Kemboi v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 8221 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8221 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E015 OF 2023

JRA WANANDA, J

JULY 2, 2024

BETWEEN

DELVIS BARSIR KEMBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the conviction and sentence of the Appellant in Eldoret Chief Magistrates Criminal Case No. E095 of 2023.

2. The Appellant was charged with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*. The particulars were that on 6/08/2018 at around 2100 hours at Koibirir location, within Elgeyo Marakwet county, without lawful excuse uttered unlawfully words "nitakukata na panga" threatening to kill one Lilian Jeruto Cheserek (complainant) while armed with a panga. The said complainant was the Appellant's own mother.

3. The Appellant was convicted on his own plea of guilty and sentenced to 4 years in prison.

4. Aggrieved with the decision, the Appellant instituted the present appeal vide the Petition of Appeal filed on 19/09/2023 and sought a retrial. He raised the following 5 grounds;

    i. That the complainant was misled and intimated by the prosecutor.

    ii. That the learned trial Magistrate upheld judgment with the sense that the accused was oppressed.

    iii. That the learned trial Magistrate did not consider the prime factor of the offence.

    iv. That the lower honourable Court violated the accused's rights.

    v. That the accused was not given time to explain himself.

5. The Respondent, through Prosecution Counsel Ms. Calvin Kirui filed Submissions on 28/05/2024 in opposition to the Appeal.

6. On his part, when given the opportunity to submit on the Application, the Appellant stated that he had since reconciled with the complainant (his mother). Indeed, the mother attended Court and when given the opportunity to speak, she, too, stated that she had forgiven the Appellant and pleaded with the Court to release the Appellant from prison.

Respondents' Submissions

7. In his Submissions, Prosecution Counsel submitted that from the grounds of Appeal, it is hard to pinpoint whether the same is against legality of the sentence or conviction or both, that the Appellant was convicted on his own plea of and as such Section 348 of the Criminal Procedure Code bars such appeals except on the extent and legality of sentence. He cited the case of *Olel v Republic* [1989] KLR 444 and submitted further that the bar only operates where the plea is equivocal and that it does not therefore bar the Court from making an inquiry as to whether a prima facie plea of guilty was unequivocal or not and as to whether the facts constituted an offence. He also cited the case of Alexander Lukoye Malika vs. Republic [2015] eKLR, Section 207(1) and (2) of the *Criminal Procedure Code* and also the case of Ombena vs. Republic [1981] eKLR (in which the famous case of Adan v Republic [1973] EA 445 was followed).

8. Counsel contended further that from the trial Court's proceedings, it is clear that the plea was unequivocal, that the grounds of Appeal do not indicate any illegality on the sentence and that therefore the Appeal should be dismissed as it is a waste of the Court's time.

Determination

9. 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 vs Republic (1972) E.A 32).

10. The issue that arises for determination in this Appeal is "whether the trial Court properly convicted the Appellant on his own plea of guilty for the offence threatening to kill and sentenced him to 4 years imprisonment"

11. As correctly observed by the Prosecution Counsel, the grounds of appeal seem to be challenging conviction. In view of the provisions of Section 348 of the *Criminal Procedure Code*, this is inappropriate. The Section 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."

12. In regard to the above provision, the Court in the case of Olel v Republic (1989) KLR 444 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."

13. It is therefore true, as observed by Prosecution Counsel that in the case of a conviction by a subordinate Court upon a plea of guilty, an Appeal can only be entertained "as to the extent and legality of the sentence".

14. 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 appreciated by the Court of Appeal in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR, where 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."

15. As enumerated above, some of the grounds of Appeal alleged are that the Appellant was "misled and intimated by the prosecutor", that the trial Magistrate failed to consider that "the accused was oppressed", that the trial Court "violated the Appellant's rights" and that the Appellant "was not given time to explain himself". These matters appear to be questioning the process and the manner in which the plea of guilty was recorded. However, apart from merely proclaiming these allegations, the Appellant has not in any way explained, or demonstrated or substantiated the same. The Court has been left to only speculate.

16. The correct manner of the 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."

17. In this case, I note that the proceedings were conducted in the Kiswahili language which the Appellant has not alleged that he did not understand and which is the language in which he is recorded to have responded to the questions put to him. There is also no allegation that the charge laid against the Appellant and to which he pleaded guilty disclosed no offence known in law. I also note that the Appellant was arraigned on 14/08/2023 and when the charge was read out, he readily pleaded guilty thereto. The trial Magistrate then adjourned the reading of facts to the next day, namely, 15/08/2023. By this adjournment, the Appellant got more time to think over the plea that he had taken. When the matter came then up on 15/08/2023 and facts read out to him, the Appellant again readily confirmed that the facts as read out were correct. It is only after this 2-day process that the trial Magistrate eventually convicted the Appellant on his own plea of guilty.

18. In the circumstances and in the absence of any explanation of how the process of plea-taking was flawed, I find that the same was unequivocal and fully complied with the requirements of Section 207 of the *Criminal Procedure Code*.

19. Regarding sentence, the applicable principles in considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [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 that the Appellant was convicted of was threatening to kill contrary to Section 223(1) of the *Penal Code* which states as follows –

> "Any person who without lawful excuse utters, or directly or indirectly causes any person to receive a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years".

21. The maximum sentence is therefore 10 years imprisonment. In view of the above, it is clear that the sentence of 4 years imprisonment imposed was well within the law. The Appellant was also given opportunity to mitigate, which he did by apologizing and stating that he will not repeat the offence and that he was drunk at the time of committing the same. The trial Magistrate also called for a pre-sentence Report which was duly filed and only after considering the same did the trial Magistrate, on 5/09/2023, read out the sentence.

22. Nevertheless, I take judicial notice of other factors that should ordinarily be also taken into account when determining an appropriate sentence.

23. Regarding sentence, Majanja J, quoting the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR), in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, 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. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, 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;

(h) any other factor that the Court considers relevant.

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

> " With regard to the above, 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. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

25. In this case, the complainant was the Appellant's own mother whom he threatened to kill. The Appellant had the audacity to chase his own mother around the homestead while brandishing a panga. By his action, the Appellant crossed the accepted societal norms which does not and cannot condone such level of indiscipline against one's own mother, a cherished, treasured and almost sacred figure in families. In our African belief, a child who has no respect for his own parent is a cursed child and borders on being rendered an outcast. Such disrespect cannot be tolerated in any civilized society.

26. However, in view of the guidelines set out in the various authorities cited above, considering the Appellant's mitigation before the trial Court and also considering the contents of the pre-sentence Report submitted before the trial Court, I find that the sentence of 4 years imprisonment should be reduced. The Appellant is evidently remorseful and having already been in custody since he was arrested on 12/08/2023, about 10 months ago, I trust that he has had ample opportunity to reform while in remand and in prison and is now ready to be released back to the society to achieve social re-adaptation. I believe that he has now suffered sufficient retribution for his actions and is now ready for rehabilitation into the society.

27. I also take judicial notice of the mother insisting on addressing the Court when the matter came up before me on 6/06/2024 which opportunity I granted her and during which she informed the Court that the two have since forgiven each other and reconciled. She frantically pleaded with the Court to release the Appellant.

28. I note from the charge sheet on record that the Appellant was arrested on 12/08/2023, was arraigned on 14/08/2023 and remained in remand custody until 5/09/2023 when he was sentenced. In view of the proviso to Section 333(2) of the *Criminal Procedure Code*, which requires that the period that a convict has spent in remand custody be "taken into account" while determining sentence, I will apply this proviso.

Final Order

29. In the circumstances, I make the following Orders:

    i. The Appeal against conviction fails.

    ii. The sentence of 4 years imprisonment imposed by the trial Court against the Appellant is however set aside and substituted with a sentence of 1 year imprisonment to be computed from the date of arrest, namely, 12/08/2023.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 2ND DAY OF JULY 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of: