Kiok v Republic (Criminal Appeal 183 of 2014)
[2023] KECA 916 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 916 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 183 OF 2014

F SICHALE, FA OCHIENG & WK KORIR, JJA

JULY 28, 2023

BETWEEN

AMOS MEMUSI KIOK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((An Appeal from the judgment of the High Court of Kenya at Nakuru, (Omondi, J as she then was), dated 19th May 2014) IN HC. CRA NO. 232B OF 2012)

JUDGMENT

1. The appeal before us is a second appeal in which Amos Memusi Kiok (the appellant herein), had been initially charged at the Senior Resident Magistrate's Court, Narok with two separate counts of defilement of a boy and committing an indecent act with the same boy aged 8 years contrary to Section 8 (1) (b) and Section11(1) of the *Sexual Offences Act* No. 3 of 2016 respectively.

2. The particulars of Count I were that on 5th December 2012, at (particulars withheld), he willfully and intentionally caused his penis to penetrate the anus of KK a boy aged 8 years old.

3. In Count II, the particulars were that on 6th December, 2012, at the same place as in Count I, he wilfully and unlawfully touched the anus of KK (name withheld), a boy aged 8 years old.

4. The appellant was convicted on what the court considered his own plea of guilty and sentenced him to life imprisonment. Being aggrieved with the conviction and sentence, the appellant moved to the High Court on appeal on the grounds inter alia that he did not understand the language in which the charges were read to him. In a judgment delivered on 19th May 2014, Omondi J (as she then was), found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Unrelenting, the appellant filed a Memorandum of Appeal on 11th July 2014, raising 4 grounds of appeal. Subsequently thereafter, the appellant through his advocate filed supplementary grounds of appeal dated 21st August 2017, raising the following grounds of appeal:

> "
>
> "i. That the first appellate court erred in law in upholding the conviction on a "plea of guilty" that was equivocal and/or not properly taken.
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> ii. That the first appellate court erred in law by upholding the conviction without realizing that the appellant pleaded guilty to a serious offence without being accorded a chance to be represented by an advocate as envisaged under Article 50 (2) (g) and (h) of *the Constitution*.
>
> iii. That the first appellate court erred in law in upholding the conviction without realizing that the charge sheet was fatally defective
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> for it did not disclose the penalty on the offence charged and thus the appellant (then accused) was greatly prejudiced.
>
> iv. That the first appellate court erred in law by upholding the conviction without taking cognizance of the fact that the judgment of the trial court contravened the provisions of Section 169 (2) of the *Criminal Procedure Code* by failing to specify the offence upon which the appellant (then accused) was convicted."

6. When the matter came up for plenary hearing on 24th January 2023, Mr. Kanyi Ngure learned counsel for the appellant relied on his written submissions dated 17th January 2023, which he orally highlighted in Court. Miss Mburu on the other hand while opposing the appeal relied on her written submissions dated 23rd January 2023.

7. It was submitted for the appellant that he was charged with 2 counts of separate and distinct offences and that the trial court proceedings do not indicate whether the charges and particulars of both counts were read out to the appellant; that the proceedings indicate that "the substance of the charge and every element thereof has been stated to the accused in Maasai" and that from the proceedings, it was not clear as to which count and in respect of which offence the appellant is said to have entered his plea of guilty hence, the plea was equivocal and not properly taken.

8. It was submitted that the facts of the offence which were read out to the appellant seem to relate to the 1st count but in absence of clarity on the offence which the accused person pleaded to, it could not be said with certainty that the appellant admitted to the facts of any of the offences as charged.

9. It was further submitted that the proceedings indicated that the charge and every element were stated to the appellant in the Maasai language and the court record indicated that there was a court clerk by the name "Winnie" but the record was silent as to who made the interpretation of the proceedings in the Maasai language and that neither was it indicated that the Maasai language was the preferred language of communication by the appellant. Additionally, that the language in which the appellant communicated and responded to the court had not been indicated.

10. The trial court was further faulted for failing to inform the appellant of his right to legal representation and/or to assign him legal representation at the State's expense considering that he was facing serious charges with severe penalties in the event that a finding of guilty was entered. For this proposition,

reliance was placed on the decision of the Supreme Court in *Republic v Karisa Chengo & 2 Others* [2017] eKLR.

11. It was further submitted that the charge sheet in respect of count 1 was fatally defective as the appellant was charged with defilement contrary to Section 8 (1)(b) which was non-existent; that the appellant ought to have been charged with defilement contrary to Section 8(1) as read together with Section 8(2) as it was crucial for the appellant to be informed of the charges he was facing and the penalty prescribed.

12. Finally, the trial court was faulted for contravening the provisions of Section 169 (2) of the *Criminal Procedure Code* in that the appellant was charged with 2 counts in regard to separate and distinct offences and that the court failed to specify whether the appellant was convicted for the offence under the 1st count or the offence under the 2nd count.

13. On the other hand, it was submitted for the respondent that the appellant having pleaded to the charges, he could only appeal on sentence and that a careful look at the proceedings and especially mitigation, showed that the appellant understood the charges he was facing; that the appellant pleaded guilty to the offence of defilement which was the main count and it was not necessary for him to plead in respect of the other count. It was also submitted that all these issues that the appellant was raising were afterthoughts.

14. As to whether Article 50 (2) (g) and (h) of *the Constitution* were violated, it was submitted that the right to legal representation did not cut across and was only applicable where there was evidence that substantial injustice would otherwise occur, and that in the instant case, there was no evidence that substantial injustice had occurred.

15. It was further submitted that the charge sheet was not defective and that inclusion of Section 8 (1) (b) of the *Sexual Offences Act* in the charge sheet was a typographical error which ought to have read Section 8 (1) (2) of the Act and that the said defect was not fatal as it was curable under Section 382 of the Criminal Procedure Code cap 75 of the Laws of Kenya.

16. Finally, as regards non-compliance of the provisions of Section 169 (2) of the Criminal Procedure Code, it was submitted that the appellant was convicted on his own plea of guilty and there was no judgment written by the trial magistrate as full trial did not take place and further, that the appellant was charged with an offence known in law.

17. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

18. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

19. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

20. Before we embark on considering the grounds of appeal raised by the appellant, it was contended by the respondent that the appellant having been convicted on his own plea of guilty, he could only appeal on sentence. Indeed, Section 348 of the *Criminal Procedure Code* provides as follows:

> " 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 or legality of the sentence."

21. In *Alexander Lukoye Malika v Republic* [2015] eKLR this Court held 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."

22. The High Court was faulted for upholding the conviction on a "plea of guilty" that was equivocal and/or not properly taken.

23. We have carefully perused the record and the same shows that when the appellant was first arraigned in court on 10th December 2012, before C.A Nyakundi (the then SRM), the following was recorded:

> " 10/12/12.
>
> Before me C.A Nyakundi SRM. Cp-Pc Haji.
>
> C/c Winnie. Accused-Present.
>
> Court- the substance of the charge and every element thereof has been stated to the accused in Maasai.
>
> Accused-it is true.
>
> Court- Plea of guilty entered."

24. The facts were then read out to the appellant and he confirmed that the facts were correct whereupon the trial court proceeded to convict him on his own plea of guilty and sentenced him to life imprisonment.

25. However, although the record indicated "that the substance of the charge and every element thereof has been stated to the accused in Maasai", there is no indication of whether the court inquired from the appellant what language he understood. In *Elijah Njihia Wakianda v Republic*, Kisumu Criminal Appeal No. 437 of 2010, this Court stated:

> " We think that it is a good practice for the specific language used to state the elements of the charge specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language".

26. Nevertheless, in the instant appeal, although the record at the tail end (as opposed to at the commencement of plea taking) indicates "Explained in Maasai by Sekut", it is clear that the charge was read to the appellant in the Maasai language and the appellant pleaded guilty. The facts were then read to the appellant and the record indicates that he stated "facts are correct". When the appellant was asked to mitigate, the record shows that he communicated to the court which recorded his mitigation as follows: "Sorry for what I did. I am willing to cater for the medication of the boy. I am 23 years old. I am married to wife with 3 kids".

27. In *Ombena v Republic*, Criminal Appeal No. 36 of 1981, this Court held:

> " ... whether or not a plea can be accepted as unequivocal will depend on the circumstances of the case ..."

28. Given the circumstances of this matter where it is evident that the appellant was informed of the charge facing him in the Maasai language although the court recorded this at the tail end as opposed to at the commencement of plea taking, we find that the plea was unequivocal.

Be that as it may, the gravamen of this appeal is whether the plea was in respect of count I or in respect of count II.

29. The appellant herein was charged with two separate and distinct offences, one being count I and the other one being count II. The offences are said to have been committed on separate dates as the former is alleged to have been committed on 5th December 2012 while the latter is said to have been committed on 6th December 2012. An offence under Sec. 8(1)(2) attracts a sentence of life imprisonment whilst an offence under Sec.11(1) attracts a sentence "... of not less than ten years' imprisonment". Unfortunately, the record does not show which offence the appellant pleaded to.

30. In *Ombena v Republic* (*supra*), this Court while addressing an issue where an appellant had been charged with more than one count stated thus:

> " As to the first ground of appeal, we feel that it is not a desirable practice for the trial court to record only one plea in respect of more than one count. It is important that the accused should understand each count, and that the accused should answer separately the charge in each count, and that the words of each answer should be separately recorded. Otherwise the court cannot always be sure that the accused has both understood and applied his mind to each count." (Emphasis supplied)

31. It is our view that failure on the part of the trial court to indicate whether the appellant's plea was taken in respect of count I or count II, was an irregularity necessitating a retrial.

32. Finally, the trial court was faulted for contravening the provisions of Section 169 (2) of the *Criminal Procedure Code* CAP 75 of the Laws of Kenya. The said Section provides as follows:

> " In the case of a conviction, the judgment shall specify the offence of which and the Section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

33. In the present appeal and as we had alluded to earlier, the appellant was charged with two counts which were alleged to have been committed on different dates. The record does not indicate the offence in respect of which the appellant was convicted of, thus, raising an issue of a mis-trial. Accordingly, we find merit in this ground of appeal and we allow the same.

34. Given the above, it follows that the conviction and sentence meted out on the appellant cannot be allowed to stand and we hereby quash the conviction and set aside the sentence.

35. However, taking into consideration that the appellant has spent over 10 years in custody and given the fact that the witnesses may not be readily available and to have the complainant rehash the ordeal he underwent whilst he was 8 years, we are of the considered opinion that this would not be a proper case to order a retrial as it would not serve the interests of justice.

36. Accordingly, we allow the appeal and order that the appellant be forthwith set at liberty unless otherwise lawfully held.

It is so ordered

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR