Njue v Republic (Criminal Appeal E026 of 2022)
[2022] KEHC 12247 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E026 OF 2022

LM NJUGUNA, J

JUNE 29, 2022

BETWEEN

DAVID MURIMI NJUE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was convicted and sentenced on his own plea of guilty in Principal Magistrate's Court at Siakago in MCCR No. E219 of 2022 for the offence of: Count 1 Robbery with Violence contrary to section 295 as read with 296 (1) of the *Penal Code* and Count 2; willfully resisting a police arrest contrary to section 103 (a) of the *National Police Service Act* No. 114 of 2011.

2. The particulars of the first count are that on March 10, 2022at Kanyuambora Township in Mbeere North Sub County within Embu County, robbed Rosemary Mwende 21,670.00 and at the time of such robbery used actual violence to the said Rosemary Mwende; in reference to the second count, that on the March 16, 2022at Kanyuambora Township in Mbeere North Sub- County within Embu County, willfully and unlawfully resisted No. 64343 Cpl. Ireri and No. 226240 Babusa Galana who were acting in due of execution of their police duties.

3. The appellant was arraigned before the court on March 21, 2022and wherein the charges and the facts of the case were read out to him and he pleaded guilty and the court thus entered a plea of guilty and proceeded to sentence the appellant to Thirty (30) years' imprisonment in reference to Count 1 and six (6) months imprisonment for Count 2.

4. Aggrieved by the conviction and sentence, the accused by a Petition dated April 1, 2022has approached this court on grounds that :

    i. The learned trial magistrate erred in both law and fact by failing to consider that during the plea taking, the appellant claimed to have been tortured and forced to accept the charges preferred against him.

    ii. The learned trial magistrate erred in law and fact by not being cognizant of the fact that the appellant and the complainant had reconciled.

    iii. The learned magistrate erred in both law and fact by rejecting the appellant's defence and /or mitigation without giving any cogent reasons.

    iv. The learned trial magistrate erred in law and fact by failing to record reasons for her determination.

5. The Court is urged to allow the appeal, quash the conviction and set aside the sentence of the trial court.

6. The appellant submitted that the police officers beat him while he was in the cell to make him concede to the fact that he actually perpetrated the offence and any failure would attract dire consequences. That upon being arraigned to take plea, he was confused and absent minded and therefore, he admitted that he perpetrated the offences. He submitted that the trial magistrate failed to explain to him the consequences of his plea given the seriousness of the offence and as a result, his rights were infringed upon. Further, it was his case that on the material day, he was drunk and never understood the charge/s facing him and only realized the consequences of his actions upon being sentenced to serve thirty (30) years imprisonment. He thus pleaded with this court to set him at liberty and in the alternative, order for a retrial in order for justice to be served.

7. Ms. Leah Mati, the learned prosecution counsel made oral submission in response to the appellant's submission and wherein she conceded that although the appellant pleaded guilty, there was impropriety on the part of the trial magistrate in that the court never explained to the appellant the consequences of his plea. In the end, the respondent prayed that the matter herein be remitted back for retrial.

8. 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 give allowance for that.

9. The appellant having been convicted on his own plea of guilty, the matter did not proceed for trial, thus the trial court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

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

    "(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."

11. Section 207 of the *Criminal Procedure Code* states as follows:

> '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;
>
> 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 v R* (1954) KLR 809 the court was of the view 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 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.

13. The accused having been arraigned before court on March 21, 2022 and after the substance of the charge and particulars of the offences were read to him, pleaded guilty. For completeness I will reproduce the record of the lower court wherein the accused on count one replied as' Ni ukweli' and on the second count, he also replied as 'Ni kweli'. The court then noted that the appellant was convicted on his own plea of guilt and upon mitigation, sought for forgiveness stating that he was drunk and further that, he had reconciled with the complainant.

14. In the case of *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:

> " "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. As was submitted by the parties, I note that the trial court did not warn the appellant of the consequences of pleading guilty. The importance of warning the accused person of the consequences of pleading guilty was considered in the case of *Elijah Njihia Wakianda v Republic* [2016] eKLR where the Court of Appeal held that;-

> " .....We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, it 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....."
>
> [See also *Paul Matungu v Republic* [2006] eKLR].

16. This duty exists not only in relation to capital offences but other serious offences to whose sentences may be indefinite or long. The Court must ensure that not only the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but also that he understands the sentence he faces where he opts to plead guilty as failure to do so is a violation of the accused's right to fair trial. [See *Fidel Malecha Weluchi v Republic* [2019] eKLR].

17. Flowing from the above cases, it was pertinent that the appellant be made to understand the gravity of the charges facing him and thereafter be informed of the consequences of his plea. The offence facing the appellant was a serious one and the court ought to have made sure that the appellant was aware of its gravity.

18. From the above, it is clear that the plea by the appellant was equivocal and the same cannot stand. The question therefore is what orders should this court issue in the given circumstances? The appellant in his submissions prayed that this court do set him at liberty while on the other hand, the respondent prayed for an alternative order for a retrial.

19. The law as to when a retrial should be ordered has long been settled. In the case of *Fatehali Manji v Republic* [1966] EA 343 the Court of Appeal when dealing with the same issue, gave the following guideline;

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."
>
> See *Philip Kipngetich Terer v Republic* [2015] eKLR].

20. Similarly, in the case of *Muiruri v R* [2003] KLR 552, the Court held that: -

> "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 *Zedekiah Ojuondo Manyala Vs 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 court's."

21. From the authorities above, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interests of justice on the one hand and those of the accused person on the other.

22. The record shows that the appellant was arraigned before court on 21.03.2022 and then sentenced on the same day without the court explaining to him the consequences of his plea. Being guided by Article 159(2) of *the Constitution* which recognizes the principles that should govern the exercise of judicial authority. Which are:

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

b) Justice shall not be delayed;

c) .....

23. Further, in reference to the powers of this Honourable Court, on appeal [See Section 354 of the *CPC*] which include that;

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) .....

(iii) .....

24. In the above premises, I do allow the appeal and remit the matter back for retrial before a different magistrate.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2022.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent