IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 253 OF 2007

BETWEEN

HASSAN ALI SWALEH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at NAIROBI (Lesiit & Makhandia, JJ.) dated 25th July, 2006

in

H.C.CR.A. NO. 702 OF 2003)
****

JUDGMENT OF THE COURT

The appellant, ***HASSAN ALI SWALEH,*** was arraigned before the Chief Magistrate's Court at Kibera in ***Criminal Case No. 4929 of 2002***, charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code and in the alternative handling stolen goods contrary to ***section 322(2)*** of the Penal Code. The particulars of the offences were as follows:-

"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 OF THE PENAL CODE.

HASSAN ALI SWALEH:- ***On the 12th day of June, 2002 at Upper Matasia in Kajiado District within the Rift Valley Province, jointly with others not before court, robbed*** *Achola Mak' Owuor* ***of Motor Vehicle Registration No. KAH 702K Peugeot 405,a sonny television, a gas cylinder, a radio cassette make sonny, a video cassette make JVC, a mobile phone Siemens C35 and cash Kshs.6,000/= all valued at Kshs.288,000/= and at or immediately before or immediately after the time of such robbery struck the said*** *Achola Mak' Owuor*.***"***

ALTERNATIVE CHARGE

"HANDLING STOLEN GOODS, CONTRARY TO SECTION 322(2) OF THE PENAL CODE.

"*HASSAN ALI SWALEH*:- ***On the 12th day of June, 2002 at Kahara in Kajiado District within the Rift Valley Province, jointly with others not before court, otherwise than in the course of stealing dishonesty retained a Sonny television Set, a radio cassette make sonny and a video cassette make JVC***

all valued at Kshs.56,000/= the property of Achola Mak' Owuor, knowing or having reason to believe them to be stolen goods."

The appellant denied the charges and his trial commenced before the learned Principal Magistrate (Ms. Mwangi) on *25th September, 2002* when the complainant Achola Mak'Owuuor (PW1) testified on how he was robbed of the various items on *12th June, 2002* at his house at about 4:00 a.m. The complainant testified that he was able to identify the appellant among the robbers. ***Julius Ochieng Orora*** *(PW2)* who was with the complainant during the robbery testified that he, too, was able to identify the appellant. In the course of his evidence in chief ***Orora*** *(PW2)* said:-

"I identified the accused now before court. He had a rifle and a jungle jacket on. I was able to identify him properly. I had never seen him before the robbery. I was never injured during the robbery."

Although ***Jacob Owuor*** *(PW3)* was in that house the same night he was not able to identify any of the robbers.

Pc Thomas Masila *(PW5)* testified on how he arrested the appellant who was in possession of some of the items stolen during the robbery. In his evidence in chief, ***Pc Masila*** *(PW5)* testified as follows:-

"While there investigating near Kamera road I saw a white saloon coming from Kiserian/Magadi road. Near where we were it stopped and the accused opened the car door in a hurry. He went to a small bush next to the road. I checked him and I saw he had lifted this T.V. referring to MFI one. I produce it as an exhibit. Exhibit 1. He started to get to the car and we raised alarm and people nearby helped and we chased and caught him. The vehicle he had come by drove off. We went to where he was taking the T.V. and found the radio cassette and the video deck. Produced as exhibit 2 and exhibit 3. We took the accused to the police post. He was later charged. The complainant then identified the items. He showed us his names in the radio."

When put to his defence, the appellant explained how he was arrested on the morning of *12th June, 2002* by people who said that they were police officers. They led him to a house where a T.V. set was recovered. The defence of the appellant was that he was not involved in the robbery and that he was not found in possession of any items connected with the robbery.

The learned trial magistrate considered the prosecution evidence and what the appellant said in his defence and she came to the conclusion that the case against the appellant had been proved beyond reasonable doubt. In concluding her judgment, the learned trial magistrate said:-

"I do believe the accused was properly identified. Also he was found trying to carry away the T.V. and radios recovered near where the car had been deserted. I believe the very recent possession of the stolen items which the accused does not explain is a clear indication that he was one of the persons who robbed P.W.1. I do find him guilty of count 1 having been so well identified and I convict him accordingly."

Having convicted the appellant, the learned trial magistrate sentenced him to death by stating:-
"There are no two sentences under the section the accused is charged tried and convicted. I sentence him to death as per the provisions of the law."

Being aggrieved by both conviction and sentence, the appellant filed an appeal in the High Court. The learned Judges of the superior court (*Lesiit & Makhandia, JJ.*) in their judgment delivered at Nairobi on *25th July, 2006* dismissed the appellant's appeal by stating inter alia:-

"To conclude this judgment we would state that the evidence against the appellant was based on identification of the appellant by PW1 and PW2 at the scene of crime as well as in an identification parade and the recent possession by the appellant of some property stolen during the robbery. In our view these evidence taken together makes the prosecution case watertight.

In view of the foregoing, it is our considered opinion that the appellant's conviction was inevitable. Consequently, his appeal must be and is hereby dismissed."

It is the foregoing that has given rise to the appeal to this Court. The appeal came up for hearing on *10th May, 2011* when Mr. Gerry G. Gitonga appeared for the appellant, while Mr. V.S. Monda (Senior State Counsel), appeared for the State.

The submissions of Mr. Gitonga could be categorized as follows:-

(i) identification
(ii) analysis and evaluation of evidence
(iii) doctrine of recent possession
(iv) consideration of appellant's defence
(v) death sentence
(vi) legal representation

On the issue of identification, it was Mr. Gitonga's submission that as the robbery took place at night the conditions for a favourable identification should have been considered and that even though witnesses claimed that they had identified the appellant these witnesses could have been mistaken. It was his contention that positive identification was not possible in the circumstances of this case. Mr. Gitonga further submitted that the identification parade had not been properly conducted as the prosecution witnesses had seen the appellant before the parade.

On the question of analysis of evidence, Mr. Gitonga submitted that there was no analysis of evidence by both the trial court and the first appellate court as the evidence of ***PW5*** should have been considered as hearsay.

On the doctrine of recent possession it was submitted that there was no clear evidence of recent possession of stolen property.

It was further submitted that the defence of the appellant was never considered.

As regards death sentence, Mr. Gitonga argued that the death sentence was unconstitutional.

Lastly, Mr. Gitonga submitted that the appellant was entitled to legal representation; and since he had no lawyer then the trial was not fair.

In his reply, Mr. Monda submitted that the two courts below reached the correct conclusion that the appellant had committed the offence. He went on to submit that the appellant was identified and then found in possession of the property which had been stolen during the robbery. As regards the appellant's defence, Mr. Monda argued that the alibi defence was considered and properly rejected. On the issue of death sentence, Mr. Monda informed us that the point had been considered and settled in this Court's decision in ***DAVID NJOROGE MACHARIA VS. REPUBLIC*** – *Criminal Appeal No. 497 of 2007,* which also settled the issue of legal representation. Mr. Monda therefore asked us to dismiss this appeal.

Having set out the history of this appeal and the summary of rival submissions, we now proceed to consider the issues at hand. As already stated elsewhere in this judgment, this was a case of robbery with violence at night when the complainant was attacked. The incident took place at about 4:00 a.m. The complainant, (*PW1*) and his colleague ***Owuor*** (PW2) testified that they identified the appellant as one of the robbers. That was about 4:00 a.m. and then soon after 7:00 a.m. ***Pc Masila*** (PW5) arrested the appellant in suspicious circumstances in which the appellant was found in possession of some of the items stolen during the robbery i.e. T.V. and a radio. These items were positively identified by the complainant. Hence this is a case of identification coupled with recent possession of the stolen property. On this issue, the judges of the superior court had the following to say in their judgment:-

"In the present case there was the evidence of identification by the complainant (PW1) and his friend

(PW2) of the appellant at the scene of crime. Subsequent thereto, the two witnesses identified the appellant in an identification parade. Then there was the evidence of recovery from the appellant of some of the items stolen from PW1 during the robbery. It is to be observed that the evidence of recovery of the complainant's T.V. was never seriously challenged."

Hence on the issue of identification and recent possession of the stolen property, we are satisfied that the two courts below considered the same and came to the same conclusion that the appellant was identified during the robbery and only a few hours later he was found in possession of some of the items stolen during the robbery.

As regards analysis of the evidence, the first appellate court was alive to its duty when the learned judges in their judgment stated inter alia:-

"As we consider the submissions by the appellant as well as by the learned State Counsel, it must be remembered that as this is a first appeal we are duty bound to examine and reevaluate the evidence on record to reach our own conclusions in the matter, always bearing in mind that we had no advantage, as the trial court did, of seeing and hearing the witnesses. See OKENO VS. REPUBLIC (1972) E.A. 32. It is also an established principle that an appellate court will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal matter, unless it is based on no evidence, or on misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings it did – See CHEMAGONG VS. REPUBLIC (1984) KLR 611."

Having so stated, the learned Judges proceeded to analyse and re-evaluate the evidence of the prosecution witnesses and the defence put forth by the appellant. On our part, we are satisfied that the learned judges of the superior court discharged their duty as the first appellate court. That being our view of the matter, it follows that the appellant was convicted on very sound evidence of identification and recent possession of stolen property.

What remains to be considered were the issues of death sentence and legal representation. We have carefully considered the submissions of Mr. Gitonga and all we can say is that the issue of death sentence has been considered in other earlier decisions of this Court. 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."

As regards legal representation, we would refer to this Court's decision in ***CHARO KARISA THOYA VS. REPUBLIC*** – Criminal Appeal No. 274 of 2002 in which we said:-

"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 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 us is concerned, his trial took place under the old Constitution and he would not be entitled to free legal representation during the trial.

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

We have said enough in this appeal to show that we have found no merit in all the grounds raised by the appellant's counsel. Consequently, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 1st day of July, 2011.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

P.N. WAKI
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR