



REPUBLIC OF KENYA



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**Waswa v Republic (Criminal Appeal E084 of 2022)
[2024] KEHC 3259 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E084 OF 2022
AC MRIMA, J
MARCH 18, 2024**

BETWEEN

DUNCAN NYONGESA WASWA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence by Hon. T. Omono (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. E649 of 2021 delivered on 24th November 2022)

JUDGMENT

Background:

1. Duncan Nyongesa Waswa, the Appellant herein, was with two counts. The first Count was the offence of Causing grievous harm contrary to section 234 of the Penal Code. In the second count, he faced the charge of Assault causing actual bodily harm.
2. The particulars of the first count were that, on the 6th day of February 2022 at Mutua Market, Keiyo Location, Kwanza Subcounty within trans-Nzoia County did grievous harm to Michael Krop.
3. In the second count, the particulars were that on the 6th day of February 2022 within Trans-Nzoia County unlawfully assaulted David Ekiru thereby occasioning him actual bodily harm.
4. The Appellant initially pleaded not guilty. However, later in the proceedings, he requested to change plea. He admitted to the charges. The plea of guilty was entered and was accordingly convicted. He was sentenced to 7 years for each count, to run concurrently.



The Appeal:

5. Through an undated Petition of Appeal, the Appellant urged this Court to reconsider his sentence based on grounds as hereunder;
 1. That I pleaded not guilty [sic] of the charges
 2. During hearing since I was in remand and life was not easy decided to plead guilty, I had no body to bail me out. I Come from a poor family.
 3. That I never did the incident intentionally but I was out of mind, can't even remember how it happened.
 4. I am requesting for lenient sentence
 5. That plead the court considers the period of 10 months I was in remand.
 6. That I am a psychiatric under medication.
6. The Appellant did not file written submissions.

The Respondent's case:

7. The State challenged the Appeal through written submissions dated 20th June 2023.
8. It simply was its case since the Appellant pleaded guilty, under Section 348 of the Criminal Procedure Code, his appeal could be considered only with respect to the extent or legality of the sentence.
9. It was its case that none of the grounds of appeal touch in sentencing and as such the appeal is not proper before this Court. It prayed that the Appellant's appeal be dismissed and his conviction and sentence affirmed.

Analysis:

10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. 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 as so held in Ajode v. Republic [2004] KLR 81.
11. As can be discerned from the background of this judgement, the Appellant was convicted upon pleading guilty to the charges. However, his first ground of appeal is of contrary position. It is his case that he did not plead guilty. The inconsistency, therefore, invites this Court to interrogate Appellant's plea taking process generally.
12. Before delving into that, this Court will look at the legal requirements generally and what Courts have said about the subject and subsequently compare it to the process the Appellant was subjected to.
13. The first port of call is *the Constitution*. It regulates the means by which a charge is presented to an accused. Article 50(2) provides as follows: -
 - 50(2) Every accused person has a right to a fair trial which includes the right;
 - (b) To be informed of the charge with sufficient detail to answer to it.



14. The Criminal Procedure Code, Cap. 75 of the Laws of Kenya, ranks second in the pecking order. It provides for the process of recording pleas in Section 207(1) in the following manner;
- The substance of the charge shall be stated to the accused person by the Court, and shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement.
15. From the foregoing provisions, the process of plea taking must be guarded jealously with strict adherence to both constitutional and statutory edicts lest an accused loses his/her liberty without their full conscientious participation.
16. The Court now turns to what Courts have generally said on this matter. In Criminal Appeal 365 of 2011, John Muendo Musau -vs- Republic [2013] eKLR, the Court of Appeal, in reference to Adan -vs- 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 vs 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."
17. This Court appreciates, as was observed by the Court of Appeal in Ndede vs Republic [1991] KLR 567 that the bar to an appeal against a conviction is not absolute. There are circumstances where a Court departs from the finding of the trial Court's conviction based on guilty plea. The Learned Judges observed as follows: -
- ...This court held that the court is not be bound to accept the accused persons 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.
18. The foregoing sets the stage to consider the process that culminated in the Appellant's own plea of guilt.
19. When the Appellant was arraigned in Court on 21st February 2022 for plea taking, he denied both charges. For avoidance of doubt, he stated as follows: -
- "Si kweli"
20. A plea of not guilty was entered.



21. On 16th August 2022 when the Respondent herein wanted to present its case, the Appellant informed the Court that he wanted to plead afresh. For avoidance of doubt he stated as follows;

"Kesi ianze upya"

22. The Appellant was accordingly warned of the consequences under Section 200 of the Criminal Procedure Code.

23. He then made the following remarks;

"...was acting out of self-defence when the offence occurred."

24. The Court then set the matter down for de novo hearing on 13th September 2022. The Accused was absent on the said date. A production order was issued and mention slated for 27th September 2022.

25. On 27th September 2022 the Prosecution informed Court that the witnesses were not in Court. The State urged the Court to grant another hearing date. The Appellant, frustrated, stated that the case was taking too long. He prayed that the suit be withdrawn. The Court, nonetheless, scheduled hearing for 11th October 2022.

26. On the subsequent hearing date, the Prosecution asserted that it was unable to bond its witnesses. Yet again, the Appellant claimed that the case was taking long. He sought Court's intervention.

27. The Respondent's case eventually took off on 15th November 2022. The Complainant, Michael Krop testified as PW1. After examination-in-chief, the Appellant cross-examined him. Immediately after re-examination, the Appellant out of the blues stated that he wanted to plead guilty.

28. The Court warned him that he may be sentenced to life to which the Appellant responded that he knew and was ready.

29. Subsequently, the charge and substance thereof were read out to the Appellant in Kiswahili. He answered;

"Ni kweli"

30. A plea of guilty was entered. The Appellant also admitted to the facts of the case and he was convicted on his own guilty plea. The Court subsequently considered the Pre-Sentence Report and the Appellant's mitigation and upon making the finding that he was not remorseful and that he was a menace in the society, sentenced him to 7 years imprisonment on both counts. It ordered the sentences to run concurrently from 21st February 2022.

31. On a careful consideration, it is this Court's finding the Appellant's convictions based on his own admission of the charges was unequivocal. It was within *the Constitution* and the law.

32. Having found as much, the focus now turns to the propriety of the sentence.

33. Section 348 of the Criminal Procedure Code 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.



34. The trial Court, upon considering the Pre-Sentence report and the Appellant's mitigations observed that he was a menace in the society. It then sentenced him to 7 years imprisonment on both counts to run concurrently.
35. On a review of this matter, it is the Probation Officer's report that the Appellant had generally been a menace to the community. His father had reported him on many occasions to the Administration. His own family did not want him back home yet. The Complainants were still bitter and apprehensive that if allowed back to the society, the Appellant may recede to his violent character.
36. The Appellant was liable to life sentence in the first count of Committing Grievous Harm. He was also liable to a sentence of 5 years imprisonment on the second count of Assault Causing Actual Bodily.
37. In an appeal against sentence, the Court of Appeal in *Ogolla s/o Owuor vs R* (1954) EACA 270 stated as follows: -

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky* (1912) CCA 28TLR 263).
38. This Court finds that the sentencing Court was right with respect to Count I. However, for Count II, the trial Court appears to have meted out a sentence which was grave than what is prescribed by the law. The period of imprisonment for Assault causing actual body harm is 5 years.
39. Respectfully, the Learned Magistrate erred in yielding a sentence beyond what was contemplated by the law.
40. In *Wanjema v. R* [1971] E.A. 493, 494, the Court held that the appellate Court is entitled to interfere with the sentencing discretion of the trial Court in view of plain error. The sentence of 7 years imprisonment on the count of assault causing actually bodily harm is hereby set-aside.
41. By considering the fact the Appellant pleaded guilty to the charge, this Court finds that a sentence of 2 years' imprisonment will suffice.

Disposition:

42. Drawing from the foregoing, the appeal partly succeeds in respect to Count II and the following final orders hereby issue: -
 - a. The appeals against the conviction and sentence in respect of the offence of causing grievous harm are hereby dismissed.
 - b. The appeal against the conviction in respect of the offence of assault causing actual bodily harm is hereby dismissed. The appeal against the sentence is hereby allowed. The sentence of 7 years' imprisonment is hereby substituted with that of 2 years' imprisonment.
 - c. Both sentences to run concurrently from 21st February 2022 when the Appellant was charged.It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 18TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE



Judgment delivered in open Court and in the presence of: -

Duncan Nyongesa Waswa, the Appellant in person.

Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

