Sang v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 12443 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E002 OF 2024

RL KORIR, J

OCTOBER 17, 2024

BETWEEN

COLLINS KIPTOO SANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E064 of 2024 by Hon. Kimtai B.M in the Senior Principal Magistrate's Court in Sotik)

JUDGMENT

1. The Appellants were charged with the offence of stealing contrary to section 278A of the Penal Code. The particulars of the offence were that between 11th November 2023 to December 2023 at Kuryot village in Sotik Sub-County within Bomet County, they stole a motor cycle Bajaj Boxer red in colour registration number KMFJ 920N valued at Kshs 65,000/= the property of Benard Kiprono Bett.

2. The Appellants took plea on 15th January 2024 and each pleaded guilty to the offence. The facts were read out to them and they stated that the facts were correct. The trial court entered a plea of guilty and they were each convicted on their own pleas of guilty. The trial court then sentenced the Appellants to each serve 5 years imprisonment.

3. Being aggrieved with the conviction and sentencing by the trial court, the Appellants through their Petition of Appeal dated 9th April 2024 appealed and relied on the following grounds:-

    i. That the learned trial Magistrate erred in law in failing to appreciate that the plea of guilty was not unequivocal.

    ii. That the trial Magistrate erred in law in failing to ask the Appellants the language which they understood and would prefer to be used to them during the reading of the charges.

iii. That the learned trial Magistrate erred in law in failing to warn the Appellants on the severity of the charges and the consequences of the plea of guilt given that the Appellants are young, fearful naive men who did not have legal counsel.

iv. That the learned trial Magistrate erred in law and fact in not appreciating that the charge sheet was manifestly defective and fatal as it only contained the punitive section of the alleged offence but did not contain the section of the law creating the alleged offence.

v. That the leaned trial Magistrate erred in law and fact in disregarding the fact that the particulars on the charge sheet were not in consonance with the facts as read in court; as the facts read in court disclosed a different offence from the offence on the face of the charge sheet.

vi. That the leaned trial Magistrate erred in law and fact in accepting the plea of guilty from the Appellants who pleaded through blackmail and false promises of their liberty as the charge was said to be a minor charge punishable by a short probation sentence.

vii. That the leaned trial Magistrate erred in law and fact in meting out a sentence that was expressly and manifestly harsh and excessive in the circumstances.

viii. That the leaned trial Magistrate erred in law and fact in considering extraneous issues in convicting the Appellant.

ix. That the leaned trial Magistrate failed to appreciate that there was a great discrepancy on identity of the complainant since the names as indicated were variably and erratically different.

x. That the leaned trial Magistrate erred in law and fact in sentencing the Appellant by taking into account an irrelevant factor or factors and/or applied wrong principles making the sentence so excessive and an error in principle.

xi. That the leaned trial Magistrate erred in law and fact in convicting the Appellant without first analysing the evidence.

4. On 11th April 2024, parties took directions to canvass the Appeal by way of written submissions.

The Appellants' submissions.

5. In their submissions dated 10th April 2024, the Appellants submitted that even though section 348 of the Criminal Procedure Code barred appeals where an Accused had been convicted on their own plea of guilt, the said section of law did not bar the court from inquiring whether the plea was unequivocal or not. That the plea was not unequivocal and should not have been used to convict and sentence the Appellants. They relied on Anthony Muthonga Munene vs Republic (2022) eKLR, JMN vs Republic (2021) eKLR and Losherian vs Republic (Criminal Appeal 16 of 2015) [2023] KECA 477 (KLR) (12 May 2023) (Judgment).

6. The Appellants submitted that while taking plea, the trial court failed to ask the Appellants which language they understood before reading out the charge. That the record did not explain whether the Appellants understood the charge. They relied on Adan vs R (1973) EA 445, Kariuki vs R (1954) KLR 809, Anthony Muthonga Munene (supra) and Elijah Njihia Wakianda vs Republic (2016) eKLR.

7. It was the Appellants' submission that the Appellants were of young age and they kept quiet in court because they were intimidated by the court atmosphere. That the trial court ought to have assisted them by being their protector.

8. The Appellants submitted that the charge sheet was defective as it only contained the punitive section of the law (section 278A of the Penal Code) and not the section of the law creating the offence (section 268 of the Penal Code). That the offence was not complete by actus reus alone as it had to be completed by mens rea. They relied on Daniel Lopeyok vs Republic (2022) eKLR.

9. It was the Appellants' submission that the contents of the facts read out in court revealed a different offence. That going by the facts read out in court, the 2nd Appellant ought to have been charged with the offence of handling stolen property and not stealing. It was their further submission that the Appellants pleaded to charges that were unknown to them in law and different to the one contained in the charge sheet. They relied on Peter Nkonge Gatundu vs Republic (2021) eKLR.

10. The Appellants submitted that the failure of the charge sheet to disclose a specific offence occasioned miscarriage of justice and that was reason enough for this court to allow their Appeal.

11. It was the Appellants' submission that the Appellants pleaded guilty to the charge because they were harassed and intimidated by the police. That the police directed them to plead guilty as they would get probation sentences. That the trial court ought to have considered that the Appellants were young and naive and were intimidated and the court had to step in to protect them. They relied on JMN (supra).

12. The Appellants submitted that there was a discrepancy on who the complainant was. That the charge sheet stated that the complainant was Benard Kiprono Bett while the proceedings indicated Benard Bore. That there was no evidence of how the Appellants were traced and anyone could consider the evidence as hearsay or the charges fabricated. They further submitted that there was also a discrepancy in the motor cycle's registration number as it was captured as KMFJ 920N in the charge sheet and KMFJ 920M in the proceedings. That it was unsafe to convict them in light of these discrepancies.

13. It was the Appellants' submission that the sentences meted out to the Appellants were excessive and harsh. That the trial court ought to have considered that the Appellants were of a very young age, were first time offenders, had pleaded guilty and the gravity of the offence and value of the motor cycle did not warrant such a hefty sentence.

The Respondent's notice to concede

14. The Respondent filed their notice to concede on 11th October 2024 and the same was admitted out of time.

15. It was the Respondent's submission that they did not contest the Appeal because the 1st Appellant was prosecuted merely on suspicion that he had stolen a motorcycle and that suspicion was not a basis for conviction. Further that the 1st Appellant admitted to stealing the motorcycle and the trial court ought to have established whether the confession they allegedly made upon arrest was admissible.

16. The Respondent submitted that the facts did not support the charge against the 2nd Appellant. That he was an accomplice and that accomplice evidence was of little probative value. The Respondent further stated that the plea of guilty was not unequivocal.

17. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 9th April 2024 and the Appellants' written submissions dated 10th April 2024. I have also considered the Respondent's notice to concede dated 11th October 2024 and the following issues arise for my determination:-

    i. Whether the charge sheet was defective.

    ii. Whether the plea was equivocal.

iii. Whether the sentence was harsh and excessive.

18. Before I begin my analysis, I observe that the Respondent's conceded the Appeal. However, I shall subject the case to a fresh evaluation to determine whether or not the concession was merited. Secondly, it is important to state that the Appellants were each convicted on their own pleas of guilty. Section 348 of the Criminal Procedure Code provides:-

> 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 or legality of the sentence.

19. It has however been held that the above section of the law was not an absolute bar to appeals such as the present one. The Court of Appeal in Wandete David Munyoki vs Republic (2015) eKLR held:-

> " It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in Ndede v R [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed."

20. Similarly in John Muendo Musau vs Republic (2013) eKLR, the Court of Appeal held:-

> " There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute....."

21. From the above authorities, this court is permitted to consider the grounds of Appeal raised by the Appellants despite the provisions of section 348 of the Criminal Procedure Code. It is only after such consideration and analysis that this court can determine whether the Appellants' convictions were safe or not.

i. Whether the charge sheet was defective

22. The Appellants stated that the charge sheet was defective. Section 134 of the Criminal Procedure Code provides as follows:-

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

23. It was the Appellants' contention that the charge sheet was defective because it contained the section of the law penalising the offence (section 278A of the Penal Code) and not the section of the law that created the offence (section 268 (1) of the Penal Code).

24. Section 268 (1) of the Penal Code provides:-

> A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

25. Section 278A of the Penal Code provides:-

> If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.

26. It is clear from the above that section 268 (1) of the Penal Code prescribed the offence while section 278A of the Penal Code gave the penalty for the offence. It is proper practice that when a charge sheet is drawn, as in the present case, the section of the law prescribing the offence and the penalty are included in the charge sheet. As the Appellants correctly stated, the present charge sheet contained the penal section only and this in my view made the charge irregular. In Calistus Nandeke Egesa vs Republic (2021) eKLR, Chepkwony J. held:-

> " According to the charge sheet in count I, it is not clear what exactly the Appellant was charged with. Further, a reading of Section 278 A under which the Appellant was charged reveals that this is the penal provision and not the Section prescribing the offence. It therefore follows that the Appellant was charged with the offence of committing the penalty. In my opinion, this was irregular. The correct offence that the Appellant should have been charged with is the one prescribed under Section 268 (1) of the Penal Code, which is the offence of stealing."

27. Similarly in George Mulama Lutta vs Republic (2011) eKLR, Nambuye J. (as she then was) held:-

> " This court has revisited those remarks and it is of the opinion that the offence disclosed in the mind of the learned trial magistrate was the offence described in Section 268 (1) of the penal. But this was not the offence that the appellant faced. I have no doubt that the learned trial magistrate realized this anomaly and that is why he stated that appellant is found guilty as charged. It is to be noted that fraudulent taking of the motor vehicle is not part of the ingredients of the offence charged in Section 278 A of the penal code. It therefore follows that the appellant has a genuine complaint. What the learned trial magistrate should have done upon realizing the error is that he should have declared the proceedings mistrial and then asked the prosecution to start afresh if they so wished but not to shy away from an illegality.....
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> .....This is a further call to courts may they be subordinate or superior that where such courts are seized of a criminal jurisdiction, care should be taken to ensure that the charge is well founded before proceeding with the trial. Failure to do so render the trial a nullity and this is the position herein."

28. Though the above authorities are from courts of equal jurisdiction and not binding to this court, I am persuaded by the reasoning behind them. In the present case, the offence of stealing was not prescribed. The Appellants should have been charged with stealing contrary to section 268(1) as read with section 278A of the Penal Code. In my view, as I have already stated above, the irregular nature of the charge made the charge sheet defective and it could not sustain a conviction.

ii. Whether the plea was equivocal

29. It was a ground of the Appeal that the plea that the Appellant took was equivocal. The process of plea taking is provided under Section 207(1) and (2) of the Criminal Procedure Code which states :-

    (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.

30. In the case of Ombena vs Republic (1981) eKLR, the Court of Appeal held that:-

    "In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

    "Held:

    (i) 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;

    (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

    (iii) 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;

    (iv) 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;

    (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

31. I have gone through the trial court record and I have noted that the plea taken on 15th January 2024. The Appellants have faulted the plea process because the trial court did not indicate which language the Appellants preferred to be addressed it and address the court. I have gone through the record and I have noted that the language used was an interpretation between English to Kiswahili. The court also recorded the Appellants' responses as "it's true". When the facts were read out to the Appellants, the trial court recorded their responses as "facts are correct" and thereafter entered plea of not guilty. To that extent, I am satisfied that the trial court did not err during the plea process.

32. However, I have noted that the Appellants were unrepresented. I have gone through various authorities and it is clear to me that it is the practice in our courts that where an Accused is charged with an offence which carries a prison sentence or where their liberty could be curtailed, the trial court should

inform the Appellants of the consequences of pleading guilty. The Appellants faced the possibility of the maximum sentence of seven (7) years imprisonment. In Elijah Njihia Wakianda vs Republic (2016) eKLR the Court of Appeal stated that:-

> " ... 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.....
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> ....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."

33. I am persuaded by Ngugi J. (as she then was) in Simon Gitau Kinene vs Republic (2016) eKLR, where she stated:-

> " 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. In Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:
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> > "In those cases (where there is an unrepresented Accused charged with a serious offence), care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....to put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea."

34. Similarly in Abdallah Mohammed vs. Republic (2018) eKLR the court held:-

> " 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....."

35. As I have already stated, the Appellants were unrepresented when they took plea before the trial court. It was clear from the above authorities that where an Accused was charged with an offence which carried a custodial sentence as the present one, it was the duty of the trial court to warn him of the consequences of pleading guilty to the charge. The trial Magistrate in this case did not warn the Appellants of the consequences of pleading guilty to the charge and that the offence attracted a maximum of seven years imprisonment. The failure to so warn the Appellants fell short of fair trial rights as contemplated in Article 50(2) of *the Constitution*.

36. Having found that the charge sheet was defective and the plea equivocal, it then follows that the conviction of the Appellants was unsafe and fit for setting aside.

37. Following the above, the question that arises was whether this court should order for a retrial or not. The Court of Appeal in the case of Ahmed Sumar vs. R (1964) EALR 483 offered the following guidance:-

> " ...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."

38. In the case of Samuel Wahini Ngugi vs. R (2012) eKLR, the Court of Appeal stated: -

> " 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 vs. 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".

39. Similarly in Obedi Kilonzo Kevevo vs Republic (2015) eKLR the Court of Appeal held that:-

> " Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri –Vs- Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-
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> > "Generally, whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the

arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.....”

40. Guided by the above authorities, I have considered the circumstances of the present case. As already shown, the charge was incurably defective and the plea was not unequivocal. Further, I have considered the Respondent’s grounds for conceding the Appeal. It was clear that their concession was an admission of gaps in the Prosecution case. To order for a re-trial would amount to aiding the Prosecution to fill the gaps in its case.

41. It is my firm finding therefore that a re-trial would not serve the interests of justice.

42. Before I pen off, the Appellants filed a Notice of Motion dated 24th May 2024 where they sought bail pending Appeal. The Appeal having been determined, it is my finding that the Application has been overtaken by events and is hereby dismissed.

43. In the end, the Appeal dated 9th April 2024 is allowed. I set aside the conviction and quash the sentence. The Appellants are set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 17TH DAY OF OCTOBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. D. Kipngetich holding brief for Mr. Mwita for the Appellants, 1st Appellant virtually present at Ngeria Prison, 2nd Appellant present in open court, Mr. Njeru for the Respondent and Siele (Court Assistant).