Kimanzi v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 13189 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E019 OF 2023

JO NYARANGI, J

OCTOBER 31, 2024

BETWEEN

JOSEPH KIMANZI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Wajir PM Criminal Case No. E259 of 2022 by Hon. Mugendi Nyaga – SRM dated 01.07.2022)

JUDGMENT

1. The appellant, Joseph Kimanzi was charged with the offence of house breaking contrary to section 304 (1) (b) and stealing Contrary to Section 279 (b) of the *Penal Code*.

2. The particulars of the charge were that on 27.06.2022 at Wajir Township Location, Wajir East Sub County within Wajir County, jointly with another not before court broke and entered the building used as a dwelling house by Nasra Hassan and stole twenty-seven (27) pairs of shoes all valued at Kes. Ninety Thousand (Kes. 90,000/-) and cash of Kes. Five Thousand Five Hundred (Kes. 5500/-), the property of Nasra Hassan.

3. The appellant also faced an alternative count of handling stolen property contrary to Section 322 (2) of the *Penal Code*. The particulars of the alternative charge were that on 27.06.2022 at Wajir Township Location, Wajir East Sub County within Wajir County, otherwise than in the course of stealing dishonestly retained fifteen (15) pairs of shoes having a reason to believe them to be stolen.

4. He was convicted on his own plea of guilty in respect of the alternative count and thereafter sentenced to 5 years' imprisonment. A plea of not guilty was however entered on the main count.

5. Being aggrieved by both the conviction and the sentence of the trial court, the appellant listed the grounds of appeal which can be summarized to be in the form of mitigation and /or submissions.

The appellant acknowledged that even though he was convicted, he seeks for leniency on the basis that he committed the said offence due to peer pressure. That he has since been rehabilitated and has become a committed Christian who is ready to go out there and spread the gospel. He urged that given a second chance, he was willing to transform other law breakers to be obedient citizens. He prayed that his sentence be set aside and he be set at liberty.

6. At the hearing of the appeal, the appellant, who appeared in person chose to rely entirely on his written submissions which I have already summarized herein above.

7. Mr. Kihara, counsel for the state opposed the appeal and orally submitted that the appellant had pleaded guilty to the main count of housebreaking and stealing and was thus convicted on his own plea of guilty. The learned prosecutor while relying on section 348 of the *Penal Code* and the case of *Ndede v Republic* [1991] KLR urged that the appellant did not demonstrate that the plea was not unequivocal and neither was sentence meted out by the trial court shown to be illegal. That the sentence by the trial court was not only legal but also appropriate bearing in mind the circumstances of the case and therefore, this court ought not interfere with the same.

8. In considering this appeal and in view of the fact that the appellant was unrepresented before the lower court, it is imperative that I first consider whether the plea was taken in a proper manner in line with the provisions of Section 207 (1) and (2) of the *Criminal Procedure Code* and the test set in the case of *Adan v Republic* (1973) EA 443.

9. The said sections read as follows:

207 (1). The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, or guilty subject to a plea agreement.

207 (2). If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

10. In the case of *Adan v Republic* (*supra*) the procedure for taking of a guilty plea is stated as follows:

(i). The charge and all the essential ingredients of the offence should be read and explained to the accused in his language or in a language he understands.

(ii). The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii). The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.

(iv). If the accused does not agree with the facts or raises any question of his guilty in reply must be recorded and a change of plea entered.

(v). If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded."

11. In the instant case, the proceedings, which I partly reproduce verbatim were recorded in the following manner.

> "Court: Accused present; the substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands, who being asked whether he admits or denies the truth of the charge replies.
>
> Main Count: We took 15 pairs.
>
> Alternative count: It is true. I was found in possession of the 15 pairs and I knew they were stolen.
>
> Court: Plea of not guilty entered in main count. Plea of guilty entered in the alternative count".

12. Consequently, the prosecutor read the facts to which the appellant responded;

> " Accused: I understand the facts. I was found in possession of the shoes. I knew they were stolen.
>
> Court: The accused person is convicted in his own plea of guilty in the alternative count.
>
> Prosecutor: the accused has previous records. I pray for time to get the records.
>
> Court: I grant prosecution time to avail the records. Mitigation and sentencing on 01.07.2022".

13. Consequently, prosecution tendered records to show that the appellant was not a first offender. The court went further to sentence him to serve 5 years imprisonment in respect to the alternative charge.

14. The foregoing extract of the proceedings clearly demonstrates that the appellant was convicted and thereafter sentenced on the alternative charge hence not the main count.

15. It remains unknown why the court did not deal with the main count having recorded a plea of not guilty. In the case of *Republic v Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another v State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the case of *Bhagwan Singh v State of M. P.* (2002)4 SCC 85 was cited as follows: -

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

16. It therefore follows that the trial court having recorded a plea of not guilty, it ought to have proceeded to conduct a hearing on the same and thereafter reach a finding as to whether the appellant was guilty or not. As already noted, the fact that the trial court did not make a finding on the main count made the whole hearing process a nullity or mistrial. As soon as the appellant denied the main count, a plea of not guilty was inevitable notwithstanding any admission of the offence in the alternative count. An admission of an alternative count can not dispose of the main count.

17. The *Black's Law Dictionary*, 10th Edition defines a mistrial as: -

> "A trial that the Judge brings to an end without determination on the merits because of a procedural error or serious misconduct occurring during the proceedings".

18. From the above, I am satisfied that a miscarriage of justice was occasioned when the trial court failed to reach a logical conclusion on the main count herein. Thus, the hearing process was encumbered with a procedural irregularity. The plea was irregularly taken hence the only remedy is to quash the conviction and set aside the sentence which I hereby to.

19. Having held as above, the next thing to consider is whether the matter should be referred back to the trial court for a retrial. Before ordering a retrial, there are factors to be considered. Firstly, whether the accused will suffer an injustice by being subjected to a second round of trial; secondly, whether the witnesses will be found; thirdly, the length of time that has elapsed since arrest; 4th, whether a retrial would be used to fill up gaps or whether the prosecution was entirely to blame for the mistake leading to the quashing of the conviction. See *Charo Karisa Salimu v Republic* (2016) eKLR and *Muiruri v Republic* (2003)KLR 552.

20. In the instant case, the appellant was not to blame nor was the prosecution. The appellant was arrested on 27-06-2022 and sentenced on 01-07-22. To date, he has been in custody for a period of 2 years and 4 months. Taking into account remission if he were to serve the sentence imposed, he would be remaining with 12 months to complete serving 40 months.

21. In the circumstances therefore, it is not in the interest of justice to order a retrial taking into account the time that has lapsed since arrest. He has basically served reasonable sentence hence suffered enough punishment. Accordingly, the appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE