Mochache v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 8904 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E022 OF 2023

WA OKWANY, J

JULY 4, 2024

BETWEEN

DENNIS OKIAGO MOCHACHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence in the Principal Magistrate's Court at Keroka in MCCR No. E372 of 2023 by Hon. B.M. Kimtai, Principal Magistrate on 8th June 2023)

JUDGMENT

1. The Appellant herein, Dennis Okiago Mochache, was convicted on his own plea of guilty for the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars were that on the 1st day of June 2023, at around 1000hrs at Bwabene Village, Rigena Sub-County in Masaba North County within Nyamira County, wilfully and unlawfully assaulted one Maureen Nyaboke occasioning her grievous harm.
2. The Appellant was sentenced to serve seven (7) years imprisonment.
3. Aggrieved by the said decision, the Appellant filed the instant Appeal and listed the following grounds of appeal: -
    1. The Appellant pleaded guilty.
    2. That the matter of offence before the court was out of a domestic feud that existed between the complainant and the appellant over some disputes.
    3. That the Appellant was supposed to be charged with the offence of assault since no injuries were caused.

4. That the learned trial magistrate erred both in law and fact by convicting and sentencing the Appellant to 7 years without noticing that the Appellant thought that he was to be charged with the offence of assault and not of grievous harm.

5. That the learned trial magistrate erred in both law and fact by basing (sic) the conviction without warning the Appellant on the consequence of pleading guilty.

6. That the sentence awarded is highly excessive and punitive.

7. That he earnestly prays that the sentence awarded therein be reviewed and a lesser sentence be considered.

4. The Appeal was canvassed by way of written submissions which I have considered.

Analysis and Determination

5. I have considered the Record of Appeal and the parties' rival submissions. I find that the main issue for determination is whether the appeal is merited. I note that the Appellant mainly challenges the manner in which the plea was taken before the trial court and maintains that the proper procedure was not adhered to.

6. In Mark Oiruri Mose vs. R (2013) eKLR, the Court of Appeal outlined the duty of a first appellate court and held that: -

> "This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

7. The Appellant submitted that the language used before the trial court to read and explain the charge and its particulars to the Appellant was not indicated so as to enable this court to satisfy itself that the guilty plea was unequivocal. Reference was made to the decision in Collins Anami Shilivika vs. Republic (2020) eKLR where the court quashed the conviction and sentence for non-compliance with Section 207 of the Criminal Procedure Code (CPC).

8. The Appellant also submitted that the consequences of the guilty plea was also not explained to the Appellant in view of the fact that the offence of grievous harm carries a life sentence. The Appellant cited the decision in the case of Richard Koech Kibet vs. Republic (2019) eKLR where the court ordered a retrial because the Appellant was not warned of the consequences of a guilty plea and the case of Francis Macharia Nzeki vs. Republic (2021) eKLR where it was held that there was a need to explain to the accused the seriousness of the charge of grievous harm where the accused is not represented by counsel.

9. It was further submitted that the degree of injury was not indicated in the P3 Form (P.Exh2) and that the offence was therefore not proved. The Appellant cited the decision in Patrick Amutsa Ikoha vs. Republic (2018) eKLR where the court explained what maiming entailed.

10. The Appellant argued that should this Court find that plea was taken in compliance with the law, then the sentence passed by the trial court should be set aside as it was excessive and harsh in view of the fact that the Appellant pleaded guilty to the offence and did not have any previous criminal record.

11. The Respondent, on the other hand, submitted that since the Appellant was convicted on his own plea of guilty, the applicable law, on appeal, is Section 348 of the Criminal Procedure Code which

only allows an appeal only on sentence. It was submitted that the trial court duly complied with the procedure for taking plea. Reference was made to the decision in Ombena vs. Republic (1981) eKLR wherein the steps for taking plea were outlined.

12. Section 207 provides as follows: -

> 207. Accused to be called upon to plead
>
> (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.
>
> (3) .....

13. The principles governing plea taking were stated in the case of Adan vs. Republic [1973] EA 445 where the Court held:-

> " (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 facts relevant to sentence together with the accused's reply should be recorded."

14. The trial court's record shows that the plea was taken as follows: - Accused – Present

> Translation: Kiswahili
>
> The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands, who being asked whether he admits or denied the truth of the charge replies in Kiswahili: -
>
> Accused - Its true
>
> Ogada: On 1.6.2023 at 10 am, complainant was sleeping when accused pulled her towards him and pushed her outside the house. She managed to get back to the house and locked herself, accused then broke the door, entered the house, slapped her on the ear, kicked her on the stomach and pushed her outside the house, she screamed, witnesses came and found

her kneeling begging for forgiveness, held her. She was escorted to hospital where she was referred to Keroka hospital. She got medication and went to report at Rigoma, P3 Form her ears were discharging puss and not responding to any sound. This was 5 days after the incident. P3 Form stated degree of injury was maim. P3 Form (P.Exh2), Treatment Noted (P.Exh1).

Accused: Facts are correct

Court: Plea of guilty entered and convicted on own plea.

15. The Appellant argued that the plea was not unequivocal because the record does not indicate the original language that the trial court used to read out the charge and facts before it was translated to Kiswahili. I note that the even though the record indicates that there was translation to Kiswahili it does not indicate the language in which the trial was conducted. It cannot be assumed that the trial was in English or some other language and translated to Kiswahili when that was not recorded by the trial magistrate in his proceedings.

16. It is also noteworthy that the trial court's record does not indicate if the Appellant was asked to elect the language that he understood or if he understood Kiswahili. This Court cannot assume that the Kiswahili translation was the language that the Appellant understood.

17. My finding is that while stating the language used by trial court during the proceedings may not be of much consequence where a plea of not guilty is entered due to the numerous safeguards that exist in the subsequent trial process, it becomes particularly significant where an accused person is said to have pleaded guilty to an offence such as the present case. It is my finding that the trial court did not adhere to the principles for plea taking as set out under Section 207 CPC.

18. The Penal Code at Section 234 states thus: -

234. Grievous harm

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

19. This Court is cognizant of the gravity of the offence for which the Appellant was charged with and further notes that he was not represented by Counsel during the trial. It was therefore incumbent upon the trial court to ensure that the Appellant was informed of the consequences of a guilty plea so that he can plead to every constituent of the offence. I find that failure to do so meant that the plea was not unequivocal and the principles of a fair trial were not adhered to. I am guided by the decision in Elijah Njihia Wakianda vs. Republic [2016] eKLR where it was held thus: -

> " Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry

of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms." (Emphasis added).

20. The Court of Appeal went on to state as follows: -

> " With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. 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." (Emphasis added)

21. Having found that the plea was not unequivocal and that the Appellant's right to a fair trial was eroded by the manner in which the plea was taken, the next step will be to determine whether this court may order for a retrial. In Ahmed Sumar vs. R (1964) EALR 483 the Court of Appeal offered the following guidance: -

> " ...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."

22. In Samuel Wahini Ngugi vs. R [2012] eKLR the Court of Appeal opined that case must depend on its particular facts and held that: -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows: -
>
> 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that

> a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'

23. In the present case, I note that the Appellant has been in custody for a period of one year and that the treatment notes and the P3 Form did not indicate the nature/degree of the complainant's injury so as to prove that it amounted to maiming which constitutes grievous harm. My take is that if this Court was to order a retrial, it would afford the Prosecution an opportunity to fill in the gaps in their case thereby occasioning prejudice to the Appellant. It is my finding that it, in the circumstances of this case, it will not be in the interest of justice to order for a retrial. The only avenue that remains is to quash the conviction and set the sentence aside.

24. I hereby find merit in the appeal and allow it. The conviction is hereby quashed and the sentence of 7 years imprisonment is set aside. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

25. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 4TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE