



REPUBLIC OF KENYA



**Otieno v Republic (Criminal Revision E135 of 2023)
[2023] KEHC 26075 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E135 OF 2023
RE ABURILI, J
NOVEMBER 27, 2023**

BETWEEN

DAVIES OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence by HON. K. Cheruiyot, Senior Principal Magistrate Kisumu Chief Magistrate's Court Traffic Case No. E303 of 2023 at Kisumu)

RULING

1. This file was opened for revision of proceedings rendered in Kisumu Chief Magistrate's Traffic Case No E303 of 2023: *Republic v Davies Otieno*.
2. The accused was charged with three counts of riding an insured motor cycle on a public road contrary to section 103 B (3) as read with section 103 B (7) of the *Traffic Act*; riding a motor cycle without driving licence contrary to section 103 B (5) as read with section 103 B (7) of the *Traffic act* and riding a motor cycle without protective Helmet contrary to section 103 B (1) as read with section 103 B (7) of the *Traffic Act* cap 403 Laws of Kenya.
3. The offences are alleged to have occurred on October 2, 2023 at around 7.00am at Sai area along Kisumu Ahero Road in Kisumu Sub-county within Kisumu County.
The motor cycle is registration No. KMED 767F make Boxer.
4. When the accused was presented to court before hon. K. Cheruiyot SPM on October 2, 2023, he is recorded to have pleaded guilty to counts 1 and 2 and Not guilty to count 3. He was fined Kshs. 1,000 in counts 1 and 2 while the matter was slated for mention on October 16, 2023 for count 3.
5. On the latter date, the accused who had been on cash bail of Kes 5,000 came to court late and by then, a warrant of arrest had been issued and another date November 20, 2023 already fixed but the same upon



his arrival in court, the warrant of arrest was lifted and the accused stated that he wanted to change the plea and plead guilty but the prosecutor stated that he did not have the police file hence the trial court fixed the case for November 20, 2023.

6. On November 20, 2023, the accused informed the court that he wanted to change the plea then the charges in all the three counts were again read out to him and he is stated to have pleaded guilty to each of the 3 counts then after the prosecution stated that facts are as per charge sheet, the accused was convicted as charged.
7. The accused mitigated then he was fined Kshs. 1,000 on count 1 in default to serve 5 days imprisonment, Kshs. 2,000 in count 2 in default to serve 10 days imprisonment and fined Kshs. 2,000 in count 3 in default to serve 10 days imprisonment.
8. The accused then asked for cash bail to be treated as fine and an order to that effect was made. Immediately thereafter, the trial magistrate realised that he had convicted the accused twice on counts 1 and 2 because the accused had already been convicted and fined on the 2 counts in the said counts on October 2, 2023.
9. The trial court forwarded the file to this court for revision in accordance with Section 362 - 364 of the [Criminal Procedure Code](#).
10. I have considered the proceedings before the trial court as conducted on October 2, 2023 and November 20, 2023 and I find that those proceedings were irregular. Besides the double plea that was taken on October 2, 2023 and November 20, 2023, the plea taken on 2nd October was fatally defective and equivocal. This is because the accused person was never convicted on October 2, 2023 after he allegedly pleaded guilty to counts 1 and 2 and secondly, no facts were ever read out to him in respect of the said counts 1 and 2.
11. The accused was simply fined Kshs.1,000 in count 1 and Kshs.2,000 in count 2 without facts followed by a conviction. Accordingly, I hereby quash and set aside the equivocal plea of guilty entered on October 2, 2023.
12. On the subsequent plea of guilty that was entered on November 20, 2023, albeit the accused is stated to have pleaded guilty to the three counts, and a plea of guilty entered in respect thereof, no facts were read out to the accused person upon which the accused could admit for a conviction to be rendered.
13. Furthermore, even when the prosecution stated 'facts per charge sheet' there was no admission of those facts upon which a conviction could follow and the subsequent mitigation and sentence.
14. For all the above reasons, I find that the plea of 'guilty' was haphazardly entered against the accused on an equivocal plea.
15. The conviction of the accused person herein Davies Otieno on November 20, 2023 cannot stand. It flies in the face of an established procedure for taking a plea of guilty and is prejudicial to the accused person who did not plead to any facts or at all. Furthermore, unlike on October 2, 2023, on November 20, 2023, the language by which the plea was taken is not indicated.
16. For the benefit of the trial Magistrate who handled the case herein, I shall reiterate the well beaten path for taking of pleas as stipulated in section 207 of the [Criminal Procedure Code](#) and as interpreted by the courts over time.



17. The manner of recording of a plea is provided for in section 207(1) and (2) of the Criminal Procedure Code as hereunder:

“207(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.

18. The manner of recording plea of guilty was appreciated in *Ombena v Republic* [1981] eKLR where the Court of Appeal held that:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

‘Held:

- 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;
- iv. 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.”

19. In this case it is certain that the prosecutor never stated the facts, nor was the accused given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said “Facts are as per charge sheets”, and that the charge was read over and explained is not sufficient to satisfy the court that the plea was unequivocal.

20. In the *Adan* case, *supra*, the court stated at p 447 that:

“The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he



pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.”

21. The Court of Appeal and indeed this court has over time appreciated that magistrates and judges are very busy and overloaded with work in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However, as a superior court of record, I have to judge by the record as it is. In this case, I am not satisfied that the plea of the accused can be safely accepted as an unequivocal plea of guilty, or that the convictions can safely be allowed to stand.
22. It is therefore clear that the charge, the particulars and the facts must be read to the accused in his language or in a language he understands. This is what the decision in *K N v Republic* [2016] eKLR, affirms that:

“The procedure for taking plea follows a well-beaten path. The leading case, *Adan v R* (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in *Adan* (supra) in *Hando S/o Akunaay v Rex* (1951) 18 EACA 307 as follows;

‘...before convicting on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent.’

Where an accused person who has been called upon to plead under section 207 of the [Criminal Procedure Code](#) in the subordinate court admits the charge, the proviso to subsection (2) requires the prosecution to outline the facts upon which the charge is founded.

The truth or otherwise of the charge is a combination of three things, the charge, the particulars of the offence contained in the charge sheet or information, as the case may be, as well as the facts outlined where the accused pleads guilty. The facts therefore are as important part of a plea as the charge itself.

The nature and elements of the offence in totality must be understood by the accused and the trial court must be satisfied about this before accepting them as true.

The court should also explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence. In outlining the facts, the prosecution’s role is to present the evidence that could have been proven if the case had gone to trial. Therefore, for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond any reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to also present the exhibits that they would have relied on at the trial.”

23. In this case, it was the duty of the Trial Court to ensure that the facts were not only read over to the Appellant but were read over to him in a language which he had indicated that he understood. Here I shall borrow heavily and substantially from the detailed decision by Odunga J (as he then was) in [Jackson Wambua v Republic](#) [2022] e KLR where he cited many decisions on the subject as below.



24. The learned Judge associated himself with the opinion of the Court of Appeal in [Elijah Njibia Wakianda v Republic](#) [2016] eKLR and so do I that:

“Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.”

25. He further cited W. Korir, J (as he then was) in Abdallah [Mohammed v Republic](#) [2018] eKLR where the learned judge expressed himself as hereunder:

“A plea of guilty can only be entered in respect of an offence known to the law...In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the appellant had no legal representation and the trial court ought to have taken steps to ensure that the appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on the record so as to form part of his plea. From the record, it is apparent that the appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.

26. He then emphasised the importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person citing Prof Joel Ngugi, J (as he then was) in [Simon Gitau Kinene v Republic](#) [2016] eKLR when it was stated that:

“19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an accused person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R* Kiambu Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:



“In those cases [where there is an unrepresented accused charged with a serious offence], care should always be taken to see that the accused understands the elements of the offence, especially if the evidence suggests that he has a defence...To put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behoved the court to warn the accused person of the consequences of a guilty plea.”

27. I therefore find that the manner in which the charge was read out to the accused herein did not attempt to comply with section 207(1) and (2) of the Criminal Procedure Code. In the premises the appellant’s plea cannot be sustained as it was equivocal

28. In Elijah Njibia Wakianda v Republic (*supra*) 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 smacks 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.”

29. For the above many, many reasons, I find the ‘conviction’ of the accused herein to have been fatally defective. The conviction is quashed and set aside. The fines imposed on the accused person are hereby set aside and treated as cash bail.

30. I however order that the accused shall take a fresh plea before a different court, on the same charges and should he plead guilty unequivocally, the cash bail shall be treated as the fine.

31. This ruling to be typed and served on the prosecution counsel and the trial court for implementation. The lower court file to be returned forthwith and placed before the chief magistrate for reallocation.

32. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF NOVEMBER, 2023

R. E. ABURILI



JUDGE

