



REPUBLIC OF KENYA



KENYA LAW
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**Elias & 2 others v Republic (Criminal Appeal 53 of 2018)
[2023] KEHC 20050 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 53 OF 2018
SC CHIRCHIR, J
JUNE 29, 2023**

BETWEEN

AMOS JOSEPH ELIAS 1ST APPELLANT

BARRACK ELIAS MAREGI 2ND APPELLANT

KASIRI CHAI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Hon A. Mwangi –SRM delivered on 10th September at the Kigumo Chief Magistrate’s court in Criminal cases Nos 1614,1615, and 1616 of 2018)

JUDGMENT

1. The appellants were each charged with 2 Counts in the lower court .
In Count- 1, they were charged with trafficking in persons contrary to section 3(3)(5) of *counter trafficking in persons Act*.
In Count 2; they were charged with being unlawfully present in kenya contrary to section 53(1) (j) as read with section 53(2) of *kenya citizenship and immigration* no. 12 of 2011.
2. On count 1 , the 1st , 2nd and 3rd Appellants was each charged with trafficking with KM, aged 13 years , NN, aged 8 years and EE, respectively, at Kangari market, on September 6, 2018 in kigumo subcounty of muranga county.
3. On count 2 each Appellant was charged with the offence of being in Kenya Illegally.
4. They were arraigned in court on September 7, 2018, pleaded guilty to the charges and later each sentenced to 30 years in prison on the first count or ksh. 30,000,000 in default. On the 2nd count, they were each sentenced to 2 years imprisonment. The sentences were to run concurrently.



5. Aggrieved by the outcome they have proffered this Appeal and have set out the following grounds:

Amended grounds of appeal:

- a That the court allows them take a fresh plea in the interest of justice, since they pleaded guilty to the charges without their best knowledge and they were not represented.
- b That they pleaded guilty to the charges and did not waste the courts time.
- c That the trial magistrate did not order for mental checkup for the appellants during the time of plea to ascertain whether they were on their right senses, since they pleaded guilty immediately to the offence of that magnitude.

6. The Appeal was canvassed by way of written submissions.

Appellants' submissions

7. The Appellants have submitted that the court should allow them to take a fresh plea, as they took the plea when they were traumatized, were not familiar with the Kenyan legal system and without the benefit of legal advice.
8. They admit that they are not Kenyan Citizens and that the children they were using to beg were orphans in their country and their acts were also motivated by the need to assist them.
9. It is the Appellants further submission that at the time of the arrest, they were young adults with the 1st appellant having been 19 years and the 2nd appellant was 21 years; they were not educated; and were suffering from some mental disorder at the time of the arrest.
10. They further prayed for a re-trial for them to take a fresh plea since they did not understand the consequences of the charges
11. It is the Appellant's final submission that, the court, in sentencing the Appellants considered extraneous factors, and in particular, failed to realize that the sentence of 30 years was longer than their age at the time

Respondent's submissions

12. The state concedes that the crimes facing the accused persons were serious and the Appellants ought to have been warned of the consequences of a guilty plea before the plea could be entered on record. It is further conceded that the trial court having failed to exercise caution before entering the guilty plea, entitles the Appellants to a retrial.
13. On the issue of the Appellants' mental status, it is the Respondent's submission that the general presumption is that an accused person is in a proper mental state until the court determines otherwise. In this case, the Respondent argues, there is nothing to rebut the presumption. The prosecution has anchored its submission on section 11 of the penal code and section 162 (1) and (2) of the criminal procedure and urged the court to dismiss this complain.

Determination.

14. The Court of Appeal, in *Elijah Njibia Wakianda vs Republic* [2016] eKLR (Waki, Nmabuye & Kiage, JJA) stated as follows on the manner of plea taking: " We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his



virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process”

15. The follow-up question was whether this requirement of explaining to an Accused person who pleads guilty the nature of the sentence likely to be imposed applies only to capital offences or other offences as well. In NK v Republic Criminal Appeal No 124 of 2015 (2019) eKLR, while holding the view that the requirement to explain to an Accused who pleads guilty the nature of sentence that he is likely to have imposed on him is not only restricted to capital offences but also to non-capital offences, Odunga, J. cited the case of Bernard Injendi v Republic [2017] eKLR, where Sitati, J found that: -“Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words “as nearly as possible in his own words”. I am convinced that if the appellant in this case had been appropriately warned about the twenty years’ term of imprisonment, he would have reconsidered his plea of guilty.”
16. Thus the above two decisions sum up what the trial court ought to have done in this case. The sentence for the offence of trafficking in persons attract a mandatory minimum sentence of 30 years or a fine of Kenya shillings 30 million or both for a first offender, and life imprisonment for subsequent conviction (see section 3(6) of the counter-trafficking in persons Act).The above sentence is indeed severe and the Appellants ought to have been warned of the consequences of pleading guilty. The Appellants have also pleaded that they were illiterate and unrepresented, a fact which has not been contested . All these circumstances ought to have made the trial court to proceed cautiously when taking plea and make sure that the Appellants knew the consequences of the guilty plea.
17. The remedy for defective trial is retrial as held by the Court of Appeal for East Africa in Fatehali Manji v The Republic [1966] EA343. The principle was laid down as follows: “In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it.”
18. The factors to be considered were set out in the case of Opicho v R [2009] KLR 369, 375 which were as follows: “In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it.



19. The Appellants face a serious transnational crime, that of human trafficking that has become rampant in the recent years. It is my view that interest of justice and public interest calls for a retrial. The omission in this case was that of the court, and had nothing to do with the prosecution.
20. I take note of the fact that the Appellants have been in custody for close to 5 years now but as per the requirement of section 333(2) of the *criminal procedure code*, in the event that they will be convicted, the trial court will be expected this period into account when passing the sentence.
21. In conclusion I make the following orders:
 - a. The Appeal herein succeeds
 - b. I hereby declare the trial of each of the Appellants in Kigumo chief Magistrate's criminal cases Nos 1614,1615 and 1616 all of 2018, respectively, a nullity
 - c. Consequently, the conviction rendered against each of the Appellants are hereby quashed and sentences set aside.
 - d. The Appellants to be produced before court for a retrial, before a court of competent jurisdiction, other than the trial court, as soon as reasonably practical and at any rate each of their cases should be listed for mention within 14 days from today's date with a view to listing the matter for plea-taking

Dated, signed and delivered, virtually, at Kakamega this 29th day of June, 2023.

S Chirchir

In the presence of:

The Appellants.

