



**Loshерian v Republic (Criminal Appeal 16 of 2015)
[2023] KECA 477 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 477 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 16 OF 2015
F SICHALE, LA ACHODE & WK KORIR, JJA
MAY 12, 2023**

BETWEEN

HARUN LOSHERIAN APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) delivered and dated 14th November 2013) In HC CR Appeal No. 192 of 2013)

JUDGMENT

1. Harun Loshерian, the appellant herein, was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and was subsequently sentenced to serve 20 years imprisonment. The case against him was that sometime in June 2013 he met the complainant (LM) within [Particulars Withheld] estate in Nakuru. He asked the complainant for her hand in marriage, took her to his house at [Particulars Withheld] area. The appellant then lived with the complainant, who was at the time aged 15 years, as his wife. On August 21, 2013, the complainant was picked from the appellant's house by members of the public. Upon being taken for treatment, she was found to be pregnant.
2. During the trial, the appellant changed his plea twice. It is alleged that he finally pleaded guilty subsequent to the testimony of the complainant. The record does not show that the appellant pleaded guilty and neither is there any evidence of a conviction entered against him. The record shows that after receiving the appellant's mitigation, the trial court went ahead to sentence him. Being aggrieved with the conviction and sentence of the trial court, the appellant lodged an appeal in the High Court. After considering his appeal, the High Court rendered its decision on November 14, 2014 dismissing the appeal. The appellant was dissatisfied with the decision of the first appellate court and is now before us appealing on the grounds that his plea was equivocal; that he was not accorded a fair trial; that the



- first appellate court failed to discharge its duty of independently analyzing the evidence on record; and, that his mitigation was not taken into consideration.
3. When this matter came up for hearing on December 14, 2022, the appellant who appeared in person sought to rely on his written submissions accompanied with a short oral reiteration of those submissions. The crux of the written submissions was that the first appellate court abdicated its duty to re-evaluate the record prior to arriving at its own conclusion. The appellant contends that had the first appellate conducted its duty faithfully, it would have realized that there was an error in the trial proceedings rendering the plea equivocal. He referred the Court to the decision of *Adan v Republic* [1973] EA 445 for the essentials of an unequivocal plea of guilty which he argues were not met in his case. The appellant also argued that the reliance on the equivocal plea was prejudicial to him. In his oral submissions, he pointed out that he pleaded ignorance of the offence arguing that the complainant was his wife. He also stated that the complainant regularly visits him at the prison and that a child born of the relationship was now 9 years old. He invited the Court to allow his appeal on these grounds.
 4. Ms Mburu for the respondent informed the Court that she was relying on the written submissions through which she submitted on three issues. On whether the plea was unequivocal, counsel relied on Section 207(1) of the *Criminal Procedure Code* and the case of *Adan (supra)* to reiterate the procedure for taking pleas. Counsel also cited the case of *Alexander Lukoye Malika v Republic* [2015] eKLR as providing the circumstances under which a court can interfere with a plea of guilty. Counsel referred to page 2 of the record and submitted that in this case, all the essential procedural requirements were adhered to by the trial court. She stated that from the record, the appellant understood the substance of the charge and therefore the plea was unequivocal. She urged the Court not interfere with the plea.
 5. On whether the first appellate court abdicated its duty to re- evaluate the evidence on record, Ms Mburu relied on the case of *John Nakoroto Ereagai v Republic* [2014] eKLR to point out that there was no specific mode of discharging the duty of the first appellate court. Counsel referred to the judgment of the first appellate court stating that the court addressed the issue of plea and submitted that the court indeed discharged its mandate by carrying out an independent evaluation of the evidence.
 6. As to whether the sentence was harsh and excessive, counsel submitted that the law provides for a prison sentence of not less than 20 years for the offence. Ms Mburu submitted that the sentence was fair and reasonable given the age of the victim, the appellant's own plea of guilty and the minimum sentence provided by the law. In summary, the respondent urged us to dismiss the appeal in its entirety.
 7. This is a second appeal and the remit of our mandate is as provided under Section 361(1) (a) and (b) of the *Criminal Procedure Code*. We are only to entertain matters of law and let the concurrent findings of facts by the two courts below remain undisturbed. It is only if the findings of fact are not supported by the law that we can interfere with the appealed decision on factual basis.
 8. Upon considering the record of appeal, the memorandum of appeal and the submissions, this appeal raises the following issues for our determination, namely, whether the appellant was properly convicted, and, whether the sentence was legal and reasonable in the circumstances of this case.
 9. The appellant in this case was convicted on his own plea of guilty. He, however, contends that the plea was equivocal and did not meet the threshold for a plea of guilty. Before we delve into this issue, we find it prudent to reiterate that Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. However, the provision does not bar the first appellate court from reviewing the record with a view to 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 in as far as the



appeal against conviction is concerned. Similar views were expressed by this Court in *Alexander Likoye Malika v Republic* [2015] eKLR as follows:

“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.”

10. A perusal of the record shows that the first appellate court appreciated the law and addressed the issue of plea taking by stating in the judgment that non-attendance of school and illiteracy were not grounds for an appeal. However, we note that the first appellate court did not conduct a review of the record in respect to the plea of guilty but instead, downed its tools at the earliest opportunity possible. This, in our respectful view, was a misinformed interpretation of Section 348 of the *Criminal Procedure Code*. We say so because had the first appellate court reviewed the record, it would have arrived at a different conclusion from that which it arrived at. This will be evident in our subsequent discussion on this matter.

11. The procedure for taking plea is provided for under Section 207(1) & (2) of the *Criminal Procedure Code* 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.” (Emphasis ours)

12. In *Ombena v Republic* [1981] eKLR, this Court cited with approval the procedure established in *Adan (supra)* for the recording of plea of guilty as follows:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full—

“Held:

- 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.”

13. In the present case, the appellant changed his plea twice. He first pleaded guilty, then at 3.05pm, he changed the plea to one of not guilty. The complainant was then called to the stand as PW1. After the complainant testified, the appellant cross-examined the complainant. Thereafter, the trial court entered in the record a note that the appellant had pleaded guilty and proceeded to hear the appellant on mitigation.

14. In our view, the record as it is does not conform to a properly administered plea of guilty. We fault this procedure for the following reasons. First, there is nowhere in the record that the appellant pleaded guilty after the complainant concluded her testimony. Prior to the trial court receiving the victim's testimony, the appellant had clearly indicated that he was changing the plea of guilty entered initially to one of not guilty.

Any change of plea thereafter ought to have been clearly captured on record.

15. Second, no facts were read over to the appellant when the plea of guilty was entered. The truth or otherwise of a charge is always premised on a charge known in law, the particulars of the charge as well as the statement of facts. The statement of facts therefore forms part and parcel of what an accused person pleads guilty to. In *Adan (supra)*, the Court underscored the relevance of stating the facts as follows:

“The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.”

16. Third, there was no indication as to whether the charge was read to the appellant at the time he is deemed to have pleaded guilty. Perhaps the proper way was for the trial court to note that the appellant intended to change his plea and thereafter have the charges read afresh and to allow the proper procedure to take place from that point. There was even no harm in having the record reflect the appellant's request to change plea before even reading the charge to him afresh.

17. Fourth, the record does not show whether the court rendered its decision as to conviction as required under Section 207 of the *Criminal Procedure Code*. The provision requires in mandatory terms that a conviction shall be recorded once the accused person accepts the accuracy of the facts read out by the prosecutor.



18. We further wish to reiterate that where an accused is unrepresented and he or she pleads guilty to a charge which attracts a custodial sentence, the court is under obligation to ensure that the accused person understands the consequences of such a plea. The record must show that the accused voluntarily entered the plea of guilty in respect of an offence created by the law and that the facts as read out actually confirm the commission of an offence. A plea of guilty is not an issue to be taken lightly and as was stated by this Court in *Elijah Njibia Wakianda v Republic* [2016] eKLR:

“Given all the safeguards available 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 walkover 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 clear and unambiguous terms.”

19. Similarly, in *Ombena (supra)* the Court stressed that the record should, as a matter of necessity, be reflective of the proceedings; and the procedural safeguards of the right to fair trial should not be sacrificed at the altar of high workload and the urge to conclude cases. In that regard, the Court pointed out that:

“We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand.”

20. In the circumstances, we find that the plea of guilty entered for the appellant did not meet the legally set threshold. We also find that there was no proper conviction of the appellant as a conviction is nowhere on the record. We wish to point out that even though the appellant makes concessions even in his mitigation that he committed the offence, the procedural safeguards of plea taking and the trial in general ought not to have been forsaken as appears to have been in this matter.

21. Having reached the conclusion that the appellant’s conviction was not safe, there is no reason for considering the issue regarding the legality of the sentence meted on the appellant. Considering what has been stated in this judgment, we find this appeal has merit and we allow it. The conviction against the appellant is hereby quashed and the sentence set aside. The appellant be and is hereby set free forthwith unless otherwise lawfully held in custody.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....



JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

