Hussein v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 2789 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2789 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E002 OF 2023

JN NJAGI, J

MARCH 30, 2023

BETWEEN

ABDIRAHMAN HUSSEIN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Simon Arome, SRM, in Marsabit Chief Magistrate`s Court Criminal Case No. E185 of 2022 delivered on 19/7/22)

JUDGMENT

1. The Appellant was convicted on his own plea of guilty for the offence of assault causing actual bodily harm contrary to section 251 of the *Penal code* and was sentenced to serve three years imprisonment. The particulars of the offence were that on the 12th day of July 2022 at Marsabit town in Marsabit Central sub-county within Marsabit County he unlawfully assaulted Abdidullahi Koto (herein referred to as the complainant) thereby occasioning him actual bodily harm.

2. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that he was influenced by the investigating officer to admit the charge failing which he would be tortured; that the trial court failed to exercise caution or vital safeguards prior to convicting him on his own plea of guilty; that the trial court did not explain to him the consequences of pleading guilty and that the sentence meted out on him was harsh and excessive.

Submissions

3. The appeal was canvassed by way of written submissions of the Appellant and oral submissions of the Prosecution Counsel, Mr. Otieno. The Appellant submitted that the trial court did not warn him of the consequences of pleading guilty to the charge. That this was necessary because of the long sentence that awaited him in the event of pleading guilty to the charge that he was facing. The Appellant relied

on the cases of *Paul Matungu v Republic* [2006] eKLR and *Boit v Republic* [2002] KLR 815 where it was held that a court that accepts a plea of guilty must warn the accused person of the consequences of a plea of guilty and that the accused must be made to understand what he is pleading guilty to.

4. The Appellant further submitted that his right to fair trial under Article 50(2) of *the Constitution* was violated by failure to ensure that he understood the ingredients of the charge. That in the circumstances the plea was not equivocal.

5. The prosecution Counsel on his part submitted that the Appellant pleaded guilty to the charge of assault. That the plea was taken in a language that the Appellant understood. He confirmed that the facts read out to him were correct. However, that the sentence meted out on the Appellant of 3 years imprisonment was manifestly harsh as he pleaded guilty to the charge thus saving the court`s time. That he should therefore have benefited from a lenient sentence.

Analysis and Determination

6. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify. The Court of Appeal in *Okeno v Republic* [1972] EA 32 set out the duty of a first appellate court 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 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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."

7. Upon going through the grounds of appeal, the grounds in opposition thereto and the submissions, the issues for determination are:

   1) Whether the plea was equivocal.

   (2) Whether the sentence imposed on the Appellant was harsh.

Whether the plea was equivocal

8. The Appellant argued that the trial magistrate did not make him understand the charge that he was facing and therefore that the plea was equivocal.

9. The manner of taking pleas was explained in the case of *Adan v Republic* [1973] EA 445 where the Court of Appeal laid down the steps which should be followed in taking pleas as follows:

   (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."

10. The court record in the instant matter shows that the plea was taken in Kiswahili language whereby the charge was read out to the Appellant and he replied that;

> " True."

11. The trial court then entered a plea of guilty. The court prosecutor then proceeded to give the facts of the case. The facts as reproduced by the prosecutor were as follows:

> On 12.7.22 at about 5.50pm the complainant was walking along Alturis street. He met the accused. The accused was armed with an axe. The accused told the complainant that it was curfew time. He hit him with the axe below the chin and left hand. The complainant fell and was rescued by members of public and namely Barako Dida, and Abdi and others. He was taken to the police and was sent for treatment. He reported and was treated at Marsabit county hospital. P3 form – Exh.-1. Axe –Exh.2.

12. The Appellant was then asked whether the facts were correct and answered that;

> " The facts are correct."

13. The trial court then convicted the appellant on his own plea of guilty. He then proceeded to mitigate as follows:

> " I seek for leniency I will reform. I have a family and the sole breadwinner. I will reform."

14. From the above reproduction there is no aiota of doubt that the plea was taken in accordance with the guidelines set out in Adan vs Republic (*supra*). The plea was taken in a language understood by the Appellant. There is no substance in the assertion by the Appellant that the court did not make him understand the charge that he was facing.

15. The appellant alleged that he was influenced by the Investigating Officer to admit the charge. There is no evidence that the Investigating officer was present in court when the plea was taken and that he coerced the Appellant to admit the charge. This is a are mere allegation with nothing to support it.

16. The Appellant argued that the trial court did not warn him of the possible sentence that awaited him in the event that he pleaded guilty to the charge. The offence that the Appellant was facing carried a maximum sentence of 5 years imprisonment. I do not think that this is the type of charge that the trial court was obligated to warn the Appellant of the consequences of pleading guilty as the offence did not carry a lengthy jail term such as that of robbery with violence or defilement where the court is under duty to warn an accused person of the likely sentence if he opted to plead guilty to the charge. There is thereby no substance in this argument.

17. In view of the foregoing I do not find any error in the manner the learned trial magistrate took the plea. The fact that the Appellant mitigated and pleaded for leniency showed that he understood the charge that he was facing. The conviction is thereby upheld.

Sentence

18. Sentencing is a discretion of the trial court and being so it must be done judiciously. Guidance on the subject can be derived from the Court of Appeal decision in the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No.253 of 2003 where it was held that:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* (1989 KLR 306)"

19. The same Court in *Bernard Kimani Gacheru v Republic* [2002] eKLR stated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

20. The Appellant was charged with an offence of assault contrary to 251 of the *Penal Code* which carries a punishment of up to 5 years imprisonment. The Appellant was sentenced to serve 3 years imprisonment. According to the P3 form that was produced in the case the complainant had sustained a cut wound on the chin measuring approximately 2cm. The injury was thus not very serious and did not warrant such a severe sentence of three years imprisonment. The Appellant pleaded guilty to the charge. He thus saved the court precious time of holding a full trial and ought to have been considered favourably. The trial court did not seem to have done this. I agree with the prosecution counsel that the sentence was manifestly harsh.

21. I have Considered the mitigation by the Appellant that he was the sole breadwinner of his family. I have also considered that the injuries inflicted on the complainant were not aggravated in degree. I am of the view that the Appellant should have been accorded the option of a fine. Considering that the appellant attacked the complainant with an axe for no particular reason I am of the view that a fine of Ksh. 20,000/= would serve the justice of the case.

22. The upshot is that the sentence of three years imprisonment is set aside and is substituted with a fine of Ksh.20,000/=, in default of payment of which the Appellant is to serve six months imprisonment.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 30TH DAY OF MARCH 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant – present

Court Assistant - Jillo

14 days R/A.