



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 124 OF 2016.

BETWEEN

ABDULLAHI DIRIYE.....APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.1632 of 2014 delivered by Hon. T. Okello, SPM on 3rd April, 2014).

JUDGMENT.

Background.

1. Abdullahi Diriyee, hereafter the Appellant was charged of creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95(1)(b) of the Penal Code. The particulars of the charge were that on 27th March, 2014 at Immigration Office Jomo Kenyatta International Airport within Nairobi County, created a disturbance by bringing commotion to one Mr. Kaunda duty officer Immigration with the intention of forcibly taking away one Siraj Abdille Telow a passenger who had been held by Immigration Officer for interrogations. In the alternative he was charged with entering a security restricted area and committing an offence contrary to Regulation 56 of Legal Notice No. 89 of 2008 of Civil Aviation Act. The particulars of this offence were that on 27th March, 2014 at staff entrance Jomo Kenyatta International Airport within Nairobi County, accessed baggage hall area to the Immigration office without a security movement pass.

2. The Appellant was arraigned in court on 31st March, 2014 and he pleaded not guilty to the two offences. However, on 3rd April, 2014 he changed his plea to one of guilty and was fined Kshs. 10,000/- in the first count and Kshs. 40,000/- in the second count. In default of the fines he was to serve six months imprisonment in each count.

3. The Appellant was dissatisfied with both the conviction and sentence against which this appeal is lodged. The grounds for appeal as set out in his supplementary petition of appeal filed 20th March, 2018 are that; he was convicted on a defective charge sheet, that the facts of the offence were at variance with the particulars of the charge, that it was an error when he was sentenced on the main and alternative counts, that the magistrate erred when he entertained the charge and proceedings in this case which trampled his rights and finally, that the manner in which the plea was taken did not comply with Section 207 of the Criminal Procedure Code.

Submissions.

4. The Appellant was represented by learned counsel, Mr. Nyamberi whilst Ms. Atina acted for the Respondent. Both parties made oral submissions. On defect of the charge sheet, Mr. Nyamberi submitted that it did not comply with Section 89(5) of the Criminal Procedure Code. He submitted that this was in view of the fact that there was no count 2 which begged the question why during the proceedings of 3rd April, 2014 the Appellant pleaded guilty to counts 1 & 2. His submission was that the purported count 2 was an alternative to count 1. That therefore, once the Appellant pleaded guilty to count 1, count 2 ought not to have been read to him.

5. Further, that the facts of count 1 were not supported by the evidence as the evidence was that the Appellant had just landed from abroad with a passenger called Siraj Abdille. The said Siraj had a document he wanted to use. The Appellant then wanted to go out with the passenger. He started hurling insults at the officer with a view to taking the parcel by force. He entered into a restricted area where he was charged with the offence. He submitted that the charge sheet did not mention any document. But that Mr. Kaunda was attracted to the scene by the commotion. He was of the view that what mattered was that the evidence did not support the charge. That it was also not disclosed who this Siraj Abdille was.

6. Counsel submitted that under Section 95(1)(b) of the Penal Code, the prosecution must demonstrate the presence of a brawl or disturbance or insult and the person to whom the disturbance was caused. He submitted that in the circumstances of the case the magistrate should have invoked Section 89(5) of the Criminal Procedure Code. He further submitted that the evidence did not disclose which restricted area was referred to in the charge sheet. He submitted that the Appellant was not represented and was therefore not informed of the implications of pleading on a defective charge. It was therefore not a proper plea as it did not meet the threshold of what constitutes a proper plea.

7. He then turned to the violation of the Appellant's rights. He submitted that Article 49(1)(f) of the Constitution was violated as the Appellant was arrested on 24th March, 2014 and charged on 31st March, 2014. That he was held in police custody for more than 24 hours which meant that all proceedings afterwards were illegal. He submitted that Section 207 of the Criminal Procedure Code was also not complied with as the law does not envisage a double conviction as happened in this case. Hence, the plea was improper. He urged the court to quash the conviction or in the alternative order a retrial. He submitted that if the court chose to take the latter route, it should consider that since the Appellant's conviction, he has lived with a guilty conscience.

8. Ms. Atina begun conceded to the appeal. She agreed that the charge sheet was defective as the particulars of the charge did not support the statement of the charge itself. That the particulars were that there was a commotion yet the nature of the commotion was not spelt out. She added that no acts of subverting justice and creating a disturbance were disclosed. She submitted that what was indicated as an alternative charge could not be an alternative charge to count I.

9. She was of the view that the framing of the charge could have confused the accused. That this was demonstrated by the fact that the conviction on the alternative count rendered it a second count. She agreed with counsel for the Appellant that since the Appellant entered a plea of guilty on count 1 he should not have pleaded to count 2. She submitted that the sentence was also illegal as the court did not follow the provisions of Section 28(2) of the Penal Code. With regard to the failure to take the Appellant to court within 24 hours she submitted that he should seek redress in civil proceedings by suing for damages.

10. Mr. Nyamberi, in reply urged the court to allow the appeal.

Determination

11. After considering the submissions of the respective parties and the record of appeal this court finds that the following issues arise for determination:

- a. Whether the appeal is properly before the court.
- b. Whether the Appellant's plea of guilty was unequivocal

12. On the first issue for determination, Section 348 of the Criminal Procedure Code provides that:

“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.”

13. In the instant case, the Appellant was sentenced to pay a fine of Ksh, 10,000/ in default serve six months imprisonment. In count II he was fined Ksh 40,000/ in default serve six months imprisonment. In Count I he was sentenced under Section 95(1) (b) of the Penal Code which provides for a sentence of up to six months imprisonment. In Count II he was sentenced under Regulation 56 of Legal Notice no. 89 of 2008 of the Civil Aviation Act which provides for a sentence of a fine not exceeding Ksh. 550,000/ or an imprisonment not exceeding one year. Therefore, both sentences were legal and this court cannot disturb them.

14. A plea of guilty can also be disturbed if it is demonstrated that the plea was not taken in accordance with Section 207 (1) and (2) of the Criminal Procedure Code, which is also a ground of appeal raised by the Appellant. The application of the provisions were expounded in the renowned case of **Adan Inshair Hassan v. Republic**[1973] EA 445 as follows;

“When a person is charged, the charge and the particulars of the charge 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 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.”

15. The Court of Appeal further expounded on grounds on which a plea of guilty can be disturbed in the case of **Alexander Lukoye Malika v. Republic**[2015] eKLR . It delivered itself 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 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 the 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.”

From the above decision, the circumstances under which a plea of guilty can be upset can be dissected into five as follows;

- a. 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.
- b. where an accused person pleaded guilty as a result of mistake or misapprehension of the facts.
- c. where the charge laid against the accused person to which he has pleaded guilty disclosed no offence known to law.
- d. where upon admitted facts the appellant could not in law have been convicted of the offence charged and
- e. where upon admitted facts the appellant could not in law have been convicted of the offence charged.

16. None of these circumstances obtained in the instant case. The major contestation is that Count II was framed as an alternative charge and that therefore, the Appellant having pleaded guilty to count1 could not plead to an alternative count. However, in the plea taking process, the learned trial magistrate categorically recorded the 'alternative count' as Count II and the Appellant pleaded to it as such. For avoidance of doubt the proceedings were recorded as follows;

“Count 1;- It is true.

Count 2;- It is true.

Court; Plea of guilty entered.”

17. It is also contested that the facts of the case did not disclose two offences. However, a closer look at the admitted facts of the case demonstrate that the two offences were committed namely first by creating disturbance when the Appellant caused a commotion as he tried to forcibly take away a fellow passenger who was held by immigration officers. Secondly, in entering a security restricted area by accessing the baggage hall to the immigration office without a security movement pass. All this information was spelt in the admitted facts. Accordingly, both Counts were established by the facts and properly pleaded to as such. Furthermore, Count II by its framing could not constitute an alternative charge to Count I. Each of the counts clearly constituted a distinct offence by itself.

18. I also observe that the manner in which the plea was taken accorded with Section 207(1) and (2) of the Criminal Procedure Code and as set out in the **Adan case(supra)**.

19. Finally, it is now settled law that the mere fact that an accused person is incarcerated in police custody for a period longer than the law provides cannot, of itself, invalidate a trial. The Appellant can seek compensation by way of damages in civil proceedings against the person responsible for violating his constitutional right to freedom.

20. In the end, I find the appeal without merit. The same is hereby entirely dismissed.

DATED and DELIVERED this 11th day of April, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Nyamberi for the Appellant.
2. Miss Sigei for the Respondent