Owuor v Republic (Criminal Appeal 16 of 2019)
[2022] KECA 18 (KLR) (21 January 2022) (Judgment)

Neutral citation: [2022] KECA 18 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 16 OF 2019

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

JANUARY 21, 2022

BETWEEN

DUNCAN OUMA OWUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (W. Korir, J.) dated 31st January 2019 in Malindi HCCA No. 38 of 2017)

JUDGMENT

1. This is a second appeal arising from the *judgment* of the High Court at Malindi (W. Korir, J.) dated 31st January 2019. The appellant was charged before the Chief Magistrate's Court at Malindi in Criminal Case No. 859 of 2016 with seven counts of robbery with violence contrary to Section 296(2) of the *Penal Code*. The appellant was unrepresented throughout the trial. The appellant was eventually found guilty in respect of five of the seven counts and sentenced to suffer death.

2. Aggrieved by the conviction and sentence, the appellant lodged an appeal on various grounds in Malindi High Court Criminal Appeal No. 38 of 2017. Again, the appellant conducted his appeal in person. The learned Judge upheld the conviction by the Chief Magistrate's court but varied the sentence of the Chief Magistrate's Court from a death sentence to 15 years imprisonment for each of the five counts, running concurrently with effect from 3rd November 2017.

3. Still aggrieved by the decision of the High Court, the appellant has filed this appeal. This appeal is based on the following grounds as set out in the supplementary grounds of appeal filed on 28th April 2012:

4. That the 1st Appellate Court and the Trial Court erred in law by denying the appellant the right to legal representation and therefore the appellant's right to a fair trial was prejudiced. That the 1st Appellate Court erred in law in its duty in re-examining and re-evaluating the evidence from the Trial Court by: Failing to find that the sentence was manifestly excessive and harsh; Failing to find that the Trial Court

did not conduct a sentence hearing; Failing to find that the offence was not proved beyond reasonable doubt; and thereby drawing a wrongful conclusion of the appeal that was before it.

5. The appeal was disposed of by way of written submissions which were highlighted in open court during the hearing.

6. On the first ground, Counsel for the appellant submitted that Article 50 (1) (g) and (h) of the *Constitution* gives an accused person the right to choose and be represented by an advocate and the accused informed of this right; and the right to be provided an advocate by the State, and to be informed of this right. Counsel submitted that the trial court failed to inform the appellant of his right of representation by an advocate in the first instance and did not explain to the appellant that he had a right to legal representation and to be assigned an advocate by the State, more so in the face if the serious charges that carried a death sentence. Counsel contended that the appellant was a layman and could not adequately prepare a formidable defence.

7. Counsel relied on the case of *David Njoroge Macharia v Republic* Criminal Appeal No. 497 of 2007 where it washeld that, in addition to situations where "substantial injustice would otherwise result" under Article 50 (2) (h), persons accused of capital offences, where the penalty is loss of life, have the right to legal representation at state expense. Counsel noted that the court in that case directed that the Executive, Constitutional Implementation Committee and the Law Reform Commission be served with the judgment in order to implement the necessary action to give effect to the judgment. Counsel also noted that a similar finding was made in the Karisa Chengo case, Criminal Appeal Nos 44, 45 & 76 of 2014, and a plea made to the Attorney General to fast track the enactment and operationalization of the appropriate legislation in the form of the *Legal Aid Act*.

8. Counsel argued that the Executive's lethargic implementation of this Constitutional provision was tantamount to holding justice at ransom and that the right of a fair trial is a fundamental right that cannot be limited or held at ransom by laws awaiting implementation or allocation of funds by Parliament or state officers. Counsel contended that all capital offence trial conducted without an advocate assigned to the accused should be declared null and void ab initio.

9. Counsel further submitted that, it is common sense that substantial injustice will occur if an accused faces criminal charges attracting the death penalty without the assistance and skills of a defence advocate, since in our adversarial system, the judicial officer conducting the trial cannot direct the accused in the conduct of his or her defence. That the appellant, prior to the trial, has never come into contact with the relevant legislation, the Constitution, or any other legal instrument that would inform him of the most advantageous way of conducting his defence.

10. Counsel gave a brief historical on the law on legal aid, beginning with the holding of the East African Court of Appeal in *Mohamed s/o Salim v R* [1958] EA 202 emphasising that, in the interest of justice, a person on trial in a capital charge should have the benefit of legal aid; pointing out that the pauper brief system funded by the Judiciary has, since its inception, been limited to providing legal aid solely to suspects charged with murder in the High Court; that there seems to be no logical reason that suspects facing charges for robbery with violence are excluded, other than the fact that the offence of robbery contrary to Section 296 (2) did not have a death penalty attached to it until 1973. Counsel also cited the provisions of the *International Covenant on Civil and Political Rights* and the *African Charter on Human and Peoples' Rights* on the right of legal assistance in cases involving capital punishment.

11. On the second ground, Counsel submitted that the superior court wrongly upheld the finding that the doctrine of recent possession applied when one ingredient was not satisfied. Counsel submitted that the four ingredients to be satisfied are that the property was found with the suspect; that the

property is positively identified as the property of the complainant; that the property was stolen from the complainant; and that the property was recently stolen from the complainant.

12. Counsel contended that the second ingredient was not satisfied because the ownership of the property was not proved to the required standard; that the complainants did not describe the items stolen nor produce any receipts or warranties for them, and that the mere listing of serial numbers and IMEI numbers does not prove ownership without official receipts. Counsel noted that some items listed in the charge sheet were not even referred to by the witnesses, such as the nail polish.

13. Referring the case of *Peter Kariuki Kibue v Republic* [2001] eKLR cited by the superior court, counsel submitted it is to be distinguished from the present case as the appellant in that case was arrested in the locus quo inside the stolen car while the appellant herein was arrested 4 kilometres away from the scene of crime in a room where the stolen items were, and it was not established whether it was his house or a rented premise for the night. Counsel argued that the court ought to have settled on the alternative count of handling stolen property.

14. On the sentence meted out by the two courts, it was submitted, the same was not proportional to the offending behaviour; and even though the superior court reduced the sentence from death to 15 years, the sentence is still harsh taking into account that there was no loss of life, no physical injury, no identification of the assailants, no loss or damage of property, that all the items were recovered, and that the appellant was a first offender. That there were no aggravating circumstances to warrant a long prison term. Given that the life expectancy of a Kenyan man is 60 years, the sentence of 15 years was a substantial part of his life and in any case, the one year the appellant spent in legal in remand was not properly taken into account.

15. On the issue of the omission of a sentence hearing, Counsel cited page 47 of the Judiciary Sentencing Policy Guidelines which states that upon conviction, the court should schedule a sentencing hearing in which it receives submissions that would impact on the sentence. Counsel argued that the appellant was not given a sentence hearing at the trial court, leading to an over-sentencing. That no pre-sentencing report was ordered by the court, which report would have highlighted the unique circumstances surrounding the case including the personal circumstances of the appellant such as his age. Counsel urged this Court to reduce the sentence to the term already served or quash the conviction, set aside the sentence and set the appellant at liberty.

16. Counsel for the respondent opposed all the grounds of appeal contending that the prosecution was able to prove its case beyond reasonable doubt. He submitted that the prosecution called 8 witnesses who testified in court to confirm that on 24th November 2016, there was robbery with violence at Pine Court Hotel and assorted items stolen from the complainants. PW1 and PW8 testified that they found the appellant in possession of the recently stolen items. That the learned trial magistrate, in convicting the appellant, correctly applied the doctrine of recent possession as set out in the case of *Isaac Ng'ang'a Kahiga & another v Republic Criminal Appeal 272 of 2005*.

17. Counsel submitted that the prosecution was able to prove all the ingredients of robbery with violence as set out in the case of *Oluoch v Republic* [1985] KLR where the offender is armed with any dangerous and offensive weapon or instrument; or the offender is in the company of one or more person or persons; or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.

18. On sentencing and mitigation, Counsel submitted that the superior court had noted that, at the time, the only sentence available for robbery with violence was death and the trial magistrate could not be faulted for imposing that sentence.

19. At the hearing, Counsel for the respondent however conceded that the appellant ought to have been afforded legal representation and proposed that a re-trial be held and the appellant given legal representation. In reply, Counsel for the appellant argued that a re-trial would be an exercise in vain as the prosecution would not be able to secure attendance of some of the witnesses, particularly those who reside abroad.

20. As this is a second appeal, the Court ought to confine itself to matters of law, as provided under Section 361 (1) (a) of the *Criminal Procedure Code*, unless it is shown that the findings of fact by the two courts below are based on no evidence, or if it is shown that the courts acted on wrong principles in making the findings.

21. The right of an accused person to legal representation is enshrined in Article 50 (2) of the Constitution as follows:

> " (2) Every accused person has the right to a fair trial, which includes the right—...
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> g. 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."

22. The value that legal representation adds to an accusedb defence in ensuring not only a vigorous but skilled participation in the criminal process cannot be gainsaid. Lord Denning in *Pett v Greyhound Racing Association*, (1968) 2 All E.R 545, at 549 stated:

> " It is not every man who has ability to defend himself on his own. He cannot bring out the point 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 every day. 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 trained for the task?"

23. This right was exhaustively examined and expounded on in the case of David Njoroge v Republic [2011] eKLR where this Court held that the principle of equality of arms where a balance must exist between the prosecution and the defence was the main underpinning of this right, more so in our adversarial system. This Court then held 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 where serious prejudice would result without such representation:

> " 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."

24. This Court, again in *Karisa Chengo & 2 others v Republic* [2015] eKLR emphasized that the element ofsubstantial injustice arising was indispensable to establishing whether the right to state funded legal representation in cases involving capital offences was available to the accused:

> " However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

25. The Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR emphasized that the right to legalrepresentation at State expense was not limited only to accused persons charged with capital offences; and that it is a right to be enjoyed pursuant to the constitutional edict and not progressively, regardless of whether certain legislative steps have been taken to buttress this right; and that "this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result."

Regarding the factors to consider in determining whether substantial injustice will be suffered in criminal cases, the Supreme Court held that:

> " Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include: the seriousness of the offence; the severity of the sentence; the ability of the accused person to pay for his own legal representation; whether the accused is a minor; the literacy of the accused; the complexity of the charge against the accused."

26. In the years following the promulgation of the 2010 Constitution and prior to the enactment of the *Legal Aid Act*, challenges to convictions based on denial of the right guaranteed under Article 50 (2) (h) tended to be dismissed on the strength of the absence of a legal aid framework. However, the enactment of the *Legal Aid Act*, which came into force on 10th May 2016, has done away with the perception of a lacuna in the legal framework for State funded legal aid. See *Thomas Alugha Ndegwa v Republic* [2016] eKLR.

27. Section 5 of the *Legal Aid Act* establishes the National Legal Aid Service with its functions being, inter alia, to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; facilitate the representation of persons granted legal aid under the Act; assign legal aid providers to persons granted legal aid under the Act; and administer and manage the Legal Aid Fund.

28. The *Legal Aid Act* also eliminates any procedural ambiguities regarding the duties of a court when faced with an unrepresented accused person. Section 43 provides that:

> " '(1) A court before which an unrepresented accused person is presented shall —
>
> i. promptly inform the accused of his or her right to legal representation;
>
> ii. if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and inform the Service to provide legal aid to the accused person.
>
> (2) The Service shall provide legal aid to the accused person in accordance with this Act.

(3) Where an accused person is brought before the court and is charged with an offence punishable by death, the court may, where the accused is unrepresented, order the Service to provide legal representation for the accused."

29. In the present case, proceedings in the trial court commenced on 28th November 2016, while the hearing began on 12th June 2017, long after the commencement of the *Legal Aid Act*. Regarding the issue whether at that point a substantial injustice was to result if the appellant was not offered legal representation, the first point of consideration ought to have been the seriousness of the offence and the severity of the sentence. The appellant was facing robbery with violence charges which carries a death penalty on conviction – it goes without saying that given the severity of the sentence, the appellant would have benefitted from the services of an advocate.

30. The trial court ought to have taken this into consideration and informed the unrepresented appellant of his right to legal representation under Article 50 (2) (h). It is clear from the record that the appellant was not informed of this right at any stage of the proceedings, or any time before the commencement of proceedings. The record also indicates that no inquiry was made by the trial court to determine whether the appellant was eligible for legal representation at the expense of the State.

31. In the early stages of the proceedings, it became apparent that the appellant did not have the financial ability to pay for copies of witness statements. This would have been an opportune moment for the trial court to inquire about the appellant's ability to pay for his own legal representation; and inform him of the right to be provided with legal representation by the State. The trial court instead made orders that the appellant be provided with the witness statements at no cost and proceeded with the trial without informing the appellant of his right to legal representation.

32. For the appellant to benefit from the omission by the trial court and the High Court, he must demonstrate that from the commencement of the trial he raised concern about his inability to afford legal representation and that substantial injustice may occur as a result. We find support for this in the case of *Charles Maina Gitonga v Republic* [2020] eKLR, a decision of the Supreme Court which had occasion to address similar issues as raised by the appellant in the instant appeal. The Supreme Court rendered itself as follows,

> "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. We have interrogated the record before us from the trial court to the High Court judgment that led to the present appeal. Nowhere did the appellant raise the issue of legal representation and therefore, the same has no place in the proceedings before us. In fact, the Supreme Court in *Charles Maina Gitonga case* (supra) said as follows,

> "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."

34. We have considered the record before us and noted that the appellant followed the proceedings very keenly. This is informed by the fact that he participated in the trial by cross examining the prosecution witnesses on very salient points related to the charges. His detailed defence before the trial court is a further demonstration in that regard. He therefore understood the charges he was facing and the evidence presented. There is no evidence that the appellant was incapacitated in the trial for lack of legal representation.

35. The prosecution through P.W. 1 and P.W. 8 provided evidence that led to recovery of some property which was found in the possession of the appellant. The evidence of identification of the said property was sufficient. At the scene where the property was recovered only the appellant was present.

35. Between the time of the robbery and the finding of the property only about four hours had elapsed. His defence did not dislodge the evidence provided by the prosecution. The conclusion that the appellant was one of the robbers was irresistible in the circumstances. The application of the doctrine of recent possession was correctly applied by the trial court and the High Court, and therefore we are unable to fault the concurrent findings.

37. The evidence adduced before the trial court and which the High Court agreed with, was that the victims of robbery confirmed there were several attackers at the time of the robbery. There was also evidence that some were armed with pangas and one had a gun. They threatened or applied some violence during the robbery. The ingredients of robbery with violence under Section 296 (2) of the Penal Code were met. In the circumstances, the convictions were safe and we have no reason to interfere with the same.

38. The High Court reduced the sentence from that of death to 15 years imprisonment on each of the counts upon which the appellant was convicted and ordered the terms to run concurrently. The High court applied the principles set by the Supreme Court following the *Muruatetu Case*. That was prior to Directions of the Supreme Court in *Francis Karioko Muruatetu & another vs Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR clarifying the Muruatetu Case was specific to the mandatory death sentence in respect of murder.Again, we are unable to fault the High Court in that regard. The end result is that this appeal is dismissed in its entirety.

DATED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR