Tuki v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 21630 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E058 OF 2022

GL NZIOKA, J

JULY 31, 2023

BETWEEN

DANIEL NDIRANGU TUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Traffic Case No. E938 of 2022 at the Chief Magistrate's Court at Naivasha rendered by Hon J. Karanja, Senior Principal Magistrate (SPM), on 11th November, 2022)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha charged *vide* Traffic Case No. E938 of 2022, with the offence of driving a motor vehicle on a road while under the influence of alcohol contrary to section 45 (1) as read with Rules 3 (1) of the *Traffic Amendment Rules* vide Legal Notice 138 of 2011 as read with section 13 of the *Traffic Amendment Act* No. 38 of 2012.

2. The particulars of the charge are that, on the 10th day of November 2022 at about 2.24pm along Nakuru – Nairobi road in Naivasha Sub-County within Nakuru County, being the driver of motor vehicle registration number KDB 375J make Toyota Hiace P.S.V matatu did drive the said motor vehicle while under the influence of alcohol beyond the required limit as read on the breathalyzer of 0.00 mg/l of breath and took 1.103 mg/l of breath, thereby exceeding the limit by 1.103 mg/l of breath.

3. The appellant pleaded guilty to the charge and was convicted on his own plea of guilty. He was then sentenced to serve twelve (12) months imprisonment and in addition pay a fine of Kshs. 100,000 and in default serve twelve (12) months imprisonment. The default sentence was ordered to run consecutively with the imprisonment sentence. In addition, his driving license was also cancelled for a period of twelve (12) months.

4. However, the appellant is aggrieved by the decision of the trial court and appeals against both the conviction and the sentence on the grounds as here below reproduced: -

    a. That the Learned Trial Magistrate erred in law and in facts in that he convicted and sentenced the appellant on his own plea when the plea cannot be said was unequivocal.

    b. That the Learned Trial Magistrate erred in law and facts in convicting and sentencing the appellant when the facts given by the prosecution did not establish the offence under section 45 of the *Traffic Act* (Cap 403) of the Laws of Kenya.

    c. That the Learned Trial Magistrate erred in law and facts in that he misdirected himself in fact and law by failing to consider the appellant was a first offender there being no previous record or convictions that was placed before the court by prosecution hence he failed to grant the appellant the alternative of a fine in his sentence.

    d. That the Learned Trial Magistrate erred in law and facts in that he imposed a sentence of cancellation of the appellants license for 12 months a sentence which is not provided under section 45 of the *Traffic Act* (Cap 403) of the Laws of Kenya.

    e. That the Learned Trial Magistrate erred in law and facts in imposing a fine of Kshs. 100,000 in default one (1) Year imprisonment period which is the maximum sum provided for an offender under section 45 of the *Traffic Act* in the second limb when the circumstances of this case did not require imposing of a maximum fine provided in law.

    f. That the Learned Trial Magistrate erred in law and facts in failing to afford the appellant an opportunity to offer his mitigation before sentence and the appellant was seriously prejudiced.

    g. That the Learned Trial Magistrate erred in law and facts in sentencing the appellant before considering the mitigation that the appellant would have offered.

    h. That the Learned Trial Magistrate erred in law and facts in meting out a very harsh sentence under the circumstances of this case.

5. However, the respondent in response to the appeal filed ground of opposition which states as follows: -

    a. That the applicant was convicted and sentenced on his own plea of guilty.

    b. That the sentence and conviction on the accused was in line with section 45(1) as read with rue 3(1) of the *Traffic Amendment rules*, Legal notice 138/ 11 read with section 13 of the *Traffic Amendment Ac*t 38 of 2012 Cop 403 Laws of Kenya.

    c. That the sentence meted out by the trial court was lenient having taken into account his mitigation and his record as a first time offender.

    d. That the petition (sic appeal) is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence be upheld.

6. The appeal was disposed of by filing of submissions. The appellant filed submission dated; 15th March 2023, in which he submitted that while section 348 of the *Criminal Procedure Code* does not allow appeals on a plea of guilty, the court has jurisdiction to look into the extent and legality of the sentence. That, in the case of *Alexander Lukoye Malika vs Republic* (2015) eKLR the Court of Appeal held that, a court may only interfere in a situation where an accused has pleaded guilty where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty.

7. He submitted that the plea taking process herein failed to meet the threshold of recording plea under section 207 (1) and (2) of the *Criminal Procedure Code* and Article 50 (1) (b) of the *Constitution* of Kenya, 2010, which gives an accused the right to be informed of the charge with sufficient detail to answer it.

8. That, in the case of; *Adan vs Republic* (1973) EA 445the Court of Appeal outlined the procedure of plea taking and stated that the essential ingredients of the offence should be explained to the accused in a language he understands, that the accused own words should be recorded if it an admission, the prosecution should read the facts to the accused who should be given an opportunity to dispute, explain or add any relevant facts, and where there is no change of plea a conviction should be recorded.

9. That, in the instant case, it is not clear whether the prosecutor stated the facts as he stated that "facts are as per the charge sheet", or if the appellant was given an opportunity to dispute or explain or add any relevant facts.

10. Further, in the case *Hando s/o Akunaay vs Rex* (1951) 18 EACA 307 the court stated that the court should explain the natural consequences of pleading guilty, the conviction and likely sentence. The appellant argued that, the court failed to inform him of the nature of the charges, the consequences of pleading guilty, and the prescribed sanctions.

11. That, the entire process occasioned prejudice and a miscarriage on his part and that the errors on the plea of guilty are not curable by the provisions of section 382 of the *Criminal Procedure Code*. He relied on the case of; *Elijah Njhia Wakianda vs Republic* (2016) eKLR where the court state that appellate courts would not accept a plea of guilty unless satisfied that the same was entered consciously, freely and in clear and unambiguous terms.

12. Furthermore, the appellant submitted that the trial court never gave him an opportunity to mitigate contrary to section 216 of the *Criminal Procedure Code*. That in the case of; *Francis Karioko Muruatetu & another vs Republic* (2017) eKLR, the Supreme Court of Kenya stated that while mitigation is not expressly mentioned as a right in the *Constitution* of Kenya, it is important to note down mitigating factors as they might affect sentence and futuristic endeavours as on appeal when seeking for clemency and thus mitigation is an important congruent element of fair trial.

13. That he has been in prison for five (5) months on the basis of an illegal conviction, occasioning hardship to him and his young family that is fully dependant on him. Thus the court has a duty to step in and reverse the conviction and sentence of the trial court and acquit him.

14. However, the respondent filed submissions dated; 16th February 2023 and submitted that the appellant pleaded guilty, the facts were read out to him and the breathlyzer certificate was produced and he confirmed the facts to be true.

15. Further, in sentencing the appellant, the trial court exercised it discretion and was well within the law in imposing the sentence therein, which in the circumstances of the case was very lenient.

16. Lastly, that no illegality has been proved as provided for under section 348 of the *Criminal Procedure Code* and therefore the court should uphold both conviction and sentence.

17. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own

conclusion, noting that it did not benefit from the demeanour of the witnesses. The court observed: that: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. 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 findings and conclusions; 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"

18. To revert back to the substance of the matter herein, I note that, the appellant pleaded guilty to the charges and was convicted on his own plea of guilty. In that regard, the provisions of section 348 of *Criminal Procedure Code*, (cap 75) Laws of Kenya, provides that, where an accused person pleads guilty to the charges, no appeal shall be allowed, except as to the extent or legality of the sentence.

19. Be that as it were, the appellant avers that, the plea in this matter as taken in the trial court was unequivocal. That the facts were not clearly read out and he was not cautioned before or after the charges were read.

20. In considering that ground of appeal I find that the process of plea taking is settled as per the provisions of; section 207 of the *Criminal Procedure Code* which provide that: -

> " (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".

21. Similarly, the Court of Appeal in the case of; *Adan v Republic* [1973] EA 445 held that: -

> " (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."

22. In the instant matter the trial court record indicates that, the charge was read to the appellant in Kiswahili language and he responded "it is true". The understanding of this court is that, the appellant could not have answered that; "it is true" if he did not understand the charge as read out to him.

23. It is on record that after he stated the charge was true, the prosecutor is recorded as having told the trial court that; "the facts as per the charge sheet" and produced breathlyzer certificate as prosecution exhibit number 1. The court then proceeded to record that; "accused convicted on his own plea of guilty". At this point it is clear that the trial court missed a critical step in plea taking process that is, to inquire from the appellant whether the facts were true as read and/or in total.

24. Further considering the particulars of the charge as stated, I hold the view that they are not adequate in detail; in that, it is not clear as to what happened after the appellant after the appellant exceeded the limit of authorized alcohol intact. That is, whether he was arrested and arraigned.

25. Furthermore, it is clear from the sentence provided for under the law and meted out herein, that the offence is serious and therefore, full facts should have been read out. Mere indication that the facts are as per the charge sheet is inadequate and did not meet the threshold required.

26. It is also noteworthy that the court record does not indicate whether the records of the appellant if any were called for and/or availed and neither does it indicate whether the appellant was given an opportunity to offer mitigation. These two factors pray a critical role in determining the sentence to be meted out. The importance therefore has been spoken to in the case of *Francis Karioko Muruatetu & another vs Republic* (supra) and clause 23.5 of the Sentencing Policy of the Judiciary which accords an accused an opportunity to be heard on mitigation. Once again the omission of these steps, is prejudicial to the appellant and renders the process of plea taking flawed and obviously becomes impossible to confirm the sentence imposed however legal it may be.

27. In light of the foregoing, the conviction and sentence meted out in the subject matter by the trial court is quashed and set aside respectively. However, an accused person should go through the due process of the law and the court's mistake does not vitiate that. I therefore order for retrial of the appellant in the interest of justice before a different court. The trial court may take into account the period custody the appellant has been in custody, as it may deem fair and just to do.

28. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF JULY. 2023.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Ndalila for the appellant

Mr Atika for the respondent

Ms Ogutu court assistant

Appellant present virtually