Jivuye v Republic (Criminal Appeal E014 of 2022)
[2024] KEHC 2029 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E014 OF 2022

JN KAMAU, J

FEBRUARY 28, 2024

BETWEEN

HARIZON JIVUYE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in Principal Magistrate's Court in Criminal Case No. E186 of 2022 on 14th April 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of burglary contrary to Section 304(2) of the *Penal Code*. He was also charged with an alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*.

2. He was convicted on his own plea of guilty on the alternative charge by Hon S. Manyura (RM) and was sentenced to three (3) years imprisonment.

3. Being dissatisfied with the said Judgement, on 18th October 2022, he lodged the Appeal herein. His Petition of Appeal was of even date. He set out eight (8) grounds of appeal.

4. His Written Submissions were dated 30th November 2023 and filed on 1st December 2023 while those of the Respondent were dated 28th June 2023 and filed on 31st July 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the plea was unequivocal;

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Plea Taking

9. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal were dealt with under this head.

10. The Appellant submitted that the plea and proceedings were not conducted in compliance with the legal procedure hence the same was not unequivocal. He invoked Section 207(2) of the *Criminal Procedure Code* and argued that though the alternative charge was read to him in Kiswahili, the facts of the case were not read and explained to him.

11. He placed reliance on the case of *Adan v R* (1973) EA 445 where it was held that for a plea to be taken to be unequivocal, an accused person did not only need to understand the language that was used at his trial but he or she also had to appreciate all the essential ingredients of the offence he or she was charged with.

12. He also relied on the case of *Abdallah Muhammed v Republic* [2018] eKLR where it was held that a plea of guilty could only be entered in respect of an offence that was known to law and that in a case where an accused person who was undefended pleaded guilty to a charge, the court had a duty to ensure that plea is unequivocal.

13. In this regard, he argued that he had no legal representative at the time of taking plea and it was therefore prudent for the Trial Court to have afforded him a fair trial by reading and explaining the facts of the alternative charge to him in a language that he understood.

14. On its part, the Respondent submitted that the proceedings were conducted in Kiswahili language and the Appellant was able to respond to all the questions put to him. It was emphatic that the facts of the case were read to him and that he confirmed that they were correct. It pointed out that the Appellant also mitigated. It was its contention that the proceedings were regular and hence, the plea was unequivocal.

15. Section 348 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides that no appeal shall lie against a plea of guilty in respect of the extent and legality of the sentence that was meted against an accused person. It stipulates 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."

16. In the case of *Olel v Republic* (1989) KLR 444, the court therein interpreted the above provision as follows:-

> "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."

17. The plea taking process was laid out in the case of *Adan v Republic* (*Supra*) thus:

> "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 guilt, 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."

18. The plea in this case was taken in a language that the Appellant herein understood, Kiswahili. When the charge was read to him and he was asked whether he admitted or denied the truth of the charge he replied "It is true" The Prosecution then read the facts of the case to him and he replied, "The facts are not correct".

19. The Trial Court ordered that the charges be read again to him. For the main count, he responded, "1st Accused entered alone." In respect of the alternative count, he stated that "It is true. I know items were stolen". The Trial Court then entered a plea of guilty against him on the alternative charge. He also confirmed that the facts on the alternative charge were correct.

20. Notably, the record of the Trial Court showed that the proceedings relating to the plea taking were regular and lawful. The charges were read to him in Kiswahili and he responded to the same. He thereafter mitigated before he was sentenced. His plea of guilty was therefore unequivocal. His argument that he was not given a chance to dispute the facts of the case therefore fell by the wayside. An appeal could therefore not lie against his conviction. He could only appeal against the extent and legality of the sentence that was meted upon him.

21. In the event he would have wanted to challenge any aspect of the Prosecution's case, he had an opportunity to do so at the time the plea was being taken, a conclusion that was also arrived at in the case of *Henry Kerage Nyachoti v Republic* [2020] eKLR.

22. In the premises, Grounds of Appeal Nos (1), (2), (4) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

23. The Appellant submitted that the Trial Court relied on a Pre-sentence Report that read the name of his co-accused and not his name. He added that he was not given an option of paying a fine instead of serving the sentence.

24. On its part, the Respondent submitted that sentence was lawful and should not be interfered with. It added that as per the Pre-sentence Report, the Appellant was a member of a dreaded gang that used to break into shops and houses and that he should not be allowed to benefit from a typographical error on the report.

25. Notably, an appellate court will not disturb the trial court's discretion on sentence unless it is manifestly excessive or the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle.

26. Even if the appellate court was of the view that the sentence was heavy and that it might itself have passed a lighter sentence, that was not in itself a sufficient ground for it to interfere with the discretion of the trial court, a position that was set out in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR.

27. The Appellant's co-Accused was charged with the offence of burglary contrary to Section 304(2) of the *Penal Code* Cap 63 (Laws of Kenya). The same states that:-

    1. Any person who—

        a. breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

        b. having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

    2. If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

28. On his part, the Appellant herein was charged under Section 322(1) as read with Section 322(2) of the *Penal Code*. The same provides that:-

> " A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years."

29. Bearing in mind the penalty in Section 322 (2) of the *Penal Code*, the sentence of three (3) years that the Trial Court meted on him was therefore lawful and had the basis of the law. Indeed, the Trial Court had the option of sentencing him up to a maximum of fourteen (14) years with hard labour.

30. The above notwithstanding, this court did not find it prudent to determine whether or not the sentence that was meted on him was harsh or not. It took cognisance of the fact that on 28th June 2022, P. J. Otieno J had rendered his Ruling on the Appellant's application for revision in *Jivuye v Republic* (Criminal Revision E010 OF 2022) KEHC 12021 (KLR) (28 June 2022) where he advised the Appellant to appeal on the issue of his grievance to plea of guilty. He observed that the sentence that was meted upon him was modest and within the law.

31. The Learned Judge stated as follows:-

> " ...that a grievance is a challenge to the entry of plea of guilty. That I consider to be a matter for appeal in appropriate instances and not apt for revision. I discern the record to show that plea taking as a process was regularly undertaken, the entry of the plea was both regular and legal and the sentence was itself modest and within the law (emphasis court)."

32. The learned judge's pronouncement on the legality, extent and adequacy of the sentence that was meted upon the Appellant herein therefore barred this court from commenting on the same. The Appellant's submissions that the Trial Court adopted a Pre-Sentence bearing another person's name was therefore rendered moot.

33. Notably, this court was of equal and competent jurisdiction to that of the learned judge and therefore could not sit on appeal and/or review of his decision. If the Appellant was aggrieved by his decision, the only option that he had was to appeal the said decision at the Court of Appeal.

Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated and filed on 18th October 2022 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as it was safe to do so.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE