Kirui v Republic (Criminal Appeal E046 of 2021)
[2022] KEHC 15632 (KLR) (22 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15632 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E046 OF 2021

RL KORIR, J

NOVEMBER 22, 2022

BETWEEN

VINCENT KIMUTAI KIRUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Conviction and Sentence by Hon. Kipkurui Kibelion, PM)
in Bomet Magistrate's Court Criminal Case Number E086 of 2021)

JUDGMENT

1. The appellant was charged and convicted of the offence of grievous harm contrary to section 234 of the *Penal Code*, cap 63 Laws of Kenya. The particulars of the charge were that on the January 18, 2021, at around 0700 hrs at Menet sub-location in Mengi location within Bomet county, unlawfully caused grievous harm to CSK.

2. The appellant was first arraigned before the trial court on January 10, 2021 to take plea. He was originally charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code* to which he pleaded guilty to. The prosecution then brought an application to amend the charge on January 26, 2021 where the appellant was freshly charged with the present offence of causing grievous bodily harm. The amended charges and statement of charge were read to him in Kipsigis language and he stated that he understood what he was charged with. He also stated that it was true and a plea of guilty was subsequently entered.

3. Having been convicted on his own plea of guilty, the appellant was sentenced to serve seven (7) years imprisonment by the trial court.

4. Despite being convicted on his own plea of guilty, the appellant was dissatisfied nonetheless and filed a memorandum of appeal on December 15, 2021 raising five grounds of appeal against the conviction and sentence as follows: -

1. Thathe pleaded guilty at the trial.

2. Thatthe trial court erred in law and fact by not considering that he was a person without professional or specialized knowledge on a matter of law and that the trial court failed to caution him on the repercussions of pleading guilty to the charge.

3. Thatthe trial court did not inform him of the charges he faced in accordance with article 50(1)(2)(b) of the*Constitution* of Kenya 2010.

4. Thatthe learned trial magistrate erred in law and fact by not taking into consideration that he was convinced by the police officers to admit the offence after he was advised that he was facing assault charges and would then be forgiven and set free.

5. That he prayed for a re-trial and to be present during the hearing of the appeal.

5. On April 4, 2022, the appellant filed before this court an amended memorandum of appeal as follows:-

1. Thatthe learned trial magistrate erred in law and fact in failing to observe the procedure used to obtain a guilty plea which resulted in an unequivocal guilty plea.

2. Thatthe learned trial magistrate erred in law and in fact by proceeding on a misconception of the law and ended up imposing an unduly hard sentence to the appellant.

3. Thatthe learned trial magistrate erred in law and in fact in failing to consider that there were threats, intimidation and blackmail.

4. Thatthe appellant was a form four student at [particulars withheld] secondary school of age 17 at the time of his arrest and hence the trial court violated the provisions of article 25 (a) (c) and 53 (1) (d) of the *Constitution* of Kenya 2010.

6. By court directions on March 24, 2022, the parties were directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

7. The appellant's submissions were filed on April 4, 2022. He submitted on the four grounds raised in his amended memorandum of appeal. Firstly, he submitted that the plea of guilty entered on record by the trial court was not unequivocal. He stated that even though he had lost his right of appeal on conviction as per section 348 of the *Criminal Procedure Code*, it was the duty of the trial court to have taken extra steps to caution him of the consequences of his plea especially because he was unrepresented. He relied on the case of *Paulo Malimi Mbusi v Republic*, Kiambu Criminal Appeal No 8 of 2016 (UR). It was his submission that the plea of guilty was unsafe under the circumstances.

8. Secondly, the appellant submitted that the sentence was harsh and did not conform to the objectives of sentencing. That he was reformed and fully equipped to be reintegrated back to society. He cited the *Magistrates' Courts Bench Book* at page 86, paragraph 6 and the case of *Dahir Hussein v Republic*, Criminal Appeal No 1 of 2016.

9. Thirdly, the respondent submitted that he only pleaded guilty to the charge because he had been threatened and intimidated by the police and was consequently never given time by the trial court to inform them of this. That he pleaded guilty in a desperate bid to secure his freedom and that the police took advantage of his gullibility and vulnerability.

10. Lastly, the appellant submitted that article 25 (1) (c) and 53 (1) (d) were violated since he was a first offender. Further, that he had maintained good behaviour for the two years in prison.

The Respondent's (Prosecution's) Submissions.

11. In this appeal, the prosecution, made oral submissions in court on June 22, 2022 where they opposed the appeal on the grounds that the appellant pleaded guilty on his own after the charge was read to him in Kipsigis language which he understood. They also submitted that the sentence of 7 years imprisonment was lenient and urged the court not to interfere with it. They prayed for the appeal to be dismissed.

12. It is the duty of the first appellate court to re-evaluate the evidence presented at the trial court and arrive at its own conclusions. This duty was succinctly stated by theCourt of Appeal for Eastern Africa in *Pandya vs. Republic* (1957) E.A. 336 where it stated thus:-

> "On a first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

13. I have perused the trial record and considered the two memoranda of appeal filed on December 15, 2021 and April 4, 2022, the appellant's submissions and the respondent's submissions. I discern two issues for my determination as follows:-

    i. Whether the plea of guilty was entered in accordance with the established legal principles.

    ii. Whether the sentence was legal and just.

i. Whether The Plea Of Guilty Was Entered In Accordance With The Established Legal Principles.

14. The offence of grievous bodily harm is provided for under section 234 of the P*enal Code*, cap 63 as follows:-

    234. Grievous harm

    Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

    section 4 of the Act further defines grievous harm as follows:

> "grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;

15. The appellant in this case was originally charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. He pleaded guilty at the first round of plea taking on January 10, 2021. However, the charge was later amended and he was charged with the more serious offence of grievous harm. The facts were read to him and he pleaded guilty.

16. The offence of grievous harm attracts a sentence of life imprisonment. It was the contention of the appellant that being unrepresented by counsel, the trial court ought to have taken steps to ensure that he understood what he was pleading to.

17. It is trite that no appeal can lie in respect of a conviction where a party pleaded guilty. Section 348 of the *Criminal Procedure Code* states thus:-

> " 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."

18. The Court of Appeal in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR held 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."

19. A plea of guilty must be unequivocal. The guiding principles in recording a plea of guilty were outlined under section 207 of the *Criminal Procedure Code* 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 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."

20. Similarly, in the *locus classicus* case of *Adan v Republic* [1973] EA 445, the court restated the procedure for recording a plea of guilty as follows: -

> " a. The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands.
>
> b. The accused's own words in reply should be correctly translated into english and carefully recorded.
>
> c. If the accused admits the charge, then the facts pertaining to the charge shall be read out to the accused, still in vernacular or in some other language that he understands.
>
> d. The accused shall then be asked to confirm to the court whether or not he admits the facts as given and in this regard, his full answer shall be recorded by the court.
>
> e. Where the facts as given are admitted, the court shall proceed to confirm the plea of guilty and to convict the accused.

f. Where the accused's response to the facts suggests a change of plea, the same shall be recorded and a plea of not guilty entered."

(See also Baya v Republic [1984] KLR 657)

21. As to whether a plea of guilty is unequivocal or not will depend on the facts and circumstances of the case. I have considered the evidence on the trial record. The amended charge was read to the accused in Kipsigis language to which he answered, 'It is true'. The facts of the case were read to the appellant by the prosecutor and he stated that the facts were correct. The court subsequently recorded a plea of guilty. The record clearly shows that the court assistant was at hand to interpret english/kiswahili/ kipsigis.

22. The appellant has argued that the trial court did not explain to him the consequences of pleading guilty to the charge. That he was also never informed that the new charge differed from the original charge and was unlikely to attract a similar sentence.

23. The record however shows that the trial prosecutor made an application to amend the charge and the accused was given a chance to respond. It indicated that he had no objection and it was only then that the amended charge was read to him. It cannot be true therefore that he did not follow the proceedings.

24. I have considered the trial court record bearing in mind the safeguards in recording an unequivocal, conscious and free plea of guilty. The safeguards were aptly restated in the Court of Appeal case of *Elijah Njihia Wakianda v Republic* [2016] eKLR where the court held thus: -

> "…..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……." (emphasis mine).

25. Having reviewed the evidence in totality and the manner in which the plea was taken, I am satisfied that the plea was read to the appellant in the language that he understood, that his response which was "ni ukweli" to mean 'it is true' was properly recorded, that upon admission of the charge, the facts were further read to him and he confirmed that they were correct. It was on this premise that the trial court entered a plea of guilty against the appellant. I am satisfied that the plea was unequivocal. He is therefore precluded from seeking an appeal on his conviction as provided by section 348 of the *Criminal Procedure Code*.

iii. Whether the sentence was legal and just.

26. During sentencing, the trial court considered the appellant's mitigation and expressed its sympathy towards the appellant who at the time was a student in form 4 awaiting his examinations. Nonetheless, the trial court formed an opinion that the actions of the appellant warranted the kind of sentence that would reform and rehabilitate the appellant and thus, sentenced him to serve 7 years imprisonment.

27. The respondent submitted in this appeal that the sentence meted by the trial court was lenient and therefore ought not to be interfered with.

28. In order to arrive at a just sentence, this court called for a pre-sentence probation officer's report. The same was filed on September 1, 2022.

29. The Supreme Court of India in *Alister Anthony Pereira v State of Mahareshtra* at paragraph 70-71 gave guidance on the objectives of sentencing as follows: -

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

30. The objectives of sentencing are also clearly outlined in the Judiciary Sentencing Policy Guidelines 2016 at page 15, paragraph 4.1 and 4.2 as follows:-

    1. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    3. Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding person.

    4. Restorative Justice: to address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

    5. Community protection: to protect the community by incapacitating the offender.

    6. Denunciation: to communicate the community's condemnation of the criminal conduct.

        4.2. These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality."

31. In the New Zealand case of *R vs. AEM* (200) it was decided: -

> " ... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."

32. I have considered the gravity of the offence committed by the appellant, the surrounding circumstances of the case, the accused's mitigation, and the probation officer's report. The facts of this case were rather bizarre. The appellant who was a student at [particulars withheld] secondary school waylaid the victim on the way to school and cut her on the head with a panga causing her serious injuries. The probation report stated that the two had a relationship and the appellant was ired by the victim whom he suspected of having another relationship with a school staffer. On this appeal, the appellant told the court:-

> " I was a student, 18 years old. I didn't know the law. The victim was a fellow student. She was my girlfriend. We had agreed to marry after school."

33. This court echoes the sentiments expressed by the trial court in sentencing the appellant. It emphathizes with the appellant who was just entering the prime of his youth. It is clear that he laboured under the mistaken notion that he owned his girlfriend and she therefore had no right to leave him. His rash behaviour occasioned a young lady serious injury which caused her disfigurement and halted her education for some time. This is conduct that must be sanctioned and punished. It is a state of mind that must be rehabilitated. A custodial sentence would send the right signal that young people must learn to negotiate relationships peacefully and not resort to the use of violence.

34. Having stated the above, I have taken into account the fact that the appellant was a first offender and had no prior criminal records. I have also considered that he has undergone some self-reflection and participated in rehabilitation programs for the two years he has been in prison. I will temper justice with mercy and reduce his prison sentence.

35. I reduce the sentence of 7 years to 4 years imprisonment from the date of conviction in the trial court being January 26, 2021.

36. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 22ND DAY OF NOVEMBER, 2022

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered virtually in the presence of the Appellant acting in person, Mr. Waweru for the Republic and Kiprotich (Court Assistant).