Hassan v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 13734 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E036 OF 2023

JN ONYIEGO, J

NOVEMBER 7, 2024

BETWEEN

ALI IBRAHIM HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence by Hon. M. Kimani SRM in Senior Resident Magistrate's Court at Mandera Criminal Case No. E266 of 2022 delivered on 07.01.2022)

JUDGMENT

1. The appellant was convicted on his own plea of guilty in respect of the following offences:

2. Count I: breaking into a building with intent to commit a felony contrary to section 307 of the Penal Code. The particulars were that Ali Ibrahim Hassan on 05.10.2022 at around 0530hrs at Shafshey location in Mandera East Sub County he broke and entered a shop belonging to Abdullahi Haji Mohamed with intent to steal therein.

3. Count II: being unlawfully present in Kenya contrary to section 53(1)(3) as read with section 53(2) of the Kenyan Citizenship and Immigration *Act No. 12 of 2011*. The particulars were that Ali Ibrahim Hassan on 05.10.2022 at around 0530hrs at Shafshey location in Mandera East Sub County being an Ethiopian national was found unlawfully present inn Kenya without a valid passport or permit allowing him to stay in Kenya.

4. He was convicted on all counts and sentenced to serve a term of 5 years and 1-year imprisonment respectively. His custodial sentences were to run concurrently to be calculated from 06.10.2022 when he took plea. Upon completion of the custodial sentence, he was to be repatriated back to Ethiopia.

5. The appellant being aggrieved by the sentence of the trial court filed a petition of appeal in court on 05.10.2023 citing the following grounds:

i. The learned trial court erred in fact and law by convicting him and yet the prosecution did not prove its case beyond any reasonable doubt.

ii. The learned trial court erred in fact and law by failing to consider and interrogate his defence properly.

6. The court gave directions that the appeal be canvassed by way of written submissions. The appellant filed submissions dated 30.05.2024 urging that the court erred in its finding for the reason that the sentence meted out was not only harsh but also excessive despite him presenting his mitigation. That the plea of guilty was as a result of duress occasioned to him while in the custody. He submitted that the prosecution failed to prove its case to the required standard noting that the evidence was not only contradictory but also inconsistent. He submitted that this court finds in his favour by allowing this appeal, quashing his conviction and setting aside his sentence.

7. The prosecution on the other hand submitted orally by arguing that the prosecution proved its case against the appellant beyond any reasonable doubt. That the plea was unequivocal as the same followed the standard procedure and further, the business of the court was conducted in a language that the appellant stated that he understood. He argued that it was not demonstrated that the trial magistrate erred in his finding and therefore this court was urged to uphold the finding of the trial court and dismiss the appeal herein.

8. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify. [See the Court of Appeal in the case of Okeno vs Republic [1972] EA 32].

9. Upon going through the grounds of appeal, I find that the appeal is hinged on the argument that the sentence was excessive: thus, I am called upon to determine the following issues;

i. Whether the plea was equivocal.

ii. Whether the sentence imposed on the appellant was harsh.

10. The manner and process of taking pleas was explained in the case of Adan vs Republic [1973] EA 445 where the Court of Appeal laid down the steps which should be followed in taking pleas as follows:

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."

11. The court record in the instant matter shows that the plea was taken in English and Somali language. Of importance to note is the fact that on 06.10.2022, the matter was presented before the court at the first instance and the appellant denied the charges. On 15.11.2022, he informed the court that he wished to change his plea to that of 'guilty'. Noting that the prosecutor did not have his file in court

on that day, the court directed that the police file be availed on the following day when the said charges were read unto the appellant and further explained in Somali language. The appellant stated that he understood the charges he faced and that he was guilty of the same.

12. Facts were read to the appellant in Somali language and he still admitted that he was guilty of the said offences. In mitigation, he stated that he was a widower with three children and further sought for forgiveness for his misdoing.

13. During sentence, the court noted that the appellant was a repeat offender having been convicted in MCCR E309 of 2022 thus the court sentenced him to serve a term of 5 years and 1-year imprisonment respectively. His custodial sentences were to run concurrently to be calculated from 06.10.2022 when he took plea. Upon completion of the custodial sentence, he was to be repatriated back to Ethiopia.

14. Having perused the record and the manner in which the plea was taken, I have no doubt that the plea was taken in accordance with the guidelines set out in Adan vs Republic (supra). The appellant took plea in a language that he understood well and therefore the allegation that he was under duress hence the change of his plea to that of guilty is unfounded. Accordingly, the manner in which the plea was taken in my view, cannot be faulted.

15. On sentencing, it is trite that sentencing is a discretion of the trial court and being so it must be done judiciously. Guidance on the subject can be derived from the Court of Appeal decision in the case of Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No.253 of 2003 where it was held that:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered. (Also see also Sayeka vs R (1989 KLR 306].

16. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that it might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

17. The appellant was charged with the following: Count I: breaking into a building with intent to commit a felony contrary to section 307 of the Penal Code whose punishment is five years upon being found liable. Count II: being unlawfully present in Kenya contrary to section 53(1)(3) as read with section 53(2) of the Kenyan Citizenship and Immigration *Act No. 12 of 2011* whose punishment is a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

18. In as much the appellant pleaded guilty to the charges hence saving court its precious time, it is not lost to this court's mind that the appellant is a repeat offender and therefore, needs time to undergo rehabilitation. However, considering the mitigation on record and the fact that the appellant pleaded guilty thus saving the court time, giving a maximum sentence was a bit harsh. In the circumstances I am inclined to substitute the sentence of 5 years with that of 3 years in respect of the 1st count. The sentence to run concurrently with that in count two from the date of sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE