constituted in the case of **Karisa Chengo & 2 Others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014** dealt with the same issue at length and in finding that the appellants' right was not infringed for want of proof that the appellants could not afford legal representation, expressed itself as hereunder: -

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occassioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
>
> **Again, this Court differently constituted in the case of Moses Gitonga Kimani vs. Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows: -**
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> **"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."**
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> **It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the**

Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under Article 261 of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under Article 19 of the Constitution. As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail."

52. Based on the foregoing, **Mrima, J** in **Lawrence Ombunga Otondi & another vs. Republic** (supra) noted that:

"From the above analysis, I do find that since the appellants have demonstrated their ability to, and indeed engaged a Counsel in this appeal, it is sufficiently clear that they had the ability to so afford legal representation during the trial but opted not to. They further actively participated in their trials and subjected witnesses to intense examination. I hence find that no injustice was occasioned to them by the State's failure to accord them legal representation. Turning to the submission that the appellants' right under Article 50(2)(h) of the Constitution was infringed, I wish to point out that I have carefully gone through the record before the trial court and did not find anywhere where the appellants protested to the court that they needed time and any particular facilities to aid him prepare their defence."

53. I associate myself with the said findings.

54. However, as I have found that in arriving at her decision, the learned trial magistrate based her judgement on the perceived weakness of the defence case as opposed to the strength of the prosecution case, the said decision was not free from error. The mere fact that the appellant's co-accused gave a detailed account of himself and even called a witness to support his case, cannot necessarily mean that an otherwise unproved prosecution case was thereby proved against the appellant. In the premises this appeal succeeds, the conviction of the appellant is set aside and the sentence against him quashed. He is to be set at liberty unless otherwise lawfully held.

55. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 11th day of March, 2019.

G V ODUNGA

JUDGE

In the presence of: