



**Gikunda v Republic (Criminal Appeal E066 of 2022)
[2024] KEHC 6559 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E066 OF 2022**

LW GITARI, J

MAY 30, 2024

BETWEEN

DUNCAN MUTETHIA GIKUNDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. When the appellant herein was arraigned before the trial court on 3.1.2022 he was charged with two counts, namely; Arson contrary to Section 332(a) of the Penal Code in that on 31/12/2021 at Kirimaitune Location in Imenti North Sub-County within Meru County, wilfully and unlawfull set fire to a building namely a dwelling house valued at Kshs.199,8750/- belonging to John Mwangi.

Count II

Refusing to be taken finger prints contrary to Section 55 (5) of the [National Police Service Act](#) No.11 of 2011. He pleaded not guilty and a plea of not guilty was entered.

2. He however changed plea on 27/4/2022 and a plea of guilty was entered. The facts were read by the prosecution and the appellant herein confirmed the facts as true. He was subsequently convicted on his own plea of guilty. Upon mitigation, the court after considering the same, proceeded to sentence the appellant to serve life imprisonment.
3. The appellant herein proceeded and appealed against the conviction and sentence vide the petition of appeal dated 27.04.2022 which was filed on 28.04.2022 by the appellant. The grounds of Appeal are:
 - i. That the learned trial magistrate erred in matters of Law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 - ii. That the -----learned trial magistrate erred in law and facts by failing to note that the charges were a frame up because of grudge.



- iii. That the learned trial magistrate erred in law and facts to order the sentences to run concurrently instead of consecutive.
- iv. That the learned trial magistrate erred in law and facts by failing to note that the appellant have disability since he has only one leg, that makes life hard for him within prison.
- v. That the learned trial magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witness were uncollaborating and inconsistency(sic).
- vi. That the learned trial magistrate erred in both law and facts by failing to note that the testimony of the complainant contradicts the evidence of the expert(doctor).
- vii. That the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.
- viii. That since I cannot recall all what transpired during trial, I wish to be availed with the trial proceedings and judgement to draft more cogent grounds.

He prays that the appeal be allowed, the sentence be set aside and he be set at liberty.

- 1. Directions were taken that the appeal be canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

A. Submissions by the parties

- 2. The appellant substituted his former grounds to the instant grounds namely:
 - i. That the learned trial magistrate erred in both of law and fact by failing to note that the sentence is harsh and excessive.
 - ii. That the learned trial magistrate erred in both matters of law and fact by failing to note that the appellant was mentally challenged at the time he committed the offence.
 - iii. That I beg this honourable court to consider my mitigation factors and review the sentence.
- 3. The Appellant submitted that he filed an appeal against conviction and sentence. That he was convicted on his own plea of guilty for the offence of arson contrary to section 332 of the penal code and he was sentenced to life imprisonment.
- 4. The Appellant submitted that the offence of arson is a serious offence carrying a sentence of life imprisonment.
- 5. The Appellant submitted that the learned trial magistrate erred in both matters of law and fact by failing to note that the appellant was mentally challenged at the time he committed the offence. The Appellant further submitted that the trial magistrate failed to note that there was evidence adduced by the relatives of the appellant to show that he was mentally challenged and the same was recorded by court.



6. The Appellant submitted that in this case the charge which the appellant faced carried a maximum sentence of life imprisonment submitted further that in such serious offences where sentences may either be long or indefinite the court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of plea taking but also understands the sentence he faces where he opts to plead guilty.
7. It is the Appellant submission that what is contemplated under article 50 (2) of *the Constitution* provides the right to a fair trial and the said article prescribes certain ingredients of a fair trial.
8. The Appellant submitted that the appellate court is to uphold the rule of Law and not to cause miscarriage of justice irrespective of whether or not in a particular offence.
9. The Appellant submitted that the Judiciary Criminal Procedure Bench Book 2018 provides elaborate step by step considerations that the court must apply when sentencing an offender.
10. The Appellant submitted that he relied on the legal gazette notice number 2970 o 29th January 2016 wherein Dr. Willy Mutunga as he then was formulated sentencing policy guidelines that judicial officers have discretion to refer on when sentencing in accordance with sentence impact on the society, on the family and the entire justice system. The Appellant relied in the case of Titus Ngamau Musila alias Katitu Criminal case no.78 of 2014.
11. The Appellant prayed for mercy and leniency based on the above mitigation that outweighs the aggravating factors having considered all the circumstances of the case.
12. The respondent filed his submissions dated 26th June 2023 wherein he submitted that the charges were read to the Appellant in a language that he understood being Kiswahili whereupon he pleaded guilty to both counts. The trial magistrate proceeded to convict him and sentenced him to life imprisonment for the first charge and the second count was held in abeyance in view of the sentence.
13. The respondent submitted that upon the Appellant pleading guilty to the charge, the facts were read out to him and photographs of the crime scene were produced by the prosecution as PEXH a,b,c,d and f and the certificate of photographic print was produced as exhibit 2-3 and the Appellant then confirmed the facts and the exhibits.
14. It is the respondent submission that section 348 of the penal code provides that no appeal shall be allowed where an accused has pleaded guilty to an offence in the subordinate court and has been convicted on that plea except as to the extent of the legality of the sentence.
15. The respondent relied on section 332 of the penal code which stipulates that any person who wilfully and unlawfully sets fire to any building or structure is guilty of a felony and is liable to imprisonment for life.
16. The respondent submitted that the trial magistrate took into consideration the Appellant's mitigation vis a vis the seriousness of the offence and therefore the sentence meted out to the Appellant was according to the appropriate law. That the trial court considered the gravity of the case and the circumstances of the same and also for the sentence to serve as a deterrent.
17. The respondent prayed for the court to uphold both the conviction and sentence.
18. This being a first appeal, this Court is bound to re-evaluate and analyse afresh, the evidence before the trial Court and come to its own independent findings and conclusions bearing in mind that it did not witness the witnesses testify. See Okeno vs. R [1972] EA 32.



Issues for determination

1. Whether the trial magistrate erred in both law and fact by failing to note that the appellant was mentally challenged.
2. Whether the plea was unequivocal

These grounds were not however supported by the record and this could be the reason why the appellant filed supplementary amended grounds of appeal which are basically challenging the sentence imposed by the learned trial magistrate. The respondent opposed the appeal and filed written submissions dated 26/6/2023. The respondent has urged the court to uphold the conviction and the sentence. The record of the learned trial magistrate shows that the appellant was a known case of person who had suffered a mental illness for a long time dating back to 2013. A relative Harriet Mukoronene ID No. 10899871 and an aunt of the accused informed the court that the accused had mental issues and she produced the medical report in court. The documents are not on record.

The learned trial magistrate ordered that the appellant be escorted to hospital for a mental assessment. A report was filed by Dr. Gordon Ambayo, a Psychiatrist Consultant who noted that he was treated for a mental illness at Meru Level 6 Hospital from 2013 to 2020. He recovered from the mental illness and is mentally fit to plead and stand trial. The circumstances under which the offence was committed do not have any motive provocation or any reason for setting the house on fire. Upon the trial court being informed that the appellant suffered from mental illness she ought to have appreciated that he was vulnerable and promptly informed him of his rights. Under Article 50(2) (g) of *the Constitution*, it is provided;

“Every accused person has the right to a fair trial which includes the right-
to choose and be represented by an advocate and to be informed of this right promptly.
to have an advocate assigned to the accused person by the State and at State expense if
substantial injustice would otherwise result and to be informed of this right promptly.”

To buttress this, Section 43(1) a, b. & c of the *Legal Aid Act* provides that:

“A court before which unrepresented accused person is presented shall-

- a. Promptly inform the accused of his/her to legal representation;
- b. If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her, and
- c. Inform the service to provide legal aid to the accused person.”

In determining whether substantial injustice is likely to occur, the court shall take into consideration the charge or severity of the charge and the sentence, complexity of the case, the capacity of the accused to defend themselves (emphasis mine). The fact that the appellant had history of mental illness and if he pleaded guilty which on conviction would lead to imprisonment for life are good indicators that he would be prejudiced and the court to give him legal representation. Short of that the learned trial magistrate had a duty to inform the appellant promptly of his constitutional right to have an advocate and the right to have an advocate at State expense. If the appellant was unable to hire a lawyer and substantial injustice would occur and he was unrepresented the appellant had a right to have an advocate. The Supreme Court in the case of *Karisa Chengo –v- Republic* stated that the likelihood of suffering substantial injustice is not limited to capital offences. The Court of Appeal in



the case of Thomas Aluga Ndegwa-v- Republic, Nairobi Criminal Application No.2/2014, allowed an application for legal aid from an appellant who had not been represented in the proceedings before two lower courts.

The Court of Appeal held that because he had not previously been represented and because he was serving a life sentence, substantial injustice might occur if he was not represented during appellate proceedings. The appellant was not informed promptly of his right to legal representation. The right to fair trial is fully guaranteed without any exemption under *the Constitution* as it is one of the rights that cannot be denied. Under Article 25 of *the Constitution* the right to fair trial is one of the fundamental rights and freedoms that may not be limited. The right is sacrosanct, inviolable and therefore immune from violation. The right of the accused to fair trial was violated. The entire trial was a mistrial and cannot be upheld.

19. At his first appearance in court, the court must satisfy itself that the accused understands the language of the court. The language of the court was indicated as English/Kiswahili but there was nothing on record to show that the court was satisfied that he understood either of the two languages. The grounds of appeal and supplementary grounds is an indication that more likely than not he did not understand the proceedings. Article 50(2) m of *the Constitution* does not seem to have been complied with and therefore this right was violated.

Whether the Plea was unequivocal:

Section 207 of the Criminal Procedure Code (Cap 75 Laws of Kenya) the Court has a duty to explain the charge and all the elements of the offence to the accused in a language he or she understands. Where an accused person was charged with more than one offence, each count must be read and the answer to each charge must be recorded as nearly as possible in the words used by the accused. See Section 207(2) of the Criminal Procedure Code. See Adan –v- Republic (1973) E.A 445 & John Muendo Musau-v- Republic. This is aimed at ensuring that the plea of guilty is unequivocal and that the plea as recorded cannot be interpreted in any way other than admission of guilt.

In this case the learned trial magistrate recorded only one answer. This is a court of record and therefore the record of the trial court is important in informing the court what transpired. The record shows that only one charge was read to the appellant and the court ended up convicting him on the two counts. The plea was not properly taken and the appellant pleaded that he had suffered and did not have people to take care of him. The court did not make enquiries as to what he had suffered. The plea was not unequivocal. There is also a danger in convicting an accused person on unequivocal plea as it is obviously grievous where the accused is unrepresented and had had belaboured under mental illness for a long time. See Adan –v- Republic (supra). The trial court did not follow the right procedure for recording a plea of guilty as provided under Section 207 (2) as only one answer to the charge was recorded and the accused was convicted on two counts. I also note that the appellant was not supplied with witnesses' statements though he pleaded to be supplied throughout the entire trial. This violated Article 50(2) c & (j) of *the Constitution*. The appellant was not made aware of the evidence before the alleged plea of guilty. These violations show that the trial before the learned magistrate was a mistrial. I should then consider the remedy to these violations.

Retrial:

It has been held by this court and the Court of Appeal that a retrial is the standard remedy for mistrial or defective trial except where the interests of justice of the particular case dictates otherwise. See Fetahali Manyi –v- Republic (2003) KLR 552 and Mwangi –v- Republic (1983) KLR. The court has to consider the time lapse since the person was convicted and the availability of witness to determine whether a retrial is possible. The ultimate consideration must be whether the interest of justice demand



retrial. Such a consideration is where the accused has been in prison for a long time. In this case the offence was committed on 31/12/2021. The appellant was sentenced on 27/4/2022. I find that the witnesses did not testify. They are likely to be traced. The appellant has not been in prison for an inordinately long period. For these reasons I find that it is possible to hold a retrial.

In conclusion:

I find that this appeal has merits. I order as follows:-

1. The conviction and sentence is set aside.
2. A retrial shall be conducted before a magistrate with jurisdiction other than the trial magistrate.
3. The appellant shall be released from prison forthwith and be remanded at Meru Police Station. He shall be produced before the Chief Magistrate on 4/6/2024 for plea taking.
4. The appellant shall be provided with a Legal Counsel at State expense throughout the entire trial.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

