



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 61 OF 2016

(From original conviction and sentence in Criminal Case No. 818 of 2015 of the Chief Magistrate's Court at Kerugoya).

JACKSON GITHINJI KARANIAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant Jackson Githinji Karani was charged before the Chief Magistrate's court Kerugoya with the offence of Grievous Harm Contrary to Section 234 of the Penal Code. The appellant denied the charge. The trial commenced and two witnesses testified. The appellant then pleaded guilty to the charge and was convicted and sentenced to imprisonment for twenty(20) years.

2. He lodged this appeal and filed amended grounds as follows:-

a) In reliance he pleaded guilty without enquiring why he kept changing the plea and failing to consider Section 12 of the Penal Code.

b) No malice aforethought was proved, only single witness was called and essential witnesses were left more the doctor who examined the victim thus Section 77 of Evidence Act was not complied.

c) Without considering he was not served with witness statements thus Article 50(2)(c) and (h) of the Constitution and OCS report was not put into record.

3. Directions were given that the appeal be disposed off by way of written submissions.

4. The appellant filed amended grounds of appeal and submissions. He raises three grounds which are challenging the evidence other than the plea of guilty and the conviction. The appellant submits that the trial Magistrate failed to make enquiry as to why he kept changing plea. Failure to consider that there was no malice aforethought and that the appellant was not supplied with witness statements as provided under Article 50(2)(c) & h of the Constitution.

5. The State filed submissions through Geoffrey Obiri Assistant Deputy Public Prosecution who submits that the appellant pleaded guilty and can only appeal on the legality of the sentence as provided under **Section 348 of the Criminal Procedure Code.**

6. The Court of Appeal has held that there are situations where a conviction based on a plea of guilty can be interfered with. In **Alexander Lukoye Malika –v- R(2015) eKLR** it was stated:-

“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.”

7. It is therefore erroneous for the State to submit that a plea of guilty cannot be interfered with on appeal. Where the plea is equivocal, the court has a duty to step in.

8. Summary of the proceedings

The appellant pleaded guilty on 14/12/2015 and the facts were read over. The following day, the prosecution applied to amend the charge sheet upon which the appellant pleaded not guilty. The court ordered that he be supplied with copies of charge sheet, witness statements and any other documents the prosecution wishes to rely on.

9. On 06/07/2016, the appellant informed court that he needs the witness statements and the prosecution stated they will supply on that date. The court informed the appellant that he is entitled to apply for legal representation under the Legal Aid Act.

10. On 17/10/2016 PW 1, the complainant and the appellant's father testified that the appellant went to his house around 9:00 p.m. They were in the kitchen when the appellant sat next to him and stabbed him on the chest with a knife. His mother succeeded in pulling the knife out and he was taken to Kerugoya County Hospital where he was admitted for 3 days.

11. On 21/11/2016 the appellant stated that he stabbed PW 1 with a knife whereupon the court sought to have the evidence of the medical personnel be taken first before change of plea. PW 2, the clinical officer testified that PW 1 was brought to hospital with an open wound on anterior chest and was bleeding. He was admitted for 3 days where the wound was stitched.

12. Later, the appellant was asked by the court whether he still pleads guilty or would wish to proceed with the case. Charge was read over to him and he confirmed the same to be true. The court entered the plea of guilty and the prosecution adopted the evidence of PW 1 and PW 2. The appellant confirmed the facts as correct and he was convicted accordingly.

13. On 30/11/2016, the CSO report was presented in court, the court considered it and stated it was not favourable. After considering mitigation of the appellant proceeded to convict him to serve 20 years imprisonment.

14. Issue arising; appeal against a plea of guilty

The Appellant was convicted on his own plea of guilty and Section 348 of the Criminal Procedure Code comes into play. It states:

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.

15. Obedi Kilonzo Kevevo v Republic [2015]

The Court of Appeal stated on recording plea of guilty;

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

“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.”

..... The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.

16. A plea of guilty that has not complied with the standards laid above will not be upheld on appeal.

17. The record of the trial court shows that the charge was read out to the appellant and he stated that – ‘It is true’. What followed was that the prosecutor addressed the court and stated – ***“I wish to adopt the evidence of PW1 & PW2 and also produce the knife marked as exhibit. Exhibit – Knife.”***

Appellant then stated – ***“The facts are correct.”***

18. There was no indication that the evidence of PW1 & 2 was read. The evidence of PW-2- was given on the day appellant pleaded guilty while that of PW-1- was given over a month ago.

19. The procedure adopted by the prosecution was flawed. The facts of the case were not read to the appellant. The Court of Appeal in the case of **Adan –v- R** emphasized the importance of the statement of facts in the following terms:-

“...The statement of facts serves two purposes; it enables the Magistrate to satisfy himself that the plea of guilty was really

unequivocal and that the accused has no defence and it gives the Magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction.....”

20. Where an accused person pleads guilty the court has a duty to ensure that the plea is unequivocal and more so where the accused is unrepresented. The court must ensure that the accused understands every element of the charge and even warn the accused that the offence he wished to plead to carries a sentence of imprisonment for life. These warnings must be captured on record. The court must be cautious and ensure that the accused understands the facts and ask the accused to say what he means by saying it is true and the explanation is captured on record.

21. In a case like this one where the offence is serious, care should be taken to ensure that the accused understands the elements of the charge he pleads guilty to and the consequences. Where the offence is serious the court must take extra steps to ensure that the accused is made aware of the possible sentence where the offence is serious.

22. The court had a duty to ensure that all the facts of the case were read to the appellant. In this case this was not done. The PW-1- & -2- were not the only witnesses, the prosecution had lined up Four. The prosecution had a duty to give a summary of all the facts of the case and the accused be asked if he admits them.

23. The appellant had assaulted his father. After he was convicted, he addressed court in mitigation. A look at the mitigation statement shows that the appellant was raising a defence. The plea was therefore not unequivocal. Even after conviction where the accused disputes the facts and alleges some additional facts to justify his action, the court must find that the plea is not unequivocal and must enter a plea of not guilty at that stage as it will not have passed the sentence.

24. I find that failure by the prosecution to give a statement of facts at the stage where the appellant pleaded guilty rendered the plea unequivocal and occasioned a miscarriage of justice.

25. I must then consider what orders to make. The criminal justice system requires that the court balances the rights of the accused and those of the victim and the society at large.

26. Where the trial was flawed, the court orders a retrial. This calls for consideration as to whether the accused has had a proper trial. A retrial will be ordered where a trial was illegal or defective. This depends on the circumstances of each case. A retrial will be ordered where the interests of justice is required and will not occasion an injustice to the appellant.

27. In the Case of **Muiruri –vs- Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:

1. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

2. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

28. In this case the appellant was sentenced in 2016. The appellant was not tried. The offence involves use of violence the interests of justice require that the case be re-heard. I find that a retrial will be appropriate in the circumstances of this case.

I order as follows:-

a) The appeal is allowed.

b) The conviction is quashed.

c) The sentence of twenty years is set aside.

d) A retrial shall be held before the Chief Magistrates Court Kerugoya by a Magistrate with competent jurisdiction to try the offence.

e) The appellant be remanded at Kerugoya Police station and be produced in the Chief Magistrate’s court on 27/5/19 for plea taking and directions on hearing.

Dated at Kerugoya this 24th day of May 2019.

L. W. GITARI

JUDGE