



REPUBLIC OF KENYA



**Kabiro v Republic (Criminal Appeal 42 of 2018)
[2023] KEHC 3695 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 42 OF 2018
SC CHIRCHIR, J
APRIL 25, 2023**

BETWEEN

CHARLES MAINA KABIRO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising out of the Judgment of A. Mwangi (SRM) at the of senior principal Magistrate's court at Kigumo in on Criminal case No. 409 of 2028 on 11th July 2018)

JUDGMENT

Background

1. The Appellant was charged with the offence of Trafficking in Persons Contrary to Section 3(3) of *Traffic in Persons Act*. The particulars were that on March 23, 2018 in Kigumo substation within Muranga County transported and harboured a child namely SB who purported to be disabled for purposes of exploiting him by begging and receiving alms.
2. He also faced a 2nd count of being unlawfully present in Kenya Contrary to Section 53(11) as read with section 53(2) of the *Kenya citizenship and immigration Act* No.12 of 2011
The particulars of the charge were that on 23rd March 2018 in Kigumo Sub-county within Muranga County being a Tanzanian national ,was found in Kenya without valid travel or pass authorizing him to remain in Kenya in contravention of the above Act.
3. He pleaded guilty on both counts and was sentenced to 30 years imprisonment on the 1st count and 6 months on the 2nd count.
4. Aggrieved by the outcome, he proffered this Appeal.



The Appeal

5. On the Appeal he has set out a number of grounds which I have paraphrased as follows:
 1. That the guilty plea was not unequivocal
 2. That the Trial court erred by convicting him without evidence
 3. That the charge was defective, particularly in respect to count 1
 4. That the trial court violated Article 50(2) of the *Constitution*.

In his submissions however the appellant has extensively addressed himself to the manner of plea taking and little on sentencing.

6. I take note of the fact that the appellant is unrepresented, and therefore I would also consider the issue of plea taking. I am guided in this regard by the Court of Appeal decision in the case of *Gabriel Andati Sutse Versus Republic* (2022) KECA.678 eKLR, which took up and considered issues raised in the submissions notwithstanding the fact that the same issues had not been raised on the grounds of appeal.

Appellant's submissions.

7. It is the Appellant submission that he was convicted on an unequivocal plea. That he changed his plea several times and the trial court should have settled for a "not guilty plea" in the circumstances; that on the particular day of sentencing he had pleaded not guilty but the court went ahead and sentenced him to 30 years. He further submits that he could not understand the language of the court, which was English.
8. The Appellant further contends that he was convicted on insufficient evidence. He cites for instance the fact that the child whom he is alleged to have trafficked was not brought to court, bringing into question the existence of the alleged child in the first place.
9. It is further submitted that there was no evidence submitted to court to prove acts of trafficking and that it is not known who the child is, what age and of what nationality.

Respondent's submissions.

10. It is the respondent's submissions that the Appellant was convicted on his own plea of guilt. Relying on section 348 of the criminal procedure code the Respondent submits that having been convicted on his own plea of guilt, the Appellant has no right of Appeal against the conviction.

Analysis and determination.

11. I have considered the grounds of Appeal, the record and the submissions of the parties. This being the first appellate court, it is mandated to relook at the evidence presented to the trial court, reassess it and arrive at its own conclusion. (*Onoko vs Republic* (1972)EA132)
12. I have identified following issues for determination namely:
 - a. Whether the plea was unequivocal.
 - b. Whether the sentence was excessive
 - c. Whether the charge was defective



- d. Whether the Appellant's Rights under Article 50(2) of the constitution were violated.
13. The Appellant herein was convicted on his own plea of guilty, and therefore the question as to whether there was sufficient evidence to sustain a conviction is immaterial and therefore it is not an issue for consideration.

Was the plea unequivocal?

14. The plea taking is set out in Section 207 of the Criminal Procedure Code, and as regards the " guilty plea" subsection (2) provides as follows:

2. "If the accused person admits the truth of the charge otherwise than by 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 the sentence upon or make an order against him, unless there appears to be sufficient course to the contrary..."

15. In *Adan Versus Republic* the court of appeal held regarding plea of guilty process:

"When a person is charged the particulars should be read out to him, so far as possible in a language which he can speak or understand. The magistrate should then explain to the accused person all the essential elements of the offence. 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 completed; should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused doesn't agree with the statement of facts or assert additional facts which, if true, might raise a question as to his guilt, the magistrate should read a charge of plea to "not guilty" and proceed to hold a full trial....."

16. The Appellant submits that he changed plea severally and that in the circumstances, the court should have treated this, in totality, as a plea of "not guilty." The Appellant has further submitted that though his eventual plea was that of "not guilty" the trial went ahead and convicted him.

He further contends that he couldn't understand the language of the court which language in this case was English; that he was illiterate and unrepresented.

17. I have carefully perused the lower court record and noted as follows:

- a On March 26, 2018, the charges were read to the Appellant and he pleaded:

Count I - Not true.

Count II - No response

Court: Plea of not guilty entered.

- b on May 28, 2018 another plea taking took place. The reason for this plea taking session is not indicated by the court but the record reads as follows: "The substance of the charges and every element thereof have been stated by the court to the accused in kiswahili – the language he understands (emphasis added) and upon being asked whether he admits/denies the truth of the charge, he replies:-

Count I: It is true



Count II: It is true.

Court: Plea of guilty entered.

The facts were then read to him after which he responded. "The facts are correct."

He was convicted. He proceeded to mitigate, after which the court ordered for a probation report. The sentencing was deferred.

c On July 4, 2018 the court makes an entry that "the accused wants to change plea", and the matter was referred to another court and given a date of July 11, 2018.

d On July 11, 2018: The Appellant takes the plea again. The record reads; "The charge read over to the accused and every element thereof stated to him in Kiswahili; a language he confirms to understand (Emphasis added) and on being asked whether he admits it or not he states;

Count I: True.

Count II: True.

Court: Plea of guilty entered on each count"

On the facts the court record reads:

"The facts as recorded on May 28, 2018 are read out to the accused"

To which the Accused responded "facts are correct"

Court: – Accused is convicted on his own plea of guilty in each count.

e). On mitigation, the Appellant told the court: "The parent of the child called me to Kenya for a job and I came but when I came, I did not get the job and he gave me the child to beg around with it as I needed fare to go back to Tanzania. I did not know it was wrong to come to Kenya without a permit. This is my first offence. I ask for mercy from the court. I am unwell. I did not know it was wrong. The child came to Kenya with his father".

The magistrate then records: The accused's mitigation denies bringing the child to Kenya – plea of not guilty entered".

Accused – No, I admit I am the one who brought the child here."

The appellant was then sentenced to 30 years.

18. I have extensively quoted the lower court proceedings on the issue of change of plea, because I think it is important to appreciate the sequence of events. What is material in my view, is what the Appellant's last plea was before sentencing. From the record, it is very clear that the plea was unequivocal. Indeed, upon being asked to mitigate the Hon, magistrate noted that his response amounted a denial and she entered a "not guilty plea" but the Appellant is the one who quickly corrected her and stated "No, I admit am the one who brought the child here". With such strong assertion, it cannot be said that the Appellant was not sure about the plea. His plea of ignorance is lacking in sincerity and am of the view that he only had a change of mind rather too late in the day, when he realized that the sentence for the offence is quite severe. This ground is unmerited and I dismiss the same.

19. On the language used the Magistrate recorded that "The charge read over to the accused and every element thereof stated to him in Kiswahili, a language he confirms to understand".

It is evident therefore that the Appellant had indicated to the court that he understands Kiswahili and that the charge was explained to him in Kiswahili.



The Appellant's submissions that the language of the court was English and which language he did not understand is not true. He was able to follow and react to the proceedings appropriately. One instance is the one I have cited above, when the court wanted to record a "Not guilty" plea. His immediate reaction indicates that he was not just following proceedings but was doing so keenly.

On this aspect of the language I find that the trial court complied with the guidelines set out in the case of *Jason Akhonya Makokho vs Republic* (2014) eKLR on plea taking.

20. In any case, the Appellant was under the reciprocal duty to alert the court if there was a language barrier. In the case of Jason Akhonya (supra) the court had this to say on the issue of language; "there was a reciprocal duty on the part of the accused person to indicate to the court, for instance that he was not able to understand the language of the proceedings....."

This complain is equally without merit .I dismiss it.

21. On the alleged illiteracy of the Appellant, all indication as earlier stated were that the Appellant was following the proceedings keenly. He understood the language of communication, and his literacy level was immaterial.
22. On the sentence, it is submitted that the same was harsh and a lesser sentence should be considered .Section 3(5) of the Counter Trafficking in Person's Act No. 8 of 2010 prescribes a minimum sentence of 30 years of a person convicted of such offence or a fine of not less than ksh. 30 million or both. The sentence is mandatory and neither the trial court nor this court could or can mete out a lesser sentence.
23. On the alleged defectiveness of the charge, the Appellant has not submitted on this aspect and am not in a position to know what quarrel he had with the charge. However I have looked at the charge sheet and I have not found any defect in it.
24. On the alleged violation of basic rights under Article 50 on sentencing, the supreme court has since clarified that its finding on Francis Muruatetu & Ano vs Republic(2017) eKLR case only applied to section 204 of the *penal code*.
25. However in view of the provisions of section 333(2) of the *criminal procedure code*, the trial court ought to have taken into consideration the period spent in custody by the Appellant prior to conviction in meting out the sentence . Effectively the sentence of 30 years is upheld but will run from the 23rd march 2018, being the date of his arrest.
26. In conclusion I make the following orders:

- a The Appeal on conviction and sentence is unmerited and it is hereby dismissed.
- b the sentence of 30 years will ran from the date of arraignment in court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 25TH DAY OF APRIL 2023

S CHIRCHIR,

JUDGE

In the presence of:

Susan- Court Assistant

Appellant- present



Ms Muriu for the Respondent

