Irungu v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 2117 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E010 OF 2024

CW GITHUA, J

FEBRUARY 19, 2025

BETWEEN

SAMUEL KIMANI IRUNGU ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an appeal against the conviction and sentence of Hon. P.N. Maina, CM, dated the 20th of February, 2024, in the Chief Magistrate's court at Murang'a criminal case No. E083 of 2024)

JUDGMENT

1. The Appellant, Samuel Kimani Irungu was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*.

   The particulars alleged that on 30th January 2024 at Konguini village in Murang'a County, he assaulted Peter Irungu Kimani by slapping him on his head and hitting him against the wall occasioning him bodily harm.

2. The court record shows that when the appellant was arraigned before the trial court on 5th February 2024, he was convicted on his own plea of guilty and was sentenced to eighteen (18) months imprisonment.

3. He was aggrieved by his conviction and sentence. Through his advocates, M/s Wanjira Mwaniki & Co. Advocates, he proffered the instant appeal through a memorandum of Appeal dated 5th March 2024.

4. I must state at this juncture that institution of the appeal through a memorandum of appeal was unprocedural and irregular. Section 350 of the *Criminal Procedure Code* (CPC) makes it clear that a criminal appeal against decisions made by a subordinate court should be filed in the High Court through a petition of appeal and not a Memorandum of appeal. A memorandum of appeal is a pleading through which civil appeals are lodged and has no place in criminal appeals.

5. That said, it is my view that the filing of an appeal by a procedure not recognized by the law is an irregularity that does not affect the competence of the appeal. It is a procedural technicality which goes to the form as opposed to the substance of the appeal. Guided by *the constitution* which decrees under Article 159 (2)(d) that justice shall be administered without undue regard to procedural technicalities, I will disregard the above procedural defect and proceed to consider the appeal on its merits.

6. In his memorandum of appeal, the appellant advanced eleven grounds of appeal which were for the most part duplicated. A look at the grounds of appeal in their totality reveals that in the main, the appellant's complaint was that the trial court erred in law and fact by convicting him on an equivocal plea in that the learned trial magistrate failed to ensure that he understood the charge he was facing and the consequences of pleading guilty considering that he was unrepresented.

7. The appellant also faulted the learned trial magistrate for disregarding the pre-sentence report and sentencing him to 18 months imprisonment which in his view was harsh and excessive given the circumstances of the case and the fact that his family including the complainant had forgiven him and were ready to receive him back home.

8. The appeal was prosecuted by way of written submissions which I have carefully considered alongside the proceedings before the trial court bearing in mind my duty as the first appellate court. The duty of the first appellate court has been enunciated in a plethora of authorities which I need not rehash here but suffice it to say that it requires the appellate court to exhaustively re-evaluate, re-asses and analyse the evidence and material placed before the trial court to arrive at its own independent conclusion whether the appellant was properly convicted and sentenced.

9. Having considered the grounds of appeal, the submissions filed by each party and the record of the trial court, I find that the only issue for my determination is whether the appeal was merited.

10. It is trite that where an accused person had been convicted on his own plea of guilty, an appeal can only lie against the sentence imposed by the trial court but not against conviction unless it was demonstrated that the plea was not unequivocal. This position is postulated in Section 348 of the *Criminal Procedure Code* (CPC) which provides as follows;

> "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."

11. In interpreting Section 348 of the *Criminal Procedure Code* (CPC), the court in Olel V Republic [1989] KLR 444 express itself thus;

> "where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but bars it completely"

12. In this case, the appellant has faulted his conviction on grounds that it was based on a plea which was equivocal. Section 207 (1) and (2) of the *Criminal Procedure Code* enumerates the steps that a trial court ought to take when recording a plea from an accused person. Those steps were expounded by

the Court of Appeal in Joseph Wambua Mbuvi V Republic [2019] eKLR which when citing with approval the case of Adan V Republic [1973] 445 stated 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 guilty, 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."

13. In this case, I have read the record of the trial court. It is clear from the proceedings that the charge and every element thereof was read and explained to the appellant in a language he understood which was Kiswahili as the interpretation was stated to be from English to Kiswahili. The record shows that in response to the charges, the appellant stated "It is true" in the Swahili language and after the facts were read out to him, he admitted them as true and correct. A perusal of the facts admitted by the appellant show that they disclosed all the elements of the offence with which he was charged.

14. In my considered view, the learned trial magistrate complied with the guidelines for taking and recording of a plea of guilty as set out in Section 207 of the *Criminal Procedure Code* (CPC). The fact that the charge and the facts supporting it were read in English and interpreted to the appellant in Swahili which language he used to respond to the charges is an indicator that the learned trial magistrate took steps to ensure that the appellant understood the charges facing him before he was called upon to plead.

15. The fact that the appellant's response was communicated in the Swahili language but was recorded in English does not in my view mean that he did not understand the charge and its components or that this by itself invalidated the plea of guilty. In fact, a close scrutiny of the grounds of appeal and the appellant's submissions show that his complaint was not that he did not understand the charges read out to him but that the learned trial magistrate failed to appreciate that he was not represented and failed to take extra precaution to ensure that he understood the charges and the consequences of pleading guilty to them.

16. The court record confirms that indeed the appellant in this case was unrepresented when he took his plea. As stated earlier, it is my finding that the learned trial magistrate ensured that the appellant understood the charges which were facing him by having the language of the court which was English interpreted to the appellant in Swahili language which he understood.

17. The only error of omission the learned trial magistrate committed was failing to explain to the appellant the possible consequences of pleading guilty considering that he was unrepresented. Given that the offence facing him was one that was likely to attract a custodial sentence, the learned trial magistrate ought to have taken extra caution to ensure that the appellant not only understood the charges facing him but was also aware of the consequences of pleading guilty to the charge. If after such an explanation

which should be captured on record the appellant maintained his plea of guilty, then his plea would no doubt be unequivocal.

18 . I agree with the rationale espoused by my Sister W.A. Okwany J in Josephat Obungo Ogire V Republic [2024] KEHC 12765 (KLR) for requiring trial courts to explain to unrepresented accused persons the consequences of entering a plea of guilty. The learned judge expressed herself as follows;

> " ... when an accused person pleads guilty to a charge, it means that they give up their right to be taken through a full trial process which provide specific legal safeguards that ensure that the rights of an accused are upheld, and most importantly, that the presumption of innocence prevails until the determination of the trial. A guilty plea, on the other hand, presents a walk-over for the Prosecution where an accused person's liberty and presumption of innocence ends up the moment he pleads guilty particularly where the charge attracts a custodial sentence. The trial court is therefore required to ensure that an accused person understands what is at stake and the likely consequences of a guilty plea"

19. In view of the foregoing, I find that the trial court's failure to explain to the accused the consequences of pleading guilty to the charges that had been read over to him made his plea equivocal and this amounts to sufficient basis for vitiating his conviction. Learned prosecution counsel Ms. Muriu correctly conceded as much in her written submissions.

20. Having found as I have above, I am satisfied that the appeal is merited and it is hereby allowed. The appellant's conviction is consequently quashed and sentence set aside.

21. The next question that I must now consider is whether to acquit the appellant or order a retrial. Considering that the offence charged in this case was committed against the appellant's father who has since forgiven him as shown in the pre-sentence report filed in the trial court which I must say was not binding on the learned trial magistrate and considering also that the appellant has served about one year of his sentence, I find that it would not serve the ends of justice to order a retrial in this case. In the premises, I direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 19TH DAY OF FEBRUARY 2025.

HON. C. W. GITHUA

JUDGE

In the Presence of:

The appellant

Ms. Mwaniki for the Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo, Court Assistant