



Gitonga v Republic (Petition 11 of 2017) [2020] KESC 61 (KLR) (23 January 2020) (Judgment)

Charles Maina Gitonga v Republic [2020] eKLR

Neutral citation: [2020] KESC 61 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 11 OF 2017

MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

JANUARY 23, 2020

BETWEEN

CHARLES MAINA GITONGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the entire Judgment and Order of the Court of Appeal sitting at Nyeri (Waki, Nambuye & Kiage, JJA) dated 7th June, 2017 in Criminal Appeal No. 78 of 2014)

An appellate court has no jurisdiction to entertain a ground of appeal that was never raised in the lower courts

Reported by Robai Nasike Sivikhe

Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - boundaries within which the Supreme Court's appellate jurisdiction could be exercised - where the issue raised before the Supreme Court was first raised in the Court of Appeal and not any other lower court - whether the Supreme Court had jurisdiction to hear, on appeal, a matter that raised an issue which was first handled at the Court of Appeal and not any other lower court - whether the Court of Appeal erred when it entertained the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the lower courts - Constitution of Kenya, 2010, article 163(4)(a)

Brief facts

The appellant challenged the entire judgment and orders of the Court of Appeal and thus sought four (4) declaratory orders namely; that the Supreme Court had jurisdiction to entertain additional constitutional questions in relation to existing constitutional questions; that it was mandatory for an accused person in custody to be informed of his right to legal representation; that the fundamental rights of the appellant were gravely violated and that the trial court was mandated to make an inquiry as to whether an accused person in a serious case deserved an advocate assigned by the State and at the State's expense. Apart from the declaratory



orders, the appellant also sought orders to have him discharged or acquitted and that the Court of Appeal's judgment be reversed and set aside.

On the other hand, the respondent had argued that the appellant did not have an automatic right of appeal to the Supreme Court and that his prayer that he be acquitted on grounds that his rights to legal representation under article 50(2)(g) and (h) of the Constitution were violated, was totally misconceived and legally untenable.

Issues

- i. Whether the Supreme Court had jurisdiction to hear, on appeal, a matter that raised an issue which was first handled at the Court of Appeal and not any other lower court.
- ii. Whether the question of legal representation as one of the grounds of appeal could be handled despite an acknowledgement by the Court of Appeal that it was never raised in the lower courts.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163 (4)(a)

(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

a) As of right in any case involving the interpretation or application of this Constitution;

Held

1. There were boundaries to the jurisdiction of the Supreme Court. An appeal to the Supreme Court had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution.
2. An appellant had to challenge the interpretation or application of the Constitution which the Court of Appeal used to dispose the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.
3. In order to determine whether the appeal was properly before court, it had to be confirmed that the issues of constitutional interpretation and application being raised, arose through the normal appellate mechanism so as to reach the court. The question as to whether the appellant's right to a fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. The issue was neither raised at the Resident Magistrate's Court nor at the High Court. In addition, none of the articles of the Constitution in the petition of appeal was the subject of interpretation and application at the High Court.
4. The Court of Appeal was at fault for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the lower courts. To allow the appellant to ignore the normal hierarchy of courts would amount to abuse of the process of court. The Supreme Court lacked jurisdiction to entertain the appeal pursuant to article 163(4)(a) of the Constitution.

Petition of appeal dismissed with no orders as to cost.

Citations

Cases

Kenya

1. *Abdallah Mohammed v Republic* Criminal Appeal 90 of 2012; [2018] eKLR - (Explained)
2. *Ali Salim Awadh alias Majid v Republic* Criminal Appeal 192 of 2012; [2015] KECA 322 (KLR); [2015] eKLR - (Explained)
3. *Caleb Wawire Sifuna v Republic* Criminal Appeal 174 of 2016; [2018] KEHC 1705 (KLR); [2018] eKLR - (Explained)



4. *David Njoroge Macharia v Republic* Criminal Appeal 497 of 2007; [2011] eKLR - (Explained)
5. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR) - (Explained)
6. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
7. *Hassan Njanje Charo v Mwashetani & 3 others* Civil Application 14 of 2014; [2014] eKLR - (Explained)
8. *Isaac Ng'ang'a Kabiga & another v Republic* Criminal Appeal 272 of 2005; [2006] KECA 137 (KLR); [2006] eKLR - (Explained)
9. *Ngure, John Nduati v Republic* Criminal Appeal 121 of 2014; [2016] KECA 674 (KLR); [2016] eKLR - (Explained)
10. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
11. *Joseph Kamau Gichuki v Republic* Criminal Appeal 523 of 2010; [2013] KECA 448 (KLR); [2013] eKLR - (Explained)
12. *Karani v Republic* Criminal Appeal 26 of 2008; [2010] eKLR; [2010] 1KLR 734 - (Explained)
13. *Lowethbit Loritim v Republic* Criminal Appeal 126 of 2012; [2014] KEHC 6816 (KLR); [2014] eKLR - (Explained)
14. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
15. *Mugure, Mercy v Republic* Criminal Appeal 150 of 2017; [2018] KEHC 5734 (KLR); [2018] eKLR - (Explained)
16. *Michael Mungai v Housing Finance Co (K) Ltd & 5 other* Civil Appeal (Application) 9 of 2015; [2017] KESC 47 (KLR); [2017] eKLR - (Explained)
17. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR); [2014] eKLR - (Explained)
18. *Muruatetu & another v Republic & 6 others* Petition 15 & 16 of 2015; [2017] KESC 2 (KLR); [2017] eKLR; [2017] 1KLR 101 - (Explained)
19. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
20. *Ndwiga & 2 others v Republic* Criminal Appeal 78 of 2014; [2017] KECA 443 (KLR); [2017] eKLR - (Mentioned)
21. *Ndurya, Neema Mwandoro v Republic* Criminal Appeal 446 of 2007; [2008] KECA 324 (KLR) - (Explained)
22. *Ngoge v Kaparo & 5 others* Petition 2 of 2012) [2012] KESC 7 (KLR); [2012] eKLR - (Explained)
23. *Office of Director of Public Prosecutions v Peter Onyango Odongo, SPM Siaya & Attorney General* Petition 2 of 2015; [2015] KEHC 91 (KLR); [2015] eKLR - (Explained)
24. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR; [2014] KESC 31 (KLR) - (Explained)
25. *Rama Alfani & 2 others v Republic* Criminal Appeal No 223 of 2002 - (Explained)
26. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR); [2017] eKLR - (Explained)
27. *Simon Gitau Kinene v Republic* Criminal Appeal 9 of 2016; [2016] KEHC 1569 (KLR); [2016] eKLR - (Explained)
28. *Yusuf Gitau Abdallah v Building Centre (K) Ltd, UBM Overseas Ltd, Alibhai Shariff & Co Ltd, Raffiq Shariff & Noor Shariff* Petition 27 of 2014; [2014] KESC 50 (KLR); [2014] eKLR - (Explained)

United Kingdom

1. *Director of Public Prosecutions v Woolmington* [1935] UKHL 1 - (Explained)
2. *Pett v Greyhound Racing Association* [1968] 2 All ER 545 - (Explained)

United States

1. *Gideon v Wainwright* 372 US 335, 372 US 344 [1963] - (Explained)



2. *Johnson v Zerbst* 304 US 458 (1938) - (Explained)
3. *Powell v Alabama* 287 US 45 [1932] - (Explained)
4. *United States v Cronin* 466 U.S 648 [1984] - (Explained)

Canada

1. *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46 - (Explained)
2. *R v Rowbotham* 1988 CanLII 147 (ON CA) - (Explained)

Texts

Office of the Inspector General (2017) *National Police Service Standing Orders* Nairobi: Government Printer

Statutes

Kenya

1. Constitution of Kenya - (Interpreted) articles 20(2)-(5); 22; 23; 25(c); 48; 49(1)(c); 50(1)(2); 164(3)(a)(4)(a)(b)(i)
2. Criminal Procedure Code (cap 75) - (Interpreted) sections 200(3); 207
3. Legal Aid Act (cap 16A) - (Cited) In general
4. Penal Code (cap 63) - (Interpreted) section 296(2)
5. Supreme Court Act (cap 9B) - (Interpreted) section 15(1)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. Basic Principles on the Role of Lawyers, 1990
3. European Convention on Human Rights, 1950
4. International Covenant on Civil and Political Rights (ICCPR), 1966
5. Universal Declaration of Human Rights (UNDHR), 1948

Advocates

1. *Mr. Kanjama* for the appellant
2. *Mr. O'mirera* for the respondent

JUDGMENT

A. Introduction

1. Before us a Petition of Appeal dated and filed on July 21, 2017, pursuant to article 163(4)(a) of the [Constitution](#). The appellant is challenging the entire judgment and Orders of the Court of Appeal (Waki, Nambuye & Kiage, JJA) at Nyeri in Criminal Appeal No 78 of 2014 delivered on June 7, 2017.
2. The appellant's case is premised on five (5) grounds particularly, that the Court of Appeal erred and misdirected itself by; holding that the appellant did not demonstrate that he was willing but unable to obtain legal representation despite the fact that the appellant was never informed of his Constitutional right to legal representation; holding that the State was not under any obligation to provide free legal counsel at the time the appellant's trial commenced despite the substantial injustice arising from the fact that the appellant was charged with an offence whose penalty is death; upholding the judgments of the High Court and the Magistrate's Court; failing to properly evaluate the standard and burden of proof in criminal cases; and failing to recognize and apply the principle that lack of or insufficient assistance by counsel is directly injurious to the due process and the Constitutional guarantees to a fair trial in an appropriate case, such as the criminal trial of the appellant.
3. The appellant has thus sought four (4) declaratory orders namely; that this court has jurisdiction to entertain additional constitutional questions in relation to existing constitutional questions; that it is



mandatory for an accused person in custody to be informed of his right to legal representation; that the fundamental rights of the appellant were gravely violated and that the trial court is mandated to make an inquiry as to whether an accused person in a serious case deserves an advocate assigned by the State and at the State's expense. Apart from the declaratory orders, the appellant has also sought two other orders; firstly, to have him discharged or acquitted and second, an order that the Court of Appeal's judgment be reversed and set aside. The appellant finally sought any other orders that the court would deem fit to grant.

4. The respondent opposed the Petition by filing written submissions dated September 20, 2019, the substance of which we shall shortly summarize.

B. Background

5. The appellant, together with two others not before this court (John Bosco Njue and Irene Wawira Muthoni) were charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* before the Senior Resident Magistrate's Court at Wanguru. The trial court (BM Ochoi, SRM) connected several factual chain links from the evidence tendered and found no coexisting circumstances to weaken that chain of events pointing unerringly to the three accused as the perpetrators of the alleged crime.
6. Dissatisfied by the decision of the trial court, the appellant, John Bosco Njue and Irene Wawira Muthoni all preferred appeals to the High Court. The High Court (Ong'udi & Githua, JJ) found no reason to overturn the decision of the trial court. The learned judges in their judgement accepted the chain link of events as found by the trial court and laid emphasis on the finding of the deceased's stolen items in possession of the appellant, John Bosco Njue and Irene Wawira Muthoni in circumstances that they could not explain away. Consequently, the court rejected the defences put forward by the appellant and the co-accused in the same manner as the trial court had done.
7. Further aggrieved by the decision of the High Court, the appellant, together with his co-accused lodged a second appeal before the Court of Appeal being *Criminal Appeal No. 78 of 2014*. Specifically, it was the appellant's case that the learned Judges of the High Court erred in law and fact by: not making a finding that the prosecution contravened Section 46 of the *Police Standing Orders* during his trial; applying the doctrine of recent possession yet none of the deceased's items were recovered from him; relying on uncorroborated evidence; relying on the evidence of PW6 who was not a trustworthy witness; not considering his defence; not taking into account the fact that he lacked legal representation in both the Magistrate's Court and at the High Court; relying on circumstantial evidence to uphold his conviction; applying accomplice evidence to prove that he committed the alleged offence with others; and by failing to consider that none of the elements of robbery with violence under section 296(2) of the *Penal Code* had been satisfied. On June 7, 2017, the Court of Appeal dismissed the appeal for lack of merit hence the present appeal filed as of right under article 164(3)(a) of the *Constitution*.

C. Parties' Submissions

(i) The appellant's submissions

8. On the court's jurisdiction to entertain the Petition, the appellant submitted that the court has jurisdiction to entertain the appeal pursuant to article 163(4)(a) as read with article 163(4)(b)(i) of the *Constitution*. The appellant in that regard seeks interpretation of several articles of the *Constitution* including articles 20(2), (3), (4) & (5), 22, 23, 25(c), 48, 49(1)(c) and 50(1)(2)(a, b, c, g, h, I, j, k, l, q). The appellant submits that the issue of legal representation which led to an unfair trial under article 50 of the *Constitution* arose at the Court of Appeal and was subject of the Court of Appeal's determination



thus placing his appeal within this court's jurisdiction. He further anchors his submissions on that issue in three of this court's decision namely, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] eKLR, *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 others* [2014] eKLR and *Gatirau Peter Munya v Dickson Mwenda & 2 others* [2014] eKLR.

9. Counsel for the appellant, Mr Kanjama, furthermore submitted that the appellant's right to have legal representation under article 50(2) and elevated by article 25(c) of the *Constitution* is non-derogable and at no point in time was the appellant ever accorded the said right. Consequently, he added, the appellant's right to fair trial was gravely violated. Counsel also contended that the right to fair trial cannot be limited and that the trial court was mandated to inform the appellant of his right to legal representation but did not do so. Counsel also faulted the High Court for not looking into the omission.

According to counsel the Court of Appeal also erred in finding that the appellant fully and meaningfully participated in the trial and first appeal and that his belated complaint on non-representation was baseless. On this point, counsel for the appellant cites various international legal instruments such as the *Universal Declaration of Human Rights 1948*, *International Covenant on Civil and Political Rights 1966*, the *African Charter on Human and People's Rights 1969*, *European Convention on Human Rights* and the *Basic Principles on the Role of Lawyers 1990*. He also relied on several cases in support of his submissions including this Court's decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the US Supreme Court cases of *United States v Cronic*, 466 US 648 [1984], *Gideon v Wainwright*, 372 US 335, 372 US 344 [1963], *Johnson v Zerbst* US 458 [1938], and *Powell v Alabama*, 287 US 45 [1932] as well as the Court of Appeal's decision in *David Njoroge Macharia v Republic* (Criminal Appeal No. 497 of 2007). Counsel in that regard maintained that the appellant was compelled to participate fully in the trial and first appeal proceedings because he had no choice but to defend against the charges against him and that action should not be used against him.

10. While citing sections 200(3) and 207 of the *Criminal Procedure Code*, the appellant compared the court's duty to inform an accused person of the right to legal representation with other absolute rights to information in the course of criminal proceedings. For instance, he argued that a trial magistrate has a mandatory obligation to inform an accused person of the right to demand any witnesses to be re-summoned and re-heard. On this point, counsel cited several decisions to support his argument ie: *Simon Gitau Kinene v Republic* [2016]eKLR, *Abdallah Mohammed v Republic* [2018]eKLR, *Caleb Wawire Sifuna v Republic* [2018] eKLR, *Mercy Mugure v Republic* [2018]eKLR, *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* High Court at Siaya [2015] eKLR. The appellant concluded on this issue by stating that the right to information is absolute and that if the same is not exercised, the proceedings are a nullity. He therefore, urges this court to nullify the proceedings of the courts below and set him free.
11. Counsel in addition urged that the appellant's constitutional right to legal representation at the state's expense is enshrined in article 50(2)(h) of the *Constitution* and citing the *International Covenant on Civil and Political Rights*, he submitted that legal aid is mandatory in offences whose penalty is loss of life in case of conviction. He thus submits that since the charge facing the appellant was so serious in complexity and consequence, substantial injustice did result from the absence of both legal counsel and information of the right to legal representation at the State's expense, hence the claim of an unfair trial. He cited the cases of *Pett v Greyhound Racing Association* (1968) 2 All ER 545, *New Brunswick (Minister of Health and Community Services) v G(I)* [1999] 3 SCR 46, *R v Rowbotham*, [1988] Can LII 147 (ON CA), and this court's decision in *Republic v Karisa Chengo & 2 others* [2017]eKLR, to anchor his submissions on that point. The appellant consequently, faults the Court of Appeal's finding



- that the State was not under any obligation to provide free legal counsel when the appellant's trial commenced in October, 2010.
12. The appellant has also submitted that the Court of Appeal erred and misdirected itself by upholding the judgments of the High Court and Magistrate's Court despite both being laden with various shortcomings. First, counsel urged that none of the prosecution witnesses testified as having seen the appellant with the deceased prior to his demise. In the appellant's view, the Court of Appeal believed the testimony of a PW6 aforesaid without the said witness tendering sufficient proof that the appellant stole anything from the deceased. Counsel thus urged that the learned Judges of Appeal relied on hearsay evidence in dismissing a valid appeal and cites the Court of Appeal's decision in *Ali Salim Awadbi alias Majid v Republic* [2015] eKLR to support his submission in that regard.
 13. Counsel further submitted that the evidence of PW7 was not tendered in form of either video or photographic evidence. In addition, that the learned judges failed to take judicial notice of the fact that the place where PW7 (Esther Nduku Damaris) is alleged to have seen the appellant drop a driving licence in the name of the deceased (Josphat Mugo Muriuki) was a public place where human traffic is great. Counsel therefore urged that there was sufficient exculpatory evidence to absolving him of any crime.
 14. While citing the Court of Appeal's decisions in *Rama Alfani & 2 others v Republic* (Criminal Appeal No. 223 of 2002), *Isaac Ng'ang'a Kabiga & another v Republic* (Nyeri Criminal Appeal No. 272 of 2005), *Neema Mwandoro Ndurya v Republic* [2008] eKLR and *John Nduati Ngure v Republic* [2016] eKLR, Counsel for the appellant urged that the learned judges failed to believe the evidence of the appellant without assigning any sufficient reasons to it and wrongly applied the doctrine of recent possession yet the appellant was not found in possession of any of the alleged stolen items. The appellant also maintained in his submissions that the learned judges wrongly placed reliance on circumstantial evidence to uphold the appellant's conviction and erroneously applied accomplice evidence to show that the appellant committed the alleged robbery.
 15. Subsequently, counsel submitted that none of the elements of robbery with violence under section 296(2) of the *Penal Code* were sufficiently proved and to support this argument he cited the case of *Lowethit Loritim v Republic* [2014] eKLR. Counsel also submitted that the appellant was not armed with a dangerous weapon at any time, no dangerous weapon produced as evidence in court and that there was also no evidence that the appellant was at the scene of crime.
 16. It was also the appellant's submission that the Court of Appeal failed to evaluate the standard and burden of proof in criminal cases, and thus shifted the burden of proof to the appellant contrary to his constitutional right to a fair trial. The case of *DPP v Woolmington*, [1935] UKHL 1 in support of the appellant's submission in that regard.
 17. To conclude his submissions, counsel for the appellant urged that the Court of Appeal had failed to recognize and apply the principal that lack of or insufficient assistance by counsel is directly injurious to due process and the constitution guarantees to a fair trial in an appropriate case, such as the criminal trial of the appellant herein. He thus urged that lack of assistance by counsel made it difficult for the appellant to cross-examine the prosecution witnesses effectively and mount a defense to the charges against him. Consequently, the appellant has urged this court to allow the appeal with costs and to grant the reliefs sought.

(ii) The respondent's submissions

18. As to whether this court has jurisdiction to entertain the appeal, Mr. O'mirera, counsel for the respondent submitted that the appellant cannot avail to himself both rights under article 50(2) (g)



and (h) of the Constitution. Counsel for the respondent argued that the appellant was either poor to qualify be availed an advocate at the state's expense or he had means and could have engaged an advocate of his own choice had he been promptly informed of his right to legal representation. Counsel thus maintained that there are clear provisions under article 22 of the Constitution that the appellant ought to have used and complained and/or instituted appropriate proceedings on the alleged violation. Thus, the mere fact that both courts below did not inform him of his rights under article 50(2)(g) and (h) is not enough a ground to nullify the entire case against him. Further, that article 50(2)(h) does not expressly provide that a court must meet the terms of legal representation and of an accused person before commencement of a trial and therefore the correct remedy available to the appellant is to refer the case to the High Court to determine if the appellant was prejudiced or that substantial injustice could otherwise result by non-representation.

19. The respondent, in support of his submissions relied on article 163(3) (b), (4) (a), and (5) of the Constitution, this court's decisions in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others, SC App No 2 of 2011; [2012] eKLR, Yusuf Abdallah v Building Centre (K) Ltd & 4 others, SC. Pet. No. 7 of 2014 (Yusuf Abdallah case), Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another, SC Pet No 3 of 2012; [2012] eKLR (Lawrence Nduttu Case), Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others, SC Pet No 10 of 2013 (Hassan Jobo case); [2014] eKLR and Republic v Karisa Chengo, SC Pet 2 of 2015 [2017] eKLR (Karisa Chengo case). Referring to the Karisa Chengo case, counsel distinguished it from the facts in the instant appeal. He maintained that in the Karisa Chengo case, unlike in the instant appeal, there were two central issues that made this Court assume jurisdiction firstly, the fact that the High Court Bench was not properly constituted and that the Petitioners were not accorded legal representation at the State's expense. Secondly, in the, the respondent had specifically asked the Court to pronounce itself on whether their rights to fair trial under article 50(2)(h) had been violated. The respondent submitted that in the instant case, the appellant seeks a declaration under both articles 50(2)(g) and (h) of the Constitution which is an anomaly leading to no remedy being available for him.
20. As to whether the appellant suffered substantial injustice, counsel for the respondent submitted that even though the Court of Appeal did not take into account this Court's decision in the Karisa Chengo case declaring the right to legal representation as a fundamental ingredient in the right to a fair trial, it was acutely aware that the Legal Aid Act had been enacted though not operationalized. The Respondent thus urged that the learned Judges of Appeal considered the legal dilemmas in the circumstances of the entire case and satisfied that the appellant had meaningfully and adequately participated in the trial, no substantial injustice was suffered nor occasioned. Further, the Respondent urged that the trial Magistrate rightly convicted the appellant on identification evidence and evidence of recent possession which conviction remains unshaken. The Respondent cited the Court of Appeal's decision in Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic Cr App No 272 of 2005(UR) in support of his submission that all the elements on the doctrine of recent possession were satisfied in the instant appeal ranging from the circumstantial evidence by PW1(Lewis Gaithuma Njeri), PW2(Cyrus Njagi), PW6(Peter Maina Mwangi), PW7(Esther Nduku Damaris), PW9 and PW12(Cpl. Richard Odhiambo). In addition, the Respondent submitted that the High Court was satisfied that the prosecution's case was premised purely on circumstantial evidence to the effect that the three appellants appeared in PW6's rental house at the same time the robbery was committed and having possession of the deceased's stolen motor cycle.
21. Counsel for the respondent furthermore urged that the High Court rightly addressed itself on the factors to be considered before invoking the doctrine of recent possession, considered the appellant's defense, consequently, concurring with the trial court's finding and dismissing the appellant's appeal.



22. While citing the Court of Appeal's finding in the case of *Karani v Republic* [2010] 1KLR 734, the respondent submitted that the Court of Appeal adequately considered all the issues on the concurrent findings by both the Magistrate's Court and the High Court before reaching its decision. The Respondent alleged that further evaluation of circumstances of the instant case on points of law will not yield a different outcome because nothing had changed in that regard.
23. On the second issue of jurisdiction to raise additional related constitutional questions, and the third issue on whether the Court of Appeal properly exercised its mandate, the respondent submitted that the issues of contestation ought to have been raised at the first appellate court and at the trial court. That neither the appellant nor his co-accused raised any complaint about their inability to understand the trial process at the High Court in the first instance. Counsel for the respondent also urged that the law does not operate in a vacuum but is part of a large system of public decision-making processes which embodies the rule of law as provided under articles 1, 2, 10, 20(3), 27 and 259 of the *Constitution*. The courts below therefore exercised their respective mandates as donated by the Constitution and the present complaint by the appellant is akin to casting aspersions on the court's exercise of its powers and functions. To support his case, the respondent cited the following authorities; *Erad Supplies & General Contractors v National Cereals Produce Board*, SC Pet No 5 of 2012; [2012] eKLR, *Lawrence Nduttu Case*, *Hassan Njanje Charo v Mwashetani & 3 others*, SC Appl No 4 of 2014, and *Yusuf Abdallah v Building Centre (K) Ltd & 4 others*.
24. On the relief sought, the respondent relying on this court's decision in *Karisa Chengo Case* and Court of Appeal case in *Joseph Kamau Gichuki v Republic* Crim Appeal No 523 of 2010 argued that the rights to legal representation under article 50(2)(g) of the *Constitution* is on equal footing with the right under article 50(2)(h) of the *Constitution* with the same effect to secure a fair trial for an accused person. The respondent added that this court has already pronounced itself on this issue and therefore, no controversy to warrant further interpretation.

In conclusion, the respondent thus urged that the appellant does not have an automatic right of appeal to the Supreme Court and that his prayer that he be acquitted on grounds that his rights to legal representation under articles 50(2)(g) and (h) of the *Constitution* were violated is totally misconceived and legally untenable.

D. Issues for Determination

25. From the filed pleadings, written and oral submissions by parties, the following issues emerge for determination:
- (i) Whether the appeal before this court meets the Constitutional threshold under article 163(4) (a) of the *Constitution*.
 - (ii) If the answer to issue (i) is in the affirmative, whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the State or by failure to inform him of the right to legal representation
 - (iii) What remedies are available in the circumstances?



E. Analysis

(i) Does the Appeal before this Court meet the constitutional threshold under article 163(4)(a) of the Constitution?

26. Whereas, it is respondent's submissions that this court lacks jurisdiction to determine whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the State or by failure to inform him of the right to legal representation; The appellant's view is to the contrary, and argues that this appeal is properly before this Court within the ambit of article 163(4) (a) of the Constitution.

27. The appellate jurisdiction of this court is rightly captured in article 163(4) of the Constitution of Kenya which states as follows:

- “(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
- a) As of right in any case involving the interpretation or application of this Constitution; and
 - b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
- (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”

28. Likewise, section 15(1) of the Supreme Court Act provides that appeals to the Supreme Court shall be heard only with the leave of the court. Section (15)(2) of the same Act on the other hand provides that Sub-Section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

29. Apart from the foregoing constitutional and legal provisions, this Court has ceaselessly stipulated the boundaries of its jurisdiction under article 163(4)(a) of the Constitution in several decisions, which decisions are still applicable. In the Lawrence Nduttu case, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

- “28: The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163 (4) (a).”

30. Further, in the Hassan Jobo case this court observed as follows:

- “37: In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same



has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*.... ” [emphasis added].

31. The same principle was affirmed in this court’s decision in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:

“ 69: The import of the court’s statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

32. In order to determine whether this appeal is proper before us therefore, we must confirm that the issues of Constitutional interpretation and application being raised before us have risen through the normal appellate mechanism so as to reach us. It is in that regard not disputed that the question as to whether the appellant’s right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate’s Court nor at the High Court. None of the articles of the Constitution in the present appeal was also the subject of interpretation and application at the High Court.

33. This court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. For instance, in the *Peter Oduor Ngoge v Francis Ole Kaparo & others* [2012] eKLR we stated thus:

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”

34. Further, in *Michael Mungai v Housing Finance Co (K) Ltd & 5 other*, SC Appeal/Application 9 of 2015; [2017] eKLR, we specifically stated as follows:

“ 14. The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in article 163(3) of the *Constitution*. One cannot ask the Court to exercise its powers in a carte blanche manner. A litigant’s plea must be precise and targeted. One cannot make omnibus prayers to the Court with the expectation that the Court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the Court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case



of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy.”

35. We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to article 163(4)(a) of the Constitution.
36. Concerning costs, this court has previously settled the law on award of costs, that costs follow the event, and that, a judge has the discretion in awarding costs. This was the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No 4 of 2012; [2014] eKLR. Noting that the appellant is incarcerated and has no lawful means of paying any costs awarded against him, we order that there should be no order as to costs.
37. Consequently, the appeal fails and is dismissed.

Orders

38. Accordingly, and in view of the foregoing reasons the final orders are:
 - i. The Petition of appeal dated July 21, 2017be and is hereby dismissed.
 - ii. There shall be no order as to costs.
39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2020

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M.K IBRAHIM
JUSTICE OF THE SUPREME COURT

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J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original



**REGISTRAR
SUPREME COURT OF KENYA**

