Gitahi v Republic (Criminal Appeal E048 of 2023)
[2024] KEHC 3114 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E048 OF 2023

DKN MAGARE, J

MARCH 15, 2024

BETWEEN

STEPHEN WACHIRA GITAHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate Court Nyeri delivered on the 3rd April, 2023 in Criminal Case No. E432 of 2023)

JUDGMENT

1. This is an appeal of the decision of Hon. M. Okuche SPM given on 3rd April, 2023 in Nyeri MCR No.E432 of 2023. Parties filed submissions. The petitioner filed an amended petition seeking the decree to be set aside. They challenge the failure by the magistrate to adhere to guidelines hence causing irregular proceedings.

2. They rely on the decision of the cases of *Paul Matungu v Republic* [2006] eKLR and *Boit v Republic* [2002] KLR 815 where it was held that a court that accepts a plea of guilty must warn the accused person of the consequences of a plea of guilty and that the accused must be made to understand what he is pleading guilty to.

3. It was their case that there needs to be care before liberty is taken away. Reliance was placed on the case of *Gitau Kinene V Republic* [2016] eKLR, *Mose V R* [2002] 1 EA, 163 and *George Wambugu Thumbi V Republic* Criminal Appeal 1 Of 2018[2019] eKLR.

4. The prosecution opposed the Appeal.

Analysis

5. The element of the charge is indicted as being read and the Appellant "It is true" in Kiswahili. I have perused every Kamusi for the words it is true. I have come to the inevitable conclusion that they are English words. The court proceeded to sentence him of each of the counts.

   a. In count 1, the court fined the Appellant Kshs.200,000.00, in default 1 year imprisonment.

   b. Count 2 - 3 years imprisonment, and

   c. Count 3 – fine of Kshs.200,000/-, in default 1 year imprisonment.

6. The plea was said to be a plea of guilty. There is no right of Appeal from the plea of guilty unless in this narrow sense that the plea was not unequivocal.

7. There is no indication whether the Appellant was explained to the nature of the charges and severity of sentences.

8. There has been a dearth of authority on what constitutes a plea of guilty. Section 207 (1) and (2) of the CPC, provides as follows:-

   Section 207 of the *Criminal Procedure Code* (cap 75) says as to guilty pleas:

   > "(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
   >
   > (2) If the accused person admits the truth of the charge 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 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."

9. The plea of guilty must be unequivocal. Any equivocation changes the plea to the offence. It is irrelevant on the words used thereafter on facts. The principles enunciated in the case of *ADAN V R*, [1973] EA 446 govern plea taking: -

   > "(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; and
   >
   > (v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

10. The error is not curable. In this case the language is translated as Kiswahili. The words "It is true" are not Kiswahili words. The plea has not been recorded as nearby as possible in the words used by him. This was not adhered to and as such the court fell into error.

11. The second aspect of the case, is that the charge carried stiff penalties. The care should take every step to ensure that the plea is voluntary and has been thought through.

12. Secondly, the words it is true, creates a situation of lexical ambiguity. It can be true in terms of the substances of the charge. It is also true that he had been charged with. The court record reflects that meat was destroyed. However, there is a record of destruction. The court and the prosecutor will have to deal with the sufficiency of remaining evidence.

13. In this matter the accused was unrepresented. The court did not take any precaution to ensure that the plea is unequivocal. See *Simon Gitau vs Republic* 2016 eKLR.

14. Fair trial cannot be derogated from under Article 25 of the *Constitution* which provides as follows: -

> " Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial; and
>
> (d) the right to an order of habeas corpus.

15. The matter shall therefore be remitted for retrial as I see no prejudice. There is nothing in the submissions, requiring acquittal. No basis was laid.

16. The power of the High Court relating this matter is set out in section 354 of the *CPC* as follows.

17. In *Mose vs Republic* (2002) 1 EA 163 the Court of Appeal stated as doth regarding the words it is true: -

18. It is not indicated on the record what the Appellant was agreeing on. The foregoing raises legitimate doubts on the equivocality of the plea.

19. It is not in the interest of justice to discharge the Appellant having not been taken through a trial. Consequently, a dismissal will not suffice. In the case of *Pius Olima & another v Republic* [1993] eKLR, the Court of Appeal stated as doth: -

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar v Republic, (1964) EA 481; Manji v The Republic, (1966) EA 343; Mujimba v Uganda, (1969); and Merali and Others v Republic, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

20. Consequently, I find that this conviction was improper. It is therefore set aside together with the sentence.

21. The net result is that having found the plea of guilty was not, the conviction falls aside. It follows that sentence cannot in the face of setting aside of conviction.

Order

22. In the circumstances I make the following orders: -

    a. The Appeal is allowed, the conviction and sentence are set aside.

    b. for retrial by a magistrate with jurisdiction other than Hon. Okuche, to take plea and deal with bond issues.

    c. The Appellant shall be remanded at Nyeri Maximum security prison till 19/3/2024 when he shall be arraigned in the lower court.

    d. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF MARCH, 2024. JUDGMENT DELIVERED PHYSICALLY AND THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

The Appellant in person

M/s Musakari for the Respondent

Court Assistant – Millicent Thaithi