REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER E 050 OF 2021

ANTHONY MUTHONGA MUNENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mavoko Chief Magistrate's Court Traffic Case No. E359 of 2021,

Hon. H Onkwani, PM delivered on 10th and 11th August, 2021)

BETWEEN

REPUBLIC .....PROSECUTOR

VERSUS

ANTHONY MUTHONGA MUNENE.....ACCUSED

JUDGEMENT

1. The appellant herein, **Anthony Muthonga Munene**, was charged in Mavoko Chief Magistrate's Court Traffic Case No. E359 of 2021 with the offence of Causing Death by Dangerous Driving Contrary to Section 46 of the Traffic Act. When the charge was read out to him the first time, he pleaded guilty but when the facts were read out, he denied the same and a plea of not guilty was entered. That was on 23rd June, 2021. On the 9th August, 2021, he indicated that he was ready to change his plea and the matter was deferred to 10th August, 2021. On 10th August, 2021, the charge was read over to him and he pleaded not guilty. However, instead of having the facts read over to him as was done the first time, the prosecution simply stated that the facts were as per charge sheet and then proceeded to produce the post mortem report and motor vehicle inspection report. There was no response to the Appellant as regards the facts simply because the same were never read out.

2. The appellant then mitigated and without being convicted, he was remanded in custody for sentencing which was done on 11th August, 2021 when he was sentenced to serve 10 years imprisonment.

3. Without necessarily going into the grounds of appeal, one needs to determine whether the manner in which these proceedings were conducted were in compliance with the law. Before doing that an issue arses as to whether an appeal lies against a plea of guilty. I agree with **Mr Ngetich** learned counsel for the State that since the conviction and sentence of the Appellant arises from his plea of guilty, section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence by providing that:-

> ***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 and legality of the sentence.***

4. In the case of **Olel v Republic [1989] KLR 444,** it was held that:-

"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

5. It follows that the appellant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.

6. That bar, in my view only operates where the plea is unequivocal. Accordingly, that bar does not bar the Court from inquiring as to whether a *prima facie* plea of guilty was unequivocal or not. Similarly, it does not bar the court from making an inquiry as to whether the facts constituted any offence. Where the plea in unequivocal, I agree with **Mwita, J's** holding in **John Shikoli Atsunzi vs. Republic [2016] eKLR** that that would make the conviction unlawful thus justifying the court in addressing itself on the issue of conviction.

7. In Alexander Lukoye Malika vs. Republic [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

"A court may only interfere with a situation where an accused person 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 person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

8. Accordingly, if the plea is equivocal, the court has a duty to step in.

9. The manner of recording of a plea is provided for in section 207(1) and (2) of the ***Criminal Procedure Code*** provides as hereunder:

(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 manner of recording plea of guilty was dealt with in **Ombena vs. Republic [1981] eKLR** where 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."

In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:

"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."

11. It is therefore clear that the charge, the particulars and the ***facts*** must be read to the accused in his language or in a language he understands. This is my understanding of the decision in **K N vs. Republic [2016] eKLR**, where it was held that:

"The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;

'…before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.'

Where an accused person who has been called upon to plead under section 207 of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself. The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts the prosecution's role is to present the evidence that could have been proven if the case had gone to trial. Therefore for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial."

12. In this case, the Appellant indicated his language of preference as Kiswahili. The facts as contained in the charge sheet were expressed in English. It was the duty of the Court to ensure that the said facts were not only read over to the Appellant but were read over to him in a language which he had indicated that he understood. This was so particularly as in the first instance the Appellant had initially pleaded guilty to the same charge but upon being read to the facts denied the same.

13. In this regard I associate myself with the opinion of the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR** that:

"Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms."

14. Apart from that the charge facing the Appellant was a serious one. In **Elijah Njihia Wakianda vs. Republic** (supra) the Court expressed itself as hereunder:

"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. 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."

15. I associate myself with **W. Korir, J** in **Abdallah Mohammed vs. Republic [2018] eKLR** where he expressed himself as hereunder:

"A plea of guilty can only be entered in respect of an offence known to the law…In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.

15. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by Joel Ngugi, J in Simon Gitau Kinene v Republic [2016] eKLR when he stated that:

'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:

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.'"

16. I therefore find that the manner in which the charge was read out to the appellant did not strictly comply with section 207(1) and (2) of the ***Criminal Procedure Code.*** In the premises the appellant's plea cannot be said to have been unequivocal and **Mr Ngetich**, learned counsel for the Respondent, was right in not opposing this appeal.

17. What is the course available to the Court in such circumstances? 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;....."

18. 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:

'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.'"

19. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522 and Fatehali Maji –vs- Republic (1966) EA, 343** the view expressed was that: -

"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

20. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."**

21. In this case the appellant was sentenced on 11th August, 2021 for a period of 10 years. In those circumstances, I agree with **Mr Ngetich**, learned counsel for the Respondent that the appropriate order wold be to order for retrial.

22. Accordingly, the appeal is allowed, the appellant's conviction is hereby set aside and his sentence quashed. I direct that the matter be heard de novo.

23. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Mulandi for the Appellant

Mr Ngetich for the Respondent

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