REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 42 OF 2018

JK..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted of the offence of threatening to kill contrary to Section 223 (1) of the Penal Code wherein he pleaded guilty and the trial court sentenced him to imprisonment at president's pleasure.

2. It is this conviction and sentence which necessitated the appeal herein and which was instituted by way of petition of appeal filed in court on 06/11/2018 wherein the appellant raised six (6) grounds. Basically, the appellant's grounds of the instant appeal are that the trial court erred in law and fact when it failed to note that the appellant had a recurring mental problem and went against the doctor's recommendation; when it failed to consider the appellant's mental disability in sentencing him at the presidential pleasure; and when it failed to consider the sentence provided for the offence under Section 223(1) of the Penal Code.

B. Submission by the parties

3. The appeal was canvassed orally. The appellant submitted that he wanted to be heard afresh because he was not given a chance to defend himself and further urged this court to review the sentence as he was remorseful. Ms. Mati for the respondent on her part submitted that the appellant was legally barred from appealing against a plea of guilty save for the legality of the sentence. In a rejoinder, the appellant prayed that he be placed under probation.

C. Issues for determination

4. This being a first appellate court, the duty bestowed upon it (as was stated in **Okeno vs Republic [1972] EA 32)** is to re-examine the evidence (facts and evidence) presented before the trial court and evaluate the same in order to determine whether the trial court erred in law and fact to the extent raised in the petition of appeal. Even where no evidence was adduced by the prosecution witnesses (for instance where a plea of guilty is recorded), the appellate court is still obligated to scrutinize the proceedings in their entirety so as to ascertain whether or not the sentence was lawful and legal.

5. I have definitely considered the record of the trial court and it is my view that the main issue which needs to be decided is whether the appeal herein is merited.

D. Applicable law and determination

6. As I have noted, the appellant herein pleaded guilty when he was arraigned before the trial court. However, it is trite that before a plea of guilty is entered, the trial court must ensure compliance with the law and practice related to the taking and recording of a plea of guilty as was laid down in ***Adan v Republic (*****1973) EA 445 and which law and practice is aimed at ensuring that an accused person understands the nature of the charges he is facing. {See *John Muendo M. –vs- Republic [2013] eKLR* and Willy Kipchirchir –vs- Republic [2015] eKLR)}.** The obvious presumption when the trial court is recording a plea of guilty is that the accused has a requisite mental capacity to take plea. Where the accused person does not have the mental capacity to take plea, the plea therein cannot be said to be unequivocal.

7. In the instant case, the trial court records are clear that the appellant was arraigned in court on 22/10/2018 and upon pleading guilty, the prosecution prayed for another date for facts and on 26/10/2018 the matter came up for facts. The record further indicates that before the facts were read, the charges were again read to the appellant and he pleaded guilty. Upon the reading of the facts he confirmed the same to be true and the appellant was convicted on facts. The appellant was then invited to mitigate and wherein he indicated that he was mentally unstable. In **John Muendo Musau –vs- Republic [2013] eKLR,** the Court of Appeal while reiterating the law on plea taking held that; -

"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in Adan vs Republic (supra) is also provided for under section 207 of the Criminal Procedure Code."

8. It is my considered view that by the appellant having indicated to the trial court that he was mentally insane, the court ought to have changed the plea of guilty to that of not guilty on the day the appellant indicated that he was mentally insane. That is notwithstanding the earlier report dated 8/10/2018 from Mathare Hospital confirming that the accused was fit to stand trial.

9. Further, the records indicate that the prosecution informed the court that the appellant herein had previously been charged in Criminal Case No. 275 of 2018 with a similar offence but which was withdrawn under Section 87(a) of the Criminal Procedure Code pending his treatment at Mathare (after the appellant herein was found fit to stand trial). On 8/10/2018, a report of Mathare Hospital confirmed the accused was fit to stand trial and on 21/10/2018 he was charged with the same offence and he pleaded guilty. On 26/10/2018, he informed court that he was unwell and he was escorted for mental examination and results therefrom indicated that he was unfit to stand trial.

10. It is my view that, if the trial court well analyzed the evidence before it (in relation to the mental status of the appellant herein) in that the appellant had previously been found mentally unfit to stand trial (vide a report of 28/05/2018) and later treated, and further that the appellant was found to be mentally unfit to stand trial just seven days from the date of plea, the trial court ought to have treated the issue cautiously and looked at the plea initially taken jealously. This is bearing in mind that what was before it was an issue which would have the effect of curtailing the rights of the appellant herein and further that the appellant was undefended. Courts have always held that extra caution needs to be taken in the case of undefended/unrepresented and where an accused person is unrepresented, the duty of the court to ensure that the plea of guilty is unequivocal is heightened. (See **James Khisa v Republic [2019] eKLR).**

11. Taking into consideration all the above, it is my view that the plea by the appellant herein was not unequivocal. The appellant did not have the requisite mental capacity to take plea. As such, the plea itself, proceedings that ensued, the conviction and the sentence were all a nullity. The Appellant's conviction ought to be quashed. The sentence that was imposed on him is hereby set aside.

12. Ms. Mati for the State submitted that the appellant could not appeal against a conviction based on a plea of guilty unless on the legality of the sentence only. It appears that she based these submissions on the provisions of section 348 of the Criminal Procedure Code which bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. **However, 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."

13. As such, it is clear that if the plea is equivocal, the court has a duty to step in. **In the instant case, the plea by the appellant was equivocal and thus the appeal in relation to the same can be entertained.**

14. The issue that remains for determination is whether the court should order for the retrial of the appellant as requested by appellant. The law as to when a retrial should be ordered has long been settled. In the case of **Fatehali Manji Vs 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 –vs- Republic [2015] eKLR)**

15. In **Muiruri Vs 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."**

16. In Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that: -

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

17. From these authorities, 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.

18. In the present appeal, this court ordered the appellant to be taken for mental assessment and a report was filed herein to the effect that he is fit to plead. However, from the facts read before the trial court, it is my view that on a proper consideration of the potentially admissible evidence, a conviction might result as one of the prosecution's witnesses is the complainant (Mary Njura). The appellant if convicted is liable to imprisonment for term not exceeding ten (10) years. He was arrested on 10/05/2018 and sentenced on 1/11/2018 and thus has served two years in prison and which period should be taken into consideration just in case the trial court convicts him and thus the same occasioning no injustice to the appellant herein. Further, it is a constitutional right for any person to have access to justice and have his or her case determined in an impartial and fast justice system.

19. Taking all the above into consideration, it is my view that by the fact that the trial was illegal, and further that the victim of the offence herein deserves justice, and further taking into consideration that the time spent in prison will be taken into account in the event the appellant is found guilty after the retrial, it is my considered view that the an order for retrial ought to be ordered and the appellant ought to be produced in court and the trial ought to be conducted by a court different from the trial court.

20. The appellant should thus be produced before a court of competent jurisdiction for plea taking, within 14 days from today.

21. In the meantime, he should be released and be held in the nearest police station as he awaits his arraignment to court.

22. It is so ordered.

Delivered, dated and **signed** at **Embu** this **20th** day of **January, 2021.**

L. NJUGUNA

JUDGE

……………………………………………………..for the Appellant

…………………………………………………….for the Respondent