



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO, & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 102 OF 2014

BETWEEN

OMARI BAKARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero and Muya, JJ.) dated 19th February 2014

in

H.C.C.R.A. No. 65 of 2009)

JUDGMENT OF THE COURT

The substantial question in this appeal is whether the appellant's trial, which resulted in his conviction for robbery with violence and imposition of the death sentence, is null and void because of failure by the State to assign him an advocate at State expense and to promptly inform him of that right, contrary to **Article 50(2) (h)** of the **Constitution**. The appellant contends that for that very reason, his trial is a nullity whilst the respondent thinks otherwise.

It is common ground that the offence with which the appellant was charged was committed on 12th October 2007. He was tried by the Chief Magistrate's Court, Mombasa and convicted on 14th April 2008. All this was therefore during the currency of the former Constitution, which expressly provided in **section 77 (14)** that an accused person was not entitled to representation by an advocate at public expense. The issue raised by the appellant is thus only relevant as regards his first appeal in the High Court, which was heard and determined after the current Constitution came into force. It is not disputed that before the High Court, the appellant was not represented by an advocate.

The brief background to the appeal, as settled by the two courts below, is as follows. On 12th October 2007 at about 6.45 p.m. **Mercy Achieng Sabare (PW1)**, accompanied by her husband, **George Sabare (PW2)** and their 9 year old child alighted at a bus stage near their home in Kisauni, Mombasa. As they

walked home, PW2 and the child went ahead while PW1 followed a short distance behind them. The appellant, who lived in the same estate as the couple and was thus well known to them, suddenly pounced on PW1 and attempted to snatch her handbag. PW1 resisted and held onto the handbag. A struggle ensued, and to subdue her, the appellant cut PW1 on the right arm with a *panga*, forcing her to let go the handbag. The appellant then ran off with the handbag, which contained Kshs 5,000/-, PW1's national identity card, a bunch of keys and toiletries. PW1's screams as she struggled with the appellant attracted the attention of PW2 and their child, who both came back to her rescue. They chased after the appellant, but he managed to disappear among the houses near his home.

The same evening, PW1 sought medical attention at Nevada Hospital and reported the robbery the next day at Nyali Police Station, where she was issued with a P3 Form and subsequently examined by **Dr. Lawrence Ngone (PW5)** at Coast General Hospital.

Attempts to arrest the appellant at his home proved futile, as he successfully evaded the police. However, on 18th November 2007, slightly over a month after the robbery, the police managed to arrest him at his home. On 21st November 2007 he was charged before the Chief Magistrate's Court, Mombasa, with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. He pleaded not guilty and was taken through a trial, where he was not represented by counsel. As we have already noted, that was of no moment granted the express provisions of the Constitution that was in force at the time of his trial.

The five witnesses called by the prosecution gave evidence confirming the facts as we have outlined above. In particular PW 5 testified that when he examined PW1, she had a cut wound on her right hand, which required to be stitched. The wound, in his opinion, was caused by a sharp object and the nature of PW1's injury was harm.

When the appellant was put on his defence, he elected to give an unsworn statement and called no witness. The substance of his defence was that the case against him was concocted because of a grudge between him and PW2. Before he was arrested, he stated, he had given PW2 his cellphone for repairs. PW2 had failed to repair the phone, thus making the appellant angry. One week later, police came to his house, arrested him and took him to the police station, where he was charged with an offence that he had not committed.

By the judgment dated 14th April 2008, the trial magistrate found the charge against the appellant proved beyond reasonable doubt, convicted him as charged and sentenced him to death. His first appeal was heard in 2012 when the appellant was still not represented by an advocate, and by the judgment dated 19th February 2014 the same was dismissed, thus precipitating this second appeal.

Other than the ground of appeal challenging his conviction on the basis of denial of the right to an advocate, the appellant's appeal as argued by his learned counsel, **Mr. Ole Kina**, also raises three other grounds of appeal, which we will deal with first. These are that the particulars of the charge and the evidence adduced in support thereof were at variance; that the first appellate court failed in its duty to properly evaluate the evidence; and that the appellant's defence was not adequately or properly considered.

On the first issue, counsel submitted that the property that was alleged to have been stolen from PW1 was different from the property that PW1 testified was stolen from her by the appellant. Counsel submitted that in view of the discrepancy between particulars in the charge sheet and the evidence of PW1, loss of the property specified in the charge sheet was not proved beyond reasonable doubt.

Counsel further submitted, regarding the second issue, that had the first appellate court properly discharged its duty to evaluate and reappraise the evidence, it could have easily noted the discrepancy between the charge sheet and the evidence that was adduced. That it did not notice the discrepancy, it was submitted, was evidence enough of failure by the court to discharge its duty.

On the third issue, it was submitted that the two courts below did not adequately consider the appellant's defence, which was that he was framed in the prosecution because of a dispute with PW2 arising from the

latter's failure to repair his cell phone. It was urged that the defence was credible, as PW2 had admitted that indeed he deals in electronics.

On the main issue in the appeal, Mr. Ole Kina submitted that the appellant's first appeal in the High Court took place under the current Constitution which guarantees him the right to be represented by an advocate at State expense if substantial injustice would otherwise result, and to be informed of that right promptly. Counsel urged that despite the constitutional guarantee, the appellant was not provided with an advocate and was not informed of that right promptly. As the appellant faced a capital offence, it was submitted, substantial injustice was sure to result if he was not represented by an advocate.

Lastly it was contended that under **Article 25** of the Constitution, the right to fair trial cannot be limited. To the extent that failure to provide an advocate for the appellant was a trial-related infraction, it was argued, the effect of the same was to vitiate the trial and render his conviction a nullity. The nature of the violation that the appellant was complaining about, counsel added, was not amenable to the remedy of award of damages. He accordingly urged us to allow the appeal and set the appellant to liberty.

Mr. Musyoki, Senior State Counsel opposed the appeal submitting that the discrepancy between the charge sheet and the evidence adduced was not material and did not occasion the appellant any prejudice. He further submitted that the two courts below adequately analyzed the evidence and fully considered the appellant's defence, which they found to lack merit. Since there were concurrent findings by the trial and the first appellate court, we were urged not to disturb their findings.

Regarding the appellant's right to be represented by an advocate, Mr. Musyoki submitted that there was no violation of the right to fair trial and that the appellant's right to be represented by an advocate at State expense was dependent on a framework to actualize the right being first established, which was not in existence at the time of his first appeal, but which now has been established. We were urged to find the appeal bereft of merit and to dismiss the same.

We have duly considered the record of appeal, the grounds of appeal and the submissions of learned counsel. On the first issue raised by the appellant, the particulars of the property that was said to have been stolen from PW1 was a handbag containing mobile phone make Safaricom 225, perfumes, national identity card and cash Kshs 5,000/-. When she testified on 13th May 2008, PW1 stated that the appellant robbed her of her handbag containing Kshs 5,000/-, national identity card, a bunch of keys and beauty items. There was no discrepancy between the charge sheet and the evidence that PW1 was robbed of her handbag; the only discrepancy that the appellant can point to is the mobile phone which was mentioned in the charge sheet but was not mentioned by PW1 and the bunch of keys which PW1 mentioned in her evidence but was not in the charge sheet. Otherwise, in both the charge sheet and PW1's evidence, there was consistency that PW1 was robbed of Kshs 5,000/-, national identity card and ladies' toiletries referred to as perfumes and beauty products that were in the handbag.

In our view the discrepancy that the appellant points out is not material to warrant interference with the concurrent findings of the two courts below, which were satisfied that the appellant robbed PW1 of her handbag that at least contained, Kshs 5,000/-, her national identity card, and her toiletries. In ***Kimeu v. Republic* [2002] 1 KAR 757**, this Court stated as follows regarding discrepancies between the charge and evidence:

“The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernable prejudice is caused to the accused.”

We are satisfied that in the circumstances of this appeal, there is no merit in this ground of appeal.

On the second ground of appeal relating to evaluation and reappraisal of evidence, it cannot be gainsaid that indeed that is the bounden duty of the first trial court. In ***Okeno v. Republic* [1972] EA 32** the former Court of Appeal for Eastern Africa expressed itself as follows regarding that duty:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination...and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion...It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported.”

This Court has also stated that there is no set format by which the first appellate court is to undertake the re-evaluation and re-appraisal of the evidence. The extent and manner in which evaluation may be done depends on the circumstances of each case and the style employed by the first appellate court. It will suffice if the record shows that the court has subjected the evidence to a fresh look and made its own decision on the evidence. (See ***Simon Kariuki Muriithi v. Republic, CR. APP. No. 311 of 2005***).

Having carefully considered the judgment of the High Court, we are satisfied that it was acutely aware of its duty as a first appellate court. Indeed it quoted ***Okeno v. Republic*** (supra) to remind itself of that duty. Secondly it did subject the evidence to sufficient re-evaluation and re-appraisal and came to its own conclusion, which was in sync with the findings of the trial court.

The same applies to the question whether the High Court adequately considered the appellant’s defence. The answer is in the positive as shown by page 5 of the judgment where the court specifically considered the defence as follows:

“In his unsworn statement in defence he maintains that he had before the arrest taken his phone to the complaint’s husband for repairs but when he went to collect it he was told that it was not ready and on the second occasion he was told that it had been taken to another repairer and this caused a misunderstanding between the two which led to his arrest. The complaint’s husband testified as PW2. During cross-examination the appellant did not ask him any question relating to a mobile phone taken to him for repairs. His defence is an afterthought.”

This leaves the last ground on the appellant’s right to be provided with an advocate at State expense. As we have already noted, section 77(14) of the former constitution provided in express terms that the right to an advocate did not entitle an accused person to be represented by an advocate at public expense. Article 50 (2) (h) of the current Constitution departed from that position and now provides as follows:

“50(2) Every accused person has the right to a fair trial, which includes the right-

...

(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.”

In ***David Njoroge Macharia v. Republic, Cr App. No. 497 of 2007***, this Court, after noting the difference between Article 50 of the Constitution and provisions of the former Constitution regarding the right to legal representation, stated under Article 50 an accused person is entitled to legal representation at State expense if the situation requires it, such as in cases involving complex issues of fact or law where the accused person is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. The Court concluded thus:

“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.”

In ***Karisa Chengo & 2 Others v. Republic, Cr App. Nos. 44, 45 and 76 of 2014***, this Court reiterated that under Article 50 of the Constitution, an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. The Court noted further that while the Constitution does not define what would constitute substantial injustice, **Article 261** thereof and the **Fifth Schedule** required Parliament to enact legislation, which would fully implement Article 50, within four years of the coming into force of the Constitution. That position has been reiterated in ***Moses Gitonga Kimani v. Republic, Cr App. No. 69 of 2013 (Meru)*** and ***Hamisi Swaleh Kibuyu v. Republic, Cr. App. No. 25 of 2013 (Malindi)***.

Parliament has since enacted, in compliance with Article 261 and the Fifth Schedule to the Constitution, the **Legal Aid Act, 2016** (after extension of the time required for enactment of implementing legislation as provided by Article 261(2) of the Constitution) which among other things provides a framework to give effect to Article 50(2) (g) and (h) on legal representation. The Act creates the **National legal Aid Scheme** whose functions include the establishment and administration of an affordable, accessible, sustainable, credible and accountable national legal aid scheme; facilitating representation of persons granted legal aid and assigning legal aid providers to such persons. The Act also sets up the **Legal Aid Fund** for purposes of defraying the expenses incurred in the representation of persons granted legal aid and to pay remuneration of legal aid providers for services rendered.

The Act requires a person who is eligible to receive legal aid to apply to the National Legal Aid Service in accordance with the procedure prescribed by **Part VII** of the Act. **Section 43(1)** of the Act sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.

The commencement date of the Act is **10th May 2016**. With the enactment of this legislation, we believe that the framework for full implementation of Article 50 (h) is now in place as required by the Constitution. In light of all the foregoing reasons, we have come to the conclusion that this appeal is for dismissal, and it is so ordered.

Dated and delivered at Malindi this 17th day of June, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR