IN THE COURT OF APPEAL

AT MALINDI

(CORAM: M. KOOME, H. OKWENGU & G.B.M. KARIUKI JJ.A)

CRIMINAL APPEAL NO.25 OF 2013

BETWEEN

HAMISI SWALEH KIBUYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction, Judgment, Decree, Order or as the case

may be) of the High Court of Kenya Mombasa (Ojwang & Odero, JJ.)

delivered on 14th October 2014

in

H.C.CR. A. NO.212 OF 2008)

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JUDGMENT OF THE COURT

1. **The appellant, Hamisi Swaleh Kibuyu**, lodged a second appeal in this Court on 15th December 2010 against his conviction and sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code, Chapter 63 of the Laws of Kenya. The offence carries a mandatory death sentence to which the appellant was condemned. His first appeal to the High Court was dismissed on 30th November 2010.

2. The particulars of the charge against the appellant were that

> ***"on the 6th day of April 2007 at Midodoni Village in Mtongwe location of Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely knives and clubs robbed RIZIKI SHABAN of one pair of shoes, cash Ksh.7,000/= all valued at Ksh.8,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said RIZIKI SHABAN."***

3. The substance of the charge was read to the appellant in Kiswahili on 4th July 2007 before the Resident Magistrate at Mombasa, Hon. T. Mwangi. The appellant had no legal representation. He denied the charge and a plea of not guilty was entered. The hearing opened before the learned trial magistrate on 18th February 2008 and after the close of the prosecution's case following adduction of evidence from four prosecution witnesses, the learned trial magistrate found that the appellant had a case to answer and placed him on his defence. The appellant's defence was contained in a short unsworn statement in which he denied the charge.

4. In his judgment delivered on 25th July 2008, the learned trial magistrate found the charge against the appellant proved beyond reasonable doubt and accordingly found the appellant guilty and convicted him as required by Section 215 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya which stipulates -

> ***"The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."***

The trial magistrate then proceeded to sentence the appellant to death after mitigation.

5. In his appeal to the High Court, the appellant was unrepresented by counsel. He submitted that the trial magistrate erred in convicting him on the basis of evidence of recognition given that the offence was committed at night. The attack was sudden and terrifying to the complainant, and the circumstances therefore prevailing at the scene of the crime were not favourable for positive identification. The High Court was not persuaded. In its judgment, it found that the complainant who testified in the trial Court as PWI was able to recognize the appellant *"whom he knew"* as one of his attackers. *"He even told the (trial) court that the appellant's nickname was "Kibuyu""*, the Court observed. The High Court found that there was *"no possibility of a mistaken identity"* and consequently dismissed the appeal and upheld the appellant's conviction and sentence. That decision precipitated this second appeal.

6. The appellant was represented in this second appeal by **Miss Aoko Otieno of Aoko Otieno & Associates**, Advocates, who filed three supplementary grounds of appeal contending:

a. **firstly**, that the appellant's right to fair trial was infringed especially with regard to Article 50(1) (g) & (h) of the Constitution and
b. **secondly**, that the proceedings in the trial court were a nullity and
c. **thirdly**, that the sentence of death meted out to the appellant by the trial court and upheld by the High Court was unconstitutional.

7. By dint of Section 361 of the Criminal Procedure Code, Cap 75 Laws of Kenya, a second appeal to this Court is restricted to matters of law only. This statutory requirement has been emphasized by this court in successive decisions and as long ago as 1982 this Court stated in the case of **Njoroge Vs Republic, (1982) KLR 388**, with regard to a second appeal -

> ***"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by the concurrent finding of facts made by the lower courts unless those findings were not based on evidence."***

This point was also re-emphasized in the case of **Sasi V. Republic (2009) KLR 353.** But there are three exceptions to this. These are (1) if the findings of the lower court/s were not based on evidence at all or (2) were a pervasion of the evidence or (3) this court is satisfied that on the totality of the evidence no reasonable tribunal properly directing itself would arrive at such finding/s. See **Adan Muraguri Mungara v. Republic (C.A. Cr. Appeal No.247 of 2007, Nyeri).**

8. The appeal came before us on 29th January 2015. Submitting on behalf of the appellant, Miss Otieno contended that the proceedings in the High Court were a nullity because the appellant was not afforded

legal representation when his first appeal was being heard yet the offence of which the appellant was charged and convicted carried a death sentence. In addition, Miss Otieno contended that when the plea was first taken on 4th July 2007 in the trial court, the name of the prosecutor was not indicated and therefore it is unclear whether the prosecutor was present. In her view, the law as it stood then under Section 85 (2) of the Criminal Procedure Code was infringed. On 4th July 2007, Section 85 (2) read –

> ***"85 (2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case."***

9. As the law stood on 7th April 2007, Section 85 (2) of the CPC (supra) required the prosecutor to be a police officer not below the rank of assistant inspector or an advocate appointed by the Attorney General. This provision was amended by Act 7 of 2007 and as the law now stands following that amendment, the Attorney General by notice in the Gazette, may appoint public prosecutors for Kenya for any specified area thereof and either generally or for any specified case or class of cases. Under the current Section 85 (2) of the CPC, the restriction imposed on the Attorney General by the erstwhile Section 85(2) of the CPC not to appoint a person in public service not below the rank of assistant inspector of police was removed by the amendment.

10. In support of her submissions, Miss Otieno invited our attention to the case of **Bernard Lolimo Ekimat V The Republic** (C.A. Crim. Appeal No.151 of 2004 at Eldoret) on which she relied in support of her submission that the proceedings in the trial court were a nullity as there was no record of the name of the prosecutor present in court when the hearing commenced and that it was not possible to tell if such prosecutor, if present, was of the rank specified by S.85 (2) of the Criminal Procedure Code Cap 75.

11. Counsel for the appellant pointed out that the appellant's first appeal to the High Court was heard after the promulgation of the Constitution and contended that the appellant was entitled to legal representation which was not provided, hence the alleged breach of the appellant's right under Article 50. But the record shows that the appeal was filed on 31st July 2008 before the date of promulgation of the Constitution on 27th August 2010 and was heard on 26th October 2010 although judgment was delivered on 30th November 2010. To buttress her submission, counsel cited the decision in **Chalo Karisa V R (2011) e KLR** and contended that the right to legal representation was violated. Borrowing from the decision in the case of **Chalo Karisa (supra)** counsel contended that the right to legal representation cannot be limited. Relying on the decision in **Macharia V. R. (Criminal Appeal No.497 of 2007)** counsel opined that the death sentence meted out to the appellant was disproportionate to the offence as no one died the complainant having suffered only head injuries which healed after 12 days. Moreover, added counsel, the law does not state that death is the only sentence.

12. **Mr. Monda**, the learned Assistant Director of Public Prosecutions, opposed the appeal and contended that the decision in the case of **Joseph Njuguna Mwaura V. R. (supra)** has settled the issue of the constitutionality of death sentence.

13. On the submission that the proceedings in the trial court are a nullity because there was no record of the name of the prosecutor when the plea was taken on 4th July 2007, Mr. Monda contended that no prejudice was occasioned by the omission and none was pointed out. As regards the right to legal representation during the hearing of the appeal in the High Court, he relied on the authority of **David Njoroge Macharia V.R.** (Criminal Appeal No.497 of 2007 – Nairobi – Okubasu, Waki & Visram JJA) in which the Court delivered itself thus on the matter:

> ***"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. 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.

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 have been entitled to free legal representation during the first trial. His appeal is therefore dismissed."

14. In Mr. Monda's view, the High Court evaluated the evidence properly and carried out a thorough and exhaustive examination and came to the right conclusion in rejecting the appeal. It was his submission that there was sufficient evidence of recognition on the basis of which the appellant was found to be the robber. He urged as to dismiss the appeal.

15. We have examined the three points of law raised in this appeal. On the issue of the prosecutor's name not being reflected in the record we state as follows.

16. At the plea stage, the charge was read out to the appellant in Kiswahili and he denied it, hence the recording of the plea of not guilty. Non-recording by the Court of the name of the prosecutor is in our view, only prima facie evidence of absence of a prosecutor. After the plea no evidence was adduced and no hearing other than the plea taking took place. We observe that counsel did not show what possible prejudice the appellant could have suffered on account of that omission. As no hearing or adduction of evidence ensued after the plea of not guilty was recorded, no prejudice was occasioned to the appellant by the non-recording of the prosecutor's name.

17. A perusal of the authority of Bernard Lolimo Ekimat (supra) shows that it is distinguishable from the present case. In Bernard Lolimo's case, the hearing of the prosecution case against the appellant started and concluded (on 12th February 2002) and at the start of the hearing, there was no record to indicate the Coram of the court. This Court differently constituted found that other than the trial magistrate and the appellant, there was nothing to show whether a prosecutor was in Court when the prosecution witnesses testified and whether such prosecutor, if indeed he was in Court, was of the rank specified by Section 85 (2) (supra). Consequently, this Court found that an issue of jurisdiction had been raised. The Court cited with approval the decision in **Roy Richard Elireman & Another V.R. (Criminal Appeal No. 67 of 2002)** that-

"in Kenya, ... there must be a prosecutor, either public or private who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue the prosecution for a trial to be validly conducted within the provision of the Constitution and the code..."

This Court made a finding in Bernard Lolimo Ekimat's case that there was nothing to show whether there was a prosecutor before the Court when the prosecution witnesses gave evidence and if such prosecutor, if in Court, was of the specified rank.

18. In the instant appeal, when the hearing commenced on 18th February 2008 there was an Inspector of Police, namely, IP Bahati, present in court and he prosecuted the case on that day when PW1, PW2 and PW3 testified in chief and in cross-examination. On 31st March 2008 when hearing resumed, Inspector Kituku prosecuted the case and PW4 testified and was cross-examined. Inspector Bahati returned to the case on 9th June 2008 when his application for adjournment was disinclined forcing him to close the prosecution case without calling the investigating officer. It is quite clear from the facts in the case of

Bernard Lolimo Ekimat that it can be distinguished from the instant appeal because at no time did the prosecution of the case in the instant appeal go begging for a prosecutor of the rank of an Inspector. We are therefore not persuaded by the submission by the appellant's counsel on that point which Mr. Monda, the respondent's counsel, the Assistant Director of Public Prosecutions opposed.

19. On the evidence of recognition, the appellant, when accosted and asked for a cigarette, was provided with an opportunity that lasted a few minutes, which was sufficient to ascertain who the appellant was talking to. The complainant knew the appellant. He told the Court that the appellant's nickname was "Kibuyu". The scene was lit and according to the testimony of PW2, the houses in the vicinity had security lights on. PW2 identified the appellant as one of the three attackers and even asked the appellant why they were attacking the complainant (PWI) to which the appellant is recorded to have retorted by telling PW2 to mind his own business. In short, there was a conversation, albeit brief, between the robbers on the one hand and PW2 on the other which facilitated PW2 with an opportunity to ascertain the identity of the appellant who was known to him.

20. On this issue of recognition, we are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification **(see KAMAU versus REPUBLIC (1975) EA 139)**. In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit. In the case of **Cleophas Otieno Wamunga Versus Republic (1989) KLR 424** this court correctly stated in this regard:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R. VS. TURNBULL (1976) 3 ALL ER 549at page 552 where he said:-***
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> > ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***
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> **"Although a fact may be proved by the testimony of a single witness, *"this does not lessen the need for testing with the greatest care the evidence of such single witness respecting identification."* This is particularly so where the conditions are not conducive to proper identification or where conditions favouring a correct identification are difficult."**

21. We have circumspectly perused the record of appeal and are satisfied on the evidence adduced in the trial court that the appellant was positively recognized by the complainant and there was no possibility of mistake or error in his recognition.

22. During the hearing of the first appeal in the High Court (which commenced on 5th October 2010 and concluded with the delivery of judgment on 30th November 2010), the appellant had no legal representation. His counsel contended before us that Article 50 (1)(g) & (h) of the Constitution was violated because the State failed to provide legal representation to the appellant. Article 50(2)(g) & (h) of the Constitution which was promulgated on 27th August 2010 stipulates –

> ***"50 (2) every accused person has the right to a fair trial, which includes right –***
>
> ***(g) to choose, and be represented by an advocate and to be informed of his 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 his right promptly.

23. On the issue of the appellant's legal representation in the High Court, was there a constitutional obligation on the part of the State to provide him with legal representation in respect of the offence of robbery with violence Contrary to Section 296 (2) (supra)?

24. The appellant's appeal in the High Court was lodged on 31st July 2008 and it was heard on 26th October 2010. The new Constitution was then in place. Judgment was delivered on 30th November 2010. In light of this, was the appellant not entitled to free legal representation at the State's expense? The right to fair trial is absolute and cannot be limited. The Constitution so stipulates in Article 25 (c). The right to fair trial includes (i) the right to "choose and be represented by an advocate and to be informed of his right promptly (see Article 50g) and (ii) the right to have an advocate assigned to the accused person by the State at State expense, **if substantial injustice would otherwise result**, and to be informed of this right promptly.

25. The right to legal representation is not absolute. It accrues where an accused person would suffer substantial injustice if it is not provided. This requirement was not addressed sufficiently by counsel. There is paucity of case-law on the issue of what constitutes "substantial injustice." Since the right to provision of legal representation is dependent on whether "substantial injustice would otherwise result," and since the right to fair trial includes the right to legal representation, it is imperative to define the term "substantial injustice" with a view to show where legal representation should be provided, if not in all cases. In cases where the liberty of an individual is at stake, persons without legal expertise require provision of legal representation for the simple reason that they may not have capacity to defend themselves or be able to discern legal points in their favour or legal weaknesses in prosecution case, matters that are easily discernible to a lawyer, and yet the fate of an accused person may depend on such matter and one's ability to effectively deal with them. Without the help of a lawyer, an accused person is at a disadvantage and the scales of justice may easily swing against him where the trial proceeds without aid of counsel. An unrepresented person may not be able to cross-examine, or argue points of law or even understand the law and rules of evidence. He may not have capacity to defend himself or to sift the grain from the chuff as it were and may place little importance to aspects that are vital and on which decision may repose while unknowingly concentrating, sometimes at great length, on points of little legal significance. This Court, stated in **David Njoroge Macharia V Republic** (supra) that –

"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.

"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."

26. This Court has taken the position in David Njoroge Macharia's case (supra) that substantial injustice would arise in capital offences if no legal representation is given but has not unraveled the term in regard to non-capital offences. In effect, therefore, there is still need to define the term "substantial injustice" in non-capital offences.

27. In the instant appeal, the appellant faced a capital offence under S.296 (2) of the Penal Code. On the

authority of David Njoroge Macharia V. R. (supra), he was entitled to legal representation at the State's expense during the trial. The enjoyment of this right is subject to enactment of legislation by Parliament as mandated by Article 261(1) of the Constitution which reads:-

> ***"261 (1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***

28. The legislation to be enacted by Parliament under the Fifth Schedule includes legislation on Article 50 relating to fair hearing and the time specified for it is four years from the effective date. That period ended in August 2014. As indicated above, the appeal in the High Court was heard on 26th October 2010 and judgment was delivered on 30th November 2010. The appellant was not lucky in that as at that time, no legislation was in place to facilitate his enjoyment of free legal representation. Parliament had four years to put such legislation in place. But courts have been pro-active and have facilitated litigants facing capital offences with legal representation while awaiting Parliament to legislate. It goes without saying that it was neither feasible nor possible for Parliament to effect immediately or at once all the legislation mandated by Article 261. The rights that are encapsulated in the fifth schedule were meant to be progressively realized and Parliament was given timelines by the Constitution. In respect of the right to fair trial under Article 50, four years was the time-frame given. As this period had not elapsed as at the time of the hearing and disposal of the first appeal in the High Court, the appellant became a victim of the progressive realization of the right to legal representation. That was unfortunate. However, though the ideal position is one where the appellant should have had legal representation, we find on the facts and evidence, there was proof beyond reasonable doubt that justice was served and the decision reached by the two courts below was correct. In our view, the failure of legal representation did not occasion substantial injustice to the appellant.

29. As regards the issue of **death sentence**, this Court (Mwera, Warsame, Kiage, Gatembu & J. Mohammed JJA) in **Joseph Njuguna Mwaura & 2 Others versus Republic (Criminal Appeal No.5 of 2008 at Nairobi)** expressed itself on the matter as follows:-

> ***"the death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.***
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> ***We also do not consider that the deprivation of life as a consequence of unlawful behavior is grossly disproportionate punishment for the offences committed, which in many cases result in the loss of life, and the loss of dignity for the victims. For example, in the present appeal, the victims of the crimes were roused from their sleep in the middle of the night, and faced with the threat of harm, and even death if they did not comply with the demands of the intruders. This was a violation of their right to dignity, and from all accounts, was a cruel act.***
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> ***Among the purposes of punishment are retribution, so that equal harm is done to the offender, and securing justice for the victims of the crime. In addition, the punishment must serve as a deterrent, and in this case, the punishment fits the crime."***

30. In this appeal the appellant's right to fair trial under Article 50(1) (g) and (h) of the Constitution was not infringed nor were the proceedings in the trial Court a nullity on account of the absence of the name of the prosecutor on 4th July 2007 when the plea was taken and no prejudice was caused. As the death sentence has already been declared not to be unconstitutional, the appeal is bound to fail. We dismiss it. We take this opportunity to commend the appellant's counsel, Miss Aoko Otieno, and the Assistant Director of Prosecutions, Mr. Monda, for preparing their briefs well and for assisting the Court through their research and erudite presentations.

31. We urge Parliament to discharge the mandate bestowed on it by Article 261. The Registrar of this Court will relay a copy of this judgment to the Clerk of the National Assembly in relation to Article 261

of the Constitution.

Dated and delivered at Malindi this 9th day of October, 2015.

M. KOOME

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR