Wakianda v Republic (Criminal Appeal 437 of 2010)
[2016] KECA 181 (KLR) (17 November 2016) (Judgment)

Elijah Njihia Wakianda v Republic [2016] eKLR

Neutral citation: [2016] KECA 181 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 437 OF 2010

PN WAKI, RN NAMBUYE & PO KIAGE, JJA

NOVEMBER 17, 2016

BETWEEN

ELIJAH NJIHIA WAKIANDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 8th October, 2010). (H. C. Cr. A. No. 34 of 2009.)

Role of a trial court during plea taking

The appellant was sentenced to life imprisonment by the trial court upon conviction on his own plea of guilty for the offence of defilement of a girl aged 7 years. The court highlighted the role of a trial court during plea taking.

Reported by Kakai Toili

Criminal Procedure *– criminal proceedings - plea taking - what was the role of a trial court during plea taking.*

Brief facts

The appellant was sentenced to life imprisonment by the trial court upon conviction on his own plea of guilty for the offence of defilement of a girl aged 7 years. The record showed that after the substance of the charge and every element thereof were stated to the appellant, "in a language that he understands", he replied in Kiswahili, "it is true". The facts were then read to him by the prosecutor. Immediately after the reading of those facts the appellant was recorded as having stated 'facts are true' whereupon he was "convicted on his own plea of guilty". The appellant appealed to the High Court but his appeal was dismissed provoking the instant appeal. The appellant argued that the High Court erred in upholding a conviction that was based on language that the appellant did not understand and that it failed to note that the appellant's guilty plea was not unequivocal due to his mental status.

Issues

What was the role of a trial court during plea taking?

Held

1. Criminal proceedings had serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process was designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus, the heart of a criminal trial was the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence was given on oath and tested at trial through the process of cross-examination. The accused person essentially got the opportunity, if he chose to, to confront and challenge his accusers. He also got to make submissions and to persuade the court that he was not guilty of the matters alleged. He was also at liberty to testify on his behalf and call evidence on the matters alleged against him. He had no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.
2. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presented 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 came with its consequences of varying gravity. Thus, it was that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same had been entered consciously, freely and in clear and unambiguous terms.
3. The beginning point of ensuring that the accused person had entered into a free and conscious plea of guilty was being satisfied that he understood the proceedings and that he in particular understood the charge that was facing him. Indeed, the court taking the plea was required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understood.
4. The record of the trial court read "Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- "It is true." That was part of a template used by courts at plea taking. That was why it spoke of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it was more normal and logical to simply state the language used. That smacked of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered was one of not guilty followed by a trial with all its attendant safeguards, it assumed a critical dimension when the plea was one of guilty and led to conviction.
5. It was 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 understood, and recording his answer before either using the language he mentioned or ensuring a translator was present to convey the proceedings to him in the chosen language. The elements of the offence were not complete if the sentence, especially if it was a severe and mandatory sentence, was not brought to the attention of the accused person.
6. One ought to know the consequences of his virtual waiver of his trial rights that the Constitution guaranteed him. That did not occur in the instant case and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding was not to be a mere umpire aloofly observing the proceedings. He was the protector, guarantor and educator of the process ensuring that an unrepresented accused person was not lost at sea in the maze of the often-intimidating judicial process.
7. The appellant did not wish to admit without any qualification each and every essential ingredient of the charge. The fact that he had a history of psychiatric challenges only went to add to the possibility of equivocation. Where, as in the instant case, a plea of guilty was not unequivocal, the ensuing conviction and sentence could not be allowed to stand. The plea-taking was a nullity.

Appeal partly allowed.

Orders

i. *The conviction was quashed and the sentence set aside.*

ii. *The court directed that the appellant be presented before the Principal Magistrate's Court at Nyahururu within 14 days of the date thereof for the purpose of taking a fresh plea to the charge.*

Citations

Cases

Kenya

1. *Abdi, Bishar v Republic* Criminal Appeal 57 of 2008; [2010] KECA 388 (KLR) - (Explained)
2. *Kariuki v Republic* Criminal Appeal 177 of 1984; [1984] KECA 79 (KLR); [1984] KLR 809 - (Applied)
3. *Lusiti, Charles v Republic* Criminal Appeal 319 of 1971; [1977] KEHC 15 (KLR); [1976-80] 1 KLR 585 - (Applied)
4. *Okwatenge, David Nyongesa v Republic* Criminal Appeal 51 'A' of 2006; [2010] KEHC 2059 (KLR) - (Explained)

Regional Court

Adan v Republic [1973] EA 445 - (Applied)

Statutes

Kenya

1. Constitution of Kenya In general —(Cited)
2. Criminal Procedure Code (cap 75) section 162 — (Interpreted)
3. Sexual Offences Act (cap 63A) sections 8(1)(2); 39(1)(4) — (Interpreted)

Advocates

Miss Alwale for the appellant

Ms Kibera Prosecution Counsel for the respondent

JUDGMENT

1. On February 30, 2009 the appellant Elijah Njihia Wakianda was sentenced to life imprisonment by the Nyahururu Acting Principal Magistrate upon conviction on his own plea of guilty for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act, 2006*. In addition, he was declared a dangerous offender who will require long-term supervision upon release from prison (under section 39(1) of the said Act). A Probation Officer's report will be required under section 39(4).

2. The particulars of the offence that visited that fate on the appellant were that on July 5, 2009 at [particulars withheld] Village in Nyandarua District within Central Province, he caused his penis to penetrate into the vagina of MMW a girl aged 7 years.

3. The record shows that after the substance of the charge and every element thereof were stated to the appellant, "in a language that he understands", he replied in Kiswahili, "it is true". The facts were then read to him by the prosecutor;

> " On January 5, 2009 at about 4.00 PM, the accused who is a neighbour to the appellant who was 7 years old called her from their house to the rear where he was standing. He took her to his house. He forcefully removed her under pant and ordered her to lie down. He removed his trousers, his under pant – he defiled the child by putting his penis into her vagina. He hand gagged her. After defiling her, he ordered her to leave, telling her if she told anyone he would kill her. On January 6, 2009 the aunt noticed that she was not walking in the normal way. She questioned her. The child divulged the information to her.

> The aunt rushed to Mairo Inya Police Station. She was a given a treatment note to take her to hospital. She took her to Nyahururu District Hospital where she was treated, discharged.P3 form was filled. It is before this court P3 exhibit I. Accused was arrested and charged with offence."

4. Immediately after the reading of those facts the appellant is recorded as having stated 'facts are true' whereupon he was "convicted on his own plea of guilty". The prosecution had no previous records on him and in mitigation the appellant stated simply;

> " I stay alone in my house, the only person I found was that child."

5. The appellant appealed to the High Court but his appeal was dismissed by Emukule J on October 8, 2010 provoking the present appeal. The grounds of the appellant's grievance, as can be gleaned from his self-authored original Memorandum of Appeal and Supplementary Grounds of Appeal as well as the submissions made before us by Miss Alwale, his learned counsel, are that the learned Judge of the High Court erred by;

   a) Upholding a conviction that was based on language that the appellant did not understand.

   b) Failing to note that the appellant's guilty plea was not unequivocal due to his mental status.

6. Arguing the appeal, Miss Alwale first submitted that the appellant's right to an interpretor was violated. She pointed out that whereas the language used is indicated on record as Kiswahili/English, there was no indication of which language the appellant understood. She cited the case of *David Nyongesa Okwatenge v Republic* [2010] eKLR, a decision of the High Court Bungoma, where FN Muchemi, expressed herself thus;

> " It is clear that the record does not indicate the language used to read and explain the charge to the appellant. The indication of English/Kiswahili is ambiguous and does not show which of the two languages between Kiswahili and English the court used. There is no record of whether the court inquired from the appellant what language he understood. Such an enquiry would have assisted the court to determine the language of reading and explaining the charge."

7. Counsel also called in aid this court's decision of *Bishar Abdi v Republic* [2010] eKLR reiterating the critical importance of a trial court ensuring that the charge is explained to an accused person in a language he understands. She referred to *Adan v R* [1973] EA 445 on the proper steps for the recording of a plea of guilty and in particular the need for the exact words used by the accused person to be accurately recorded.

8. Counsel next submitted that the appellant's plea could not possibly have been unequivocal without enquiry being made into the appellant's mental status. She referred to the record, in particular to a report by one Dr Wanjau JW dated February 25, 2010, which, though indicating that the appellant was "currently of sound mind and fit to plead to the charges he is facing," nevertheless noted that he had previously been "admitted at Gilgil Psychiatric Unit for 3 weeks in July 2008, due to substance induced psychosis. He used to abuse alcohol and bhangi (sic)." That report was made following an order by the learned Judge for the appellant to be examined after his mental status was questioned through a report dated September 30, 2009, by one David Kemboi of Ol Kalou District Hospital, the authenticity of which the learned Judge doubted. That report stated that the appellant had been seen at the hospital with "Acute Psychosis R/O Organic Psychosis since October 2008. He was admitted at Gilgil Hospital with the same condition and thereafter followed up as a Psychiatric out-patient at

the Nyahururu Hospital and then Ol Kalau Hospital Psychiatric Clinic from October 2008 to the time he was arrested in January 2009." That report then purported to state gratuitously that "most psychiatric patients have automatic obedient, they agree with anything without refusing (sic) and again male psychiatric patients are sexually inactive due to anti psychotic drugs mostly used....."

9. Counsel then made the case that in the circumstances of this case, the trial court ought to have made an enquiry into the appellant's mental status in accordance with section 162 of the *Criminal Procedure Code* cap 175 Laws of Kenya. She concluded by stating that in the totality of the circumstances, the appellant ought to be set at liberty outright.

10. For the Republic, learned Prosecution Counsel Ms Kibera opposed the appeal. She asserted that on the date the plea was taken, the appellant understood the charge and responded in the Swahili language and he even addressed the court in mitigation using the same language. As to the appellant's mental capacity, counsel submitted that the court had no reason to believe that the appellant was not mentally sound and so there was no need for a psychiatric evaluation. She asserted that the mental issues were a mere afterthought first raised at the High Court which properly determined the same. She stated that the report by the aforesaid David Kemboi wad introduced at the High Court "through the back door" and was unreliable.

11. We have considered the record, the submissions made before us by counsel and the authorities cited. The appeal turns on the simple issue of whether or not the plea of guilty entered by the appellant when arraigned before the Principal Magistrate was plain and unequivocal and therefore an efficacious basis for the conviction and sentence that followed. Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt.

12. 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. The process of ensuring this was well-captured in the oft-cited case of *Adan v Republic* (*supra*) and has been followed in many cases after it. See: *Lusiti v Republic* [1976-80] 1 KLR 585;*Kariuki v Republic* [1984] KLR 809.

13. The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands. In the instant case, the record reads thus;

> " Court: The substance of the charge(s) and every element thereof has been stated by the court to the accused in a language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili:- "It is true."

14. With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction.

15. 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. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.

16. We are not satisfied that the appellant herein, to use the phraseology of *Lusiti v Republic* (*supra*) "wished to admit without any qualification each and every essential ingredient of the charge". The fact that he had a history of psychiatric challenges only goes to add to the possibility of equivocation but we shall not explore the issue further in view of what we shall shortly state.

17. Where, as here, a plea of guilty is not unequivocal, the ensuing conviction and sentence cannot be allowed to stand. We consider the plea-taking to have been a nullity. Accordingly we quash the conviction and set aside the sentence. We set the clock back so the process is restarted on proper footing. In consequence, we direct that the appellant shall be presented before the Principal Magistrate's Court at Nyahururu within fourteen days of the date hereof for the purpose of taking a fresh plea to the charge.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF NOVEMBER, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR