



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, J.J.A.)

CRIMINAL APPEAL NO. 165 OF 2007

BETWEEN

PETER NJOROGE KINUTHIA APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 20th September, 2007 in **HC. CR.A. No. 232 of 2005**)

JUDGMENT OF THE COURT

1. This appeal is premised on only one ground; that the first appellate court erred in law by failing to observe that the appellant was not represented by an advocate both at the trial court and before it; and that amounted to breach of the appellant's right to a fair hearing as guaranteed under **Article 50(2) (g) and (h)** of the **Constitution of Kenya, 2010**.
2. The trial was concluded on 4th May, 2005 and the appeal was determined on 20th September, 2007, long before the Constitution of Kenya, 2010 was promulgated on 27th August, 2010.
3. The facts of the case that gave rise to this appeal are simple and straight forward. The appellant was convicted of robbery with violence contrary to **section 296(2)** of the **Penal Code** and sentenced to death as by law provided. His first appeal to the High Court was unsuccessful, hence this second appeal.
4. The particulars of the offence were that on 22nd October, 2004 at Ruthingiti village, Kiambu District, the appellant, being armed with a panga, violently robbed Waweru Mungai of a bicycle valued at Kshs.3,500/=.
5. After a full trial in which the appellant was unrepresented, the trial court established that the appellant was indeed known to the complainant before the date of the robbery; that the offence was committed at about 7: 00 p.m. when it was not yet dark; that the complainant recognized the appellant; that the appellant was arrested shortly thereafter and the stolen bicycle as well as the attack weapon were recovered from the appellant.
6. Before the High Court, the appellant was again unrepresented. The High Court (Ojwang, J. as he then was, and Dulu, J.) re-evaluated the evidence tendered before the trial court. It found no merit in the appeal and dismissed it.
7. In his brief submissions before this Court, **Mr. Omari**, learned counsel for the appellant, did not fault the learned judges' findings except on the issue of the appellant's non-representation as already stated. Counsel argued that even though the trial and the first appeal were conducted before the advent of the 2010 Constitution, the High Court had inherent power to advise the appellant that given the nature of the appeal it was necessary that he be represented by an advocate. On that ground alone, counsel urged this Court to allow the appeal and set the appellant at liberty.
8. Opposing the appeal, **Mr. Mirera, Senior Assistant Director of Public Prosecutions**, submitted that the lone ground of appeal was totally misconceived, considering that the trial and the first appeal were done before the new Constitution came into force.

He pointed out that at no time did the appellant request for legal representation and urged this Court to dismiss the appeal.

9. We have considered the brief submissions advanced by counsel.

Article 50(2) (g) and (h) of the Constitution of Kenya, 2010 states 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.”

10. There is no dispute that there were no similar provisions under the repealed Constitution. That being so, we do not understand the basis of Mr. Omari’s submission that the High Court ought to have advised the appellant of the need for legal representation. Section 77 of the repealed Constitution provided in part as follows:

“77(1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

2. Every person who is charged with a criminal offence

a. shall be given adequate time and facilities for the preparation of his defence;

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.....

d. shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

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14. Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense. (emphasis supplied)

11. In **DOUGLAS KINYUA NJERU v REPUBLIC [2015] eKLR**, this Court expressly stated that under the repealed Constitution an accused person was not entitled to legal representation at the State’s expense.

12. Likewise, in **CHARO KARISA THOYA v REPUBLIC, Criminal Appeal No. 274 of 2002**, this Court held:

“As we have indicated before, in so far as the appellant before this Court is concerned, his trial took place under the old Constitution and he would not be entitled to free legal representation during the trial”.

We reiterate that position.

13. This appeal is without merit and is accordingly dismissed in its entirety. It is so ordered.

Dated and Delivered at Nairobi this 8th day of December, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR