



REPUBLIC OF KENYA



**EE & 2 others v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 22891 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E017 OF 2022
LM NJUGUNA, J
SEPTEMBER 29, 2023**

BETWEEN

EE 1ST APPELLANT

AM 2ND APPELLANT

RS 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. A. Lorot (CM) in the Chief Magistrate's Court at Wang'uru Criminal Case No. E051 of 2022 delivered on 18th August 2022)

JUDGMENT

1. The appellants filed a petition of appeal dated the 30/8/2022 seeking orders that the appeal be allowed, conviction and sentence be quashed and the appellants be set at liberty. The grounds of the appeal are that the trial magistrate erred in law and fact by:
 - a. Convicting and sentencing the appellants on a defective charge sheet;
 - b. Convicting and sentencing the appellants on particulars of offence which did not support the charge;
 - c. Convicting and sentencing the appellants on evidence which was not in support of the offence in the charge;
 - d. Convicting and excessively sentencing the appellants in the circumstances;
 - e. Convicting and sentencing the appellants when it was unsafe to do so given the defective charges and facts;



- f. Convicting and sentencing the appellants on scanty facts and circumstances; and
 - g. Failing to consider that the appellants were not conversant with Kenyan law and were entitled to representation in court.
2. The appellants were charged with trafficking persons contrary to Section 3(1)(g) as read together with Section 3(6) of the *Counter-Trafficking In Persons Act* of 2010. The particulars were that on 20th and 24th April 2022, the appellants, with others not before this court were found trafficking in persons by means of receiving payments to obtain consent transferred MM, RK and RA, children aged 12 years, 10 years and 14 years respectively, from Tanzania to Kenya for the purpose of financial exploitation as beggars in Makutano and Mwea markets in the Republic of Kenya.
 3. All the appellants pleaded guilty to the charge and a guilty plea was duly entered. However, when the facts were re-read to the appellants, the court noted that the plea entered was not unequivocal even though some parts of the facts were acknowledged. Therefore, the court recorded a plea of not guilty owing to the nature of the charges. At a later hearing before the court, and at the request of the appellants, the prosecution re-read the facts of the case and was ready to call its witnesses and produce exhibits. The charges were explained to the appellants and they all pleaded guilty and each of them was convicted on their own plea of guilty.
 4. The appeal was canvassed by way of written submissions and both the appellants and the respondents complied.
 5. The appellants submitted that the trial magistrate failed to act cautiously in determining that the plea taken was not unequivocal and that the plea of guilty was not entered cautiously, freely and unambiguously. They relied on Article 50(2)(b) of the *Constitution of Kenya* on the right of the appellants to fair trial and to be informed of the charge they were facing, in sufficient detail to enable them to answer it. They also cited the cases of *Elijah Njibua Wakianda Vs. Republic* (2016) eKLR and *Bernard Injendi Vs. Republic* (2017) eKLR in making their submission that as the court records a plea of guilty, it should inform the accused person of the sentence that will be meted on them if a conviction is entered based on the guilty plea. They urged the court to allow the appeal as there was a mistrial against the appellants when the trial court failed to record whether the appellants understood the language of the court. In support of this, they cited the case of *Julia Kaume Vs Republic* (2021) eKLR.
 6. The respondent submitted that the charges were read out to the appellants severally and in a language that they could understand and in compliance with the provisions of Article 50(2)(b) of the *Constitution of Kenya, 2010* and Section 207(1) of the *Criminal Procedure Code*. That the plea of guilty was duly entered and the same cannot be the subject of an appeal except only as to the legality of the sentence, as provided under Section 348 of the *Criminal Procedure Code*. That the trial court took all precaution to ensure that the charges were understood by the appellants and the facts were presented severally in Kiswahili which is the language that they all understood. That the charge sheet contained sufficient information to communicate the offence to the appellants as provided under section 134 of the *Criminal Procedure Code*. That the charge was supported by the facts and the same cannot be contested in this appeal as under Section 382 of the *Criminal Procedure Code*. They submitted that aside from conviction, this appellate court has discretion to deal howsoever on the issue of sentence.
 7. The issues for determination herein are as follows:
 - a. Whether or not the charge sheet was fatally defective;
 - b. Whether or not the appeal can stand against conviction based on a guilty plea; and



- c. Whether or not the sentence meted on the appellants is excessive.
8. In determining the first issue, the characteristics of a proper charge sheet are set out under Section 134 of the [Criminal Procedure Code](#) which provides:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.” (emphasis added)

9. Going by the standard set in the above provision, I have perused the charge sheet in question and am satisfied that it contains all the necessary information to enable the accused person to understand the charges they faced. The appellants claimed that the charge sheet and the facts were not in tandem. In my view, the particulars of the charge as stated on the charge sheet are the source of the facts of the case and the same were read repeatedly to the appellants at trial. The charge sheet is not defective within the meaning of the above-cited provision. Further, courts have held similar positions, for instance, in the case of [MG Vs Republic](#) (Criminal Appeal E051 of 2021) (2022) KEHC 14454 (KLR) it was held thus:

“The Court of Appeal in [Benard Ombuna Vs Republic](#) (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him”

10. The appellants herein were fully aware of the charges preferred against them and opted to plead guilty. Even if a defect were to be found on this charge sheet, the guiding question is whether the defect would affect the outcome of the case or hinder justice and at what point the argument on the defect is being raised. The court in [MG Vs Republic](#) (Criminal Appeal E051 of 2021) (ibid) went on to state:

“Section 382 gives guidance on whether even with such defect justice could still be met or whether the defect is curable. Section 382 of the [Criminal Procedure Code](#) provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.”



11. On the second issue of whether an appeal can stand against a conviction arising from a plea of guilty, the same is expressly provided for under Section 382 of the Criminal Procedure Code which states:

“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.”

12. In determining this issue, I shall also address the issue of the language of the trial court. At the plea taking I have noted from the trial court’s proceedings that the court on 25th April 2022 applied interpretation from English to Kiswahili and the magistrate noted that the charges were read to the accused persons in a language that they understand. They all responded in Kiswahili and the court recorded that they said “ukweli”. On 28th April 2022, the charges were read to them again in Kiswahili and they pleaded guilty. However, when the facts were stated, the court noted that the plea was not unequivocal and proceeded to enter a plea of not guilty. On 21st July 2022, the charges and facts were read to them again and they still pleaded guilty. On the same day they confirmed that the facts were all correct as read to them. It then followed that the trial court convicted them on their own guilty plea and they were sentenced to 20 years imprisonment each. In the case of Elijah Njibia Wakianda Vs. Republic (2016) eKLR the court stated as follows:

“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.....”

13. This court cannot allow the appeal on conviction based on a plea of guilty and in that regard, my hands are tied. However, it may review the sentence on the basis of extent or legality of the same. This leads me to the third question as to whether or not the sentence was excessive. I do note that the trial court considered the mitigation presented and departed from the mandatory sentence of 30 years imprisonment. On this, I do not think that the sentence of 20 years imprisonment is excessive in the circumstances. In the same vein, I find no requirement in the law that the trial magistrate ought to have told the appellants of the sentence they are bound to face if they are convicted on a guilty plea. Though this may be a position in caselaw, I do not think it is sufficient ground for appeal.

14. In the premises, I do not find a reason to disturb the findings of the trial court both on conviction and sentence. Therefore, this appeal fails for want of merit and is hereby dismissed.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

