Kipruto v Republic (Criminal Appeal E072 of 2020)
[2023] KEHC 19723 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19723 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E072 OF 2020

JRA WANANDA, J

JULY 7, 2023

BETWEEN

ELPHAS KIPRUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered in Eldoret Chief Magistrates Court Criminal Case No. E572 of 2022. By the said Judgment, the Appellant was convicted and sentenced to imprisonment.

2. The Appellant had been charged with the offence of threatening to kill contrary to Section 223 of the Penal Code. The particulars of the offence were that on 6/03/2022 at Kamptumo village, Kapkoi location, Kesses Sub-County within Uasin Gishu, without lawful excuse uttered the words "wewe sio mama yangu na nitahakikisha nimekuua wakati wowote" to one Constaine Melly.

3. The record indicates that the Appellant took plea on 4/04/2022 and that he pleaded guilty to the charge. The Learned trial Magistrate then on 16/05/2022 convicted the Appellant on his own plea of guilty and sentenced him to 3 years imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant filed this Appeal on 27/5/2022. He preferred 4 grounds of Appeal as follows:

    i. The learned trial Magistrate erred in law and fact in convicting the Appellant on his own plea of guilty without satisfying herself that the procedure stipulated in Section 207 of the *Criminal Procedure Code* and the celebrated case of *Adan v Republic* (1973) EA 445 and 446 had been followed to the latter.

ii. The learned Magistrate erred in law and fact by failing to warn the Appellant of the consequences of a guilty plea considering the offence carries a life sentence and the Appellant was unrepresented.

iii. The learned trial Magistrate erred in law and fact by failing to accord the Appellant a chance to raise his mitigation before sentencing.

iv The learned trial Magistrate erred in law and fact in meting excessive and harsh sentence against the Appellant.

Hearing of the Appeal

5. Pursuant to directions given, the Appeal was canvassed by way written submissions. The Appellant, through his Advocates, Messrs D.K & Associates filed his Submissions on 20/07/2022 whereas the Respondent, through Prosecution Counsel, Mark K. Mugun filed its Submissions on 18/01/2023.

Appellant's Submissions

6. Counsel for the Appellant submitted that the procedure used by the trial Court to record the Appellant's plea of guilty was deficient, ambiguous and failed to meet the threshold stipulated in Section 207 of the *Criminal Procedure Code* and outlined in the case of *Adan v Republic* (1973) EA 445 and 446. He then submitted that the trial Court did not follow the procedure provided when taking the plea, although the trial Court's record indicates that the substance of the charge and every element thereof were read out to the Appellant in a language that he understood, the Court failed to categorically state which language the Appellant understood, the record shows that the trial Court neither indicated the language in which the charges and facts were read and explained to the Appellant nor the language that he understood, the omission leads to the conclusion that the plea of guilty was equivocal. He cited the case of *Elijah Njihia Wakianda v Republic* [2016] eKLR which, he stated, was cited with approval in *Simon Vundi Mwaniki v Republic* [2021] eKLR.

7. Counsel further submitted that the record of the trial Court indicates that when the charges were read and explained to the Appellant, the trial Magistrate indicated that the Appellant answered by saying "ni kweli" whereupon a plea of guilty was entered, however, when the facts were read to him the Court recorded the Appellant as saying "facts are true", further, during mitigation, the Court recorded the Appellant as saying "I pray for leniency", on the basis of the failure by the trial Magistrate to indicate the language that the Appellant understood and the one used by the Court, it is not possible to tell which language was used by the Court or which language he understood, the plea of guilty entered against the Appellant cannot therefore be said to have been unequivocal, a plea of guilty should not be left to deductions, conjecture or guess work in respect to the language used or the one understood by the Appellant. He cited the case of *Simon Gitau Kinene v Republic* [2016] eKLR and *Alexander Lukoye Malika v Republic* [2015] eKLR to argue that this Court has the power to intervene since the plea of guilty recorded was imperfect, ambiguous and unfinished for failure by the trial Court to follow the procedure stipulated and that the conviction is unsafe.

8. Further, Counsel submitted that the conviction of the Appellant on the basis of a plea of guilty is unsafe for reason that the trial Court failed to exercise extra caution and warn the Appellant of such plea considering that he was unrepresented and that the offence in question carries a custodial sentence, the Appellant was charged with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code* which carries a maximum sentence of 10 years, the offence is a felony which carries a custodial sentence hence it was incumbent upon the Court to warn the Appellant, who was unrepresented, of the consequences of a plea of guilty.

9. Finally, Counsel submitted that in the event that this Court is inclined not to set aside the conviction and sentence on the basis of the aforementioned reasons, then it should order for a re-trial of the matter in the subordinate Court. He relied on the case of *Muiruri v Republic* [2003] KLR 552 and added that from the record, the alleged offence occurred on 6/03/2022 whereas the same was reported at the police station on 2/03/202, about 4 days earlier than the date when the offence is alleged to have occurred.

Respondent's Submissions

10. On his part, Counsel for the Respondent stated that the State is conceding to the Appeal on the ground that the plea was equivocal. He too cited the case of *Adan v Republic* (*supra*) and submitted that where the Appellate Court finds that there was an error, ambiguity, unfinished or flawed process of recording the plea of guilty then according to the Court in *Alexander Lukoye Malika v Republic* [2015] eKLR, the plea of guilty can be interfered with, in this instant case, the facts admitted by the Appellant differ from those contained in the particulars of the offence in the charge sheet, the actual words the Appellant uttered to threaten the complainant were not read out to him, he thus admitted incomplete facts, the facts admitted by the Appellant confirmed that the Appellant merely called the complainant a stray dog and thus cannot be construed to be threatening, the facts admitted by the accused are suggestive of the offence of either creating disturbance under Section 95 of the *Penal Code* or offensive conduct under Section 94 of the *Penal Code*. He added that the impression created is that the Appellant pleaded guilty to and admitted a different offence from what he was charged with, it was therefore unsafe to maintain the plea of guilty, the trial Magistrate ought to have entered a plea of not guilty, as such the Republic concedes to the Appeal.

11. In conclusion, Counsel submitted that the Republic would not be praying for a re-trial on account of the consideration that the Appellant has been in custody since April 2022.

Analysis & Determination

12. This being a first appellate Court, the power bestowed upon it (as was stated in *Okeno v Republic* [1972] EA 32) is to re-examine the evidence (facts and evidence) presented before the trial Court and evaluate the same in order to determine whether the trial Court erred in law and fact to the extent alleged in the Petition of Appeal. Even where, as herein, no evidence was adduced by the prosecution witnesses since a plea of guilty was entered, the appellate Court is still obligated to scrutinize the proceedings in their entirety so as to ascertain whether or not the sentence was lawful and legal.

13. Before I proceed further, I note that although in the Petition of Appeal, among the grounds preferred were that the Appellant was denied a chance to mitigate before he was sentenced and that the sentence of 3 years was excessive and/or harsh, Counsel for the Appellant, in his Submissions, did not at all canvass or even refer to these grounds. I shall therefore presume that these two grounds have been abandoned by implication. I will not therefore include them in the issues for determination.

14. I also note that, in his Submissions, the Appellant has articulated the Appeal on the sole ground that there is no indication by the trial Court on which language was used during the plea taking process. The State has, on its part, conceded to the Appeal but on the separate and different ground that the facts read out and admitted to by the Appellant differ from those contained in the particulars of the offence. According to the State therefore, the Appellant pleaded guilty to a different offence from what he was charged with.

Issues for determination

15. In view of the foregoing and upon perusing the record, including the Petition of the Appeal and the Submissions filed by the parties, I find that the issue that arises for determination in this Appeal to be the following:

> Whether the process leading to the entry of plea of guilty before the trial Court and the resultant conviction complied with the required procedure and therefore whether the conviction was safe.

16. I will now proceed to analyze and answer the said Issue.

17. The procedure of taking a plea is clearly set out in Section 207 of the Criminal Procedure Code. The provision was expounded upon in the celebrated case of *Adan v Republic* (1973) EA 445 (*Supra*). The procedure requires that 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. The accused's own words should then be recorded and if they are an admission, a plea of guilty should be recorded.

18. 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. 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. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

19. In the present case, it is evident that the trial Court's record does not indicate the language that the Appellant is alleged to have understood before taking his plea. It cannot therefore be established with certainty that the Appellant understood the charges that were read to him and the ingredients thereof.

20. For a guilty plea to be unequivocal, the steps set out in Adan v Republic (supra) must be followed. Further, the record must be such that it leaves no doubt as to whether the accused understood the charges and confirmed the charges as true.

21. As further correctly argued by Appellant's Counsel, the trial Court did not warn the Appellant on the consequences of pleading guilty. The importance of this duty was reiterated in the case of *Elijah Njihia Wakianda v Republic* [2016] eKLR where the Court of Appeal guided as follows:

> "……We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process……"

22. This duty exists not only to capital offences but other serious offences whose sentences may be indefinite or long. The Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understands the sentence he faces where he opts to plead guilty. In this case, the failure to do so was a violation of the Appellant's right to a fair trial and the plea of guilty was in those circumstances not unequivocal. The Appellant having been unrepresented and having pleaded guilty, the trial Court had a duty to

take extra caution in ensuring that he understood the nature of the charges and the consequences of such a plea. In the instant case, there is no evidence that the Court made this extra effort to ensure the foregoing. In these circumstances, given the seriousness of the charge the Court was about to convict and impose sentence, it behoved the Court to warn the Appellant of the consequences of a guilty plea.

23. Counsel for the Respondent stated that the State is conceding to the Appeal. However, as aforesaid, this concession is based on the different ground that the facts admitted by the Appellant differ from those contained in the particulars of the offence in the charge sheet.

24. As already set out, the words stated in the charge sheet and which the Appellant is alleged to have uttered were "wewe sio mama yangu na nitahakikisha nimekuua wakati wowote". To demonstrate the discrepancy, Counsel referred to the trial Court's record which is set out as follows:

BRIEF FACTS	On 6/3/2022 at about 3.00 pm the complainant was in her house alone. She is partially blind and diabetic, when the accused went armed with a panga and insulted her "mbwa koko" and informed her that he will make sure he will kill her anytime. She pleaded with him. The accused left and on 2/3/22 a report was made at Cheptiret Police Post and on 1/4/22 the accused was then arrested and charged
Accused:	Facts are true
Court:	Accused convicted on his own plea of guilty

25. From the above record, the discrepancy in the words set out in the charge sheet and those read out to the Appellant is apparent. I therefore agree that the concession by the Prosecution Counsel has been correctly made and was the right thing to do in the circumstances. It is clear, as submitted upon by the State Counsel, that the actual words that the Appellant is alleged to have uttered in threatening the complainant were not read out to him. Clearly therefore, he admitted incomplete facts. The facts read out to the Appellant and which he is purported to have admitted to only relate to the allegation that the Appellant called the complainant "a stray dog". Needless to state, this cannot be construed to be threatening. As submitted by the State Counsel, the facts read out and admitted are only suggestive of the offence of either creating disturbance or offensive conduct. It is therefore true that the Appellant may have admitted and pleaded guilty to a different offence from what he was charged with.

26. On the strength of the guidelines set out in the case of *Adan v Republic* (*supra*) and reiterated in *Alexander Lukoye Malika v Republic* [2015] eKLR, I feel perfectly justified to interfere with the entry of the plea of guilty since I am satisfied that the process of recording the plea was marred by error and ambiguity and the same was also unfinished and/or a result of a flawed process. Accordingly, I agree and find that the plea of guilty entered in this case was not unequivocal and hereby quash the conviction and sentence.

27. Having quashed the conviction, the question that now arises is whether the Appellant should be set free forthwith or whether a retrial should be ordered. On this point, Prosecution Counsel for the Respondent, having conceded to the Appeal, submitted that the Republic would not be praying for a re-trial on account of the consideration that the Appellant has been in custody since April 2022.

28. I take guidance from the Court Appeal case of *Fatehali Manji v Republic* 1964 E.A 481 the following was set out:

> " even where a conviction is vitiated by a mistake of the trial Court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and a order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

29. The Court of Appeal, again, in *Samuel Wahini Ngugi v R* [2012] eKLR stated as follows:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered ... In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'

30. In yet another of its decisions, the Court of Appeal, in *Muiruri v R* [2003] KLR 552, held that: -

> " It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala v Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's."

31. The Prosecution Counsel has submitted that the Appellant has been in custody since April 2022, more than 1 year now. Indeed, the Charge Sheet indicates that the Appellant was arrested on 1/04/2022 and the trial Court's record indicates that he took plea on 4/04/2022. Upon his plea of guilty, he was convicted and sentenced on 16/05/2022. It is therefore true that the Appellant has been in custody since April 2022.

32. Guided by the said authorities, considering the period already spent in custody and also the State's decision not to seek a re-trial, I form the view that, in the circumstances of this Appeal, insisting on a retrial will only cause an injustice to the Appellant.

Final Orders

33. In the end, I issue the following orders:

    i. The conviction is quashed and sentence set aside.

    ii. Consequently, the Appellant is hereby set at liberty forthwith unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

WANANDA J. R. ANURO

JUDGE