Marangu v Republic (Criminal Appeal E032 of 2022)
[2023] KEHC 17687 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E032 OF 2022

LW GITARI, J

MAY 4, 2023

BETWEEN

PATRICK NKARI MARANGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal filed by the Appellant herein against his conviction and sentence. The Appellant was charged in Criminal Case No E916 of 2021 at Marimanti Law Court with the offence of burglary contrary to Section 304(2) of the *Penal Code* and stealing contrary to Section 279(b) of the Penal Code. In the alternative, he faced the charge of handling stolen goods contrary to Section 322(1) of the *Penal Code*.

2. The particulars of the main count were that on September 21, 2021 at Marimanti Township in Tharaka-South sub-county within Tharaka Nithi County, the Appellant broke and entered the dwelling house of one Jonathan Mwiti Nyaga and therein stole cash amounting to Kshs 278,300/= and other assorted items, all valued at Kshs 383,000/=.

3. The Appellant pleaded guilty to the offence of burglary and stealing as charged in the main count and was convicted on his own plea of guilt. He was then sentenced to serve seven (7) years imprisonment and in the alternative count he was sentenced to serve 2 (two) years imprisonment. The trial court ordered for the two sentences to run concurrently.

4. Despite being convicted on his own plea of guilty, the Appellant preferred this appeal stating that he was aggrieved by both the conviction and sentence meted out against him by the trial court. His main grounds for this appeal are that:

    i. The honourable trial magistrate erred in both laws and facts by imposing a harsh and excessive sentence upon the Appellant without considering that he was a first offender.

ii. The learned trial magistrate still erred in both matters of laws and facts by imposing a harsh sentence without considering the circumstances which led the Appellant to plead guilty.

iii. The learned trial magistrate still erred in both matters of laws and facts by failing to note that the Appellant pleaded guilty unconsciously.

iv. That the learned trial magistrate still erred iin both matters of laws and facts by not putting into consideration that the Appellant was qualified for the benefit of the least severe punishment under Article 50(2) of the *Constitution*.

5. Based on the foregoing grounds, the Appellant thus prayed for this appeal to be allowed by quashing his conviction and setting aside his sentence or by substituting his sentence with the least severe punishment prescribed in law.

6. The appeal was canvassed by way of written submissions which I have summarized hereunder.

Appellant's Submissions

7. The Appellant submitted that it was his constitutional right to benefit of the least severe punishment for the offence he was convicted with. That being a first offender, the trial court ought to have given him a lenient sentence. The Appellant further submitted that he was young and ignorant when he committed the crime and that as a result of his experience in prison; he has now reformed and is capable to resist any influence that would lead him to commit a crime of any kind. The Appellant thus urged this Court to review the sentence imposed on him downwards.

Respondent's Submissions

8. It was the Respondent's submission that Section 348 of the *Criminal Procedure Code* prohibits an accused person convicted in his own plea of guilt from challenging the said conviction unless his challenge goes to the extent or legality of the sentence. That the exceptions to this rule are where:

i. The plea taken is ambiguous, imperfect, unfinished, or

ii. The trial court erred in treating it as a guilty plea;

iii. The accused pleads guilty as a result of misapprehension or mistake or

iv. The Charge disclosed no offence known in law.

9. The Respondent further submitted that considering the above exceptions, the Appellant has failed to demonstrate why this COurt should interfere with his plea of guilt. In addition, that the trial court did follow the correct manner of recording a plea of guilt as laid down in the case of *Adan v Republic* [1973] EA 446 in that the charges were read to the Appellant who consequently pleaded guilty. That the facts supporting the charge were thereafter read and exhibits produced to which the Appellant confirmed the same to be true. That he was then convicted on his own plea of guilt and that he again conceded the charges against him in his mitigation. It was thus the Respondent's submission that the Appellant's of guilt was not flawed.

10. On the sentence meted against the Appellant, it was the Respondent's submission that the trial court correctly exercised its discretion within the confines of the law and that as such, the sentence should not be altered by this Court.

Issues for Determination

11. This court has considered this appeal and the response made.. The main issues that arise for this Court to determine are as follows:

    i. Whether the Appellant's plea of guilt was unequivocal; and if so,

    ii. Whether the sentence meted against the Appellant was harsh or excessive in the circumstances.

Analysis

12. This being the first appellate court, this Court is duty bound to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of *Okeno V Republic* [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala V R* (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

[See also: *Kiilu & Another vs Republic* [2005] 1KLR 174]

13. Guided by the aforementioned authorities, below is an analysis of the main issues raised in the instant appeal.

Whether the Appellant's plea of guilt was unequivocal

14. As rightly submitted by the Respondent, an appellate court may only interfere with a guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a guilty plea; or where the accused pleads guilty as a result of misapprehension or mistake; or where the charge disclosed no offence known in law. [See: *Alexander Lukoya Maliku vs Republic* [2015] eKLR]

    Section 348 of the *Criminal Procedure Code* provides:-

> " 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."

15. I have looked at the record of proceedings in the trial court. Both the charge and the detailed particulars of the charge were read over to him and he stated "It's true". The plea of guilty was then entered, as per the proceedings of the trial court, and the facts were then read over to him. Consequently, the Appellant replied "The facts are true and correct". The trial court then proceeded to convict the Appellant of the offence in the main count on his own plea of guilt. Given these facts, this Court finds that the Appellant's plea of guilt was unequivocal in every sense. Further, it is the finding of this Court that the charge, the particulars of the charge, and the detailed facts read over to the Appellant did disclose the offence of burglary contrary to Section 304(2) of the *Penal Code* and stealing contrary to Section

279(b) of the *Penal Code*. The decision in *Alexander Lakoye Maliku vs Republic* (2015) eKLR does not therefore apply here as I do not find any basis to interfere with the Appellant's conviction.

Whether the sentence meted against the Appellant was harsh and excessive in the circumstances

16. As a first appellate court, this Court should only disturb the sentence meted on the Appellant if it is established that the sentence was illegal, or that in sentencing, the trial court failed to take into account relevant factors, or took into account irrelevant ones or that it applied the wrong legal principles. An appellate court can also interfere with the sentence if, in its view, the sentence was harsh or manifestly excessive in the circumstances of the case. [See: *Bernard Kimani Gacheru V Republic*, [2000] eKLR; *Macharia V Republic*, [2003] KLR 115].

17. Having found that the Appellant was guilty of the offences of burglary and stealing, the learned trial magistrate imposed a sentence of 7 (seven) years imprisonment for burglary and 2 (two) years' imprisonment for the offence of stealing.

18. Under the provisions of Section 279 a person is liable to imprisonment upon conviction, for fourteen years. On the other hand, the felony of housebreaking and burglary under the provision of Section 304 of the *Penal Code* attracts a liability of imprisonment for seven years. Given the prescribed sentences under the mentioned provisions and considering the circumstances of this case, it is my view that the trial court correctly exercised its discretion in meting out the sentence against the Appellant. The same was lenient and as such, this Court need not interfere with the same.

Conclusion

For the reasons stated above, I find that this appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF MAY 2023.

L.W. GITARI

JUDGE