Godido & 19 others v Republic (Criminal Revision E238 of 2024) [2024] KEHC 15668 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL REVISION E238 OF 2024

HM NYAGA, J

DECEMBER 5, 2024

BETWEEN

ALOSO GODIDO & 19 OTHERS .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. By an application filed by twenty Applicants, which is undated, they have sought the following orders:-
   a. That the Applicants herein were charged for an offence of being unlawfully in Kenya. Under Section 53(1) (j) as read with Section 53(2) of *Kenya Citizenship and Immigration Act* No. 12 of 2010. The Applicants were the citizen of Ethiopian.
   b. That the Applicants prayer before this honourable court is that their sentences to be reviewed with an order that to be repatriated back to their country or to the refugee camp to enable them to process their application/passport.
   c. That the applicants be heard on priority basis.
2. The application was supported by the affidavit of the first Applicant.
3. In a nutshell, the Applicants state that they were charged and convicted on the offence of being unlawfully present in Kenya Contrary to Section 53(1)(5) and read with Section 53(2) of the *Kenya Citizenship and Immigration Act*, 2011.
4. They were sentenced to varying sentences ranging from 6 months to 8 months imprisonment in default of a fine of Kshs. 80,000/-.
5. They have now moved the court with the present application.
6. The Application premised upon the grounds that:-

a. They were unable to understand the proceedings as the same were conducted in English.

b. They were not represented by counsel.

7. The Applicants seek that the sentences imposed on them be reviewed and that they be ordered to be re-deported back to their country of origin.

8. I called for the lower court records on the 4 files:-

1. CM's Meru Cr. Case No. E937/2024.

2. CM's Meru Cr. Case No. E628/2024.

3. CM's Meru Cr. Case No. E692/2024.

4. CM's Meru Cr. Case No. E988/2024.

9. This court has been moved pursuant to Section 362 and 364 of the Criminal Procedure Code. The said Section provide as follows;

> "The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

10. The powers of this court are to be read alongside the provisions of Article 165 (6) and (7) of *the constitution* which provides that;

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
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> (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

11. From the court record, the accused persons in Meru CM's Criminal Case No. E988 of 2024 appeared before the court on 20/06/2024. The charges were read to them in Amharic, but it is not shown who the interpreter was. The coram for that day shows that the court clerk/assistant was one Doris.

12. In Meru CM's Criminal Case No. E987 of 2024 plea was also taken on 20/06/2024. Again the charges were said to have been read in Amharic but it is not recorded who that interpreter was. The court assistant was Doris.

13. In Meru CM's Criminal case No. E628 of 2024, the charges were deferred several times to get an Amharic interpreter. The record shows that on 26/04/2024, the charges were read to accused in Amharic, but again there is no indication as to who that interpreter was. The court assistant again was Doris.

14. In Meru CM's Criminal case No. E692 of 2024, plea was also deferred several times and was eventually taken on 26/04/2024. It is stated that the charges were read out in Amharic but the name of the interpreter is not indicated. The court assistant was Doris.

15. The importance of the language of the court to be used in proceedings cannot be over emphasized. Article 50(2) (m) of *the Constitution* makes it a requirement that an accused person ought to have the assistance of an interpreter without payment if he/she cannot understand the language used at the trial.

16. Now the court, under the said Article, duly deferred plea to source for an Amharic interpreter on the date of plea in all the 4cases. There was no indication as to who that interpreter was. It could not have been Doris, the court assistant as she was present when plea was deferred, so could not understand Amharic.

17. In my view, the trial court's record is deficient in that it did not provide the name of the person who interpreted the proceedings into Amharic. That deficiency renders the entire process a nullity.

18. Usually, if the court assistant is the one in court undertaking the interpretation, the court will take it that it is that court assistant who did so if his/her name appears on the Coram for that day.

19. If on the other hand, the court secures another person to conduct the interpretation, not being a court assistant/interpreter, then the correct procedure is to have the said interpreter's name indicated.

20. It is also usual practice to have such an interpreter sworn prior to the interpretation. The court is then to satisfy itself of the competence of the interpreter to undertake the interpretation. While this practice is encouraged, failure to do so would not necessarily render the trial a nullity. In Phillip Lapunganpui and Another Vs Republic (2010) eKLR, the court was of a similar opinion. It held as follows:-

> "The language of the subordinate courts in Kenya are English and Kiswahili (S.198 (4) Criminal Procedure Code). However provision is made for situations where either an accused or a witness does not understand the language of the court. S.198 (1) of the Criminal Procedure Code provides
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> 198 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands"
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> This is exactly what the trial magistrate did. The 2nd appellant needed to have the proceedings translated into Ki-Samburu for his benefit and a Samburu interpreter was availed. We note from the record that this translation into Ki-Samburu was available throughout the proceedings. The Criminal Procedure Code does not provide that an interpreter must be sworn before proceeding to translate the proceedings. This is an administrative detail which will ordinarily be handled by the Deputy Registrar of the court in question. There is no legal requirement that this procedure be conducted by the trial magistrate. In this case the trial magistrate may have decided as a matter of transparency to have the interpreter sworn in open court. This is commendable but failure to follow this procedure does not invalidate the trial at all. It is sufficient that translation was provided into a language which the 2nd appellant understood."

21. Having looked at the matter, I find that the failure to provide the details of the interpreter created as unsafe conviction, as it cannot be stated for sure that the unknown person, whose competence was not set out on the court record, correctly interpreted the proceedings on the relevant date. On that ground, I find that the conviction of the accused was unsafe.

22. I also note from the court record that after the charges were read to the accused, the court only recorded the response of the first accused in full. For the other accused the court used inverted comms, to signify a similar plea by the rest of the accused persons.

23. The procedure for taking plea is set out under Section 207 of the Criminal Procedure Code 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.

24. In Ombena Vs Republic (1981) eKLR, the Court of Appeal dealt with the manner of recording a plea of guilty. It stated as follows:-

> "In Adan Vs 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 —
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> Held:
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> (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;
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> (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
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> (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;
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> (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."
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> In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets",and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:
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> > "The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."

25. Clearly, the use of inverted commas to signify a plea of guilty does not meet the threshold set out in Adan Vs Republic (Supra).

26. It is acknowledged that many magistrates courts, especially those tasked to take the so called petty pleas, may have a lot of work on any given day and thus may device ways to expedite the procedure of plea taking. However, that simplified procedure should not flout the express provisions of statute and reiterated by the authorities that I have referred to.

27. Having looked at the court records, I am satisfied that the pleas of guilty by the accused persons were not unequivocal and thus cannot be upheld.

28. For the foregoing reasons, I proceed to set aside the convictions and sentences in the four stated court files.

29. So, having set aside the conviction and sentence should the court order a retrial?

30. I am of the view that since the plea taking has been declared unequivocal, the trial was thus a nullity. I find that it would not be in the interest of justice to order a retrial, as the Applicants have already served a large proportion of their sentences. I choose to rely on Ahmed Sumar Vs Republic (1964) EA 483 where it was held as follows;

> " ....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 insufficient 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......"

31. The Court of Appeal likewise had the following to say in the case of Samuel Wahini Ngugi Vs Republic (2012) eKLR:

> " 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 Republic (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."

32. That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

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

33. Therefore, I proceed to set all the Applicants at liberty.

34. However, there is no question as to the applicants being foreign nationals, and almost certainly were found to have been unlawfully present in Kenya. Therefore, I direct that the prisons Authorities hand over the Applicants to the relevant agencies as they would have done upon the Applicants completing their sentences, for repatriation to their country(ies) of origin.

35. Orders accordingly.

H.M. NYAGA

JUDGE

DATED, SIGNED & DELIVERED IN OPEN COURT AT MERU THIS 5TH DAY OF DECEMBER, 2024.

H.M. NYAGA

JUDGE

In the presence of: