Abdullahi v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 3896 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL APPEAL E006 OF 2024

AK NDUNG'U, J

MARCH 26, 2025

BETWEEN

RASHID ABDULLAHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Maralal SPM Criminal Case No E383 of 2023– J.L Tamar, SPM)

JUDGMENT

1. The Appellant, Rashid Abdullahi, was charged with burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal Code*. He was convicted on his own plea of guilty and sentenced to ten (10) years imprisonment. The particulars were that on 24/12/2023 at around 2230hrs at Shabaha area of Kirisia Samburu central sub-county within Samburu County, entered the shop of Irene Lolkitekwi with intent to steal therein and did steal from therein assorted food stuffs valued at Kshs.12,730, the property of Irene Lolkitekwi.

2. He filed a petition of appeal where he raised the following grounds;

    i. The learned magistrate erred by failing to accord him the chance to defend himself even after indicating that he will give sworn evidence.

    ii. The learned magistrate misapprehended the law on admissibility and production of documentary evidence.

    iii. The learned magistrate erred by shifting the burden of proof to the Appellant.

    iv. The learned magistrate erred by not giving him a chance to read the charge sheet in a language that he understood.

v. That going by the records, he was arrested, sentenced almost immediately without being warned on the nature of the offence.

vi. That he prays that in event the appeal is rejected, that he be sent for a retrial in a different court.

3. He filed written submissions and submitted that he is seeking retrial since his case was done in a haste for he was charged on 28/12/2023 and was sentenced on the same day. The trial court erred passing the judgment based on his previous conviction and failed to consider the complainant victimised him due to the previous sentence. That he took plea under duress because of the torture that was subjected to him particularly threats and beatings. He urged the court to order retrial to enable justice to prevail. That the judicial officer's hands were untied by the supreme court decision on sentencing and can now exercise their discretional powers having considered the submissions.

4. The Respondent's counsel filed written submissions and argued that the Appellant entered a plea of guilty. Facts were read out to him in accordance with section 207 of the *Criminal Procedure Code*. Further, the trial court followed the procedure in convicting and sentencing him as required by law. And in accordance with section 348 of the *Criminal Procedure Code*, an appeal against conviction cannot be allowed. That he understood the charges he was facing hence he suffered no prejudice. Reliance was placed on the case of Abdallah Mohammed vs Republic (2018) eKLR where the court held that based on the seriousness of the offence, it behoved upon the court to warn the accused person of the consequences of a guilty plea. That the conviction and the sentence was proper and he urged the court to uphold the same.

5. I have considered the rival submissions by the parties herein. The Appellant is challenging the conviction and the sentence on account that he was not given a chance to read the charge sheet in a language that he understood, that the trial was conducted in a haste as he was arrested and sentenced immediately without being warned on the nature of the offence, the trial court sentenced him based on the previous record and that he took plea under duress because he was subjected to torture and that the trial court failed to apply its discretion while sentencing him.

6. The procedure for taking plea is provided under section 207 of the *Criminal Procedure Code* which states as follows;

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

...

7. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in Adan v Republic(1973) EA 445 at 446-

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the

essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

8. The following was recorded during plea taking;

" Magistrate: Hon. J.L Tamar (SPM)

Prosecutor: PC Ndira

Court Clerk: Leaduma

Accused: Present

Interpretation: Kiswahili

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he/she understand, who being asked whether he/she admits or denies the truth of the charge(s) replies:

Ni kweli

Court-Plea of Guilty Entered

Prosecutor: the facts are that....

Accused- The facts are true. I broke into and stole.

Court: Accused convicted on own plea of guilty.

Court prosecutor: The Accused has previous record in criminal case number 893/2016 where he was charged with indecent assault and convicted and sentenced to serve 10 years in count 2 of resisting arrest he was convicted to serve 1 year imprisonment.

Accused- It is true I was convicted and sentenced to serve 10 years which I completed in August 2023.

Mitigation

I am sorry. I went to the shop and took the items because mine had been broken into I took the items and sold them to get some money. I am sorry.

Sentence

I have considered the accused mitigation as well as the circumstances under which the offence was committed. It is on record, and the accused admits that he had been charged convicted and sentenced in Cr. Case No. 893/2016. The accused served the sentence and according to him he was released three months ago. He is therefore a repeat offender who has not learnt form the previous punishment. In the circumstances the accused is sentenced to serve (10) years imprisonment."

9. The record reveals that the charges were read to the accused person in a language that he understood and he responded by stating that 'Ni ukweli'. The language used is indicated as Kiswahili. The facts were read and he stated that the facts were true and that he broke into and stole. Further, in his mitigation, he gave the reasons why he broke into the shop and stole the items and he further stated that he sold the items to get some money. This shows that he clearly understood the charges that he was facing and cannot therefore say that he did not understand the charges. The trial court also followed the procedure of plea taking as provided under section 207 of the *Criminal Procedure Code*.

10. He claimed that the trial was conducted in a haste and was not even warned on the nature of the offence. I see nothing out of the ordinary in the speed at which the trial was conducted. In a guilty plea, the proceedings are summary ones and the trial magistrate cannot be faulted for doing what he was mandated to do by law.

11. As to sentence, the Appellant was sentenced to 10 years imprisonment as provided under section 304(2). It is also noteworthy the trial court did not sentence him on the second limb of the offence of stealing. The trial court considered that he was a repeat offender and that he had been released three months before he was arrested for the current offence. The trial court thus noted that he had not learnt from the previous punishment. Furthermore, when he was given a chance to mitigate, he only said that he was sorry and stated that he stole because his items had been stolen too and that he sold the stolen items to get some money. He was therefore not remorseful at all.

12. Sentencing is at the discretion of the trial court. The It is therefore my considered view that the sentence was proper in the circumstances of the case.

13. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

14. I find no grounds upon which to interfere with the sentence herein.

15. With the result, that the appeal herein has no merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MARCH 2025

A.K. NDUNG'U

JUDGE