Murokoi v Republic (Criminal Appeal E095 of 2022)
[2023] KEHC 26728 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E095 OF 2022

DK KEMEI, J

DECEMBER 19, 2023

BETWEEN

SAMUEL MUROKOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Webuye, Hon. M. Munyekenye, SPM in the Criminal Case No. E330 of 2022 issued on 15th November 2022)

JUDGMENT

1. Samuel Murokoi was charged before Webuye Senior Principal Magistrate's Court with the main charge of burglary contrary to section 279 (b) of the *Penal Code* and an alternative charge of handling stolen goods contrary to section 322(1)(2) of the Penal Code.

2. During plea taking, the Appellant pleaded guilty on both the main and alternative charges. When Prosecution gave the facts of the case, the Appellant confirmed that the facts were correct. He was convicted on his own plea of guilt.

3. On 31st October 2022, the trial Court took his mitigation where he stated that it was not his wish to steal and that he was an orphan with no job. The prosecution on the other hand stated that the Appellant was a first offender. The trial Court proceed to call for a Probation Officer's report.

4. On 15th November 2022, the trial Court having considered the Probation Officer's report, noted that the Appellant was a habitual offender and that he was also convicted prior to this case in Webuye Criminal Case No. 21/2008 for stealing. It further noted that there was no change in the Appellant's behavior and proceeded to issue a sentence of seven (7) years' imprisonment on the main charge and fourteen (14) years for the alternative charge. The sentences were ordered to run concurrently.

5. It follows from the provisions of section 348 of Criminal Procedure Code that the Appellant's appeal can only be against the sentence, unless his conviction was unsafe. This is what was stated in the case of *Samuel Kanyiri Wanjiru vs. Republic* (2020) eKLR thus:-

> " No appeal on plea of guilty, nor in petty cases. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.
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> In Kisumu Criminal Appeal No.581 of 2010, *Alexander Likoye Malika Versus Republic* (2015) eKLR the Court of Appeal made reference to this section and stated as follows:-
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> > " "May we by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty-see section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused to which he has pleaded disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged..."

6. Aggrieved by the sentence of the trial Court, the Appellant filed the present appeal raising four grounds as follows: -

   i. That he pleaded guilty to the charges not knowing the dangers of pleading guilty to such an offence.

   ii. That the learned trial magistrate erred in law and fact by basing his conviction on fabricated facts by the Prosecution not withstanding there may be Police influence and pressure on the Appellant.

   iii. That the learned trial magistrate did not warn herself when handling two similar criminal cases belonging to one person as it required her to transfer the 2nd one to her fellow colleagues as required under law.

   iv. That the learned trial magistrate erred in law and fact by convicting the Appellant on his plea of guilty not putting into consideration that there may be a kind of pressure behind the issues.

7. The appeal was canvassed by way of written submissions. The Appellant in a nutshell submitted that there was fabrication of facts by the Prosecution and pressure on him by the Police by subjecting him to torture.

8. Opposing the appeal, the Respondent in a nutshell submitted that the Appellant's plea before the trial Court was unequivocal as the charges were read out to the Appellant and who confirmed the same as true plus the facts. Counsel relied on the case of *Obedi Kilonzo Kevevo vs Republic* (2015) eKLR. Counsel further submitted that an accused person convicted on his own plea of guilt may only be allowed to lodge an appeal on the sentence. Counsel relied on section 348 of the *Criminal Procedure Code* and the case of *Joseph Waweru Njoka vs Republic* (2001) eKLR. Counsel submitted that there was no illegality in the sentence meted out on the Appellant as it was within the confines of the law

and that the trial Court did exercise discretion. Counsel urged this Court to uphold the decision of the trial Court and dismiss this appeal.

9. Given that this is a first appeal, the role of this court is well settled. It was held in the case of *Pandya v R* [1957] EA 336 that this Court is duty bound to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.

10. As the Appellant was convicted on his own plea of guilty, the matter did not proceed on for trial, thus the trial Court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

11. Central to the appeal is the question of plea taking and whether the guilty plea was unequivocal. Article 50 (2)(b) of *the Constitution* states that: -

> "
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> "(2) Every accused person has the right to a fair trial, which includes the right- (b) to be informed of the charge, with sufficient detail to answer it."
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> Section 207 of the *Criminal Procedure Code* states as follows:
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> 207 (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 plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by 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;
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> 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."

12. Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. In the case of *Adan vs R* (1973) EA 445 and in the Court of Appeal case of *Kariuki vs R* (1954) KLR 809 the rendition of the Court was as follows:-

(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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

Further in the case of *Kariuki vs R* (supra) the Court went on and stated that:-

> " "The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

13. The Appellant was presented in lower Court on 31st October 2022 for plea. For purposes of completeness, i will reproduce the record of the lower Court:

Date: 31/10/2022

Magistrate: Hon. M. Munyekenye, SPM

Prosecutor/State Counsel: Awuor

Court clerk: Sharon

Accused: Present

Interpretation: Swahili

The substance of the charges and every element thereof has been stated by the Court to the Accused Person in Swahili language that he understands who being asked whether he admits or denies the truth of the charges replies:

Main count: Ni ukweli

Alternative count: Ni ukweli

Court: Plea of guilty entered for accused.

Ms. Awuor: Facts are that on 30/10/2022 at 4.15 am the Complainant heard someone break into his kitchen. When he came out he saw someone leave the kitchen. He was carrying a luggage. The person on seeing him ran away. He checked his kitchen and he noticed that his red cock was missing. He informed the village elder and neighbours. On the same day, the Accused was spotted trying to sell a red cock in colour fitting the description of the Complainant's cock. The cock was recovered at the Accused's home. A photo was taken-shown P. Exhibit-1. The Accused was apprehended and charged.

Court to Accused: Are the facts correct?

Accused: The facts are correct.

Court: The Accused convicted on main count. No orders as to the alternative count.

Ms. Awuor: The Accused is a first offender.

Mitigation by Accused: it is not my wish to steal. I have no parents. I have no work. I pray for Court to help me. I will not repeat.

Court: Mitigation and fact that Accused is 1st Offender have been considered. Mention on 15/11/2022 for Probation Officer's Report. Until then Accused remanded in custody.

M.Munyekenye, SPM

31/10/2022

15/11/2022

Magistrate: Hon. M. Munyekenye, SPM

Prosecutor/State Counsel: Awuor

Court clerk: Kibet/Sharon

Accused: in custody

Mr. Mokua: Probation Officer present

Mr. Mokua: The Probation Officer's Report is on Court record. I pray the Court considers the same.

Court: Matter placed aside. We will proceed after link is sent to prison.

M.Munyekenye, SPM

15/11/2022

Later Coram as before

Accused present virtually

Court: I have considered the Probation Officer's Report. I find that the Accused is a habitual offender. In Webuye Criminal Case No. 21/2018, Accused was charged of stealing and convicted. It seems the Accused has not changed his behavior, is unwilling to change and cannot change within the society.

On the first limb of the offence of Burglary contrary to Section 304(2) of the *Penal Code*, the Accused is sentenced to 7 (seven) years imprisonment.

On the second limb of stealing contrary to Section 279 of the *Penal Code* the Accused is sentenced to 14 (fourteen) years imprisonment.

The jail terms will run concurrently.

Right of appeal 14 days.

M.Munyekenye, SPM

15/11/2022

14. The lower Court record as reproduced above indicates that the proceedings in the case were conducted in Kiswahili language. The Appellant replied to the charge and to the particulars of the charge in Kiswahili language. He mitigated to the Court in the same language. The proceedings were conducted in Kiswahili language that the Appellant understood. However, in *Mose v R* (2002) 1 EA ,163, the Court of Appeal Chunga CJ Lakha and Okubasu JJA held;

> " The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent." In the same vein, in *George Wambugu Thumbi v Republic* Criminal Appeal 1 of 2018 [2019] eKLR the Court held:
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> > " "It is time that when an accused person responds 'it is true' to a charge read to him or her, to be asked what exactly he is saying is true to."

15. Against the backdrop of the aforementioned authorities, it is noted that when the charges were read to the Appellant, he responded that 'Ni Ukweli', which means 'it is true'. The record does indicate that the substance of the charges and every element thereof were stated by the Court to the Appellant in Swahili language but this still raises doubts as to whether the plea was therefore unequivocal.

16. Going further, I associate myself with the sentiments regarding an unequivocal plea of guilty–especially where the accused person was unrepresented and the charges facing them attracted a custodial sentence as expressed by Ngugi J (as he was then) in Simon Gitau *Kinene v Republic* Criminal Appeal 9 of 2016 [2016] eKLR:

> " 19. Finally, Courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:
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> > " In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the Court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."

17. Flowing from the above case, it was pertinent that the Appellant be made to understand the gravity of the charges facing him. The record show that the trial magistrate never explained to the Appellant the consequences of the plea of guilty and the sentence to be imposed thereafter but proceeded to enter a plea of guilty on the premise that the Appellant indicated the charges were 'true' and the facts were 'correct'. The Court of Appeal in *Paul Matungu vs. Republic* [2006] eKLR 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"

18. Again, the Courts have always held that extra caution needs to be taken in the case of undefended accused persons who plead guilty. The Appellant herein was not represented by an advocate while taking his plea hence the trial magistrate ought to have been extra cautious. In my view, the circumstances under which the plea of guilty was taken made it not to be unequivocal.In totality, I am of the persuasion that it would be unsafe to uphold the guilty plea in the circumstances.

19. What is the course available to the Court in such circumstances? Article 159(2) of *the Constitution* recognizes the principles that should govern the exercise of judicial authority. These are:

    a. Justice shall be done to all, irrespective of status;

    b. Justice shall not be delayed;

c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

20. The Judiciary Alternative Justice Systems Baseline Policy,2020 recognizes the importance of traditional justice systems in the resolution of both civil and criminal disputes. It adopts the Agency Theory of Jurisdiction as the constitutionally permissible modality to determine the acceptability and propriety of a particular dispute, controversy or issue to be before an AJS Mechanism. This theory also challenges us to go beyond the narrow view in criminal law of taking these cases as disputes between the State and the individual, and not between two individuals.

21. This theory has been applied in *Republic v Mohamed Abdow Mohamed* [2013] eKLR where the Court discharged an accused who had been charged with murder in keeping with the agency theory, since the Court established that there was consent in the withdrawal of the matter. A similar situation prevailed in *Republic v Musili Ivia & another* Criminal Case No. 2 of 2016 [2017] eKLR.

22. I have set out the above rendition as it is my feeling that given the circumstances of this case, a more appropriate approach would have been to engage the accused person in traditional dispute resolution. I say so emboldened by the fact that the Appellant is a young man of 25 years at the time the offence was committed but I also consider the Probation Officer's Report that the Appellant is a repeat offender and the sentiments of the area chief, and the village elder that confirmed that prior to his arrest in 2018 they had handled many cases involving him. They further noted that the Appellant was released from jail after serving three years.

23. In other words, should the Court order a retrial? The Court of Appeal in the case of *Ahmed Sumar vs. R* (1964) EALR 483 offered the following guidance:

> " ...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 the 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;....."

24. The Court of Appeal likewise had the following to say in the case of *Samuel Wahini Ngugi vs. 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 vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> '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'

That decision was echoed in the case of *Lolimo Ekimat vs. R*, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

> "'...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"

25. In this case I believe it will appropriate if a re-trial is ordered unlike Alternative Dispute Resolution Mechanism. It transpired from the proceedings that the appellant is a repeat offender and hence not suitable to be processed under the alternative justice system. The appellant has barely served a fraction of the sentence and that there is no evidence that the prosecution will have difficulty in getting witnesses in the event of a plea of not guilty entered by the accused.

26. Accordingly, I find merit in the appeal. The same is allowed. the Appellant's conviction is hereby quashed and the sentence set aside and is substituted with an order for a retrial. The appellant is ordered to be presented before the Senior Principle Magistrate Webuye on the 20/12/2023 for purposes of the re-trial.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF DECEMBER 2023.

D. KEMEI

JUDGE

In the presence of:

Samuel Murokoi Appellant

Mwaniki for Respondent

Kizito Court Assistant