Cheboi v Republic (Criminal Appeal 46 of 2020)
[2023] KEHC 18377 (KLR) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 46 OF 2020

RN NYAKUNDI, J

JUNE 12, 2023

BETWEEN

JOSEPH CHEBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

1. The Appellant was charged with the offence of threatening to kill contrary to section 223(1) of the *Penal Code* in Eldoret Chief Magistrate's *Criminal Case no. 77 of 2020*. The particulars of the offence are that on March 28, 2020 at around 1700 hrs at Kimoning village, Moiben Sub County within Uasin Gishu County, without lawful excuse, he uttered the words 'Nitakuua Leo'' threatening to kill Susan Jepkemoi.

2. The appellant pleaded not guilty and the facts were read out to him and he confirmed the same as true. He was later reminded of the charge and maintained a plea of guilty. the accused was then convicted of his own plea of guilty and upon considering his mitigation, the trial magistrate sentenced him to 5 years imprisonment.

3. Being aggrieved with the conviction and sentence, the appellant instituted the present appeal vide a petition of appeal dated October 22, 2020. The appeal is premised on the following grounds;

    1. The trial court erred in law and in fact in convicting the appellant on his own plea of guilty when the essential ingredients of the offence were not explained to him as required in law.

2. The trial court erred in law and in fact in convicting the appellant on his own plea of guilty when the plea was equivocal.

3. The trial court erred in law in convicting the appellant on his own plea of guilty when the prosecution failed to establish the facts of the case beyond reasonable doubt.

4. The trial court erred in law in convicting the appellant on his own plea of guilty when the appellant did not understand the nature and elements of the offence he was facing.

5. The trial court erred in law in convicting the appellant on his own plea of guilty when the appellant did not understand the language the plea was conducted over the virtual proceedings.

6. The trial court erred in law in convicting the appellant on his own plea of guilty where the court failed to warn the appellant the consequences of the plea of guilty.

7. The trial court erred in law in convicting the appellant on his own plea of guilty where the appellant pleaded guilty to an offence not known in law.

8. The trial court erred in law in convicting the appellant without following the proper procedure for taking a plea of guilty as set out under section 207 of the *Criminal Procedure Code* and as established by the Court of Appeal in *Adan vs Republic* (1973) EA 445-

Analysis & Determination

4. Upon considering the petition of appeal, the following issues arise for determination;

    1. Whether the plea was unequivocal

    2. Whether the sentence should be set aside

Whether the Plea was Unequivocal

5. The crux of the appeal is whether the guilty plea was unequivocal. 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."

Section 207 of the *Criminal Procedure Code* states as follows:

> "'207 (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 plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by 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."

6. The courts have discussed the manner in which a guilty plea ought to be recorded extensively. In *Ombena vs. Republic* [1981] eKLR the Court of Appeal held that:

> " In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> '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 the facts relevant to sentence together with the accused's reply should be recorded."

7. From the record of the court, it is evident that the court read out the charge to the accused in Kiswahili and he plead guilty by saying 'Ni Ukweli'. The facts were read out to the accused person and he confirmed that they were true. The trial court then proceeded to convict him and sentence him. I find no reason to disturb the conviction as meted out by the trial court.

Whether the Sentence was Harsh/Excessive

8. Section 233 of the *Penal Code* states as follows;

> 1. Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years

In *S v Rabie* 1975 (4) (SA) 855 (A) at 857 D-F Holmes JA observed that

9. In every appeal against sentence, whether imposed by a magistrate of a judge, the court hearing the appeal:

> a. Should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court."
>
> b. Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised."

2 The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly in appropriate.

10. A review of the memorandum of Appeal provides no evidence that the trial court in exercising discretion to sentence the Appellant erred in law or facts to arrive at a verdict of 5 (five) years imprisonment. The impugned judgement sets out the tone on aggravating and mitigating factors resulting review of sentence. In *Joseph Muerithi Kanyita vs Republic* [2017] eKLR_ where this court stated: " In this appeal the sentence by the trial court was not illegal or unlawful. There is not palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant"

11. The appellant was not a first offender and therefore the trial magistrate exercised discretion in sentencing him to 5 years' imprisonment. I find no reason to interfere with the sentence. The appeal is dismissed in its entirety.

DELIVERED, SIGNED AND DATED AT ELDORET ON THIS 12TH DAY OF JUNE 2023

.....

R. NYAKUNDI

JUDGE