



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambura & another v Republic (Criminal Appeal E008 of 2023)  
[2023] KEHC 26669 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E008 OF 2023  
RPV WENDOH, J  
DECEMBER 20, 2023**

**BETWEEN**

**MAGIGE WAMBURA ..... 1<sup>ST</sup> APPELLANT**

**JOMO WAMBURA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. A. N. Karimi  
– Resident Magistrate in Senior Principal Magistrate’s Court  
Kehancha Criminal Case NO. E 126 OF 2022 delivered on 21/2/2022)*

**JUDGMENT**

1. Magige Wambura and Jomo Wambura, the appellant’s herein together with others, were charged with four offences before the Senior Principal Magistrate Kehancha as follows:-

Count Going armed in public contrary to Section 88 of the Penal Code. It was alleged that on I: 11/2/2022 at 1600 hours at Isebania Township Kuria West; without lawfully excuse were armed with arrows, knives and panga in a Public place i.e. Isebania County Hospital in a manner to cause terror to the public.

Count Preparation to commit a felony contrary to Section 308 of the Penal Code, in that on the same II: date at same place were found armed as in Count I.

Count Affray contrary to Section 92 of the Penal Code. The particulars were that on same day, time III: and place, they took part in a fight in a public place.

Count Creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95 IV: (b) of the Penal Code by fighting among themselves.



2. When they were arraigned in court on 14/2/2022, they pleaded guilty to the all the charges and after the facts were read to them, they admitted the charges and were convicted on their own plea. They were sentenced as follows: -

Count I: Six (6) months imprisonment;

Count II: Seven (7) years imprisonment;

Count III: Six months imprisonment;

Count IV: Six (6) months imprisonment.

The sentences were ordered to run concurrently.

3. Being aggrieved by the said conviction and sentence, the two appellants filed their respective appeals.

Criminal Appeal No. E013 of 2023 Magige Wambura vs. Republic

Criminal Appeal No. E08 of 2023 Jomo Wambura vs. Republic

Both appeals were consolidated to proceed as Criminal Appeal E08 of 2023 while Criminal Appeal E013 of 2023 was closed.

4. The grounds of appeal are as follows:-

1. They did not understand the charges that they faced.

2. That the court did not comply with Article 50 (2) (g) and (h) of *the Constitution*

3. That the sentences passed were irregular.

5. They pray that the convictions be quashed and sentence set aside or that the sentence be reviewed and they be sentenced to the term already served or that the court do order a retrial.

6. The appellants having pleaded guilty to the charge, Section 348 of the *Criminal Procedure Code* comes into play. The said section provides as follows:-

348. No appeal on plea of guilty, nor in petty cases

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.”

7. The above section bars an appeal against conviction except against the legality and extent of the sentence. Courts will however intervene where the plea is unequivocal.

8. In the decision of *Davies Maina vs. Republic Nyeri HCCR Appeal No. 49 of 2017*, the court said:-

Although the provisions of section 348 of the Criminal Procedure Code appear to framed in mandatory terms the Court of Appeal has variously held otherwise. This is in recognition of the fact that our criminal justice system is open to abuse by those who wield power despite the rights guaranteed for an accused person. Secondly, it is not a friendly system, has not yet to be fully demystified, and attain the requisite levels of professionalism. Persons of all walks of life are intimidated by it. Some end up pleading guilty out of fear and confusion, and even ignorance of processes.



9. In *Wandate David Munyoki vs. Republic (2015)* eKLR the Court of Appeal said:-

It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in *Ndede v R* [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed.

10. Section 207 *Criminal Procedure* provides on how a plea may be taken. In the celebrated case of *Adan vs. Republic (1973)* EA the East African Court of Appeal set out the procedure for taking plea. The court said:-

- (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;
- (v) 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."

11. In this case it is not certain that the prosecutor stated the facts, or that the appellants were 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 a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the *Adan* case the court said, at p 447:

"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."

12. We are aware of how busy magistrates and judges are 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 we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."



13. I refer to the charges herein. The particulars of the charges indicate that they occurred on the same date i.e. 11/2/2022 about 1600 hours, at the same place i.e at Isebania Sub County Hospital. After the appellants pleaded guilty, the prosecutor read to the court the following facts:-

“On the 11/2/2022 at about 15:30 hours, one group of young men went to Isebania Police Station to file a report of assault. They had visible injuries on their bodies. They were advised to seek medical attention first. Before they could leave the Police Station, another group of men came armed with arrows, knives and pangas with visible injuries. They were also advised to seek medical attention. Shortly thereafter cries and screams were heard at Isebania Police Station where the two groups were fighting in public.”

14. Clearly, the facts materially from the particulars of the charge. In the particulars, the offences were committed at Isebania Sub County Hospital whereas the facts disclose that the scene was Isebania Police Station. Besides, from the facts, two groups of people reported assault to police station and were sent for treatment after they were found to be involved in a brawl. The facts do not reveal that they were preparing to commit a felony or behaved in a manner likely to create a disturbance if they were already fighting. The facts do not support the particulars of the charge.
15. The appellants also allege that the Court failed to comply with Article 50 (2) (b) of the Constitution. The said Article provides as follows: -

Article 50 (2) (b)

Every accused person has the right to a fair trial, which includes the right

(b) to be informed of the charge, with sufficient detail to answer it.”

16. Whereas the three counts were misdemeanours, Count II was a felony and the court went ahead to sentence the appellants to seven years imprisonment. It means that it was a serious charge. It was therefore the duty of the court to explain the charge to the Accused in all necessary detail for the Appellants to appreciate that it was a serious charge and the likely sentence they would suffer or the they may have needed time to prepare for the defence.
17. In the end, I find that apart from the plea being unequivocal, the appellants rights under Article 50 (2) (b) were also violated. In the end, I find that the conviction was irregular it is quashed and sentences set aside.
- Can the court order a retrial?
18. The case of Ahamad Sumar vs. Republic (1964) KLR set down the principles that the courts may follow in ordering a retrial. The court said:-

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.”



19. In this case, the appellants were sentenced on 21/2/2022. So far, they have served about one year, ten (10) months in prison. There is no particular complainant in the case save the State. As observed earlier, the facts arose from one transaction and it seems in charging the appellants the prosecution were fishing and not sure of which charge to prefer. No prejudice will be suffered by the prosecution if the appellants are set at liberty. I hereby decline to order a retrial. The Appellants are therefore set at liberty forthwith unless otherwise lawfully held.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**R. WENDOH**

**JUDGE**

**In presence of; -**

Ms. Kaino for the state

Appellant Absent

Ms. Emma/ Phelix –Court Assistant

