Aroto & another v Republic (Criminal Appeal E048 of 2022)
[2024] KECA 987 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 987 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E048 OF 2022

FA OCHIENG, WK KORIR & LA ACHODE, JJA

JULY 26, 2024

BETWEEN

PETER ESINYENI AROTO ..... 1ST APPELLANT

ERICK EKENO EBEI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgement of the High Court at Eldoret (O.Tunya J) dated 3rd February 2002 in HCCR Case No. 43 of 2003)

JUDGMENT

1. This appeal was filed by Peter Esinyeni Aroto the appellant herein, and his co-accused Erick Ekeno Ebei. They had been charged at Eldoret High Court with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge were that on 13th January 2002 at Bondeni Estate within Eldoret Municipality, Uasin Gishu District of the Rift Valley Province (as it then was) both persons jointly murdered John Epenyo.

2. The learned Judge of the trial court convicted each of them on his own plea of guilty and sentenced them to death as by law prescribed. Dissatisfied with the decision of the court, the appellant and the co-accused filed an undated memorandum of appeal in this Court raising several grounds of appeal. They later filed supplementary grounds of appeal dated 16th June 2023.

3. A summary of the grounds of appeal was that the learned Judge erred:

    i. In failing to consider that the facts adduced failed to prove malice aforethought.

    ii. In failing to explain to the appellants in sufficient detail, the elements of the charge before entering a plea of guilty.

iii. In failing to ensure that the appellants' pleas of guilty were entered in accordance with the law.

iv. In sentencing the appellants without taking into account the appellant and co-accused's mitigating circumstances.

v. In convicting and sentencing the appellants, thus the conviction should be squashed and the sentences set aside.

4. Subsequently, Erick Ekeno Ebei abandoned this appeal and successfully applied to the superior court for a review of his sentence. His sentence was reduced to the time served. This appeal is therefore, in regard to only the appellant Peter Esinyeni Aroto.

5. The appeal was disposed of by way of written submissions. The firm of Oyaro J Associates & Co. Advocates filed submissions dated 16th June 2023 for the Appellant, while Mr Duncan Ondimu, Principal Prosecution Counsel in the Office of the Director of Public Prosecution, filed the respondent's submissions dated 22nd June 2023.

6. Learned counsel Mr Oyaro submitted that the facts of this case did not support the conviction for murder, as the element of malice aforethought was missing. He cited the decision in *Joseph Kimani Njau v Republic* [2014] eKLR to advance this argument and the decision in *Alexander Lukoye Malika & Republic* [2015] eKLR to urge that this case falls within instances where a plea of guilty can be interfered with and that the plea of guilty herein was not properly entered as set out in the case of *Adan v Republic* [1973] EA. Counsel posited that the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR made the mandatory death sentence illegal, and hence, the sentence imposed herein was inappropriate.

7. In rebuttal learned State counsel Mr. Ondimu, submitted for the Respondent, that the Appellant was represented by counsel during trial and he readily pleaded guilty. Hence, he and this very Court are bound by Section 348 of the Criminal Procedure Code which provides that no appeal arises where an accused person has pleaded guilty and has been convicted on that account. Counsel stated that the plea taking process was carried out in accordance with Section 207 of the *Criminal Procedure Code* and the *locus classicus* case of Adan v Republic [1973] hence, the Appellant's contention regarding plea taking should be dismissed.

8. From the foregoing narrative, the following issues arise for determination:

a. Whether the plea of guilty was unequivocal?

b. Whether the facts establish the ingredients of the offence of murder?

c. Whether the sentence was commensurate with the offence?

To begin with, this is a first appeal and the duty of this Court in hearing and determining this appeal is as was set out by the Court of Appeal in *Okeno v Republic* [1972] EA 32 that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA.
>
> (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether

the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424."

9. In view of the foregoing we evaluate the record to establish first, whether the plea of guilty that was entered in relation to the Appellant was unequivocal. The Appellant in his grounds of appeal stated that the learned Judge failed to explain to him, in sufficient detail, the elements of the charge before entering a plea of guilty and to ensure that the plea of guilty was entered in accordance with the law. In rebuttal the Respondent stated that the Appellant was represented by counsel during trial and that he readily pleaded guilty

10. The manner of recording a plea is provided for in Section 207(1) and (2) of the *Criminal Procedure Code* as hereunder:

> "(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."

11. This procedure was succinctly set out in the land mark case of *Adan v Republic* [1973] EA 445, by the Court of Appeal as follows:

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;

ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

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;

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.

12. The record of appeal before us indicates that during plea taking on 9th December 2002, the Appellant spoke and understood Kiswahili language. The charge was read over to him and explained in Kiswahili. He was warned regarding the magnitude of the offence he was charged with. He pleaded guilty and in particular he stated that: "I admit the charge" and "I do". Counsel for the defence told the court that he had been caught unawares by the plea of guilty hence, the matter was adjourned to 3rd March 2003 to give him time to confer with the accused person.

13. On 3rd March 2003, the Appellant was produced in court and according to the record, he was once again warned of the consequence of pleading guilty to a murder charge. The charge was read and explained

to him in Kiswahili and he pleaded guilty. In particular, he responded that: "I admit I murdered him". The facts were read out and the appellant responded that: "I have heard and understood all the facts as stated by prosecutor and I admit them all as true".

14. It is therefore, our finding that the proper procedure was followed when: the appellant was informed of the consequence of pleading guilty to a murder charge; the charge was read and explained in Kiswahili, a language which he understood; and the facts were read to him in Kiswahili and he admitted them. We are satisfied that the plea of guilty was unequivocal and as such, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (cap 75) does not merely limit the right of appeal in such cases but bars it completely. (see *Olel v Republic* [1989] KLR 444).

15. The second issue for determination is whether the facts as presented established the offence of murder. Both learned counsel Mr Oyaro and Mr Ondimu urged that the facts of this case did not support the conviction for murder, as the element of malice aforethought was missing. That the facts presented disclosed the offence of manslaughter and not one of murder. Mr Ondimu urged that the facts did not contain the ingredients which constitute malice aforethought under Section 206 of the *Penal Code* and as were set out in *Naftaly Mukundi Waweru v R* [2015] eKLR.

16. For the offence of murder to stand, the existence of malice aforethought must be established, besides the fact of death and the act or omission that results in the death of a person. Section 206 of the *Penal Code* defines malice aforethought as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony"

17. On what constitutes murder the Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR, held as follows:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
>
> i. The intention to cause death;
>
> ii. The intention to cause grievous bodily harm;
>
> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one who succumbed....."

18. The fact of the death of John Epenyo and that it was as a result of the assault on him by the Appellant and his co- accused was not disputed. The question that begs an answer is whether or not they acted with malice aforethought. The events that occurred on 13th January 2002 at 3:00p.m. began innocently, when the deceased who was sitting at home with his family was visited by the Appellant, Peter Esinyeni Aroto and his co-accused, Erick Ekeno Ebei. A quarrel erupted between the deceased and his wife and the Appellant's co-accused joined the fray in aid of the deceased. He hurled insults at the deceased's wife and finally removed his shoes and threw them at the wife, thereby hitting her child.

19. At this point the deceased rose to his wife's defence in a bid to rescue her from the onslaught by the co-accused. The Appellant joined the melee and felled the deceased with one punch. While the deceased was on the ground the co-accused hit him on the head with a stone. The deceased was rushed to hospital where he succumbed to his injuries two days later on 15th January 2002.

20. From the acts of the appellant and his co-accused as set out above, they ought to have known that there was a serious risk that death or grievous bodily harm would ensue. The postmortem conducted by one Dr. Koslova at Moi Teaching and Referral Hospital on 23rd January 2002 attributed the death to blunt force trauma to the head and a depressed fractured skull. The amount of force employed and the fact that they directed it at the deceased's head points to the intention to cause grievous bodily harm. They assaulted the deceased deliberately and without lawful excuse. We are therefore, satisfied that the ingredient of malice, or intent to cause death or grievous harm was proved. We cannot therefore, fault the learned Judge for convicting the Appellant for the offence of murder.

21. Lastly, we consider whether the sentence was commensurate to the offence. The learned Judge upon considering the facts sentenced the appellant to death as provided for under Section 204 of the *Penal Code*. At the time of the sentencing, the jurisprudence in Muruatetu (supra) had not been developed. The appellant brought this to the attention of this Court.

22. In Muruatetu (supra), the Learned Judges of the Supreme Court held that:

> " Section 204 of the *Penal code* was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial Court's exercise of discretion while sentencing."

23. Mr Oyaro stated that Muruatetu (supra) made the mandatory death sentence illegal hence, the sentence imposed herein was inappropriate. Mr Ondimu on his part opined that the Appellant having been in custody since 25th September 2002, a period of over twenty (20) years, the time served was adequate for the offence of manslaughter.

24. We have re-evaluated the record of appeal taking into account the severity of the offence, the number of years the Appellant has spent in custody from 25th September 2002 being more than twenty (20) years and that he was treated as a first offender. We also note that his co-accused who applied for sentence review in the superior court, had his sentence reduced to the time served and was released from custody in 2021. We are of the considered view that his appeal on sentence should succeed and we accordingly allow it.

25. In sum, the appeal fails on conviction and succeeds on sentence only. We therefore order that:

    i. The sentence meted upon the Appellant be and is hereby reduced to the time already served.

ii. The Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR