Kandie v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 9754 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E032 OF 2024

JRA WANANDA, J

JULY 4, 2025

BETWEEN

MARY JEPKORIR KANDIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment and sentence delivered on 1/08/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E786 of 2024 by Hon. V. Karanja-PM)

JUDGMENT

1. The Appellant was charged with the offence of obtaining by false pretences, contrary to Section 313 of the *Penal Code*. The particulars were that on 7/09/2020 at around 1030 hours at Iten Township, Keiyo North Sub-County within Elgeyo Marakwet County, she, jointly with 2 others, with intent to defraud, obtained from Irine Jeruto Chemwetich a sum of Kshs 380,000/-.

2. The Appellant, on 1/08/2024, pleaded guilty to the charge and was accordingly convicted and sentenced to serve 3 years imprisonment. Aggrieved with the decision, through Messrs J.K. Kiplagat & Co. Advocates, she filed this Appeal on 14/08/2024. The following 4 grounds were presented:

    i. That the learned trial Magistrate erred in law and in fact in entirely relying on a defective charge sheet.

    ii. That the learned trial Magistrate erred in law and in fact in entering plea of guilty against the Appellant without considering the language clearly understood by the Appellant.

    iii. That the learned trial Magistrate erred in law and in fact in arriving at an erroneous judgment not supported by law.

    iv That the learned trial Magistrate erred in law and in fact in harshly and excessively convicting and sentencing the Appellant.

3. The Appeal was then canvassed by way written submissions. The Appellant's said Advocates filed the Submissions dated 4/03/2025 while the Respondent, through Prosecution Counsel Racheal Mwangi, had earlier filed the Submissions dated 19/11/2024.

Appellant's Submission

4. Counsel for the Appellant, in respect to the plea of guilty, submitted that the Appellant was not familiar with the language used at the trial Court as she is an elderly Kalenjin [Keiyo] lady who is illiterate, that the trial Court did not interrogate whether she was comfortable with the Kiswahili language that was used as she was also unrepresented and that she did not understand the nature of the charge against her. Counsel cited the case of *Adan v R* [1973] EA, 443 and also the case of *Okumu v Republic*; Criminal Appeal No. E025 of 2023[2024] KEHC 2618 [KLR]. According to him therefore, the Appellant pleaded guilty without knowing the nature of the charge and the gravity of the offence, and that the proceedings therefore resulted in a miscarriage of justice and a hash sentence.

Respondent's Submissions

5. Prosecution Counsel Ms. Racheal Mwangi, on her part, submitted that the Appellant pleaded guilty and was convicted properly. She pointed out that the conviction and sentence of the Appellant arises from her plea of guilty, and Section 348 of the *Criminal Procedure Code* bars appeals from the subordinate Court in a case where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. She cited the case of *Olel v Republic* [1989] KLR 444. She submitted that by virtue of the said provisions, the Appellant is barred from challenging the conviction and that her only recourse was to challenge the extent or legality of the sentence imposed on her by the trial Court. She however observed that this bar only operates where the plea is unequivocal and that, it does not bar the Court from inquiring as to whether a prima facie plea of guilty was unequivocal and further, that it does not bar the Court from making an inquiry as to whether the facts constituted any offence. On the manner of recording a plea of guilty, she cited the case of *Omena v Republic* [1981] eKLR. She then urged that from the trial Court's proceedings, the charge was read to the Appellant and interpreted to Kiswahili, the Appellant pleaded guilty, the facts were read out to her and she responded that the same were correct. According to her therefore, the plea was unequivocal. Counsel submitted further that the grounds of appeal do not indicate any illegality with the sentence. She cited Section 313 of the *Penal Code* and submitted that the sentence of 3 years imprisonment is the one provided for and thus legal. She urged this Court not to interfere with the trial Court's discretion with regard to sentencing unless it is demonstrated that the sentence was manifestly excessive, illegal, improper or based on misrepresentation of material facts. She cited the case of Bernard Kimani Gacheru v Republic.

Determination

6. As a first appellate Court, I am obligated to revisit and re-evaluate the matter afresh, assess the same and make my own conclusions [see *Okeno v Republic* [1972] EA 32].

7. The issues that arise for determination in this Appeal are evidently the following:

    i. Whether the trial Court properly convicted the Appellant on her own plea of guilty for the offence of obtaining by false pretences.

    ii. Whether the sentenced of 3 years imprisonment was justified.

8. As correctly observed by Prosecution Counsel Ms. Mwangi, under the provisions of Section 348 of the *Criminal Procedure Code*, no appeal is allowed in the case of an accused person who has been convicted

on his own plea of guilty, except as to the extent or legality of the sentence. This was reiterated in the case of *Olel vRepublic* [1989] KLR 444:

9. Apart from "... the extent and legality of the sentence", the other situation where the High Court may entertain an Appeal pursuant to a conviction based on a plea of guilty, is where the plea taking process was itself flawed. This was reiterated by the Court of Appeal in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR, in which the following 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 unfurnished 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 a 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 in law. Also where upon admitted facts, the appellant could not in law have been convicted of the offence charged."

10. The correct manner of plea taking process was set out in the leading case of *Adan v Republic* [1973] EA 445 at 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, off course, be recorded."

11. In this case, the record of the trial Court indicates that the language used by the trial Court in addressing the Appellant was Kiswahili "that she understands". The record further indicates that when the charge was read out to the Appellant, she responded that "it is true", upon which a plea of guilty was duly entered.

12. The Appellant's Counsel now claims that the Appellant only understood the Keiyo language. I doubt the truth of this submission since there is no indication that at the trial Court, the Appellant at any point raised this alleged fact.

13. Although the better manner of conducting the plea would have been for the trial Magistrate to have expressly recorded that she had asked the accused the language she understands and also record the Appellant's response thereto before reading out to her the charge, there is nothing on record to indicate that the Appellant did not understand the Kiswahili language. If she did not, she would clearly have protested or brought this fact to the Court's attention, or failed to respond at all to the Magistrate's inquiries. In this case, she fully responded.

14. I am fortified in my above finding by the fact that after the plea of guilty was entered, the record also reflects that the facts of the charge were read out to the Appellant and the record indicates that when asked whether the facts, as read out, were correct, she responded that "the facts are correct".

15. Even further, the record also reflects that the Appellant, after being convicted, was given a chance to mitigate and which she did by stating that "I pray for the Court's indulgence. We can discuss this matter at home".

16. I am persuaded that the trial Magistrate, although she did not expressly record it, did inquire from the Appellant the language that she understood, or whether she understood the Kiswahili language. In case this was not done, still a look at the record convinces me that the Appellant fully comprehended the proceedings. This explains why she throughout participated in the proceedings since all her answers made in Kiswahili are recorded.

17. In view of the circumstances recounted above, I am not at all persuaded by the Counsel's claim that the Appellant only understood the Keiyo language. I find it to be a belated afterthought.

18. In view of the foregoing, my finding is that it has not been demonstrated that the Appellant's plea of guilty was not unequivocal. I am satisfied that the manner in which the plea was taken and the plea of guilty entered substantially complied with the requirements of Section 207[1] and [2] of the *Criminal Procedure Code*.

19. Regarding the sentence, the applicable principles in re-considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru vRepublic* [2002] eKLR, in the following terms:

> " It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".

20. The offence of obtaining by false pretence is then defined under Section 313 of the *Penal Code* as follows:

> " Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

21. In view thereof, it is clear that the sentence imposed by the trial Court was within the statute, although it the maximum permitted. This observation does however mean that this Court cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

22. The Supreme Court, in the case of *Francis Karioko Muruatetu & Another vRepublic* [2017] eKLR], guided that, in sentencing, the following mitigating factors would be applicable;

    [a] age of the offender;

[b] being a first offender;

[c] whether the offender pleaded guilty;

[d] character and record of the offender;

[e] commission of the offence in response to gender-based violence;

[f] remorsefulness of the offender;

[g] the possibility of reform and social re-adaptation of the offender; and

[h] any other factor that the Court considers relevant.

23. I also cite Majanja J, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, in which, quoting the Muruatetu case [supra], he stated as follows:

> " The *Sentencing Policy Guidelines,* 2016 ["the Guidelines"] published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

24. Similarly, in the case of *Daniel Kipkosgei Letting v Republic* [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

25. Applying the above principles to the facts of this case, I note that the amount said to have been defrauded was Kshs 380,000/-, a substantial amount for the average Kenyan. My reading of the record and also the submissions made in this Appeal does not also demonstrate any remorse from the Appellant, a fact which was also noted by the trial Magistrate when reading out the sentence.

26. I also note that the Appellant is said to have received the money in the year 2020 and up to the date of conviction, 2024, 4 years later, she had not yet refunded the amount. It does not therefore seem that the Appellant has any intention of refunding the same.

27. I however also consider that the Appellant was a 1st offender. She also pleaded guilty and thus saved the Court precious judicial time. I also note that the offence of "obtaining by false pretence" committed by the Appellant is categorized as a misdemeanour under the Penal Code. The trial Magistrate also did not expressly state why she thought it necessary to impose the maximum sentence. For these mitigating reasons, I find the sentence of 3 years imprisonment to be substantially excessive.

Final Order

28. In the end, I make the following Orders:

i. The appeal against conviction fails and the conviction is upheld.

ii. On sentence, I hereby set aside the sentence of 3 years imprisonment imposed by the trial Court in Iten Senior Principal Magistrates Court Criminal Case No. E786 of 2024, and substitute it with a sentence of 2 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JULY 2025.

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant [present virtually from Eldoret Main Prison]

Mr. Kiplagat for the Appellant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi