Okumu v Republic (Criminal Appeal E100 of 2022) [2024] KEHC 12048 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12048 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E100 OF 2022

RPV WENDOH, J

OCTOBER 2, 2024

BETWEEN

DICKENS DAVID OKUMU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. J. Munguti – Senior Principal Magistrate in Migori Chief Magistrate's Court Criminal Case No. E456 of 2022 delivered on 29/08/2022)

JUDGMENT

1. Dickens David Okumu, the Appellant herein, has filed this appeal against the judgment of the Senior Principal Magistrate, Migori, in which he was convicted for the following offences; Count I - Robbery with violence contrary to Section 296 (2) of the Penal Code, Count II - Robbery with violence contrary to Section 296 (2) of the Penal Code and Count III – being in possession of narcotic drugs cannabis sativa contrary to section 3(1) as read with section 3(2) of the Psychotropic Drugs Control *Act No. 4 of 1994*. He was sentenced to serve a term of twenty (20) years imprisonment each in Count I and Count II and to serve a term of ten (10) years imprisonment in Count III. The sentence was ordered to run concurrently.

2. The particulars of the three Counts are as follows: -

   On the 23rd August, 2022 at around 2230hrs at Masara Township in Masara location, Suna West Sub- County in Migori County within the Republic of Kenya, jointly with others not before court, while armed with offensive weapons, namely panga and knives, robbed Zainabu Boke Kshs. 6070/- and Techno Spark phone valued at Kshs. 14,000/- all items valued at Kshs. 20, 070/-

   On the same date and time as above, while armed with offensive weapons, namely panga and knives, robbed Mary Boke Marwa Kshs. 2500/- and her phone valued at Kshs. 3,000/-.

On the 27th August, 2022 at around 3.30pm at Masara Township in Masara location, Suna West Sub- County in Migori County within the Republic of Kenya, was found in possession of 10 rolls of cannabis sativa (bhang) which was not meant for medical purposes in contravention of the said Act.

3. The appellant pleaded guilty to the said offences, the facts of the charges were read out to him to which he also confirmed that the facts were correct. A Plea of Guilty was thereafter entered. In his mitigation, he prayed for leniency stating that he was only 18 years old.

4. Consequently, the appellant was sentenced. Dissatisfied with the conviction and sentences the appellant lodged the instant appeal on the following grounds amended on the 23/05/2024 pursuant to section 350(2) (v) of the Criminal Procedure Code THAT: -

    a. The trial Magistrate erred in law and facts in convicting the appellant on a plea of guilty that was not unequivocal.

    b. The learned trial magistrate erred in law and facts by failing to take necessary steps to ensure that the appellant understood every element of the charge considering that the appellant was unrepresented.

    c. The learned trial magistrate failed in his duty to be cautious when accepting the pela of guilty from unrepresented accused person.

    d. The trial magistrate erred in law and in fact by failing to warn the appellant that the charges and offence he was facing carries a mandatory death penalty.

    e. The learned trial magistrate erred in law and facts in failing to ensure that the appellant understood and appreciated the consequences of pleading guilty of the charges he was facing.

    f. The learned trial magistrate misdirected himself in convicting and sentencing the appellant on a plea of guilty without asking the appellant the reasons for pleading guilty.

    g. The learned trial magistrate erred in law and facts by failing to realize that the appellant's plea of guilty was induced by believing that the court will release his co-accused (mother)

5. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside and the appellant be set free.

6. Directions were taken and the appeal was disposed of by way of written submissions. The appellant filed his written submissions and Amended grounds of appeal on 23/05/2024 while the Prosecution filed his submissions dated 31.10.2023.

Appellant's Submissions

7. The Appellant submitted that the plea was not unequivocal; that he was not represented during plea taking and that there is no evidence that the trial court warned him on the consequences of pleading guilty on the charges. He relied on the decision in the case of Boit vs Republic [2002] eKLR where the Court of Appeal held that, "a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused person must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words as nearly as possible in his own words".

8. It is his submission that from the trial court's proceedings, it is evident that the trial court failed and erred in law by accepting and acting on a plea that was unequivocal because the court failed to warn him on the consequences of pleading guilty to charges that carry mandatory death penalty and that there is no evidence on record that the plea of guilty was entered consciously, freely and in a clear and unambiguous terms.

9. He also relied on the decision in Adan vs Republic (1973) EA 445 which outlined the steps to be followed by the court in taking and recording plea. It was his submission that the trial court did not follow the said steps and procedures and erroneously acted on a plea of guilty that was unequivocal.

10. It was also his submission that he was forced to enter a plea of guilty in order to secure his mother's freedom, who was his co-accused, without understanding the consequences of pleading guilty to an offence of such magnitude that carries mandatory death penalty.

Prosecution's Submission

11. The prosecution submitted on one main issue; whether the plea of guilty was unequivocal. It was Ms. Ikol's her submission that the appellant's contention is that he was not warned of the consequences of pleading guilty whereas, from the record of the trial court, the charge was read to the appellant to which he answered "true".

12. Counsel conceded the appeal on the grounds that the appellant was warned on the consequences of pleading guilty especially when he was facing two charges of capital offence and which attracts death sentence; that he was also unrepresented thus disadvantaged. Counsel relied on the court of appeal decision in Tony Mamboleo vs Republic [2022] eKLR and Bernard Ijendi vs Republic [2017] eKLR, both of which emphasized on the need to warn the accused person of the consequences of pleading guilty and reading the charge to him again after the warning.

13. It was therefore her submission that the manner in which the proceedings were conducted violated the Appellant's rights to a fair trial and that the plea of guilty was not unequivocal in the circumstances and urged the court to order for a retrial in the interest of justice, considering the short period that the appellant had been in custody.

14. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of Okeno vs. Republic (1977) EALR 32 and further in the Court of Appeal case of Mark Oiruri Mose vs. Republic (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter.

15. I have considered the Amended grounds of appeal, the rival submissions tendered before me and it is my considered opinion that the main issue at the center of this appeal is whether the plea was unequivocal. Section 348 of the CPC bars any appeal arising from a plea of guilty. The section provides as follows;

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent and legality of the sentence"

In Olel V. Rep. (1989) KLR 444 the Court of Appeal held as follows-

> " where a plea is unequivocal, an appeal against conviction does not lie Section 348 of the CPC does not merely limit the right of appeal in such cases but bars it completely"

From a reading of the above case, it means that one can only appeal against conviction after a plea of guilty if the plea is equivocal. In the case of Alexander Lukoye Malika V. Rep(2015) eKLR, the Court of Appeal identified situation in which conviction based on a plea of guilty can be interfered with as follows;

> “ A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against the accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts, the appellant could not in law have been convicted of the offence charged

16. W. Korir, J in Abdallah Mohammed vs. Republic [2018] eKLR held that:-

> “ A plea of guilty can only be entered in respect of an offence known to the law…In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.

17. See also Boit V. Rep (Supra)and Mamboleo V. Rep(supra). From the record of appeal, it is also common ground that the trial court did not warn the appellant of the consequences of pleading guilty, the seriousness and/or the gravity of the offence he was charged with. The charge against the appellant is a capital offence and the same attracts the death penalty and, he ought to have been warned of the consequences of pleading guilty.

18. It is therefore my finding that the plea as taken was not unequivocal and the sentence based on the said conviction is therefore unsafe and unsound. The question that therefore follows is whether this court can order a retrial.

19. The Court of Appeal in the case of Ahmed Sumar vs. R (1964) EALR 483, outlined the threshold to govern the court in ordering a retrial and stated as follows: -

> “ 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 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"

20. Further, the Court of Appeal in Mwangi vs Republic [1983] KLR 522 at page 538 while addressing the issue of a retrial held as follows: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

21. I have carefully considered that the appellant was charged with of Robbery with Violence and the gravity of the sentence thereto. He had been sentenced to serve (twenty) years imprisonment and so far, he has only served one year imprisonment and therefore he would not suffer any prejudice if a retrial is ordered. Besides the complainant's rights have to be protected by the matter going to full trial so that the truth is laid bare. The facts as read by the prosecution seem to disclose that there is evidence that may result in a conviction. I find that this is a case fit for a retrial and hereby order a retrial.

22. The appellant be released to Migori police station to be presented before the Migori Senior Principal Magistrate's Court 1 on 4/10/2024 for fresh plea and trial. Being a retrial, the trial should be expedited.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 2ND DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

Delivered in the presence of:

Appellant - In person

Majale for the State.

Court Assistants – Juma