



**Bwari v Republic (Criminal Appeal E015 of 2022)  
[2022] KEHC 14694 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14694 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E015 OF 2022  
MW MUIGAI, J  
OCTOBER 27, 2022**

**BETWEEN**

**EDNA BWARI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an Appeal from the original conviction and sentence in Criminal Case Number E188 of 2022 at the Mavoko Principal Magistrate's Court (Ms) P. Kasavuli on 22nd February 2022))*

**JUDGMENT**

**Trial Court Record**

1. The Appellant was charged with four charges.
2. The first charge was being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) (a) of the [Narcotic drugs and Psychotropic Substances Control Act](#) No 4 of 1994.
3. The particulars of the offence were that on the 21<sup>st</sup> day of February 2022 around 1100 hours at Githunguri area of Muthwani ward in Athi River Sub County within Machakos County, she was found in possession of narcotic drugs namely *cannabis sativa* (bhang) to wit 57 roll of *cannabis sativa* of estimated street value Kshs 5700/- which were not in proper medical preparation form.
4. In the 2<sup>nd</sup> count, she was charged with selling alcoholic drinks without a license contrary to section 7 (B) (1) as read with section 62 of the [Alcoholic Drinks Control Act](#) No 4 of 2010
5. The particulars of the offence are that on the 21<sup>st</sup> day of February 2022 around 1100 hours at Githunguri area of Muthwani ward in Athi River Sub County within Machakos County, she was found selling alcoholic drinks namely chang'aa and muratina to wit two (2) litres and ten (10) litres respectively without a license.



6. In count three, the Appellant was charged with contravening alcoholic drinks requirement contrary to section 27(1) (B) as read with section 27(4) of the [Alcoholic Drinks Control Act](#) No 4 of 2010.
7. The particulars of the offence are that on the 21<sup>st</sup> day of February 2022 around 1100 hours at Githunguri area of Muthwani ward in Athi River Sub County within Machakos County, she was found in possession of alcoholic drinks namely chang'aa and muratina to wit two (2) litres and ten(10) litres respectively which do not conform with the requirements of this Act.
8. In count four, she was charged together with David Omwana, Samuel Mugo and Kennedy Karanjafor being found at a place where persons result for the purpose of smoking, inhaling, sniffing or otherwise using narcotic drugs contrary to section 5(1) (B) of the [Narcotic drugs and Psychotropic Substances Control Act](#) No 4 of 1994.
9. The particulars of the offence are that on the 21<sup>st</sup> day of February 2022 around 1100 hours at Githunguri area of Muthwani ward in Athi River Sub County within Machakos County, they were found at a place where persons result for the purpose of smoking, inhaling, sniffing or otherwise using narcotic drugs in contravention of the said Act.
10. At the time of taking plea, the Appellant pleaded as follows;  
Count 1: *Ni Ukweli*  
Count Ii: *Ni Ukweli*  
Count Iii: *Ni Ukweli*  
Count Iv: *Ni Ukweli*
11. The prosecutor then stated that on February 21, 2022 at foot bridge received information at Githunguri area selling alcohol. They went there and found accused 1 who they arrested and on search, they found 57 rolls of bhang. They continued with the search and found containers with 2 litres muratina and 10 litres chang'aa. the co accused was there. The inventory was made and accused 1 signed. An inventory was produced as exhibit 1, 57 rolls a exhibit 2 and 10 litres of chang'aa as exhibit 3. He indicated that the accused were charged.
12. The accused persons responded as follows;  
Accused 1 : facts are correct  
Accused 2 : facts are correct  
Accused 3 : facts are correct  
Accused 4 : facts are correct
13. The accused were convicted.
14. the prosecutor indicated that there were no records.
15. In mitigation, they said the following  
Accused 1 : I pray for leniency  
Accused 2 : I plead for leniency  
Accused 3 : I plead for forgiveness  
Accused 4: I pled for forgiveness



16. The 1<sup>st</sup> Accused person was sentenced as follows  
Count i: Kshs 100,000 in default 9 months in jail  
Count ii: Kshs 30,000 in default 1 month in jail  
Count iii: Kshs 20,000 in default 1 month in jail  
Count iv: Kshs 10,000 in default 1 months in jail
17. The court indicated that the sentence was to run consecutively and right of appeal was 14 days.
18. The 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons were placed on probation for 1 year after the probation officer's report was presented.
19. The 4<sup>th</sup> accused person, a minor, was to be committed at Shikusa Borstal institution for a period of 3 years after Mrs Looce a probation officer presented the report in court.

### **The Appeal**

20. Dissatisfied by the conviction and sentence, the Appellant appealed against the conviction and sentence vide a memorandum of Appeal dated March 21, 2022 on the grounds that;
  - a. The Hon Court erred in law and fact in rendering judgement without considering the Appellant's mitigation
  - b. The Hon Court erred in law and fact by failing to caution the Appellant on the gravity of the charges and a right to be represented in court by counsel
  - c. The Hon court erred in law and fact by failing to call for a probation report before rendering judgment.
  - d. The Hon court erred in fat and law by rendering a harsh judgement in the circumstances.
21. The Appeal was disposed of by way of written submissions.

### **Appellant Submissions**

22. The Appellant filed submissions on 28<sup>th</sup> of July 2022 in which it was submitted that the pleas was not unequivocal. While relying on the case of *Adan vs Republic* [1973] EZ 445, it was submitted that when the charges were read over to the accused person the very first time the plea was taken, she pleaded guilty using the words "ni Ukweli" and when the facts were read over to her, she accepted them as true. It was submitted that the only problem is that this court cannot be sure whether she was accepting the facts or not. The court went on to convict the accused irrespective of the uncertainty of what the accused was pleading to.
23. She contended that her response meant that she did not understand the facts as they had been read out to her and she was utterly confused on how to respond and thus the Trial court ought to have warned itself that the plea entered was riddled with uncertainty. Further reliance was placed in the case of *Republic v Peter Muirurui & Another* [2014] eklr and *Fatehali Manji v Republic* [1964] EA 481. The Appellant also asked the court not to order for a retrial as she is single mother and a first time offender.



24. The second ground upon which the Appellant submitted was on consecutive sentences. While relying on section 37 of the [Penal Code](#) and Section 14 of the [Criminal Procedure Code](#)

- "(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
- (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
- (3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at on trial, consecutive sentences—
  - (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, which ever is the less; or
  - (b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose"

25. It was submitted that computation of sentences is always done upon admission at the penal institution. However, if no such order is expressed on the committal warrant, the authorities follow the requirements of the law. It was submitted that upon expiry of one sentence, the second sentence would start running and this amounted to an excessive sentence.

26. The Appellant submitted that Section 333 (2) of the [Criminal Procedure code](#) stipulates that a sentence should be couched in mandatory terms and that subject to the provisions of section 38 of the [Penal Code](#), each and every sentence shall be deemed to commence upon pronouncement of the same and should include the whole day of pronouncement unless there is some different provision under the [Criminal Procedure Code](#). The Appellant prayed that the court be ordered to serve concurrent sentences instead of consecutive sentences and the sentence should commence from the date of her arrest.

### **Respondent Submissions**

27. The Respondent filed submissions dated July 27, 2022 in which Counsel submitted that the trial court in the appellant's mitigation before sentencing her. It was submitted that the right to representation is anchored on Article 50 (2) of the [Constitution](#) but since the Appellant at the time of plea acted in person then the right to counsel did not suffice in this scenario.

28. On the probation report, it was submitted that the trial court is not obligated to request for a probation report and it is only a matter of practice. Reliance was placed on the case of [R v Peter Mutuku Mulwa & another](#) [2020] eklr.



29. On the sentence, it was submitted that the trial court acted within the law as stipulated by the sections under which the Appellant had been charges.
30. While relying on the case of *John Muendo M v Republic* [2013] eKLR, it was submitted that the trial court followed the procedure of plea taking as required by the law and the only issue arising is that the prosecution failed to produce any government analyst report indicting that the exhibits produced in court is bhang and chang,aa.
31. Section 348 of the *Criminal Procedure Code*
- "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."
32. Section 350 of the *Criminal Procedure Code*
- "(1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.
- (2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal: Provided that—
- (i) subject to the provisions of paragraph (ii), where, within five days of the date of the judgment or order appealed against, the appellant or his advocate has applied to the subordinate court which passed the judgment or made the order for a copy of the record of the
- (ii) the provisions of paragraph (i) shall not apply where the petition of appeal is signed by an advocate who represented the appellant in the proceedings before the subordinate court appealed from;"
33. The Respondent indicated that they conceded the Appeal.

### **Determination**

34. I have perused the Memorandum of Appeal, the Lower court record and the submissions on record.



35. The Appellant was convicted on an unequivocal plea of guilty therefore the Appeal can only be on the sentence. Section 348 of the [Criminal Procedure Code](#) provides that;

"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."

36. The manner of recording plea of guilty was dealt with in [Ombena vs 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;
- (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."

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."

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.”

37. The Appellant contends that the court convicted him without understanding whether she had understood the position when he pleaded guilty. The Appellant admits that she pleaded guilty and accepted the facts as true. From the record, the procedure in the case of Adan, supra was followed. The charge and all the essential ingredients of the offence were explained to the accused in a language they understood. Secondly, the accused’s own words were recorded and a plea of guilty was recorded. The prosecution immediately stated the facts and the accused were given an opportunity to dispute or explain the facts or to add any relevant facts. Lastly, the Appellant did not dispute the facts or raise any question of her guilt.
38. On the issue of the sentence, Section 333(3) of the *Criminal Procedure Code* provides that;
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
39. From the charge sheet, the Appellant was arrested on February 21, 2022, arraigned in court on February 22, 2022 and sentenced on the same day. The sentences are to run consecutively, technically, the Appellant is to be imprisoned for 12 months.
40. This court notes that the penalty provided for the being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) (a) of the *Narcotic drugs and Psychotropic Substances Control Act* No 4 of 1994 reads as follows;
1. Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
  - (2) A person guilty of an offence under subsection (1) shall be liable— (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;
41. The Appellant was sentenced to 9 months in default of paying Kshs 100,000. This sentence was fair.
42. On the 2<sup>nd</sup> charge of selling Alcoholic drinks without a license contrary to section 7 (B) (1) as read with section 62 of the *Alcoholic Drinks Control Act* No 4 of 2010. The said section (B) (1) does not exist and therefore this charge cannot stand.
43. In count three, the Appellant was charged with contravening alcoholic drinks requirement contrary to section 27(1) (B) as read with section 27(4) of the *Alcoholic Drinks Control Act* No 4 of 2010 27 (1) provides that No person shall- (a) manufacture, import or distribute; or
- "(b) possess, an alcoholic drink that does not conform to the requirements of this Act 27(4)
- A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both.
44. The court sentenced the Appellant to one month in jail in default of paying Kshs 20,000. This court finds this sentence to be fair.



45. In count four, being found at a place where persons resort for the purpose of smoking, inhaling, sniffing or otherwise using narcotic drugs contrary to section 5(1) (B) of the *Narcotic drugs and Psychotropic Substances Control Act* No 4 of 1994 which provides that;

"1) Subject to this Act, any person who—  
without lawful and reasonable excuse, is found in any house, room or place to which persons resort for the purpose of smoking inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance;"

46. This charge was defective for failure to include the section that provides for the sentence. The right to be informed of the charge, with sufficient detail to answer it under Article 50 (2) (b) of the *Constitution* was thus infringed. This charge cannot stand.

47. In the end, I find that only count 1 and 3 could stand and the sentences were not harsh. The Appellant should thus serve 9 months and the sentences should run concurrently.

48. The Appellant has raised the issue that the court did not request for a probation report before sentencing him. Justice Odunga( as he then was) held in the case of *KNN v Republic* [2020] eKLR that;

“To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court’s duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.”

49. The failure to request for the probation report was thus not fatal.

50. However, this court notes that the Appellant was released on 3<sup>rd</sup> of September 2022 on presidential pardon vide a letter dated September 6, 2022 which read as follows

Re: Criminal Appeal No E015 of 2022

Orig. Cr Case File No E188 of 2022 At Srm’s Court Mavoko Edna Bwari

Kindly be informed that the above named person was accused of .....

Sentences to run consecutively. She was released on September 3, 2022 on presidential pardon.

CGP Nairobi office letter P/40/5/VOL IV/ 167 dated September 2, 2022 is relevant.

Jane Oyoo(SP)

Officer In Charge

Machakos Women Prison

### **Disposition**

1. Pursuant to the letter dated September 6, 2022, the Appeal is overtaken by events and stands dismissed.

2. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27th DAY OF OCTOBER 2022  
(VIRTUAL/PHYSICAL CONFERENCE).**

**M.W MUIGAI**



**JUDGE**

**IN THE PRESENCE OF:**

**NO APPEARANCE - FOR APPELLANT**

**MWONGERA - FOR STATE**

**GEOFFREY/PATRICK - COURT ASSISTANT(S)**

