Setonei alias Chris v Republic (Criminal Appeal E011 of 2024)
[2024] KEHC 15385 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E011 OF 2024

RPV WENDOH, J

NOVEMBER 28, 2024

BETWEEN

CHRISTOPHER SETONEI ALIAS CHRIS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal by Christopher Setonei Alias Chris who was convicted on his own plea for the offence of Threatening to kill contrary to section 223 (1) of the Penal Code.

2. The particulars were that on 11/4/2023 at Mwisho Farm Kwanza Location, Kwanza sub-county of Trans Nzoia County, without lawful excuse, armed himself with a rungu (club) and threatened to kill one Elizabeth William Lokichar upon being convicted he was sentenced to serve four (4) years imprisonment.

3. He is aggrieved by both the conviction and sentence. The appeal is premised on the undated amended grounds of appeal to the effect that;

    1. The trial court erred by reading to him the charge in a language he did not understand;

    2. That the court erred by failing to inform the appellant of the consequences of pleading guilty to the offence.

    3. That the court failed to considered his plea that he was tortured.

4. He prays that the conviction be quashed, sentence be set aside and the matter be sent back to court for a retrial.

5. Ms. Kiptoo, Prosecution Counsel, conceded the appeal. Counsel did not file any submissions nor did she tell the court why she was conceding the appeal

6. The appellant filed submissions in support of the appeal. He submitted that the Magistrate when taking plea should ensure that the plea is unequivocal, and must satisfy itself that the accused understands the charge read to him, that the charges was read to him in English which is a language he does not understand; The appellant also submitted that the court should also have warned the appellant of the consequences of pleading guilty to the charge which was not done.

7. The appellant also complained that he was tortured by police after arrest and forced to plead and that he tried to bring it to the attention of the court but the court ignored him and hence the plea was not unequivocal.

8. Section 348 of the Criminal Procedure Code (CPC) bars an appeal from a conviction arising from a plea of guilty except on the extent or legality of the sentence. Section 348 CPC reads "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 (severity) and legality of the sentence"

9. In Olel V. Republic , the court confirmed the above position when it said ".....

10. However, courts have held that they will only interfere where the plea was not unequivocal. In the case of Alexander Lukoye Malika V. Republic (2015) eKLR, the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows;

> A court may only interfere with a situation where an accused person pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of a mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts the appellant could not in law have been convicted of the offence charged".

11. The appellant has complained that the charge was not read in a language that he understands Article 50(2)(m) provides that an accused person has a right to have the assistance of an interpreter without payment if the said person cannot understand the language used at the trial. This means that before plea, the court has to determine which language the accused person understands and wishes to proceed in. The law was expounded upon by the Court of Appeal in George Mbugua Thiongo V. Republic (2013) eKLR which it held. "For the court to nullify proceedings on account of lack of language used during the trial. It should be clear from the record that the accused did not at all understand what went on during his trial". "That is not the case here. The appellant cross examined all three (3) witnesses, with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore, consider that the omission by the learned trial magistrate to record the language occasioned a "miscarriage of justice". In the instant case, the case did not go to full trial. The court also recorded that the appellant understood Kiswahili language when the charge was read to him, he said it was true. The facts were then read to him and the court recorded that he said that the facts were correct.

12. Later, the appellant gave his mitigation. I find that the appellant understood the proceedings and actively took part. The court conducted the proceedings in a language that the appellant understood.

13. After the facts were read to the appellant, I note that he admitted they were correct and the court did not enter a conviction thereafter but went straight to get the rewards from the prosecutor. As things stand the appellant was never convicted. The plea was incomplete and imperfect and must be set aside.

14. I also do agree with the appellant that though the court when sentencing the appellant noted that the offence was serious in nature and called for a deterrent sentence, the court never warned the appellant of the consequences of pleading guilty to the said serious charge. Article 50(2) provides that an accused person has the right to be informed of the charges with sufficient detail to answer it. The details of the charge include, informing an accused of the probable sentence upon conviction. The court has therefore had to warn a person pleading guilty to a serious charge of the resultant sentence. In Elijah Njihia Wakianda V. Republic CR.A 437/2010 e KLR, the Court of Appeal had this to say

> ... We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual 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.
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> ... 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."

See also CR.Rev.15/2019 for Rose Wayumbu V. Republic

15. In the end, I find that the plea was imperfect, incomplete and therefore equivocal. It is hereby quashed and sentence set aside.

16. The next question is whether this court can order a retrial. In the case of Ahmed Sumar (1964) EA 481 the court set out guidelines on when a court can order a retrial. The court said, "a retrial may be ordered where the charge was defective; whether the potentially admissible evidence is likely to result in a conviction; has accused served a substantial part of the sentence, whether the appellant will suffer any prejudice if a retrial is ordered and that each case depends on its own special facts". In this case, the appellant faced a serious case of threatening to kill contrary to section 223 (1) of the Penal Code wherein upon conviction one is liable to ten (10) years imprisonment. The appellant was sentenced to four (4) years imprisonment on 24/10/2024. So far, he has only served one year which is not a substantial part of the sentence and so he will not suffer prejudice. From the facts read to the court, it seems the available evidence might result in a conviction. The complainant who was allegedly threatened needs to see justice done to both parties. In the end, I find that this is a case that is suitable for a retrial.

17. The appellant is released to the OCS Kwanza police station, to be presented to the Chief Magistrate's Court Kitale for fresh plea on 2/12/2024.

18. It is so ordered.

DELIVERED, DATED AND SIGNED IN KITALE THIS 28TH DAY OF NOVEMBER, 2024

R. WENDOH.

JUDGE

Judgment delivered virtually in the presence,

Mr. Majale for the State

Appellant – present (virtual)

Court Assistants - Juma/Hellen