IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 38 OF 2018

BETWEEN

KENNEDY HAMISI ISIGOLI.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Mombasa

(Ongeri, J.) dated 11th January, 2017 **in H.C.CR.A No. 148 of 2014)**

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JUDGMENT OF THE COURT

1. **Kennedy Hamisi Isigoli** (hereinafter the appellant) was arraigned before the Chief Magistrate's Court at Mombasa on 15th August, 2011 to answer two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. Subsequently another count of assault causing actual bodily harm contrary to **section 251** of the penal code was added.

2. He denied all the charges and the matter went to full hearing with the prosecution calling a total of five witnesses. At the conclusion of the trial before the trial magistrate, which was characterised by unusual inexorable and intransigent display of unruliness and rudeness by the appellant culminating in his defiantly walking out of the court room at one point. He was found guilty, convicted and sentenced to death.

3. He appealed against conviction and sentence before the High court on grounds that he was not availed services of an interpreter (he did not say into which language); his identification was not proper in that no description of the suspect was given to those who arrested him; that those who arrested him were not called as witnesses; and finally that section 200 Criminal Procedure Code had not been complied with. These grounds were later amended and the ground on interpretation appears to have been dropped and one concerning glaring contradictions and inconsistencies was added. The appellant also filed written submissions for the court's consideration.

4. The High Court (**A. Ongeri, J**) heard the appeal and dismissed it giving the following reasons;

> ***(i) The Appellant applied to recall PW1 and PW2 but this could not be done as the two witnesses had left the country. It was not possible for the trial court to comply with section 200 of the criminal procedure code.***
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> ***(ii) The incident took place in broad daylight at 21:20 p.m. and the Appellant was positively identified by both complainants and PW3 who arrested the Appellant.***
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> ***(iii) The Appellant was arrested shortly after the incident and most of the stolen property was recovered.***
>
> ***(iv) The evidence against the Appellant is water tight. The Appellant did not raise any defence.***

5. Being aggrieved by the said judgment the appellant moved to this Court basically raising the same grounds he had raised in his first appeal.

However, his counsel on record **Mr. Wamotsa** later on 6th December, 2018 filed supplementary grounds of appeal which can be summarised as follows:

a. The trial court did not inform the appellant of his right to legal representation pursuant to Article 50 2(g) of the Constitution;

b. The charge was not signed by a qualified person within the meaning of Article 157(6) and (9) of the Constitution and s.85 of the Criminal Procedure Code;

c. The trial court did not comply with the mandatory provisions of S. 214 (1)(ii) of the Criminal Procedure Code which requires the Court to inform the appellant of his right to recall witnesses to testify afresh or be further cross examined by the appellant on the amended charge, a right going to the root of a fair trial;

d. The trial court failed to consider whether the amendment would prejudice the appellant especially where the appellant was unrepresented.

e. A denial by the two courts below of the appellant's rights to recall the witnesses on the ground that the witnesses could not be traced violated the appellant's right to a fair trial in the circumstances;

f. The concurrent findings of the two courts below breached the appellant's constitutional right to a fair trial and to a lesser sentence;

g. Both courts failed to consider the appellant's grounds for mitigation and leniency;

6. **Mr. Wamotsa** also filed written submissions dated 13th February, 2019 expounding on the above grounds. When the matter came up for plenary hearing before us, learned counsel said he would entirely rely on his submissions and list of authorities which we must say were very detailed and on point. We shall revert to the submissions later.

7. In the meantime, a recapitulation of the evidence before the trial court is necessary in order to contextualise this appeal. Sarah Hargin (complainant-PW1) and Dorcas Margauy (2nd complainant-PW2) both French nationals on vacation in Kenya, were on the fateful afternoon of 12th August, 2011 at around 12.20 pm walking to Royal Beach Hotel when a person armed with a knife accosted them from behind demanding for their bags and threatened to kill PW1 in the event that they failed to comply. The complainants complied and the robber, who they later identified as the appellant, made off with their bags. In the meantime, the complainants screamed for help and this prompted the people who were nearby to run after the suspect who fled and scaled a perimeter wall surrounding the Reef Hotel (the Hotel) and was seen escaping into a bush.

8. Stanshis Munkai Kasihili (PW4) who is an employee at the Hotel received a distress call at around 1.30 pm from a guard at the beach area of a thief who had been chased from Link Road had since climbed up a tree and jumped on the roof of the Hotel building. PW4 went to the side of the hotel wall to find an armed mob struggling to climb up the wall. He stopped the mob and climbed up the roof where he found the appellant at a corner covered from waist upwards with thatches. PW4 grabbed the appellant by his legs, pulled him down and managed to prevail upon him to climb down. A growing mob lingered below the roof baying for the appellant and hence his refusal to climb down. The appellant made a hole in the roof of thatches being his only gateway and fell into one of the hotel's meeting rooms.

9. PW4 climbed down from the roof and found the guard barricading the appellant from escaping and warned PW4 that the appellant was armed with a metal. The appellant immediately and at full speed ran through the barricaded door and hit PW4 at the back of his head rendering him unconscious. The last PW4 recalled seeing was the mob descending upon the appellant with beatings. This attack on PW4 formed the basis of count No.3 in the amended charge sheet.

10. Police Constable Benjamin Kithii (PW3) arrived at the scene after receiving a report of robbery with violence and found the appellant locked in a room bleeding. PW3 in the company of Sergent Kiilu and Investigating Officer, Corporal Makumbo (PW6) intervened in record time before the mob had their way with appellant. The appellant led the police officers to a bush where the stolen items were recovered together with the knife and the appellant's clothes. Amongst the items recovered belonging to PW1 were a Nikon camera, a towel, gloves, water bottle, tissue paper, a bag and cash worth Kshs. 632 while PW2 recovered a Samsung camera, USB card, MP3, kanga (lesso), bikini, sun cream, VISA and credit cards, necklace, purse, one bag and cash worth Ksh.12,080. All the stolen items were recovered save for PW2's necklace and cash worth Kshs.700 as listed in the charge sheet. The appellant was then escorted to the police station where he was charged with the offences stated earlier.

11. When the appellant appeared in court for plea taking, he denied all the charges. The prosecutor applied for a priority hearing as the complainants were scheduled to travel back home on 28th August, 2011.The matter was fixed for hearing on 25th August. It is noted from the record that the appellant did not object to the hearing date. Three witnesses testified on that date. The appellant had no cross examination for the 1st complainant but when he said he had no questions after PW2 testified, the court reminded him of the seriousness of the charges facing him, the gravity of the sentence and the fact that after they were released by the court, they would not be available thereafter for re-calling.

12. That notwithstanding, the appellant said he had no questions for the witnesses. He did not also object to the release of the exhibits to the complainants. The matter was then adjourned to 10th November, 2011 but on that, the appellant applied for an adjournment on grounds that he had not been supplied with witness statements. The court directed that he be supplied with the statements as requested.

13. Three months later when the matter came up for hearing, the appellant said he wanted the witnesses recalled for purposes of 'further cross examination', a request that was denied given the fact that the witnesses he wanted recalled were already out of reach. He then applied that the matter be transferred to another court. No reasons appear to have been proffered by the appellant but the trial magistrate acceded and had the case transferred to another magistrate. The appellant renewed his application for the witnesses to be recalled and when his application was denied, he sought leave to appeal. Leave to appeal was granted. The matter dragged in court for almost 2 years with the appellant insisting that he wanted the matter to start afresh. He did not avail any evidence to court to show that he had filed any appeal against the

order denying him recall of the witnesses.

14. On 4th September, 2014 when the trial magistrate refused to adjourn the matter further, the appellant is said to have become unruly, and when ordered by the trial magistrate to sit down, he just looked at her, opened the door to the holding cells and walked out. Left with no other option, the court proceeded with the matter in the absence of the appellant as provided by law. The appellant also walked out again on the dates the doctor and the investigating officer testified.

15. At the close of the prosecution case, the appellant was placed onto his defence. He opted to make an unsworn statement and said he had no witnesses to call. The matter was adjourned for defence hearing but the appellant appears to have changed his mind and said he would remain silent and await the judgement. As stated earlier, he was convicted and sentenced to death in respect of count 1. Sentences in counts 2and 3 were left in abeyance. His appeal to the high court was unsuccessful.

16. In his written submissions, **Mr Wamotsa** leveraged on Article 50 (2) of the Constitution saying that failure to accord legal representation to the appellant violated his constitutional right to fair trial and the trial was consequently a nullity. On noncompliance with Section 214 of the Criminal Procedure Code, Mr Wamotsa submitted that the appellant had a right to recall the witnesses after amendment of the charge. He also impugned the death sentence and urged us to interfere with the same should the appeal against conviction fail.

17. Opposing the appeal, **Mr. Japheth Isaboke**, the senior counsel for the State submitted that Article 50 (2) (h) was not couched in mandatory terms as it is not the duty of the court to provide counsel. According to counsel, the accused has a duty to appoint counsel or apply to court if he encounters difficulties in appointing one. On the issue of failure to recall witnesses after amendment of the charge sheet and after the matter was transferred to another magistrate, Mr Isaboke submitted that the appellant had deliberately failed to cross examine the witnesses knowing very well that they would not be available later for recall. Furthermore, the appellant had been granted leave by the court to appeal that decision yet he failed to appeal. He posited that the appellant omitted to do what he was supposed to do just to turn around and blame the court for violating his rights. He urged us not to interfere with both conviction and sentence saying the appellant deserved maximum sentence.

18. Mr. Wamotsa in rebuttal concluded that it was the duty of the Court to comply with Article 50 since the subject charge involved a capital offence and it was up to the court to inform the appellant that he required an advocate. He was not informed of that right before the first appellate court either. He therefore urged that the appeal be allowed.

19. We have considered these submissions along with the grounds of appeal, the entire record and the law which was very comprehensively articulated by Mr. Wamotsa. We are alive to the fact that this is a second appeal and only issues of law fall for our determination by dint of Section 361(1) of the Criminal Procedure Code. See **M'Riungu v. Republic [1983] KLR 455** where we stated that on second appeal, the guiding principle is that the Court will normally not interfere with the decision of the first appellate court unless it is apparent from the evidence on record, that no reasonable tribunal could have reached that conclusion. Additionally, this court is beholden to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial. This Court in the case of **Thiaka v Republic [2006] 2 EA 326** reiterated this principle and expressed itself in the following terms:-

> ***"… [this Court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."***

It is with this in mind that we must determine the issues raised in this appeal. We note however that the issues raised herein revolve around points of law. We shall now deal with the grounds of appeal *vis a vis* the submissions and the law as we understand it.

20. On ground No.2, we note that the issue ought to have been raised at the High court. There are also no submissions made on the same and we can only presume that it was abandoned. Moreover, a cursory look at the charge sheet does not reveal who signed the charge sheet and whether he/she was authorized to do so. Nothing therefore turns on that ground. Addressing a similar situation this Court in **John Kariuki Gikonyo v Republic [2019] eKLR** that;

> ***"The question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:***
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> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."*** (Emphasis added).

21. On Compliance with Section 214(1) (ii) C.P.C we note that the amendment in this case was in respect of count 3, which had nothing whatsoever to do with PW1 and PW2 who the appellant wanted recalled. There was no prejudice at all occasioned to the appellant. That ground therefore fails.

22. This leaves us with the main ground of appeal on the right to legal representation. We must say that this is not a novel issue and this Court has been called upon to address it on several occasions. Is right to legal representation as enshrined in Article 50(2) h automatic? Is it

inderogable? We shall address that shortly.

23. One vital component of a fair trial is the right to legal representation. This Court while considering the importance of legal representation in ***David Njoroge Macharia -vs- Republic*** ***[2011] eKLR*** expressed itself as herein under:-

> ***"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:***
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> > ***"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""***

24. The centrality of that right saw its inclusion in ***Article 50 (2)*** of the current Constitution under two distinct facets as follows;

> ***"(2) Every accused person has the right to a fair trial, which includes the right –***
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> ***…….***
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> ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(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."***

It is worthy of note that the Macharia case (supra), like the present case was tried in the first instance before the enactment of the Legal Aid Act, an Act of Parliament enacted to effectuate Article 52(2)h of the Constitution. Had it been heard after commencement of the Legal Aid Act, the appellant would have been availed legal counsel at state expense without much fuss.

As things stand now, the appellant can only call in aid Article 50(2)h of the constitution. Did the said article entitle him to automatic legal representation at state expense? We don't think so. The said Article qualifies the right by requiring existence of likelihood of substantial injustice being occasioned. In considering whether substantial injustice would result, the trial court would definitely need to look at several factors.

25. This court has pronounced before that the issue of state funded legal aid only applies at the trial court level. In ***Isaiah Maroo -vs-Republic*** ***[2015] eKLR*** this Court discussed the issue of right to legal representation at length as set out herein below:-

> ***"Does the right to legal representation which we have treated*** *(sic)* ***above apply to appeals" We think not.***
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> ***Beginning with the constitutional text itself, it is quite plain that the right to State funded legal representation is available to "every accused person." Indeed, it is one of nearly a score safeguards to a fair trial during which all care must be taken to ensure that the process of adjudicating on whether an accused person is guilty of that which he is charged with is fair, open, transparent, timely, efficient and devoid of prejudice. The entire process presupposes the accused person's innocence until the court should find otherwise on the basis of evidence tendered by the prosecution to the appropriate standard in discharge of a duty peculiarly its own.***
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> ***We do not apprehend that the entire corpus of the elements of a fair trial applies wholesale to an appeal. Once a person has been convicted, on a trial fairly and properly conducted, he no longer enjoys that all-important presumption of innocence. The presumption that sets in is one of legitimacy of his conviction and sentence so long as it was imposed by a court of competent jurisdiction. The fair trial rights enumerated in Article 50 (2) (a) to (p) do not and cannot apply to his situation without leading to an absurdity. In fact, the only application of Article 50 (2) to an appeal is in (q) which provides that an accused person has the right;***
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> ***'if convicted, to appeal to, or apply for review by a higher court as prescribed by law.'***
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> ***It is for precisely this change of status that, for instance, release on bond or bail, which is a right that an arrested person has pending charge or trial and which he enjoys automatically unless compelling reasons dictate otherwise under Article 49 (1) (h), becomes available to a convicted person only under unusual or exceptional circumstances. See, Jivraj Shah –vs Republic [1986] KLR 605; Somo -vs- Republic [1972] EA 476 and Munjia Muchubu -vs- Republic [2014] e KLR…..The considerations that obtain and the position an accused person is placed at in the eyes of the law are totally different after the trial. In the latter case the law is highly solicitous of the position of an accused person, anxious to ensure he receives a fair trial, hence the extra safe guards including State-funded legal representation. In contrast, appeals and other consequential proceedings have a voluntary or elective character at the instance of the appellant. In a jurisdiction where even provision of State-funded legal representation at trial is yet to materialize, it seems to us overly ambitious for the appellant to seek to upset the judgment of the High Court on***

account of his not having been provided an advocate to represent him in his first appeal." (Emphasis added).

26. This Court has also held that as the right is not automatic, unless in very obvious cases, it is upon the accused person to request for legal aid where he/she feels that substantial injustice will result. We analysed in detail the goings on in the trial court. Here was an accused person who in spite of being reminded by the court that the charge he was facing was serious decided to walk out on the court. His conduct was not that of a person who needed advice or any other form of assistance from the court. Further as appreciated in **Maroo vs Republic** (supra) free state funded legal representation had not materialized before the enactment of the Legal Aid Act. The only legal aid that was available was for murder suspects both at the High Court and Court of appeal level. It is highly doubtful, from a practicability perspective, that a magistrate court could order free legal representation for suspects appearing before those courts when there was no laid out structure, or policy within which such aid could have been availed. Our conclusion on this issue is that right to legal representation for an accused person even with the coming into force of the Legal Aid Act is not inderogable and is dependent on several factors as was clearly set out by the Supreme Court in **Petition No. 5 of 2015 Republic v Karisa Chengo & 2 others [2017] eKLR,** where the Court observed "***the Legal Aid Act indeed has not defined the term 'substantial injustice' and consequently for one to know who would be entitled to legal representation at the expense of the State, one would have to draw inferences from the various provisions of the Act that relate to grant of legal aid. The courts would therefore need to consider provisions of Section 36 which stipulates the persons entitled to legal aid.***

The Supreme Court further observed that;

> ***[94] "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;"***

This list not being conclusive, we would add another criterion to the list to the effect that the conduct of the accused person should also be a factor for consideration. Where an accused person makes it impossible for the court to hear his case and he goes ahead to even exclude himself from the proceedings by literally walking out of the courtroom, would he turn around and claim that the court owed him a duty to provide him with free legal aid? That ground of appeal also fails.

27. Like the two courts below, we are satisfied that the appellant was properly identified as the person who robbed the complainants in broad daylight; was chased by members of public and arrested while trying to hide himself on the makuti rooftop and he led the police officers and others to the bushes where he had hidden the stolen items. The evidence against him was simply overwhelming. His appeal against conviction fails.

28. On the issue of sentence, we are in agreement that the appellant should benefit from the Supreme Court's finding in **Francis Karioko Muruatetu Vs R [2017] eKLR** which decreed the mandatory aspect of the death sentence unconstitutional. In mitigation on behalf of the appellant, Mr Wamotsa submitted that appellant was a first offender; is remorseful; did not injure the complainants; was assaulted by members of public during his arrest and has undergone rehabilitation while in prison and is now of good character. He entreated the Court to reduce the sentence to the term already served.

29. On his part however, Mr Isaboke urged us to retain the maximum sentence saying robbers who have the temerity to commit robberies in broad daylight deserve no mercy. He also decried the impact of such actions on tourism in the country. We have considered these sentiments carefully and come to a conclusion that we should set aside the death sentence which we hereby do. We substitute therefor a sentence of 20 years imprisonment on counts 1 and 2. On count 3 we sentence the appellant to 2 years imprisonment. Sentences to run concurrently from the date of conviction by the trial court.

Dated and delivered at Malindi this 20th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR