William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) (21 January 2022) (Judgment)

Neutral citation: [2022] KECA 23 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 49 OF 2020

A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA

JANUARY 21, 2022

BETWEEN

WILLIAM OONGO ARUNDA (HITHERTO REFERRED TO AS PATRICK ODUOR OCHIENG) ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (A. Ongeri, J.) delivered on 7th March 2017 in High Court Criminal Appeal No. 13 of 2016)

JUDGMENT

1. The appellant, William Oongo Arunda, who has hitherto been referred to as Patrick Oduor Ochieng despite amendment to the charge sheet, was alongside Nicodemus Mutunga Mulatya (Mutunga) charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars of the charge were that on 15th November 2014 along Wenje-Garsen road in Tana River sub county within Tana River County jointly robbed Kioko Muasya of motorcycle registration number KMDB 338 U, Make Bajaj Boxer, a mobile phone make Nokia 112 and cash, Kshs.2,500, all valued at Kshs.99,500 and immediately before or immediately after the time of robbery wounded the said Kioko Muasya. They both faced an alternative charge of handling stolen property.

2. The appellant, and Mutunga, were tried before the Senior Resident Magistrate#s court at Hola and convicted for the offence of robbery with violence in the judgement delivered on 20th January 2016. They were each sentenced to death. Their appeal before the High Court at Garsen (A. Ongeri, J.) was dismissed in a judgement delivered on 7th March 2017 whereupon the appellant lodged this second appeal.

3. The facts are as follows: Felix Minda Mweke (PW1), the owner of motorcycle registration number KMDB 338 U, Make Bajaj Boxer, employed Kioko Muasya (PW2) to operate it as a Boda Boda. On

15th November 2014, Kioko Muasya was going about his usual business and was positioned at Hola stage waiting for passengers. He was approached by two men, who he later identified as the appellant and Mutunga. They wanted to be ferried to a place known as Wenje. They had a small green bag. The appellant asked PW2 what his name was. On learning that PW2 is Kamba, the appellant pointed out to him that Mutunga was also Kamba. PW2 conversed with Mutunga in their language. They negotiated the fare for transporting them to Wenje which was agreed at Kshs.800.00. Kshs.500 was paid. The balance of Kshs.300.00 was to be paid later. The motorcycle was fuelled. Mutunga sat in the middle. They embarked on the journey. At Wenje, they asked PW2 to take them towards a pillar. At PW2#s request, they agreed to pay an additional Kshs.200.00. PW2 took them there, where, PW2 explained, he was hit on the head. At that point, Mutunga had alighted and was standing next to him while the appellant had not yet alighted.

4. On being hit, PW2 lost consciousness. When he regained consciousness, his motorcycle was nowhere to be seen. Neither were his passengers. Kshs. 2,500.00 which PW2 had on him as well as his Nokia 112 phone had also disappeared. He screamed for help. Three good samaritans came to his aid. He explained to them what had happened. He gave them the registration number of his motorcycle. The good samaritans made phone calls and escorted him to Wenje Dispensary from where he was then taken to Hola Hospital for treatment. He was later called by police to identify a motorcycle which had been recovered. He identified it as his.

5. Charo Jufa (PW7) a clinical officer at Hola District Hospital produced treatment notes in respect of PW2 which showed that he (PW2) had sustained three cuts, one behind the head and two on the side and an injury to the eye. He classified the degree of injury as maim. He produced the P3 form.

6. Omar Barisa Abdalla (PW4) and Mohamed Kombo (PW5), both Boda Boda motorcycle operators, were on 15th November 2014 waiting for passengers at a place known as Mnazini when they received a call with a request to lookout for motorcycle had been stolen "around Wenje" and that "the cyclist was injured." While there, they saw a person, who they later identified as the appellant, carrying a jerry can looking for petrol. Mohamed Kombo (PW5) enquired from him where the motorcycle was, and the appellant responded that it was at the main road. They directed him where to get petrol. They became suspicious of him. They volunteered to escort him to where he said the motorcycle was. In the words of Mohamed Kombo (PW5):

> "We suspected him with the motorcycle theft. We planned to offer him a lift. I took my motorcycle and took a passenger. We carried him in the middle. The other rider and passenger went ahead of us. He asked us we were heading we told him we were going to the junction. The accused called out Mutunga when we reached the bushes. The second accused alighted and walked to the bushes. The rider ahead of me was Barissa. The first accused had a motorcycle. He did not come out of the bush when he was called out. We asked them to surrender. They threw everything and started running. The motorcycle stolen was in the bush not on the road. There was a green bag on the motorcycle. When they ran way we gave chase and managed to arrest them. We were six people."

PW4 and PW5 stated that on arresting them, they questioned them about the motorcycle and thereafter made a call to the police.

7. Administration Police Constable Stephen Rotich (PW3) was on 15th November 2014 at his place of work at Mnarani Administration Police Post when he received a report of theft of the motorcycle and the arrest of the suspects. He proceeded to the scene and rearrested the suspects, took them to the station and communicated with Hola Police. Also at the scene was the motorcycle registration KMDB 838U, a bag which had phones, a „bob# and a knife.

8. Police constable Francis Muthui (PW6) of Hola Police Station was on 15th November 2014 instructed by the officer commanding station to go to Mnazini to pick suspects who had been arrested in connection with theft of a motorcycle at Wenje. Accompanied by another officer, they went to Mnazini where they found the appellant and his co accused, motorcycle registration KMDB 838U, a bag which contained a pen knife, try square, plumb line, and a phone. They interrogated the witnesses and recorded their statements and subsequently charged the appellant and his co accused with the offence of robbery with violence and an alternative charge of handling stolen property. He produced as exhibits, documents of ownership of the motorcycle, the bag recovered and its contents, and the motorcycle registration KMDB 838U.

9. In his unsworn defence, the appellant, who maintained that his name is William Oongo Arunda, stated that he resides in Malindi and works as a panel beater; that on 15th November 2014 he was to travel to Kotile, Tana River, at the invitation of a customer who required a motor vehicle repaired. He had never been to Kotile before; that he boarded a bus at Malindi and was to alight at Mnazini from where he was to seek directions to Kotile; that on alighting from the vehicle at Mnazini, he saw about 10 men who went to where he was sitting; they addressed him by the name Patrick Oduor Ochieng but he did not respond as that is not his name; that a person said, "ni huyo! Huyo!" refering to him; that he was then surrounded and assaulted; that his wallet which contained his National Identity Card was taken from him; that fearing for his life, he requested to be taken to a safe place and was taken to the AP Camp within the area; that he was joined there by another man he did not know and together they were locked up in the cells; that police then arrived and took them to Hola Police Station where they were placed in the cells before being charged with the offences of which he knew nothing.

10. The trial court was satisfied that the prosecution had established its case to the required standard and convicted the appellant as well as the co-accused for the offence of robbery with violence. In doing so, the learned trial magistrate stated:

> " PW4 and PW5 provided corroborative evidence which connects and confirms in material particulars that the accused committed the crime. The complainant has identified his mobile phone which he lost together with the motorcycle. The same was recovered from the accused. The identification of each one of the accused is watertight and free from any possibility of error. The offence took place in broad day light and there can have been no mistaken identity. I do find the prosecution witnesses credible and trustworthy."

11. In upholding the conviction, the learned Judge of the High Court expressed that the doctrine of recent possession of stolen goods was properly invoked; that the decision of the trial court was well supported by the evidence; and that the ingredients of the offence of robbery with violence were proved.

12. The appellant is aggrieved and has lodged this second appeal complaining that the offence of robbery with violence was not proved to the required standard; that the doctrine of recent possession did not pass muster; that the charge sheet was defective; that the appellant#s right to fair trial under Article 50 of the Constitution was violated as he was not accorded legal representation; and that the death sentence imposed is unconstitutional, extremely punitive, harsh, and excessive.

13. Urging the appeal before us, learned counsel Miss. Aoko submitted that the identity of the appellant was not established despite his complaint about his name from the onset; that PW2 did not say who assaulted him; that no identification parade was conducted; that because there were gaps in identification the conviction was not safe; and that the charge sheet is defective as it does not reasonably describe the appellant.

14. On recent possession, counsel referred to the High Court decision in Arum vs. R [2006] eKLR and submitted that the four ingredients necessary for the doctrine of recent possession to apply were not met in this case; that the motorcycle and the phone were not found in his possession, and neither was the ownership of the phone established.

15. As regards sentence, counsel referred to the Judiciary Sentencing Policy Guidelines and the decision of this Court in the case of *Bernard Kimani Gacheru vs. Republic [2002] eKLR* and the Supreme Court decision in *Francis Kariokor Muruatetu vs. Republic SCK Petition No. 15 and 16 of 2015 [2017] eKLR* and submitted that sentencing is a matter that lies in the discretion of the court; that the sentence meted out in this case is not proportional having regard to the circumstances where the injury was minimal and no disability resulted and the property was recovered and restored to the owners and no sentence hearing was conducted.

16. Counsel submitted further that the appellant was denied legal representation by the trial court and his right to fair trial was thereby violated; that the appellant was not informed of his right to legal representation, and neither was he assigned an advocate despite the seriousness of the charge he was facing. The case of David Macharia vs. Republic Cr. Appeal No. 497 of 2007 was cited for the argument that where substantial injustice would result, persons accused of capital offences where the penalty is loss of life, have a right to legal representation at state expense. The case of Francis Karioko Muruatetu & another vs. Republic [2017] eKLR was also cited in support of the argument that the right to fair trial, of which the right to legal representation is a component, is inalienable. The same case was cited for the argument that mandatory death sentence is unconstitutional.

17. Opposing the appeal Mr. Jami Yamina, learned counsel for the respondent submitted that the appellant and his co accused were positively identified as the persons who injured PW2 and robbed him of the motorcycle; that the learned Judge of the High Court properly reviewed and analysed the evidence and properly concluded that the doctrine of recent possession was properly invoked, and identification was proper. It was submitted that there are concurrent findings by the trial court and the High Court that the offence was proved to the required standard and all the ingredients of the offence established and there is no basis for this Court to interfere with the conviction.

18. As regards the appellant#s name, it was submitted that the appellant pointed out to the trial court that his name is not Patrick Oduor; that the prosecution pointed out that it is the appellant who had supplied that name and applied for amendment of the charge sheet which was allowed by the trial court despite which the proceedings have erroneously continued to reflect the name Patrick Oduor Ochieng. It was submitted the issue of the name is an administrative error by the court which does not affect the proceedings and that the clerks ought to have amended the name on the court file after the charge sheet was amended.

19. On legal representation, it was submitted that although the appellant was not informed of his right in that regard, no prejudice was occasioned as the appellant actively participated in the trial; that in any case the provisions of the *Legal Aid Act* came into operation on 10th May 2016 after the appellant#s trial had been concluded on 20th January 2016. Counsel referred to the Supreme Court decision of *Republic vs. Karisa Chengo & 2 others, SCK Petition No. 5 of 2015[2017] eKLR* where that Court gave guidelines and the circumstances to be considered in determining whether substantial injustice has resulted from lack of legal representation; that whether substantial injustice has occurred is a matter for determination on a case-to-case basis.

20. On sentence, it was submitted that the Supreme Court has since clarified in its Directions of the Court in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR, that its decision is not authority for stating that all provisions of the law prescribing

mandatory or minimum sentences are outlawed. Counsel submitted that this Court cannot ignore that decision as it is part and parcel of the judgment in that case; that the clarification was necessitated by public interest; that in R*aila A Odinga & another vs. IEBC [2017] eKLR*, the Supreme Court addressed the question of its jurisdiction to clarify ambiguity of a decision it had rendered and that it found it could do so in public interest. The case of *Standard Chartered and another vs. Manchester Outfitters [2014] eKLR* was also cited.

21. We have considered the appeal and the submissions. The issues for the determination are: Whether the offence of robbery with violence was proved to the required standard. In that regard there is the question whether the doctrine of recent possession was properly invoked and whether the appellant#s right to legal representation was violated. Third, whether this Court should interfere with the sentence meted out.

22. We start with the question whether the doctrine of recent possession was properly invoked. As regards the circumstances under which the doctrine of recent possession may apply, in *Athuman Salim Athuman vs. Republic [2016] eKLR*, thisCourt held that:

> " The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how be came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See MALINGI V. REPUBLIC (1989) KLR 225 H.C and HASSAN V. REPUBLIC (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA V. REPUBLIC, CR. APP. NO. 272 of 2005, where this Court stated:
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> > "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 the 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. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."

23. The question therefore is whether the ingredients of the doctrine of recent possession were satisfied in this case. It was established that motorcycle KMDB 338 U was owned by Felix Minda Mweke (PW1). The logbook, purchase agreement, invoice and sale agreement in that regard were produced in evidence. At the material time, that motorcycle was under the control of his employee, Kioko Muasya (PW2) who was operating it as a Boda Boda. PW2 was attacked whilst ferrying passengers and lost consciousness and on regaining consciousness the motorcycle, his phone and cash, were missing. He raised alarm. Omar Barisa Abdalla and Mohamed Kombo (PW4 and 5) also Boda Boda operators, were amongst those on the lookout for the stolen motorcycle. They assisted the appellant in getting fuel and he then led them to where the appellant#s co accused was and where the motorcycle was hidden in the bush. The appellant and his co accused then attempted to run away and were apprehended. APC Stephen Rotich (PW3) who re-arrested the appellant and his co-accused corroborated the evidence of PW4 and 5. He found the appellant and his co accused had been restrained; that they had the stolen motorcycle as well as a bag which had, among other things, PW2#s phone, a Nokia 112, which he identified as his and which was produced in evidence.

24. It is also noteworthy, that when the alternative charge of handling stolen property was read out to the appellant and his co-accused in court on 19th November 2014, the appellant#s co accused is reported to

have stated that "even though I was found in possession of the properties in question, I did not know they had been stolen" while the appellant stated that, "I did not know that the things in question were stolen." The appellant, and his co-accused, did not offer any explanation how they came into possession of the stolen property. See *Daniel Mugo Kimunge vs. Republic [2015] eKLR*.

25. There is no question therefore that the motorcycle and the phone were found with the appellant and his co-accused; that the motorcycle was positively identified to be the property of PW1 while the phone was identified to be the property of PW2 and were stolen from PW2; and that the property was recently stolen having been recovered within hours of having been stolen. As stated by the Supreme Court of Uganda in *Bogere Moses & Another vs. Uganda, Cr. App. No. 1 of 1997* that:

> " It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness."

26. Moreover, the evidence of recent possession presented corroborated the evidence of identification of the appellant and his co-accused by PW2. There is no merit therefore in the complaint that the High Court and the trial Court improperly invoked the doctrine of recent possession.

27. Next is the question of whether the appellant#s right to fair trial was violated as he was not accorded legal representation. Article 50(2)(g) of the *Constitution* provides that every accused person has the right to fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly. Under Article 50(2)(h) of the Constitution the right to a fair trial, also includes the right...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 *David Njoroge Macharia vs. Republic [2011] eKLR*, this Courtstated that:

> " Under the new Constitution, 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, 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."

28. In Republic vs Karisa Chengo and 2 others [2017] eKLR, the Supreme Court expressed 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 but 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". The Supreme Court went on to say that the right to legal representation is not limited to cases where the accused person is charged with a capital offence; that the operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result...." and that "the protection embedded in Article 50 (2) (h) goes beyond capital offence trials". The Supreme Court then went on to say that:

> " ...it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, 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:
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> (i) the seriousness of the offence;
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> (ii) the severity of the sentence;
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> (iii) the ability of the accused person to pay for his own legal representation;
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> (iv) whether the accused is a minor;
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> (v) the literacy of the accused;
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> (vi) the complexity of the charge against the accused;"

29. It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. The Constitution demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court, from the way the appellant cross examined the prosecution witnesses and from his general conduct during the trial, it is not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2)(g) and 50(2)(h) of the Constitution. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we are satisfied that the conviction is well founded, and we have no basis for interfering with the same.

30. As regard sentence, and as already noted, on 6th July 2021 the Supreme Court in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) directed that the judgment of the Court in that case cannot be the basis for stating that all provisions of the law prescribing mandatory or minimum sentences are unlawful. The implication thereof is that upon conviction, courts must pass the mandatory sentences that are prescribed. We are therefore unable to interfere with the sentence meted out by the trial court and upheld by the High Court in this matter.

31. The result of the foregoing is that this appeal fails and therefore dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR