Situma v Republic (Criminal Appeal E111 of 2021)
[2023] KEHC 3639 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E111 OF 2021

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

HARUN WANGA SITUMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant and his co-accused were charged in Bungoma Chief Magistrate's Court Criminal Case No. E1981 with the following offences:

    a. Count I: burglary contrary to section 304(2) of the *Penal Code*. The particulars were that on the night of October 20, 2021 at Sinoko village in Namirembe location within Bungoma County, jointly with others not before court, they broke and entered the dwelling house of one David Barasa Nakitare with intent to steal from therein.

    b. CountII: stealing from a dwelling house contrary to section 279(b) of the *Penal Code*. The particulars were that on the same night and same place as above, jointly with others note before Court, they entered the dwelling house of the same person as above and did steal from therein one moulding plough, ½ roll of barbed wire, 2 sufurias, 18 pieces of metallic plates and 28 pieces of plastic plates all valued at Kshs 40,000/-, the property of the same person above.

2. From the record, when the Appellant was arraigned on October 28, 2021, he (2nd accused) pleaded guilty to Count II but pleaded not guilty to Count I. He was duly sentenced to 3 years imprisonment for the Count II to which he had pleaded guilty.

3. His trial for Count I was to therefore proceed separately to its logical conclusion.

4. He has now filed this Appeal challenging the conviction and sentence. His grounds of appeal are set out in the Petition of Appeal dated November 9, 2021. He is faulting the trial court for allegedly erring in convicting and sentencing him:

    i. when the Appellant pleaded not guilty to the said charges;

    ii. in conducting proceedings that violated the rights of the appellant.

    iii. in arriving at a decision based on evidence that was full of contradictions and without analyzing the same.

    iv. in considering extraneous matters in the decision making.

5. The Appellant then states that "..... I wish to raise more grounds of appeal when the same comes up for hearing".

Submissions

6. The Appeal was canvassed by way of written Submissions. The appellant filed his Submissions onNovember 3, 2022.

7. In the Submissions, in a somewhat confusing manner, he alleges as follows:

> " However, the appellant herein pleaded guilty to only Count II but denied the charges of Count I which he was acquitted for the 1 Count and sentenced to 3 (three) years imprisonment for Count II."

8. From what I had already recounted above, it is evident that the use of the word "acquitted" by the appellant in the above statement is obviously in error. From the record, on Count II, he was convicted on his own plea of guilty and sentenced to 3 years imprisonment. On Count I, theappellant having pleaded not guilty, its trial was to proceed to its logical conclusion. There was therefore no acquittal for any of the charges.

9. The appellant then states as follows:

> " Your Lordship, the reason as to why theappellant/applicant accepted Count II is that he was under pressure, threats and even he had been beaten and injured on the head to an extent that at the time of plea taking, he accepted without hearing since the exercise was online."

10. He further submits, in an incomplete sentence, as follows

> " Your Lordship, the Application dated March 30, 2022 seeking for an order to be granted bail pending the hearing of the appeal herein, with reasons that the appellant/applicant is a bread winner to his family and that he ....."

11. It is not very clear what exactly theappellant is stating above but on this point of the Application seeking bail pending Appeal, I have perused the record and noted that D. Kemei J had already heard the Application for bail and by his Ruling delivered on July 5, 2022in this same Appeal, he dismissed the Application. The issue of bail pending Appeal is therefore not before this court, the same having already been determined.

12. Finally, the appellant submits as follows:

> " Your Lordship, the appellant however would like to be given alternative sentencing different from the three years that were given and therefore we pray that the appellant be sentenced on probation basis or otherwise be allowed to pay fine which would enable him to take care of his family given that he is still young .."

13. Learned State Counsel Ms. Mukangu has objected to the Appeal.

14. Counsel has trashed the appellant's allegation that he only pleaded guilty on Count II because "he was under pressure, threats and even he had been beaten and injured on the head to an extent that at the time of plea taking, he accepted without hearing since the exercise was online".

15. On the issue of plea-taking, Counsel has referred to the decision in *John Muendo M v Republic* (2013) eKLR in which the Court, quoting the earlier decision in *Adan v Republic* (1973) EA 445, reiterated the principles to be applied in plea taking in criminal cases.

16. Counsel submits that the record of the lower court is clear that all the relevant principles set out in the said authorities were applied, namely, that the charge and the elements of the charge were read and stated to the appellant in a language that he understood and that he still pleaded guilty.

17. Counsel further submits that the facts were then read out to the appellant and he still pleaded guilty, that he went on to mitigate, that he understood the charges enough to admit one and deny the other, that his understanding of the proceedings on that day are not in doubt, that the allegation that the appellant had been threatened and even injured and could not follow the proceedings has not been proved and that the allegation is an afterthought.

18. Counsel therefore submits that theappellant had enough presence of mind to follow the proceedings, that his responses are well documented and that at no time did he raise the issue of threat or injury.

19. On the issue of sentence, Counsel has quoted several decisions. The first decision is the one from the Constitutional Court of South Africa delivered in *S vs Malgas* 2001 (1)) SACR 469 (SCA), in which the Court stated as follows:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

20. Other decisions quoted by Counsel and which reiterate the limitations on the powers of an appellate Court to interfere with a sentence imposed by the trial Court were the Supreme Court of South Africa's decision in *Mokela v The State* (135/11) (2011) ZASCA 166, the decision in *Ogolla s/o Owuor vs Republic* (1954) EACA 270 and the decisions of the Kenyan Court of Appeal in Shadrack *Kipkoech Kogo v R*, Eldoret Criminal Appeal No. 253 of 2003 and *Bernard Kimani Gacheru v Republic* (2002) eKLR.

Determination

21. From the foregoing, I find the following to be the issues that arise for determination in this Appeal:

    i. Whether the plea of guilty and conviction were properly arrived at.

    ii. Whether the sentence imposed was lawful.

22. I now proceed to determine the said issues.

i. Whether the plea of guilty and conviction were properly arrived at

23. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. The Section provides as follows:

> "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."

24. In the case of *Olel v Republic* [1989] KLR 444, the Court explained this provision as follows:

> "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."

25. Generally, therefore,section 348 bars an appellant from challenging the conviction and his only recourse would therefore be to challenge the extent or legality of the sentence imposed on him by the trial court. However, conviction on a guilty plea can be challenged where the plea was not unequivocal.

26. In this Appeal therefore, conviction having been based on a plea of guilty, this court can only address itself on the issue of sentence if, after interrogating the manner in which the plea was taken, it finds that the plea of guilty was not equivocal. If not equivocal, the conviction may be deemed unlawful and thus open the way for thecourt to address itself on the issue of sentence.

27. As a first appellate court therefore, thiscourt is required to look afresh at the evidence presented before the trial court and evaluate the same so as to determine whether the proper procedure was followed in recording the plea before the appellant was convicted (see *Okeno v Republic* [1972] EA 32).

28. In this appeal, the issue of interrogating the evidence presented by the prosecution does not arise since a plea of guilty was entered upon which the appellant was convicted on his own plea of guilty. However, my understanding is that even in the case of a plea of guilty, an appellate Court is still under a duty to examine the proceedings taken during the plea taking with a view to determining whether the guilty plea was unequivocal and whether therefore the proceedings were properly conducted.

29. The correct manner of recording a plea of guilty and the procedure to be complied with by the courtwas set out in the already quoted case of *Adan v Republic* (1973) EA 446 as follows:

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in

his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

30. In this case, the record reflects that the plea was taken in the following manner:

> " The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies:
>
> Accused 1 – Count I - True
>
> Count II - True
>
> Accused 2 – Count I - Not true
>
> Count II - True
>
> Court – Plea of guilty entered for the 1st accused for count I and count II. Plea of guilty entered for 2nd accused for Count II
>
> Accused 1 – Forgive me
>
> Accused 2 – Forgive me
>
> Court – Accused 1
>
> Sentenced to four (4) years imprisonment for count I and 3 (three) years imprisonment for count II. Sentences to run concurrently.
>
> Accused 2
>
> Sentenced to three (3) years imprisonment for count II
>
> Plea of not guilty entered for count I."

31. As aforesaid, the appellant was the Accused 2.

32. I have considered the above record vis-à-vis the principles applicable to the manner in which a plea of guilty and conviction should be conducted by the court. I find that the Magistrate complied with the same and therefore met the required threshold. I am satisfied that the magistrate recorded what the appellant stated in response to the charge and when facts were read to him, he admitted those facts to be true. I agree with the State Counsel that the fact that theappellant pleaded guilty to one charge and not guilty to the other is sufficient proof that he sufficiently understood the charges. His understanding of the proceedings on that day is therefore not in doubt.

33. Accordingly, I find that both the plea-taking and the conviction were proper.

ii. Whether the sentence imposed was lawful

34. In *Macharia v Republic* (2003) KLR 115, the Court of Appeal held as follows:

> " A court does not alter a sentence on the mere ground that if a member of the court had been trying the appellant, they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material factors."

35. The appellant was convicted under section 279(b) of the *Penal Code* which provides as follows:

> " if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.

36. While therefore the section provides for a possible maximum prison sentence of 14 years, the appellant was sentenced to 3 years. That sentence is therefore lawful.

Final Orders

37. Although I have found that the plea was properly taken and that the conviction and sentence were lawful, I have nevertheless taken into consideration other relevant circumstances that merit reduction of the sentence.

38. I have therefore considered the fact that the appellant has already served more than 1 year of the sentence in prison and I believe that he has got an opportunity to reform. I have also considered the fact that he readily pleaded guilty to the charge and thus saved thecourt's valuable time. The sentence also appears excessive considering the value of the items stolen. The 3-year custodial sentence does not therefore appear aptly proportional to the circumstances of the offence.

39. Consequently, I hereby reduce the sentence of 3 years imprisonment to two (2) years imprisonment which is to be computed from the date of arrest, namely, 25/10/2021 as recorded in the Charge sheet.

40. In reducing the sentence, I am well guided by the principles set out by the Court of Appeal in *Shadrack Kipkoech Kogo v R* Eldoret Criminal Appeal No 253 of 2003, where the court stated the following:

> " 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 take into account an irrelevant factor that the wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with (See also *Sayaka v R* [1989] KLR 306)."

41. This Appeal is therefore dismissed save for the said reduction in sentence from 3 years to two (2) years imprisonment, which is to be computed from the date of arrest, namely, 25/10/2021.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

.....

JOHN R. ANURO WANANDA

JUDGE