



REPUBLIC OF KENYA



**Chesum v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 1938 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E050 OF 2022
SM MOHOCHI, J
FEBRUARY 27, 2023**

BETWEEN

NAHASHON KIPSEREM CHESUM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the Sentence in Eldoret, CM's Cr. Case No.
E3625 of 2021 - delivered by R. Odenyo, S.P.M. on 23.11.2021)*

JUDGMENT

Introduction

1. The Appellant was on the 1st November 2021, arraigned charged with the offences of impersonation contrary to Section 101(1), (b) of the [National Police Act](#), in count one (1) and with breaking into a building and committing a felony, contrary to Section 306 (b) of the [Penal Code](#) in count two (2).
2. The Particulars of the 1st Count was that, “On the 29th October 2021, at Tarakwa Police Station, Kapseret Sub-County, within Uasin Gishu County, the suspect pretended to be a police officer stationed at Mau Summit Police Station and Tarakwa Police Station for a purpose of avoiding arrest of unpaid bill of kshs 1300/- which he consumed at a bar”
3. The Particulars of the 2nd Count was that, “On the 29th October 2021, at Tarakwa Police Station, Kapseret Sub-County, within Uasin Gishu County, broke and entered a traffic office and committed therein a felony namely theft of a police uniform kept in a bag”.
4. It is noteworthy that the Appellant entered plea of guilty upon arraignment and that the substance of the charge(s) and every element being stated to him in English language.



5. He (Appellant), was subsequently remanded until 16th November 2021 where the prosecution presented facts of the case and produced the bag together with thirteen (13) other exhibits in aid of the facts of the case.
6. The Appellant was accordingly sentenced on the 1st count, to three (3) years' imprisonment and on the 2nd count, to two (2) years imprisonment both to run consecutively.

Appellants Case

7. The Appellant being dissatisfied with the sentence, appealed setting out three (3) grounds of appeal
 - a) Sought review of the sentence urging that the same runs concurrently and that he be accordingly set to liberty.
 - b) He urged that he had reformed while serving his imprisonment by undertaking various theological and tailoring training courses; and
 - c) That the period he had served in imprisonment was adequate punishment as an objective.
8. The Appeal was canvassed by way of written submissions and highlighting of the submissions on the 18th January 2023. The issues to be determined are the propriety of the conviction and the propriety of the sentence.
9. The Appellant orally submitted, that he had undertaken National Industrial Training Authority (NITA) certified carpentry training and that as a father of two tender children, whose mother had abandoned the matrimonial home upon his imprisonment he is more needed to support their upbringing and regretted the offence he had committed.

Respondents Case

10. The Respondent opposed the Appeal urging that the offence of impersonation contrary to section 101 (1), (b) attracts a penal sanction of a fine of up to Kenya shillings one million (1,000,000/-) or to a term of imprisonment not exceeding 10 years or to both, a fine and imprisonment. And that the 2nd count of breaking into a building and committing a felony contrary to section 306 (a) attracts imprisonment of seven (7) years.
11. The Respondent through its written submissions dated 17th January 2023 was of the view that the Appellant's conviction and sentencing by the trial court was sound and in strict compliance with the provisions of section 207 (1), and (2) that provides that an accused shall be called to enter Plea;
 - (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
 - (2) If the accused person admits the truth of the charge otherwise than by a plea agreement 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 an 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.
12. The Respondent Submitted that the Appellant was convicted on his own admission of guilt and the facts as enumerated in the trial court and that his mitigation informed the sentence that in its opinion



was sufficient and deterrent urging this court not to disturb the same and that the Court finds the Appeal to lack merit and accordingly dismiss it.

Legal Analysis

13. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to form its own conclusion(s) in line with the settled principles established in the case of *Okeno vs Republic* {1972} E.A, 32 at pg 36 EA 424,

‘An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant’s court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses.’

14. The Court observes that the Appellant pleaded Guilty to both charges on the st November 2021 with the substance of the charge(s) and every element being stated to him in English language.
15. The (the Appellant), was subsequently remanded until 16th November 2021 where the prosecution presented facts of the case and produced exhibits. The facts stated. that;

“On the 29th November 2021, the accused was at “Fair London Bar and Restaurant. He received a bill of Kshs 1,300/-, he wanted to leave without paying the bill. When asked to pay, he failed to pay. The owner of the bar called officers from Langas Police Station. The accused had told the owner of the bar that he was a police officer. Police went to the bar and arrested accused. He was taken to Langas Police Station. He was asked and he admitted that he is not a police officer. On being asked about the police uniform he has? he said it belonged to a police officer at Tarakwa Police Station. It was confirmed that on the 29th November 2021, accused had broken into the traffic office and stolen a bag containing the police uniform he had.

Officers from Tarakwa Police Station were called. Accused led them to where he left the bag”.

16. Section 207 (1), and (2) of the [Criminal Procedure Code](#) provides that an accused shall be called to enter Plea;
- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
 - (2) If the accused person admits the truth of the charge otherwise than by a plea agreement 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 an 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.
17. It is noteworthy that the Trial court never entered a finding of conviction after the plea and facts of the case being availed. The Court further note from the record that the trial court did not forewarn the



Appellant of the consequences of his plea of guilty and the seriousness of the charge(s) it proceeded to sentence him to imprisonment.

18. Flowing from the analysis and in association with the case of *Elijah Njibia Wakianda vs. Republic* eKLR where the Court expressed itself as hereunder:

“With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of “charge(s)” when there was a single charge and the rather odd “in a language he understands”, when it is more normal and logical to simply state the language used. This smack of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. 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 rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.”

19. This Court has a constitutional duty to ensure that all fair trial rights are availed to a criminal suspect and more so where the accused is unrepresented.

The standard of administering “plea”, is now well settled in the case of *Adan v Republic*, [1973] EA 446 where the Court held as follows;

“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 of course be recorded”.

20. Upon Considering the issues as raised by the Appellant in his record of Appeal, the Response by the State in opposition and the scrutiny and analysis of the record of appeal the court finds that, no Conviction finding, was entered against the accused by the trial court and as such the Appellant was Sentenced to imprisonment without a conviction.



21. In the case of *Kennedy Indiemu Omuse vs Republic*, Criminal appeal 344 of 2006 the court held that,
“before imposing a sentence a court ought to look at the facts of the case in its entirety before imposing a sentence on an accused person, these facts however, must be those that have been proved and evidenced”
22. The Court finds serious mis-match between the facts as presented and the charges which the trial court ought to have interrogated but did not, that the fatality of sentencing an accused person to imprisonment without a finding of conviction, to be irregular and incurable, therefore the manner in which the charge was read out to the appellant did not strictly comply with section 207(1) and (2) of the *Criminal Procedure Code* and the Appellant’s plea cannot be said to have been unequivocal.

Disposition

23. Under the circumstances what is the recourse available? should this court order a retrial?
24. In the case of *Ahmed Sumar vs. R* (1964) EALR 483 the Court of Appeal offered the following guidance:
“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;”
25. The Court of Appeal likewise in the case of *Samuel Wabini Ngugi vs. R* [2012] Eklr while citing the case of *Ahmed Sumar vs. R* (1964) EALR 483, reaffirmed what the Court should consider on whether or not to order retrial as follows:
‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’
26. The Court finds the Plea entered by the Appellant before the trial court on the st November 2022 and on the 15th November 2021 was not unequivocal and that the misdirection by the trial court in failing to enter a finding of conviction and or forewarn the Appellant before sentencing resulted in a miscarriage of justice and contravened the Appellants fair trial guarantees as provided for under Article 50 (1) and (2) of the *constitution* of Kenya.
27. The Court finds that the circumstances of imprisonment of the Appellant since 23rd November 2021 fatally affects any prospects for a retrial and that it will not be in the interest of justice to subject him as such. The court thus allows the appeal and hereby discharge the Appellant.
28. The Appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.



**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 27TH FEBRUARY
2023**

MOHOCHI S.M

JUDGE

27.2.2023

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

