



REPUBLIC OF KENYA



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**Lerai v Republic (Criminal Appeal 107 of 2021)
[2023] KECA 752 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 752 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 107 OF 2021
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
JUNE 22, 2023**

BETWEEN

NATHAN OCHICHI LERAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Machakos
(Nyamweya, J.) dated 21st March, 2013 in HC. CR.A. No. 174 of 2013)*

JUDGMENT

1. This is a second appeal from the Judgment of the High Court of Kenya at Machakos (Nyamweya, J. – as she then was) delivered on March 21, 2016 where the appellant’s appeal both on conviction and sentence was dismissed. Our mandate in such an appeal is limited by section 361 (1) (a) *Criminal Procedure Code* to deal with matters of law only as was stated by this court in the case of *Karani v Republic* [2010] KLR 73 as follows:

“This is a second appeal and so only matters of law can be raised.”

2. We will visit the facts of the case briefly to see how the same were dealt with by the trial and the High Courts but as will be seen later the appeal turns on a constitutional question raised by the appellant.
3. The facts of the case were simple and straight forward. Daniel Ouma Odera (Odera – PW1) had enjoyed the evening at Nomadis bar at Kitengela and was heading home at about 1.30 a.m. on October 24, 2012. He intended to take a motor cycle (boda boda) home and as he waited for one the appellant, who he knew before as a watchman in the area joined him. No boda boda came and he decided to walk home which was not far from where he was. Before proceeding two policemen who had a dog passed by and they engaged in a conversation. While walking he observed that the appellant was following him. When he reached a dark corner near his house he was hit on the head with a rungu and he fell down



and lost consciousness. When he came to he found cash Ksh.3000 and his C-Nokia phone missing. He was hurt on the head and right hand elbow. He walked home, woke up a neighbor and they reported the incident to Kitengela Police Station. Meanwhile Corporal Benard Sila (PW2) and Corporal Peter Epocho (PW3) both of that police station were on patrol that night in Kitengela town when they heard the cry of a man calling for help. On looking in the direction the voice was coming from they saw the appellant, who they had seen and spoken to moments earlier, running from that direction.

4. They stopped him and because he was carrying a rungu they became suspicious and when they carried out a search on him they recovered a blood stained mobile phone from his trouser pockets. The phone rung and when PW2 answered it there was a woman on the other end who claimed that the phone belonged to her husband, Odera. It was proved through production of a purchase Receipt that the phone belonged to Odera.
5. Police Sergeant Elias Oware of the said police station investigated the case and produced various documents into the case and Geoffrey Gichobi Wagura, Clinical Officer in Charge, Kitengela Health Centre who had received and examined Odera testified that his (Odera's) clothes were blood-stained, there was an injury to the head and bruises on other parts of the body.
6. Put on his defence the appellant testified that on the material day he was at work as usual when police confronted him, snatched away his rungu and arrested him for an offence he knew nothing about. He denied the charge.
7. The trial court evaluated the evidence and found that the prosecution had proved its case to the required standard and convicted the appellant and sentenced him to imprisonment for life, findings that were upheld on first appeal.
8. The appellant is now before us in this second appeal through Supplementary Memorandum of Appeal drawn by his lawyers M/S W. Ndegwa & Associates Advocates where 5 grounds of appeal are set out. The appellant in the first ground of appeal faults the Judge of the High Court for failing to consider:

“...the violation of the Accused’s constitutional right to a fair hearing when the trial Magistrate declined to allow the recall of the complainant for further cross-examination and declined to adjourn the hearing despite the illness of the Accused and his lack of witness statements ...”.
9. The second ground of appeal relating to prosecution of the case by a person without authority to do so was abandoned at the hearing of this appeal while in ground 3 the appellant faults the Judge on first appeal for failing to appreciate that the charge sheet was defective and bad in law for duplicity. In ground 4 the appellant faults the Judge for failing to consider that some witnesses mentioned in the trial were not called to testify while in the last ground the appellant says that the Judge erred in law in failing to consider that the sentence imposed was excessive.
10. When the appeal came up for hearing before us on a virtual platform on May 15, 2023 the appellant was present from Kamiti Maximum Prison and was represented by learned counsel Miss Ndegwa while learned Prosecution Counsel Mr. Kimanthi appeared for Office of Director of Public Prosecutions (ODPP). Both sides had filed written submissions which we have perused and considered. Counsel for the appellant in a highlight of submissions pointed out that the appellant was raising 2 issues in this appeal that had not been raised before to the effect that there was no fair hearing contrary to article 50 of the *Constitution of Kenya, 2010* the second issue being the abandoned one relating to the competence of the prosecutor who had handled the case at the magistrates level.



11. On the live issue relating to right to fair hearing counsel pointed out that the appellant had informed the magistrate that he was unwell; he had applied that Odera be recalled for further cross-examination and the appellant had applied for adjournment on the further ground that he had not brought witness statements to court but the trial court had refused the applications. Counsel cited the case of *Moses Ngichu Kariuki v Republic* [2009] eKLR for the proposition that the right to cross-examination is the lynchpin to a fair trial and submitted that the order refusing the application violated rights under article 50 of the *Constitution*.
12. On the ground of appeal relating to the framing of the charge sheet counsel submitted that the appellant was charged with an offence under section 295 as read with section 296 (2) of the *Penal Code* and submitted that this was a duplex charge. The case of *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR was cited on what amounts to a duplex charge.
13. Submission on sentence was made in the alternative, counsel citing the case of *Isoe v Republic* [2023] eKLR where this court sitting at Eldoret found that alternative sentences, not only death sentence or life imprisonment could be meted out in appropriate cases depending on the circumstances of the case.
14. Mr. Kimanthi did not agree. He demonstrated that the prosecutor before the trial court was duly gazetted to prosecute which led to abandonment of that ground of appeal by the appellant. On the facts of the case it was his submission that the case was proved to the required standard which proof showed that the appellant was found with Odera's phone moments after it had been stolen; the appellant was armed and Odera had been injured. On the alleged violation of article 50 of the *Constitution* rights it was counsel's submission that the appellant had not made a formal application to recall Odera for further cross-examination but counsel conceded that there was no requirement that a formal application be made. On sentence it was Mr. Kimanthi's submission that the appellant was lucky to be sentenced to life imprisonment when he could have been sentenced to death. For all that he asked us to dismiss the appeal.
15. Miss Ndegwa, in final reply, submitted that it was wrong to charge the appellant under both sections 295 and 296(2) of the *Penal Code* and that there was no valid reason why the Magistrate had rejected the applications by the appellant.
16. We have considered the whole record, submissions made and the law.
17. As we have seen the facts of the case were straightforward where Odera was robbed by a person who was known to him; that person (the appellant) was arrested near the scene of robbery as soon as it had taken place and he was found in possession of Odera's mobile phone which had recently been stolen from him. The elements of robbery with violence as was defined by this court in the case of *Oluoch v Republic* [1985] KLR 549 were established and the issue would have ended there as the conviction was sound but the appellant has raised a new issue touching on rights to a fair hearing and that is the issue that we will now address.
18. Whether or not we have jurisdiction to entertain an issue not raised before the courts below was the subject of determination by this court in the case of *Mark Wanjala Wanyama v Republic* [2008] eKLR. The facts in that case were that the appellant, who was charged with the offence of defilement was produced in court four days after arrest where the previous Constitution and statute required that he be produced in court within 24 hours of arrest. The issue was taken for the first time on second appeal and this is what this court stated in the Judgment delivered on November 7, 2008:

“The question of deprivation of a constitutional right is a matter of law and this court cannot stop an appellant from raising it in his last appeal simply because it was not raised at the



trial court or at the first appellate court. Neither can this court down its tools on the mere reason that a legal point is being raised before it for the first time. That would be abdication of our powers. The issue was raised, and the prosecution, which produced the appellant in court after twenty four hours, is not able to show that that as soon as reasonably practicable. That being the case, the court has no reason to reject the appellant's contention that his rights were violated."

19. So the answer to the question whether we have jurisdiction is that, yes, we do have jurisdiction.
20. It was submitted before us that there was a violation of the appellant's constitutional right to a fair hearing when applications he made before the trial Magistrate were rejected.
21. Odera testified before the trial Magistrate on January 11, 2013 after which two police officers testified and the case was adjourned on the application of the prosecutor. When the matter came up again for hearing on February 1, 2013 the investigations officer testified and the appellant had no questions for him. The matter was adjourned and came up again for hearing on February 8, 2013 when the appellant is recorded to say:

"I am unwell and I need time to cross examine witness further ..."

22. The prosecutor responded by saying that the appellant had not produced documents to cross examine; that the appellant was unwell but he (the prosecutor) opposed re-examination of the witness as no good reason had been given. The appellant then said:

"I did not carry the statements."

This is the order that was made by the trial Magistrate:

"Application by accused considered together with statements of prosecutor. Accused says he wishes to cross examine P.W.1. further. He also says he is unwell. Prosecutor has objected to the application as accused has not produced treatment notes and that he had sufficient time to cross examine the witness. Application to reexamine PW1 is disallowed as the same has no legal basis as the witness already been reexamined. Accused also sought adjournment on the ground that he is unwell but no treatment notes were produced by him. He later changed and said he did not carry his statements. The witness testimony today is a formal one who does not record statements. It is clear from the foregoing that accused is trying to delay the case to proceed in the interest of justice."

Article 50 (2) (k) of the Constitution of Kenya, 2010 provides that:

"Every accused person has the right to a fair trial, which includes the right-

(k) to adduce and challenge evidence."

23. Section 150 Criminal Procedure Code on "Power to summon witnesses, or examine person present" provides as follows:

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution



or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

24. Considering the place and importance of cross-examination in a criminal trial this is what we said in the case of *Moses Ngichu Kariuki v Republic* [2009] eKLR:

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. In our view, denial to cross-examine means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in section

77 in that the entire provision entitles the provisions to secure protection of the law. Clearly, the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant”.

25. The predecessor of this court had dealt with the same issue in the case of *Juma Ali v Republic* [1964] EA 461 referring to section 151 of the *Tanzania Criminal Procedure Code* which is similar to section 150 of the (Kenya) *Criminal Procedure Code* where it was held:

“Under the first part of section 151, the court has a general discretionary power to call and to recall witnesses, a power which must be exercised judicially and reasonably, and not in a way likely to cause prejudice to the accused. Under the second part of the section, once the court forms an opinion that certain evidence is essential to the just decision of the case, the court is under a duty to call a witness or witnesses to give that evidence, whatever its effect is likely to be.”

26. The proceedings that we have reproduced show clearly that the appellant applied for adjournment on three grounds namely – that he was unwell; that he was not prepared to proceed with the hearing as he had not carried witness statements to court and finally, as emerges from the order made by the Magistrate, he required to cross-examine Odera further. We note that the appellant had not been released on bail but conducted the case while in custody and was unrepresented during the trial. He applied to cross-examine Odera further. The prosecutor did not say that there would be any difficulty in procuring Odera’s attendance for further cross-examination. The appellant had no duty to prove that he was unwell – his medical condition could have easily been established if he had been referred for medical treatment. The appellant further stated that he had not brought witness statements to court. The trial Magistrate held that the remaining witnesses were formal ones. We see no distinction between formal or other witnesses – an accused person is entitled to have witness statements throughout the trial to be able to be fully equipped to defend himself against allegations made against him in the charge. The trial proceeded fairly speedily and no prejudice would have been occasioned if an adjournment had been granted to allow the appellant to be prepared to proceed with the hearing after getting medical attention for the illness he claimed he was suffering from. The prosecutor did not state any difficulty in procuring the attendance of Odera for further cross-examination. All in all we find that there was no good reason given why the appellant’s applications for adjournment were refused and we find that the trial was conducted in a manner that violated the appellant’s fair hearing rights which was against rights donated to him by the *Constitution*.

27. Then there is the last complaint relating to the framing of the charge sheet.



28. It is submitted for the appellant that he was charged under section 295 as read with section 296 (2) of the Penal Code which, according to the appellant, made the charge duplex. The appellant relies on this court’s decision in the case of *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR where this court examined the said provisions (Sections 295 and 296(1) and (2) of the Penal Code) and this is what the court stated on framing of a charge on robbery with violence:

“Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this court in various cases before us; the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge.”

29. The appellant’s submission that the charge as framed was duplex is true. He was charged with robbery with violence under section 295 as read with section 296 (2) of the Penal Code which was wrong.

Having found on the main issue – that there was a violation of the appellant’s fair trial rights what is the final order to be made? This court in *Mark Wanjala Wanyama (supra)* where the appellant in that case was not produced in court within the time required in law held that:

“... we think constitutional rights were violated and, much as we are completely unhappy with his alleged actions that landed him in court, he nonetheless is entitled to his liberty...”

30. The conviction was quashed and sentence was set aside.

31. Likewise in this appeal we deprecate the actions of the appellant who robbed Odera and which landed him in court. But in view of violation of fair trial rights the conviction cannot stand. The same is hereby quashed and we set aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

