Kitaka v Republic (Criminal Appeal 128 of 2016)
[2024] KECA 1146 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1146 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 128 OF 2016

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

SEPTEMBER 20, 2024

BETWEEN

CHARLES MULANGU KITAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ogola & Kamau, JJ.) dated 12th November 2013 in HCCRA No. 316 of 2009)

JUDGMENT

1. The appellant, Charles Mulangu Kitaka was charged before Kiambu Magistrates Court, with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code. The particulars of the offence are that, on 17th December 2008 at Kikuyu West District within the then Kiambu District, the appellant jointly with another not before the court and while armed with dangerous weapons namely metal bar, knife and rungu robbed Keziah Muthoni Kariuki of Kshs.56,000, one Sony Ericson T105 mobile phone worth Kshs.4,000 all valued at Kshs.60,000 and immediately before or after the time of such robbery threatened to use actual violence against the said Keziah Muthoni Kariuki.

2. The facts giving rise to this appeal according to the prosecution are that the complainant (PW1) Keziah Muthoni Kariuki was employed as a manager in a shop selling Zain cards in Kikuyu town, where she worked with 17 other people. She recalled that on 17th December 2008 at about 4.00 pm, while at the shop with one, Titus Karori, two men carrying bags entered the shop. They inquired whether they sold Zain lines and she responded to them. One of them then put his hands through the grills, pulled her, and ordered her to open the door. The two men entered the shop and one of them lifted a metal bar, slapped her, and ordered her to lie down. They took Kshs.56,000, the witness' mobile phone – Sony Ericson T15 and left. The robbery took about 5 minutes. She followed the assailants and started screaming "thief, thief" and members of the public gave chase, one of the robbers was caught within 5 minutes; she was able to identify him as the one who asked whether they sold Zain lines, as he had the

same bag and jacket; the person is the appellant. They later escorted the person to the police station, he was searched, and Kshs.8,550 was recovered from his boots and the mobile phone – Sony Ericson T15 in his trouser pocket.

The witness produced the receipt of the purchase of the phone giving its serial number as 3520200033453xxxx.

3. PW2, Serah Nyawira Wangu, a colleague of PW1 testified that on 17th December 2008 at about 4.00 pm she left PW1 at the shop and had gone out to exchange coins. On returning she saw two men leaving the shop and they ordered her to enter the shop. She did not. The men began running and PW1 started shouting "thief, thief, thief" when members of the public chased the men, and one of them was arrested with the help of one Kiarie; the arrested suspect was subjected to beating by those who arrested him. She was able to identify the person as the one she had seen coming out of the shop, wearing a jacket, and holding a bag. She also identified him as the one who specifically told her to enter the shop, hence she saw his face.

4. PW3, Eliud Kiarie Karoki owned a property next to the shop where PW1 was robbed. He testified that on 17th December 2008, he was standing outside his property when he heard someone shouting "thief, thief, thief." He then saw two men carrying bags coming from the shop running. He gave chase and was able to catch up with one of them at a shop called Satellite. The other jumped over the fence at Kikuyu Garden. He took the person they arrested back to the shop which had been robbed and PW1 identified him. He put the suspect in his car and drove him to Kikuyu Police Station, where the suspect was searched and money and a mobile phone were recovered from him.

   During cross-examination, he confirmed that he was able to properly identify the appellant.

5. PW4, No. 88456 PC Livingston Katama was the arresting officer. He stated that on 17th December 2008 at about 5.00 pm he was at the station, when members of the public, who were about 10 in number brought in the suspect. He recovered Kshs.8,550 from the appellant's boots and a Sony Ericson mobile phone from the back pocket of the suspect's trousers. He then held the suspect in the cells.

6. PW5 No. 89109 PC Pius Kamende, the investigation officer testified that he was stationed at Kikuyu Police Station and on 17th December 2008, while at the station at about 6.00 pm, members of the public brought in a suspect. They informed him that the suspect had robbed a shop in Kikuyu town where the complainant was selling telephone lines; that the complainant was with her colleagues when she was robbed; that the complainant and others screamed and members of the public arrested the suspect. The complainant produced the receipt for the purchase of the phone.

7. Upon the close of the prosecution case the appellant was put on his defence and he chose to give an unsworn statement, wherein he denied committing the offence. It was his testimony, that on 17th December 2008, he worked as a tout at the matatu terminus until 1.00 pm when he left for lunch. On returning someone came running after him, told him that he was going to Nairobi, and sat at the front of the matatu. Shortly thereafter, some people came asking for a person who had stolen, arrested, beat him, later took him to the police station, and alleged to have recovered money and a mobile phone from him. He was placed in the cells, later taken to court and charged with the offence.

8. In its judgment delivered on 20th June 2009 the trial court found that the ingredients of the offence of robbery with violence to have been established, and the charge to have been proved beyond reasonable doubt. It was the trial court's view that the appellant's defence was a sham and a mere denial. It convicted him and sentenced him to death.

9. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. In determining the matter, the learned judges framed the issues for determination to be; whether the charge sheet was defective; whether the appellant was positively identified; whether there was sufficient evidence on which to convict the appellant; and whether the prosecution proved its case beyond reasonable doubt.

10. On whether the charge sheet was defective, the appellant had alleged that this was the case since the particulars of the charge sheet indicated that the stolen phone was Sony Ericson T105 yet the complainant during examination in chief testified that it was Sony Ericson T15. The court found the mix up to be a typographical error and did not go into the substance of the issue. Concomitantly, the alleged defect was curable under Section 383 of the Criminal Procedure Code.

11. On whether the appellant was positively identified, the court found that from the evidence adduced by the prosecution witnesses, they had not left a gap to cast doubt on the appellant being the one who attacked PW1. The court found that the appellant was arrested merely 5 minutes after the said attack and found in possession of the phone and Kshs.8,550. The court applied the doctrine of recent possession and found that the appellant was positively identified and the stolen property found in his possession was adequate corroboration as he failed to explain how he came about the money found on him and the appellant's phone.

12. On whether there was enough evidence to convict the appellant, the court found that the appellant's conviction was safe as each element of the offence was proved. Also, the court found that the prosecution had discharged its evidential burden and proved its case beyond reasonable doubt.

13. In their judgment dated 12th November 2013 the learned judges upheld both the conviction and sentence, thus precipitating this second appeal. Aggrieved by the judgment, the appellant filed a memorandum of appeal on 28th March 2014 containing 8 grounds that may be summed as; the learned judges erred in law; when they upheld the decision of the trial court and failed to find that the appellant's fundamental rights were infringed; by relying on a fatally defective charge sheet to uphold both conviction and sentence; by upholding conviction and sentence yet failing to find that the provisions of Section 150 of the Criminal Procedure Code were not adhered to; by relying on incredible evidence to uphold the decision of the trial court; by upholding the decision of the trial court yet failing to find that crucial exhibits were not produced during the trial; by shifting the onus of proof against the appellant and dismissing the appellant's defence.

14. The appellant filed submissions and a list of authorities both dated 29th August 2023. He submits that the superior court did not inform him of his right to legal representation which prejudiced as his appeal proceeded without a counsel on record; he contended that at the hearing in the trial court, he did not enjoy the privilege as the repealed Constitution was still in force since the alleged offence took place on 17th December 2008; at the High Court the current Constitution had come into force and the appellant ought to have enjoyed the rights conferred under Article 50(2)(g) and (h) of the *Constitution*; the provisions impose a duty on the court to inform the appellant of his rights and in support of this proposition the appellant relies on the case of *Owuor vs. Republic (Criminal Appeal 16 of 2019)* [2022] KECA 18 (KLR), and submits that the constitutional violations complained of were not violations by the trial court but by the High Court. As a result, the issue is properly raised for the first time in this appeal. He further cited the cases of Sheria Mtaani Na Shadrack Wambui vs. Office of the Chief Justice & Another and Office of the Director of Public Prosecutions & Another (Interested Parties) [2021] eKLR. He submits further that in the case of Owuor vs. Republic (supra), the court underscored the difference legal representation makes in a trial, by holding that the value that legal representation added to an accused's defence in ensuring not only vigorous but skilled participation in the criminal process could not be gainsaid.

15. On whether the case was proved beyond a reasonable doubt, the appellant submits that the ingredients of the offence of robbery with violence were not proved by the evidence on record; and that the crude weapons allegedly used by the appellant and his accomplice were never produced in court despite the claim that the appellant was arrested merely 5 minutes after the said attack; the alleged accomplice was never arrested or brought to court; and there was no medical evidence to prove any of the violence alleged by PW1, which the superior court should have noted while evaluating the evidence and acquitted the appellant since the alternative charge had already been dismissed. In support he relies on Boniface Mutinda Mwema & Charles N. Kimeu vs. Republic [2003] eKLR.

16. Further he contends that the doctrine of recent possession does not necessarily prove the offence of robbery with violence and relies on the case of Raymon Hermes Odhiambo vs. Republic [2002] eKLR. He also relies on the case of Charles Kalo Sitiabai vs. Republic [2019] eKLR, to buttress his argument that the ingredients of robbery with violence were not proved and a court ought not to convict based on speculation. He sums it up that the superior court erred in its review of the evidence and that its decision ought to be set aside.

17. The appellant also took issue with the fact that the trial court ignored his request to recall PW1 & PW2 for further cross examination and did not even give a ruling on the appellant's oral application.

18. He submits further, that in the event that this Court orders a retrial, based on the evidence adduced, the only likely conviction is on the alternative charge of handling stolen goods whose maximum penalty is 14 years; that the appellant has been in custody for more than 14 years (i.e. since 17th December 2008) hence no interest of justice will be served by ordering a retrial. To support this argument, he relies on the case of Samuel Wahini Ngugi vs. Republic [2012] eKLR.

19. The State in its submissions dated the 15th of May 2023 submits that the appellant was not specific on the rights that were allegedly infringed by the High Court; that the proceedings show that the trial was fair. On the allegation that the charge sheet was fatally defective, the respondent submits that this was extensively canvassed in the two courts below and it is in agreement with the finding of the High Court that the charge sheet was proper, save for the typographical error as the phone in question was properly identified by PW1 and found in the appellant's pocket together with Kshs.8,500 that was found in the appellant's boots; there was no possibility of error as the evidence was overwhelming; there was no prejudice occasioned by the error as the charge sheet contained sufficient particulars, the appellant understood the charge facing him and was able to defend himself. As for Section 150 of the Criminal Procedure Code, this was complied with as relevant and crucial witnesses gave evidence and in any event who to call as a witness is the prerogative of the prosecution reference being made to Section 143 of the *Evidence Act*.

20. On whether the ingredients of the offence of robbery with violence were proved, it is submitted that all the ingredients of the offence were proved; the appellant was positively identified and placed at the scene of crime; the stolen items were found in the appellant's possession the same day he was arrested which he did not deny, and even though the alleged weapons were not recovered, there was no doubt that the appellant was armed.

21. As regards the question whether the burden of proof was shifted to the appellant, it is submitted that the burden of proof is on the prosecution and never imposed on the accused; but there are peculiar instances where the law places the duty on an accused to explain certain facts within his knowledge and in support reference is made on Section 111(1) of the *Evidence Act*, and it is argued further that since the appellant was found in possession of stolen items it was upon him to give a reasonable explanation of how he came by the same minutes after the robbery; and he gave none.

22. In relation to the sentence it was argued that the appellant was sentenced to death after his mitigation was considered and that the High Court upheld the same.

23. Having duly considered the record, the appellant's grounds of appeal, submissions and case law cited, it is our opinion that only two issues arise for our consideration:

    i. Whether the lack of legal representation of the accused caused an injustice.

    ii. Whether the offence of robbery with violence was proved to the required standard.

24. This is a second appeal and our mandate is restricted to addressing only matters of law. The court will also not normally interfere with concurrent findings of facts by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. In the case of Karani v. R [2010] 1 KLR 73, the role of the second appellate court was succinctly set out, wherein this Court expressed itself as follows:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior Court on facts unless it is demonstrated that the trial Court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

Further, in the case of *George Kamau Gatogo vs. Republic, Civil Appeal No. 21 of 2011* this Court cited with approval the holding in Kaingo vs. R [1982] KLR 213 where the court affirmed the above position by restating that; -

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on the second appeal is whether there was evidence on which the trial court could find as it did (Reuben Karari C/o Karanja VS. R [1956] 17 EACA 146)."

25. The appellant did not complain on the failure of the State to provide him with legal representation when conducting his appeal in the High Court. He cannot also blame the court for his failure to have legal representation as no such duty is placed upon the court on appeal. Further counsel has freshly introduced the matter on a second appeal. This Court has stated times without number that its duty is to consider matters of law that arise from issues that were canvassed before the High Court. The issue of representation was not raised before the High Court.

26. The Supreme Court extensively covered a similar situation as the one placed before us in the case of Charles Maina *Gitonga vs. R (Petition 11 of 2017*) [2020] KESC 61 (KLR) (23 January 2020), the court stated; -

> " 34. ...It is in that regard not disputed that the question as to whether the Appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate's Court nor at the High Court. None

of the Articles of the *Constitution* in the present appeal was also the subject of interpretation and application at the High Court.

33. This Court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the Peter Oduor Ngoge v Francis Ole Kaparo & others [2012] eKLR we stated thus: "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

35. We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the Appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to Article 163(4)(a) of the *Constitution*."

27. We have extensively quoted the Supreme Court's decision as it is on all fours similar to the matter before us. We are bound accordingly and need not say more.

28. Learned counsel also seems to suggest that the injustice became apparent after the fact; that failure by the High Court to inform the appellant that he was entitled to a legal counsel occasioned a miscarriage of justice and this issue is therefore determinable by this Court, placing reliance on the Constitutional provision:

"50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate,

(2) Every accused person has the right to a fair trial, which includes the right—another independent and impartial tribunal or body.

...

(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;

In the case of R vs. *Chengo & 2 Others (Petition No. 5 of 2015)* [2017] KESC (15) (KLR), the Supreme Court stated as follows concerning legal representation; -

"We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, 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. We must however emphasize the fact that in accordance with the language of the *Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

89. It is noteworthy in the above context that the *Legal Aid Act*, 2016 which came into force on 10th May, 2016 in its preamble states that its focus is to "give effect to Articles 19(2), 48, 50(2)

(g) and (h) of the *Constitution* to facilitate access to justice and social justice."

90. While we have taken note of the extensive and useful comments made by the Court of Appeal in Thomas Alugha Ndegwa v. Republic (supra) in the operationalization of this Statute..."

In the case of David Macharia Njoroge vs. R, [2011] eKLR this Court considered the applicability of Article 50 of the *Constitution* and held:

> " State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. 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.
>
> 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."

29. Based on the above analysis we find that the applicant did not bring to the attention of the court that he is an indigent person and required legal representation, nor did he demonstrate that he met the criteria that would have enabled him to be accorded a counsel at the expense of the State. Further, as stated earlier this Court lacks jurisdiction to deal with this ground that was not canvassed in the court below and the same must fail.

30. On whether the offence was proved to the required standard, which in this case is proof beyond a reasonable doubt, we take note that the trial court was satisfied that the offence of robbery with violence was proved beyond reasonable doubt. It was the finding of the trial court that the prosecution witnesses were able to identify the appellant whom they gave chase and arrested without losing sight within 5 minutes of the robbery. Further, the appellant was found in possession of the stolen phone and money forming part of the stolen loot and what was telling was that the money that was recovered from inside his boots was still in the manner it had been arranged by PW1; in sets of different denominations. Further, the appellant was still dressed in the clothes he wore at the time of the robbery, he also failed to explain how he came by the phone and the money. In addition, there was evidence that the appellant was in the company of another and in the process of committing the robbery they were armed with crude weapons, slapped and threatened PW1. In his defence the appellant claimed to have been a tout; was found at the matatu terminus, was questioned about a certain person and on indicating that the person had boarded a matatu to Nairobi, he was arrested. The High Court in in its determination agreed with the findings of the trial court.

31. Before us, the appellant has failed to demonstrate that the two courts below misrepresented the facts of the case, or acted on a wrong principle or that the two courts below were wrong in their respective determinations. A mere allegation not backed with any concrete proof from the record is not enough.

We have not seen anywhere where the courts below shifted the burden of proof unlawfully as alleged. We find that the High Court rightly applied the principle of recent possession. The appellant was found to be in possession of stolen goods and the law requires that he explain how he came by them and he failed to do so.

This Court in the case of Isaac Ng'ang'a Kahiga alias Peter *Ng'ang'a Kahiga vs. Republic, CA Criminal Appeal No. 272 of 2005* (Nyeri) (unreported), stated:

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant, thirdly; that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant ... in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property; and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

We therefore decline to interfere with the findings of the judge in the superior court as we find them to be sound and within the law.

32. Based on the above analysis the appeal fails and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

P.O. KIAGE

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR