Sang v Republic (Criminal Appeal E056 of 2022)
[2023] KEHC 20424 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20424 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E056 OF 2022

RL KORIR, J

JUNE 29, 2023

BETWEEN

BARNABA KIPRONO SANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number 565 of 2022 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The appellant was convicted by Hon L. Kiniale Principal Magistrate for the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charge were that on June 10, 2022 at around 1730 hours at Kapkimolwa trading centre in Bomet East sub-county within Bomet County, the appellant unlawfully caused grievous harm to Daniel Tuimising.
2. The appellant pleaded not guilty to the charge before the trial court and the prosecution called three (3) witnesses in support of its case.
3. During the trial, the appellant changed his plea and a plea of guilty was entered. He was then convicted on his own plea of guilt and was sentenced to serve 20 years in prison.
4. Being dissatisfied with the conviction and the sentence, the appellant appealed to this court on the grounds reproduced verbatim as follows:-
    i. That I pleaded guilty to the charges
    ii. That the learned trial Magistrate erred in law and in fact by not considering that the plea of guilty entered was not equivocal.(sic!)

iii. That the learned trial Magistrate erred in law and in fact in failing to observe that there were threats, intimidation and blackmail.

iv. Thatthe learned trial Magistrate erred in law and in fact in convicting the appellant to a harsh & excessive sentence based on circumstances and violated the provisions of article 50(2) of the *Constitution of Kenya 2010*.

5. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was stated by theCourt of Appeal in *Peter M. Kariuki vs Attorney General* (2014) eKLR where the court held *inter alia* as follows:-

> " We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that he conclusions reached by the trial judge are consistent with the evidence....."

The Prosecution's Case.

6. It was the Prosecution's case that theappellant attacked Daniel Tuimising (PW1) on June 10, 2022by stabbing him with a sharp screw driver. PW1 testified that he was called by his son (PW2) who told him that the appellant had blocked the road and denied them access. That when he got home, he confronted the appellant and that was when he was stabbed twice in the back from which he collapsed and bled profusely.

7. Victor Sang (PW2) who was the appellant's brother testified that he witnessed the appellant stabbing their father (PW1).

8. Julius Magut (PW3) who was the clinical officer testified that upon examining PW1 he saw a cut wound on the left side of the shoulder up to the back that was caused by a sharp object. That an x-ray revealed that he had no internal injuries. PW3 classified the injuries as harm.

9. After PW3 had completed testifying, the appellant changed his plea and a plea of guilty was recorded. The facts were read out to him and he agreed with the facts. He was then convicted on his own plea of guilt.

The Prosecution's/Respondent's Submissions.

10. The Prosecution submitted that they conceded the Appeal because the charge was not read to the appellant when he changed his plea. They further submitted that the appellant was charged with grievous harm while the medical practitioner stated that the injuries were mere harm and not grievous harm.

11. It was the Prosecution's submission that the appeal should be allowed as the court did not subject the appellant to a fresh plea once he elected to change his plea. The prosecution however asked the court to order a retrial.

The Appellant's/Accused's Submissions.

12. It was the appellant's submission that the plea entered on November 1, 2022was equivocal as the same was not properly taken. That courts should observe extra caution in cases where undefended defendants pleaded guilty. He relied on *Paulo Malimi Mbusi v R Kiambu* (unreported).

13. The appellant submitted that when an unrepresented accused pleaded guilty to a serious charge which attracted a custodial sentence, the obligation of the court was to ensure that the accused understood the consequences of such a plea. That the trial court did not do this.

14. It was the appellant's submission that he had gone through the prison initiatives, spiritual nourishment and that he was now fully equipped and ready to be useful in the society. That the sentence was too harsh and this court should consider a lesser sentence or community service.

15. The appellant submitted that he was arrested on June 10, 2022 and presented in court on June 15, 2022, which was more than the 24 hours as provided by the law. That his rights enshrined in article 25(c), 50(2) and 53(d) of the *Constitution* were violated.

16. It was the appellant's submission that he had no previous record of conviction and that he was a first offender. That he had not engaged in any negative or immoral activities while imprisoned. It was the appellant's further submission that this court grants him a second chance in a free society.

17. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on November 28, 2022, the Amended Memorandum of Appeal and appellant's written submissions both filed on March 7, 2023, and the respondent's oral submissions. The only issue for my determination is whether the plea entered by the appellant was unequivocal.

18. It was a ground of the Appeal that the plea that theappellant took was equivocal. The process of plea taking is provided under section 207(1) and (2) of the *Criminal Procedure Code* which states :-

    (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

    (2) If the accused person admits the truth of the charge otherwise than by a 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 sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

    Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

19. In the case of *Ombena v Republic* (1981) eKLR, the Court of Appeal held that:-

> "In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> "Held:
>
> (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."

20. I have gone through the trial court record and I have noted that the plea taken on November 1, 2022 was taken in compliance with the law as the substance of the charge was explained to the accused in Kipsigis, a language he confirmed to understand and he responded in Kiswahili, "*ni ukweli*". When the facts of the facts were read out to him, he equally responded "*maelezo ni ukweli*".

21. This court observes that the appellant has initially taken plea on June 15, 2022 when he was first arraigned. He pleaded not guilty and the court entered a plea of not guilty. He was on the same date supplied with a copy of the charge sheet 3 witness statements.

22. The record further shows that the trial took off on August 24, 2022 when PW1 and PW2 testified. The matter was adjourned to September 27, 2022 but the prosecution sought an adjournment because of lack of witnesses. Subsequently, PW3 testified on November 1, 2022. At the end of PW3's testimony, the accused addressed the court thus:

Accused- " I did this. I stabbed my father and it is because he killed my mother I was angry at him."

23. The court asked the accused whether he wished to change plea and the accused stated "*Nakubali ni Ukweli*." The record clearly shows that the court proceeded to read the charge afresh to the accused who answered "*Ni Ukweli*." A plea of guilty was entered. Facts were read and explained to the accused and he answered accused- "*Maelezo ni Ukweli*". The court then entered a plea of guilty and convicted the accused on his own plea of guilty.

24. It is not true therefore, as submitted by the Prosecution, that the court did not take a fresh plea once the accused expressed his desire to change plea. The proceedings show that plea was taken afresh and all the steps of taking plea were followed to the letter. I dismiss the respondents' submissions in this regard.

25. My analysis of the plea taking process above also determines Ground II of the appeal.

26. The appellant stated at Ground (iii) of the appeal that his plea waws unequivocal and faulted the trial court for failing to observe that the same was procured by threats, intimidation and blackmail.

27. I have painstakingly gone through the record and I find no record of the appellant having informed the court of such intimidation. He does not state in the submissions the person or persons who intimidated him into changing his plea. In fact, the record shows that he offered the reason for his charge of plea by explaining that he was bitter with the father for killing the mother. I observe that nothing more was said of the allegation and it is not known to this court whether there was a criminal charge with respect to the alleged killing of the mother.

28. It is my finding from the foregoing that the plea was unequivocal.

29. The appellant stated in his Amended Memorandum of appeal that his fair trial under article 50(2) of the *Constitution* rights were violated. He elaborated this ground in his submissions by stating that he was not cautioned on the consequences of pleading guilty. He also submitted that his plea was rushed by the trial court.

30. However, I have noted that the accused was unrepresented. I have gone through various authorities and it is clear to me that it is the practice in our courts that where an accused is charged with a serious offence that may attract a stiff sentence, the trial court should inform the accused of the consequences

of pleading guilty. Theappellant herein if convicted faced the possibility of a life sentence. In *Elijah Njihia Wakianda v Republic* (2016) eKLR the Court of Appeal stated that:-

> " ... 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."

31. In this case however, and as stated earlier, the appellant had pleaded not guilty and the trial proceeded. He changed his mind and pleaded guilty when the trial was at its tail end. It appears to this court that the appellant only changed his plea because of the evidence already on record. Prior to that he had actively and effectively represented himself as demonstrated by his cross-examination of the witnesses. It is this court's conviction that he understood and appreciated the proceedings including his change of plea which was intentional. I find the conviction was proper.

32. Turning to sentence, the appellant has urged the court to review his sentence which he deems harsh. He submitted that he was a first offender and that the time he has spent in prison has shaped him having reflected on his life and how to improve his future.

33. I have relooked the trial court record and noted that the appellant had not expressed any remorse at all. He told the court in mitigation that he had been neglected by his family that he had 2 wives who depended on him and that his father had denied him land. The trial court noted that both the pre-sentence probation officer's report and the victim impact statement were not positive and that the accused then was deserving of a deterrent sentence. I have looked at the two reports. They state that the appellant was an anti-social person and had several brushes with the law. His father who was victim of the offence specifically desired that he be locked away since he was a threat to his (father's) life.

34. I have considered the sentence of 20 years vis-a- vis the circumstances of the case. I agree with the appellant that the sentence was harsh and excessive. I have also considered that the appellant was now remorseful having spent some time in custody and as he says, reflected on his life.

35. In the end, I affirm the conviction. I however set aside the sentence of 20 years imprisonment and substitute therefor a sentence of 10 years' imprisonment. This sentence shall be deemed to run from June 10, 2022 being the date of arrest and pre-trial custody.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JUNE, 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person Mr. Waweru holding brief for Mr. Njeru for the Respondent and Siele(Court Assistant)