EKO v Republic (Criminal Appeal E034 of 2021)
[2023] KEHC 20957 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E034 OF 2021

WM MUSYOKA, J

JULY 28, 2023

BETWEEN

EKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment, conviction and sentence by Hon. PY Kulecho, Resident Magistrate, RM, in Busia CMCCRC No. 2904 of 2021, of 25th November 2021)

JUDGMENT

1. The appellant, EKO, alias A, had been charged before the primary court, on 1 count, of child stealing, contrary to section 174(1)(a) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on November 16, 2021, at [Particulars Withheld] Village, Funyula Township, Samia Sub-County, within Busia County, she forcibly took GZ, a child aged 1 year 2 months, with intent to deprive AN, the mother who had lawful care and possession of the child.

2. Plea was taken on November 19, 2021. The record reflects that the charge was read in English/ Kiswahili. The appellant replied to the charge in Kiswahili, by saying "ukweli." The facts were then read to her, in Swahili, to which she is recorded as responding in Kiswahili, "Ni kweli." She was convicted on her own plea of guilty, and was sentenced to 7 years imprisonment.

3. The appeal herein arises from that conviction. The grounds of appeal turn around the trial court convicting on the basis of a defective identification parade, the sentence was harsh and excessive, the plea was not unequivocal, the court was not cautious when accepting a plea of guilty from an undefended accused person, the trial court convicted without asking the appellant the reasons for pleading guilty, the trial court failed to ensure that the appellant understood the consequences of pleading guilty, the trial court failed to realize that the plea of guilty was induced by threats, and the plea of guilty had been procured by blackmail and false promises of liberty.

4. The appeal was canvassed by way of written submissions, following directions taken on May 11, 2023. The appellant reduced the grounds into 4 main ones: identification parade, caution in taking plea of guilty and sentence. *David Mwita Wanja & 2 others v Republic* [2007] eKLR (Omolo, Waki & Deverell, JJA), *John Muendo Musau v Republic* [2013] eKLR (Kihara Kariuki PCA, Ouko & Murgor, JJA), *JMN v Republic* [2021] eKLR (Nyakundi, J), *Paul Mutungu v Republic* [2006] eKLR (Bosire, Waki & Onyango-Otieno, JJA), *Simon Gitau Kinene v Republic* [2016] eKLR (J. Ngugi, J) and *Francis Macharia Nzeki v Republic* [2021] eKLR (D. Kemei, J). The submissions by the respondent are in reply to the arguments by the appellant. The respondent has cited section 207 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya; section 174 of the *Penal Code*; *Arthur Muya Muriuki vs Republic* [2015] eKLR (Mativo, J) and *Wanjema v Republic* [1971] EA 493 (Trevelyan, J).

5. A full-fledged trial was not conducted, for the appellant pleaded guilty. Although an identification parade form was put in evidence as an exhibit, there was no way the trial court could assess whether or not the conduct of the parade was defective, for the appellant admitted the facts, and she had already pleaded guilty. No one raised issue with the form, at the time it was being produced, and the trial court was not obliged to pass judgment on the matter of the conduct of the parade.

6. On the plea taking exercise, I have closely gone through the record, and noted that the trial court followed the guidelines set out in section 207 of the Criminal Procedure Code. The record reflects that the charge was read to the appellant, and she responded to it. The facts were read out to her, and she answered to them. All looks well, except when the principles on guilty pleas are to be taken, set out in *Adan v Republic* [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA), are brought to bear on the process, particularly the recording, in the court file, that the charge and its elements were explained to the accused, in a language he understood, and he pleaded guilty to the charge with that understanding. The trial record is vague on that . Although it appears that the appellant was responding to the charge and the facts in Kiswahili, there is no record reflecting that that she ever said that Kiswahili was the language she understood or preferred to use. The record merely records that the charge and particulars were read to her in Swahili, the language the court noted she understood. It is not reflected that she understood the charge as read to her in Kiswahili. Regarding cautioning on consequences of pleading guilty, it was pointed out in, Adan v Republic [1973] EA 445 (Sir William Duffus P, Spry VP & Mustafa JA), that that only applied to capital offences.

7. Part of the argument appears to be with the use of the words “ukweli” and “ni kweli.” The plain meaning of the two, in ordinary English, is “true” and “it is true.” True in ordinary English and legalese does not mean the same thing with guilty. The challenge is whether Kiswahili has a word equivalent to guilty. The appellant, much as she has issues with “ukweli” being treated as equivalent to “guilty,” has not offered a Kiswahili word which translates directly to “guilty.” The use of “ukweli” and “si kweli,” to mean guilty and not guilty, before the trial courts in Kenya, is notorious, and the same is accepted as a proper mode of pleading to criminal charges.

8. However, what the appellant said in mitigation, changed the whole scenario, suggesting that “ukweli” and “ni kweli” were not used to mean that she was guilty, but rather to mean that it was factual that she did take the child, but she did not have the intent to steal. In other words, she admitted the actus reus, but not the mens rea. Her words at mitigation were that she was under the impression that the subject child was her child, who was staying with her aunt, AO, and that she did not know that the subject child was not the child with AO, and she did not intend to steal. That meant that the otherwise unequivocal plea of not guilty, became equivocal, once that statement was made at mitigation, and the trial court ought to have changed her plea to that of not guilty, so that her mens rea could be investigated and scrutinized in a full trial. See John Muendo Musau v Republic [2013] eKLR (Kihara Kariuki PCA, Ouko & Murgor, JJA).

9. On sentence, the offence of child stealing is related to child trafficking, which is a global menace. It is a serious offence, and a serious violation of the human rights of a child of tender years. If the appellant had succeeded in getting away with it, the child would have been separated from her biological mother, and denied her right to grow up within the environment of blood kith and kin. She would have been condemned to living a life with total strangers, against her will. She has a right to live with her own biological kin, unless she is separated from them through a legal process, not through criminal enterprise. Secondly, it cannot be guessed what the intentions of the appellant were with the child, for there is a possibility of the child having been stolen for the purposes of organ harvesting. The facts indicate that the appellant was caught while trying to spirit the child through the border into Uganda, which would have made it more difficult to trace the child. The circumstances called for a stiff penalty. The sentence imposed was legal, for it was within the limits allowed by section 174 of the Penal Code.

10. Overall, I find merit in the appeal, to the extent that the plea was not unequivocal, in view of the mitigation statement. I allow the same. The conviction in Busia CMCCRC No. 2904 of 2021, is hereby quashed, and the plea of guilty recorded substituted with a plea of not guilty. The sentence is set aside. The file in Busia CMCCRC No. 2904 of 2021 shall be returned to that court, for a full trial to be conducted on the basis of a plea of not guilty. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Masiga, instructed by Masiga Wainaina & Company, Advocates for the appellant.

Mrs. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.