



REPUBLIC OF KENYA



KENYA LAW
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**Setonei v Republic (Criminal Appeal E12 of 2024)
[2024] KEHC 15315 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E12 OF 2024
RPV WENDOH, J
NOVEMBER 28, 2024**

BETWEEN

CHRISTOPHER SETONEI ALIAS CHRIS APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Christopher Setonei Alias Chris, the appellant herein, was charged with two offences before the PM Kitale Court.
 1. Threatening to kill contrary to section 223(1) of the Penal Code.

The particulars of the charge are that on 22/10/2023 at Mwisho farm, Kwanza Location, Trans Nzoia County, without lawful excuse armed himself with a thermos flask full of hot tea and a piece of wood threatened to kill one Elizabeth William Lokichar.
 2. Malicious damage to property contrary to section 339(1) of the Penal Code in that he willfully and unlawfully damaged a thermos flask worth Kshs.1 ,500/= the property of Elizabeth William Lokichar.
3. The appellant pleaded guilty to both charges, was convicted and sentenced to serve four (4) years imprisonment.
4. The appellant contests the said conviction and sentence for reasons that.
 1. That the charge was read to the appellant in a language that he did not understand;
 2. That the court ignored the appellant's complaints that he was tortured to plead guilty;
 3. That the court failed to inform him of the consequences of pleading guilty.



5. He prays that the conviction be quashed, sentence be set aside and, case be sent for retrial.
6. The appellant filed submissions in support of the appeal. He submitted that the trial court did not follow procedure in plea taking as was held in *Adan V. Republic* (1973) EA 445. He also relied on the case of *Njuki V. Republic* (1990) eKLR which emphasized that the trial court has to be satisfied that the accused understands all the elements of the charge and pleads unequivocally.
7. He also submitted that the charge was read to him in the English language which he did not understand; that the record does not show that the court enquired from him which language he understood.
8. The prosecution Counsel, Ms. Kiptoo opposed the appeal through written submissions. Counsel submitted that none of the appellant's grounds challenged the legality and extent of the sentence as provided under Section 348 of the CPC which bars any appeal against conviction on a plea of guilty except as to the extent and legality of the sentence. Counsel also submitted that the appellant understood the charge he faced; that the sentence was lenient. Counsel urged the court to dismiss the appeal.
9. I have now considered the grounds of appeal. Section 348 of the CPC bars an appeal against a conviction from a plea of guilty except as to extent and legality of the sentence. The section 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 and legality of the sentence”
10. Notwithstanding the above provision, an appellate court is still required to review the record in order to ascertain whether or not the plea was unequivocal. If, on the face of the record, the appellate court is satisfied that the plea was unequivocal, the court downs its tools as regards the conviction.
11. In the case of *Loshierian V. Republic* (2023) KECA 477 the court stated

... Before we delve into this issue, we find it prudent to reiterate that Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. However, the provision does not bar the first appellate court from reviewing the record with a view to ascertaining whether the plea was unequivocal or not. Upon being satisfied that the plea was unequivocal, the first appellate court is then required to down its tools in as far as the appeal against conviction is concerned. Similar views were expressed by this Court in *Alexander Lukoye Malika vs. Republic* [2015] eKLR...”
12. In the *Lukoya* case (*Supra*) the Court of Appeal stated as follows; -

A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of a mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded disclosed no offence known to law. Also, where upon admitted facts, the appellant could not in law have been convicted of the offence charged”.
13. The appellant complained that the charge was read to him in English language which he did not understand. Article 50 (2)(m) of *the Constitution* provides that an accused is entitled to interpretation



free of charge if he does not understand the language of the court. The court record indicates that the language of the court was English and Kiswahili. The appellant did not tell what the language of his choice is. The court clearly indicated that the appellant spoke in Kiswahili. Apart from admitting the offence, he also gave his mitigation. This court finds the said ground untenable. The appellant did understand the charge read to him and responded in Kiswahili accordingly.

14. The appellant also complained that the court did not warn him of the consequences of pleading guilty. Article 50(2)(b) of *the Constitution* requires that the charge be explained to an accused person in detail, which includes consequences of admitting the charge. Article reads 2(b) reads “Every person has the right to fair trial which includes, the right (b) to be informed of the charge, with sufficient detail to answer it”. In the case of *Elijah Njihia Wakianda V. Republic* (2016) eKLR the Court of Appeal in addressing the said Article 50 (2)(b) said,

We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial right, that *the Constitution* guarantees him”.

15. The offence of threatening to kill is a serious one which carries a maximum sentence of fourteen (14) years imprisonment. The appellant was sentenced to four (4) years imprisonment which in my view is quite a serious sentence and I find that the trial court erred by not informing the appellant of the sentence consequent to pleading guilty and therefore the plea was imperfect and incomplete.
16. As for the allegation that the appellant had been tortured by police to plead guilty, there is no evidence on record. Had the appellant informed the court of any torture to obtain a plea of guilty, the court would not have taken it up and may have ordered for investigations. It is not the court that threatened the appellant and that ground has no basis and must fail.
17. However, since the court has found the plea to be imperfect and therefore equivocal, the conviction that followed is unsound and is hereby quashed.
18. Should the court order a retrial? The principles that should guide the court in ordering a retrial were considered in *Ahmed Sumar V. Republic* (1964) EA 481. *Manji V. Republic* (1966) EA 343 and *Merali and others V. Republic* (1971) 221 which are; a retrial may be ordered where the charge was defective; where the potentially admissible evidence is likely to result in a conviction; where accused has not served a substantial part of the sentence; whether the appellant will suffer any prejudice if a retrial is ordered and that each case depends on its own special facts.
19. In the present case, the offence is serious hence the case must be heard to its logical conclusion and if found guilty, the perpetrator must be brought to book, The appellant was convicted on 24/10/2023. He has not yet served a substantial part of the sentence and he will not suffer any prejudice in the end, I find that it is a suitable case for retrial. The appeal has merit and succeeds. Accused is released to the OCS Kwanza Police Station so that he is produced to the Chief Magistrates court Kitale on 2.12.2024 to face fresh charges. It is so ordered.

DELIVERED, DATED AND SIGNED IN KAPENGURIA THIS 28TH DAY OF NOVEMBER, 2024

R. WENDOH.

JUDGE

Judgment delivered virtually in the presence,



Miss. Kiptoo for the State
Appellant – present virtually
Court Assistants - Juma/hellen

