



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

CORAM: VISRAM, KOOME & ODEK, JJA)

CRIMINAL APPEAL NO. 101 OF 2011

BETWEEN

GEORGE GIKUNDI MUNYI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit &

Kasango, JJ.) dated 31st March, 2011

in

H.C.CR.A No. 165 of 2008)

JUDGMENT OF THE COURT

1. The appellant jointly with Mwenda Kairira, Stephen Kanyiri Itamunya, Moses Muriuki Kubai and Raphael Mwingirwa Isaya were charged in the Principal Magistrate's Court at Maua with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and one count of malicious damage to property contrary to **Section 339 Penal Code**. The appellant and Raphael Mwingirwa Isaya were additionally charged with an alternative charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

2. The particulars of the first count of robbery with violence were that on 19th September, 1999 at about 9:00 p.m. at Kalitheria along Kianjai/Ruri road in Meru North District within the then Eastern Province, the appellant and his co-accused jointly with others not before the court, while armed with offensive weapons to wit panga, rungu, axes, crow bars robbed PC Justus Baariu of a motor vehicle registration number KAK 757L make Toyota Corolla valued at Kshs. 420,000/=, cash Kshs. 2,600/= and at or immediately before or immediately after the time of such robbery injured the said PC Justus Baariu. The particulars of the second count were that on the above mentioned date and place the appellant and his co-accused jointly with others not before the court while armed with the aforementioned offensive weapons robbed C.I. Joseph Muriira Thaimuta of cash Kshs. 17,510/=, Seiko wrist watch valued at Kshs. 10,000/=,

10 compact cassettes valued at Kshs. 1,000/=, a driving license and at or immediately before or immediately after the time of such robbery injured the said C.I Joseph Muriira Thaimuta.

3. On the count of malicious damage to property, the particulars were that on the above mentioned date and place the appellant and his co-accused jointly with others not before the court willfully and unlawfully damaged seven drop wires and a cable worth Kshs. 44,000/= the property of Telkom Kenya. The particulars of the alternative charge were that on the above mentioned date and place the appellant and Raphael Mwingirwa Isaya otherwise than in the course of stealing dishonestly handled one motor vehicle registration number KAK 757L make Toyota Corolla valued at Kshs. 420,000/= the property of PC Justus Baariu knowing or having reason to believe it to be stolen.

4. The appellant and his co-accused pleaded not guilty to all counts. The prosecution called a total of nine witnesses in support of its case. At the conclusion of the trial, the trial court convicted the appellant and Raphael Mwingirwa Isaya for the offence of robbery with violence and acquitted the others. Following an appeal by the appellant and Raphael Mwingirwa Isaya, the High Court ordered a retrial.

5. At the retrial it was the prosecution's case that on 19th September, 1999 at around 9:00 p.m. PW1, PC Justus Baariu (PC Baariu) and his nephew PW2, C.I. Joseph Muriira Thaimuta (C.I. Joseph) were traveling in C.I Joseph's motor vehicle from Kianjai to Nairobi. At all material times PC Justus was driving the said vehicle. At Kulithiria PC Justus stopped the vehicle upon noticing a telephone pole across the road. Thereafter about eight men emerged from the side of the road; they had torches and were armed with pangas. They managed to open the driver's door and dragged PC Justus out of the car. They started beating PC Justus demanding for money and his firearm. According to C.I. Joseph, he was ordered to come out of the vehicle and was severely beaten by the assailants until he lost consciousness.

6. When C.I. Joseph regained consciousness the assailants continued beating him and one of them asked him for his firearm. C.I Joseph testified that the assailants took Kshs. 17,500/=, his wrist watch and driving license. It was P.C Justus's evidence that he was robbed of Kshs. 2,600/=. On noticing that another motor vehicle was heading towards the scene, the assailants got into C.I. Joseph's vehicle and fled. Both PC Justus and C.I. Joseph were not able to identify any of the assailants since they had worn masks.

7. The incident was reported on the same day at Nchiru Police Station and information regarding the stolen vehicle was circulated to various police stations. On the same day at around 11:00p.m.while PW5, IP. Stephen Kithinji (IP. Stephen) was at the Meru/Maua road block he noticed a vehicle matching the description of the stolen vehicle. He stopped the vehicle which had two occupants and managed to apprehend the appellant who was driving the vehicle while the other occupant fled. IP. Stephen identified Raphael Mwingirwa as the assailant who had fled from the stolen vehicle. It was IP. Stephen's evidence that upon searching the stolen vehicle he recovered a panga, Simi and a bundle of keys. C.I Joseph later positively identified the recovered vehicle as his.

8. Satisfied that the prosecution had made a case against the appellant the trial court placed him on his defence and acquitted his co-accused. The appellant gave an unsworn statement and denied committing the offences he was charged with. He testified that he was arrested on 19th September, 1999 and taken to Nchiru Police Station. While at the police station he was physical assaulted by the police to admit to an offence he did not commit. According to him, he was not informed of the charges against him until 28th September, 1999 when he was arraigned in court.

9. At the end of the retrial the trial court convicted the appellant for the two counts of robbery with violence and sentenced him to death. Aggrieved by the said decision, the appellant filed an appeal in the High Court which was dismissed vide a judgment dated 31st March, 2011. It is that decision of the High Court that had provoked this second appeal based on the following grounds:-

- ***The trial magistrate and superior courts erred in law in proceeding in trying the appellant without having the appellant assigned an advocate by the state at the state's expense, as substantial injustice would result and did result and also failed to inform appellant of the said***

- rights promptly. Thus the appellant suffered substantial injustice in the first and second trials.*
- *The learned Judge erred in law in not finding that there was an error by the trial court in allowing evidence of previous proceedings and conviction to be produced which was highly prejudicial to the appellant's case and thus poisoned the court's mind.*
 - *The learned Judge failed to find that the appellant's rights were violated by being held in custody for a period exceeding the stipulated period (19/9/99 to 8/10/99) without any justification.*

10. Miss Kiome, learned counsel for the appellant, submitted that **Article 50** of the **Constitution** establishes the right of an accused person to be afforded legal representation at the state's expense in capital offences. She submitted that the appellant was not given such representation hence he was prejudiced during the trial. According to Miss Kiome, the appellant's rights were also violated since he had been held in custody for 18 days before being arraigned in court. She argued that the appellant's defence of alibi was never considered by the two lower courts. She urged us to allow the appeal.

11. Mr. Makori, Senior Prosecuting Counsel supported the conviction against the appellant. He submitted that the appellant had an opportunity to request for legal representation but never did. He argued that the allegations of violation of the appellant's rights were never raised in the two lower courts. According to Mr. Makori, the prosecution's evidence was consistent; the appellant was found in recent possession of the stolen vehicle hence the defence of alibi was displaced.

12. We have considered the record, submissions by counsel and the law. This is a second appeal and by dint of **Section 361** of the **Criminal Procedure Code**, Chapter 75, Laws of Kenya, the jurisdiction of this Court is confined to matters of law only. In **Chemagong -vs- Republic (1984) KLR 213** at page 219 this Court held,

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)”

13. It is imperative to first deal with the allegations of violation of the appellant's constitutional rights. It was the appellant's contention that his rights were infringed because firstly, he was detained in custody for a period of 18 days before he was arraigned in court and secondly, he was not afforded legal representation at the State's expense.

14. **Section 72(3)** of the former Constitution which was in force then provided as follows:-

“72(3) A person who is arrested or detained ..

.....

upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

15. From the record the appellant was arrested on 19th September, 1999 and arraigned in court on 8th October, 1999, four days after the stipulated time frame for a capital offence. Therefore, what was the implication of the said delay? In **Dominic Mutie Mwalimu –vs- Republic- Criminal Appeal No. 217 of 2005** this Court observed:-

***“A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).*”**

The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.”

16. We cannot help but note that the appellant never raised the aforementioned allegation in the two lower courts. The appellant did not apply for legal representation. That being the case, we find that the prosecution did not have an opportunity to offer an explanation for the said delay so as to enable the two lower courts to determine whether it was reasonable. This being a second appeal, we are unable to determine from the record whether the said delay was reasonable or not hence this ground must fail. In ***Samuel Ndungu Kamau & Another –vs- Republic- Criminal Appeal No. 223 of 2006*** where this Court held,

“The provisions of Section 72 (3) (b) above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under Section 84 of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual position. When such a complaint is raised for the first time before this court, it may not be possible to investigate the truth or falsity of the allegation. That being our view of the matter, this ground fails, more so when it does not relate to the question whether or not the 2nd appellant alone or together with other persons not before the court committed the offence he stands convicted of”

17. On the alleged violation of the appellant’s rights, the issue that arises for consideration is whether the appellant was entitled, as of right, to legal representation at the state’s expense. If so, whether the rights of the appellant, who was not represented by counsel at the trial, were violated.

18. The appellant's trial took place between the year 2000 and 2001 under the former Constitution. **Section 77** of the former 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

.....

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

.....

(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;

.....

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

Based on the foregoing an accused person was not entitled to legal representation at the State's expense under the former Constitution. In *Charo Karisa Thoya –vs- Republic- Criminal Appeal No. 274 of 2002*, it was 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.”

19. However, the right to legal representation at the State's expense is provided under **Article 50** of the current **Constitution** which provides in part:-

“Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(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;....”
Emphasis added.

20. This Court while considering the importance of legal representation in the *David Njoroge Macharia –vs- Republic - -Criminal Appeal No. 497 of 2007* 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?"

The right to legal representation is integral to the realization of a fair trial more so in capital offences.

21. In ***David Njoroge Macharia –vs- Republic (supra)*** this Court held,

“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.”

Under the current ***Constitution*** an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the ***David Njoroge Macharia –vs- Republic (supra)*** the Constitution does not set out what constitutes substantial injustice. Chapter 18 (transitional & consequential provisions) of the current Constitution places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under ***Article 50*** within four years of the promulgation of the Constitution. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. Whereas it was the intention of the framers of the Constitution that there be a right to legal representation we appreciate that the same can only be achieved progressively. Bearing the foregoing in mind we implore Parliament to enact the relevant legislation.

22. The appellant's conviction was based on the doctrine of recent possession. Both lower courts made concurrent findings that the appellant was found in recent possession of the stolen vehicle. This Court has decided in several cases and outlined when the principles of recent possession may be applied to a case. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005***, this Court held,

“...It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

23. It was IP. Stephen's uncontroverted evidence that he arrested the appellant on the material day at the Maua/Meru road block; the appellant was driving the stolen vehicle. Subsequently, C.I Joseph positively identified the recovered vehicle as the one that had been stolen. We note that the appellant did not give any explanation for being in possession of the stolen vehicle. We further note that the appellant was found in possession of the stolen vehicle about two hours after the robbery which leads us to the inevitable conclusion that he was involved in the robbery. In ***George Otieno Dida & Another -vs-Republic [2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

“There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....”

In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.”

24. On the issue of Alibi, DW2, Charles Mugwika, testified on behalf of the appellant as follows:-

“I am the above named. On the 19/9/99 I was with Gikundi (appellant) the accused in the dock from 2pm at Maua town at Kaciongo. We were selling miraa. We sold miraa up to 7pm when the police came and arrested him...I was not with the accused at 9pm on that day.”

We find that the evidence tendered by the prosecution was overwhelming and displaced the alleged alibi. We also note that the appellant’s witness was not able to give an account of the appellant’s whereabouts at around 9:00 p.m. when the robbery occurred.

25. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed. Given that this Judgment raises a constitutional issue in respect of realization of the right of an accused person to legal representation, we direct the Deputy Registrar of this Court to formally serve a copy of this Judgment to the Hon. the Attorney General, the Constitutional Implementation Committee and the Law Reform Commission for their records and necessary action, as may be appropriate.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR