Mburu v Republic (Criminal Appeal 75 of 2018)
[2024] KECA 1438 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1438 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 75 OF 2018

MA WARSAME, JM MATIVO & WK KORIR, JJA

OCTOBER 11, 2024

BETWEEN

JOHN MAINA MBURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (Mwongo, J.) dated 18th October 2018 in Naivasha HCCRA No. 13 of 2016)

JUDGMENT

1. John Maina Mburu (the appellant), was arraigned before the Chief Magistrate's Court at Engineer in Criminal Case Number 91 of 2016 together with Samuel Kuria Wairimu, Paul Wanjama Mbugua and Hiram Chege Ng'ang'a charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code.

2. In Count 1, it was alleged that on 30th January, 2016 at Wanja village in Kipipiri Sub-County within Nyandarua County, armed with a dangerous weapon namely a knife, they jointly robbed Daniel Njoroge Kamau one mobile phone Make Samsung N6 valued at Kshs.2,300/- and assorted shop goods worth Kshs. 420 all valued at Kshs.2,700/- and at the time of such robbery, they threatened to use actual violence on the said Daniel Njoroge Kamau.

3. The accusation in Count II was that on 30th January, 2016 at Wanjohi Village, in Kipipiri Sub-County within the Nyandarua County armed with a dangerous weapon namely a knife, they jointly robbed Joseph Mwaura Macharia one mobile phone, Make Nokia Asha valued at Kshs.2,000/- and cash Kshs.40 all valued at Kshs.2,040/- and at the time of such robbery, they wounded the said Joseph Mwaura Macharia.

4. The appellant pleaded guilty to both counts. In mitigation, he asked for forgiveness and stated that he will not repeat the offence again. After considering his mitigation, the learned magistrate sentenced him to suffer death noting that it was the only sentence provided for the offence.

5. In his quest to overturn both the conviction and sentence, the appellant appealed in High Court Criminal Appeal No. 13 of 2016, Naivasha, contending that he was misled by the investigating officer to plead guilty, that he was not referred to a psychiatrist and that he was not warned about the death penalty prescribed for the offence. In the impugned judgment, the learned judge upheld both the conviction and sentence and noted that the appellant's mitigation even if it had been considered, would not have altered the sentence imposed.

6. Aggrieved by the above verdict, the appellant appealed to this Court challenging both the conviction and sentence. In his memorandum of appeal dated 27th February, 2024, the appellant cites the following grounds: (a) that the learned magistrate failed to find that his plea of guilty was not unequivocal; (b) that the elements of the offence were not complete; (c) the first appellate court failed to find that he did not mitigate.

7. In addition to the above grounds, the appellant filed supplementary grounds of appeal dated 27th June, 2024 citing 10 grounds. In summary, the appellant contents that the learned judge failed to: (a) consider the effect of the trial court's failure to warn him about the nature of the capital charges and the applicable penalty; (b) consider the effect of being unrepresented at the plea taking stage and throughout the proceedings; (c) consider that he was not supplied with copies of all witness statements and documents, therefore, he was not ready to take plea and that the resulting plea of guilty was premature and a violation of his non-derogable right to a fair trial; (d) appreciate that the proceedings were conducted in a language he did not understand; (e) appreciate that the conviction was born of a flawed process because he did not understand the nature of the capital offence facing him; (f) consider the effects of the variation between the charges as drawn and the facts as read out to the appellant, especially with respect to the alleged wounding of the second complainant, all which were contradictory and did not point to the guilt of the appellant; (g) appreciate that the sentence was excessive; (h) record the language used in the High Court; (i) erred by accepting a conviction and sentence despite indication that the appellant may have not been in the right frame of mind to plead; and (j) rejected the appellant's mitigation without assigning any reason for the rejections.

8. We heard this appeal virtually on 1st July, 2024. Learned counsel Ms. Sabaya appeared for the appellant while learned counsel Mr. Omutelema appeared for the respondent. Both counsel highlighted their written submissions.

9. Ms. Sabaya's written submissions are dated 27th June, 2024. On the question of whether the appellant's plea of guilty was unequivocal, counsel cited this Court's holding in Kennedy Ndiwa Boit vs. Republic [2002] eKLR that before a plea of guilty is accepted and acted upon by any court, certain vital safe-guards must be strictly complied with and it must appear on the court record that those safe-guards have been strictly complied with - and those safeguards are that the person pleading guilty fully understands the offence he is charged with, that is the substance and every ingredient constituting the offence which has to be explained in a language he understands and with that understanding and out of his free-will the pleader admits the charge.

10. Counsel submitted that the trial court rightly ordered a mental assessment report to be undertaken, but argued that the report was not properly produced in evidence for the court to be satisfied that the appellant was in the right frame of mind at the time he pleaded guilty because it is unusual for a person to admit such a grievous offence. Therefore, the court ought to have warned the appellant about the applicable penalty for the charges he was facing.

11. The other ground urged by Ms. Sabaya is that the trial court did not inquire into the appellant's preferred language and it assumed that the appellant understood Kiswahili and the charges against him. Counsel maintained that this violated Article 49 (1) (a) of *the Constitution*. Counsel contended that the facts were conflicting contrary to Article 50 (2) (b) of *the Constitution*, and therefore, his right to a fair trial was violated.

12. It was also counsel's submission that the appellant was coerced and misguided by the police to plead guilty because he was a lay person without the benefit of legal representation contrary to Article 49 (2) (g) and (h) of *the Constitution*. To buttress her submissions, counsel cited the Supreme Court holding in Republic vs. Karisa Chengo & 2 Others [2017] eKLR which underscored the right to a fair trial as follows:

> " The right to legal representation...under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more."

13. Ms. Sabaya also submitted that the appellant was not supplied with the evidence against him before he was called upon to plead to the charges.

14. Regarding the sentence which the appellant terms as excessive, Miss Sabaya contended that the appellant was not given a chance to mitigate before being sentenced to death, which was later commuted to life. Meaning the longer he lives, the longer the sentence. That was not the fault of the trial magistrate as the decision was rendered before Muruatetu I and II. Therefore, this Court is free to exercise discretion and consider mitigating factors before sentencing the appellant. In support of her submission counsel cited this Court in Evans Nyamari Ayako vs. Republic [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) where life imprisonment sentence was defined to mean 30 years imprisonment.

15. Learned counsel for the respondent Mr. Omutelema relied on his submissions filed on 28th June, 2024 and maintained that the appellant pleaded guilty to the charges and even admitted the facts after they were read out to him, and being called upon to mitigate, the appellant prayed for forgiveness saying that he will not repeat the offence. Unfortunately, since the sentence was mandatory the appellant was sentenced to death.

16. Counsel also submitted that the 1st appellate court reconsidered and re-evaluated the circumstances under which the plea of guilt was taken and the learned Judge was satisfied that the plea was properly and lawfully recorded pursuant to section 207 of the Criminal Procedure Code. Further, counsel argued that the appellant's plea of guilty was unequivocal, that the substance of the charge was explained to him in a language he understood, namely Kiswahili to which he replied "it is true", the detailed facts were read out to him and he was asked whether he admitted them and his response was that "the facts are true". Counsel argued that he was not influenced by any person in authority to plea of guilty. Therefore, the appellant was properly convicted on his plea and pursuant to section 348 of the Criminal Procedure Code, no appeal can be entertained where an accused person had pleaded guilty and is convicted on that plea except as to the extent or legality of the sentence.

17. We have considered the record, the parties' rival submissions, the authorities cited and the law. This being a second appeal, our jurisdiction is limited to consideration of matters of law only as stipulated under Section 361 of the Criminal Procedure Code. In Reuben Karari S/o Karanja vs. R. [1956] 1 E.A.C.A. 146 the predecessor of this Court stated:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.

> The test to be applied on second appeal is whether there was any evidence on which the trial count could find as it did."

18. The gravamen of the appellant's case is that he was misled to pleading guilty and that he was not informed of the gravity of the offence and the consequences. He also argues that he was not in a proper state of mind.

19. Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused is convicted upon his own plea of guilty except on the extent and legality of sentence by providing that: -

> "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."

20. This appeal turns on the question of whether the appellant's plea was unequivocal. For a plea to be unequivocal for purposes of conviction, there are conditions that the convicting court must ensure that they exist conjunctively at the time of conviction. In the case of Michael Adrian Chaki v. R. Criminal Appeal No. 399 of 2017 (unreported), the Tanzania Court of Appeal stated that there cannot be an unequivocal plea on which a valid conviction may be founded unless the following conditions are conjunctively met:-

    a. "The appellant must be arraigned on a proper charge. That is to say, the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;

    b. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.

    c. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

    d. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

    e. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be dear.

    f. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."

21. We will, meticulously examine at close range and with keen attention, the trial court's proceedings to ascertain whether the above conditions were met, and determine whether the High Court was wrong to uphold the appellant's conviction and sentence. The trial court's record shows that on 3rd February, 2016, the accused persons appeared before the trial Magistrate, Hon. Mutegi, SRM. The learned Magistrate recorded as follows: "The charges are read to the accused persons in Kiswahili language which they understand and they reply..." The appellant answered "it is true" in answer to count 1 and also "it is true" in answer to count 11.

22. The learned magistrate ordered that the appellant and two other accused persons who had also pleaded guilty be taken to Gilgil Mental Hospital for psychiatric evaluation. On 10th February 2016, the appellant's medical report was presented to the court.

The report showed that the appellant and his co-accused persons were fit to stand trial. The charges in respect of the two counts were read afresh to the appellant and he pleaded guilty to both counts. The facts for the two counts were read to the appellant and upon being asked whether the facts were true, the appellant replied as follows: "the facts are true." The learned magistrate entered a plea of guilty for both counts and convicted the appellant on his own plea of guilty.

23. Firstly, we have carefully reviewed the charge and it is notable that the charge is valid and well-drawn in compliance with Section 134 of the Criminal Procedure Code for it contains, a statement of the specific offence (s) with which the appellant was charged, together with such particulars capable of affording him with reasonable information as to the nature of the offence charged, which robbery with violence. We need not overemphasize that, the offence is well known to law. That means the first condition was met because the appellant was arraigned on a proper charge.

24. Secondly, we have herein above made reference to the relevant parts of the proceedings and reproduced the relevant excerpts showing how the appellant pleaded guilty and how the learned magistrate ordered that he be examined by a doctor and ultimately he was convicted on his own plea of guilty. There exists a presumption that a court record accurately represents what actually transpired in court and it should not be easily impeached. We find no reason to suggest that the trial court's proceedings as captured above do not represent what transpired in court.

25. Thirdly, as the record shows, the facts that were read over to the appellant disclosed the essential facts pertaining to the offences and the appellant admitted the facts as presented after they were read to him. In addition to the above, after the appellant was convicted during mitigation, he asked for forgiveness and stated that he will not repeat the offence again.

26. We find nothing to suggest that the appellant did not understand the charges and that he was not warned of the gravity of the offence. The proceedings were conducted in Kiswahili which the appellant understood. We find nothing to suggest that he did not understand Kiswahili. The learned magistrate did no rush to convict the appellant after he pleaded guilty. He instead directed that he undergoes a medical examination, which was undertaken and the ensuing report confirmed that the appellant was fit to take a plea. When presented in court for the second time, the appellant again pleaded guilty to the charges and confirmed that the facts were true as presented in court.

27. It is well established that for a plea of guilty to be unequivocal, the charge must be clearly explained to the accused who must, not only plead guilty, but also admit the facts as correct. The facts should encompass all the essential ingredients of the offence as set out in the particulars of the offence. It follows therefore, that if the statement of facts admitted as correct does not contain an essential element of the offence, the plea stands equivocal and a plea of not guilty ought to be recorded. Where a plea is unequivocal, an appeal against conviction does not lie because section 348 of the Criminal Procedure Code completely bars appeals in such circumstances. This Court in Alexander Lukoye Malika vs. Republic [2015] eKLR identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

> " 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."

28. We find no reason to suggest that the appellant's plea was equivocal. It is also our finding that the plea taking process complied with Section 207 (2) of the Criminal Procedure Code which provides as follows:

> " 207. (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:
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> 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."

29. Mwongo, J. in the impugned judgment observed as follows:

> " 6. The proceedings show that the appellant was charged as Accused No 2. On 3rd February, 2016, he was arraigned in court with others. According to the proceedings, the charge was read over and explained to the accused persons – in accordance with section 207 of the CPC – "in Kiswahili language which they understand". This was in pursuance of the standard set out in Adan v Republic [1973] EA. The Appellant, being unrepresented, the court was required to ensure that the charges were explained to him. The record shows that the charge was explained. The procedure to be applied on the taking of a guilty plea was explained in the case of Adan vs Republic, [1973] EA 445 where the Court held..."
>
> 7. I have looked at the charges that were read out. They contain the key element of the offence of robbery, that is: stealing, the use of violence or threat to use it, the fact that the appellant was armed with a knife and was accompanied by others and in count II that he did in fact wound the complainant..."
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> 15. The question whether the plea was unequivocal in this case, is answered in the positive in that: the statement of facts discloses the offence of robbery with violence, and there is no evidence of the appellant having disputed any of the facts. Is the court convinced beyond doubt that the accused intended to plead guilty?
>
> I think so. The charge on each of the count was read out, and the accused pleaded guilty to each. The appellant was then taken for psychiatric evaluation and found to be of sound mind. At the next hearing, the facts were then read out and the accused stated that the facts were true."

30. Having read the trial court's record as highlighted earlier, we find no reason to fault the learned judge's findings as reproduced above.

31. Regarding sentence, we note that the learned Magistrate in sentencing the appellant to suffer death noted the appellant's mitigation and stated that "this court's hands are tied because there is only one

sentence provided by law for these offences." The learned magistrate proceeded to impose the death penalty.

32. The Supreme Court in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR declared the mandatory nature of the death sentence as provided for under section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases and lastly directed the legislative making bodies to enact legislation repealing sections that made provision for the death penalty. However, subsequently, the Supreme Court issued directions clarifying that the said decision only applies to murder cases. The appellant was convicted of the offence of robbery with violence. Regrettably, even though he was sentenced to suffer death, the Supreme Court decision clarifying the applicability of Francis Karioko Muruatetu & Another vs. Republic (supra) to other cases stated that the said decision does not apply to persons convicted of robbery with violence. We however note from that the appellant's counsel's submissions, that the appellant's death penalty was commuted to life sentence.

33. Arising from our analysis of the issues discussed above, the conclusion is that this appeal fails on both conviction and sentence. The upshot is that the appellant's appeal is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.