



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, AZANGALALA & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL (APPLICATION) NO. 2 OF 2014

BETWEEN

THOMAS ALUGHA NDEGWA.....APPLICANT/APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J) dated 13th June, 2013

in

HC CR.A. NO. 116 OF 2012)

RULING OF THE COURT

Background

1. The appellant, **THOMAS ALUGA NDEGWA** was charged and convicted of the offence of defilement of a girl contrary to **section 8(1) read together with sub-section (2) of the Sexual Offences Act, Act No. 3 of 2006**. He was sentenced to mandatory life imprisonment by the Chief Magistrates' Court at Thika. The conviction and sentence was upheld by the High Court at Nairobi. This is a second appeal and during the hearing, the appellant applied for legal representation since he was unrepresented in the two courts below. He urged the court to assign him a lawyer to represent him in this second appeal as he is unable to instruct one due to financial constraints.

2. The issue for determination by this court is whether the appellant is entitled to receive legal aid. The idea of legal aid is guaranteed by the Constitution through two key provisions. **Article 48** recognises the right of access to justice for all, it provides:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Article 50 gives the right to a fair hearing. **Article 50(2)(h)** provides:

“Every accused person has the right to a fair trial, which includes the right 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. [Emphasis added]

3. While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party.

4. The State established the National Legal Aid and Awareness Programme (NALEAP) in 2007 with the stated goal of creating a practical, affordable and effective legal awareness and legal aid service delivery scheme that increases access to justice for all.

5. The Government of Kenya has established a legal and institutional framework for the provision of legal aid. The Legal Aid Act, Act No. 6 of 2016, (the Act) was enacted in 2016 with a commencement date of 20th May, 2016. Its stated purposes are: to give effect to **Articles 19 (2)** (general provision on the Bill of Rights); **48** (right of access to justice); **50 (2) (g) and (h)** (right of fair hearing) of the Constitution; to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid and for the funding of legal aid and for connected purposes.

6. The Act establishes the 'National Legal Aid Service' (the Service) as the successor to NALEAP (s5(1) and (2)). The functions of this Service are, *inter alia*, to - establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable (s7(1)(a)); facilitate the representation of persons granted legal aid under the Act (s7(1)(l)); assign legal aid providers to persons granted legal aid under the Act; (s7(1)(m)); and administer and manage the Legal Aid Fund (s7(1)(p)). **Section 29(1) of the Act** establishes the Legal Aid Fund. The fund shall consist of (s29 (2)):

“moneys allocated by Parliament for the purposes of the Service; any grants, gifts, donations, loans or other endowments given to the Service; such funds as may vest in or accrue to the Service in the course of the exercise of its powers or the performance of its functions under this Act; and moneys from any other lawful source accruing to the Fund.”

Section 30 of the Act provides for the 'Application of the Legal Aid Fund'. It expressly provide:

“The Service may use the monies of the Fund to-defray the expenses incurred in the representation of persons granted legal aid in accordance with this Act; pay the remuneration of legal aid providers for services provided in accordance with this Act; meet the expenses incurred by legal aid providers in providing services under this Act; and meet the expenses of the operations of the Service as approved by the Board.”

Section 35 of the Act provides the general principles of legal aid. The said section provides:

“The Service shall provide legal aid services at the expense of the State to persons who qualify for legal aid services under this Act; the Service shall provide legal aid services in civil matters; criminal matters; children matters; constitutional matters; matters of public interest; or any other type of case or type of law that the Service may approve. Despite subsection (2), the Service shall: determine the legal needs of indigent persons and of disadvantaged communities in Kenya; establish priorities for the areas of law, types of proceedings for which it will provide legal aid services; and formulate policies for the kind of legal aid services to be provided in the different areas of law, types of cases and types of proceedings.”

Section 36 of the Act, notes the persons eligible for legal aid. It provides:

“A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is: a

citizen of Kenya; a child; a refugee under the Refugees Act (No. 13 of 2006); a victim of human trafficking; or an internally displaced person; or a stateless person. A person who is eligible to receive legal aid services under subsection (1) shall apply to the Service in the prescribed manner. A person shall not receive legal aid services unless the Service has determined that the individual's financial resources are such that the person is eligible for the services. Despite subsections (1), (2) and (3), the Service shall not provide legal aid services to a person unless the Service is satisfied that: the cost of the proceedings is justifiable in the light of the expected benefits; ... denial of legal aid would result in substantial injustice to the applicant; or there exists any other reasonable ground to justify the grant of legal aid. Part VII of the Act contains provisions on how the application for legal aid should be done.

7. One of the transitional provisions under **section 87 of the Act** is that until the Board is established, the National Legal Aid and Awareness Steering Committee appointed pursuant to Gazette Notice number 11598 of 2007 and in existence immediately before the coming into force of this Act shall continue to operate as if it were the Board under this Act (S87(2)). The members of the Board of the National Legal Aid Service provided for under **S 9 Legal Aid Act** were appointed vide Gazette Notice Number 6512 of 19th August, 2016. The Chairperson of the Service was appointed vide Gazette Notice number 8722 of 28th October, 2016. The Board of the Legal Aid Service has therefore been established.

8. In addition to the Constitutional and statutory provisions for the Government to provide legal aid, there is an international framework in place committing the Government of Kenya to provide legal aid. The Government has made commitments under various regional and international human rights instruments to enhance access to justice and provide a state funded legal aid scheme. Some of the international human rights instruments include: the International Covenant on Civil and Political Rights (ICCPR), 1996, The UN Convention on the Rights of the Child (CRC), 1989, The UN Convention on the Rights of Persons Living with Disabilities, 2007, the African Commission on Human and Peoples' Rights (ACHPR), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. The ACHPR Principles and Guidelines obligates states parties to ensure that an accused person has a right to legal assistance assigned to him or her in any case where the interest of justice so require and without payment by the accused if he or she does not have means to pay for it. The interests of justice in criminal matters are to be determined by considering the seriousness of the offence and the severity of the sentence.

9. A determination of whether the appellant herein is entitled to legal aid, in view of the fact that Legal Aid Act commencement date was 10th May, 2016, is a novel issue. We will look at authorities from Kenya as well as other jurisdictions for jurisprudential guidance.

10. This Court in the case of ***DAVID MACHARIA NJOROGE V R, (2011) eKLR*** analyzed the applicability of **Article 50 of the Constitution** and held:

“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. 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. 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.”

In ***David Macharia Njoroge V R, (supra)***, this Court considered the right to free legal counsel at state expense for the first time in Kenya and expounded on the principle of “substantial injustice”.

11. More recently, this Court in the case of ***KARISA CHENGO & 2 OTHERS V R, CR NOs. 44, 45 &***

76 OF 2014, stated:

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that 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. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

The South Africa Constitutional Court in the case of ***FRASER V ABSA BANK LIMITED***, (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (15 December 2006) stated:

“Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced. An accused also has the right to have a legal practitioner assigned at the state’s expense in terms of section 35(3)(g) where substantial injustice would otherwise result, as acknowledged by the Supreme Court of Appeal. The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges.”

13. The importance of legal representation was also recognized by the African Commission in ***ADVOCATS SANS FRONTIERS (ON BEHALF OF BWAMPANYE) V BURUNDI, AFRICAN COMMISSION ON HUMAN RIGHTS, COMM. NO. 213/99 (2000)*** when it observed that:

“...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...”

The Commission concluded on the need of legal representation thus:

“the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to „argue their cases ...on an equal footing.”

14. In the United States, the court in the case of ***GIDEON V WAINWRIGHT***, 371 US 335 {1963}, made this point very clear when it held that the noble ideal of a fair trial before impartial tribunals in which every defendant stands equal before the law, cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer.

15. Lord Denning in the celebrated case of ***PETT V GREYHOUND RACING ASSOCIATION***, (1968) 2 All E.R 545, at 549 succinctly stated that:

"It is not every man who has ability to defend himself on his own. He cannot bring out the point

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 trained for the task?"

From the foregoing it is clear that the right to legal representation at state's expense is a fundamental human right and essential to the realization of a fair trial. However this right is not absolute and there are instances where the same can be limited. In the case of S V HALGRYN 2002, (2) SACR 211 (SCA) para 11, Harms JA stated that:

"Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.?"

17. In regard to the approach to be adopted by the court when considering whether an accused was able to bear the costs of representation from his or her own resources, the Supreme Court of Appeal of South Africa in the case LEGAL AID BOARD V THE STATE, (363/09) [2010] ZASCA 112 (21st September 2010), Ponnan JA stated the following:

"Section 3B makes plain that it is in fact the court's enquiry. It follows that the employment of terminology such as 'burden or onus of proof is particularly unhelpful and would serve to obfuscate rather than elucidate the enquiry. In those circumstances it would be wholly inappropriate for a court to saddle an accused person with an onus and to decide the matter on the strength of whether or not that has been discharged. That is not to suggest that persons such as the respondents would be free to adopt a supine attitude. On the contrary, particularly where, as here, the information sought is peculiarly within their knowledge, they have as much - if not more - of an obligation as the State to assist the court's enquiry. Failure in those circumstances to assist the court may well be fatal to their quest for legal assistance at State expense. For, if the court is left in the dark as to one's personal circumstances it can hardly properly undertake the postulated enquiry. Were that to be the case it must perforce decline to issue the directive contemplated by s 3B(I). In this case Borchers J observed that 'the court has not the administrative machinery to investigate the correctness of the information supplied'. That may be so. But that ignores the court's power to subpoena witnesses and documents or to place witnesses such as the respondents under oath and if necessary for them to be subjected to cross examination. Those are formidable weapons in the judicial armoury that must, where necessary, be employed by a court to enable it to discharge its constitutional mandate.

18. In LEGAL AID SOUTH AFRICA V VAN DER MERWE AND OTHERS, (A409/2010) [2010] ZAWCHC 525, it was stated:

"It should not be required by a court to provide legal representation at state expense where this is not necessary, because the person concerned is able to afford such representation him or herself."

19. Whether a court has the power to prescribe the scope and the extent of the legal representation to be afforded to the accused at state expense the court in the case of Legal Aid Board v The State (*supra*) had this to say:

"Courts should be slow to attribute a superior wisdom to themselves in respect of matters entrusted to other branches of government."

Further:

"That is not to suggest that a court is powerless in the face of an unreasonably intransigent legal aid board. After all it is the court that is burdened with the constitutional obligation of ensuring

that the proceedings are conducted in accordance with notions of fairness and justice.”

20. In Kenya, **Section 43(1) of the Legal Aid 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.

21. In the instant application, it is clear the framework for full implementation of **Article 50 (h)** is now in place as required by the Constitution. **Section 40 of the Act** requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to **section 41 of the Legal Aid Act** is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate.

Dated and delivered at Nairobi this 25th day of November, 2016.

M. K. KOOME

JUDGE OF APPEAL

F. AZANGALALA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR