Kipchumba v Republic (Criminal Appeal 385 of 2019)
[2023] KECA 294 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 294 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 385 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 17, 2023

BETWEEN

GEOFFREY KIPCHUMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (O. Osewe, J.) delivered and dated 8th August, 2018) In HC CR Appeal No. 40 of 2016)

JUDGMENT

1. In respect to this appeal, Geoffrey Kipchumba (the appellant) first appeared in the corridors of justice before the Principal Magistrate's Court at Kabarnet. The appellant was in the main charge of the first count charged with the offence of defilement contrary to section 8(1) as read withsection 8(4) of the *Sexual Offences Act*. In the alternative to the main charge, he faced the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. It was alleged that he committed either of the offences on February 21, 2016 at (name withheld) village, within Nandi County against DJ, a child aged 17 years and 3 months.

2. The appellant also faced a second count of being in possession of narcotic drugs contrary to section 3(1)(a) as read with section 4(1) of the *Narcotic Drugs and Psychotropic Substances Control Act*. On this, it was stated that he was found in possession of two rolls of cannabis sativa (bhang) of street value of Kshs. 400 not being medically prepared in contravention of the stated provisions.

3. The appellant pleaded guilty to the main charge in count 1 and 2.

   From the facts presented to the trial court, the prosecution's case was that on February 21, 2016 at 5.30pm the appellant met the complainant who was aged 17 years while she was on her way home. The appellant then stopped her, greeted her and started walking by her side towards the direction she was headed. After walking alongside the complainant for a few meters, he grabbed her and dragged her

into a nearby forest where he forcefully removed her pants, covered her mouth and defiled her. The complainant tried to resist but the appellant threatened to strangle her. The complainant nevertheless raised an alarm and security officers from the nearby [Particulars Withheld] Nandi Station went to the scene and found the two. The complainant narrated to them what had transpired after which they arrested the appellant and handed him over to the police.

4. Upon conviction, the trial magistrate sentenced the appellant to serve 15 years imprisonment for the first count and 3 years imprisonment for the second count. The sentences were ordered to run consecutively. The appellant being aggrieved by the conviction and sentence of the trial court invoked his right of appeal by lodging an appeal in the High Court at Eldoret. In a judgment delivered on August 8, 2018, Olga Sewe, J. dismissed the appeal noting that the learned magistrate could not be faulted for the conviction as the appellant had pleaded guilty and that the sentence imposed was within the law.

5. In this court, the appellant filed grounds of appeal and supplementary grounds of appeal. In his initial grounds of appeal, the appellant contends that the first appellate court did not re-evaluate the evidence as was required of it; that the court failed to find that the language of interpretation was ambiguous; and that his mitigation was not considered. In his supplementary grounds of appeal, the appellant raises eight grounds of appeal. All the supplementary grounds of appeal revolve around the sentence as passed by the trial court and affirmed by the first appellate court. His case is that he pleaded guilty, was a first offender hence the sentence as passed was harsh, he was remorseful, and had been rehabilitated during the time served in prison.

6. The appellant who appeared in person sought to rely on his written submissions. It is the appellant's case that even though he pleaded guilty to the charges, he was illiterate at the time and his plea was also induced by the arresting officers who implored him to accept the charges in exchange for a lenient sentence. The appellant acknowledged that he had no evidence to support the allegation of inducement, but nevertheless urged us to grant him leniency on that account. Further, he argues that being a first offender and illiterate in law, he was at a disadvantaged position with the law enforcers thereby doing everything asked of him oblivious of what the repercussions would be. To this end, he contends that the two courts below ought to have taken these circumstances into consideration failure of which led to the harsh sentences that were meted against him. To him, this failure on the part of the two courts denied him the benefit of the right to equal protection of the law under article 27(1), (2) and (4) of the *Constitution*.

7. The appellant also took issue with the sentences running consecutively. He argues that had the two courts below considered hismitigation, they would have ordered the sentences to run concurrently. He also seeks to be placed on probation based on the provisions of section 39(2) of the *Sexual Offences Act*. The appellant also submits that he is remorseful, repentant, informed and rehabilitated. He further states that he has undertaken various vocational trainings while in prison and that this will help him earn a living and support his family who depended on him. In conclusion, he urged us to allow his appeal, quash the conviction and set aside the sentence.

8. Ms Asiyo learned counsel for the respondent filed submissions dated November 24, 2022. Counsel submitted on two issues. On the first issue as to whether the appellant's plea was unequivocal, Counsel submitted that under section 348 of the *Criminal Procedure Code*, the appellant having pleaded guilty was barred from challenging his conviction on appeal. Counsel added that this being a second appeal, the appellant could only appeal on matters of law. Reliance was placed on the cases of *Adan vs. Republic* [1973] EA 445 and *Ombena vs. Republic* [1981] eKLR as well as section 207 of the *Criminal Procedure Code* as highlighting the parameters of a correctly taken plea. Ms Asiyo pointed out that the appellant changed his plea on two occasions before finally pleading guilty to the charges and that even after the

facts were read to him, he confirmed that those facts were true. Ms Asiyo further submitted that it cannot be said that the appellant pleaded guilty as a result of mistake or misapprehension of fact; or that the charges did not disclose offences known in law; or that the plea was imperfect or ambiguous to warrant the interference of this court with the plea. Reliance was placed on the case of *Alexander Likoye Malika vs. Republic* [2015] eKLR as stating the factors that can lead an appellate court to quash a plea of guilty. To this end, counsel urged us to leave the plea undisturbed and find that the appellant's plea was unequivocal.

9. The second limb of the respondent's submissions is that the sentence passed was legal and commensurate in the circumstances of the case. Ms Asiyo urged that for the first count, section 8(4) of the *Sexual Offences Act* legislates for a minimum sentence of 15 years while the sentence for the second count as provided under section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* is "not more than 5 years". According to Counsel, the trial court considered the mitigation by the appellant prior to imposing the impugned sentences. Counsel further submitted that since sentence was a discretion of the trial court, there was no evidence to impute that the discretion was not exercised judiciously. Counsel therefore urged this Court to leave the sentences undisturbed. Counsel, however, conceded to the appellant's prayer that the sentences should run concurrently as opposed to consecutively.

10. We have carefully considered the record of appeal as well as the rival submissions and the cited authorities. This appeal is a second attempt by the appellant to overturn the conviction and sentence of the trial court. In a second appeal, the scope of our engagement is limited to issues of law. We are to leave undisturbed the concurrent findings of fact by the two courts below save for where in our review, we find that the findings so made cannot be substantiated in light of the evidence on record; or that the findings of fact have been arrived at courtesy of wrong application of the legal principles. As per the provisions ofsection 361(1)(a) & (b) of the *Criminal Procedure Code*, matters of sentence are also not within our domain unless the sentence passed is one which the trial court was by law, not allowed to pass, or where the first appellate court enhanced the sentence.

11. The appeal before us raises two issues, namely, whether the plea was unequivocal and whether the sentence was lawful. Before we address the first issue, we reiterate that section 348 of the *Criminal Procedure Code* bars appeals from subordinate courts where an accused was convicted upon a plea of guilty. The exception to the rule is that the convict can appeal in respect to the extent and legality of sentence. It also goes without saying that the bar is only in respect of an unequivocal plea. A plea that leaves doubt or is ambiguous is open for appeal. We wish to add that the duty of the first appellate court to review the record and come up with its own conclusion is not vitiated by section 348 of the *Criminal Procedure Code.* The first appellate court ought to review the record with a view of ascertaining whether the plea was unequivocal or not. Upon being satisfied that the plea was unequivocal, the first appellate court is then required to down its tools with respect to the appeal against conviction. Our view herein resonates with the holding of this court, but differently constituted, in the case of *Alexander Likoye Malika* (supra) where it was stated that:

> "May we, by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty – See Section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. 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."

12. We proceed to consider whether the appellant's plea of guilty was unequivocal. A perusal of the grounds of appeal shows that the essentially complains of ambiguity in the language used in the plea taking. It then follows that the appellant does not actually challenge the plea taking process. His appeal turns on the question of language. From the record, we note at page 2 of the typed proceedings that the plea was taken in Kiswahili language which was requested by the appellant. The learned magistrate proceeded to record the appellant's response to the charges in Kiswahili language. Our perusal of the record shows that the plea was taken in compliance with the template set in Adan (supra) andsection 207 of the *Criminal Procedure Code.* We therefore do not find any impropriety on the part of the trial court. We have no doubt that the plea of guilty as entered against the appellant was unequivocal. Consequently, his appeal against conviction is without merit and is hereby dismissed.

13. The next line of our inquiry is with regard to the sentence. The appellant was imprisoned for 15 years on count 1 and 3 years on count 2. The sentences were to run consecutively. The appellant is dissatisfied with the sentences citing two major grounds, namely, that the sentences are harsh and excessive, and, that the sentences ought to have run concurrently. On the other hand, the respondent contend that the sentences are legal and commensurate to the offences. The respondent, however, concede to the appellant's request for the sentences to run concurrently.

14. As we have already stated, the scope of our mandate with regard to sentence is a limited one. Section 8(4) of the *Sexual Offences Act* provides for a minimum sentence of 15 years. For Count 2, the sentence provided for under Section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* is a maximum of 10 years where the person found with the cannabis satisfies the court that the same was intended for his own consumption. The record shows that the learned magistrate duly considered the appellant's mitigation prior to passing the sentences. Sentencing remains a matter of discretion,and in an appeal like the one before us where the record does not show any impropriety in the exercise of discretion on the part of the trial court, we are barred from interfering with the sentence. Perhaps just to add, that as provided by section 361(1) of the *Criminal Procedure Code* severity of a sentence is a matter of fact. Our only concern therefore is in respect to the question as to whether the sentences ought to have been ordered to run concurrently or consecutively. This issue involves a point of law that then authorizes us to address it on second appeal. An authority for this statement is found in the decision of this court in *John Waweru Njoka vs.Republic* [2001] eKLR where it was stated that:

> "We are satisfied that there was a point of law involved on sentence in this appeal when the magistrate ordered the sentences on the two limbs of the charge to run consecutively because they were committed in one transaction and should, therefore, have run concurrently. For this reason, we are satisfied, that an appeal would lie before us on sentence on second appeal."

15. The law that authorizes the imposition of concurrent or consecutive sentences where a person is convicted of several offences at one trial is found in section 14 of the *Criminal Procedure Code* which provides as follows:

> 14. Sentences in cases of conviction of several offences at one trial
>
> 1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the

other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

2. In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

3. Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

   a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

   b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

4. For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

16. From the cited law, the decision as to whether the sentence should run consecutively or concurrently is one bestowed on the trial court. We, however, point out that such a discretion being a discretionary should be exercised based on the laid down principles. What then are the principles established within our jurisdiction that guide courts in making that decision? Thiscourt in the case of *Peter Mbugua Kabui vs. Republic* [2016] eKLR gave guidance as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

In *John Waweru Njoka* (supra), this court pointed out that:

> " In law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. Nevertheless, it is an established principle of law that where offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts."

Lastly, in *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97,the defunct East African Court of Appeal stated as follows:

> " The practice in cases where a person has been charged with and convicted on two counts involving the same transaction, one for burglary or housebreaking and one for stealing has been to direct the sentences to run concurrently. In the present case the accused, a person with a long list of previous convictions, was found guilty on two counts, one for burglary and one for stealing, and sentenced to consecutive sentences of 7 years on each count. While we recognize that the accused is a hardened criminal deserving of a severe sentence, our view is that where, as here, both offences have been committed at the same time and in the same transaction, the practice referred to should be adhered to save in very exceptional

circumstances, where, for instance, a person breaks and enters a house and commits the felony of rape therein where an order that the sentences on both counts might be directed to run consecutively. In this case we increase the sentence on the charge of burglary to 10 years, allow the sentence for theft 7 years to stand, and direct that the sentences shall run concurrently."

17. The inherent theme in the authorities cited above is that for offences committed in the same transaction, the sentence ought to run concurrently save where there are exceptional circumstances to warrant a directive that the sentences should run consecutively. In the present case, the appellant was arrested on allegation of defilement. Upon being arrested, he was frisked and two rolls of bhang recovered in his pocket. In our view, had the appellant not been arrested for the offence incount 1, the offence in count 2 could not have been detected. The two offences can therefore be said to have arisen from the same transaction as one offence led to the discovery of the other. In that case therefore, the learned magistrate erred in ordering the sentences to run consecutively. The concession to the appeal on this ground by the respondent's counsel was therefore the correct and just thing to do. In the circumstances, we accept the appellant's invitation to intervene, which we hereby do, and order that the sentences do run concurrently.

18. The upshot of the foregoing is that the appeal against conviction is found to be without merit and is dismissed. The appeal against sentence partially succeeds to the extent that the sentence of imprisonment for 15 years in respect to the first count and the sentence of 3 years imprisonment for the second count shall run concurrently from the date of sentencing by the trial court being February 29, 2016.

19. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MARCH, 2023

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

Signed

DEPUTY REGISTRAR