Keragia v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 15994 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E007 OF 2024

WA OKWANY, J

DECEMBER 18, 2024

BETWEEN

AMOS OMWOYO KERAGIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. E1053 of 2023 delivered by Hon. B. Jumar, Resident Magistrate on 6th February 2024)

JUDGMENT

1. The Appellant herein was convicted, on his own plea of guilty, for the offence assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was consequently sentenced to serve 3 years imprisonment. The particulars of the charge were that on 25th October 2023, at Kebirigo Sub-Location in Bonyamatuta Masaba Location in Nyamira South Sub-County within Nyamira County, he wilfully and unlawfully assaulted Justus Chabani Mong'are, thereby occasioning him actual bodily harm.

2. Aggrieved by the trial court's decision on sentence, the Appellant filed the instant appeal. He listed the following grounds of appeal in the Petition of Appeal: -

    1. That the Appellant pleaded guilty to the offence of assault since he was misadvised and misdirected by the police officer who wanted to score a conviction.

    2. That the complainant is willing to withdraw this matter thus asking this Honourable Court with such powers to remit this matter to 'ADR' as an alternative way of resolving the dispute.

    3. That the Appellant is a single parent with two children who are schooling after his wife had ran away to an unknown destination.

4. That it is for the interests of justice that this Honourable Court hears and determines this Appellant (sic) for leniency of sentence.

5. That more grounds shall be adduced during the hearing and determination of this appeal.

3. At the hearing of the Appeal, the Appellant submitted that he did not wish to challenge the decision on sentence but was only seeking its reduction. He pleaded for leniency while stating he has been in jail for a period of one year. He added that he was the sole bread winner of his family comprising of young children who have been left to fend for themselves since their mother is a student at a Medical Training College (MTC). He urged the court to grant him a non-custodial sentence so that he can return home and take care of his children.

4. Mr. Chirchir, learned counsel for the Respondent, submitted that the maximum sentence prescribed for the offence of assault, under Section 251 of the Penal Code, is 5 years imprisonment. He argued that the sentence passed by the trial court was therefore fair and just considering that the Probation Officer's Pre-Sentence Report did not favour a non-custodial sentence.

5. The Court of Appeal restated the duty of the first appellate court in the case of Njoroge vs. Republic (1987) KLR 19 at P. 22:4 thus: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R(1957) EA 336, Ruwalla V. R (1957)EA 570)"

6. In the present case, I note that even though the Appellant's submissions and grounds of appeal consisted mainly of what can be termed as mitigation or plea for a more lenient sentence, the opening ground, on his Petition of Appeal, appears to suggest that he contests the guilty plea. This therefore calls for this court to examine the manner in which the plea was taken with a view to establishing if the plea was unequivocal. The court will also be required to determine whether the sentence passed by the trial court was legal and appropriate.

i. Whether the Plea of guilty was unequivocal.

7. Section 348 of the Criminal Procedure Code (CPC) stipulates as follows on appeal against convictions where the appellant is convicted on his or her own plea of guilty.

348. 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 and legality of the sentence.

8. In Olel vs. Republic [1989] KLR 444, it was held that:-

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

9. The principle that emerges from Section 348 of the CPC is that an appeal does not lie against a conviction where the Appellant unequivocally pleads guilty to the charge. In such a scenario, an appellate court is only required to examine the plea-taking process in order to satisfy itself on its legality

and determine if the guilty plea is unequivocal. Where the plea is found to have been properly recorded and therefore unequivocal, the task of an appellate court will only be limited to determining the legality of sentence passed by the trial court.

10. In Alexander Lukoye Malika vs. Republic [2015] eKLR the Court of Appeal explained the circumstances under which the court, on appeal, may interfere with a plea of guilty thus: -

> " A court may only interfere with a situation where an accused person has 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 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. Section 207 of the Criminal Procedure Code outlines the manner in which a plea is to be recorded 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 a plea agreement;

(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.
>
> (See also Adan vs. Republic [1973] EA 445)

12. It is also trite that where an accused person pleads guilty to a charge, the trial court must satisfy itself that the plea is unequivocal, especially where the charge is serious in nature, by explaining every element of the charge and going an extra mile to explain, to the accused person, the likely consequences the plea. In Hando S/o Akunaay vs. Rex (1951) 18 EACA 307 it was held that: -

> " ...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent."

13. Similarly in Elijah Njihia Wakianda vs. Republic [2016] eKLR the Court of Appeal held thus: -

> " 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 matters alleged. He is also at liberty to testify on his 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 a plea of guilty presents 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 the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.....
>
> ...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 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."

14. Applying the principles stated in the above cited cases to the instant case, I find that it will be necessary to examine the trial court's proceedings in respect to the plea taking process with a view to establishing if the guilty plea was unequivocal. A perusal of the said proceedings reveals that when the matter first came up before the trial magistrate on 15th November 2023 for plea taking, the Appellant pleaded not guilty to the charge after which he was granted bond and the matter listed for mention on 29th November 2023.

15. When the matter came up for mention on 29th November 2023, Appellant informed the court of his intention to change his plea. The charge was then read afresh to the Appellant who pleaded guilty to it after which the matter was adjourned to 4th December 2023 to enable the Prosecution avail the facts of the case.

16. The charge was once again read out to the Appellant on 6th December 2023 when he once again pleaded guilty after which the facts were also read out and he confirmed the same to be correct. He was thereafter convicted on his own plea of guilty.

17. Having regard to the above narration of the proceedings that were undertaken by the trial court during the plea taking process, I am satisfied that all the elements of the charge were read out and explained to the Appellant who initially pleaded not guilty to the charge but subsequently opted to change his plea to guilty after which the charge was once again read out to him on more than one occasion. I note that not only did the Appellant plead guilty to the charge twice, but that he also confirmed the facts of the case as correct. I am satisfied that the Appellant understood the nature of the charge that he was facing and that his guilty plea was unequivocal.

Sentence

18. Section 251 of the Penal Code provides thus: -

> 251. Assault causing actual bodily harm
>
> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

19. As I have already stated in this judgment, the trial court sentenced the Appellant to 3 years imprisonment. The Appellant was categorical that he did not wish to challenge the legality of the sentence and that all that he was seeking is a reduction/review of the sentence.

20. It is trite that sentencing falls at the discretion of the trial court and that an appellate court may not interfere with the sentence passed by the trial court unless the trial court has acted on wrong principles or overlooked some material factor. (See Ogolla s/o Owuor vs. R ((1954) EACA 270).

21. In S vs. Nchunu & Another (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated thus: -

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be."

22. Having regard to the principles expressed in the above cited cases, I note that the trial court considered the Appellant's mitigation and the Probation Officer's Pre-Sentence Report before arriving at the sentence of 3 years imprisonment. The said Pre-Sentence report revealed that the Appellant was a repeat offender who had become a menace to his own family members. It is also noteworthy that the Appellant attacked the complainant on the head using a panga, which is a potentially lethal weapon. I further note that the trial court considered the period that the Appellant had spent in custody while awaiting his trial, during sentencing, in accordance with the requirement of Section 333 (2) of the Criminal Procedure Code. I find that the sentence passed by the trial court was not only legal but also appropriate. I am not persuaded that I should interfere with the said sentence.

23. In sum, I find that the appeal is not merited and I therefore dismiss it.

24. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE