Alusiola v Republic (Criminal Appeal E067 of 2023)
[2024] KEHC 15853 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E067 OF 2023

AC BETT, J

DECEMBER 16, 2024

BETWEEN

ALBERT ALUSIOLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement, conviction and sentence of Hon. A. Odawo, Principal Magistrate, in Kakamega Chief Magistrate's Court Criminal Case No. E2069 of 2023 delivered on 15th November 2023)

JUDGMENT

1. By a Petition of Appeal dated 28th November 2023, the Appellant seeks to have the conviction and sentence entered against him on 15th November 2023 upon his own plea of guilty, quashed and set aside on the following grounds:-

   (a) The plea was not unequivocal.

   (b) The plea was not taken in a language that the Appellant understood.

   (c) The trial magistrate considered extraneous matters in the matter that she handled the plea.

   (d) The Honourable trial Magistrate was rather casual in the manner that she handled the plea.

2. The Appellant had been charged with the offence of burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code the facts being that on the night of 8th August 2023 at Shinyalu Market, Shibuye Location in Kakamega East Sub-County within Kakamega County, he and his co-Accused jointly broke and entered the dwelling house of Jackline Nyongesa with intent to steal and therein did steal from there 280 braiding oils, one blow dryer and assorted braids the property of

Jackline Nyongesa all totaling to Kshs. 82,000/=. The Appellant was also charged with an alternative count of handling stolen property contrary to Section 322(1) (2) of the Penal Code.

3. The Appellant had been arrested on 13th November 2023 which was a Monday and arraigned on 15th November 2023 which was a Wednesday. In the premises, the Appellant was kept in police custody for a period exceeding twenty four (24) hours before being made to appear before a court of law, an act which was in violation of the Appellant's fundamental rights and freedom as guaranteed by Article 49 (1) (f) of *the Constitution*. The Appellant did not raise his unfair detention and the court will therefore not deal with it beyond pointing out that it was in contravention of the law.

4. On the day the Appellant appeared for plea, there is no record as to whether the Appellant was asked to indicate which language he was conversant with. What is simply there is a record that the charge and every element thereof was read to him in a language he understood and on being asked whether he was admitting or denying the truth of the charges replied "True".

5. The record further reflects that the facts were read out and the Appellant responded "It is true."

6. The Respondent is not opposed to the appeal. They cite the case of *JMN -v- Republic* [2021] eKLR where the trial Judge elucidated the procedure and manner in which a plea of guilt should be taken by reiterating the provisions of Section 207 of the Criminal Procedure Code which states as follows:-

> "(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.
>
> (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.
>
> (5) If the accused pleads—
>
> (a) that he has been previously convicted or acquitted on the same facts of the same offence; or
>
> (b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

7. The learned trial Judge in the aforesaid case noted that apart from following the laid down procedure as stated in *Adan -v- Republic* [1973] EA 445, another requirement as laid down by the Court of Appeal

in the case of *Mose -v- Republic* [2002] 1 EA 163 is imperative. The Court of Appeal in the said case stated:-

> " The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent."

8. It is also not certain whether the words recorded by the trial court were the exact words used by the Appellant. In the case of George Wambugu Thumbi -v- Republic [2019] eKLR, the Court held:-

> " It is time that when an accused person responds it is true to a charge read to him or her to be asked exactly what he is saying it is true to."

9. Looking at the facts as stated by the Prosecution, one cannot deduce whether the Appellant understood that he was alleged to have broken into and entered the complainant's dwelling house and stolen therefrom the items listed in the charge sheet. It is therefore difficult to know whether the Appellant was saying that it was true he had broken into, entered and stolen from the complainant's salon or that he was found with the blow drier marked as Exhibit one. The ambiguity that is latent in the facts as stated by the prosecution renders the plea unequivocal.

10. Flowing from the foregoing reasoning, I find that the plea of guilty against the Appellant was not unequivocal and I therefore allow the appeal and quash the conviction and set aside the sentence.

11. The Respondent has urged the court to order a retrial. Relying on the case of *Samuel Wahini Ngugi -v- Republic* [2012] eKLR, Counsel for the Respondent submits that a retrial at this stage is in the interest of justice because from the facts elucidated by the Prosecution, it is clear that there is sufficient evidence to sustain a conviction. The Respondent also urges the court to consider the value of the stolen items, which at Kshs. 82,000/= is quite substantial.

12. In the case of *Lolimo Ekimat -v- Republic*, Criminal Appeal No. 151 of 2004 (unreported), the court held as follows:-

> " ...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of each case but an order for retrial should only be made where the interests of justice require it."

13. Although the error on the record is attributable to the trial court, there is nothing to demonstrate that the prosecution's evidence is likely to end up in a conviction for the main charges of burglary and stealing or even handling stolen property because the Appellant was convicted on his own plea of guilty.

14. The principles under which the court can order a retrial were enunciated by the Court of appeal in the case of *Pius Olima & Another -v- Republic* [1993] eKLR where the court stated:-

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether retrial should be ordered or not. These are: - Ahmed Sumar v Republic [1964] EA 481; Manji v The Republic [1966] EA 343; Mujimba v Uganda, [1969]; and Merali and Others v Republic [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interest to justice so require and if no prejudice is caused

to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

15. The Appellant has already served thirteen months of his three year sentence. Guided by the case of Pius Olima & Another (Supra), I am of the view that a retrial would be prejudicial to the Appellant who has a right to a fair trial as envisaged by Article 50 of *the Constitution*. Having spent time in custody, the Appellant must have also learnt his lesson. Additionally, since the Appellant has spent time custody, the public interest has been catered for.

16. The upshot is that the appeal is hereby allowed. The conviction is hereby quashed and sentence set aside. The Respondent's application for an order of retrial is disallowed.

17. The Appellant is therefore set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

The Appellant

Ms. Chala for the Respondent

Court Assistant: Polycap