



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 83 OF 2016

BETWEEN

ERICK INGOHI LUEVO 1ST APPELLANT

MOSES ONYANGO ONGULE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru & Ngenye, JJ.) dated 27th May, 2015 in H. C. Cr. A No. 55 & 59 of 2012)

JUDGMENT OF THE COURT

1. On 31st January, 2010 at around 9:30 p.m. Shilen Thakerar (PW1) flew into Nairobi from Dar es Salaam. He was picked up from the Jomo Kenyatta International Airport by his wife, Basri Shilen Thakerar (PW8), their 4 year old son and brother in law, Roop Vinodlal Ruparel (PW4). They all headed to his father in law, Mr. Vinodlal Rupaker's house at Westlands, arriving there at around 10:30 p.m. The 1st appellant, who had been employed as a guard at the house, opened the gate and they drove into the compound. Mr. Vinodlal came out of the house to greet them. He stood at the verandah and beckoned them to come into the house.

2. Shilen and Roop got out of the car and headed towards the house, leaving Shilen's wife and their son in the car. Roop then noticed a man armed with a knife approaching him on his right, and another armed with an axe, on his left. He also saw a third man armed with a panga. The intruders directed them to enter the house. However, the door had been shut by the wind. The intruders begun pressurizing Mr. Vinodlal to open the door and he informed them that it could only be opened from the inside. He rang the door bell and asked his wife, who was inside, to open the door. Before she could do so, one of the intruders stabbed Mr. Vinodlal on his neck causing him to scream out in pain. Roop ran to assist his father, Mr. Vinodlal, but one of the robbers hit him on his right eye and he begun bleeding.

3. Once the door was opened the intruders pushed Mr. Vinodlal, Shilen and Roop into the house. Mr. Vinodlal fell on his face and lay motionless in a pool of his own blood. Meanwhile, one of the intruders

had forced Shilen's wife and son out of the car and into the house. The intruders ordered them to sit down and they robbed them of cash, mobile phones and other personal effects. When the intruders were done, they took all of them with the exception of Mr. Vinodlal into a bathroom and tied them up. The intruders also made away with Shilen's vehicle.

4. Thereafter, Shilen pressed the security alarm and KK security guards came to their aid. It was then that it was discovered that Benjamin Wambua (PW2), a houseboy who was then in the servants' quarters, had also been tied up and robbed. It also became apparent that the appellant was nowhere to be seen. Mr. Vinodlal was rushed to hospital where he was pronounced dead upon arrival. On the other hand, Roop who had sustained serious injuries to his eye was admitted and unfortunately, he completely lost sight in his right eye.

5. Following investigations, the 1st appellant was traced at Kipkelion and arrested. Several religious items which were allegedly stolen on the material night were recovered in his house. The 2nd appellant was also arrested following a tip off from an informer. Mobile phones and a wrist watch which had been stolen were recovered on his person. He was also identified by Shilen as one of the intruders at an identification parade. The appellants together with three co-accused were charged with four counts of robbery with violence.

6. In their defence, the appellants gave sworn statements refuting the charges against them. The 1st appellant denied knowing the victims, let alone being hired as a guard at Mr. Vinodlal's house. He was adamant that the religious items were not recovered at his house. The 2nd appellant insisted that the mobile phones which were recovered on his person belonged to him; receipts of their purchase had been confiscated by the police on the day of his arrest and had never been returned. He also denied being in possession of the wrist watch which was recovered.

7. Upon weighing the evidence, the trial court found that the prosecution had proved its case against the appellants. They were convicted of all the four counts and sentenced to death. Aggrieved with the trial court's decision, the appellants filed appeals in the High Court which were dismissed. They have now come to this Court for a second bite of the cherry.

8. The appeal is predicated on the single ground that the learned Judges erred in law by failing to observe that the appellants' constitutional rights to a fair hearing under **Article 50** of the Constitution were violated. In particular, **Article 50 (2) (g) & (h)**; the right to be represented by an advocate appointed by the court and to be informed of the said right. Mr. W. O. Omari, learned counsel for the appellants, submitted that while the 1st appellant was represented by an advocate at the trial the 2nd appellant was not represented. Both appellants were not represented at the High Court. To him, the same occasioned injustice to the appellants.

9. Mr. P. Mailanyi, Senior Assistant Director of Public Prosecution, in opposing the appeal, argued that the appellants' rights had not been violated. **Article 50** of the Constitution envisions representation during trial and not in an appeal. He was adamant that the appellants had been represented at the trial. According to Mr. Mailanyi, the appellants had not demonstrated how they were prejudiced by lack of representation at the High Court. He urged us to dismiss the appeal.

10. We have considered the record, submissions by counsel and the law. A fair trial is fundamental in every judicial setting and it encompasses several components. This much was appreciated by the Supreme Court of India in **Rattiram -vs- State of M. P. {2012} 4 SCC 516**, wherein a three-Judge Bench ruled thus:-

“Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism.”

And again:-

“Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.....”

11. 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?”

12. 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.”

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.

13. 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.

14. Having perused the record, it is clear that from the onset up to the conclusion of the trial both

appellants were represented by counsel. As such, we find that the appellants' rights were not violated as far as the trial was concerned.

15. It is not in dispute that during the first appeal both appellants appeared in person. Were their rights to legal representation at the state's expense violated? In Isaiah Maroo -vs- Republic [2015] eKLR the issue was discussed at length by this Court 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.

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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 appellants were not entitled to legal representation at the 1st appellate stage. Consequently, that and the only ground of appeal fails.

16. Accordingly, we find that the appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of February, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR