



**Nyakundi v Republic (Criminal Appeal E057 of 2023)
[2024] KEHC 13883 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E057 OF 2023
WA OKWANY, J
OCTOBER 24, 2024**

BETWEEN

DOUGLAS MEROKA NYAKUNDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Senior Principal Magistrate's Court at Keroka in Criminal Case No. MCCR E677 of 2023 delivered by Hon. M. Munyekenye, Senior Principal Magistrate on 18th October 2023)

JUDGMENT

1. The Appellant was convicted on his own plea of guilty for the offence of creating disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code. The particulars of the charge were that on the 16th day of October 2023, within Kibirichi sub-location, Masaba North Sub-County in Kisii County, created disturbance in a manner likely to cause a breach of peace by chasing one Millicent Osoro Kerubo while armed with a panga.
2. The trial court sentenced the Appellant to serve 5 years' imprisonment on the basis that he was a repeat offender.
3. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -
 1. That the learned trial magistrate erred in law and in fact in convicting the Appellant without taking into consideration the procedure used for obtaining plea.
 2. That the learned trial magistrate erred in law and in fact in convicting the appellant without taking into consideration whether the Appellant understood the language while taking plea.



3. That the sentence was harsh, excessive and unsafe in the entire circumstance.
4. That the learned trial magistrate erred in law and in fact while convicting the Appellant herein on a plea of guilty without inquiring as to what influenced the Appellant to plead guilty.
5. That the trial magistrate erred further in law after being impressed with the charges laid down in respect of the Appellant and failed to comply with Section 11 of the Penal Code.
4. The Appeal was canvassed through written submissions.
5. The Appellant submitted that the sentence of 5 years' imprisonment harsh and excessive considering that he had pleaded guilty to the charge. He urged this Court to consider reducing the 5 years' imprisonment sentence.
6. Counsel for the Respondent conceded to the Appeal and submitted that the sentence imposed by the trial court was illegal notwithstanding the fact that the Appellant was a repeat offender.
7. The duty of a first appellate court was espoused in *Pandya vs. Republic* (1957) EA, 336 thus: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence.”
8. It is trite that the appellate court in a criminal appeal is still required to consider the merits of an appeal even where the Respondent concedes to the appeal. This is the position that was stated in the case of *Odhiambo vs. Republic* (2008) KLR 565, where it was held that: -

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”
9. The main issue for my determination is whether the appeal is merited.

Analysis and Determination

10. Section 348 of the Criminal Procedure Code provides that appeals can only lie on sentence where an accused person was convicted on his own plea of guilty. It states as follows: -

348. 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.
11. The Court of Appeal however outlined exceptions to the above principle in the case of *Alexander Lukoye Malika vs. Republic* [2015] eKLR 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.”

12. I have perused the trial court’s proceedings and I am satisfied that the guilty plea was unequivocal as the charge was read and explained to the Appellant in Kiswahili language, which he understood, after which the facts were also read and explained to the Appellant to which he pleaded guilty by stating “Ni ukweli” (It is true) in both instances.

13. I have also considered the proceedings on sentencing. The Prosecution submitted that the Appellant was a repeat offender as he had two prior convictions for which he had served custodial sentences. The trial court exercised its discretion and sentenced him to 5 years’ imprisonment.

14. The principles governing an appellate court when considering whether or not to interfere with the sentence imposed by a trial court were restated in the case of R vs. Mohamedali Jamal (1948) 15 E A C A 126, where the Court of Appeal for Eastern Africa held thus: -

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

15. The offence for which the Appellant was convicted is provided for under Section 95 of the Penal Code as follows: -

95. Threatening breach of the peace or violence

(1) Any person who—

(a) uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or

(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.

16. The above section provides for 6 months imprisonment for the offence of creating a disturbance in a manner likely to cause a breach of peace. This means that the trial court did not adhere to the provisions governing sentence for the offence in question. I therefore find that the trial court acted on wrong principles when imposing the five years’ imprisonment sentence. I find that there is sufficient cause to interfere with the said sentence. I therefore set aside the said sentence and substitute it with a sentence of six (6) months imprisonment.

17. Noting that the Appellant has been in custody from 18th October 2023, I find that the six months’ sentence has now been fully served. I therefore direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

18. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 24TH DAY OF OCTOBER 2024.**

W. A. OKWANY

JUDGE

