



**Muthusi v Republic (Criminal Appeal E038 of 2023)
[2024] KEHC 13149 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E038 OF 2023
MW MUIGAI, J
OCTOBER 25, 2024**

BETWEEN

FLORENCE MUTINDI MUTHUSI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against both conviction and sentence of the Chief Magistrate’s court at Kangundo by Hon D.N. Sure dated 10th August 2023 in Criminal case no E834 of 2023)

JUDGMENT

1. The Appellant herein was charged with grievous harm contrary to Section 234 of the Penal Code.
2. The particulars of the offence are that on diverse dated between 8th May 2023 and 8th August 2023 in Kangundo Sub County at Musyani Primary School-Kanzalu Location in Kangundo Sub County within Machakos County unlawfully did grievous harm to Patrick Mwovi Makau.

Trial Court Record

3. The proceedings read as follows;

“The gravity of the offence explained to the accused; the charges read over to the accused in Kiswahili and she states:

It is true

CT: plea of guilty entered

.....

Facts



On 8/8/23, at around 1000 hours, the complainant went to pick her son at Musiani Primary School of the Physically challenged when the school closed. The child was injured and he decided to question the matron, the accused. The accused lied the boy had fallen. Upon further interrogation, the accused acknowledged the boy had abused him and she punished him. The mother reported the matter at Kangundo Police station and statements were recorded. The Complainant was referred to the hospital and a P3 was filed and it showed the following injuries;

- i. Marks on the cheek near the eye
- ii. Marks on the lip
- iii. Bruises and burn like wound on the side of the mouth
- iv. Strangulation marks on the neck
- v. Scratch marks on the chest and the entire back
- vi. Scratch marks on the left hand
- vii. Burn like wounds on the buttocks
- viii. Scratches on the thigh
- ix. Blunt object used, hands and nails
- x. Degree of injury is grievous harm- Pexb 1

The victim is 11 years old. The accused was arrested and charged.

Accused: the facts are true.

CT; the accused is convicted of the charges on her own plea of guilty.

Sentence

S/C: No record.

Mitigation: I erred but I have been hired to take care of children with disability. It is the devil who misled me. I rely on this job for sustenance. I pray to be forgiven.

S/C: Noting the accused was tasked with taking care of the complainant who is a person with a disability and cannot take care of himself and the accused decided to injure him intensely which includes burn injuries, I pray for a deterrent sentence and justice to the complainant.”

4. The Trial Court then sentenced the accused person to imprisonment for 8 years.



Petition of Appeal

5. Dissatisfied by this conviction and sentence, the Appellant filed an appeal seeking to have the judgment set aside and the Appellant acquitted or in the alternative, the court order for retrial of the case. The same was premised on the following grounds:-
- a. The learned Trial Magistrate erred in law and in fact by convicting the Appellant on an own plea of guilty that was not unequivocal.
 - b. 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
 - c. The learned Trial Magistrate failed in her duty to be cautious when accepting a plea of guilty from an unrepresented/ undefended accused person.
 - d. The learned Trial Magistrate erred in law and in fact by failing to warn the Appellant that the charge/offence he was about to plead guilty to carried a possible life imprisonment sentence.
 - e. The learned Trial Magistrate erred in law and in fact for failing to ensure that the Appellant understood and appreciated the consequences of pleading guilty to the charge.
 - f. The learned Trial Magistrate misdirected herself into convicting and sentencing the Appellant on a plea of guilty without asking the appellant the reasons for pleading guilty.
 - g. The learned Trial Magistrate erred in law and in fact for failing to note that the Appellant did not intend to plead guilty to the charges read to her.
 - h. The learned Trial Magistrate erred in law and in fact in failing to realize that the Appellant's pleas of guilty was induced by threatened and undue influence by the police in order to secure freedom of the accused.'
 - i. The learned Trial Magistrate erred in law and in fact for failing to appreciate that the Appellant was coerced to offer a plea of guilty.
 - j. The learned Trial Magistrate erred in law and in fact by failing to ask the accused the reasons for pleading guilty yet she was unrepresented.
 - k. The learned Trial Magistrate erred in law and in fact for meting upon the Appellant a sentence that was harsh and excessive in the circumstances of the case.

Submissions

6. The Appeal was canvassed by way of written submissions.
7. The Appellant filed Submissions on 02.09.2024 and while relying on the cases of Ombena vs Republic [1981] e KLR, K N vs Republic [2016] e KLR , Anthony Muthinga Munene vs Republic [2022] eKLR, Jackson Wambua vs Republic [2022] e KLR , Paul Matungu Vs Republic [2006] eKLR and W.K,K vs Republic [2011] e KLR, Mose vs R [2002] 1 EA submitted that there was no record that the facts were read to the accused in the language that she understood , that she was given an opportunity to explain the facts. It was contended that since the charge was read in Kiswahili then the Appellants response was expected to be in Kiswahili.



8. Secondly, it was submitted that the Trial Court ought to have taken extra caution before convicting the Appellant who was unrepresented and did not sufficiently warn the Appellant of the consequences of pleading guilty including the fact that the charge carried a possible life imprisonment sentence.
9. The Appellant relied on the cases for support of its argument; Simon Gitau Kinene vs Republic [2016] e KLR, Francis Macharia Nseki vs Republic [2021] E KLR, Paul Matungu (supra), Fidel Malecha Weluchi vs Republic [2019] eKLR, Muoka Musau vs Republic [2019] eKLR , Benard Injendi vs Republic [2017] eKLR, Emododko Emoidit vs Republic [2021] eKLR, Jackson Wambua vs Republic [2022] e KLR.
10. It was the Appellants contention that upon mitigation when she said “ it is the devil who misled me” she was not taking responsibility for the offence and therefore had no intention of pleading guilty to the charges. This position was supported by the cases of Simon Vundi Mwaniki vs Republic [2021] e KLR, Paul Isaac Okengo vs Republic [2017] e KLR, John Muendo (Supra)and Simon Gitau (supra).
11. Lastly, it was submitted that if the court is inclined to uphold the conviction then it should be persuaded to review the sentence downwards taking into consideration the sentence already served by the appellant. The Appellant relied on the following cases; Benard Kimani Gacheru vs Republic [2002] eKLR, Daniel Ng’olua vs Republic [2021] eKLR and Pius Mutua Mbuvi vs Republic [2021] e KLR. The Appellant prayed for costs.
12. The Respondent filed submissions dated 30.05.2024 and submitted that the Trial Court followed the procedure in convicting and sentencing the appellant, that the plea was equivocal and the Appellant entered a plea of guilty. It was contended that the Trial Court ensures that the Appellant understood the charges she was facing and cautioned the appellant on the gravity of the charge and sentence as provided in law.
13. Reliance was placed on the cases of Olel vs Republic [1989] KLR 444, Abdallah Mohammed Vs Republic [2018] eKLR, John Oketch Abongo versus Republic [2000] eKLR, Rex vs Gwempazi s/o Mukonsho [1943] 10 EACA 101.
14. It was submitted that the appellant was given an opportunity to mitigate before sentencing and prayed for forgiveness since she was hired to take care of children with disability. Further that the appellant entered a plea of guilty without any threats or undue influence and this ground of appeal could not be substantiated.

Determination

15. This Court has considered the Appeal, the Trial Court record and the submissions of parties and finds that the issues for determination are;
 - a. Whether the plea of guilty was equivocal
 - b. Whether the sentence should be reviewed, varied and/or set aside.
16. This being a first appeal, this court is guided by the finding in the case of Okeno Vs Republic [1972] EA 74 where it was stated that the duty of the Appellate court is to re-evaluate and re-analyse evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings.



17. It is trite that Section 348 of the Criminal Procedure Code CAP 75 bars appeals from subordinate courts where an accused is convicted upon his own plea of guilty except on the extent and legality of sentence by providing that: -

“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.”

18. In the case of *Olel v Republic* [1989] KLR 444, it was held that;

“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.”

19. In this case, the Appellant was convicted on his own plea of guilty but challenges both the sentence and the conviction. The only reason an Appellate court would allow such grounds, is if there was an error in the procedure that was used to record the plea of guilty. The manner of recording of a plea is provided for in section 207(1) and (2) CAP 75 of the Criminal Procedure Code which 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.”

20. The Court of Appeal in Criminal Appeal 365 of 2011, *John Muendo Musau v Republic* [2013] eKLR made reference to the decision in *Adan v Republic* discussed the process of plea taking as follows;

(5) On this argument, we wish to state that we have outlined the procedure followed before the trial court at the time of taking the plea. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v 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."

21. Article 50 (2)(b) of *the Constitution* states that: -

- "(2) Every accused person has the right to a fair trial, which includes the right- (b) to be informed of the charge, with sufficient detail to answer it."

22. From the record, the proceedings in this case were conducted in Kiswahili, the language that the Appellant is said to have understood. The record does not show that the accused was warned of the seriousness of the offence owing to the fact that he was unrepresented. The Appellant contends that it was the devil that lead her to commit the offence and that should have been enough to change the plea of guilty into that of not guilty.

23. I am guided by the finding of Ngugi J, as he then was in the case of *Simon Gitau Kinene v Republic Criminal Appeal 9 of 2016 [2016] eKLR* where he stated as follows;

- "19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)* this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.

24. As such, I find that the plea was equivocal as the Appellant was read the charges in Kiswahili and was explained the gravity of the charges she was facing. The Trial Court record indicates that the gravity of the offence was explained to the accused at the first instance and thereafter the facts were explained to her in detail. The ground of appeal that the Appellant was induced by threatened and undue influenced by the Police in order to secure her freedom is not borne out by the evidence on record.

25. With regard to the Appellant's submission that she was unrepresented and hence prejudiced, the Court relies on the case of *William Oongo Arunda (alias Patrick Oduor Ochieng) vs Republic (Criminal appeal 49 of 2020 Kairu, Mbogholi Msagha & Nyamweya JJA)*;

- "legal representation is triggered in criminal proceedings where substantial injustice would occur arising from the complexity and seriousness of the charge(s) against the accused person. In that case, the right to legal representation ought to be raised during trial which the Appellant herein did not and not raise the issue for the 1st time on appeal. Secondly, he



pleaded guilty at the earliest opportunity and ably communicated his answers to the charge read over and facts thereof. The appellant's right to fair trial were complied with."

26. As regards the sentence, the Appellant was charged under Section 234 of the Penal Code which provides that any person who unlawfully causes grievous harm to another is guilty of a felony and is liable to imprisonment for life.
27. The powers of the High Court in an appeal are found in Section 354 of the CPC and include;
 - (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
 - (a) in an appeal from a conviction—
 - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
 - (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."
28. The Court has taken into account both aggravating and mitigating factors in Sentencing Guidelines 2016; the mitigating factors are the Appellant may have been 1st offender, remorseful for the offence and the fact that she pleaded guilty at the earliest opportunity. The aggravating factors relevant here are that Appellant caused serious physical or psychological effect on the victim; a disabled 11 year old child and hence targeted vulnerable group such as children, elderly persons and persons; the child with disability.
29. The Appellant abused position of trust and authority as she was in charge of the disabled children. The medical report depicted multiple injuries on the victim which was wicked and harmful to the victim specifically and to the rest of the children. This Court finds the sentence appropriate in the circumstances as a deterrent sentence.
30. Considering that the offence attracts a life sentence, I find that the Trial court gave a lenient sentence. Taking into consideration the circumstances of the case and the nature of the injuries, I will not interfere with the finding of the Trial Court.

Disposition

- 1.. In the end, the appeal fails and is dismissed.

JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT ON 25/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

JUDGE

In the presence of:

Ms Wandera for the Appellant -present online



Ms Koech ODPP – present online

Patrick – Court Assistant

