Munyao v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 13643 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E047 OF 2023

MW MUIGAI, J

OCTOBER 31, 2024

BETWEEN

MOSES MUTUKU MUNYAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the sentence & conviction by Hon. D.N. Sure (PM) in Kangundo Chief Magistrate's Court in Criminal Case No. E521 of 2023 Delivered on 6th July, 2023)

JUDGMENT

1. The Appellant was charged with another person with the offence of stealing contrary to section 268 as read with section 275 of the Penal Code.

2. The particulars are that on the 7th day of May 2023 at around 12.30 hours on Lathaana village location in Kangundo sub county within Machakos County jointly with others not before court stole five car rims valued at 5,000, five 50kg bags of cement valued at 3,000, one big metallic hammer valued at Kshs 1350, cooking sufuria valued at Kshs 1350, assorted scrap metal valued at 2,000 all valued at Kshs 15,000 the property of William Muli.

3. In the alternative, they were charged with handling stolen goods contrary to Section 322(1) of the Penal Code.

4. The particulars are that on the 7th day of May 2023 at around 12.30 hours on Lathaana village location in Kangundo sub county within Machakos County otherwise than in the course of stealing dishonestly detained one care tyre rim and assorted scrap metals knowing or having reason to believe them to be stolen goods.

Trial Court Record

5. On 9.5.2023, the charges were read to the Accused persons who pleaded not guilty to the charges and were each given cash bail of Kshs 30,000.

6. On 23.05.2023, the matter was allocated a hearing date of 9.8.2023 and a mention date of 5.06.2023.

7. On 5.06.2023, the accused persons were absent and a production order was issued. Further mention was scheduled for 26.06.2023

8. On 21.06.2023, the accused persons made an application to change their plea but the State Counsel indicated that they did not have the police file. The court directed that plea would be on 6.07.2023

9. On 6.07.2023, the state counsel indicated that the police file was available and the court explained the gravity of the sentence to the accused. Then the charges were read to them in

10. Kiswahili and the stated as follows;

    1st Accused: it is true

    2nd accused: it is true

11. The Court then entered a plea of guilty. The court record indicated the facts as follows;

    Facts

    On 7/5/23, At Around 12.30 Hours, in Kathana Location, the accused and others entered the homestead of the complainant through the fence and stole some items from therein. This is 5 tyre rims, 5-50 kgs bags of cement, 1 big metallic harmer, 5 cooking sufurias, assorted scrap metals all valued at Kshs 15,000. At the time, the complainant was at his work place and he had left his property under the custody of his caretaker John Munge who is the one spotted the suspects including the accused before court. He raised an alarm when the suspects ran away. Members of the public respond and managed to arrest the accused and recovered a tyre rim, scrap metals valued at Kshs 3,000. These items were stored in a polytene bag. The accused were injured and taken to Kangundo level 4 hospital. The complainant facilitated treatment of the accused. The accused were taken to Kakuyunu police station where they were charged.

    1st accused : the facts are true

    2nd accused : the facts are true

    D.n. Sure

        Ct: the 1st and 2nd accused are convicted of the charges on their plea of guilty.

12. After mitigation, the accused persons were sentenced to 4 years imprisonment.

13. From the record, as at 6/7/2023, the 1st accused was 18 years and the 2nd accused 19 years old.

The Appeal

14. Dissatisfied by the sentence, the Appellant who was the 1st Accused person filed a petition of appeal. The court was asked to allow the appeal, quash the conviction and that the sentence be placed aside, in the alternative, the sentence be reduced to the period already served by virtue of section 4(2) of the Probation offenders Act, sentence the appellant toa non-custodial sentence.

15. The appeal was canvassed by way of written submissions.

Appellant Submissions

16. The Appellant filed submissions and submitted on two issues. First was that the Learned Trial Magistrate erred in both fact and law by explicitly not explaining to him the consequences of his plea. He contended that nowhere in the proceeding did the magistrate explicitly explain to him the outcome of pleading positive and thus the plea was not unequivocal. Further, that the record does not show that the appellant understood what he was pleading to. In addition, the Trial Magistrate ought to have asked the Appellant the language he understood and failure to do so prejudiced him.

17. He submitted that he was unrepresented by an advocate and as such was lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect his rights. Reliance was placed on the cases of Bolt vs Rep (2002) 1 KLR 814, Njuki vs Republic (1990) KLR 334 and Wamithandi vs Republic 3 EALR 101.

18. Secondly, that the Learned Trial Magistrate erred in both fact and law by sentencing him to a harsh and excessive sentence as section 275 of the Penal Code provides for imprisonment of three years. According to the Appellant, he could have been awarded a fine as the matter was not that serious

Respondent Submissions

19. The Respondent filed submissions and contended that the Appellant was well identified by the caretaker and arrested while fleeing the crime scene speaks volumes about his character. Secondly, it was submitted that the Trial Court informed the Appellant about the gravity of the sentence before the plea was read to him. Thirdly, that mitigation was considered and he court stated that the Appellant was a danger to the society. The appellants conduct of entering through the fence, stealing from the complainant's house and his arrest by members of the public deserves a non-custodial sentence.

20. Fourth, it was submitted that the trial court erred in sentencing the appellant to four years imprisonment instead of three years as provided under section 275 of the Penal Code. Reliance was placed on the case of Benard Kimani Gacheru vs Republic [2002] e KLR, Mokela vs The State (135/11) [2011] ZASCA 166 and Ogolla s/o Owuor vs Republic (1954) EACA 270

Determination

21. I have considered the Appeal, the Trial Court record and the submissions on record and find that the issues for determination are as follows;

    a. Whether the Appellant's plea was equivocal

    b. Whether the sentence should be varied and or set aside.

22. This being a first appeal, the Court shall analyse and evaluate afresh all the evidence adduced before the Trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.

23. I am guided by the Court of Appeal decision of Okeno vs. Republic [1972] EA 32 where the Court of Appeal stated 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 conclusion; it must make its own findings and draw its own 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] E.A 424."

24. The Appellant pleaded not guilty to the charges then later made an application to change his plea to that of guilty.

25. Section 348 of the Criminal Procedure Code provides that;

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

26. The procedure for taking pleas is provided in section 207 of the Criminal Procedure Code to be as follows:

> " (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, guilty or guilty subject to plea agreement.
>
> (2)If the accused person admits the truth of the charge otherwise than by 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."

27. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of Adan vs Republic [1973] EA 445 where the Court held as follows:

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

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

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

d. If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

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

28. I have carefully considered the Trial Court record.

29. The Appellant contends that he did not understand the charges but from the record, interpretation was done in three languages, that is, English, Kiswahili and Kamba. When the charges were read, he stated as follows;

> " 1st Accused : it is true
>
> 2nd Accused: it is true"
>
> CT. Plea of guilty entered."

30. Even after the facts were read, he categorically said;

> " 1st Accused: the facts are true."

31. This Court finds that the Appellant's plea was unequivocal. The process before the trial Court was procedural and lawful. The Appellant was not coerced or misled into pleading guilty. He knew what he was doing despite being warned of the consequences by the Trial Court.

32. As regards the sentence, this Court is guided by the finding in the case of Nelson vs Republic [1970] E.A. 599, following Ogalo Son of Owuora vs Republic (1954) 21 EACA 270 where the court held as follows:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364."

33. The Appellant was charged with the offence of Section 268 as read with section 275 of the Penal Code. Section 268 provides that:

> (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

34. Section 275 of the Penal Code sets out the penalty for stealing as follows:

> Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

35. Both parties have in their submissions contended that the sentence was excessive. I note that in mitigation the Appellant stated as follows;

> " this is my first offence and I pray for forgiveness. I will not repeat the offence. I am an orphan. I stole the items to sell for food."

36. The Probation Officer filed Report on 11.10.2024 which I have considered.

37. I am guided by the finding of the Court in Tonny Kiprono Ngetich v Republic [2019] eKLR where it was stated as follows;

> "A person convicted of the offence of stealing 'is liable', upon conviction, to a sentence of three years imprisonment. That provision, however, does not impose a mandatory minimum sentence, and the court has discretion to impose a lesser sentence, or a fine."

Disposition

38. I therefore find as follows;

    a. The sentence of 4 years is set aside.

    b. The Appellant is sentenced to serve 1 year 6 months imprisonment and thereafter 6 months, community service to be directed by the Probation Officer.

    c. The sentence shall run from the date of plea taking.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In The Presence/absence Of

Moses Mutuku Munyao – Appellant

Ms Koech For The Respondent

Geoffrey - Court Assistant