Hussein v Republic (Criminal Appeal E027 of 2023)
[2025] KEHC 9501 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E027 OF 2023

JN ONYIEGO, J

JUNE 30, 2025

BETWEEN

MOHAMED NOOR HUSSEIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence arising from the SPM's Court at Wajir in Criminal Case Number E301 of 2022 delivered on 19.05.2023 by Hon. M. Kimani (P.M))

JUDGMENT

1. The appellant herein was charged with attempted arson contrary to section 333(b) of the *Penal Code*. It was alleged that on 01.11.2022 at around 0530hrs at Township Location in Mandera County he willfully and unlawfully attempted to set fire to a building namely, a dwelling house, the property of Nimo Abdullahi Mohamed.

2. The appellant denied the charge but changed his plea to that of guilty after the prosecution had called three witnesses. He was consequently convicted on his own plea of guilty. On mitigation, the appellant reiterated that he committed the offence but sought to be released. The court consequently sentenced him to serve a term of 14 years imprisonment to be calculated from 03.11.2023 when he took plea.

3. Being aggrieved by the conviction and sentence, he filed this appeal on the following grounds:

    i. The trial court convicted and sentenced him and yet the prosecution did not prove its case beyond any reasonable doubt.

    ii. The trial court convicted and sentenced him and yet the prosecution's case was riddled with contradictions and inconsistencies.

    iii. The trial court convicted and sentenced him without considering his defence.

4. During the hearing, parties agreed to canvass the appeal through written submissions. However, the appellant changed and made one sentence oral submission thus stating that he did not burn the shop and that he was innocent.

5. The respondent on the other hand filed written submissions dated 15.11.2023 and urged that the evidence on record was clear that the appellant's plea was unequivocal. That in order for the appellant to impeach an unequivocal plea under section 348 of *Criminal Procedure Code*, he has to demonstrate that the sentence is illegal or that the procedure followed to enter a plea of guilty was faulty. Reliance was placed on the case of Ndede v Republic [1991] KLR 567 where the court held that:

> " It is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused, or accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest".

6. That in the case herein, it was not demonstrated by any ground to warrant this Court interfere with the unequivocal plea and thus the same ought to be allowed to stand. Further, the respondent urged that the sentence meted out on the appellant was not only legal but also appropriate bearing in mind the circumstances of the case and therefore, the same also ought to be upheld.

7. The respondent thus relied on the case of Nelson v Republic [1970] E.A. 59 where the court held that:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentences on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Rex [1950], 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."

8. This court was therefore urged to dismiss the appeal herein for want of merit.

9. Having considered the grounds of appeal, the submissions filed by each party and the record of the trial court, I find that the only issue for my determination is whether the appeal is merited.

    i. Whether the plea was equivocal.

    ii. Whether the sentence imposed on the appellant was harsh.

10. It is trite that where an accused person has been convicted on his own plea of guilt, an appeal can only lie against the sentence imposed by the trial court but not against conviction unless demonstrated that the plea was not unequivocal. This position is postulated in Section 348 of the *Criminal Procedure Code* (CPC) 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."

11. In interpreting Section 348 of the *Criminal Procedure Code* (CPC), the court in the case of Olel v Republic [1989] KLR 444 expressed itself thus;

> " where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but bars it completely"

12. In this case, the appellant has faulted his conviction not on the ground that it was based on a plea which was equivocal, but rather that there was no sufficient evidence to justify his conviction. It would appear like the appellant does not understand the objective of his appeal. Having pleaded guilty, the question of inconsistent evidence and lack of sufficient evidence does not arise. The grounds raised are not in tandem with an appeal challenging entry of a plea of guilty. For those reasons, the grounds of appeal stated are not relevant to the circumstances at hand. He should have challenged the legality of the entry of a plea of guilty.

13. The above notwithstanding, section 207 (1) and (2) of the *Criminal Procedure Code* enumerates the steps that a trial court ought to take when recording a plea from an accused person.

14. The Court of Appeal in the case of Joseph Wambua Mbuvi v Republic [2019] eKLR which when citing with approval the case of Adan v Republic [1973] 445 stated as follows;

> " 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, of course, be recorded."

15. In this case, I have read the record of the trial court. It is clear from the proceedings that the charge and every element thereof was read and explained to the appellant in a language he understood which was Somali. The record shows that in response to the charges, the appellant stated "It is true I burnt the building" and after the facts were read out to him, he admitted them as 'facts correct'. A perusal of the facts admitted by the appellant show that they disclosed all the elements of the offence with which he was charged.

16. In my considered view, the learned trial magistrate complied with the guidelines for taking and recording of a plea of guilty as set out in Section 207 of the *Criminal Procedure Code* (CPC) and that the appellant understood the charges facing him before he was called upon to plead

17. Having stated that the appellant's grounds of appeal don't dispute his plea or that he did not understand the charges read out to him, the same is based on the merit of the case. Infact, in his oral submissions he denied committing the offence altogether.

18. Having perused the record and the manner in which the plea was taken, I have no doubt that the plea was taken in accordance with the guidelines set out in Adan v Republic (supra). The appellant took plea in a language that he understood well and therefore him being found guilty cannot be faulted.

19. On sentencing, it is trite that sentencing is a discretion of the trial court and being so it must be done judiciously. Guidance on the subject can be derived from the Court of Appeal decision in the case of Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No.253 of 2003 where it was held that:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered. (Also see also Sayeka v R (1989 KLR 306].

20. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account irrelevant factors, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that it might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

21. The appellant was charged with the offence of attempted arson contrary to section 333(b) of the *Penal Code*. The same states that:

    Any person who—

    (a) ...

    (b) willfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it, is guilty of a felony and is liable to imprisonment for fourteen years.

22. However, it is my considered view that the sentence is somehow excessive considering the fact that the appellant had pleaded guilty thus saving the court its precious time. In my considered view, a sentence of Seven years would be sufficient punishment.

23. Accordingly, the conviction herein is upheld and the sentence of 14 years substituted with that of seven years to run from the date of arraignment in court which is 03-11-2022.

Dated, signed and delivered virtually this 30th day of June 2025.

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J. N. ONYIEGO

JUDGE