FMM v Republic (Criminal Appeal 50 of 2023)
[2024] KEHC 10435 (KLR) (20 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 50 OF 2023

FN MUCHEMI, J

AUGUST 20, 2024

BETWEEN

FMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable E. Riany (RM), in Criminal Case No. E1652 of 2021 on 22nd June 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Resident Magistrate in Thika Cr. Case No. E1652 of 2021 whereas he was charged and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The appellant pleaded guilty and was sentenced to twenty (20) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 7 grounds which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in fact in failing to find that the appellant was a child (under 18 years) and was supposed to be tried in a Children's Court be placed in institutionalised rehabilitation centre which caters for convicted offenders under the age of majority. for convicted offenders under the age of majority.

    b. The learned trial magistrate erred in law and in fact in failing to find that the plea was unequivocal.

    c. The learned trial magistrate erred in law and in fact in failing to find that the appellant took plea at the police station flagged by uniformed police officers who blackmailed him that he

should plead guilty to the charges and he would be released due to his young age (17 years at the time of arrest) and be given a probation sentence.

d. The learned trial magistrate erred in law and in fact in failing to ask the appellant the language he understood and preferred to use for communication.

e. The learned trial magistrate never warned the appellant on the severity of the charges and the consequences of pleading guilty.

f. The sentence meted out against the appellant is harsh and excessive.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that he was 17 years old at the time of arrest and he was convicted of the offence of robbery with violence contrary to Section 296 as read with 297 of the Penal Code and sentenced to twenty years imprisonment. The appellant submits that he was born on 22nd November 2003 and he was arrested on 21st June 2021 and therefore he was a minor at the material time. The appellant relies on Article 53 of *the Constitution* and Section 186 and 191 of the Children's Act and the case of N.K.R. *vs Republic Criminal Appeal No. 28 of 2019* and P.K vs Republic Criminal Appeal No. 7 of 2014 and submits that the trial court did not consider that he was a minor at the time of sentencing and therefore urges the court to acquit him.

5. The appellant submits that the trial magistrate never asked him what language he was comfortable with and he was never given any legal representation or informed of that right.

6. The appellant relies on Section 207(1) & (2) of the Criminal Procedure Code and the cases of Adan vs Republic [1973] EA 445 and Elijah Njihia Wakianda vs Republic [2016] eKLR and submits that the trial court did not read the charge, particulars and facts in a language the accused understood. The appellant argues that in his case it is not even stated who read the facts and there is nowhere he responded to the facts read out to him. He submits that the trial magistrate concluded that he was convicted on his own plea of guilty.

7. The appellant submits that he pleaded to only one charge yet the charge sheet has an alternative charge. He further submits that it is not clear which charge he was responding to. Further, the appellant states that there is no judgment and it is not clear which section the honourable trial magistrate used to convict and sentence him.

8. The appellant submits that he was not in his right state of mind due to the beating he received from the mob. He states that he went through a beating that would have ended his life but was saved by police officers. The appellant and as such he was not in a proper mind to plead in court but the trial magistrate failed to recognize that.

9. Relying on the cases of Ahmed Sumar vs Republic (1964) EALR 483; Samuel Wahini Ngugi vs R [2012] eKLR; Lolimo Ekimat vs R Criminal Appeal No. 151 of 2004 (unreported); Muiruri vs Republic (2003) KLR 552; Mwangi vs Republic (1983) KLR 522; Fatehali Maji vs Republic (1966) EA 343 and Issa Abdi Mohammed vs Republic [2006] eKLR, the appellant submits that it would be prejudicial to subject him to another trial as it was the prosecution and the trial magistrate who did not follow the law and procedure.

10. The appellant submits that he has an eye problem which needs a lot of medical attention which is not available in prison. The appellant further submits that despite his disability he has undertaken

rehabilitation programmes during his time in prison. The appellant submits that he has learnt his lesson the hard way and he cannot be swayed by peer pressure to be forced into crime.

The Respondent's Submissions

11. The respondent submits that the appellant was charged on 22nd June 2001 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The appellant was warned of the nature of the offence and the severity before taking plea. Further, the interpretation was done in Kiswahili and the matter was done virtually. The respondent further submits that the substance of the charge and every element that had been stated by the court to the appellant in a language he understood who upon being asked whether he admits or denies the truth of the charge replied "true". A plea of guilt was entered and the facts were read to him which he answered "facts are true."

12. The respondent submits that the appellant was convicted on his own plea of guilt. The prosecutor stated that the appellant was a first offender and in mitigation the appellant stated that he was sorry. That the mob really beat him and said "mimi ni mgeni hii kazi."

13. The respondent submits that the trial court held that mitigation was considered and the appellant was sentenced to serve twenty years imprisonment.

14. The respondent relies on Section 348 of the Criminal Procedure Code and the cases of Olel vs Republic [1989] KLR 444 and Alexander Lukoye Malika vs Republic [2015] eKLR and submits that the appellant is barred from challenging the conviction and his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court.

15. Relying on the case of K. N. vs Republic [2016] eKLR, the respondent argues that the charge, particulars and the facts were read to the appellant in a language he understood. Thus the plea was unequivocal and an appeal against the conviction does not lie. The trial court stated the charge and every element thereof to the appellant in the language he understood, that is Kiswahili. The appellant's mitigation was a clear indication that he understood what was going on. Thus the guilty plea of the appellant was clear, unambiguous and unequivocal.

16. The respondent argues that the appellant did not bring up the issue of age during plea taking and this is an afterthought. Further, the appellant has not furnished the court with a birth certificate to verify its authenticity indicating that he was a child at the time of taking plea.

17. On the issue of taking plea virtually, the respondent submits that there is nothing illegal with that. The time the appellant took plea was during the covid pandemic which explains why plea was taken virtually. Furthermore, all cases in court during that period were conducted virtually country wide.

18. The respondent further submits that the appellant was in his right state of mind when taking plea. He was not coerced into it and has not tendered any evidence of torture by the police officers to make him admit to the plea.

19. On sentence, the respondent argues that the trial court was very lenient and sentenced him to twenty (20) years imprisonment instead of the death sentence. The respondent thus urges the court to enhance the sentence of twenty years to death sentence as envisaged by Section 296(2) of the Penal Code.

Issues for determination

20. The appellant has cited 7 grounds of appeal which can be compressed into two main issues:-

    a. Whether the appellant was a minor at the time of arrest and conviction.

b. Whether the charge was read to the appellant in a language he understood;

c. Whether the trial court failed to warn him of the consequences of the charges;

d. Whether the sentence was harsh and excessive.

The Law

21. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

22. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the appellant was a minor at the time of arrest and conviction.

23. The appellant submits that at the time of arrest he was 17 years and a few months as he was born on 22nd November 2003. From the perusal of the record, the appellant has not attached any evidence to support his claim. Although the appellant stated that he attached a birth certificate, the appeal record does not bear such a document. It is clear that the age of the appellant was not brought up in the trial court. That notwithstanding, the charge sheet describes the appellant as an adult. The appellant's claim that he was a minor at the time of the offence as well as during the trial was, in my view an afterthought. The appellant did not raise that issue during the trial and as such this ground of appeal fails.

Whether the charge was read to the appellant in a language that he understood

24. The Court of Appeal in Elijah Njihia Wakianda vs Republic [2016] eKLR stated:-

> Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is

> the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the offence charged. He is also at liberty to testify on his own behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of plea of guilty present a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same was entered consciously, freely and in clear and unambiguous terms.

25. The court further observed:-

> With respect, we find this disturbing. It seems to us that this part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and rather odd "in a language he understands" when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea if one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring that a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of offence are not complete if the sentence, especially if it is severe and a mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his viral waiver of his trial rights that *the constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often intimidating judicial process.

26. The charge was read to the appellant in Kiswahili language on 22/6/2021 and he replied in the same language that he was guilty. It is on record that the trial magistrate warned the appellant of the nature of the offence facing him and its severity. The substance of the charge and the elements were read to the appellant in Kiswahili language and he was asked whether he admitted or denied the charges and he replied that the charge was true.

27. The facts were read over to the appellant and he replied: "The facts are true". The trial court convicted the appellant on his own plea of guilty. In mitigation, the appellant stated "I am sorry. The mob really beat me. Mimi ni mgeni kwa hii kazi."

28. It is therefore evident that the appellant understood the charge as it was read to him. The appellant in mitigation said that he was sorry that he was new in the commission of the offence signifying that he understood that the charge against him was that of robbery. Thus, it is my considered view that the charges were read to the appellant a language that he understood. As such, the plea was unequivocal.

Whether the trial court failed to warn the appellant of the consequences pleading guilty to the charge;

29. The importance of the court exercising caution in entering a plea of guilty from an undefended accused person was stressed by Joel Ngugi J (as he then was) in Simon Gitau Kinene vs Republic [2016[eKLR when he stated that:-

> Finally, the courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an accused person is unrepresented, the duty of the court to ensure the plea of guilty is unequivocal is heightened. In Paul Malimi Mbusi vs R. Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:-
>
> In those cases [where there is an unrepresented accused charged with a serious offence care should always be taken to see that the accused understands the elements of the offence, especially if the evidence suggests that he has a defence...To put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract a custodial sentence, the obligation of the court to ensure that the accused person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behoved the court to warn the accused person of the consequences of a guilty plea.
>
> The appellant was facing a serious charge that carried a minimum sentence of life imprisonment. It is the duty of a court taking plea in such serious offence to warn the accused of the expected sentence in case he pleaded guilty to the charge.

30. Similarly in Bernard Injendi vs Republic [2017] eKLR where the appellant was charged with defilement, Sitati J (as she then was) considered the issue and held that:-

> Finally, the learned trial magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs Republic [2002] 1KLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words".
>
> I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea.

31. The appellant was unrepresented when he took plea before the magistrate on 22/6/2021. On perusal of the record, I have noted that the charge was read to the appellant and the court informed him of the seriousness and penalty for the offence yet the appellant maintained that he committed the offence. It is my considered view that the plea entered against the appellant was unequivocal. The record leaves no doubt that the appellant was warned of the nature of the offence and its severity.

Whether the sentence is harsh and excessive.

32. Section 296(2) of the Penal Code prescribes the penalty for robbery with violence as death.

33. In the instant case, the accused gave his mitigation to the effect that he was sorry and that he was new to the offence of stealing. The value of the property stolen was Kshs. 35,000/- which in my view is not a substantial amount and a factor that ought to have been considered in sentencing. The accused was a first offender according to the prosecution.

34. The appellant was sentenced on 22/07/2021 following development of jurisprudence of superior courts that declared as unconstitutional the mandatory nature of death sentence. The trial court was in order to impose a sentence of imprisonment.

35. The issue herein is whether all the relevant factors were considered in sentencing the appellant. I have perused the proceedings of the trial court and noted that the magistrate did not consider the fact that the appellant was a first offender; that he pleaded guilty to the offence as well as the fact that the property stolen was not of substantial value. Had these factors been considered, the sentence imposed would have been less than twenty years imprisonment.

36. aving HHaving considered all the foregoing factors, I am of the considered view that the sentence imposed on the appellant was excessive and ought to be reviewed.

37. The sentThe sentence of twenty (20) years imprisonment imposed by the trial court is hereby set aside and substituted with ten (10) years imprisonment to commence on 22nd July 2021.

38. TThis appeal is partly successful and is hereby allowed to the extent of the sentence imposed.

39. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF AUGUST 2024,

F. MUCHEMI

JUDGE