IN THE COURT OF APPEAL

AT NAIROBI

(CORAM): OUKO (P), M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 111 OF 2019

BETWEEN

MUSA SHABAN KABUGHU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Garissa,

(Dulu,J) dated 23rd November 2017, in H.C.CR.A No. 38 of 2017)

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JUDGMENT OF THE COURT

Musa Shaban Kabughu, the appellant was charged with the offence of being a member of a terrorist group contrary to ***section 24*** of ***the Prevention of Terrorism Act of 2012***. The particulars of the offence were that on 12th August at Garissa Police Station within Garissa County, he was found to have been recruited to join the Al-Shabaab militia, an outlawed terrorist group, and openly confessed to have been recruited as a member of the terrorist group. He pleaded guilty to the charge before the Magistrates' Court, and was thereafter convicted and sentenced to 15 years' imprisonment.

Dissatisfied with the conviction and sentence, he appealed to the High Court on grounds that his plea was not unequivocal; that the conviction was in breach of his constitutional rights, safeguards and protections; and that meting out the sentence of 15 years of imprisonment to a first time offender for an offence that carried a maximum term of 30 years was excessive. The High Court dismissed the appeal against the conviction and sentence and upheld the 15 years term of imprisonment imposed by the trial court.

The appellant was aggrieved by the High Court's decision and now appeals to this Court against the conviction and sentence on grounds that his rights to a fair trial were violated as he was held in custody for a period in excess of the 24 hours stipulated by the Constitution; that the plea of guilty that he entered was induced by the unlawful period he was held in police custody, and that his fundamental rights to an impartial trial as guaranteed by ***Article 25 (c)*** of the ***Constitution*** were violated.

Mr. Chacha Mwita learned counsel appeared for the appellant who attended the proceedings via Skype from the Kamiti Maximum Security Prison owing to the Covid-19 Pandemic. Whilst highlighting the written submissions, counsel submitted that the appellant's right to a fair trial were violated as he was arrested on Wednesday 12th August 2015 but it was not until 14th August 2015 that he was arraigned in court which was more than the 24-hour period stipulated by ***Article 49 (1) (f) (i)*** and ***(ii)*** of the ***Constitution***. Counsel also submitted that in openly professing to have been a member of a terrorist group, the appellant was in fact making a confession; and that the manner in which it was taken was not in accordance with the provisions of the law.

Further, it was submitted, despite his right to legal representation, the trial court failed to inform him of his right to counsel, particularly while making his confession. It was also asserted that the court proceedings were not conducted in a language that the appellant understood, and that though the language of the court was specified as Somali/Kiswahili/English, the proceedings were conducted predominantly in the Somali language.

On the sentence, the appellant complained that the courts below did not take into account his mitigation that he was seeking the assistance of the police, and had they done so, they would instead have fined him and repatriated him back to Tanzania.

Opposing the appeal, ***Ms. Ngalyuka,*** learned counsel for the State submitted that with respect to the alleged violation of the appellant's right

to be brought to court within 24 hours, this Court has variously stated that the complaint does not in all case give rise to a right to an acquittal, but to a claim in damages; that nevertheless, the appellant was found in Garissa at 4.00 pm on 12th August 2015 and he was arraigned in court on 14th August 2015 which was within the 24 hour mandatory period. On the language of the Court, it was submitted that since the proceedings were carried on in Somali/Kiswahili/English and therefore translated into Kiswahili, a language the appellant understood, no prejudice was occasioned to him. Counsel concluded that the confession was properly taken by the police, as was the plea before the trial court, of which was uncontrovertibly unequivocal.

The facts of the case are brief. The appellant who was found at the Garissa Police Station informed the police that whilst on his way from Tanzania he had lost his money and that he required to be assisted. He was soon after arrested when it was suspected that he was on his way to Somalia. Whilst questioning him, it became apparent that the appellant had been recruited by the Al Shabaab terrorist group and was on his way to Somalia to undergo training, and he confessed as much in a statement taken by Chief Inspector Luckyton Mudavadi.

In his mitigation, he stated that he was a Tanzanian, and that it was true that he was headed to Somalia but had decided to return to Tanzania. As he did not have any money he sought assistance at the police station. He prayed for leniency and to be repatriated back to Tanzania.

We have considered the record of the trial court; the grounds of appeal and the rival submissions made by the appellant and the State. Essentially, the issues that arise for our consideration are, whether the appellant's right to a fair trial were violated because he was held in custody for a period in excess 24 hours, contrary to the stipulations of the Constitution; whether he was entitled to legal representation at the expense of the State; whether his plea of guilty was unequivocally entered on account of the unlawful period in police custody during which time a confession was extracted from him, and finally whether the sentence was harsh and excessive.

We commence with whether the delay in arraigning him in court violated his rights to a fair trial so as to entitle him to be acquitted from the charges he faced. Addressing this question, the learned judge stated thus;

> ***"A perusal of the charge sheet shows that the appellant was arrested on 12th August 2015 and arraigned in court on 14th August 2015. The Constitution of Kenya under Article 49 (1)***
>
> ***(f) requires that an arrested person be brought to court within 24 hours of arrest. The appellant was brought to court after 24 hours, but such violation did not vitiate the conviction. He can file a civil case for damages when the State will have the right to give their position."***

There seems to be no dispute that there was a delay in arraigning the appellant in court which as a consequence was contrary to the stipulations of the Constitution. The consequence of such violation was pronounced in the case of ***Julius Kamau Mbugua vs Republic (2010) eKLR,*** which decision has since been followed by this Court, thus;

> ***"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages."***

In other words, the violation of the appellant's right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appelant was at liberty to claim for the violation of his Constitutional rights. On this basis, we do not consider the delay in his arraignment in court to have been unreasonable or fatal to the prosecution's case. This ground is dismissed.

On the complaint that the High Court wrongly shifted the onus of requesting for legal representation to the appellant, rather than informing him of his right to legal representation, much as the Constitution specifies that an accused person is entitled to legal representation at State expense, particularly where substantial injustice would be likely to occur, the Supreme Court in ***Republic vs Karisa Chengo & 2 Others [2017] eKLR***, considered ***Article 50(2)(h)*** of the Constitution emphasised that it is not in every case that legal representation is mandatory; that save for where there was an inference that substantial injustice may occur, each case required to be assessed on its own facts. More importantly, the court concluded that;

> ***"[I]t is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:***
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> ***(i) the seriousness of the offence;***
>
> ***(ii) the severity of the sentence;***
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> ***(iii) the ability of the accused person to pay for his own legal representation;***

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused".

This Court in the case of ***Dickson Mboloi Mbithi [2014] eKLR*** observed in ***Moses Gitonga Kimani vs Republic*** and ***Hamisi Swaleh Kibuyu vs Republic***, that;

> ***"…****Article 261* ***of the*** *Constitution* ***as read with the*** *Fifth Schedule* ***thereof required Parliament to enact legislation within a period of 4 years from 28th August 2010 to give effect to*** *Article 50* ***of the Constitution. The appellant's trial was within that period provided by the Constitution for the establishment of a legal aid framework. Parliament has since enacted the*** *Legal Aid Act 2016* ***providing the framework for giving effect to*** *Article 50(2) (h)****. In these circumstances we are not persuaded that there is basis for nullifying the appellant's conviction on the arguments advanced in this ground of appeal".***

Given that the trial of the appellant took place in 2015, we would adopt the above sentiments that, by the time of the appellant's trial the concerned provisions of the Constitution having yet to be formulated into a law on legal aid, a sufficient basis for nullifying the appellant's conviction was not established. Additionally, as the learned judge rightly observed, nowhere in the proceedings did the appellant demonstrate any inclination towards requiring legal representation that would have prompted the trial court to consider whether such an order was merited. As such this complaint is unfounded and is also dismissed.

We turn to the complaint that the plea of guilty was equivocal for the reason that, firstly, his alleged confession was unlawful since it was taken whilst he was in custody, and secondly, because, the police promised to assist him if he pleaded guilty to the offence. Regarding the alleged confession, the learned judge had this to say;

> ***"The appellant's counsel has complained that a confession or admission of the appellant to the police was wrongly used by the magistrate to convict the appellant. I do not think so. The appellant had already admitted committing the offence, so he was recorded as being guilty on his own admission. The prosecutor was required to give a summary of the acts which he did. The appellant's statement to the police was merely given as part of the facts summarised by the prosecutor. The appellant did not object to the production of that statement. That statement merely confirmed the plea of guilty of the appellant".***

In our view, the alleged confession is no more than a red-herring. The appellant pleaded guilty in open court. There was no trial where the prosecution sought to adduce and rely on his confession as understood in ***section 25*** of the ***Evidence Act***. See also the case of ***Adan vs Republic (1973) EA 445*** which was adopted by this Court in ***Kariuki vs Republic (1984) KLR 809.***

The appellant was arraigned in court for a plea on 14th August 2015. The proceedings show that when the plea was taken, *"…the substance of the charge(s) and every element has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge (s) replies in Kiswahili. True"* . Whereupon, when the appellant when called upon to plead to the facts he replied: -

> ***"The facts are true and correct".***

The trial court convicted the appellant on his own admission of guilt. Clearly, the appellant' pleaded guilty to the offence. And after the charge was read out to him in court, he was at liberty to plead "guilty" or "not guilty". He chose to plead guilty to having committed the offence. As a consequence, in accordance with ***section 207 (2)*** of the ***Criminal Procedure Code*** the trial court recorded the appellant's plea and convicted and sentenced him. The basis of the appellant's conviction by the trial court was his own unequivocal plea of guilt. This complaint is therefore unfounded.

That said, with respect to the claim that he pleaded guilty because the police had promised to assist him, we find this to be far-fetched. This is because there is nothing that showed that the appellant did not understand the charges that he was facing, or that demonstrated that his plea of guilt was in any way qualified.

In the case of ***P. Foster (Hallege) vs Roberts (1978) 2 All ER 751*** it was held that;

> ***"… a court cannot accept an equivocal plea of guilty: It… must either obtain an unequivocal plea or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty qualification which, if true, show that he is not guilty of the offence charged."***

The record does not show that after he pleaded guilty, the appellant subsequently stated that the police promised to assist him if he pleaded guilty. Since there was no language barrier, or qualification of the plea or other factor that was evident when the plea was taken, we are satisfied that the plea was unequivocal, and consequently, this ground is also rejected.

Turning to the sentence, the appellant contended that the sentence was harsh and excessive, particularly as the appellant stated that when he was arrested he had changed his mind from his mission and was on his way back to Tanzania.

As to whether we can interfere with the sentence for the reason of severity, ***section 361 (1) (a)*** of the ***Criminal Procedure Code*** provides**,**

> ***"A party to an appeal from a subordinate court my subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section: -***
>
> ***a) On a matter of fact and severity of sentence, is a matter of fact or,***
>
> ***b) Against a sentence, except where a sentence has been enhanced by the High Court……."***

In the case of ***Paul Tanui vs Republic (2010) eKLR,*** this Court stated;

> ***"Second appeals to this court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361***
>
> ***(1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable."***

The trial court having exercised its discretion in imposing the sentence of 15 years on the appellant for the offence, which the High Court upheld, we have no jurisdiction to interfere with the lawful sentence of the courts below.

As a consequence, this appeal fails, and is hereby dismissed.

It is so ordered.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR