Kilemi v Republic (Criminal Appeal E174 of 2021)
[2023] KEHC 18899 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E174 OF 2021

EM MURIITHI, J

JUNE 15, 2023

BETWEEN

WILSON MWENDA KILEMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence by Hon. A.G Munene P.M in Maua CR. E-1236 of 2021 on 20/9/2021)

JUDGMENT

1. Wilson Mwenda Kilemi, the appellant herein, was charged with threatening to kill contrary to section 223(1) of the *Penal Code*. The particulars of the offence were that on 9/7/2021 at about 1600 hrs at Antubochiu location in Igembe South Sub-County within Meru County, without lawful excuse uttered threatening words to kill saying Wewe Ndio Nilikua Natafuta Nitakukatakata Na Hii Panga "You are the one I was looking for...I will slice you using this panga" words meant to threaten Patrick Karuti.

2. On 12/7/2021 when the charges were first read to the appellant, he stated, "Not true. He came to destroy my house" and a plea of not guilty was accordingly entered.

3. However, on 24/8/2021, the appellant stated, "I plead guilty." When the facts were read to the appellant on 30/8/2021, he responded that, "Facts true" and he was convicted on his own plea of guilty. After mitigation, a pre-sentence report dated 17/9/2021 was duly filed. The trial court noted that, "I have read the presentence report. It is not favourable. Accused sentenced to 10 years imprisonment."

4. He has now appealed to this court on 2 grounds as follows:

    a. That the trial magistrate erred in law and fact when he failed to evaluate that the plea of guilty was equivocal.

b. That the trial magistrate erred in law and fact by making a decision without appreciating whether the plea of guilty was unequivocal since the accused person was unrepresented by an advocate thereof.

Submissions

5. The appellant urged that there was no direct, cogent, convincing and compelling evidence to warrant the trial court to convict him on his plea of guilty, and cited *Alexander Lukoya Malika v R* (2015) eKLR, *Adan v R* (1973) EA 1445, *Kariuki v R* (1984) KLR 809 and *Simon Gitau Kinene v R* (2016) eKLR.

6. The respondent urged that the facts which were read out to the appellant and all the ingredients of the offence. It urged that the proceedings and the plea were recorded and read in a language which the appellant understood, and therefore the appeal ought to be dismissed because the plea was voluntary and unequivocal. It relied on *Martin Ng'ang'a Kamanu v Republic* (2020) eKLR, *Alexander Lukoya Maliku v Republic* (2015) eKLR and *Obedi Kilonzo Kevevo v Republic* (2015) eKLR. It urged that the sentence was within the law as the trial court took into account the fact that the appellant was neither a first offender nor remorseful.

Analysis and Determination

7. The singular issue for determination is whether the appellant's plea of guilty was unequivocal.

8. The appellant was charged with threatening to kill contrary to section 223 (1) of the *Penal Code*, which provides that –

> " 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."

9. It is trite law that in cases where the offence committed carries a heavy penalty like death or life imprisonment, courts should exercise great caution when taking a plea of guilty especially where the accused is unrepresented. This Court has previously emphasized the need to explain to an unrepresented accused person the penal elements of a charge in terms of the likely penalty upon conviction before accepting a plea of guilty in Meru HCCRA No. E135 of 2021, *Abel Michubu Michek v. R* (2022) eKLR, as follows:

> "14. It is reasonable that in cases where the offence committed carries a heavy penalty such as death or life imprisonment, courts should exercise great caution when taking a plea of guilty especially where the accused is unrepresented. Further, the court must explain to the accused person the consequences of the guilty plea so that the accused knows exactly what to expect. I respectfully note the decision of Abdalla Mohammed v Republic [2018] eKLR (Korir J) where it was observed as follows:
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> "The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was stressed by Joel Ngugi, J in Simon Gitau Kinene v Republic [2016 eKLR when he stated that:
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> "Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused

Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened."

10. The appellant herein was arraigned in court on 12/7/2021 when the charges herein were read to him, and he responded, "Not true. He came to destroy my house." A plea of not guilty was entered and he was duly supplied with the charge sheet and admitted to bail. The matter was mentioned on 3/6/2021 but the appellant was absent prompting the court to further mention the matter on 24/8/2021, when the appellant was present. On that date, the appellant told the court that, "I plead guilty" and since the prosecutor did not have the police file, the matter was mentioned on 30/8/2021 for purposes of reading the facts. Come that day, the facts were read to the appellant as follows, "On 09/07/2021 at 4.00 p.m the accused was in the village with a panga and a wooden stick. He met with the complainant was is his uncle and told he was looking for him and he will cut him. The complainant ran away. The complainant made a report and he was later arrested and charged." The appellant then responded that, "Facts true" and a plea of guilty was entered.

11. This case was one of threatening to kill whose penalty is a sentence of 10 years. Although the appellant was unrepresented when he took plea before the trial court, this court finds that he understood the nature of the charges he was facing. In fact, the appellant decided to change his plea of not guilty to one of guilty on his own volition, and went ahead to admit to the facts as they were read to him after an adjournment for six days for purposes of getting the police file for reading of the facts of the case to the accused. He had ample time to reflect on his plea, and, therefore, his plea of guilty was unequivocal.

Sentence

12. This Court notes that although the trial court may have considered that, as shown in the Presentence report, the accused was not a first offender, having previously been convicted and sentenced to imprisonment for 7 years for placing illegal road blocks on the highway and demanding money from motorists while armed with swords - an offence related to the offence herein.

13. Where there the accused has previous convictions the law requires that the same be proved and put to the accused as provided under section 142 of the *Criminal Procedure Code* as follows:

> " "142. Mode of proof of previous conviction
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> 1. In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force—
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> a. by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order; or
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> b. by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.
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> 2. A certificate in the form prescribed by the Minister given under the hand of an officer appointed by the Minister in that behalf, who has compared the finger prints of an accused person with the finger prints of a person previously

convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused.

3. A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

4. A certificate under this section shall be prima facie evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered so to do. [L.N. 299/1956, L.N. 172/1960, Act No. 13 of 1982, First Sch.]"

14. The mere allegation of previous conviction in a Probation Officer's report cannot suffice in view of the caution given by the Court of Appel in *Kyalo v. R* (2009) KLR 325, 329 that –

> " It must be considered that the probation report, though important as it leads to the court into making its mind as to whether to put a person convicted on probation, it is nonetheless composed of allegations some of which had not been tested through cross-examination in court and are matters that the person convicted has not had an opportunity to comment on and as such should not form the only basis for sentencing."

15. Two principles of sentencing are established, firstly that "it is unusual to impose the maximum sentence on a first offender" See Arissol (Josphine) v. R (1957) EA 447, 449 and, secondly, that a court must give credit for a plea of guilty by an accused person - See *Wanjema v. R* (1971) EA 493, 494, where the Court of Appeal for Eastern Africa held:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took int account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967) 51 Cr. App. R. 165 and Godfrey (1967) 51 Cr. App. TR. 449. This admits no doubt because the magistrate awarded maximum sentence to the first offender, which of itself is unusual)."

In this case the court did not give credit to the accused on either count.

16. The trial court did not, therefore, properly exercise its discretion in sentencing the appellant to the maximum penalty of ten (10) years because the previous conviction had not been proved, and it was only an allegation set out in the Probation Officer's presentence report. In addition, the Prosecutor had upon conviction said the accused was a first offender. The doubt created by the Probation Officer's report as to whether the accused had previous conviction must be given to the benefit of the accused.

Orders

17. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal from conviction has no merits and it is dismissed.

18. However, the sentence of ten (10) years is set aside and substituted with a sentence of imprisonment for five (5) years from the date of sentence in the trial court.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Appellant in Person.

Ms. Nandwa for the DPP.