Olongui v Director of Public Prosecution (Criminal Revision E054 of 2024) [2024] KEHC 16663 (KLR) (7 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16663 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL REVISION E054 OF 2024

JL TAMAR, J

OCTOBER 7, 2024

BETWEEN

CHARLES LANGOI OLONGUI .... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION .... RESPONDENT

RULING

1. The applicant herein moved this court by way of a Notice of Motion brought under section 362. 364 and 365 of the Criminal Procedure Code Cap 75 Laws of Kenya.
   i. The applicant seeks that the court set aside the sentence of two (2) years imprisonment issued on the 12th June, 2024 by Hon H. Maritim (SRM) in regard to count 11 of the charge sheet.
   ii. That the Honourable court directs that the applicant takes plea afresh in regard to count 11 of the charge sheet.
2. The application is supported by the affidavit of Mugambi Marete Advocate sworn on 2nd July 2024.Counsel avers that the trial magistrate erred by failing to appreciate the fact that the plea was taken virtually and there had been network challenges hence the reason the court, while calling out the name of the accused person observed 'not responds.' Counsel therefore submitted that the plea was not unequivocal. He also raised concerns that the three days the accused allegedly spent in custody without being arraigned in court constituted a violation of his constitutional rights. The trial magistrate was also faulted for not taking steps to ensure the accused who is said to be illiterate, is availed an interpreter so as to understand all the elements of the charge and the consequences of pleading guilty. Counsel also avers that the accused was not in a proper frame of mind as he had been assaulted prior to being presented in court.
3. The state orally opposed the revision application stating the accused was properly convicted on his own plea of guilty as the facts were read to him and he responded in the affirmative.

Analysis and determination

4. I have read the submission by counsel for the applicant and the authorities quoted which I found useful and mainly reiterated the averment in the affidavit referred to earlier. At the time of writing this ruling the state had had not filed its submissions

5. In an application for revision under section 362 of the criminal procedure code, the main and dominant consideration for which the record of any criminal proceedings is called for, is to enable the court to satisfy itself as to correctness, legality and propriety of any finding, sentence or any order made by the subordinate court. It is intended as stated by Ondunga J in Joseph Nduva Mbui vs Republic [2019] eklr to correct manifest irregularities or illegalities either during the pendency of the proceedings or at the conclusion.

6. The record of the lower court shows that the accused was arraigned and charged on 11th June 2024 with the offence of threatening to kill contrary to section 223(1) of the penal code. He pleaded not guilty and was admitted to bail/bond terms. The prosecution is recorded as stating that there are two more counts which had not been printed at the time of taking plea in count one. The matter was therefore adjourned to the following day. The following day the proceedings of the court is as follows;

   12.06.2024

   Magistrate—Hon H.Maritim-SRM

   Prosecutor/state counsel- Martins

   Court clerk - Jacky

   Accused: Not responds (in ongata rongai police station)

   Elements of the charge sheet read to accused in Kiswahili for count 11 and 111.

   Responds—count 11 in(sic) ukweli(plea of guilty entered in count 11.

   Count 111—sio ukweli(plea of not guilty entered in count 111

   Hon.H. Maritim—PM

Facts in count 11

7. On 7th June 2024 the complainant called officers to his shop to arrest the accused who fought and resisted arrest. They were in uniform. They wanted to arrest him and take him to custody.

   Accused---Nakubali

   Court—accused convicted on count 11 on own plea of guilty.

   ODPP –No previous record.

   Mitigation

   I was just drunk. I pray for leniency. I was just drunk and I did not know.

   Court---on count two the accused is hereby sentenced to 2 years imprisonment.

   Bond on count 1 shall apply to count 111 until he serves the sentence in count 11. The bail terms are hereby suspended till he serves count 11. Statement to be supplied today. Mention on 10/7 2024 for pre-trial conference.

   Hon. H. Maritim—SRM

12.06.2024.

8. From the proceedings of the magistrate court above, there is nothing on record to suggest that the accused had raised before the trial court his concerns that he had been held in custody longer than permitted by the *constitution* or that he had been assaulted and was therefore not in a proper frame of mind. The accused used of the words "si kweli" "ni kweli" and "nakubali" as appears in the proceedings is an indication that the accused ex- facie understood the language until the contrary is proved although it is the responsibility of the court to find out the language the accused is conversant with. The records capture that the accused who was at ongata rongai police station did not respond when he was perhaps called out. However, there is indication that when the elements of the charge were read out he responded in count 11 and 111 and thereafter participated in the proceedings. I agree with the defence that in situations where the accused initially fails to response to the charge when virtually called out on account of his absence, it is important that when he re-join, his presence in recorded.

9. As to whether the plea was equivocal, it is clear the court was alive to the steps to be followed when taking plea as laid out in the case of Adan Vs Republic. One of the steps that the court should ensure is followed, is that 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.

10. The accused in his mitigation stated that he was drunk and did not know(sic). The accused in my view was saying that yes, he committed the offence but raised a plea of intoxication which is a defence under section 13 of the penal code. Section 13 (4) of the penal code provides that "intoxication shall be taken into account for purposes of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence".

11. Once the accused in his mitigations raised the issue that he was incapacitated by reason of being drunk, the court should have entered a plea of not guilty and allow the matter to proceed to trial where the rigours of section 13 of the penal with regard to the defence of intoxication shall be applied.

12. Had the learned magistrate paid more attention to the accused mitigation and the defence raised therein, she would have realized that the accused plea was equivocal and ought to have returned a plea of not guilty.

13. I therefore find the sentence meted out by the trial court manifestly illegal and irregular. The same is set aside. The earlier bond terms set by the trial court and which was suspended are hereby reinstated. The accused shall take plea afresh in count two (2).

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2024.

JOHN.T. LOLWATAN

JUDGE