



IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

CRIMINAL APPEAL NO. 331 OF 2012

BETWEEN

ISAIAH MAROO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction/judgment of the High Court of Kenya at Meru (Apondi, Makau, JJ) dated 18th July, 2012

In

H.C.CR.A. No. 242 of 2009)

JUDGMENT OF THE COURT

The appellant Isaiah Maroo has appealed to this Court against the dismissal by the High Court (Muga Apondi and J. Makau JJ) of his first appeal thereto against a conviction and sentence of death imposed on him by the Maua Senior Principal Magistrate's Court on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

Both courts below found as proved the prosecution case that the appellant had on 29th June 2008 at Kamumi Location of Igembe District of the then Eastern Province robbed one Charles Mutura Njau (Charles) of some Ksh.5,000. The appellant was in the company of another person who managed to escape. The two were armed with dangerous weapons namely pangas. They also threatened to use actual violence on Charles during that robbery thus satisfying several of the elements of the offence, although one would have sufficed.

Charles' testimony, which the courts below concurrently accepted, was that he was leaving Njung'a Market to his home in Antuambui when he met two men who were very well known to him. The first was the appellant whom he knew even by his two names, while the other he knew only physically. They each had a panga and ordered him to stop. He did. They next ordered him to produce money and when he hesitated, the appellant raised his panga and threatened to kill him as he rummaged through his breast pocket and relieved him of some Ksh.5,000. Charles then shouted for help and some two men John Kirima (PW2) and Julius Kainga Njau (PW3) responded and came to his aid. They struggled with the

appellant but he managed to slip away and flee.

These three witnesses went together to the Kanuni D.O's office where they reported the incident to the Administration Police Officers there who referred them to Maua Police Station where a Formal report was made and statements recorded, in which the appellant was mentioned by name as all three knew him well as someone from their village.

When placed on his defence, the appellant denied any involvement in the robbery and said that he was 'fixed' by Charles on account of some quarrel he had with Charles' wife. The trial court disbelieved the appellant's defence and found the prosecution case proved beyond reasonable doubt. The High Court agreed.

Ms Thibaru, the appellant's learned counsel did not challenge the High Court's affirmation of the appellant's conviction and sentence. In fact, she expressly abandoned his self-authored grounds of appeal and argued the single ground in her Supplementary Memorandum of Appeal which is that;

“The learned Judges erred in not finding that the Appellant's fundamental right to fair trial as enshrined in Article 50 of the Constitution were breached or violated in that he was not informed of his right to legal representation by an advocate.”

While arguing the appeal, counsel submitted that at the hearing of his first appeal in the High Court, the appellant had a right to legal representation at State expense which, she added, that court was under a duty to inform him of. She cited this Court's decision in **DAVID NJOROGE MACHARIA –VS- REPUBLIC** [2011] e KLR which is in our thinking the most thorough and authoritative judicial exposition on the right to legal representation to date.

Counsel contended that the right to legal representation at State expense at trial applies with equal force to appeals. She therefore urged us to remit the matter back to the High Court for the re-hearing of the first appeal but with the aid of state funded legal counsel.

Mr. Mulochi, the learned prosecution counsel for the respondent opposed the appeal on the ground, first, that **Article 50** of the **Constitution 2010** did not apply retrospectively and, as the appellant's trial took place in 2009, the right to legal representation, at State expense, did not apply to him. Next, he submitted that **Article 50** applies to trials only and not to appeals and so, even if the appellant's first appeal was heard under the current constitutional dispensation, no right of his was violated. He therefore urged us to dismiss the appeal as lacking merit.

The right to legal representation takes two distinct facets under **Article 50** of the Constitution 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.”

The importance of legal representation cannot be gainsaid and in a criminal trial where the life, liberty and property of an accused person is at stake, it is a critical cog in the wheel of justice and a signal step towards attaining equality of arms. Thus, the constitutional thought behind these provisions must be that an advocate is essential to criminal proceedings and so the trial court has a duty to inform an accused person, and promptly so, of his right to hire one and, if he be unable to, of the right to be provided with one at State expense. The Constitution itself limits the right to legal representation at State expense to only those cases in which “***substantial injustice would otherwise result***” a phrase the precise contours of which are yet to be delineated whether by statute or by judicial pronouncement.

The Court in **DAVID NJOROGE MACHARIA –VS- REPUBLIC** (Supra) did however express itself quite categorically that “***persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense.***” We agree with and reiterate that position. It is time courts conducting trials, especially trials of capital offences, gave full meaning to this right. The State on its part must move with deliberate speed to actualize this right. Each day trials take place without observance of this right represents a huge risk on the part of the prosecution. We would reiterate the sentiments of this Court (differently constituted) sitting right here in Meru in **DOUGLAS KINYUA NJERU –VS- REPUBLIC** [2015] eKLR;

“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 and 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.”

We would only add that Parliament is duty bound to enact legislation to give full effect to the constitutional guarantee of fair trial and it need not be implored to do that which the Constitution commands. The Hon Attorney General should move with dispatch to initiate the process towards the actualization of the right if he has not already commenced. Progressive realization of this right must not morph into a perpetual wait.

Does the right to legal representation which we have treated 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.

In similar vein, the Constitution makes a distinction when it comes to an accused person’s right of access to the record of proceedings between the time when the trial is ongoing, and after the trial, as follows;

“Article 50 (5) An accused person-

- a. **charged with an offence, ... is entitled during the trial to a copy of the record of the proceedings of the trial on request; and**
- b. **has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.”**

(Our emphasis)

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 from what they are during 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. It is worth noting that even in **DAVID NJOROGE MACHARIA –VS- REPUBLIC** which dealt with the acknowledged right to legal representation at State expense during trial, the Court struck a timely pragmatic chord as follows;

“We would not go as 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 retrial where no such legal representation was provided...”

The appellant herein is certainly not entitled to the re-trial he craves.

We find no merit in this appeal. It is accordingly dismissed.

In view of our concern about the constitutional command for enactment of enabling legislation on legal aid, we direct that this judgment be served on the Honourable the Attorney General of the Republic of Kenya.

Dated and delivered at Meru this 23rd day of July, 2015

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR