



REPUBLIC OF KENYA



**Maiyo v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 7213 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL E001 OF 2023**

**RB NGETICH, J
JUNE 13, 2024**

BETWEEN

FRANKLINE MAIYO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the decision of the Honourable A. Towett in Eldama Ravine Magistrate's courts Criminal case No. E718 of 2023 delivered on the 9th October, 2023)

JUDGMENT

1. The appellant herein, Frankline Maiyo, was charged in Eldama Ravine Magistrate's courts Criminal case no. E718 of 2023 with two counts of offences. Count 1 is the offence of assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). The particulars were that the accused on the 25th day of September, 2023, at Kiplombe Village, in Koibatek Sub- County within Baringo County, willfully and unlawfully assaulted Vivian Sang thereby occasioning him actual bodily harm.
2. Count II is the offence of threatening to kill contrary to Section 223(1) of the [Penal Code](#). The particulars were that the accused on the 25th day of September, 2023 at Kiplombe village in Koibatek Sub- County within Baringo County, without lawful excuse while armed with a panga uttered words "nitakuua ukufe", threatening to kill Vivian Sang.
3. When the charge was read out to the appellant on the 2nd October, 2023, he admitted the charge and was convicted on his own plea of guilty on both counts. The trial court called for presentence report and on the 9th October, 2023 upon considering the fact that accused was first offender, presentence report and accused mitigation, the trial court sentenced the accused/appellant to serve 2 years imprisonment.
4. Dissatisfied with the decision of the trial court, the Appellant has filed an appeal to this court on the following grounds: -



- i. That the learned trial magistrate misdirected herself in fact and in law by failing to see that the plea of guilty was not unequivocal.
 - ii. That the Learned trial magistrate erred in law and in fact by failing to take the necessary steps to ensure that the Appellant understood every element of the charge considering that the Appellant was unrepresented during the trial.
 - iii. That the trial magistrate erred in law and in fact in accepting the plea of guilty from the Appellant who pleaded through blackmail and false promises of his liberty as the charge was said to be a minor charge punishable by a short probation sentence.
 - iv. That the learned trial magistrate misdirected herself in fact and law by failing to ask the Appellant the language which he understands and prefers to be used to him.
 - v. That the learned trial magistrate misdirected herself in fact and law by failing to warn the Appellant on the severity of the charges and the consequences of the sentence.
 - vi. That the learned trial magistrate misdirected herself in fact and in law by failing to interrogate the presentence report that was missing the views of either the parents or siblings of the concerned parties (who are also siblings), which could have painted the true picture of the affairs.
 - vii. That the learned trial magistrate erred in laws and in fact by failing to consider that the Appellant was a first offender.
5. The appeal proceeded by way of written submissions.

Appellant's Submissions

6. The Appellant submits that section 348 of the *Criminal Procedure Code* bars appeals from persons who have pleaded guilty; however, he submits that the bar is not absolute because the purpose of the justice system is to ensure that no one is punished without following the due process which includes the right to appeal and relied on the case of *John Muendo Musau v Republic* [2013] eKLR and in the case of *Ndede vs Republic* [1991] KLR 567 to support their argument.
7. The appellant submits that upon charges being read to him, he said “*Ni kweli*” but the court did not ensure that he understood the charges and submit that the plea was not unequivocal and relied on the case of *Abdallah Mohammed vs. Republic* [2018] eKLR.
8. Further that the Probation Officer’s report prepared on 9th October 2023 only captured the sentiments of the complainant who is a sister to the appellant but did not take views of the siblings and parents in order to come up with an objective conclusion; that the complainant recommended deterrent sentence which the trial court imposed. Further, the area Chief’s sentiments that the appellant is generally of good conduct with members of the society but is aggressive and has threatened to kill his own family are not backed up by any claim or source of information; further on information that the report indicated that the appellant’s father who is also the father of the complainant was distraught with the outcome of the case, the appellant submitted that the case proceeded very fast in that charges were read to him on 2nd October, 2023 and was convicted on 9th October, 2023 and people had no time to react or salvage the situation.
9. The Appellant further submit that his father was tricked/misdirected to sign his witness statement on the pretext that what he was signing was form for pesa ya wazee and had the probation officers



interviewed him, he would have given his piece of mind which is that the matter was blown out of proportions but it could have been resolved at home.

10. The appellant further submitted that the clan elders undertook to reconcile him and the complainant and they executed affidavits to confirm that they are agreeable to reconciliation but the Probation Officer did not give accurate information. He urged this court to adopt views given by the family members.
11. The Appellant further submitted that he was not represented by counsel and the court failed to play its role of ensuring that he understood the implication of pleading guilty and placed reliance on the case of *Simon Gitau Kinene v Republic* Criminal Appeal 9 of 2016 [2016] eKLR; further that he was misled to believe the offence was minor and if he admitted, he would be granted a short non-custodial sentence or a warning and added that he was not in the right state of mind and the same was compounded by some wrong advice as well as the complainant who had told him that she will forgive him if he pleads guilty. He added that had he been aware of the severity of the charges, he would not have been misled into admitting the charge. He urged this court to find that he was convicted albeit without proper warning of the severity of the charges and allow this appeal, quash conviction and set aside 2-year jail sentence.
12. The prosecution counsel Ms. Ratemo submitted that the social inquiry report filed was favorable in the aspect of sentence and urged this court to consider the fact that the appellant pleaded guilty before the trial court and in her view, the conviction was proper.

Analysis and Determination

13. This is a first appellate court; I am expected to re-analyze and re-evaluated evidence adduced before the trial court and arrive at my own independent determination. This I do while minded that unlike the trial court, I did not get the opportunity of hearing witnesses first hand and observe their demeanor. This position was held in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] EA 424.”

14. In view of the above, I have perused and considered the trial court record together with submissions herein and wish to consider the following: -
 - i. Whether the plea was unequivocal
 - ii. Whether sentence imposed was harsh and excessive



Whether the Plea was Unequivocal

15. Section 348 of the [Criminal Procedure Code](#) provide 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 and legality of the sentence.”

16. In the case of [Olel v Republic](#) [1989] KLR 444, the court stated as follows: -

“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.”

17. Further in the case of [Alexander Lukoye Malika vs. Republic](#) [2015] eKLR the Court of Appeal identified the situations under which a conviction based on a plea of guilty can be interfered with 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 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.”

18. The manner of recording of a plea is provided for in Section 207(1) and (2) of the [Criminal Procedure Code](#) provides as hereunder: -

“

“(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;

(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:

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.”

19. In the case of [K N vs. Republic](#) [2016] eKLR, the court stated as follows: -

“The procedure for taking plea follows a well-beaten path. The leading case, *Adan v R* (1973) EA 445 emphasizes that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in *Adan (supra)* in *Hando S/o Akunaay v Rex* (1951) 18 EACA 307 as follows;



‘...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.’

Where an accused person who has been called upon to plead under Section 207 of the [Criminal Procedure Code](#) in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself. The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts the prosecution’s role is to present the evidence that could have been proven if the case had gone to trial. Therefore, for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial.”

20. Record show that the Appellant indicated his language of preference was Kiswahili. The facts were read to him and it is recorded that the accused admitted that the facts were true. It is evident that the trial court strictly complied with Section 207(1) and (2) of the [Criminal Procedure Code](#) and the conviction was therefore proper. The appellant understood the charge against him and he voluntarily pleaded guilty and the plea was therefore unequivocal.
21. The prosecution during the hearing of this appeal called for a probation report which was filed on the 15th April, 2014. From the report, the appellant is aged 24 years old, he admits the charges against him and states that he was angered by his sister who is the complainant after a family disagreement over their youngest sister’s pregnancy.
22. The Appellant is remorseful and prays for forgiveness from the honorable Court. He has realized the gravity of his actions. The complainant in this matter is the Appellant’s older sister and the family members were fearful of the Appellant who later sought for forgiveness from the complainant and the entire family; further that the family and area elders together with the area administrators have sat down and deliberated on his request for forgiveness and conclude that the appellant be considered for a non-custodial sentence and during this period, he shall be under observation to ascertain if indeed he has changed.
23. The area administrator who was interviewed indicated that the Appellant has been generally of good conduct with members outside his family but his aggressive behavior has always been towards members of his immediate family but this has since changed and while in custody he has expressed remorse. He confirmed that that the appellant’s family involved his office in reconciliation talks and at the end, they resolved to forgive the appellant and to further make a request to the court to have him pardoned. He is a first offender. All parties interviewed were not opposed to a non-custodial sentence.
24. I have considered the mitigation by the Applicant and sentiments given in social inquiry report. Minutes from the family meeting held on the 29th February, 2024 and the sworn affidavits attached to the minutes which includes the affidavit of the complainant confirm that the parties herein have reconciled. In view of the above, I am inclined to review sentence imposed by the trial court.



Final Orders: -

25. ...

1. Appeal on conviction is hereby dismissed.
2. I hereby revise sentence imposed by the trial court and order that the appellant serve probation sentence for the remaining period of sentence.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 13TH DAY OF JUNE 2024.

RACHEL NGETICH

JUDGE

