Kiprotich v Republic (Criminal Appeal 41 of 2020)
[2023] KEHC 1804 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 41 OF 2020

JWW MONG'ARE, J

MARCH 9, 2023

BETWEEN

BETHWEL KIPROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R Odenyo in Eldoret CMCC 253 of 2020 delivered on 24th January 2020)

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on the 24th day of December, 2019 at around 5pm, at Kosachei village, Turbo Sub County within Uasin Gishu County, he unlawfully did grievous harm to Jane Chepngetich Ngososei.

2. The Appellant was convicted of his own plea of guilty and after the facts were read out to him, he tendered his mitigation. Upon considering the circumstances of the case and the mitigation tendered, the trial court sentenced him to 10 years imprisonment.

3. Being aggrieved with the sentence, the Appellant instituted the present appeal *vide* a petition of appeal dated September 21, 2020 premised on the following grounds;

    1. That the learned trial magistrate erred in law and fact in failing to comply with section 200 and section 200(3) of the *Criminal Procedure Code*, Cap 75.

    2. That the learned magistrate erred in law and fact in failing to find that there was failure to comply with section 210 and 211 of the *criminal procedure code*, cap 75 by not hearing the Appellant on submissions or arguments which he would wish to be put before a ruling delivered.

3. That the learned magistrate erred in law and fact is failing to hold that the offence of grievous harm was not proved beyond reasonable doubt.

4. That the learned magistrate erred in law and fact in failing to draw an adverse inference against the prosecution to call vital prosecution witnesses as laid down in *Bukenya v Uganda (*1972) EA 549.

5. That the learned magistrate erred in law and fact is failing to accord the Appellant an opportunity to mitigate further.

6. That the learned magistrate erred in law and fact is failing to comply with section 213 of the *Criminal Procedure Code*, Cap 75 by informing the Appellant of the entitlement to address the court upon the close of the defence case.

7. That the learned magistrate erred in law and fact is failing to comply with provisions of article 50(2) (g) and (h) of the *constitution* of Kenya, 2010 by prior to the trial commencing informing the Appellant of the right to be choose to be represented by an advocate of his choice and in regard to consideration of substantial injustice resulting to the Appellant.

8. That the learned magistrate erred in law and fact in failing to conduct the trial in a language understood by the Appellant and achieved the requirements of a fair hearing under article 50(1) of the *Constitution* of Kenya.

The parties filed submissions on the appeal.

Appellant's Case

4. The Appellant submitted that he wished to make further mitigation on various grounds. He stated that he lived with his mother who is old and as she cannot work she is now a beggar. Further, he urged that he has undergone religious studies and learnt how to live a harmonious life with others. He urged the court to release him as he had served a substantial portion of his sentence and as he has learned skills in the industry section, he will be able to replicate the same once at home. He prayed that the appeal be allowed.

Respondent's Case

5. Learned counsel for the Respondent opposed the appeal and submitted that the complaints raised in grounds 1-6 of the petition of appeal have no basis as the conviction is based on the Appellant's plea of guilt. He cited section 348 of the *Criminal procedure Code* and urged the court to examine whether the plea of guilty was taken in compliance with the law.

6. Learned counsel for the Respondent referred the court to the case of *Alexander Lukoye Malika v Republic* (2015) eKLR and section 207 of the *Criminal Procedure Code* on the situations a plea of guilty can be interfered with and the procedure for entering a plea of guilty. He submitted that as per the record of appeal on January 3, 2020 he took plea in Kiswahili and said it is true. When the matter was adjourned to January 24, 2020, the record indicates that he was reminded of the charge and his response was that it was true. He urged that there was compliance with section 207 and the rule in *Adan v Republic* (1973) EA.

7. On the sentence, counsel submitted that section 234 of the *Penal Code* prescribes a sentence of life imprisonment for the offence of grievous harm and the Appellant was sentenced to 8 years, an indication that the court heard his cry for leniency. He urged the court to uphold the conviction and sentence.

Analysis And Determination

8. The duty of a first appellate court was set out in *Okeno V. Republic* [1972] EA 32 as reiterated in the Court of Appeal decision in the matter of *Mark Oiruri Mose V Republic* (2013)eKLR, where the court stated that;

> " this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate 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 demeanour of the witnesses and hearing them give evidence and give allowances for that"

9. The appellant having been convicted on his own plea of guilty in the appeal filed before this court appears not only to challenge the sentence but also the conviction as well.

10. It is imperative at this stage to consider the issue of both the veracity of the challenge on the conviction based on the law alongside the challenge on the sentence.

11. Upon considering the petition of appeal and the submissions of the parties, the following issues arise for determination;

    i. Whether the plea of guilty was unequivocal

    ii. Whether the sentence was harsh/excessive

Whether the plea of guilty was unequivocal

12. From the record of appeal I note that the accused was convicted on his own plea of guilty. However, in his memorandum of appeal he has asked this court to examine the following items in relation to the conviction as stated from item 1-6 of the memorandum;

    a. That the learned trial magistrate erred in law and fact in failing to comply with section 200 and section 200(3) of the *Criminal Procedure Code*, Cap 75.

    b. That the learned magistrate erred in law and fact in failing to find that there was failure to comply with section 210 and 211 of the *criminal procedure code*, cap 75 by not hearing the Appellant on submissions or arguments which he would wish to be put before a ruling delivered.

    c. That the learned magistrate erred in law and fact is failing to hold that the offence of grievous harm was not proved beyond reasonable doubt.

    d. That the learned magistrate erred in law and fact in failing to draw an adverse inference against the prosecution to call vital prosecution witnesses as laid down in *Bukenya v Uganda* (1972) EA 549.

    e. That the learned magistrate erred in law and fact is failing to accord the Appellant an opportunity to mitigate further.

    f. That the learned magistrate erred in law and fact in failing to comply with section 213 of the *Criminal Procedure Code*, Cap 75 by informing the Appellant of the entitlement to address the court upon the close of the defence case.

13. Section 348 of the *criminal procedure code* bars an appeal on conviction where a plea of guilty was entered before conviction. Section 348 states that;

> " No appeal on plea of guilty, nor in petty cases 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."

14. This bar to an appeal only occurs where the plea of guilty is taken unequivocally. As held by the Court of Appeal in the *locus classica* case of *Adan v Republic*(1973) EA at page 445, a an unequivocal plea of guilty should be as follows;

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 of guilty should be recorded.

15. This is echoed by the provisions of Section 207(1)&(2) of the *penal code* which states as follows;

s 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."

16. In the case before me, the record reflects that on January 23, 2020 when the accused was arraigned in court, having been asked to the language he understands the accused, now Appellant, stated that it was in Kiswahili. The record reflects that "the substance of the charge and element of the charge was thereof having been stated by the court, the accused replied "It is true".

17. Again on February 3, 2020 when the facts of the offence were read out to the appellant, the record reflects –"Facts are true". To my mind I find that the accused understood clearly what he was being asked to plead to and even after taking the plea of guilty, one month later when the matter came back to court, he agreed to the correctness of the facts. The trial therefore ended at this stage and the trial court proceeded to sentence the accused person.

18. I am guided by the holding of the Court of Appeal in deciding the factors upon which this court may interfere with a plea of guilty in the matter 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."

19. In the premises therefore, I find that the present case is not one where this court can be called upon to interfere with the conviction and I find no good reason to do so. I therefore find no reason to disturb the conviction.

Whether the sentence was harsh/excessive

20. Section 234 of the *Penal Code* states;

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

The trial court sentenced the Appellant to 8 years imprisonment which is a very lenient sentence compared to that required provided by statute. It is my considered view that the trial magistrate considered the mitigation of the Appellant and the circumstances of the case in sentencing him and exercised discretion judiciously. I find though that the sentence was light, the trial court correctly applied their discretion in meting out the sentence guided by the emerging jurisprudence emanating from the courts. I am therefore persuaded that the sentence was commensurate with the offence and I find no reason to disturb it.

21. In view of the all the above factors and taking into consideration the record of appeal and the submissions of the parties herein, I find the appeal before me has no merit and I will dismiss it in its entirety. The Appellant will continue to serve the sentence as per the trial court in Eldoret CMCCR Case No 253 of 2020.

DELIVERED, DATED AND SIGNED ON THIS 9TH DAY OF MARCH 2023

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J.W.W.MONGARE

JUDGE

Delivered virtually In the presence of;

1. Appellant Present

2. Ms. Okok Prosecution Counsel for the Respondent

3. Brian Kimathi – Court Assistant

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J.W.W.MONGARE

JUDGE