Mwangale v Republic (Criminal Appeal E053 of 2022)
[2024] KEHC 7410 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 7410 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E053 OF 2022

M THANDE, J

MARCH 1, 2024

BETWEEN

NDOSHO MWANGALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Stephen Ngii PM on 15.10.21 in Mariakani Criminal Case No. E476 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence are that on 12.10.21 at about 0800 hours at Myani village in Kasemeni location, Kinango sub-county of Kwale county the Appellant willfully and unlawfully did grievous harm to Mbeyu Mrema (the Complainant). The facts according to the record are that on the material date, the Appellant attacked his father Magale Maingu. When his step mother Mbeyu Mrema came tried to separate, the Appellant hit her with a stone in her lower jaw causing her to lose 2 teeth. The Appellant was on 15.10.21 convicted on his own plea of guilty and sentenced to 7 years imprisonment.

2. The Appellant has appealed against both the conviction and sentence vide a memorandum, of appeal filed on 30.9.22. Thereafter on 11.8.23, he filed amended grounds of appeal raising grounds that the learned Magistrate erred in law and fact by failing to find that his plea of guilty was not unequivocal and by failing to warn the Appellant of pleading guilty to the charges. Lastly that the sentence imposed was harsh and excessive as it was applied in mandatory terms as provided by statute without considering his mitigation and the circumstances of the case.

3. The Appeal is opposed by the Respondent.

4. Parties filed their respective submissions which I have duly considered.

5. It is the Appellant's case that his plea of guilty was not unequivocal. Further that the manner in which the charge was read to him did not comply with Section 207(1) and (2) of the *Criminal Procedure Code*. No submissions were made by the Respondent in this respect.

6. Section 207 of the *Criminal Procedure Code* stipulates the procedure for taking plea. Subsections (1) and (2) provide as follows:

> 1. The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
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> 2. If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
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> Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

7. The law requires that the court states the substance of the charge to an accused person. He is then asked whether he accepts or denies the truth thereof. If he accepts the truth of the charge without a plea agreement, as the Appellant did in the instant case, his admission is to be recorded as nearly as possible in the words used by him. Thereafter the court shall convict and pass sentence against the accused, unless there is sufficient cause to the contrary.

8. The Appellant contends that his plea of guilty was not unequivocal and faults the trial court for not so finding. He cited the case of *Ombena v Republic* [1981] eKLR where the appellant contended that the plea of guilty was not unequivocal. The Court of Appeal after considering the matter had this to say:

> In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> "Held:
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> i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> iii. the prosecution should 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;
>
> iv. if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
>
> v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

9. Flowing from the foregoing, it can be seen that to record a guilty charge, first, the court is required to explain the charge and its essential elements to the accused in a language he understands. Second, the accused's own words shall be recorded and a plea of guilty recorded. Third, the prosecution shall then immediately state the facts whereupon the accused is given an opportunity to dispute or explain the facts or to add any relevant facts. Fourth, where the accused maintains his plea, the court shall record a conviction and a statement of the facts relevant to sentence together with the accused's reply.

10. The manner in which the Appellant's plea of guilty was recorded, is reproduced hereunder:

Accused: Present.

Kiswahili.....

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language he/she understand who being asked whether he/she admits or denies the truth of the charge(s) replies.

Accused: It's true.

Court: Plea of guilty entered

Facts

Accused: On 12/10/21 at about 8pm at Muyani village, the accused person attacked his father namely Magale Maingu attracting villaghers. The step mother of the accused person Mbeya Mrema came to the scene to separate the two. The accused person on seeing Mbeya Mremo took a stone and hit her on the lower jaw. The stone caused her to lose two teeth. The step mother reported the matter to the police. At the station she was referred to Mariakani Sub county hospital for treatment and filling of the P3 form. The treatments are produced as – Pexh 1. P3 form is produced as PExh 2.

The harm was classified as grievous harm.

11. A careful reading of the record shows that the trial court did follow the procedure laid out in Section 207 and further as set out in the *Adan case* (*supra*). Further unlike in the Adan case, the facts were set out to the Appellant. After this was done, the Appellant again stated, "It's true". This is a clear indication that the Appellant was given an opportunity to dispute the facts.

12. The Court of Appeal went on to state:

> In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the *Adan case* the court said, at p 447:
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> > " 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."

13. Where an accused person pleads guilty, the statement of facts is set out to him first, to enable the court satisfy itself that the plea is unequivocal and that the accused has no defence. Second, this informs the assessment of sentence to be imposed on such accused person.

14. In the instant case, after pleading guilty, the statement of facts was set out to the Appellant who again admitted to the truth thereof. He did not after hearing the statement of facts, dispute some particular fact or allege some additional fact or otherwise demonstrate that he did not really understand the position when he pleaded guilty. In light of this, I am not persuaded that the plea was not unequivocal as claimed.

15. Section 348 of the *Criminal Procedure Code* disallows appeals on plea of guilty 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.

16. An appeal on a plea of guilty is however only allowable on sentence with regard to the extent or legality thereof.

17. In the case of *Abdallah Mohammed v Republic* [2018] eKLR, Korir, J. (as he then was) while considering the import of Section 348, stated:

> How has the above cited provision been interpreted? In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:
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> > " 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."
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> The submission by the State that a conviction based on a plea of guilty cannot be interfered with on appeal is thus erroneous. If the plea is equivocal, the court has a duty to step in.

18. Where a plea of guilty is found to be equivocal, that is to say imperfect, ambiguous or unfinished an appellate court interrogating the legality of a conviction, may interfere with the same. Similarly, where there is a mistake or misapprehension of the facts and an accused person pleads guilty, an appellate court may step in and correct the situation. A third instance in which a court may intervene is where an accused person pleads guilty to an offence unknown in law.

19. The charge in respect of which the Appellant pleaded guilty is known in law and provided for under Section 234 of the *Penal Code*. Secondly the Appellant pleaded guilty upon the charge and the elements thereof being read to him and again after the facts were set out to him. Additionally, there was no mistake or misapprehension of the facts to warrant the intervention of this Court. Not only did the Appellant admit the truth of the charge twice, he also in mitigation prayed for forgiveness and stated that he would not repeat again. This to me is indicative of a person who very well understood the charge facing him and the statement of facts as set out to him and proceeded to plead guilty .

20. On sentence, Section 234 of the *Penal Code* provides as follows:

> Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

21. The maximum sentence that may be imposed on a person convicted of the offence of grievous harm as the Appellant was, is life imprisonment. Contrary to the assertion of the Appellant, the offence does not carry a mandatory minimum sentence. In mitigation, the Appellant stated, "I pray for forgiveness. I will not repeat again". The trial court did put this in consideration and in sentencing stated:

> The accused is liable to imprisonment for life for the offence herein, however, taking into account that he is a first offender, his admission of the offence and the remorseful mitigation, I shall cognizant of the need to reiterate the position of the law in guaranteeing personal security and protection to the law abiding citizens sentence the accused for seven (7) years.

22. The trial court exercised its discretion and sentenced the Appellant not to the maximum life imprisonment, but a lenient 7 years in prison. It is well settled that appellate courts must exercise restraint in interfering with judicial discretion. In the case of *Mbogo v Shah* [1968] EA 93 the Court of Appeal considered an invitation to interfere with the exercise of judicial discretion and stated:

> " [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

23. Having reviewed the impugned decision and duly guided by the holding by the Court of Appeal I find that there is nothing to show that the trial court in the exercise his discretion, misdirected itself in some matter thereby arriving at a wrong decision. Other than stating that the sentence was harsh and excessive even after considering his mitigation, the Appellant has not argued or even suggested that the trial magistrate was clearly wrong in exercising his discretion in imposing as he did, the sentence of 7 years imprisonment, thereby occasioning a miscarriage of justice. He has not demonstrated that the trial court acted on wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing. In the absence of any manifest irregularity or illegality in the sentence I find no basis for interfering with the discretion of the trial court or to upset the sentence imposed.

24. In the end, and for the stated reasons, I find and hold that the Appeal herein lacks merit and the same is hereby dismissed.

DATED AND DELIVERED IN MALINDI THIS 1ST DAY OF MARCH 2024

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M. THANDE

JUDGE