Mwangi v Republic (Criminal Appeal E059 of 2022)
[2023] KEHC 419 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 419 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E059 OF 2022

RK LIMO, J

JANUARY 31, 2023

BETWEEN

EZEKIEL MUSYILI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal that arose from the decision of Hon. M. Kasera SPM in Kitui Chief Magistrate's court Criminal Case No. E1026 of 2022.)

JUDGMENT

1. This Appeal arose from the decision of Hon. M. Kasera SPM in Kitui Chief Magistrate's court Criminal Case No. E1026 of 2022. In that case, the appellant was charged with the Offence of stealing by servant contrary to section 281 of the *Penal Code* and the particulars were that, on diverse dates between April 30, 2022 and November 22, 2022 at Kitui Teachers Sacco, Mutitu Branch, in Mutitu Sub-County, within Kitui County, he stole Kshs. 821,550 the property of Kitui Teachers Sacco which came into his possession by virtue of his employment. He also faced a second count which was handling stolen goods Contrary to section 322 (1) of the *Penal Code*. The particulars in the 2nd Count were that, on November 25, 2022 at Kitui Teachers Sacco, Mutitu Branch in Mutitu Sub-County within Kitui, otherwise than in the course of stealing, he retained Kshs. 100,000 knowing or having reasons to believe to be stolen goods.

2. The appellant pleaded guilty and was convicted on his own plea of guilty and was sentenced to serve 5 years in prison. It is unclear from the record of proceedings whether theappellant was convicted on the 1st Count, the 2nd or both, but I will get back to that issue shortly.

3. The appellant being dissatisfied with the court's decision or conviction, preferred this appeal against the conviction vide a Petition of Appeal dated December 6, 2022and raised the following grounds;

    i. That the Learned trial erred and misdirected herself in law by failing to appreciate or note that theappellant did not understand the elements and ingredients of the first count that was read over to him.

    ii. That the Learned trial magistrate erred and misdirected herself both in facts and law by failing to note that the facts read over to the appellant did not amount to stealing by servant and/or that the appellant as a servant stole the money missing or making the discrepancies that were the subject of the charge.

    iii. That the Learned trial magistrate erred and misdirected herself in law by failing to find that the plea of guilty by the appellant was equivocal.

    iv. That the Learned trial magistrate erred in law by convicting the appellant on such equivocal plea.

4. The appellant through Counsel submits that the plea taken was equivocal because in his view, the trial court never disclosed the language used during the plea taking. He also contends that the facts were not well explained to him and was placed reliance on the decision in *Ombena versus Republic* [1981] eKLR where, the court expressed the importance of explaining the facts to an accused person before entering a plea.

5. He submits that though he pleaded guilty to the facts terming them as "correct" it does not mean that he understood them. He contends that the trial court should have explained of the charge before the plea was taken.

6. It is submitted that the facts did not point at the appellant specifically, adding that some exhibits such as the audit report and Mpesa statements were not tendered and that denied the court an opportunity to interrogate the case. He faults the manner in which the Kshs 100,000/- which was said to have been surrendered was handled, submitting that the same was handled casually. He is asking for a retrial and has cited the case of Baya versus Republic (1984) EA to support his prayer.

7. The Respondent through the Office of the Director of Public Prosecution opposed this appeal vide his oral submissions in court on January 19, 2023. Mr. Okemwa for the respondent submitted that, the plea entered by the appellant was unequivocal. He cited the case of *Adan v Republic,* [1973] where the procedure of plea taking was enunciated and submitted that the plea was taken in English which is a language understood by the appellant adding that the plea was taken on November 28, 2022 while the facts were read on November 30, 2022 which gave the appellant sufficient time to think about his plea. He contends that the appellant admitted to the facts and confirmed that they were correct.

8. The State further submitted that the prosecution produced exhibits whose authenticity remained unchallenged. The State further pointed out that the appellant requested for a chance to refund the money in his mitigation before the trial court which in his view confirmed his guilt.

9. The State also submitted that the appeal is incompetent and placed reliance onsection 348 of the *Criminal Procedure Code*. He also faulted the court's decision on the sentence citing that the same ought to have been 7 years as opposed to the 5 years rendered by the trial court.

10. This court has considered this appeal and the grounds raised.

11. The main ground canvassed by counsel for the appellant was that the plea entered by the appellant before the trial court was equivocal while counsel for the state submitted that the plea was unequivocal which means that the appellant was barred from appealing by virtue of section 348 of the *Criminal Procedure Code* which provides;

> "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."

12. The only recourse available to an accused person who is convicted on his own plea of guilty is to challenge the legality of the sentence imposed on him by the trial court or regularity of the proceedings. The court of in *Alexander Lukoye Malika v Republic* [2015] eKLR identified 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 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"

13. The main gist of the appellant's case is that he did not comprehend fully the nature of the charge read out to him. From the record of proceedings, the language used is indicated to be "Kiswahili". The trial court proceeded to record that; "the substance of the charge and every element thereof, has been stated to the accused in the language he understands and being asked whether he admits or denies the truth of the charge replies; "It is true." The trial court then proceeded to enter a plea of guilty.

14. There is nothing to suggest that the appellant never understood Kiswahili Language. AS a matter of fact, when the appellant appeared in court during the hearing of this appeal, this court asked him which language he understood and he said Kiswahili. When pressed to tell if he understood English given his job description, he conceded that he understood English as well. That in my view shows that he cannot possibly fault the trial court in respect to the language used because he understood it clearly.

15. Furthermore, the record shows that upon entering a plea of guilty, the facts or particulars of the case were read later on November 30, 2022which was 2 days after he pleaded guilty. When asked, if the facts presented including the evidence in terms of documents tendered were correct, he stated;

> "The facts are correct" Upon which the trial court enters a plea of guilty. That shows he pleaded guilty in a clear way.

16. The manner of recording of a plea is provided for in section 207 (1) and (2) of the *Criminal Procedure Code*. The same provide 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 an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

17. In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down quite clearly how a plea of guilty should be recorded and the steps to be followed. The following steps are well illustrated;

    i. 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.

    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 to add any relevant facts;

    iv. 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

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

18. There is duty placed upon a trial court to point out clearly the language used when taking plea and when an accused enters a plea of guilty. The trial court should get the facts read to the accused and the reaction or plea in the facts read.

    Courts have expressed the importance of the same as it goes to ensuring that the Constitutional rights of an accused are protected and at the same time, ensure that justice is dispensed.

    In *Elijah Njihia Wakianda v Republic* [2016] eKLR, the court made the following observations;

    > ".....The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands...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 is 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 a translator is present to convey the proceedings to him in the chosen language."

19. This court finds no basis to fault the trial court in respect to the language used and the manner in which the court recorded the particulars or the facts presented by the prosecution. The appellant even asked for a chance to refund the money he was accused of stealing.

20. However, the attention of this court has been drawn to something new that was not addressed by either the Appellant's or the Respondent.

21. As I have observed above, the Appellant faced with two separate and distinct Counts. In Count I, he was charged with stealing by servant contrary to Section 281 of the *Penal Code* and in Count II he was charged with handling stolen goods contrary to section 322(1) of the *Penal Code*. The record does not show which one between the two counts the appellant pleaded guilty to. The trial court's attention may have been taken away by the fact that it is often a practice by the Prosecution to prefer a charge of handling stolen goods as an alternative Count to the Principal Count being stealing. This however, was not the case here because the charge sheet clearly indicates that there were 2 separate counts. In fact, it is indicated the face of the charge sheet.

    22. The Statement of facts was in relation to stealing of Kshs 821,550 which was in relation to Count I as well as obtaining of Kshs 100,000/- which was related to Count II. The facts read got mixed up between the first count and the second count making it hard to distinguish which plea was taken by the trial court.

23. It is therefore apparent based on the above, that the plea taken fell short of the requirements undersection 207 (1) and (2) of the *Criminal Procedure Code*. It is unclear to know if the accused was pleading for one or both counts and it is only to that extent, that I am satisfied that the plea taken was not unequivocal.

24 In the premises, I will allow this appeal. The conviction and sentence is set aside. I will direct that the appellant be escorted back to the trial court latest by tomorrow for fresh plea and retrial before a competent court seized with the necessary jurisdiction.

Dated, Signed and **Delivered** at **Kitui** this **31st day** of **January, 2023**.

HON. JUSTICE R. K. LIMO

JUDGE