



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION  
CRIMINAL APPEAL NUMBER 170 OF 2017.

WILLIAMMWANGALE ONGOMA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1210 of 2016 delivered by Hon. K. Cheruiyot, PM on 7<sup>th</sup> December, 2017).*

JUDGMENT.

Background.

1. William Mwangale Ongoma, hereafter the Appellant was charged in three counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of Count I were that on 4<sup>th</sup> August, 2016 at Chiela Hotel along Koinange Street in Nairobi within Nairobi County, jointly with another not before court, while armed with dangerous weapons namely, a pistol and a kitchen knife robbed Gilbert Nyasani Miko of cash Kshs. 650/- and one mobile phone make HTC worth 14,000/-, all items valued at Kshs. 14,650/- and at immediately before the time of such robbery threatened to injure the said Gilbert Nyasani Miko.
2. The particulars of the Count II were that on 4<sup>th</sup> August, 2016 at Chiela Hotel along Koinange Street in Nairobi within Nairobi County jointly with another not before court, while armed with dangerous weapons namely; a pistol and a kitchen knife, robbed Nicholas Oduor Ondiek of cash Kshs. 500/- and one mobile phone make Oppo valued at Kshs. 20,500/- and at immediately before the time of such robbery threatened to injure the said Nicholas Oduor Ondiek.
3. The particulars of the Count III were that on 4<sup>th</sup> August, 2016 at Chiela Hotel along Koinange Street in Nairobi within Nairobi County, jointly with another not before court, while armed with dangerous weapons namely; a pistol and a kitchen knife, robbed Dennis Nyongesa of one mobile phone make HTC valued at Kshs. 30,000/- and at immediately before the time of such robbery, threatened to injure the said Dennis Nyongesa.
4. The Appellant was found guilty of all counts. He was sentenced to suffer death on all counts but the sentences in Count II and III were held in abeyance. He was dissatisfied with that court's decision and has lodged the present appeal against the conviction and sentence. His main grounds of appeal are that he was not positively identified, that crucial witnesses did not testify, that is mode of arrest was questionable, that his right to a fair trial under Article 50(2)(h) of the Constitution was violated and that his defence was not considered.

Submissions.

5. The appeal was canvassed before me on 22<sup>nd</sup> October, 2018. The Appellant acted in person while Ms. Atina acted for the Respondent. The Appellant relied on written submissions which he filed contemporaneously with amended grounds of appeal on 22<sup>nd</sup> October, 2018. Ms. Atina for the Respondent made oral submissions.
6. The Appellant did not dispute that the complainants were robbed on the fateful day but denied that he participated in the robbery. He submitted that in as much as the trial magistrate was impressed with the evidence of identification and the mode of arrest that linked him to the scene of the crime, it was not established that the complainants participated in his arrest or that the chase led to his arrest. He submitted that he was arrested by members of the public within a densely populated area and as such, he was a case of mistaken identity. He supported this with the fact that one of the robbers fled while wielding a gun which caused members of the public to flee in different directions due to confusion. In the meantime, he fell a victim of the circumstances. He thus submitted that he was not positively identified. He relied on **Ali Ramadhani v. Republic**, **John Kenga v. Republic** and **Norman Mbachu Njoro v. Republic** to buttress the submission.

7. He submitted that his right to a fair trial was infringed by the failure to accord him legal representation at State expense yet he faced a very serious offence which carried a death penalty. He submitted that the trial magistrate abdicated his duty of informing him of the right to legal representation as provided under Article 50(2)(h) of the Constitution .

8. Finally, he submitted that the prosecution failed to call crucial witnesses. He urged that the appeal be dismissed.

9. Ms. Atina submitted that the Appellant and PW1 struggled for a while during the incident which enabled him to ably identify him, more particularly with the clothes he was wearing. Additionally, PW2 raised the alarm before participating in the chase and arrest of the Appellant. PW3 on the other hand corroborated the evidence of PW1 and PW2. She submitted that the complainants and members of the public did not lose sight of the Appellant during the chase dismissing the Appellant's contention that this was a case of mistaken identity.

10. With regards to the Appellant's assertion that crucial witnesses were not called, she submitted that he did not state which crucial witnesses were not called. She submitted that the complainants gave candid evidence that proved the prosecution's case.

11. With regards to the sentence she urged the court to substitute the death sentence with a more lenient one as the Appellant was a first offender and no one was injured during the incident.

### **Determination.**

12. Before I delve into reevaluating the evidence, it is important to first consider the Appellant's submission that his right to a fair trial was violated on account that he was not accorded legal representation at State expense whereas he faced a serious offence which carries a possible death sentence. He argues that the court failed to accord him legal representation contrary to Article 50(2)(h) of the Constitution. Article 50(2)(h) states:

***50(2) Every accused person has the right to a fair trial, which include the right-***

***(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;***

13. Thus, before a court can find that an accused is entitled to legal representation it must be satisfied that substantial injustice would otherwise occur. The Supreme Court in **Republic v. Karisa Chengo & 2 others[2017] eKLR** while interrogated the right to legal representation held that:

***“...it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:***

- i. the seriousness of the offence;***
- ii. the severity of the sentence;***
- iii. the ability of the accused person to pay for his own legal representation;***
- iv. whether the accused is a minor;***
- v. the literacy of the accused;***
- vi. the complexity of the charge against the accused;”***

14. In the present case, the Appellant was faced with three charges of robbery with violence, an offence which, at the time, attracted a mandatory death sentence. The severity of the sentence and the seriousness of the offence were clear factors that point to the possibility of the accused suffering substantial injustice if not accorded legal representation as enunciated by the **Karisa Chengo** case(Supra) that:

***“...it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial;...”***

15. With regards to whether the Appellant could afford legal representation, the fact that he acted in person during the original trial and in this appeal is a telltale indicator that he does not possess the means to instruct counsel of his choice. Therefore, his lack of representation at his initial trial occasioned him to suffer substantial injustice and the failure to mitigate this circumstance by the intervention of the learned trial magistrate by informing him of his right to legal representation violated his right to a fair trial.

16. It is trite that a retrial is the proper order to make where a court finds that an Appellant's right to a fair trial was violated. See: **Vashanjee Liladhan v. Rex[1946] 13 EACA 150**. Before making the appellate court must consider a number of factors, majority of which were enunciated by the Court of Appeal in **Opicho v. Republic[2009] KLR 369** as follows;

***“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to***

***blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”***

17. It behooves this court to first consider the evidence that was adduced at the trial. A total of four prosecution witnesses testified. No doubt a robbery did take place as PW1, PW2 and PW3 each lost valuables including phones and money during the incident. Further, the complainants were consistent in their evidence that there were two robbers during the entire ordeal and that while one of the robbers was wielding a gun when they accosted them the other picked up a knife at the restaurant which he threatened to use against them. This clearly proved the second element of the offence; violence or the threat of violence and an attack by two or more assailants.

18. Finally, with regards to identification, the complainants' evidence was that the prevailing conditions at the scene were conducive for a positive identification as the lights were on and they all noted that the Appellant was wearing a leather jacket with PW2 and PW3 specifying that he was wearing a brown leather jacket. They testified that the Appellant and his accomplice raced out of the hotel after PW2 raised his alarm but PW1 and PW2 alongside guards at nearby buildings gave chase and arrested him near Loita Street. It is clear from the evidence that PW2 escaped from the scene before raising an alarm which caused the Appellant and his colleague to flee. The two robbers escaped in different directions with PW2 and PW1 pursuing the Appellant and arresting him a short distance from the hotel. Clearly, the chain of events was unbroken and the Appellant's arrest resultant to the same to pointed him as one of the robbers. I do find in the circumstances that there was sufficient evidence to support a conviction and that a retrial was most likely to result in a conviction.

19. On other factors that the court should consider, the Appellant took plea on 5<sup>th</sup> August, 2016. He has been in custody ever since as he failed to meet the bond terms granted by the court. That cumulatively totals to two years four months. In as much as the value of the subject matter lost during the robbery was not high, it is noteworthy that the robbers used amongst other weapons, a gun, to subdue the victims. This is an indicator that they could have easily killed their victims if they did not cooperate. And so, the period the Appellant has been in remand cannot be said to be sufficient punishment. Given the seriousness of the offence and the need to do justice to all parties in a fair trial, I hold that a retrial is justified.

20. In the result, this appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Central Police Station for purposes of preparing him to take plea afresh not later than 9<sup>th</sup> November, 2018. The trial court file shall be forthwith remitted back to the trial court to facilitate the retrial. It is so ordered.

**DATED and DELIVERED this 1<sup>st</sup> day of November, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*
2. *Miss Nyauncho for the Respondent.*