IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 274 OF 2002

BETWEEN

CHARO KARISA THOYA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi at Mombasa (Khaminwa & Omwitsa, Commissioners of Assize)

dated 18th September, 2002

in

H.C.CR.A. NO. 98 OF 1999)
****

JUDGMENT OF THE COURT

This appeal by ***CHARO KARISA THOYA*** has a long history which is to be traced to a charge sheet in which the appellant was charged with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code The particulars of the offences in the two counts were as follows:-

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

PARTICULARS OF THE OFFENCE
CHARO KARISA THOYA: On the 18th day of October, 1998 at Watamu Village in Watamu Location within Malindi District of the Coast Province, while armed with knives and iron bar, jointly with others not before court robbed Michael Thoya of two golden chains, one bracelet, a wrist watch make seiko quartz and cash K.Shs.67,000/= all valued at K.shs.100,000/= and at or immediately before or immediately after the time of such robbery wounded the said Michael Thoya

COUNT II

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

CHARO KARISA THOYA: On the 18th day of October, 1998 at Watamu Village in Watamu Location within Malindi District of the Coast Province, while armed with knives and iron bar, jointly with others not before court robbed Peninah Wanjiru Macharia of cash Kshs.410/= and at or immediately after the time of such robbery wounded the said Peninah Wanjiru Macharia."

The appellant was arraigned before the Principal Magistrate's Court at Malindi in *Criminal Case No. 1764 of 1998* on *22nd October, 1998* where the appellant denied the above stated charges.

The trial of the appellant commenced on *22nd December, 1998* when the two complainants ***Michael Mramba Thoya*** (PW1), ***Penina Wanjiru*** alias ***Shiro*** (PW2) and the two police officers who rushed to the scene ***Pc Kimolo William Kinyo*** (PW3) and ***Pc Alibillahi Mohamed*** (PW4) testified. The prosecution case was based mainly on the evidence of these four prosecution witnesses.

It was the prosecution case that on the night of *17th & 18th October, 1998* at about 4:00 a.m., ***Thoya*** (PW1) and ***Wanjiru*** (PW2) who had been at Happy Night Club, went to the beach for a walk when they were attacked by two people who robbed them of their various items as set out in the particulars of the offence in the two counts. When PW2 was hit with an iron rod, she shouted for help and as a result police officers on patrol rushed to the scene and started chasing one of the assailants whom they arrested. The assailant who was arrested is the appellant who on being searched was found in possession of the items stolen from the two complainants.

In his defence, the appellant told the trial magistrate that on the material night he was in the Happy Night Club where he met PW2. The two (the appellant and PW2) had drinks and danced until 4:00 a.m. when PW2 disappeared. When the appellant went out he found both PW1 and PW2 standing at the beach. When the appellant asked PW2 why she had disappeared, PW1 started to abuse him (appellant). The shouting attracted three police officers who came to the scene and appeared to know PW1. The police officers then started beating the appellant claiming that he was a thief. PW1 got a car which took the appellant to the police station. At first the appellant was booked for resisting arrest but later he was charged with the present offence.

The learned trial magistrate considered the evidence tendered by the prosecution and the defence by the appellant. Having analysed the evidence, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant in respect of both counts. In the course of her judgment, delivered on *10th March, 1999*, the learned trial magistrate said:-

"From the above evidence, it is not in dispute that while PW1 and PW2 were at the beach, the accused also went to the beach where there was some fight between PW1 and the accused. Police who were also at the beach stepped in to resolve the situation and at the end of it all, the accused was arrested. The evidence of PW1 and PW2 which was consistent is that accused is one of the two men who robbed them. Whereas the accused would like the court to believe that he had gone to look for PW2 whom she had been with all evening, PW2 denied that she had ever met the accused. Even if that were the case, which the court does not believe, there is further evidence from two police officers PW3 and PW4 who were on patrol and they did not know what was going on. They corroborated PW1's evidence that when they helped chase, overpower and arrest the accused, they recovered the chains, bracelets and watch that PW1 had been robbed of."

The learned trial magistrate considered what the appellant had said in his defence and in his statement under inquiry and it would appear that the learned magistrate was satisfied that the appellant was indeed the person who robbed the two complainants. In concluding her judgment, the learned trial magistrate stated:-

"The accused even named his accomplice during the robbery as William. He admitted that night he was armed with a knife, thus corroborating the evidence of PW1 and PW2. The court has warned itself of the fact that the accused repudiated his statement. However for the reasons given at the time the statement was admitted and going by the evidence on record as a whole which corroborates the accused's own confession, it is clear that the accused and others planned to rob, and they did rob PW1 of the items listed in the charge sheet. The accused was caught red-handed committing the robbery. There is evidence that there were more than one person who committed the robbery, that the two were armed with offensive weapons namely iron rod and a knife and that in the cause of the said robbery PW1 was assaulted to the extent that he suffered actual bodily harm. Reasons wherefore I find the accused person guilty and convict him for the offence of robbery contrary to section 296(2) of the penal code, as charged in the 1st count.

As regards the 2nd count, there is evidence on record that PW2 was also robbed of her money by the accused's accomplice. The accomplice may still be at large. However, it is a fact that the accused and his accomplice were acting on

their common intention of robbing PW1 and in the process, PW2 who happened to (sic) PW1's company was also robbed. For the foregoing reasons it is safe to rule that the robbery against PW2 was also committed by two people who were armed with offensive weapons which fits the ingredients of the offence as described under section 296(2) of the Penal Code. I therefore also find the accused person guilty of the above offence as charged in the 2nd count and convict him accordingly."

The learned trial magistrate then proceeded to sentence the appellant to death on each count. Being dissatisfied by both conviction and sentence, the appellant filed an appeal to the High Court where the matter was placed before Omwitsa and Khaminwa (both Commissioners of Assize). In a short judgment delivered on *18th September, 2002*, the learned Commissioners of Assize dismissed the appellant's appeal stating:-

"Upon analyzing the testimony of the complainants and that of prosecution witnesses we find that there was overwhelming evidence to support the convictions. The appellant was arrested immediately after the robbery and the articles stated in the charge, save cash recovered from him. The complainants did not loose sight of the appellant who was one of the two persons who assaulted and robbed the complainants. The second assailant disappeared into the bush while the appellant was arrested in the ocean where he had attempted to flee. A knife which he used to assault the complainants with was also recovered from him. In addition the appellant confessed to the crime. We find that the judgment of the Honourable Magistrate was cogent and well founded on evidence tendered by the prosecution. There was overwhelming evidence to prove the charges. In the circumstances we find no merit in the appeal and dismiss the same."

It is the foregoing that has given rise to the appeal before this Court. The hearing of the appeal commenced on *18th January, 2011* and then continued on *4th April, 2011* when it was concluded. Mr. T. Bryant appeared for the appellant, while Mr. Jacob Ondari (Assistant Deputy Public Prosecutor), appeared for the State.

The first ground of appeal taken up by Mr. Bryant was on the issue of a fair trial. It was his submission that it was not possible to have fair trial when the State did not provide the appellant with legal representation in this case in which the appellant was facing a death sentence. He sought to rely on ***International Covenant on Civil and Political Rights 1966*** and the ***African Charter on Human and Peoples Rights*** to support his submission. He also relied on this Court's decision in ***Rono v. Rono & Another*** *[2008] 1 KLR (G & F) 803*.

The second ground taken up by Mr. Bryant was on the issue of evidence upon which the appellant was convicted. He was of the view that there was insufficient evidence as to whether a knife was used. He submitted that there was contradiction on evidence by the prosecution witnesses (PW1, PW2, PW3 & PW4). Mr. Bryant took us through the evidence of the prosecution witnesses in a bid to demonstrate the contradictions in their evidence. He went on to argue that there were some people like the doctor who treated the appellant, the watchman and the mother of the appellant who should have been called as prosecution witnesses.

Finally, Mr. Bryant submitted that if this Court upheld the conviction he would like the Court to hold that the death sentence is inhuman. He pointed out that there was no violence used and that everything that had been stolen was recovered hence the appellant did not deserve the death penalty. Mr. Bryant abandoned all other grounds of appeal.

On his part, Mr. Ondari supported both the conviction and sentence. On the issue of legal representation, Mr. Ondari submitted that the law did not provide for legal representation at the time the appellant was arraigned before the trial court.

As regards the evidence, Mr. Ondari was of the view that the evidence against the appellant was clear and congent as he was arrested at the scene, and in possession of the property stolen during the robbery.

On the issue of death penalty, Mr. Ondari's take was that death penalty was not unconstitutional. He went on to submit that this Court has discussed the issue of mandatory death sentence and that the appellant was given an opportunity to mitigate before he was sentenced to death. Mr. Ondari therefore asked us to dismiss this appeal.

Having set out the history of this appeal, and the summary of rival submissions we may now proceed to determine the issues at

hand. We wish to deal with the question of evidence first. It was submitted by Mr. Bryant that the evidence against the appellant was insufficient and hence the conviction was unsafe. On this issue we must go back to the findings of the trial court. We have set out elsewhere in this judgment the learned trial magistrate's analysis of the evidence and her findings thereon. She had the opportunity to see and hear the witnesses testify and hence she was in a better position to assess the credibility of the witnesses – see ***OKENO V. R.*** [1972] E.A. 32. When the appellant's first appeal was considered by the High Court, the learned Commissioners likewise analysed the evidence and came to the same conclusion as did the trial magistrate that the appellant was indeed the person who robbed the two complainants on the material night. We have similarly set out in this judgment what the first appellate court said in dismissing the appellant's appeal in the High Court. Hence here we have concurrent findings by the two courts below. In ***M'IRIUNGU V. R.*** [1983] KLR 455 at p. 466 this Court stated:-

"In conclusion we would agree with the views expressed in the English case of *Martin v. Glyneed Distributors Ltd.* ***(t/a MBS Fastenings) – The Times of March 30, 1983 – that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court, unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."***

On our part, we are of the view that having considered the analysis of evidence and the findings thereon by the two courts below we, like our brothers in **M'Iriungu case** (supra), would resist the temptation to treat the findings of fact as holdings of law. On our part we would not fault the two courts below and we would give loyalty to the factoral conclusions they arrived at. This is a case in which the appellant was caught in the very act of robbing the two complainants. He was chased for only a short distance, and arrested. He was in possession of the very items that had been stolen from the two complainants. Clearly, the appellant had no chance of escaping. His conviction, in our view, was inevitable.

Hence on the issue of evidence and conviction, we find no merit in this appeal.

As regards the issue of legal representation, this Court has had opportunity to discuss the matter in its recent decision in ***DAVID NJOROGE MACHARIA V. REPUBLIC*** – *Criminal Appeal No. 497 of 2007* (unreported) in which this Court stated inter alia:-

"Right of representation in Kenya

Chapter Five of the repealed Constitution contained the Bill of Rights and provided:

"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 –

(c) 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;" and

regarding legal representation section 14 clearly rules out a right to state funded legal representation. It provides:

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

The current Constitution provides:-

"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-

(c) to have adequate time and facilities to prepare a defence;
…….

(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."

***Article 50** sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused 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 of form of legal aid be given to the accused because of the nature of the offence.*

Conclusion

*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 Sate 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 be entitled to free legal representation during the trial.

The last issue raised by Mr. Bryant related to the death sentence as to whether it is unconstitutional and more so in view of the manner the offence was committed. Again, on this issue while appreciating Mr. Bryant's gallant arguments, we can do no more than go back to our decision in **MACHARIA's** case (supra) in which we said:-

*"Finally, with regard to Mr. Bryant's argument that the death sentence herein was disproportionate to the offence committed, we take judicial notice of the fact that the President on the advice of the committee on prerogative of mercy has now commuted the death sentences of all death row convicts to one of life imprisonment. Accordingly, this is no longer an issue. However, we would reiterate here what this Court (differently constituted) said in **Godfrey Ngotho Mutiso vs. Republic** (Criminal Appeal No. 17 of 2008).*

"We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction

for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision."

In view of the foregoing, it is safe to state that the appellant is not facing a death penalty since that has now been commuted to life imprisonment.

We think we have said enough in this appeal to show that we find no merit in any of the grounds raised. Consequently, we order that the appeal be and is hereby dismissed.

Dated and delivered at NAIROBI this 3rd day of June, 2011.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR