Obure v Republic (Criminal Appeal 125 of 2019)
[2025] KECA 477 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 477 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 125 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 7, 2025

BETWEEN

DAVINUS MONG'ARE OBURE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisii (Karanjah, J.) dated 25th February, 2016inHCCRC No. 97 of 2013)

JUDGMENT

1. Davinus Mong'are Obure, the appellant herein, was first arraigned before the High Court at Kisii on 26th August, 2013, for the charge of murder, but was not required to plead as no counsel had been appointed to represent him. He was remanded in custody and thereafter appeared before the Court for mention on several occasions.

2. Subsequently, he was released on bond and continued appearing before the High Court for mention. On 16th November, 2015, the appellant appeared in court represented by learned counsel, Mr. Kaburi, while the State was represented by Mr. Boyon. The counsel informed the court that parties were discussing a plea agreement and needed time. On 25th February, 2016, the appellant appeared in court together with his counsel, Mr. Kaburi, while the State was represented by Mr. Ochieng. On that date, an information dated 25th February, 2016, in which the appellant was charged with Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* was substituted. The charge was read over and explained to the appellant who responded admitting the offence.

3. It is appropriate at this stage to set out verbatim the proceedings of the High Court on this date.

> " State counsel: My witnesses are present but we plea bargained and agreed to have the charge reduced to manslaughter. I hereby produce a fresh information for manslaughter.

J.R. Karanjah, Judge

Mr. Kaburi: I agree.

Court: Fresh charge read over and explained to the accused in Kiswahili.

Accused: I admit offence.

Court: Guilty on own plea.

J.R. Karanjah, Judge

J.R. Karanjah, Judge

Facts – On the material date the deceased a student aged 17 years old was at a funeral ceremony together with colleagues including the accused. The deceased and the accused disagreed over some money raised by students. It amounted to Kshs. 130,000/-. The dispute degenerated into a fight between the accused and the deceased. In the process, the accused drew out a knife and stabbed the deceased severally. The deceased was rushed to hospital but he died on arrival. The accused fled and disappeared.

The deceased's body was examined and a postmortem form duly filled showing that he died from stab wounds. I produce the report (PExhibit 1). The accused was later traced and arrested. He was charged with murder which has now been reduced to manslaughter following a plea bargain.

J.R. Karanjah, Judge

Accused: Facts are correct.

Court: Guilty on own plea and convicted accordingly.

J.R. Karanjah, Judge

State Counsel: Accused may be treated as a first offender.

J.R. Karanjah, Judge

Mitigation by Mr. Kaburi: Accused is a first offender. He is aged 17 years. He is remorseful and regrets the offence in which he lost a friend. He has been in custody for one year. He has since learnt his lesson. He was a student at the time of the incident. He continued with his education elsewhere and obtained a certificate of secondary education. He prays for leniency and requests for a noncustodial sentence.

J.R. Karanjah, Judge Court: Accused pleaded guilty. He is a first offender, mitigation noted. Circumstances of the case duly considered. The offence was rather unfortunate as it involved persons who were not only school mates but also friends. However, the accused did not have to use excessive force upon the deceased. One wonders how he was in possession of a knife yet he was a student in a school. His handling of a knife while in school was reckless and predisposed him to unlawful activities which came to pass with a stabbing of the deceased and causing his death.

J.R. Karanjah, Judge Sentence: Accused to serve twenty years imprisonment.

Right of Appeal.

J.R. Karanjah, Judge 25.2.16"

4. Following his conviction and sentence, the appellant lodged this appeal against his conviction and sentence. In his memorandum of appeal, he has raised two grounds as follows:

   i. that the learned Judge erred in law and fact to rely on a non-existent plea agreement in convicting the accused without proper accord to practice and procedure provided by statute law;

   ii. the learned Judge subsequently erred in law in sentencing the appellant to twenty years without attention to the fact that plea agreement procedure was not adhered to hence the sentence was unlawful.

5. The appellant has also filed written submissions through his counsel, in which he contends that the learned Judge failed to follow the proper procedure in convicting him on a plea agreement, and this vitiates the subsequent sentence. The appellant points out that Section 137E of the Criminal Procedure Act, and clause 9 of the Criminal Procedure Plea Bargaining Rules 2018, provides the procedure for plea bargaining. This includes, the plea agreement being in writing and being reviewed and accepted by the accused person or explained to him in a language that he understands; and the agreement being signed by the prosecutor and the accused person or his legal representative. It is also pointed out that in passing sentence, the learned Judge did not call for a victim impact sentence or a probation officer's report even though the appellant was 17 years, and a student who would have benefited from a non- custodial sentence. The Court was therefore urged to quash the appellant's conviction.

6. The respondent also filed written submissions through Principal Prosecution Counsel, Ms. Kitoto Victorine. Counsel conceded the appeal on the ground that the learned Judge failed to follow the proper procedure for plea agreement. Nevertheless, counsel urged the Court to order for a retrial maintaining that the error in failing to apply the correct procedure was occasioned by the High Court. Ms. Kitoto relied on Samuel Wahini Ngugi v Republic [2012] KECA 180 (KLR), (Githinji, Onyango Otieno & Okwengu, JJA), in which the Court ordered for a retrial, as the conviction was vitiated by a mistake of the trial court for which the prosecution is not to blame.

7. We have carefully considered the record of appeal, the written submissions made by the respective counsel and the law. The pertinent issues in this appeal, are whether the procedure followed by the High Court in enforcing the plea agreement and convicting the appellant on the basis of a guilty plea arising out of the plea agreement was proper; and whether the sentence imposed on the appellant on the basis of his conviction was legal.

8. Sections 137A to 137M of the *Criminal Procedure Code*, provides for the procedure relating to plea agreements. Of importance is Section 137E which requires a plea agreement to be in writing; be reviewed and accepted by the accused person; or explained to the accused in a language he understands. In addition, the plea agreement must state fully the terms of the agreement and the substantial facts of the matter, including any admissions made by the accused. The agreement must also be signed by the prosecutor and the accused person, or his legal representative.

9. Section 137F of the *Criminal Procedure Code* is imperative, as it requires that before a court records a plea agreement, the accused person must be examined on oath; and the court shall ensure that the accused person understands that he has inter alia, the right to plead not guilty or to persist in his plea if he has pleaded guilty; a right to remain silent as well as a right to a full trial represented by a counsel; and a right to waive his right to full trial, by accepting the plea agreement. Furthermore, the accused must be informed of the maximum or mandatory penalty that he would be entitled to according to

the offence charged; and made to understand that by entering into a plea agreement he is limiting his right to appeal, to the extent or legality of sentence only.

10. We have deliberately, extensively set out the proceedings of the High Court in regard to the plea agreement. The proceedings clearly show that the procedure provided under Sections 137A to 137M of the *Criminal Procedure Code* were not followed. For instance, the appellant was not examined on oath nor was anything explained to him, nor did the court inquire from him whether he understood the plea agreement. Moreover, the plea agreement was not produced before the court, so there is no evidence that the plea agreement was in writing as required. In the circumstances, we appreciate that Ms. Kitoto conceded this appeal, as that was the only reasonable route to take. Clearly the proceedings were defective and the appellant's conviction based on the defective proceedings cannot stand.

11. Ms. Kitoto has urged this Court to order a retrial, noting that the procedural mistakes in the proceedings were made by the Court. Unfortunately, we are not persuaded that the High Court was solely responsible for the procedural mistakes. Section 137C of the *Criminal Procedure Code*, provides that a plea agreement is initiated by a prosecutor or an accused person or his legal representative, and the court has no mandate or authority to participate in the plea negotiation between the parties. This means that it was the sole responsibility of the prosecution to ensure among other things, that the plea agreement was entered into in the right way; that Section 137E which requires the agreement to be in writing was complied with; and that the agreement was signed by the prosecutor and the accused person or his legal representative before it was presented to the High Court for recording of the plea agreement under Section 137F.

12. The record does not reveal any attempt by the prosecutor to produce the written plea agreement which apparently does not seem to have been in existence. Both the prosecutor and the High Court must therefore take responsibility for the breach in the proceedings. In this regard, Samuel Wahini Ngugi v Republic (supra), is distinguishable, as the prosecution was equally to blame for the defect in the plea agreement proceedings.

13. In Yusuf Sabwani Opicho v Republic [2009] KECA 171 (KLR), this Court (Tunoi, Waki & Visram, JJA), considering whether to order a retrial stated:

> " We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of the evidence on record may well prejudice that retrial. Should we order one?
>
> '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 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 retrial should only be made where the interests of justice require it;'
>
> That was stated in Fatehali Manji v. The Republic [1966] EA 343. In many other decisions of this Court it has been 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 retrial should only be made where the interests of justice require it. See Muiruri v Republic [2003]

KLR 552, Mwangi v. Republic [1983] KLR 522, and Bernard Lolimo Ekimat v Republic, Criminal Appeal No. 151 of 2004 (UR)."

14. Having come to the conclusion that the proceedings relating to the appellant's plea agreement were defective, the issue that we must next address is whether in the circumstances before us, it would be in the interest of justice to order a retrial. It has not escaped our attention that the appellant was a 17-year-old boy when he was convicted. The learned Judge did not address the apparent young age of the appellant. The delay in commencing the hearing, resulted in the plea agreement being entered about three years later and this prejudiced the appellant. Moreover, the appellant was sentenced on 25th February 2016 and has therefore already served 8 years in prison. An order for a retrial would therefore be highly prejudicial to the appellant and would not meet the ends of justice. Moreover, the circumstances in which the offence was committed show that the offence was not premeditated, but was committed in the spur of the moment. The charge of manslaughter was therefore appropriate, but the appellant ought to have enjoyed the benefit of his guilty plea.

15. In Julius Wafula Lokorito v Republic [2023] KECA 1447 (KLR), we expressed the importance of plea agreement as follows:

> "Plea agreements serve an important beneficial role in the Criminal Justice System. They increase the efficiency of the system by saving time and money which would otherwise be spent on lengthy trials. They also benefit the victim and/or her family because they are spared the public trial and its accompanying emotional trauma. Further, plea agreements offer more certainty to both the prosecutor (and the victim of the crime) and the accused person. It is therefore, a judicial policy to encourage and incentivize plea agreements in appropriate cases."

16. In Dennis Osoro Nyatigo v Republic [2024] KECA 1820, we reiterated the benefits of plea agreements:

> "One of the benefits that accrues to an accused person who surrenders arms by pleading guilty is a reduced sentence. That is one of the cornerstones of the plea bargain procedure, as affirmed by the fact that Parliament specifically legislated the factors to be taken into consideration in sentencing an accused person who has entered a plea bargain agreement. Thus, at section 137(I)(2) & (3) of the *Criminal Procedure Code* it is provided that:
>
> (2) In passing a sentence, the court shall take into account:
>
> a. the period during which the accused person has been in custody
>
> b. a victim impact statement, if any, made in accordance with section 329C;
>
> c. the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;
>
> d. the nature and amount of any restitution or compensation agreed to be made by the accused person.
>
> (3) Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report."

17. A person who pleads guilty saves the court time that would have been used to conduct a trial and also guarantees the prosecution a conviction, which is not a certainty where a trial is held. Unless there are aggravating factors, a person who pleads guilty whether on the day he first

    appears in court for a plea or through a plea bargain agreement should reap the fruits of his or her surrender."

18. We concur with the learned Judge that the offence for which the appellant pleaded guilty was serious, as a young life was needlessly lost. We also appreciate that the maximum sentence for Manslaughter is life imprisonment. Nevertheless, the sentence of 20 years imprisonment that was imposed on the appellant did not take into account the appellant's young age, nor did it take into account the circumstances in which the offences was committed, or the fact that he had entered into the plea agreement. The learned Judge did not balance the gravity of the offence with the circumstances before him. The plea agreement should have counted in favour of the appellant, so that, as in Dennis Osoro Nyatigo vs Republic (supra), the appellant benefits from "the fruits of his surrender." Needless to state that the learned Judge did not give the plea agreement its due weight.

19. The upshot of the above is that, in the circumstances of this case, it would neither be fair nor just to order for a retrial. We therefore set aside the judgment of the High Court, quash the appellant's conviction, set aside the sentence of 20 years' imprisonment, and order that the appellant be released forthwith, unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 2025.

HANNAH OKWENGU

JUDGE OF APPEAL

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H.A. OMONDI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR