



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KANTAL, JJA)

CRIMINAL APPEAL NO. 124 OF 2015

BETWEEN

MOHAMMED ABDULLAHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garissa (Muchemi & Mutuku JJ.) delivered on 18th April, 2014

in

Criminal Appeal No. 49 of 2013.)

JUDGMENT OF THE COURT

1. The appellant has preferred this second appeal against his conviction for the offence of robbery with violence. As far as this appeal is concerned, this Court has no jurisdiction to entertain matters of fact, by dint of **Section 361 (1) (a)** of the **Criminal Procedure Code**. In **Karani vs. R [2010] 1 KLR 73**, this Court succinctly pronounced its mandate on second appeal 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.”

2. In brief, the facts culminating in this appeal were that on 19th June, 2013 at 7 a.m., **Ojulu Odami** (PW1) was on his way home and along the way, he saw a woman known as **Nelly Ntaua** (PW 2) walking ahead of him. PW 2 was then stopped by the appellant, with whom she seemed to converse. When PW 1 was about to pass them, the appellant suddenly grabbed PW 1 by the collar and produced a metal bar from his waist, with which he stabbed PW 1. He then demanded for PW 1’s mobile phone, all the while ransacking PW 1’s pockets.

3. On finding the phone, he took it and ran off. Incensed, PW 1 picked up a stick and went after the appellant. Meanwhile, PW 2 went and alerted neighbours, among them **Othow Omoth** (PW 3) of the incident and they too gave chase. They managed to apprehend the appellant. In a bid to establish the truth of the matter, PW 3 rang PW 1’s phone and the same was found ringing inside the appellant’s pockets. The crowd then frog-marched the appellant to the police station and handed him over to the police. A search of the appellant’s person by **PC 73493 Elijah Kipchumba** (PW 5) revealed the stolen phone and the metal bar used to harm PW 1. The injuries sustained by PW 1 were later confirmed by **Dr. Andrew Were** (PW 4). Armed with this information, **PC 96336 Gladys Langat** (PW 6) who was the investigating officer in the matter, had the appellant arraigned in court and charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code; the particulars of the offence being that:

“On the 19th day of June, 2013 at Hagadera Refugee camp in Fafi District within Garissa county while armed with dangerous weapon namely a metal bar, robbed Ojulu Odami of his mobile phone make Nokia C-1 valued at 8,000 Kshs and at or immediately after the time of such robbery used actual violence on the said Ojulu Odami.”

4. He denied the charge and following a hearing of the prosecution’s case, the learned trial magistrate Hon. Ndungu (CM) found him with a case to answer and placed him on his defence. The appellant opted to give an unsworn statement of defence; in which he stated that this was

a question of settling of scores by a creditor of his. Elaborating further, he stated that a certain individual had given him some Kshs.7,000.00 a while back to go and purchase bhang on his behalf. However, since the appellant had more pressing needs of his own, he used the cash and on learning this, his creditor was not amused. The undisclosed creditor then threatened to have him jailed and even physically assaulted him at his house on the eve of the morning in question. The appellant reiterated that he never committed the offence he was charged with.

5. The above defence notwithstanding, the learned magistrate in a reserved judgment delivered on 11th September, 2013, found the appellant guilty as charged and sentenced him to death. Aggrieved by that outcome, the appellant lodged a first appeal at the High Court, which was dismissed vide the judgment delivered 18th September, 2014; wherein the first appellate Judges (**Muchemi & Mutuku JJ.**) upheld the trial court's findings.

6. Unrelenting, the appellant is before this Court on second appeal; which is predicated on the grounds that the learned first appellate Judges erred by; failing to find that the coram of the court was non indicative of the language of the court, as a result of which the trial was conducted in a language that the appellant did not understand; failing to find that the appellant was a Somali refugee who was not conversant with the language of the court; failure to find that there was no interpreter availed, which rendered the appellant unable to cross examine PW 4, PW 5 and PW 6 due to language barrier; on the whole, failing to find that the appellant's rights under Article 25 of the Constitution were violated.

7. Appearing for the appellant, was learned counsel **Ms. Kitui**, who held brief for **Mr. Wachira**. She submitted that save for the time plea was taken, the appellant was never accorded a Somali interpreter. She went on to add that the language of the court is a critical component in a criminal trial and should be indicated on the record; and that failure to do so must attract the vitiation of the trial. While conceding that the first appellate court addressed its mind on the matter, counsel was of the view that the proceedings ought to have been set aside. She added that the appellant was also never accorded legal representation, despite having been charged with a capital offence. Owing to lack of counsel she said, the appellant was greatly prejudiced and it is only just that he is accorded a retrial.

8. Opposing the appeal was Senior Principal Prosecution Counsel **Ms. Maina** who contended that the appellant all along understood the proceedings and was able to cross examine the witnesses. As regards legal representation, she submitted that it is only in murder trials where an accused is accorded legal counsel as of right. Otherwise, in cases of robbery with violence, legal counsel is only extended at the Court of Appeal, not at the trial court. She urged us to dismiss the appeal as it lacked merit.

9. Having considered the record, the respective submissions of both learned counsel and the law, we come to the conclusion that the issues for our determination in this appeal are two; whether the appellant was accorded a fair trial in a language he understood and whether he was entitled to free legal representation at the State's expense.

10. As regards necessity for interpretation, under **Article 50 (2) (m)** of the **Constitution**, it is provided that:

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

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

In the same spirit, **Section 198 (1)** of the **Criminal Procedure Code** states that:

“Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.??

Undoubtedly, the law gives an accused person a right to interpretation during proceedings to a language he understands. The appellant in this case does not contest that an interpreter was availed at the time of his taking plea. What he contends, is that none was availed at trial. His assertion is that he should have been given a Somali interpreter to enable him follow and understand the entire proceedings; more particularly, at the time PW 4, PW 5 and PW 6 testified.

11. Going by the record of the lower court, it is clear that at the time of plea taking, a Somali interpreter was present. The coram for the day is given as follows:

“20/6/2013

MAGISTRATE:

H.N NDUNG?U (MISS) CM

PROSECUTOR:

C.I MUNYOTU

C/ CLERK:

AHMED HASSAN

INTERPRETATION:

ENGLISH/ SOMALI

ACCUSED:

PRESENT IN PERSON

The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/ she understands, who being asked whether he/ she admits or denies the truth of the charge(s) replies in Kisomali:

Not guilty.”

12. Evidently, from the record, there was a Somali interpreter at the plea stage. Further perusal of the record reveals there was also an English/ Swahili interpreter at the time when PW 1, PW 2 and PW 3 were heard. Accordingly, from this, it can be discerned that the appellant understood Somali and Swahili; since he has raised no issue with those portions of the proceedings. Conversely, on the date when PW 4, PW 5 and PW 6 testified, the coram is as follows:

“19/8/13

BEFORE: H.N NDUNGU?U (MISS) CM

CP:

CI MUNYOTU

C/ CLERK:

MOHAMED

.ACCUSED: PRESENT

PW 4 DR WERE ANDREW DULY SWORN STATES IN ENGLISH”

The record does not indicate whether the Doctor’s evidence was interpreted into Kiswahili but there was an interpreter in court. When making his defence, the appellant appears to have given an unsworn statement in Kisomali and this in our view must have been translated into English as the record was in English language. Evidently therefore, the interpreter was doing the interpretation as expected. In resolving the language issue, the first appellate court had this to say:

“Other than that, the evidence was interpreted to the appellant in Kisomali and record shows he understood the charges against him. We have found his claim that he was not accorded a fair trial unfounded.”

13. Our perusal of the record shows that on 19th August, 2013 when PW 4, PW5, PW 6 testified the name of the court clerk is indicated as Mohamed. As held by this Court before, the principal duty of a court clerk is to interpret into the language of the court and also from the language of the court to the language an accused person or the witness understands. Where therefore the presence of an interpreter is not disputed, as is the case here, and the record clearly shows participation of the accused person in the proceedings, the presumption is that the proceedings were duly interpreted into a language the accused person understood. This Court in *Diba Wako Kiyato v. Republic [1982 – 88] 1 KAR 974* expressed itself as follows;

“...The record of the trial court alludes to interpretation in Kiswahili but does not state that there was any clerk or interpreter in court; only the presence of the Magistrate, the prosecutor and the accused are recorded. This record lends credence to the Appellant’s complaint that there was no interpretation of the proceedings to him in a language that he understands though the record has indications that he may have followed the gist of the proceedings. In the circumstances there was a breach of the appellant’s constitutional and fundamental right which is fatal to the proceedings. ---”

This position was reiterated by this Court in *Bernard Wachira Kamonye v Republic [2008] eKLR*; in the following words:-

“This case [Diba case] which was decided way back in 1986, lays down the principle that either the name of the person interpreting the proceedings to an accused person be recorded or at least the nature of the interpretation be record. (sic) The “nature of interpretation” can only be by showing the language of interpretation and as the learned Judges there pointed out:-

„-- The practice of recording, if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. --.? ”

14. In the present case, unlike in the Diba case, (supra) the record is clear that there was always a clerk in attendance whose role as stated earlier was to interpret the proceedings. This Court in *Rwaru Mwangi v. Republic, Criminal Appeal No. 18 of 2006* (unreported), faced with

a situation such as the present one pronounced itself as follows:-

“The only way a trial court would demonstrate compliance with the Constitutional provisions is to show, on the face of the record at the beginning of the trial, the language which the accused person has chosen to speak.” (Emphasis added)

Endorsing the above pronouncement in a more recent decision in ***John Ouma Awino & Another v Republic, Criminal Appeal No. 124 of 2012***, this Court had this to say:-

“The mandatory requirements under the law were to inform the appellants the nature of the offence in a language they understood, and to provide an interpreter if they did not understand the language of the court.”

This requirement was in our considered view complied with. Accordingly, the finding by the first appellate court to the effect that the appellant understood the charges and that the entire trial was conducted in a language he understood cannot be faulted. That ground therefore fails.

15. As to whether the appellant was entitled to legal representation at the State’s expense, no provision of law has been cited to support such an argument. Learned Counsel for the appellant ought to have done sufficient research in that area and placed it before us for determination and not just gloss over the issue.

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:

„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.?”

16. 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 –

.....

(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.”

17. Parliament has indeed since then taken a step further in enacting the **Legal Aid Act, 2016** in the implementation of **Article 50 (2) (h)**. The Act sets out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. It is important to note that the said Act commenced on 10th May, 2016 long after the trial, and indeed after first appeal herein had been concluded. It is therefore not applicable in this case. Be that as it may, this Court has had an opportunity to consider the issue of legal representation under **Article 50 (2) (h)** of the Constitution prior to the enactment of the **Legal Aid Act**. One such instance is in the case of ***David Njoroge Macharia - vs-Republic (supra)*** wherein this Court in its own words stated,

“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. 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.” Emphasis added.

18. Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. **Article 50(1)** of the Constitution does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The

learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation. Was the appellant entitled to legal representation at State expense as of right? Was his right to legal representation at the State's expense violated?

19. 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. 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.

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;

“if convicted, to appeal to, or apply for review by a higher court as prescribed by law.?”

*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.**

We concur with the above sentiments and find that the appellant was not entitled to legal representation at the first appellate stage. We also find that he never raised the issue before the trial court for the consideration by the trial court to give the court an opportunity to consider whether substantial prejudice would have been occasioned if he proceeded in absence of counsel. Consequently, we find that this ground should also fail.

20. Ultimately, we find this appeal devoid of merit. We dismiss the appeal against conviction. On the issue of sentencing, we note that the same was not challenged. It would nonetheless be remiss of us, in view of the new jurisprudence from the Supreme Court in the *Francis Karioko Muruatetu & others vs Republic* [2017] eKLR, not to interfere with the sentence. In the Muruatetu case (supra) the Supreme Court declared as unconstitutional the mandatory aspect of the death sentence. When the death sentence was imposed by the trial court and affirmed by the High Court, the Muruatetu case had not been determined. We also note that the appellant had not addressed the trial court in mitigation. In view of this, we feel that the appellant should be given the benefit of the recent development in our criminal jurisprudence. We therefore remit the matter to the High Court for rehearing on mitigation and sentence to enable the High Court take into account the Muruatetu's judgment (supra) and also the sentencing policy guidelines which came into force after the Judgment appealed from.

Dated and delivered at Nairobi this 10th day of May, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.