REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 14 OF 2020

DAVID NDWIGA NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. When the appellant herein was arraigned before the trial court on 19.03.2020 with the charge of arson contrary to Section 332(a) of the Penal Code, he pleaded guilty and a plea of guilty entered. The facts were read by the prosecution and the appellant herein confirmed the facts as true. He was subsequently convicted on his own plea of guilty. Upon mitigation, the court after considering the same, proceeded to sentence the appellant to twenty (20) years imprisonment.

2. The appellant herein proceeded and appealed against the conviction and sentence vide the petition of appeal dated 5.05.2020 and filed in court on 19.08.2020 and wherein the appellant raised six (6) grounds. Basically, the appellant raised the grounds to the effect that the trial magistrate erred in both points of law and fact; by failing to take into cognizance that the prosecution witnesses failed to prove their case beyond reasonable doubt as required by law; by failing to explain to the appellant the magnitude of the charge he was facing thus making the appellant not to understand the elements of the charge; that the case was orchestrated by the appellant's wife and his mother to forward the accused to the police for soft beating because he was always drunk and disturbing but they never knew that it would result to imprisonment; by rejecting the appellant's mitigation without giving cogent reasons; and that the appellant was cheated by the prosecution to accept the charges so that he could be forgiven.

3. The appellant proceeded to file written submissions in support of the appeal herein and which submissions he entirely relied on. In a nutshell, he submitted that he was in a confused state of mind and he did not know the nature of the offence he was facing when he pleaded guilty. Further that, he was a habitual drunkard and it had been lied to him that if he admitted the charges, he would be released. Further that, during the sentencing, the trial court did not take into account that he is a young man, a first offender and the circumstances under which the offence occurred.

4. Ms. Mati the Learned Prosecution Counsel made oral submissions and wherein she conceded to the appeal on the basis of Section 348 of the Criminal Procedure Code. She submitted that there was a procedural impropriety as there was no indication that the appellant was warned of the consequences. Further that, in the affidavit sworn by Loice Muthoni she stated that she had forgiven the appellant.

5. This being a first appellate court, the power 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 in the extent as 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.

6. From the petition of appeal, it is clear that the appellant herein has challenged both the conviction and sentence by the trial court. However, from the submissions, it is clear that the appellant challenges the plea taking procedure and that at the time of taking the plea he was not sober and did not know what was happening. In my view, the effect of the appellant's submissions is the state of his mind at the time of taking plea. However, he has not attached any evidence on the said state and as such the said ground cannot succeed.

7. The appellant further challenges the sentence meted out on him as being harsh and excessive. It is a well-established principle that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances. It must be *demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole, that the sentence is manifestly excessive. (See* ***Bernard Kimani Gacheru –v-. Republic, Cr App No. 188 of 2000)*****.**

8. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, this alone

is not sufficient ground for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. ***(See also Wanjema –vs- Republic [1971] E.A 493).***

9. The appellant herein was convicted on his own plea of guilty for the offence of arson. The trial magistrate correctly noted that the sentence for the said offence is life imprisonment and proceeded to sentence the appellant to twenty (20) years imprisonment. It is my view that the said sentence is not excessive. The appellant did not demonstrate the conditions which can move this court into interfering with the trial court's discretion in sentencing.

10. However, Ms. Mati for the respondent while conceding to the appeal submitted that the trial court did not warn the appellant as to the consequences of pleading guilty. This issue was never brought out by the appellant but this court notes that the appellant in unrepresented. This notwithstanding, this court has revisionary jurisdiction under Article 165(6) of the Constitution and which provision is actualized by Sections 362-365 of the Criminal Procedure Code.

11. Under the said jurisdiction this court has the power to call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. The court can be moved by an aggrieved party to exercise its powers on revision, by the lower court or the court can move *suo moto*. As such, the issue as to the procedure of taking plea before the trial court is of such a nature that it can be revised by this court in exercise of its revisionary jurisdiction more so in the instant case now that the respondent brought the same to the attention of the court.

12. The procedure of taking a plea is clearly set out in **Section 207 of the Criminal Procedure Code** and which provision was expressed in the celebrated case of **Adan –vs- Republic (1973) EA 445**. As a procedure, 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. The accused's own words should then be recorded and if they are an admission, a plea of guilty should be recorded.

13. 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. 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. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

14. In the instant case, the trial court's record does not indicate the language the plea was read to the appellant. This is in both the typed proceedings and the handwritten proceedings. It is therefore in doubt as to whether the appellant understood the charges which were read to him and the ingredients thereof. It is my view that the said plea cannot stand the "unequivocal test".

15. Further and as was submitted on behalf of the respondent, I note that the trial court did not warn the appellant herein as to the consequences of pleading guilty. The importance of warning the accused person as to the consequences of pleading guilty was considered in the case of **Elijah Njihia Wakianda –vs- 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, 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....."***
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> (See also **Paul Matungu vs. Republic [2006] eKLR).**

16. This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understand the sentence he faces where he opts to plead guilty as failure to do so is a violation of his right to a fair trial and that the plea of guilty was in those circumstances not unequivocal. (See **Fidel Malecha Weluchi –vs- Republic [2019] eKLR).**

17. It is my considered view that failure by the trial court to explain to the appellant herein the nature and magnitude of the charge he was facing and the severity of the sentence goes to the root of the non-equivocal nature of the plea taken by the appellant. The offence facing the appellant is a serious one and the court ought to have made sure that the appellant was aware of the gravity of the offence.

18. From the above, it is clear that the plea by the appellant was equivocal and the same cannot be left to stand. The question therefore is what orders should this court issue in the circumstances? The appellant in his submissions prayed that this court do set him at liberty or in alternative order a retrial.

19. 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."***

20. 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."***

21. **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."***

22. 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.

23. In the present appeal, the record is clear that the appellant herein was arrested on 18.03.2020 and was arraigned on 19.03.2020 and sentenced on the same day. *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 an order for retrial is the most appropriate in this case and the same is hereby ordered.*

24. The conviction and sentence are hereby set aside.

25. The appellant to be held in the nearest police station and be produced in court for plea taking.

26. The trial to be conducted by a different magistrate.

27. It is so ordered.

DELIVERED, DATED *AND* SIGNED *AT* EMBU *THIS* 30TH *DAY OF* JUNE, 2021.

L. NJUGUNA

JUDGE

………*for the Applicant/Appellant*

………*...for the Respondent*