Kiplimo v Republic (Criminal Revision E006 of 2024)
[2024] KEHC 3545 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E006 OF 2024

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

HOSEA KIPLIMO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a Revision from the judgement delivered by Hon. R. Odenyo In Cr. Case No. E169 of 2023 in Eldoret Law Courts.)

RULING

1. By a Notice of Motion dated 16/2/2024, the Applicant seeks orders that;
    1. Spent.
    2. This honourable court be pleased to review, vary, reverse, set aside and later the orders issued by Hon. R. Odenyo (SPM) on 26/1/2024 convicting the Applicant jointly with another in Criminal Case No. 169 of 2024, Republic V Hosea Kiplimo and another and replace it with an order allowing the orders prayed by the Applicant.
    3. That the Honourable Court be and is hereby pleased to exercise its supervisory jurisdiction of revision and direct that Eldoret Criminal Case No. 169 of 2024 be referred to the trial Court for plea taking de Novo.
    4. That the Honourable Court finds that the plea taking process was flawed and thus there was no unequivocal plea.
    5. That the Honourable Court be pleased to admit the Applicant to bail pending the hearing and determination of this application interpartes.
2. The application is premised on grounds that;

a. That the Applicant was jointly charged with another *vide* Eldoret Chief Magistrate Criminal Case No.169 of 2024 with the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the *Penal Code*.

b. That the applicant pleaded guilty to the charge on 22nd January, 2024.

c. That as result, the Applicant was convicted and sentenced to a prison term of 4 years.

d. That at the time of taking plea, the Applicant was suffering from injuries both physical and external inflicted on him by a mob prior to his arrest by the police.

e. That the accused was not taken for any medical treatment for him to be fit to stand trial and be able to take plea.

f. That further, the Applicant was unrepresented and did not understand the ingredients of the charges he was facing nor was he cautioned of the nature and consequences of his response to the charge.

g. That the plea taking process was flawed and the plea was unequivocal.

h. That there is a patent miscarriage of justice flowing from the conviction and sentence hence the Applicant's prayer that he may be admitted to bail pending the determination of this application interpartes.

i. That it is therefore just and expedient that this Honourable Court be pleased to review, vary, reverse, set aside and/ alter the orders by Hon. R. Odenyo (SPM) issued on 26th January, 2024.

j. That it is just, fair and expedient that the application be allowed.

k. That this application is brought timely, in good faith and in the interest of justice.

3. The application is further supported by the Affidavit sworn on 16/2/2024, by George O. Obudho, the Applicant's Counsel wherein he basically reiterated the grounds premised in the application save for adding that from the proceedings it is not clear whether the Applicant was cautioned of the ingredients of the charges facing him and neither were the facts read to him.

   The application is unopposed.

Determination

4. The borne of contention is on the range of rights under Art. 50 of the *Constitution* which governs the criminal process in Kenya. The concept of a fair trial is the one that is impossible to advance to formulate exhaustively and comprehensively the content of the concept. The right to a fair hearing entitles every accused person to the right to a fair trial which include the right to the presumed innocent until prove guilty, the right to be informed of the charge with the sufficient details to answer it, the right to have adequate time and facilities to prepare a defence, the right to a public trial before a court established under the *Constitution*, the right to have the trial begin and conclude without unreasonable delay, the right to be present when being tried unless the conduct of the accused makes its impossible for the trail to proceed, the right to choose, and be represented by an advocate and to be informed of this right promptly, the right to be assigned an advocate at state expense if substantial injustice would otherwise result, the right to remain silent and not testify during proceedings, the right to be informed of the evidence the prosecution intends to rely on and to have access to that evidence, the right to adduce and challenge evidence, the right not to be tried for an offence which an accused has either been previously acquitted or convicted, the right not to be tried for an offence which an accused has either

been previous acquitted or convicted, the right to the benefit of the least severe punishment and the right of appeal or review upon conviction.

5. This Art must be read with Art. 20 (3) & (4) : In applying a provision of the Bill of Rights a court shall: (a) develop the law to the extent that it does not give effect to a right of fundamental freedom and (b) adopt the interpretation that most favours the enforcement of a right of fundamental freedom.

6. A quick perusal of the trial court record is perfectly clear that before placing the applicant in the dock to answer to the summary substantial facts in terms of Section 306 of the *Penal Code* the prosecution case docket had not been supplied with any of the witness statement. The statements had been procured by the prosecution from the National Police Service which informed the Director of Public prosecution the decision to charge. In order to decide whether or not the applicant was to enter plea of guilty or that of not guilty to that extent access to part of the dossier by the star complainant/witness was of essence in the first instance to be shared with the applicant. The whole of the other committal bundles constituting the adverse evidence could possibly wait a pre-trial conference. In practice suspects are arrested, thereafter arraigned in court without having prior knowledge of the circumstances of his or her arrest. In terms of the *Constitution* flowing from Art. 49 on rights of an arrested person to Art. 50 on right to a fair trial it is necessary to inform the accused person of the allegations against him or her by way of supplying the complainant statement in advance so as to address the elements of the offence. The contents of the summary in the information by the Director of public prosecution is not sufficient to entitle the accused person to be invited to enter plea of guilty or that of not guilty. That access to information held by the state is even entrenched under Art. 35 of the *Constitution*. The sufficient particularity of the charge by itself as drawn by the office of Director of Public Prosecution is sometimes vague. It does not inspire confidence or articulate the dominant theme of the indictment.

7. The trial record viewed in its conjectural setting it does not afford support precisely whether they guaranteed rights of the Applicant was understanding the nature of the charge, it is ingredients such that he will competently offer an answer unequivocally. Reliance on the answer “ni kweli “without more is substantially flawed. During the time of plea taking, I am aware that it is not a discovery mechanism but un accused person or offender is entitle to some fundamental material on the case to entitle him or her to answer the issues raised in the charge sheet. The trial court must also take a judicial notice of indigent suspects of a crime before our courts with no knowledge on how courts work to get involved in the complexities of the criminal justice administration. That is indeed the case the applicant is making before this court through his legal counsel Mr. Obudho.

8. Having appreciated the pleadings on record. The issue before this court is Revision. Revision is provided under Section 362 of the *Criminal Procedure Code* which provides:-

> “ The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

9. The powers of the High Court on Revision are provided under Section 364 of the *Criminal Procedure Code*. It is worth noting that where an appeal lies from the finding, sentence or order, and no appeal has been brought, no proceeding shall be entertained by way of revision. The court exercises its supervisory jurisdiction over sub-ordinate court to correct apparent mistakes and to prevent a miscarriage of justice.

In *R –v- John Wambua Munyao & Others* Cr. Rev. 215/18 Justice Ondunga stated that:-

> "Article 165(6) and (7) of the *Constitution* confers upon this court supervisory jurisdiction upon this court to make any order or to give any direction it considers appropriate to ensure fair administration of justice."

10. As such the Court only exercises its jurisdiction of revision where there are glaring acts of omission by the trial Magistrate. it is noteworthy to mention that a revision is not an appeal and such parties are discouraged from arguing an appeal which is disguised as revision.

11. In the present application the Applicant wants the court to revise the orders issued by the Hon. R Odenyo (SPM) on 26/1/2024 convicting him jointly and another in Eldoret Chief Magistrates Criminal Case No. 169 of 2024 for reasons that the plea process was all flawed and thus there was no unequivocal plea.

12. The procedure of taking a plea is clearly set out in Section 207 of the *Criminal Procedure Code* and which provision was expressed in the celebrated case of *Adan –vs- Republic* (1973) EA 445. As a procedure, 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. The accused's own words should then be recorded and if they are an admission, a plea of guilty should be recorded.

13. 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. 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. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

14. In the present case, it is evident that trial Court's record indicates the language that the Applicant understands before taking his plea is Kiswahili. This is in both the typed proceedings and the handwritten proceedings. There is therefore no doubt that the Applicant understood the charges which were read to him and the ingredients thereof.

15. However, the trial Court did not warn the Applicant as to the consequences of pleading guilty. The importance of warning the accused person as to the consequences of pleading guilty was considered in the case of *Elijah Njihia Wakianda –vs- Republic* [2016] eKLR where the Court of Appeal held that; -

> " .....We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process....."

This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understand the sentence he faces where he opts to plead guilty as failure to do so is a violation of his right to a fair trial and that the plea of guilty was in those circumstances not unequivocal.

16. I therefore find for the above reasons that the Appellant's plea of guilty was not unequivocal, and the conviction of the Appellant for defilement was not safe. The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of *Muiruri vs. Republic* (2003) KLR 552, the Court considered a similar situation and held as follows, *inter alia*:

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

17. There are serious issues conceived from the record in regard to the whole process which impact on the reasonableness of and the justifiability and or the necessity of rushing the plea taking without first having purposed to carry out an inquiry as to whether the accused had been supplied with the complainant statement and further that the essential content of the charge has been fully internalised. All these factors on fair trial rights in Art. 50 of the *Constitution* must be balanced against each other to be attained and guaranteed without limitation save for the criteria outlined in Art. 19, 20, 21, 22 of the *Constitution*. It is not for an accused person to apply for witness statement made to the police and subsequently and thereafter handed over to the office of the public prosecution to influence the decision to charge under Art. 157 (6) & (7) of the *Constitution*. This related objection by the Applicant on fair trial rights, might look like an extraneous and peripheral issue but his right to access such statements for the purpose of fair trial as early as the time of plea taking is proper to meet the ends of justice. I cannot imagine for a moment how indigent, vulnerable, and or legally illiterate persons are able to set their footing at our criminal courts without legal counsel under Art. 50 (2) (g) & (h) of the *Constitution* or on the basic assistance by session judges and magistrates to navigate the standard and measure of procedural justice. The ultimate test in this case is whether having regard to any relevant facts and consideration it can be reasonably said that the applicant comprehended the fact finding process of the charge. That question though a matter of degree and the weight given to the record by this court it is answered in the negative.

18. I accordingly allow the appeal, and quash the conviction of the Applicant for the offence of the offence of breaking into a building and committing a felony contrary to Section 306(a) of the *Penal Code.* I also set aside the sentence of four (4) years imprisonment imposed upon the Applicant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mugun for the State

Appellant

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