Hamed v Republic (Criminal Appeal 92 of 2020)
[2024] KECA 1063 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 1063 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 92 OF 2020

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

FEBRUARY 2, 2024

BETWEEN

HAMED ABDULLAHI HAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Kiarie Wa Kiarie, J.) dated 27th April, 2017 in H.C.CR. APP 2 of 2016)

JUDGMENT

Background

1. Hamed Abdullahi Ahmed, the appellant, was charged with two others before the Resident Magistrate's Court, sitting at Isiolo, for promotion of trafficking in persons contrary to Section 5(d) of the Counter Trafficking in Persons *Act, No 8 of 2010*.

2. The particulars of the offence were that on 6th February, 2016 at Maua Township within Meru County, he promoted the trafficking of fifteen (15) Somali nationals by receiving them and facilitating their transport using motor vehicle registration number KCF 706C, Mitsubishi Fuso from Modogashe to Maua where they were arrested en-route to Nairobi.

3. The appellant pleaded guilty to the charge and was convicted and sentenced to pay a fine of Kenya shillings twenty million (Kshs.20,000,000) or in default to serve twenty years' (20) imprisonment on his own plea of guilty.

4. His first appeal against sentence was dismissed by the High Court of Kenya at Meru (Kiarie wa Kiarie, J.) on 27th April, 2017.

5. Undeterred, the appellant proffered this appeal on 6 grounds; that the learned Judge of the High Court erred in law in affirming the decision of the lower court thus occasioning a miscarriage of justice by

failing to hold that the appellant's right to an advocate and to be informed of such right under Article 50 (2) (g) and (h) of *the Constitution* were violated; by failing to inform the appellant of the severity and sentence of the charge; by affirming the appellant's conviction on a plea that was not unequivocal; by failing to consider the apparent procedural irregularities thereby occasioning a miscarriage of justice; and by affirming the sentence meted by the lower Court while the appellant did not understand the language used in court.

Submissions by counsel

6. Learned counsel, Mr. Mungai for the appellant argued the grounds and submitted that the plea was not unequivocal because, in the first place, there is no indication in the proceedings that the trial court inquired on the language the appellant understands. Counsel submitted that the charge was read to the appellant in Borana language and there is no indication how the court came to the conclusion that the appellant understood Borana language. Counsel further submitted that the 1st appellate court erred in presuming that the charge was read to the appellant in a language that he understood.

7. Counsel further submitted that the charge sheet ordinarily indicates the tribe of the accused and that in this case the tribes of all accused persons was recorded as being Kenyan. Counsel asserted that a trial court is bound to inquire about the language that the accused understands and put this on record and it should further inquire if the interpreter is conversant with the language of the accused and should not merely presume that the interpreter and the accused understand the same language. Counsel further asserted that for the avoidance of any doubts, the court should inquire if the language of the accused and the interpreter is of the same dialect and that the interpreter should be sworn before conducting the interpretation.

8. Counsel submitted that the trial court should have made an inquiry whether the appellant understands the facts of the case before recording his answer. Counsel asserted that this was not adhered to and that a plea of guilty should not be confined to an accused only answering in the affirmative. Counsel further asserted that the court should ensure that the accused understands what he is answering to and that the words 'it is true' alone are not sufficient answer to a charge. Reliance was placed on the cases of Mose vs. Republic [2002] l EA 163; and John Muendo Musau vs. Republic [2013] eKLR.

9. Counsel further submitted that the trial court should have warned the accused of the dangers of pleading guilty and that the accused has a right to be explained the severity of the offence and the sentence to be meted out if convicted. Counsel asserted that the trial court should have informed the appellant of his right to choose an advocate as per Article 50 (g) of *the Constitution* bearing mind the severity of the offence and sentence to be meted out if convicted. Counsel further asserted that the 1st appellate court did not appreciate the importance of cautioning an accused person on the severity and consequences of the offence. Reliance was made to Elijah Njihia W Akianda vs. Republic [2016] eKLR; Criminal Appeal No. 437 of 2010; Simon Gitau Kinene vs. Republic [2016] eKLR; Criminal Appeal No. 56 of 2013; and Adan vs. Republic [1973] EA 445.

10. At the hearing of the appeal, learned counsel for the respondent, Mr. Adams Chelule informed this Court that he was conceding the appeal. Counsel conceded that the plea was not unequivocal as the appellant did not answer to the plea when the same was read to him. Counsel further submitted that this Court may consider ordering a retrial in the circumstances.

11. In response, learned counsel for the appellant submitted that a retrial will be prejudicial to the appellant as he has been in custody for over 6 years and witnesses may not be available. Counsel further submitted that the appellant's co-accused were fined and released.

Determination

12. This is a second appeal and the jurisdiction of this Court is defined by section 361 of the Criminal Procedure Code and supported by numerous cases to the effect that in second appeals, the Court will only be concerned with points of law and for that reason it will be bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence or misapprehension of the evidence or on wrong principles. See M'Riungu V. R [1983] KLR 455.

13. In Adan V R, [1973] EA 446 and in several other authorities, the procedure of taking plea in criminal cases was established. In that case the court made it clear that:

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."(Emphasis supplied.)

14. This and the detailed steps enumerated in Section 207 of the Criminal Procedure Code (CPC) are intended to safeguard the accused person's right to a fair trial. Section 207 of the CPC provides 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."

15. From the record the trial Court stated as follows:-

> " Charge read over and explained in Borana for the third accused by Mohamed.
>
> Accused 3 (the appellant herein):
>
> True..
>
> Court: accused persons are convicted on their own plea of guilty."

16. The 1st appellate court found as follows:

> When the plea was taken on 8th February, 2016, there were a Borana interpreter and a Somali interpreter. The appellant was charged with the two others and the plea was taken at the same time for all of them. Had the same been taken separately, then the appellant could be justified to complain that he did not understand the language ascribed to him. Since this was not the case, I make a finding that the charge was read to him in a language that he understood."

17. Learned counsel for the appellant submitted that from the proceedings, there was no indication which language the appellant understood. In Bishar Abdi vs. R [2010] eKLR, this Court succinctly reiterated the critical importance of a trial court ensuring that the charge is explained to an accused person in a language that he or she understands.

18. This Court in Mose vs. R [2002] IEA 163 held that:-

> " The words 'true' or 'it is true' are never sufficient responses to the charge standing on their own, these words, cannot constitute an unequivocal plea or admission of guilt."

19. From the record, the appellant did not answer to the facts or mitigate. In John Muendo Musau vs. R [2013] eKLR, this Court stated that:-

> " We want to add here that if the accused person wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty."

20. Further, in Elijah Njihia Wakianda vs. R [2016] eKLR, this Court held as follows:

> "Given all the safeguards given to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation: a throwing in of the towel and a giving of a walk over to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus, it is that the courts, at any rate appellate courts would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clean and unambiguous terms. The process of ensuring this was well captured in the oft-cited case of Aden vs. R (supra) and has been followed in many cases after it. See: Lusiti vs. R [1976-80] IKLR 585; Kariuki vs. R [1984] KLR 809..."

The Court went on to hold as follows:

> "We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his right that *the Constitution* guarantees him. That did not occur here yet the accused was unrepresented calling the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."

21. In the circumstances, we are not satisfied that the appellant's plea of guilt was unequivocal. The ensuing conviction and sentence cannot therefore stand. Accordingly, we quash the conviction and set aside the sentence.

22. Is this a proper case for retrial as submitted by the learned counsel for the respondent? Learned counsel for the appellant submitted that the appellant has been in custody for over 6 years and the witnesses may not be available to testify. In the circumstances of this case, should we order a retrial? The provision of the law is that when there is a mistrial, an appellate court may order a retrial or set an appellant free depending on the circumstances of the case.

23. In Dennis Leskar Loishiye v Republic [2015] eKLR this Court considered the circumstances under which a court should order retrial as set out in Muiruri v R [2000] KLR 552:

> "3. Generally, whether a retrial should be conducted or not must depend on the circumstances of the case.
>
> 4. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely of the prosecution making or not."

24. In Joseph Muriuki Wachira & another V Republic [2005] eKLR this Court in ordering a retrial stated as follows:

> "Right from the very beginning of their trial which started before a Senior Resident Magistrate at Nyeri on 17th July, 2000, their prosecution was conducted before the Magistrate by a Senior Sergeant Kigera and on that basis alone, we must allow their appeals against conviction on all the counts upon which each of them was convicted. We accordingly quash the convictions recorded against each appellant and set aside the various sentences imposed on each one of them."

25. We bear in mind that the appellant has been in custody since 10th February, 2016, a period of about 8 years. The witnesses may, therefore, not be available due to the passage of time as submitted by counsel for the appellant.

26. In the circumstances, we hereby allow the appeal against conviction and sentence. The appellant is set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR