



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Maduhu v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 19897 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E020 OF 2022
GL NZIOKA, J
JUNE 12, 2023**

BETWEEN

SHIKOLE MAGELELA MADUHU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence in criminal case
No. 018 of 2021 at the Senior Principal Magistrate's Court at Engineer
rendered by Hon D.N Sure, Senior Resident Magistrate, on 12th May, 2022)*

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide criminal case No. 018 of 2021, with the offence of trafficking in person contrary to section 3(1)(e)(5) of *Counter-Trafficking in Person Act*, 2010.
2. The particulars of the charge are that, on the 8th day of December 2021 at Olkalou Township within Nyandarua County, he transported, one "J.S.Z" from Tanzania to Nyandarua County, Kenya being a position of vulnerability for the purpose of exploiting the said "J.S.Z".
3. The appellant initially pleaded not guilty to the charges. Thereafter two witnesses, (PW1) "J.S.Z" and (PW2) Dr. Patrick Kiluki testified. The prosecution then amended the charge sheet and fresh charges were read to the appellant who pleaded guilty and was convicted on his own plea of guilty. He was then sentenced to serve thirty (30) years imprisonment.



4. However, the appellant is aggrieved by the decision of the trial court and appeals against both the conviction and the sentence on the grounds as here below reproduced: -
 - a. That, the learned trial magistrate erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the appellant's defence was not considered as required by law.
 - c. That, the learned magistrate erred in law and fact by failing to find that the ingredients of the offences were not proved as required by law.
 - d. That, I pray to be supplied with a copy of the appellant court's proceedings and its judgment.
 - e. That, further grounds shall be adduced at the hearing of this appeal.
 - f. That, I wish to be present during the hearing and determination of this appeal
5. However, the respondent in response to the appeal filed ground of opposition which states as follows: -
 - a. That the appellant pleaded guilty to the facts as read to him by the court in a language that he understands.
 - b. That the court informed the appellant the gravity of the offence and explained it to him in a language he understands.
 - c. That the court called in a victim impact assessment report and noted the gravity of the injuries on the victim P3 form showing grievous harm as the degree of injury inflicted was produced as an exhibit.
 - d. That the prosecution implores on the court to dismiss the appeal and uphold the sentence of thirty (30) years imprisonment.
6. The appeal was disposed of by filing of submissions. The appellant filed submission on 8th March 2023, in which he argued that, the plea was unequivocal as the trial court misdirected itself and failed to follow the principles and procedures of plea taking as outlined in the cases of; *Adan vs Republic* (1973) EA 445 and *Kariuki vs Republic* (1984) eKLR.
7. That, the language used in the trial court was not clear as the same was never recorded nor was his response recorded. Reliance was placed on the case of; *Joseph Bosire Ogao vs Republic* (2010) eKLR where the court dealt with the importance of recording clearly the language the accused understands.
8. He further submitted that the trial magistrate did not caution him before or after the charges were read to him, which went to the root of the prosecution's case. He relied the case of; *Njuki vs Republic* (1990) KLR 334 where the court cited the case of; *Hando s/o Akunaay vs Republic* (1951) 18 EACA 305 on the need to caution the accused while recording plea of guilty.
9. That the trial dealt with the matter in one day which was not adequate time for him to prepare his defence and therefore it was contrary to article 50 (2) (b) and (c) of *the Constitution* of Kenya, 2010. Furthermore, the trial court failed to record and consider his mitigation which is part of the trial process under sections 216 and 329 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.



10. Lastly, the appellant argued that the trial Magistrate erred in meting out the mandatory sentence as provided for under section 3(1)(c)(5) of the Counter-Trafficking in Person Act 2010. That, being a first offender he was liable to benefit from the least severe sentence as provided for under article 50 (2) (p) (q) of *the Constitution*.
11. However, the respondent in response filed submissions in which it argued that before the appellant changed his plea and pleaded guilty to the charge against him, the victim (PW1) had testified how the appellant had brought him into Kenya to exploit him as a beggar and subsequently burnt him with a metal rod.
12. Further, the sentence of thirty (30) years imprisonment is not unconstitutional as the trial court exercising its discretion considered the facts and circumstances of the case before meting out the sentence, as such court should uphold the same.
13. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanor of the witnesses. The court observed: that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. 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”

14. To revert back to the substance of the matter herein, I note that, the appellant pleaded guilty to the charges and was convicted on his own plea of guilty. In that regard, the provisions of section 348 of *Criminal Procedure Code*, (cap 75) Laws of Kenya, provides that, where an accused person pleads guilty to the charges, no appeal shall be allowed, except as to the extent or legality of the sentence.
15. Be that as it were, the appellant avers that, the plea was unequivocal in that the language used is unclear and/or not reflected on record and that he was not cautioned before or after the charges were read. In that regard, the law and plea taking is settled as per the provisions of section 207 of the *Criminal Procedure Code* which provide that: -

“

- “(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. Similarly, the Court of Appeal in the case of; K N v Republic [2016] eKLR stated that: -

“The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasizes that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;

“...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.”

Where an accused person who has been called upon to plead under section 207 of the Criminal Procedure Code in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded. The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself.

The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true. We think the court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence.

In outlining the facts, the prosecution’s role is to present the evidence that could have been proven if the case had gone to trial. Therefore, for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial.”

17. In the instant matter the trial court read out the charges to the appellant when he was first arraigned in court. The court record shows, the charges were read in Kiswahili and he pleaded not guilty. He then proceeded on with the trial, and by virtue of the fact that he participated in the trial and cross examined the witnesses, indicates he understood the language used.

18. However, I note that, when the trial court read the charges after the charge sheet was amended, it did not indicate the language used. It should have done so. However, in view of the fact that, the same had already been established at the first instance and the fact that when the fresh charges were read to appellant, he responded thereto.

19. The findings of this court that, he understood the charge and was well guided and the issue of caution does not arise. I therefore find and hold the plea was unequivocal.



20. As regards the sentence I find that, the provisions of section 3(1)(c)(5) of the subject Act, under which the appellant was charged, convicted and sentenced states as follows: -

“(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of: —

(c) fraud;

(5) A person who trafficks another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life”.

21. Pursuant to aforesaid the sentence meted out is lawful, as it is the minimum sentence. Therefore, whether mitigation was considered or not, the trial court meted out the proper sentence. Even then, the manner in which the appellant treated the victim of crime was degrading, inhuman and cruel, as such the appellant deserves no interference with sentence.

22. The upshot is, that the appeal is dismissed in its entirety.

Dated, delivered, and signed on this 12th day of June 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in Prison: attending virtually

Mr. Atika for the Respondent

Ms Ogutu: Court Assistant

