Mutembei v Republic (Criminal Appeal E035 of 2023)
[2023] KEHC 25929 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25929 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E035 OF 2023

AK NDUNG'U, J

NOVEMBER 30, 2023

BETWEEN

CHRIS MUTEMBEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Maralal PM Criminal Case No E108 of 2023– J.L Tamar, SPM))

JUDGMENT

1. The Appellant , Chris Mutembei, was convicted on his own plea of guilty of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars were that on 16/04/2023 at around 2130hrs at Veterans Bar in Samburu Central Sub-County within Samburu County assaulted Samuel Nderitu by stabbing him on the left side of his stomach with a knife thereby occasioning him actual bodily harm.

2. The Appeal was drafted as on sentence only as can be gleaned from the petition of appeal dated 04/05/2023 but submissions made touch on an attack of the conviction. I will consider both facets of the appeal. The challenge on the conviction revolves around the manner in which the plea was taken. The petition of appeal raised the following grounds;

    i. The learned magistrate erred for sentencing the Appellant to a custodial sentence without considering other corrective sanctions provided under the Sentencing Guidelines.

    ii. The magistrate erred by failing to warn the Appellant on the danger of pleading guilty, the sentence to be meted and he was denied independent legal advice.

    iii. The magistrate erred by hurriedly sentencing the Appellant without calling for a pre-sentencing report to give him a better insight of the Appellant.

iv. The magistrate failed to find that the Appellant had acted out of provocation and the complainant was willing to forgive him.

v. The magistrate erred by relying solely on explanation given by the prosecution without calling the Appellant to give his side of the story and denied the victim an opportunity to address the court before sentencing.

vi. The magistrate failed to note that the Appellant was a first offender and a person of good character deserving a non-custodial sentence.

vii. The learned magistrate failed to note the credible mitigation raised by the Appellant in that he was remorseful and he was a school going child.

viii. The magistrate failed to note that he was a young person deserving a corrective sentence rather than the custodial sentence.

3. The Appellant's counsel filed skeleton and further submissions in which it is contended that the Appellant was not sufficiently warned of the dangers of pleading guilty and the nature of the sentence hence he did not have sufficient understanding of the nature of the offence and severity of the sentence. He pleaded guilty and therefore he did not waste the court's time. That the victim who had forgiven the Appellant was not given an opportunity to address the court for he was not allowed to do so. That it was prudent to call for pre-sentencing report considering the age of the Appellant and the fact that he was a first offender which would have helped the court to mete out a corrective sentence rather than a custodial one. That the sentence under section 251 of the Penal Code is not mandatory hence the trial court had discretion to mete out a non-custodial sentence depending on the circumstances of the case.

4. Further, that the trial court failed to explain the essential ingredients of the offence to the Appellant as was held in the case of *Adan v R* (1973)EA 446. That the trial court record did not indicate the language that was used to inform the Appellant the substance of the charge and its elements. There was no indication that the charge was interpreted in a language that he understood. That the use of one language to read the charge and another to read the facts might have been confusing to the Appellant. Further, the Appellant was not aware of some facts that were read since he was not supplied with documentary evidence especially medical documents. That the circumstances of this case did not call for a severe sentence and the Appellant's mitigation was not considered.

5. The Learned prosecution counsel in support of the conviction and the sentence submitted that the trial court complied with section 207(2) of the *Criminal Procedure Code* in that the statement of the charge and every element was stated to the Appellant in Kiswahili, a language he understood. After entering his plea, the facts were read and he responded by stating that the facts were true and a plea of guilty was entered. That at the time of taking plea, there were no unusual circumstances such as injury, or sign that he was confused or delay in bringing him in court that would have necessitated the court to reject his guilty plea. On the issue that he was not warned of the danger of pleading guilty, counsel submitted that the plea by the Appellant was unambiguous, it was clear and pointed to an absolute and unqualified admission. The plea was properly taken.

6. On the sentence, she argued that the facts presented pointed out to an aggravated offence since the Appellant stabbed the complainant on the stomach, he ran off and attempted to evade arrest but he was arrested by members of the public. That the learned magistrate considered the mitigating factor and the aggravating factor that the stab was penetrating and had to be stitched and found it fit to give a custodial sentence. That the Appellant was sentenced to 18 months which is way below the 5 years sentence under section 251 of the *Penal Code* and therefore, the sentence was lenient, not harsh and not excessive as claimed.

7. I have considered the rival submissions by the parties herein. The Appellant's counsel submitted that the plea was not unequivocal in that the language used during plea taking was not indicated, that the Appellant was not warned the consequences of pleading guilty and the severity of the sentence, and that the trial court failed to explain the essential ingredients of the offence to the Appellant.

8. According to the record, the trial magistrate recorded as follows during plea taking;

> 18/04/2023
>
> Before: Hon J.L Tamar (SPM)
>
> C/Pros: PC Ndira
>
> C/Ass: Veronicah
>
> Accused: Present
>
> The substance of the charge(s) and every element thereof has been stated by the court to the accused in the language that he/she understands, who being asked whether he/she admits or denies the truth of charge(s) replies; Ni ukweli.
>
> Court: Plea of guilty entered.
>
> Then the facts were read by the prosecution and after reading the facts the Appellant responded as follows;
>
> Accused: Facts are true
>
> Court: Accused convicted on his own plea of guilty.
>
> Prosecutor: Accused may be treated as a first offender.
>
> Accused mitigation
>
> I am sorry. It was my friend birthday.
>
> Sentence
>
> The accused person admitted the offence. The stab on the complainant was penetrating and had to be stitched. It would have been worse. In the circumstances the accused is sentenced to serve 18(eighteen) months imprisonment. Right of appeal within 14 (fourteen) days.

9. The procedure for taking plea is provided under section 207 of the *Criminal Procedure Code* which states as follows;

> (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.

10. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in *Adan v Republic*(1973) EA 445 at 446-

> " When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. 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 complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

11. The record reveals that the charges were read to the accused person and he responded by stating that 'Ni ukweli'. However, the language that was used to read the charge to the Appellant is not indicated on the record.

12. The Court of Appeal in *Elijah Njihia Wakianda v Republic* [2016] eKLR, considered the issue of failure of the trial court record to indicate the language used to read and explain the charge to the Appellant. The Court held as thus:

> " The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands. In the instant case, the record reads thus;
>
> > "Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - "It is true."
>
> With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction.
>
> We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language..... "

13. It is therefore clear that the trial magistrate erred by failing to record the language that was used to state the elements and the substance of the charge to the Appellant. The plea was not unequivocal. The question then would be what are the appropriate orders to make? Should a retrial be ordered? In my considered view for the scales of justice to be balanced, this would be the most appropriate order in the circumstances. I am fortified in this finding by the decision of the Court of Appeal in *Elijah Njihia Wakianda* (supra) where the court referred the matter back to the trial court for retrial. (See also *Alkano Galgalo Dida* Crim. App. No E007 2021; *Fidel Malecha Weluchi v Republic* (2019) (eKLR).

14. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In *Muiruri -v-Republic* [2003] KLR 552 where the court of appeal addressing suitability of a retrial held;

> " It, (retrial), will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedikiah Ojuondo Manyala v Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts".

15. Likewise, in *Samuel Wahini Ngugi v. R* [2012] eKLR: -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v. R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
>
> > 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'"

16. I have applied my mind to the facts and issues raised in this appeal. The record supports the proposition by the Appellant that the plea as taken before the trial court was not unequivocal. The conviction on the Appellant's own plea of guilt is legally untenable. It is set aside.

17. Following the decision in *Muiruri v Republic* [2003] KLR 552, this is a proper case for an order of retrial. No injustice will be visited on the Appellant if a retrial is ordered. A retrial will achieve desired justice for all the parties as the complainant should not be sent away from the court unheard following acts of omission by the court.

18. With the result that the conviction and sentence herein are set aside and substituted with an order that the Appellant shall be presented to court for a fresh trial before any other magistrate of competent jurisdiction other than J.L.Tamar SPM. The appellant is to be in the meantime held at the police station for processing and arraignment in court soonest.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER 2023

A.K. NDUNG'U

JUDGE