



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K Kemei, J)

CRIMINAL APPEAL NO. E005 OF 2020

FRANCIS MACHARIA NZEKI (ALIAS 'MACHA').....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence Hon. H. Onkwani-PM in Mavoko Chief Magistrate's Court Criminal Case No.468 of 2020 dated 7th September 2020)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MACHARIA NZEKI (ALIAS "MACHA").....ACCUSED

JUDGEMENT

1. The Appellant was charged and convicted on his own plea of guilty for the charge of **Attempted Murder** contrary to section **220(a)** of the Penal Code. He also faced an alternative offence of Grievous Harm contrary to Section 234 of the Penal Code.
2. The particulars of the offence were that **Francis Macharia Nzeki alias "Macha"** on the 2nd day of May 2020 at Riverside area in Athi River Sub County within Machakos County, jointly with others not before court with intent to cause unlawfully the death of **Morris Muteti Kituku** stabbed him on the head four times with a panga thus intending to kill him.
3. In the alternative charge, the particulars were that **Francis Macharia Nzeki alias "Macha"** on the 2nd day of May 2020 at Riverside area in Athi River Sub County within Machakos County, jointly with others not before court, willfully and unlawfully did grievous harm to one **Morris Muteti Kituku** by cutting him with a panga four times on his head thus resulting to a permanent injury.
4. On 31st August, 2020, the Appellant was arraigned in court and the record shows that Interpretation: *Kiswahili and that the substance of the charge(s) and every element thereof having been stated by the court to the Appellant, in the languages that he/she understands who being asked whether he/she admits or denies the truth of the Count I charge(s) replies in Kiswahili: The Complainant wishes to withdraw the case.* The trial magistrate deferred the plea to 1st September 2020.
5. On 1st September 2020, the record shows that Count I and Alternative charges were read to the Appellant in Kiswahili and Appellant's reply was in Count I: *Ni kweli*, in Alternative Count: *Ni kweli*. Similarly, after the facts were read to the Appellant by the Respondent, the record indicates that he replied: *The facts are correct. The Plea of Guilty was entered.*
6. In his mitigation, the Appellant stated: *We have reconciled and he is in court today.* The Respondent stated: *We have notice for intention for withdrawal and there has to be full settlement before the withdrawal. He was to pay the Complainant. The Complainant stated: The Appellant was to pay me Kshs. 200,000/=. He had paid Kshs. 20,000/-. We are paying the other to the police station. I pray he does not repeat the offence.* A probation officer's report was availed in court before sentencing and the trial magistrate on 8th September 2020 then proceeded to sentence him to serve 20 years' imprisonment.
7. Aggrieved by the decision, the Appellant appealed citing the following grounds:-

- (1) ***THAT*** the learned trial magistrate erred in law and in fact by convicting the Appellant on an own plea of guilty that was not unequivocal.
- (2) ***THAT*** the learned trial magistrate erred in law and in fact by failing to take the necessary steps to ensure that the Appellant understood every element of the charge considering that the Appellant was unrepresented during the trial.
- (3) ***THAT*** the learned trial magistrate failed in her duty to be cautious when accepting a plea of guilty from an unrepresented/undefended accused person
- (4) ***THAT*** the learned trial magistrate erred in law and in fact by failing to warn the Appellant that the charge/offense he was about to plead guilty to be carried as possible life prison sentence.
- (5) ***THAT*** the learned trial magistrate erred in law and in fact for failing to ensure that the Appellant understood and appreciated the consequences of pleading guilty to the charge.
- (6) ***THAT*** the learned trial magistrate misdirected herself into convicting and sentencing the Appellant on a Plea of Guilty without asking the Appellant the reasons for pleading guilty.
- (7) ***THAT*** the learned trial magistrate erred in law and in fact for failing to note that the Appellant did not intend to plead guilty to the charges read to him.
- (8) ***THAT*** the learned trial magistrate erred in law and in fact for failing to realize that the Appellant's plea of guilty was induced by threats.
- (9) ***THAT*** the learned trial magistrate erred in law and fact for failing to appreciate that the Appellant was coerced to offer a plea of guilty on a promise of being granted his liberty.
- (10) ***THAT*** the learned trial magistrate erred in law and in fact for meting upon the Appellant a sentence that was harsh and excessive in the circumstances of the case.

8. The Appellant has urged the court to allow the appeal and reverse the findings and sentence issued on 7th September, 2020 by the trial court. The appeal has been canvassed by way of written submissions. The Appellant and Respondent have submitted hereunder;

9. In this appeal, the Appellant submitted that the bar to lodge an appeal where accused person has pleaded guilty is not absolute under section 348 of the Criminal Procedure Code (CPC). Reliance was placed on the cases of ***John Muendo Musau vs. Republic [2013] eKLR*** and ***Wandete David Munyoki vs. Republic [2015] eKLR***. Further reliance in ***Gerald Macharia Githuka vs. Republic Criminal Appeal No.119 of 2004*** where the court held that the cornerstone of the justice system is that no one will be punished without the benefit of the due process including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle. On the law for plea taking it is submitted by the Appellant that the Court of Appeal in the case of ***John Muendo Musau vs. Republic (supra)*** restated the law. According to the Appellant he was coerced to offer a plea of guilty on the promise of being granted liberty. It is submitted that the trial court failed to inquire into the reasons for deferring the plea when the Appellant stated that the Complainant wished to withdraw the case against the Appellant. According to the Appellant the trial court was not cautious when taking a plea of guilty from the Appellant who was unrepresented in court and the offence of grievous harm is a serious offence attracting a punishment of life imprisonment. Reliance was placed on the cases of ***Abdalla Mohammed vs Republic [2018] eKLR*** and ***Elijah Njihia Wakianda vs Republic [2016] eKLR***. It is submitted that the plea of guilty was unequivocal. It was submitted that the trial court failed to warn the Appellant on the consequences of pleading guilty to the charge and that the plea was not entered consciously, freely and in clear and unambiguous terms. As regards the sentence of 20 years' imprisonment, it is submitted that the sentence is too harsh in the face of the Supreme Court decision of ***Francis Muruatetu & Others vs Republic [2017] eKLR*** where the court emphasized on the importance of considering mitigation. The trial court failed to consider several mitigating circumstances including the probation officer's report that was favorable to the Appellant. The Appellant urged court to acquit him.

10. On the Respondent's part, it was submitted that the conviction was not proper. According to the Respondent, the trial court failed to warn the Appellant on the repercussion of entering a plea of guilty. Reliance was placed on the case of ***Bernard Injendi vs. Republic [2017] eKLR***. On the sentence, it is submitted that the sentence was not procedural since the Appellant was not warned of the consequences of plea of guilty. The Respondent conceded to the appeal and urged the court to order for retrial.

Determination

11. I have considered the trial court proceedings and submissions filed in this appeal.

12. This being the first appeal court, I am therefore required to re-evaluate and subject the evidence before trial court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court despite the Respondent herein conceding to the appeal as held in ***Odhiambo vs. Republic (2008) KLR 565***, the court said that: -

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence”.

13. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an

allowance for the same as observed by the EA Court of Appeal in *Okeno vs. Republic (1972) EA 32* at page 36.

14. This being an appeal against both the conviction and sentence from the Principal Magistrate court at Mavoko, *Section 348 of the Criminal Procedure Code* is to the effect that appeals are barred from subordinate courts where an accused was convicted upon a plea of guilty except as to the extent or legality of sentence. However, the Court of Appeal in *Alexander Lukoye Malika vs. Republic [2015] eKLR* held that: -

“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 an 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.”

15. According to the Appellant, the plea of guilty taken by him before the trial magistrate was not unequivocal. The guiding provision under the Criminal Procedure Code on the manner in which pleas are recorded is section 207 of the *said code* where it is provided that: -

(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 plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by 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.”

16. The case of *Adan vs. Republic [1973] EA 445* was followed in *Baya vs. Republic [1984] KLR 657* where the court restated the procedure for recording a plea of guilty as follows:-

a. The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands.

b. The accused’s own words in reply should be correctly translated into English and carefully recorded.

c. If the accused admits the charge, then the facts pertaining to the charge shall be read out to the accused, still in vernacular or in some other language that he understands.

d. The accused shall then be asked to confirm to the court whether or not he admits the facts as given and in this regard, his full answer shall be recorded by the court.

e. Where the facts as given are admitted, the court shall proceed to confirm the plea of guilty and to convict the accused.

f. Where the accused’s response to the facts suggests a change of plea, the same shall be recorded and a plea of not guilty entered.

17. I have re-evaluated the evidence in the court proceedings. Before the Appellant took plea on 31st August 2020, he informed the court that the Respondent wished to withdraw the case. On 1st September 2020 the charges were read to the Appellant in Kiswahili and Appellant answer in both **count I** and **Alternative charge** was ‘*Ni kweli*’. The facts were read to him which he confirmed were correct and a plea of guilty was entered. In my view up to that point the manner of recording plea of guilty was correct. In mitigation the Appellant stated that ‘*We have reconciled and he is in court today*’. The complainant informed the court that the Appellant was to pay him Kshs. 200,000/- and had already paid him Kshs. 20,000/-. In my view, the trial magistrate ought to have changed the plea of guilty to one of not guilty. The plea was not unequivocal since the Appellant informed the court of a reconciliation between him and the complainant. In *John Muendo Musau vs. Republic [2013] eKLR*, the Court of Appeal while reiterating the law on plea taking held that; -

“We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence...”

18. Joel Ngugi J in *Simon Gitau Kinene v Republic [2016] eKLR* stated that:-

“.....I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It should be even more so when the Accused faces a serious charge capable of attracting custodial sentence.”

19. The trial magistrate found that the documents placed before her were in support of the offence of grievous harm and not the main charge of attempted murder. The charge of grievous harm attracts a serious sentence of imprisonment for life. The record show that the trial magistrate never explained to the Appellant the consequences of the plea of guilty and the sentence but proceeded to enter a plea of guilty on the premise that the Appellant said the charges were ‘*true*’ and the facts were ‘*correct*’. The Court of Appeal in *Paul Matungu vs. Republic [2006] eKLR* quoted from *Boit vs- Republic [2002] IKLR 815* and stated 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 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”

20. Again the courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty as held by **Joel Ngugi J.** in **Simon Gitau Kinene v Republic [2016] eKLR** as well as in the case of **Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)** quoted by the learned judge, the court held 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 understands the consequences of such a plea is heightened. The Appellant herein was not represented by an advocate while taking his plea hence the trial magistrate ought to have been extra cautious. In my view, the circumstances under which the plea of guilty was taken made it not to be unequivocal.

21. From the foregoing, is this then a *case to order a retrial as urged by the Respondent*? The Appellant contends that he should be acquitted. In the case of **Fatehali Manji vs. Republic [1966] EA 343** the Court of Appeal when dealing with the same issue, gave the following guideline: -

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

22. In **Muiruri –vs- Republic (2003), KLR, 552 and Mwangi –Vs- Republic (1983) KLR 522** the court held that: -

“Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.”

23. In my view the record proves that the Complainant and Appellant had the intention of settling the matter out of court. In accordance with **Section 204 of the CPC**, a complainant may withdraw the complaint before the court makes a final order in the matter and the court has discretion as to whether to allow or reject the withdrawal when satisfied of existence or otherwise of sufficient grounds for permitting such a withdrawal. The court is enjoined under **section 176 of the Criminal Procedure Code** to *promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the court.* I find a retrial would cause injustice to the Appellant who has entered into an agreement for compensation. A retrial would serve no purpose when the Appellant has indicated that there is a reconciliation between him and the complainant. It is noted that the Appellant had already paid a sum of Kshs 20,000/ to the complainant and further has been in remand for a year or so now. It is hoped that he has learnt his lessons somewhat. A retrial will not serve the justice of the case since there is evidence that the Appellant and the complainant had already reconciled and confirmed by the probation officer in her report dated 4/09/2020. A retrial will polarize the relationship between the two. I am therefore not persuaded by the Respondent’s request for a retrial.

24. In the upshot, I find the appeal has merit and I allow the same by quashing the conviction and setting aside the sentence. The Appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 5TH DAY OF OCTOBER, 2021.

M. MUIGAI

JUDGE