Mutunga v Republic (Criminal Appeal E060 of 2022)
[2023] KEHC 17504 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E060 OF 2022

TM MATHEKA, J

MAY 16, 2023

BETWEEN

MWENDWA MUTUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of Hon. J.N. Mwaniki (CM) in Makueni Chief Magistrate's Court Criminal Case No. E152 of 2021 delivered on 23rd June 2021)

JUDGMENT

1. The appellant was charged with three counts of Burglary contrary to section 304(2) and Stealing contrary to section 279(b) of the *Penal Code*, and in the alternative handling stolen goods contrary to section 322(2) of the *Penal Code*.

2. On the first count particulars of the offence were that on the night of June 1, 2021 at 0200hrs, at Kaumoni Market, Kilala Location, Makueni Sub-County within Makueni County, he broke and entered the dwelling house of Veronica Kakuli with intent to steal therein and did steal from therein one mobile phone make infinix S4, one black handbag, one light green handbag and kshs 15,000/= all valued at kshs 40,000/=, the properties of the said Veronica Kakuli.

3. In the alternative that on the 5th June 2021 at 1130hrs, at Kinyongo Village, Kaumoni Sub- Location within Makueni County, otherwise than in the course of stealing he dishonestly retained one mobile phone make infinix S4, one black handbag, one light green handbag having reason to believe them to be stolen goods.

4. On the second Count the particulars of the offence were that on the night of June 1, 2021 at unknown time, at Kaumoni Market, Kilala Location within Makueni County, he broke and entered the dwelling house of Peter Mutua with intent to steal therein and did steal from therein one mobile phone make Tecno Pop 2 Plus valued at Kshs 7,800/=, the property of Peter Mutua.

5. In the that on June 5, 2021 at 1130hrs, at Kinyongo Village, Kaumoni Sub- Location within Makueni County, the appellant, otherwise than in the course of stealing dishonestly undertook the retention of one mobile phone make Tecno Pop 2 Plus having reason to believe them to be stolen goods.

6. On the third count the particulars of the offence were that on the night of May 30, 2021 at unknown time, at Itangine Village, Kilala Location within Makueni County, he broke and entered the dwelling house of James Ndambuki Silingi with intent to steal therein and did steal from therein one mobile phone make D-Light M-1000 and ksh 9,800/= all valued at Kshs 29,300/=, the property of James Ndambuki Silingi.

7. In the alternative that on June 5, 2021, at Kinyongo Village, Kaumoni Sub- Location within Makueni County, he, otherwise than in the course of stealing dishonestly retained one mobile phone make D-Light M-1000 having reason to believe them to be stolen goods.

8. The record shows that the charges were read to the appellant on June 7, 2021 and he pleaded guilty on the three main counts, was convicted and sentenced to 4 years imprisonment on each of counts 1, 2 and 3.

9. The sentences were to run concurrently.

The Appeal

10. Aggrieved by that decision, the appellant filed this appeal and listed 5 grounds as follows:

    a. That the trial court did not consider Article 49 of the CPC(sic) which protects every person against arbitrary imprisonment.

    b. That I did not understand the charges before me.

    c. That the honorable court failed to consider the circumstances of the accused and his mitigation factors as basic factors when giving the sentence.

    d. That the trial magistrate appeared biased on the accused person whenever he raised his claims and issues on the prosecutions side.

    e. That the trial magistrate was dishonest, incompetent and negligent when delivering the ruling and judgment.

11. The appeal was canvassed through written submissions.

The Appellants' Submissions

12. The appellant submits that the sentence of 4 years is harsh and excessive and that he has realized that the longest journey in one's life is the journey of rediscovering himself. That while in custody, he made peace with himself and with God and has received constant counseling from the church and other mentors. That he has engaged in many rehabilitative programs and learnt new skills which may help him when he leaves prison.

13. He has urged the court to give him a favorable sentence and to consider the following mitigation factors;

    a. He is the sole bread winner of the family and his continued stay in prison will ruin the lives of his family

    b. He is remorseful and begs for forgiveness

c. He begs for a non-custodial sentence or community service order so he can serve while attending to his siblings

d. He promises that given the chance he will be a law abiding citizen and ambassador on the need to be law abiding

e. That even though the 4 years is a legal sentence he feels that it is harsh.

14. Further that:

i. He is a first offender.

ii. He was un-armed and did not commit the offence against multiple complainants.

iii. He is remorseful.

iv. He is well rehabilitated.

15. He has called upon this court to consider the sentencing guidelines set out by the Supreme Court decision in *Francis Karioko Muruatetu –vs- Republic*. He has also relied on the south African case of *State v Oscar Pistorius* a text cited as *SS Terreblance on Sentencing in South Africa*, 2nd Edition and NKR Misc Criminal Application no 45 of 2018 in urging the court to take into consideration the main purposes of punishment namely; retribution, deterrence and rehabilitation, while at the same time taking Guidance from provided Sentencing Guidelines.

Submissions by the Respondent

16. The State, through Prosecution Counsel Victor Kazungu, identified the following as the issues for determination:

a Whether the conviction is legal and safe.

b Whether the jail term is fair and proportionate.

c Whether this court should review or vary the sentence.

17. On issue (a), Whether the conviction is legal and safe he has relied on section 348 of the Criminal Procedure Code (*CPC*) for the submission that, an appellant does not have a right to appeal against conviction where he/she is convicted in his/her plea of guilty. He submits that the plea was unequivocal as the appellant even tendered his mitigation. That his assertion, about not understanding the charges, is untrue. He relies on the case of *Tobicho Wekesa & 2 Others –vs- R* (2022) eKLR where the Court held that:

> "..The court notes that the appellants tendered in their mitigation. The 1st Appellant asked for forgiveness and that he was born in the year 2000, the 2nd Appellant on his part asked for forgiveness stating that he was a student and the 3rd Appellant asked for forgiveness and that he will not repeat. The mitigation such as the one tendered could not have been offered had the appellants not been aware of the charges leveled against them. The court is thus satisfied that the appellants clearly understood what was at stake. The plea cannot be said to be equivocal."

18. On issue (b), Whether the jail term is fair and proportionate he submits that the trial court took into account the mitigating circumstances of the case in arriving at the sentence as required under guidelines April 23, 23.9(2) of the sentencing policy guidelines. He submits that the court settled for the 4-year

jail term after considering the mitigation by the appellant and taking into account the interests of the public. He contends that the court had to find a balance between settling on a lenient sentence and the need to protect the public from exposure to crime. He relies on the case of *R –vs- Howells* 1999 1 All ER. 50 which was cited in *Benson Nkaramata Sakita –vs- R* (2018) eKLR as follows:

> " ...courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the important public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system."

19. On issue (c), Whether this court should review or vary the sentence, he submits that this court should not disturb the sentence of a trial courtunless it is found to be illegal and manifestly oppressive. He relies on Benson Nkaramata Sakita –vs- R (*supra*) where the court stated;

> On this appeal the court must be guided by such well-known principles on review of sentences that are laid down in Ogola S/o Owuor 1954 21 EACA 270, Nilsson v. Republic 1970 EA 599 – 601 it is necessary to repeal (sic) these principles stated as follows: "The principles upon which appellate court will act in exercising of its jurisdiction to review sentences are firmly established"
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> "The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic 19 EACA 147, "it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case"

20. Having looked at the grounds of appeal, the entire record and the rival submissions the issues for determination are whether the plea was unequivocal, whether the appellant can challenge the conviction and sentence in light of s. 348 of the Criminal Procedure Code.

Analysis and Determination

21. From the record, it is evident that the appellant pleaded guilty to the charges and they have admitted as much in his petition of appeal. The record also shows that the charges and all their elements were read to him in the language which he understood and he responded by stating 'ni ukweli' in all three counts. The facts in all three counts were also read and he responded by stating 'maelezo yote ni ya ukweli'. Consequently, I have no doubt that the plea was unequivocal and as correctly submitted by the State; the appeal on conviction is barred. Section 348 of the CPC provides 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 or legality of the sentence."

22. However, there are numerous authorities that the wording of s. 348 is not a bar to bring an appeal even where an accused person has pleaded guilty because not all pleas of guilt are unequivocal. For instance, where an accused person pleads to a defective charge?

23. As regards the extent or legality of the sentence; In terms of pronouncement of the number of years that the appellant was to serve that was the discretion of the learned trial magistrate.

24. The charge sheet states that the accused person was charged with Burglary c/s 304(2) and Stealing c/s 279(b) of the Penal Code.

25. Section 304 provides Housebreaking and burglary

(1) Any person who-

a. breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein or;

b. having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein or having committed a felony in any such building, tent or vessel, breaks out thereof,

Is guilty of the offence termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary and the offender is liable to imprisonment for ten years.

26. Section 279(b) states provides for Stealing from the person; stealing goods in transit, etc. If the theft is committed under any of the circumstances following, that is to say —

(a) .....

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

27. These are two distinct charges with their own penalties. The prosecution conveniently left out the penalty under s. 279 which states that:

> the offender is liable to imprisonment for fourteen years. The question is which of the two would the learned trial magistrate use: 10 years

under s. 304(2) or 14 years under s. 279(b)? The prosecution cannot literally have their cake and eat it? Which of the two had the state intended to rely on as the sentence to be meted out with respect to the charge as you cannot have two penalties for the same charge.

28. There is no question about the fact that the charge sheet was itself fatally defective. The combination of the two charges each with its own penalty was prejudicial to the appellant who did not have the assistance of legal counsel and could not have noted that by himself. The court cannot uphold an illegality. The fact that these two were combined like that ultimately rendered the charge fatally defective, and the guilty plea cannot be held to be unequivocal.

29. S. 304 (1)(b) as read with s. (2) was sufficient to cover both the alleged burglary and theft of the complainants' property. The prosecution also had the choice to use s. 304 or s. 279(b) of the Penal code.

30. With respect to the sentence, I do agree with the submissions of the respondent that the court must remain alive to the discretion of the trial court and the need to protect society through the criminal justice system. However, the system has its own checks and balances so that sentences are not handed down capriciously and sentencing justice is achieved for all- the community, the victims, the accused persons and within the justice system itself. That is the purpose of the sentencing guidelines.

31. In this particular case the only reason given for the 4-year sentence was the fact that the Probation Officer's Report was negative. The learned trial magistrate stated:

> 'I do consider the Probation Officer(sic) which is against the release of the accused on non-custodial sentence on account of previous crimes and non-acceptance by the sentencing (sic).

32. First of all, there was nothing before the trial court to show that the appellant had previous records: the state had already rendered itself that he was indeed a first offender. There was no consideration of the fact that he had pleaded guilty in the first instance and that the stolen good were recovered. Even if the 4-year imprisonment sentence was justified the appellant had a right to have his side of the mitigation taken into consideration. That has a bearing to the right to a fair trial. There was also no evidence that the appellant was made aware of the very adverse report against him and whether he had an opportunity to respond to it.

33. I find it necessary to make reference here to the purpose of the Sentencing Guidelines which came into force vide Gazette Notice No. 2970 Headed *The Constitution* of Kenya the *Judicial Service Act* (No. 1 of 2011) Sentencing Guidelines The gazette notice states:

> These Sentencing Guidelines are a collaborative effort of the justice sector institutions under the auspices of the National Council on the Administration of Justice (NCAJ), a multi-sectoral body established under section 34 of the *Judicial Service Act*, 2011.

The Guidelines have been developed pursuant to section 35(2) of the *Judicial Service Act* which mandates NCAJ to formulate policies relating to the administration of justice and to implement, monitor, evaluate and review strategies for the administration of justice. They are also made as part of State's duty under Article 21 of *the Constitution*. These Sentencing Guidelines are aimed at guiding judicial officers, in the application and interpretation of laws that govern sentencing. They are a response to the challenges of sentencing in the administration of justice, which include disproportionate and unjustified dis parities in respect to sentences imposed to offenders who committed same offences in more or less

similar circumstances; and an undue preference of custodial sentences in spite of the existence of numerous non-custodial options which are more suitable in some cases. „„While recognizing that sentencing is one of the most intricate aspects of the administration of trial justice, the Guidelines have collated the principles of law that should guide courts in the exercise of their discretion, so that sentences for analogous circumstances are delivered as transparently and consistently as practically possible. They are now presented as a one stop reference that judicial officers and other practitioners in the justice chain can use to guide their engagements with the courts on the matter of sentencing. Accordingly, the Guidelines are not intended to substitute the provisions of the *Constitution* and statutory laws regulating the administration of Justice. (emphasis added)

34. Both the learned trial magistrate, and the Probation officer were obligated to consider all the requisite factors and to place them on record. As it is the appellants side of the matter was not considered and that is where this court comes in.

35. In the circumstances even though the appellant pleaded guilty the plea to the main three counts the plea was clearly not unequivocal in light of the defective charge.

36. It is my view that it would be in order to proceed under s. 354 of the *Criminal Procedure Code* which states: Powers of High Court

(1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court. (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address. (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

i. .... or

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

iii. ....

37. This is because the facts as read and explained to the appellant clearly established the alternative charge of handling stolen property c/s 322(2) of the Penal Code. The property was recovered from the appellant and he pleaded to the facts. With respect to the alternative charge I find that the facts as given by the prosecution and admitted by the accused person establish the alternative charge of handling stolen property c/s 322(2) of the penal code.

38. The appellant's conviction with respect to the three main counts is quashed. However, it is substituted with a conviction on the alternative charges of handling stolen c/s 322 (2).

39. The penalty as provided (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

40. Taking into consideration the mitigating factors, and that there were no aggravating circumstances, I would substitute the sentence with a term of three years imprisonment from June 7, 2021.

41. The appeal partially succeeds

42. The following orders issue

i. The conviction on the three main counts is quashed and the related sentences set aside.

ii. The finding of the learned trial magistrate is altered to the effect that the appellant is guilty of the alternative charges.

iii. The four-year sentence is substituted with three years' imprisonment each to run concurrently from the date of 1st remand, June 7, 2021.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH MAY 2023

.....

Mumbua T Matheka

Judge