Diriye v Republic (Criminal Appeal 115 of 2020)
[2022] KECA 24 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 24 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 115 OF 2020

MSA MAKHANDIA, A MBOGHOLI-MSAGHA & HA OMONDI, JJA

FEBRUARY 4, 2022

BETWEEN

ABDULLAHI DIRIYE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 11th April 2018 in Nairobi HCCRA No. 124 of 2016)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 11th April 2018 in Nairobi HCCRA No. 124 of 2016. The appellant was charged before the Chief Magistrate's Court at Makadara with creating disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) of the *Penal Code*. The particulars were that on 27th March 2014, at Immigration Office Jomo Kenyatta International Airport, the appellant created disturbance by bringing commotion to one Mr Kaunda, duty officer Immigration, with the intention of forcibly taking away one Siraj Abdille Telow, a passenger who had been held by immigration officers for interrogation.

2. The appellant was also charged with entering a security area and committing an offence contrary to Regulation 56 of Legal Notice No. 89 of 2008 of the *Civil Aviation Act*. The particulars were that on 27th March 2014 at the staff entrance of Jomo Kenyatta International Airport, the appellant accessed the baggage hall area to the Immigration office without a security pass. In the charge sheet, the second charge was framed under the title Alternative Charge but during plea taking the charges were recorded as Count 1 and Count 2.

3. The appellant was arraigned in court on 31st March 2014 and the charges read out to him as Count 1 and Count 2 to which he pleaded not guilty. On 3rd April 2014, however, the appellant stated that

he wished to change his plea. The charges were once again read out and explained to the appellant whereupon he pleaded guilty. A guilty plea was entered and the appellant convicted and fined Kshs. 10,000/=, in default to serve 6 months imprisonment in count 1; and fined Kshs. 40,000/=, in default to serve 6 months imprisonment in count 2.

4. Dissatisfied with the conviction and sentence, the appellant lodged an appeal at the High Court on the grounds that he was convicted when the facts presented did not prove the charges; that the learned magistrate contravened provisions as to the manner of keeping the proper record of the court, especially on procedure of plea of guilty contrary to Section 207 of the *Criminal Procedure Code*; that the learned magistrate did not forewarn the appellant of the implications of change of plea and did not record it properly as pleaded; that the learned magistrate did not record what language the plea was read and taken, thus infringing the appellant's right to a fair trial; that the appellant was convicted on a plea of guilty when a plea of not guilty had earlier been entered; that the appellant was convicted without a proper record being maintained; and that the appellant was convicted without ensuring all the safeguards in Article 50 (2) of the *Constitution* as read with Section 28 of the Penal Code were in place.

5. The learned judge held that the case did not fit into any of the circumstances under which a plea of guilty can be upset; that the admitted facts of the case demonstrated that the two offences recorded as Count 1 and Count 2 were committed, namely creating disturbance and entering a security area. The learned judge further found Count 2 by its framing, could not constitute an alternative charge to Count 1 as each of the counts clearly constituted a distinct offence by itself. Regarding the issue that the appellant was held in police custody longer than the law provides, the learned judge held that the appellant can seek compensation by way of civil proceedings against the person responsible for violating his constitutional right to freedom. For those reasons learned judge dismissed the appeal.

6. Still dissatisfied, the appellant lodged the instant appeal through a memorandum of appeal dated 23rd December 2020, praying that the appeal be allowed, the conviction be voided, the sentence set aside, an order be made for the refund of the fines paid together with the balance of the unutilised cash bail after appropriation towards the fine; or an alternative order be made for fresh trial. The appeal is based on the following grounds:

    a. The learned trial judge erred in law by not appreciating provisions of Section 137 of the Civil Procedure Code relating to the drawing and framing of charges.

    b. The safeguards provided for under Section 214 of the Criminal Procedure Code were flouted by the two courts below by not subjecting the charge sheet to amendment or substitution thereby infringing right to a fair trial.

    c. Whether a holding that Section 348 of the Criminal Procedure Code on jurisdiction got ousted by the guilty plea and if the said plea was unequivocal and incapable of being disturbed.

    d. The honourable judge erred in law by holding the same view with the subordinate court when Section 382 of the Criminal Procedure Code could not have cured the lacuna on the charge sheet.

    e. The two courts below erred in law by non-appreciating the provisions of Section 207 of the Criminal Procedure Code especially on the nexus between the stated and admitted facts vis-à-vis the charges.

    f. The learned trial judge erred in law in upholding the alternative count/charge which at law was unsupported and or unsubstantiated through facts/evidence thus offending provisions of Section 17 *Evidence Act* and Articles 47 and 50 of the Constitution.

7. Prof Tom Ojienda, Senior Counsel filed written submissions for the appellant and highlighted the same at the hearing. He submitted that the appeal was hinged on the issue of whether or not the plea of guilty was unequivocal. That the learned judge erred by not taking time to look at the court record from the trial court which would have proved that the plea of guilty was not unequivocal. The nature of unequivocal plea of guilty is so delicate that it has to meet all the required conditions otherwise it fails. Senior Counsel relied on Section 207 of the Criminal Procedure Code and the case of *Adan v Republic* [1973] EA 445 as quoted in *Ombena v Republic* [1981] eKLR in which this Court outlined the steps to be followed when recording pleas of guilty: the charge and all the essential ingredients of the offence should be explained to the accused in his language, or a language he understands; the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded; 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 fact; 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; if there is no change of plea a conviction should be entered, and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

8. Senior Counsel took issue with the manner in which the plea of guilty was recorded. There is nothing in the record to show any explaination or translation of the charges from English to Swahili. When the appellant appeared before the court to change his plea, the typed proceedings only indicate that the "Charge read over and explained to the accused in a language he understands and he answers in Swahili", which is a total deviation from the initial arraignment where the appellant pleaded not guilty. In the first appearance the trial magistrate recorded that "The substance of the charges and every element thereof has been stated by the court to the accused in a language that he understands, who being asked whether he/she admits or denies the nature of the charge(s)." The entry in second appearance refers only to one charge while there was a first charge and an alternative charge.

9. Senior Counsel also submitted that it is not certain that the prosecutor stated the facts, or that the appellant was given an opportunity to dispute or explain the facts or to add any relevant facts. That the bald record stated that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, which was not. Senior Counsel contended that even though it may be that the record does not do full justice to the proceedings as they were conducted, the record can only be judged as it is, citing the case of *Ombena v Republic (supra)*. The judge ought to have interrogated the entire process and considered whether the contents and elements of the charge were read to the appellant in a language he understands.

10. Further, the learned judge failed to find that the mention of

> " charge" while there were two charges, seems like a recital or template that the courts have so depended on that they do not take time to ensure that the conditions for unequivocal plea of guilty have been met, as was stated in the case of Elijah Njihia Wakandia v Republic [2016] eKLR.

11. Explaination of the substance and elements of the charge also includes informing the accused of the consequences of pleading guilty; This was the position held in the case of *Elijah Njihia Wakandia v Republic (supra)* and *Kennedy Ndiwa Boit v Republic* [2002] eKLR. The appellant was not duly informed ofthe consequences of pleading guilty and as such this vitiated the conditions necessary for unequivocal plea of guilty. Senior Counsel cited *Benard Injendi v Republic* [2017] eKLR for the proposition that information about the consequences of pleading guilty should not only apply to capital or severe sentences but to all cases where a plea of guilty has been entered.

12. Senior Counsel finally submitted that, the facts that were read to the appellant by the prosecution on the day he pleaded guilty were evidently different from those that were drafted in particulars of the charge, giving rise to confusion as to which set of facts the appellant pleaded guilty to. That the conduct of the prosecution and the trial court on the day he pleaded guilty was different from the first day he was arraigned to take plea. That the facts were not read to him and as such had no option but to accept the charges.

13. The respondent opposed the appeal. Ms Matiru, Counsel for the respondent submitted that at no given time during the proceedings does that appellant seem not to have understood what was stated in court; that the appellant never raised the issue of language and continued to communicate with the court.

14. On the issue of the charge sheet, Counsel conceded that there was a problem with the charge sheet because the trial magistrate referred to count 1 and count 2 yet the charge sheet only contained count 1 and an alternative charge. That there was no amendment or substitution of the charge sheet to reflect two counts. Counsel nonetheless contended that the appellant was guilty as charged; that he was explained to an understood all that was going on in the courtroom.

15. As this is a second appeal, the Court shall confine itself to matters of law as provided under Section 361 (1) (a) of the Criminal Procedure Code, unless it is shown that the findings of fact by the two courts below were based on no evidence, or if it is shown that the courts acted on wrong principles in making the findings.

16. The memorandum of appeal raised a number of grounds (1, 2 and 6) relating to the drawing and the framing of the charges to the effect that the charge sheet should have been amended or substituted to cure its defects, and that the omission of the two courts below to make such a finding infringed the appellant's right to fair trial. No submissions were made by the appellant on these grounds.

17. The main bone of contention regarding the charges is that, the charge sheet framed the second charge as an Alternative Charge yet when the appellant was arraigned to answer to the charges, they were referred to as Count 1 and Count 2.

18. This Court in *Benard Ombuna v Republic* [2019] eKLR had the following to say about consideration of defects in a charge sheet:

> " 13. Be that as it may, as this Court appreciated in JMA vs. R [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:-
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> > " Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

19. In the circumstances of the present case, the mislabelling of the second charge as an alternative charge is a defect that is curable by Section 382 of the Criminal Procedure Code. The object of a charge sheet is to give the accused notice of the matter he is charged with and to convey the necessary information that will enable him to make his defence or prepare his case before court (See *Amos Omondi Ojwang v Republic* [2020] eKLR).

20. The charge sheet clearly spelt out the nature and the particulars of the two charges. The learned judge rightly found that when the appellant was first arraigned the learned trial magistrate categorically recorded the charges as Count 1 and Count 2 and the appellant answered to the charges as such. The appellant was aware that the charges were being considered as Count 1 and Count 2 by the time he elected to change his plea three days later. It is difficult to see how the mislabelling of the charges would have prejudiced the appellant and affected his decision to change his plea to that of guilty.

21. The manner of recording of a guilty plea is set out under Section 207 of the Criminal Procedure Code and also well elucidated in the case of Adan v Republic [1973] EA 445 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 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 statement of the facts relevant to sentence together with the accused's reply should be recorded."

22. As stated in *Elijah Njihia Wakandia v Republic (supra)*, the underlying concern informing such a careful and sequential approach to recording a plea of guilty is that the plea of guilty has the automatic consequence of the conviction of the accused without testing the prosecution's case on the strength of the evidence and its merits, therefore a plea of guilty should only be accepted if "the same has been entered consciously, freely and in clear and unambiguous terms."

23. In *Alexander Likoye Malika v Republic* [2015] eKLR, this Court, differently constituted, also observed that:

> " 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."

24. In the present case the record captured the first steps of recording of the plea of guilty as follows:

    a. Court

    b. Charge read over and explained to the accused in a language he understands and he answers in swahili.

    c. Count 1:- It is true

    d. Count 2:- It is true

    e. Court: Plea of guilty is entered.

25. It is difficult to understand why the court would choose to maintain ambiguity about the language used to explain the charges and essential ingredients of the offence while at the same time stating that the accused answered in Swahili. Perhaps the only plausible explaination being the penchant of courts to rely on templates at the expense of specificity, a practice decried by this Court in *Elijah Njihia Wakandia v Republic (supra)*:

> " We think that it is good practice for the specific language used to state the elements of the charge be 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. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him."

26. The other confounding aspect of the plea taking process as recorded was the reference to two counts by the court after referring to the "charge" in singular being read over an explained to the accused. After the appellant responded to the two counts, the prosecution then read the facts and concluded by stating that the appellant "was arrested and charged for the offence" implying that the facts were with regard to a single charge. Ideally, good practice would have been to read the facts of each charge separately and then give the opportunity to the accused to respond to the facts relating to each charge separately before proceeding to conviction.

27. While Senior Counsel relied on the case of Kennedy Ndiwa Boit v Republic [2002] eKLR to argue that the failure of the trialcourt to inform the accused of the consequences of pleading guilty, it should be noted that in *Kennedy Ndiwa Boit (supra)*, this Court's concern was to ensure proper safeguards in recording guilty pleas where a person is charged with an offence punishable by death. The charges faced by the appellant herein are not comparable.

28. The upshot is therefore that the plea taking in this case was flawed, leading to the conclusion that the plea of guilty was not unequivocal. As a result, this appeal is allowed, conviction quashed and sentence set aside.

29. We are of a considered view that this is a fitting case for a retrial. The decision on whether or not to order a retrial largely depends on whether the trial of the accused was illegal or defective. Going by the record before us the proceedings before the trial court were not illegal but defective. It is in the interest of justice therefore that the appellant be subjected to a retrial to meet the ends of justice. See *Ouko v Republic* [2007] 2 EA 380, *James Ochomo Odionyi v Republic* [2016] e KLR and *M'Kanake v Republic* [1973] 1 EA 67.

30. Therefore, the appellant shall be presented before the lower court to record a fresh plea within 14 days from the date of this judgment, after the defect in the charge sheet has been corrected. The case should be heard by another Magistrate of competent jurisdiction other the magistrate who took the plea.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

…….

JUDGE OF APPEAL

H. OMONDI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR