



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL REVISION NO. 39 OF 2020

(CORAM: R. E. ABURILI - J.)

STEPHEN OUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Application for revision of sentence vide Senior Resident Magistrate's Court, Ukwala

Criminal Case No. 632 of 2019 dated 5.2.2020 before Hon. C.I. Agutu, Senior Resident Magistrate)

RULING

- 1. STEPHEN OUMA** is serving 1 year in prison for the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to **Section 95(1)(b) of the Penal Code**.
2. He was sentenced on 5/2/2020 after purporting to plead guilty to the charge. Under section 95 of the Penal Code, upon conviction, if the offence was committed during daytime, the offender gets up to three years imprisonment whereas if the offence is committed at night, upon conviction, the offender can be sentenced to serve up to four years imprisonment.
3. The Probation Officer's Report dated 4/2/2020 which was filed prior to sentencing on 5/2/2020 shows that the convict is a son to the Complainant Judith Anyango Oketch and that he threatened to kill her using a panga and a knife.
4. He is said to be abusing alcohol and bhang. He is single. The mother claimed that the convict threatened to kill her on several occasions and that he is always violent and intoxicated with illicit drinks and drugs.
5. His family members portrayed him negatively because they fear for their lives. The community too decry the convict's negative behavior due to drug and alcohol abuse. He is 27 years old so he is old enough to choose whether to be irresponsible or not, as he is beyond control of his parents whose lives he is threatening to take away.
6. The sentence imposed is lawful and lenient. The Probation Officer found him not suitable for release on non-custodial sentence. I agree.
7. However, this being a request for revision, I must also examine the propriety of the proceedings before the trial court, for purposes of setting the record straight.
8. When the convict was arraigned on 30/12/2019, he pleaded not guilty to the charge which was read to him in Dholuo language. He was then ordered to be released on his bond of Kshs. 100,000/= and in the alternative to deposit cash bail of Kshs. 10,000/= in court. The court also directed that he be supplied with all witness statements and implored Alternative Dispute Resolution to be exploited. The trial court then fixed the matter for hearing on 27/1/2020.
9. On the latter date, the accused requested that charges be read to him and the court record is as follows:

"27/1/2020

Before Hon. C.I. Agutu, SRM

State: Kenya

C/C: Okaka

Accused - present

Accused: I pray that charges be read afresh to me.

Court: Charges read over to the accused.

Accused: It is true,

Facts by the Accused:

On 27th December 2019 at 9.00 am the Complainant was at her home with other relatives. Accused appeared while armed with a knife and panga. The accused became violent and abusive and called her 'Malaya' meaning prostitute and threatening to kill her. One Opendo Waida ran and called neighbours for assistance. The incident was reported at Ukwala Police Station where the complainant wrote her statement. The police proceeded to the home of the accused and arrested and charged.

Court: Are facts right.

Accused: Facts are right.

Mitigation: I pray for forgiveness.

Court: Probation Report

Mention on 3rd February 2020.

Signed

C.I. Agutu"

10. On 3/2/2020 the Probation Report was not ready and so the matter was rescheduled for 5/2/2020 when the trial court considered the Probation Report and sentenced the accused to imprisonment for a period of one year at Siaya G.K. Prison. The accused person's Right of Appeal was explained to him but he has not challenged those proceedings.

11. That is the trial court record and proceedings that sent the applicant/prisoner herein to prison for one year.

12. The request for sentence review is made by the prisons department seeking for prison decongestion in view of the CIVID-19 pandemic. However, in as much as the sentence is lawful, I have serious observations to make with regard to the proceedings as conducted in the lower court in that:

1. when the accused appeared for hearing on 27/1/2020 and requested that the charges be read to him he had the intention of changing the plea of not guilty to that of guilty.

2. However, the language of the court in conducting the proceedings or in reading out the charges and the facts is not indicated. This is contrary to section 198 of the Criminal Procedure Code as read with Article 50(2)(m) of the Constitution on the guaranteed right of the accused person to be tried in a language he understands or interpretation be provided free of charge;

3. After the accused was asked by the trial court as to whether the facts were "right" and he said that the facts are right, again it is not indicated in which language he is alleged to have admitted the correctness or rightness of those facts;

4. Very materially, after the charge was allegedly read and explained to the accused person in a language that is not indicated, and after he had said that the facts were right, there was no entry of a plea of guilty prior to the presentation of facts of the case by the prosecution;

5. In addition, after the facts of the case were allegedly read out to him again in a language that is not indicated, the accused person is said to have admitted the facts, but no conviction on his own plea of guilty was ever entered against him.

13. The trial court proceeded right away to ask him for his mitigation and he said, "*I pray for forgiveness*". Then the trial court ordered for a Probation Report.

14. The accused person could have committed the offence which I find to be more serious than merely creating a disturbance in a manner likely to cause breach of the peace under **Section 95(1)(b) of the Penal Code**, which charge is only but a misdemeanor. The facts disclose a

different offence, that of threatening to kill which is a separate offence under **Section 223(1) of the Penal Code**, and which is a felony. Upon conviction, one would be liable to imprisonment for a period of ten years.

15. Nonetheless, the trial court accepted the facts as disclosing the offence as charged under **Section 95(1)(b) of the Penal Code**.

16. The correct manner of recording a plea of guilty and the steps to be followed by the court was stated in the celebrated case of **Adan V Republic, (1973) EA 446** where Spry V.P. laid down the procedure at page 446 as follows:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.. The statement of facts and the accused’s reply must of course be recorded.”

17. The above decision was followed by **Kariuki V Republic (1984) 809** where their Lordships reiterated those steps as follows:

a. the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;

b. he should then record accused’s own words and if they are an admission, a plea of guilty should be recorded;

c. the prosecution may 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;

d. if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.

18. See also **Korir v. Republic [2006] E.A. 124**

19. In my humble view, first and foremost, the plea was not unequivocal as there was no indication of the language of the court and of interpretation of facts to the accused. Secondly, there was no entry of a plea of guilty after the charge was allegedly read out to the accused person. Thirdly, there was no conviction entered on a plea of guilty.

20. As no plea of guilty was entered and as there was no conviction of the accused, there was no basis upon which the sentence of one year imprisonment was imposed on the accused.

21. Section 363 of the Criminal Procedure Code empowers this court to call for 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. Under **Section 364(1)(b) of the Criminal Procedure Code**. This court may make an order of acquittal, alter or reverse the order. Under **Section 364(2)**, no order under the Section shall be made to the prejudice of the accused person unless he had the opportunity of being heard either personally or by an advocate in his own defence.

6. Nothing in the Section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

22. Article 165(6) & (7) of the Constitution, the High Court has supervisory jurisdiction over the subordinate courts, and in exercising this supervisory jurisdiction the High Court may call for the record of any proceedings before any subordinate court and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

23. Having examined the trial court record and proceedings, I find that the plea was not unequivocal and as there was no entry of a plea of guilty or conviction entered against the said equivocal plea, the sentence of one year imprisonment imposed on the accused was irregular. I must therefore correct that irregularity.

24. I quash the proceedings before **Ukwala SRM Cr. Case No. 632/2019** and set aside the prison sentence of one year imposed on the accused Stephen Ouma.

25. However, as the offence with which the accused was charged threatens the life and limb of the complainant who is the biological mother of the accused, I order for a retrial of the accused before the SRM, Ukwala. Retrial proceedings shall be conducted before any other Hon. Magistrate with jurisdiction other than Hon. C.I. Agutu, SRM.

26. Mention on 23/3/2020 before Ukwala SRM’s Court. This Ruling to be typed and served on the trial court.

27. Orders accordingly.

Dated, signed and delivered at Siaya, this 19th Day of March 2020.

R.E. ABURILI

JUDGE