Ahmed v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 1157 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MANDERA

CRIMINAL APPEAL E008 OF 2024

JN ONYIEGO, J

FEBRUARY 27, 2025

BETWEEN

ASSAD IBRAHIM AHMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Mandera PM CRC No. E086 of 2024 delivered on 12.04.2024 by Hon. Wasike P.W. at PM.)

JUDGMENT

Background

1. The appellant was arraigned before Mandera PM's court on 26-03-2024 charged with two counts as follows;

2. Count I: Obtaining registration by false pretence contrary to section 320 of the *Penal Code*. Particulars were that, on 29.06.2017, he presented himself as a Kenyan to the Registrar of persons Lafey Sub County of Mandera County and procured a Kenyan identity card of No. 3XXXXXXX0 of Serial No.2XXXXXX9 bearing the names Asad Ibrahim Ahmed a fact he knew to be false.

3. Count II: Being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the *Kenyan Citizenship and Immigration Act* No. 12 of 2011. The particulars were that on 18.03.2024 at around 0650hrs at Mandera bus check point in Mandera East Sub County within Mandera County being a Somali national was found unlawfully present in Kenya without valid passport or permit/visa authorizing him to stay in Kenya.

4. When charges were read to him, he pleaded guilty to all the counts and accordingly convicted. Consequently, he was sentenced to two years' imprisonment for each count. Sentences were to run concurrently.

The Appeal

5. Dissatisfied with both the conviction and sentence, he filed an appeal dated 14.06.2024, citing the following grounds;

    i. The learned trial court erred in both law and fact by failing to appreciate that the appellant's plea was equivocal.

    ii. That the learned trial magistrate erred in both law and fact by convicting and sentencing the appellant based on equivocal plea.

    iii. That the learned trial magistrate erred in both law and fact by imposing a manifestly harsh and excessive sentence in the given circumstances.

6. In his written submissions dated 19.06.2024, the appellant urged that the available and applicable law in the case herein do not exclude foreigners and therefore, every person who is within or found to be within the boundaries of Kenya ought to benefit from the said provisions of the law.

7. He argued that his plea was not read as nearly as possible in the Somali language to enable him appreciate what he was pleading to. That he tried to explain to the court the circumstances surrounding the charges he was facing in Somali language to no avail as the court disregarded his explanation. In buttressing his point, he relied on the case of *Osike Emongonyang' & 2 Others v Republic* Criminal Appeal No. 69 of 1990, [1996] eKLR where the Court of Appeal stated that a court should not accept a plea of guilty without warning the accused person of the consequences of his actions.

8. That in this case, the trial court did not caution the appellant of the would be consequences of his decision to plead guilty to the charges herein. It was urged that noting the circumstances under which the plea was taken, clearly, the same could not be viewed as unequivocal. He thus urged the court to allow the appeal, quash the appellant's conviction and thereafter set him free.

9. The respondent in opposing the appeal submitted orally by stating that the appellant was regularly convicted on his own plea and therefore, the finding by the court cannot be faulted. That the plea was unequivocal as it was not demonstrated that the same was irregular. On sentence, the learned prosecutor urged that the same was within the discretion of the court and it was not shown that the discretion was used capriciously. This court was therefore urged to dismiss the appeal and uphold the finding of the trial court.

Analysis

10. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate a fresh the evidence adduced before the trial Court with a view to arriving at its own independent conclusion and finding (See *Okeno v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect. See *Ajode v Republic* [2004] KLR 81].

11. Having carefully appreciated the rival positions herein, it is my assessment that the main issue for determination is whether the appellant's plea of guilty was unequivocal as to yield a proper conviction and sentence.

12. The process of plea taking is one that must be guarded jealously with strict adherence to procedure lest an accused person loses his liberty summarily.

13. In Criminal Appeal No. 365 of 2011, *John Muendo Musau v Republic* [2013] eKLR, the Court of Appeal, in reference to the decision in *Adan v Republic* discussed the process of plea taking as follows;

> "(5). On this argument, we wish to state that we have outlined the procedure followed before the trial court at the time of taking the plea. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v Republic* [1973] EA 445 where the Court 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 facts relevant to sentence together with the accused's reply should be recorded."

14. This Court also appreciates, and as was observed by the Court of Appeal in *Ndede v Republic* [1991] KLR 567 that the bar to an appeal against a conviction is not absolute. There are circumstances that make a Court depart from the finding of the trial court's conviction based on plea of guilty. The learned Judges observed as follows;

> " This court held that the court is not be bound to accept the accused person's admission of truth of the charge of conviction as there may be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest. In the appeal before us, we reiterate our satisfaction that the plea of guilty was unequivocal".

15. I have carefully perused the record and the same shows that on 26.03.2024, the substance and every element of the charges were read out to the appellant in Somali a language he understood very well.

16. The facts were equally read in Somali and in response, the appellant in Somali replied as

> " those facts are true. I admit."

He then proceeded to mitigate in Somali wherein he sought for leniency.

17. It is on that basis that the trial court convicted the appellant on his own plea and proceeded to sentence him.

18. From the above observation, the appellant's plea was unequivocal as the process before the trial court was not only procedural but also lawful. The appellant was not coerced nor misled into pleading guilty.

In the circumstances therefore, the conviction was proper and no convincing reason has been given to make me interfere with the same. I therefore uphold the finding of the trial court in that respect.

19. On whether the sentence imposed by the court was not only harsh but also excessive, reference must be made to Section 348 of the *Criminal Procedure Code* which 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".

20. The foregoing provision must be read alongside Section 26(2) of the *Penal Code* which provides that save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term. [Also see the case of *John Muendo Musau v Republic* [2013] eKLR].

21. It therefore follows that an appellate court would interfere with the discretion of the court on sentencing only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. [See the case of *Ogalo Son of Owuora v Republic* [1954] 21 EACA 270]'

22. The provisions under which the appellant was charged are as follows: any person who willfully procures or attempts to procure for himself or any other person any registration, license or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year. In this case, the trial court sentenced the appellant to 2 years' imprisonment. Basically, this is an illegal sentence.

23. On the second count, the law provides that: any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both. In regards to this count, the appellant was sentenced to two years which is a lawful sentence.

24. In the same breadth, before handing down the sentence, the trial Court considered the pre-sentence report, the appellant's mitigation and the circumstances under which he committed the offence before pronouncing the sentence.

25. I have considered the sentences imposed by the trial court and noting that on Count I, the law provides that a person found guilty of a misdemeanour is liable to imprisonment for one year, the trial court erred by sentencing the appellant to 2 years. To that extent, the sentence of 2-years is set aside and substituted with 1 year imprisonment. In regards to Count II, the appellant was sentenced to 2 years which sentence I find to be lawful but given the persuasive mitigation and the appellant being a first offender who saved court's time by pleading guilty, I am inclined to substitute the 2-year sentence with 1-year sentence in prison.

26. In view of the above holding, the appeal against conviction is dismissed and that against sentence is upheld. The appellant shall serve one-year imprisonment for each count to be calculated from the date of Sentence. The same to run concurrently.

ROA 14 Days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

J. N. ONYIEGO

JUDGE