IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 497 OF 2007

BETWEEN

DAVID NJOROGE MACHARIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Dulu, JJ) dated 24th May, 2007

in

H. C. CR. A. No. 71 of 2005)
****

JUDGMENT OF THE COURT

On the evening of 11th August, 2004 ***David Nguyo (PW 1) (the complainant)*** went to Jos Wines and Spirits bar in Kiserian for a drink with his friends. At about 10.00 pm he left to go home, a distance of some 300 meters. As he walked alone in a dark alley, he was accosted by four people from behind, one of whom attempted to strangle him by the neck, while another held a knife. He fell down. The robbers made off with his mobile phone (Nokia 3310) and his coat. He recollected himself after a few minutes, walked back to the shopping centre, reported the matter to the watchman there, and waited for a while until it was safe to go home. Meanwhile, two young men came over and informed him that they were aware of two robbers in the area called "Njenga" and "Jubilee". The following day he reported the matter to the Kiserian Police Station. Two weeks later, police officers, acting on information received, arrested the appellant, who led them to one Simon Karanja (PW 2) (Simon), a goat seller in Kiserian, from whom the stolen mobile phone was recovered. Thereafter, the appellant led police officers to a bush from where the stolen coat was recovered. Both those items, the mobile phone and the coat, were positively identified by the complainant as belonging to him. The appellant was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. After a full trial before the Chief Magistrate's Court at Kibera, he was convicted of the said offence, and sentenced to death.

In convicting the appellant, the learned trial magistrate (Ms. Muchira) observed as follows in her judgment:

"PW 1 is *(sic)* **robbed at 10 p.m. while he is walking home. He says it was dark, he was strangled and he came to find his coat and mobile phone gone. He never recognized or identified the**

attackers. PW 3 however said he was on duty the following morning at the police station when PW 1 reported the incident. This confirms for real that the robbery was real. 2 weeks later, he was tipped that PW 2 has *(sic)* **bought a mobile phone from accused. PW 3 accosted PW 2 and the latter** *(sic)* **owned up. PW 2 corroborates PW 3's evidence who confessed accused had sold the phone to him. He surrendered the phone to accused before PW 3. All along, PW 1 is unaware of what's** *(sic)* **happening. PW 3 said upon recovery of the mobile phone, he called PW 1 to bring the receipt of purchase of his mobile phone which was stolen and as sure as a jig-saw-puzzle, the story fits. PW 1 proved the mobile phone accused had sold to PW 2 was his. The court was convinced of the identification of the said phone by PW 1 in court as his. The accused in cross-examination and defence did not deny he had sold the mobile phone to PW 2. The story would have ended there but PW 3 does not rest** *(sic)***. He plods** *(sic)* **accused who then leads him to the bushes near the scene where as sure as his word, the jacket of PW 1 was hidden. PW 1 who had reported his coat stolen identifies the coat to PW 3 and to court. Accused in cross-examination did not deny these allegations from the prosecution. In his defence he merely says 2 men arrested him while he was innocently walking to his boss's place. I do not believe that that is possible. Why could the 2 men pick him an innocent man. Accused did not establish a grudge existed between him and any of the 3 prosecution witnesses so that they would probably have a reason to frame him up. I dismiss his defence thus. The accused I find could not know where PW 1's mobile phone was, nor his coat unless, it was him with others who had robbed PW 1 of the said items. I find the prosecution case against the accused is water tight and compelling. I find accused guilty as charged and convict him."**

After his conviction and sentence, the appellant appealed to the superior court (Lesiit and Dulu, JJ) which also came to the conclusion that his appeal lacked merit, and dismissed the same. The appellant now comes before this Court on a second and final appeal.

That being so only matters of law fall for consideration – ***see section 361*** of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see ***Chemagong v. R [1984] KLR 611***.

The appellant drew up the memorandum of appeal in person filed in Court on 11th August, 2003 citing six grounds of appeal, as follows:

"1. That the learned judges of the superior court erred in law by affirming the conviction of the appellant while relying on the recovery of the stolen items and the leading *(sic)* ***which were not fully proved by any documentary proved*** *(sic)* ***as per the law requires.***

2. That the learned judges of the superior court erred in law in affirming the conviction of the appellant and failed to observed *(sic)* ***that section 211 was not adequately complied with.***

3. That the learned judges of the superior court erred in law by failing to analyse and re-evaluate the whole recorded evidence.

4. That the learned judges of the superior court erred in law in affirming the conviction of the appellant and failed to observe that section 197 of the c.p.c. *(sic)* ***was violated.***

5. That the learned judges of the superior court erred in law in affirming the conviction of the appellant and failed to put due consideration to my defence which was cogent and plausible to dislodge the prosecution case.

6. That I pray to be furnished with the certified copy of the proceedings in order to raise more reasonable grounds and I pray to be present at the hearing of this appeal."

However, at the hearing of this appeal before us, his learned counsel, Mr. T. Bryant and Mr. G. Kitonga,

sought leave to have the supplementary memorandum of appeal dated and filed on 25th October, 2010 admitted as having been filed properly. Mr. V. S. Monda, learned Senior State Counsel, having no objection to the same, the Court allowed the application. There are three important points of law raised in the supplementary memorandum of appeal, as follows:

"1. The learned Judges erred in law in confirming the conviction and sentence against the Appellant yet his constitutional and fundamental rights to be afforded a fair trial, imperative in an adversarial court system, were grossly violated

(a) By the Trial Court contravening Section 77 (1) (c) of the Constitution, and Article 14 (3) (d) of the ICCPR, and the Banjul Charter.

(b) By the Trial Court contravening Section 77 (1) (d) of the Constitution, and Article 14 (3) (d) of the ICCPR, and the Banjul Charter.

2. The learned Judges erred in law in failing to find that a mandatory death sentence was meted out against the Appellant yet –

(a) the alleged facts of the alleged offence adduced by the prosecution fall far below international standards {Article 6 (2) of the ICCPR} or comparative crimes and standards in Kenya that merit the sentence, and

(b) the Appellant's prosecution violated sections 71 (1) and 74 (1) of the Constitution.

3. The learned Judges erred in law in affirming the mandatory death sentence imposed by the trial court."

The legal issues raised here are complex, with one of the issues relating to the right to legal counsel at state expense, completely novel, and raised before this Court for the first time, and requiring extensive research. That explains the reason for the slight delay in delivering this Judgment, which we regret. We will return to the issues of law. Let us first deal with the other grounds of appeal outlined in the home-made memorandum of appeal filed on 6th June, 2007. In arguing those grounds, Mr. Gitonga essentially relied on two major themes – that the superior court failed to re-evaluate the evidence on record and to arrive at a conclusion of its own, and secondly, that the evidence relied upon was contradictory and inconsistent. He submitted that the evidence in this case was purely circumstantial and had the learned Judges analyzed the same, they would have found that there was no evidence linking the appellant to the offence; that the evidence relating to the date of sale and recovery of the stolen phone was contradictory and had not been independently corroborated; and that the two courts below had misapplied the doctrine of recent possession.

In supporting the conviction and sentence, Mr. Monda, learned Senior State Counsel, argued that there was overwhelming evidence linking the appellant to the offence; and that it was the appellant who led the police to the recovery of the stolen items soon after the incident.

In view of the complaint that the superior court did not re-evaluate the evidence, it is imperative we set out the crucial evidence.

Not unlike the trial court, the superior court also considered the evidence, evaluated the same, and drew its own conclusions. Here is how it delivered itself:

"The evidence before the court is conclusive that the phone stolen from the Complainant on the night of 11th August, 2004 was the same phone sold to PW 2 by the Appellant. The Complainant not only identified the phone itself, exhibit 2, as his but also produced its receipt, exhibit 3 comparing the serial number on the phone and that recorded on the receipt, the same tallied. There is therefore no doubt whatsoever that the phone before the court was the one robbed from the Complainant on the material night.

The Complainant's evidence was clear that he could not identify those who robbed him and that is undisputed. The Appellant's conviction is not at all predicated on his identification by the Complainant.

Both the Appellant and the learned State Counsel submitted that there was a contradiction on the date the phone was sold to PW 2. PW 2's evidence that the Appellant sold the phone to him was not challenged or shaken by the time the case was concluded. There is no doubt that the Appellant sold the phone in question to the witness, PW 2. The issue is whether the date the phone was sold is contradicted.

We think that the Appellant and the Learned State Counsel misapprehended PW 3's evidence. PW 3's evidence is quite clear. He did not say that he learnt that the phone was sold to PW 2 on the 28th August. Rather, PW 3's evidence was that he got to know on 28th August that a sale of a phone had taken place between the two parties. PW 3 never said that the sale was on 12th August. The learned State Counsel and the Appellant misunderstood PW 3's evidence and therefore came to the wrong conclusions. PW 3 did not in fact claim that he knew of the date the sale took place. We find therefore that there was no contradiction in the prosecution case as to when the Complainant's phone was sold by the Appellant to PW 2.

The learned State Counsel also submitted that PW 2 was an accomplice and that his evidence needed corroboration and which was lacking.

We do not accept that PW 2 was an accomplice. In any event, even if he may be considered an accomplice, his evidence is not the only basis upon which the Appellant was convicted. There was the further evidence by PW 3 that upon arresting the Appellant, he led him and his colleagues to a place where the Complainant's coat was recovered. The Complainant identified the coat as his. According to PW 3 who had visited the scene of attack with the Complainant the day after the attack, the coat was recovered hidden in bushes near where the attack took place. The recovery was 2 weeks after the date of the robbery. The evidence of recovery of the coat is sufficient corroboration of PW 2's evidence. The added fact that the Appellant had the phone the day after it had been stolen from the Complainant, in addition to the evidence that he led to the recovery of the Complainant's coat stolen on the same night, all these ***(sic)*** **evidence in our view can only lead to one conclusion. The conclusion is that the Appellant had recent possession of the Complainant's stolen coat and phone, one day after they were robbed off from the Complainant. The evidence of recent possession of the phone and recovery of the Complainant's stolen coat are sufficient to draw an inference that the Appellant was the robber rather than the handler of the stolen property. The learned trial magistrate's conclusion that the charge was proved cannot be faulted."**

For our part, we are satisfied that both the courts below took into account all the relevant factors in coming to the conclusion that the appellant was guilty of the offence charged. The evidence on record shows that the appellant sold the stolen mobile phone to Simon the day after it was stolen; that he eventually led the police officers to the bush from where the stolen coat was recovered; and that he was unable to explain how he came into possession of these items, leading to the inference that he was the thief. All these crucial facts were taken into account by both the courts below, as was the defence of the appellant that he was innoncent.

Selle v. Associated Motor Boat Co. Ltd. [1968] EA 123 and ***Okeno v. R. [1972] EA 32***, are among decision of this Court and the Court of Appeal for East Africa, before it, which lay down the duty of a first appellate Court. Sir Clement De Lestang, V. P. expressed the view of the Court of Appeal for East Africa on the principles to guide the court, in the first of the two cases, as follows:-

"Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally *(Abdul Hameed Saif v. Ali Mohamed Sholau (1955) 22 E.A.C.A 270)."*

Having reviewed the record carefully, and heard argument, we are satisfied that the superior court complied with the requirements laid down in the above cases. We are also satisfied that there are no contradictions, material enough to make us interfere with the concurrent findings of the two courts below.

In the result, and for reasons outlined above, we come to the conclusion that the appellant's appeal on the grounds outlined in the memorandum of appeal filed on 6th June, 2007 has no merit, and we order that the same be and is hereby dismissed.

We now turn to the other issues of law raised in this appeal, one of which, as we said is a novel issue, being raised in this Court for the first time. The principal issue can be framed as follows:
Is the right to free legal counsel in serious criminal offences a fundamental right that must be availed to an accused person at state expense?

Mr. T. Bryant, learned counsel for the appellant, made formidable arguments before this Court, submitting that the appellant herein was subjected to a trial in respect of a serious offence, for which he was ultimately sentenced to death, without affording him the benefit of legal counsel at state expense. This, he submitted, violated his constitutional and fundamental rights enshrined in both the previous and the current Constitutions of Kenya, and in two international legal instruments, namely the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the African Charter on Peoples and Human Rights (the Banjul Charter). He relied on the following cases: ***Rono v. Rono and Another, (2008) 1 KLR (G & F) 803, Collins vs Jamaica, Comm No. 356/1989, U. N. doc CCPR/C/47/D/356/1989(1993), Frank Robinson vs Jamaica, Comm No. 223/1987, U. N. Doc. Supp. No (A/44/40) at 241 (1989), Advocats San Frontieres (on behalf of Bwampamye) v. Burundi, African commission on Human and Peoples' Rights, Comm No. 231/00 (2000), Benard Lubuto vs Zambia Comm No. 390/1990: Zambia 17/11/95 CCPR/C/55/D/390/1990 (jurisprudence), Webby Chisanga vs Zambia Comm No. 1132/2002, U. N. doc. CCPR/C/85/D/1132/2002 (2005) and Godfrey Ngotho Mutiso vs Republic, Ct of appeal, Crim app No: 17/2008.***

We have considered anxiously all the cases and authorities cited by Mr. Bryant and are grateful to him for his industry and initiative in bringing this novel and interesting issue before this Court, and for giving us an opportunity to pronounce on the same. As we said before, **the issue is whether the accused, charged with a serious criminal offence, is entitled, as of right, to legal counsel at state expense.** And if so, whether the rights of the appellant, who was not represented by counsel at trial, were violated. In the event that we should answer the above question in the affirmative, Mr. Bryant asks that we order a re-trial of the case with legal counsel representing the appellant at state expense.

The Right to Legal Representation

The right to legal representation is universally acknowledged as a fundamental right. Trials in many jurisdictions are considered unfair and fatally irregular if the presiding judge or magistrate fails to inform the accused person his or her right to be assisted by a counsel; if he or she denies the accused his right to appoint a counsel of his or her choosing; if he or she fails to facilitate the effective and full participation of a counsel or if he or she does anything that would impede the counsel of the performance of his duty (see Vandki P. K. "Examining the Right to Legal Representation: a reflection on the case of the ***Inspector General v. Steven Harvey Perez and the Others*****"**).

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. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in ***Pett v. Greyhound Racing Association (1968) 2 All E.R 545,* at 549**. He had this to say:

"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"

The right to legal representation is almost axiomatic in an adversarial system. Under the adversarial system, court proceedings are left between the two parties to fight it out. The Bench serves as the umpire and intervenes only to enforce compliance with the rules and ensure fairness of the proceedings. Where it is applied in criminal matters, the adversarial system may result in an incalculable prejudice to the accused person whose liberty or life may be at stake. It is for this reason that accused persons are accorded the right to appoint legal representation of their own choosing.

Strongly related to the adversarial system, is the principle of equality of arms which is an essential feature of a fair trial. Equality of arms is an expression of the balance that must exist between the prosecution and the defence. The Human Rights Committee in *Communication No. 289/1988, D. Wolf v. Panama* while explaining the fair trial principle noted that the requirements of equality of arms and the respect for the principle of adversarial proceedings are not respected where "…the accused is denied the opportunity personally to attend the proceedings or where he is unable properly to instruct his legal representative…" The African Commission on Human and People's Rights in its communication regarding ***Advocat San Frontiers v. Burundi*** *(Communication No. 231/99),* noted that "the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial". They must, in other words, be able to "argue their cases ...on an equal footing."

It is therefore only lawyers who by study and experience have the knack to argue the cases intelligibly and successfully apply the applicable law to the facts of the matter. The Committee had this in mind when it concluded that the Court of Appeal in the above case "violated the right to equal treatment, one of the fundamental principles of a right to a fair trial." The matter was a death penalty appeal in which the Burundi Appeal Court had refused the accused person's plea for adjournment of the proceedings in the absence of his legal counsel, even though it had earlier accepted the same plea from the prosecution.

The importance of a legal practitioner is not only restricted to disproving the allegations levied in the charges against his client, but once he is on record before the court, he is considered as an officer of that court. He is also there to assist the presiding officials in the effective and fair administration of justice. The Trial Chamber I of the Special Court for Sierra Leone in its decision on the application of the 1st Accused, Samuel Hinga Norman in ***Prosecution v. Sam Hinga Norman, Moinina Fofanah and Alieu Kondowa****, Case No. SCSL-04-14-T, (CDF case),* for self-representation, gave an insightful opinion on the role of the defence counsel. The Chamber, in determining whether to grant the said accused's application for self-representation, noted that, "the role of a defence counsel is institutional and is meant to serve, not only his client, but also those of the Court and the overall interests of justice." It further noted firstly that the right to counsel was predicated upon the notion that representation by counsel was an essential and necessary component of a fair trial. Secondly, that the right to counsel "relieves trial judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings".

However, legal representation is not always required in criminal proceedings. In less complicated and less serious proceedings an accused may receive sufficient protection from the operation of the institutional processes of the courts. In ***Government of the Republic of Namibia and ors. v. Mwilima and ors****. (2002) (Case no. SA 29/2001),* for instance, a majority of the Supreme Court of Namibia considered that in a criminal proceeding involving only one or two defendants, and not raising complicated issues of law, the presumption of innocence, the role of the trial judge in ensuring procedural fairness and the prosecutors' duties to treat an accused fairly may be sufficient to ensure a fair trial.

The Right to Free Legal Representation or Legal Aid

There exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide legal aid, which began to be articulated by the international community after 1945 with the establishment of the United Nations and the development of international human rights law. These standards are contained in treaties, such as covenants and conventions, which are binding amongst the states that ratify them, as well as other instruments designed to provide guidance, such as declarations, principles, rules, recommendations and guidelines. The latter instruments, while not legally binding upon states, have been accepted by a large number of states and considered to have moral force.

Generally speaking, the United Nations regional and national human rights regimes do not proclaim legal aid as a civil or political right. Instead the human rights regimes confer on individuals certain rights to due process in civil disputes and criminal proceedings. (see Fleming D. "Legal aid and human rights", Paper presented to the International Legal Aid Group Conference, Antwerp, 6-8 June 2007).

Under the International Covenant on Civil and Political Rights (ICCPR), ***article 14 (1)***, ratified by 120 of the 192 UN member states everyone is entitled to a fair and public hearing within a reasonable time by an independent, impartial and lawfully established tribunal in the hearing of civil actions and criminal charges. Comparable provisions are contained in the regional treaties, and in the national human rights regimes. (Safeguards guaranteeing protection of the rights of people sentenced to death or facing trial for capital offences adopted by the UN Economic and Social Council in 1984 include the right to legal assistance at least equal to the ICCPR, Art. 14, provisions).

The due process rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) resemble the ICCPR equivalent. These entitle everyone in the ratifying and acceding states to a fair and public hearing by law in determining civil rights and obligations and any criminal charges, within a reasonable time, and by an independent, impartial, and lawfully established tribunal.

The African Charter on Human and Peoples Rights (Banjul Charter) ratified by 53 countries entitles every individual to have her or his cause heard, and to be tried within a reasonable time by an impartial court or tribunal.

The United Nations Human Rights Committee (the Committee) is firm that under international law, legal representation, at least in cases where the penalty is loss of life, is a fundamental human right. The Committee in ***Robinson v Jamaica*** *UNHRC Communication no 223/1987,* decided on 30 March 1989 stated:

"noting that article 14 (3) (d) stipulates that everyone shall have 'legal assistance assigned to him, in any case where the interests of justice so require', believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings . . . the absence of counsel constituted unfair trial."

The Committee observed that the refusal of the trial judge to order an adjournment to allow the defendant to have legal representation, although several adjournments had already been ordered when the prosecution's witnesses were unavailable or unready, raised issues of fairness and equality before the courts. The Committee was therefore of the view that there had been violation of Article 14. According to it, a state party was under an obligation to make provision for effective representation in cases involving capital offences.

Further, in the case of ***Pinto v Trinidad and Tobago Communication*** ***(No. 232/1987)***, the Committee reiterated its position and once again emphasized that the State has a duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant. Such duty required that legal representation be provided at all stages of the proceedings and that such legal assistance must be provided in ways that adequately and effectively ensure justice.

In elaborating on the meaning of when the "interests of justice" would require free legal representation, the Committee considers the severity of the charge and the complexity of the case in making the determination. Therefore, in a case where the accused was charged with a minor criminal offence which would have likely resulted in a fine, the Committee found that the state was not required to provide state-funded legal assistance (O. F. V Norway, Communication No. 158/1983). The Committee has also found that accused persons might have a right to legal advice prior to trial requiring the state to appoint legal counsel during the pre-trial contact with the criminal justice system. However, it is still unclear whether or not this right exists immediately upon detention (*The Responsibility Of States To Provide Legal Aid* The International Centre for Criminal Law Reform
and Criminal Justice Policy Legal Aid Conference Beijing, China March 1999).

The African Commission on Human and Peoples' Rights which draws its mandate from the Banjul Charter came up with principles and guidelines on the right to a fair trial and legal assistance in Africa. It provides that an accused has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused if he or she does not have sufficient means to pay for it. The interests of justice in criminal matters are to be determined by considering: (1) the seriousness of the offence; (2) the severity of the sentence. The guidelines further provide that the interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty, or pardon.

Other international instruments which are relevant for an individual to access state-funded counsel include the United Nations Basic Principles on the Role of Lawyers which stipulate that governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. The principles state that professional associations of lawyers should cooperate in the organization and provision of services, facilities and other resources.

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988) provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he/she does not have sufficient funds to pay. The United Nations Standard Minimum Rules for the Treatment of Prisoners provide for untried prisoners to be allowed to apply for legal aid where such aid is available.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice provide that, throughout proceedings, juveniles have the right to be represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty provide that where juveniles are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid is available.

Applicability of International Law in Kenya

Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution.

The Court of Appeal in ***Rono v Rono & Another*** ***[2005] KLR 538*** extensively examined the applicability of international laws in the domestic context and made the following remarks:

"There has, of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic

law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation."

In ***RM & another v Attorney General*** *[2006] eKLR* the court noted as a general principle that:

"Unless there is a provision in the local law of automatic domestication of Convention or Treaty, the Convention does not automatically become Municipal law unless by virtue of ratification. … On the other hand where the national law is clear and inconsistent with the international obligation, in common law countries, the national court is obliged to give effect to national law. And in such cases the court should draw such inconsistencies to the attention of appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country."

With that observation the court held that where the words of the constitution or statute are unambiguous the courts have no choice but to enforce the local law irrespective of any conflict with international agreements.

The above cases were adjudicated under the repealed Constitution which did not have any provisions regarding international laws or treaties. The current Constitution imports the Treaties and Conventions that Kenya ratified, including the general principles of international law. ***Article 2*** reads:

"2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government

….

(5) The general rules of international law shall form part of the law of Kenya.

6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

In ***Re The Matter of Zipporah Wambui Mathara*** ***[2010] eKLR*** the superior court held that by virtue of the provisions of ***Section 2 (6)*** of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.

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 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 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.

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."

Given that this Judgment has major policy and financial implications for the Executive branch of the Government, we direct the Deputy Registrar of this Court to formally serve a copy of this Judgment to the Hon. the Attorney General, the Hon. the Minister of Justice and Constitutional Affairs, the Constitutional Implementation Committee and the Law Reform Commission for their records and necessary action, as may be appropriate.

Dated and delivered at Nairobi this 18th day of March, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR