Kiprop v Republic (Criminal Appeal E043 of 2022)
[2023] KEHC 17900 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 17900 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E043 OF 2022

SM MOHOCHI, J

JANUARY 27, 2023

BETWEEN

EMMANUEL KIPROP ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the sentence in CMCC SO No. 428 of 2021 - Eldoret, Republic v Emmanuel Kiprop, delivered by C.R.T. ATEYA, S.R.M. delivered on 22.07.2022)

JUDGMENT

Introduction

1. The Petition appeals against the conviction and sentence of 7 years imprisonment for the offence of preparation to commit a felony c/sec 308(1) of the *Penal Code* based on the following grounds;
    i. He pleaded guilty before trial.
    ii. The grounds of appeal.
    iii. He is a man of straw unable to obtain legal representation.
    iv. He would wish to be present at hearing of the appeal.

Grounds Of Appeal

a. That, the learned trial magistrate erred in both law and facts by failing to explain the charges in a manner that the appellant could comprehend and understand the implication

b. That the trial magistrate erred in both law and facts by failing to accord the least possible punishment sentence.

c. That the prosecution in cohort with the police enticed the appellant to take the plea of guilty because they had no evidence to prove the case beyond reasonable doubt

d. That the prosecution failed to establish in the malicious •file the presence of any lethal weapon or instrument of destruction to substantiate the charges

e. That further ground will be adduced during the hearing.

Reasons Wherefore: -

2. He thus prays that the court be pleased, to allow the appeal, quash the conviction, set aside the sentence and forthwith set him free.

Proceedings

3. The Appellant was arrested on June 22, 2021, arraigned before the Senior Principal Magistrate's court at Iten and charged on the June 23, 2021, with the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*.

4. The Particulars of the charge were that;

> On the June 22, 2021 at about 00.20hrs at "view point" in Iten Township, Keiyo North Sub-County, within Elgeyo Markwet County, was found inside the compound of Sammy Kipchumba Rotich in circumstances that indicated that he was to commit a felony, namely store breaking.

5. Plea of not guilty entered with the Appellant, being admitted to surety bond of Kshs 50,000/ = or an alternative cash bail Kshs 20,000/=, his trial was set for Hearing on the 4/8/2021 and a Mention date on the 7/7/2021.

6. On the July 7, 2021, during the mention, the appellant asked for charges to be read to him again.

7. The substance of charge(s) and every element thereof was stated by the court to the Appellant, in Kiswahili the Language that he understood, who upon being asked as whether he admits or denies the truth of the charge(s) replied in Swahili "*Ni kweli*". And Plea of guilty entered against him.

8. The Prosecution was immediately invited to state the facts of the case which they state as follows;

Facts

9. On the June 22, 2021 the complainant was in his hotel at "view point" at 00:20hrs he left the hotel, to the store, to give store carwash machine. He met the accused coming from the toilet. He stopped the accused and on asking what he was doing, accused had no answer. He was arrested, taken to Iten Police Station and charged.

The appellant was thus convicted and found guilty on his on plea

Mitigation

10. In mitigation the appellant stated;

> "I went to the toilet to relieve myself. The Complainant arrested me and said I will explain ahead."

11. Court proceeded to note the Mitigation without any further or other inquiry and scheduled a Mention for the 15/7/2021 for pre-sentence report.

Sentencing.

12. On the July 15, 2021, the trial court considered the pre-sentencing report and noted the recommendation therein that;

13. The Accused is a repeat offender and not suitable to serve a non-custodial sentence and proceeded to sentence him (in absentia) to imprisonment of seven (7) years in jail.

14. He was afforded his right to appeal

15. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to form its own conclusion(s) in line with the settled principles established in the case of *Okeno v Republic* [1972] EA 32 at pg 36 EA 42,

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses."

16. This Court has equally considered the Pre-sentencing report noting that the same influenced the exercise of the sentencing discretion by the trial court and which states as follows;

    i. the report was compiled from perusal of the court file, interviews of the offender, the offenders family and local administration;

    ii. While the report identifies the appellant with his current name, it concludes the same to be an alias intended to deceive the criminal justice actors and hide his previous criminal conduct no detail of his actual name is offered;

    iii. The report notes that the appellant sought for leniency from court as a young offender promising to reform if sentenced to a non-custodial sentence;

    iv. The report concludes that his nuclear family is unwilling to receive him back because of his truancy and offender of the community at large, the father provided incidents of the appellants conviction and imprisonment for 6months for stealing a bicycle from a foreigner in Iten and that he should be given a custodial sentence as he is a security threat to their property and the community at large and that his conduct is beyond reproach.

17. The adverse nature of the Pre-sentence report informed the exercise of the discretion by the trial court.

18. The Republic conceded that the appeal be allowed on the defective ness of the charge, the appellant was arrested without any weapon and or instrument for preparation to commit a felony if at all and that the facts as stated clearly could not present the intent of the appellant at the point of arrest.

Determination

19. As a matter of law, a charge sheet should clearly capture the Section creating the offence for which an accused is charged together with the Section that provides for the sanction. This is in order to meet both the constitutional requirements under article 50(2) (b) and statutory requirements under Section 134 of the *Criminal Procedure Code*.

20. Article 50(2) (b) provides that an accused person has a right to be informed of the charge with sufficient detail to answer to it. Section 134 of the *Criminal Procedure Code* provides in mandatory terms that;

> "Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

21. The purpose of the requirements is to ensure that an accused person is made aware of what he faces and what he is pleading to. That constitutes an element in a fair trial which is a fundamental right stipulated under article 25 (c) of the *Constitution of Kenya, 2010*.

22. I have considered the charge as drafted with the particulars on the charge sheet and it is apparent that the particulars as framed failed to meet the fair trial guarantees threshold cited above.

23. The charge sheet in my view is considered to have sufficient details if it contains a statement of the relevant offence upon which an accused is charged and contains necessary particulars or information revealing the nature of the offence charged. In this instance, the particulars of the offence were provided as follows: -

> On the June 22, 2021 at about 00.20hrs at "view point" in Iten Township, Keiyo North Sub-County, within Elgeyo Markwet County, was found inside the compound of Sammy Kipchumba Rotich in circumstances that indicated that he was to commit a felony, namely store breaking.

24. The appellant was charged under section 308 of the *Penal code* that provides;

    a. Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

    b. Any person who, when not at his place of abode, has with him any article for use in the course of or in conection with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

    c. Any person who is found -

        i. having his face masked or blackened, or being otherwise disguised, with intent to commit a felony; or

        ii. in any building whatever by night with intent to commit a felony therein; or

        iii. in any building whatever by day with intent to commit a felony therein, having taken precautions to conceal his presence, is guilty of a felony.

d. Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.

e. Section 310.

When any person is convicted of an offence under this Chapter, the court may order that any dangerous or offensive weapon or instrument of housebreaking.

25. The right to a fair trial is a constitutional predicate that courts must jealously guard at all times. In support of this right Lord Denning in his decision in *Pett v Greyhound Racing Associate* (1968) 2 All ER 545 at 549 he had this to say

> "it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you tike"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"

26. Notwithstanding the plea of guilt entered by the Appellant, the Charge sheet as framed was defective as the accused was never arrested with any weapon and/or instrument for use to commit the felony, his intention was never showcased in evidence or even the facts of the case, in fact the facts contain mere suspicion by the complainant.

27. The defects as aforesaid are fatally and incurable under section 308 of the penal code as it goes to the heart of the constitutional right of the Appellant under Article 25. In dealing with the framing of a criminal charge the court reiterates the case of *Willie (William) Slaney v State of Madhya Pradesh*, [AIR 1956 Madras Weekly Notes 391] the Supreme Court of India held that:

> " We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent...We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands... but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way...Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

28. Other jurisdictions have also dealt with similar issues of defective charges. *In The State v Matlhogonolo Masole* 1982 (1) BLR 202 (HC) the High Court of Botswana, citing with approval (R v Greenfield, (1973) 57 Cr App Rep 849) while handling a similar situation, the court opined thus:

> "...there is, however, one over-riding matter to be considered and that is whether or not the accused was prejudiced by the duplicity in the charge, as duplicity in a count is a matter of form, not a matter of evidence (R v Greenfield, (1973) 57 Cr. App.Rep. 849)."

29. In the case of *Isaac Nyoro Kimita & another v Republic* [2014] eKLR, it was appreciated that:

> "In this case, we have no doubt in our minds that the appellant knew that it was practically impossible for him and others to have "jointly" defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together, with others, engaged in an illegal enterprise, they successively defiled the complaint. This is confirmed by the fact that in the trial, the appellant extensively cross-examined prosecution witnesses and defended himself. In the circumstances, we find that the defects in the charge were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial."

30. In *Fappyton Mutuku Ngui v Republic* [2012] eKLR the Court expressed itself as hereunder:

> "I have said elsewhere that the answer to this question must begin with section 382 of the *Criminal Procedure Code*. In material part, it provides that:.... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

31. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

32. Next, then, we must ask ourselves when it is appropriate to find that a charge sheet is fatally defective. Our case law has given pointers. Two cases are pertinent: the case of *Yosefa v Uganda* [1969] EA 236 – a decision of the Court of Appeals – and *Sigilani v Republic* [2004] 2 KLR 480 which decisions held that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. *Sigilani* held:

> 'The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.'

33. The test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him"

34. In this case, the Appellant was charged with the charge failing to disclose a critical and essential ingredient of being found armed with any dangerous or offensive weapon in circumstances that indicate

35. Did this prejudice the Appellant and occasion a miscarriage of justice" did the appellant understand the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence.

36. The Record shows that during his plea of guilty the want of the essential ingredient of the offence as framed in the particulars and the circumstances of arrest as indicated in the facts of the case would reveal that the Appellant was unable to appreciate the extent of the charges he was pleading gutty to. I hasten to add that it is a constitutional requirement to safeguard, promote and protect fundamental rights of accused person and that a miscarriage of justice occurred with this omission

37. This court thus finds favor with the Appellant, shall allow the appeal, quash the conviction of the Appellant, the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code* and set aside the sentence imposed on him of Seven (7) years imprisonment.

38. The appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF JANUARY, 2023.

.....

S. MOHOCHI

JUDGE

27. 1. 2023

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A