



**Musau & 2 others v Republic (Criminal Appeal E011 of 2022)
[2022] KEHC 15748 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E011 OF 2022
MW MUIGAI, J
NOVEMBER 22, 2022**

BETWEEN

STEPHEN KALOKI MUSAU 1ST APPELLANT

SAMMY NDONGA MUTUA 2ND APPELLANT

PETER KYANIA MUSEMBI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being An Appeal From The Conviction And Sentence Of The Senior
Principal Magistrate Court In Kangundo Hon. M. Opanga (srm)
Delivered On 19.10.2021 In Spmcc Criminal Case No. 2161 Of 2021)*

JUDGMENT

Trial Court Record

1. The Appellants were jointly charged with being in possession of ammunition without firearm certificate contrary to Section 4(2) as read with section 4(3) (b) of the [Firearms Act](#) Cap 114 Laws of Kenya.
2. The particulars of the offence are that on October 11, 2021 at Mukuyuni Shopping Centre, in Kangundo sub-county within Machakos County, jointly were found with two live ammunition of 38 special and one spent cartridge of the same caliber without firearm certificate.
3. In count II, Stephen Kaloki Musau was charged with stealing contrary to section 268 as read with section 275 of the [Penal Code](#).



4. The particulars of the offence are that on the October 10, 2021, at Mukuyuni Shopping Centre in Kangundo Sub County within Machakos County stole one mobile phone make X-TIGI S23 valued at Kshs 1400/- . The property of Patrick Mutinda Nzimbi.
5. In Count III, Stephen Kaloki Musau was charged with stealing contrary to section 268 as read with section 275 of the Penal Code
6. The particulars of the offence are that on the October 10, 2021, at Mukuyuni Shopping Centre in Kangundo Sub County within Machakos County stole one mobile phone make Neon Ray valued at Kshs 4,000/- .The property of Anthony Kyalo Somba
7. The matter came up in court on October 19, 2021, the Accused persons indicated that the language they understood was Kiswahili and they chose to represent themselves when informed of the right to legal representation and the right to seek legal aid.
8. The substance of the charges were stated by the Trial Court and the Accused persons pleaded as follows;

COUNT 1:

Accused 1 ; true

Accused 2 ; true

Accused 3 ; true

COUNT 2

Accused 1; true

COUNT 3

Accused 1; true

9. The Trial Court entered a plea of guilty for each accused on the respective charges.
10. The prosecutor stated that the facts were as follows;

' Facts are that on the October 10, 2021 Police from Kivaani Police Post received information that someone had bullets in his possession. Next day, Police in the company of area chief went to house of accused 1 and conducted a search. One live ammunition of 38 special and one spent cartridge and five mobile phones. Accused 1 was arrested. Upon interrogation he said accused 2 gave him the ammunition. Accused 1 led police to home of accused 2. Nothing was recovered. Accused 2 admitted he gave accused 1 the ammunition. He said he gave them 3 live bullets of 38 special and one cartridge of the same caliber. When accused 1 was further interrogated, accused 1 informed police he gave accused 3 in a barber shop which accused 3 operated. Accused 3 was arrested and was taken to Kivaani .DCI officers were called from Kangundo. They interrogated accused 3 who led them to his house in Mikoikoni village and search his house.

One live bullet of 38 special was recovered. Later when members of the public heard about the incident they went to report that accused 1 had stolen their phones. Two phones had purchase receipts. When police compared the Imei number with the phones recovered from accused 1, they tallied. XTigi S23 mini which I produce as exhibit 1 (a) and receipt exhibit 1 (b) . Neon ray exhibit 2(a) receipt exhibit 2(b), two live ammunition of 38 special exhibit



3(a) and(b), spent cartridge exhibit 4 of the same caliber. After investigation the three were charged with the offence before court respectively.'

11. The response on record was as follows;
ACCUSED 1 : Facts are correct
ACCUSED 2 : Facts are correct in respect of count 1
ACCUSED 3 : Facts are correct in respect of count 1
12. The Trial Court convicted each accused on their own plea of guilty.
13. the prosecutor informed the Trial Court that they were first offenders and in mitigation, accused 1 said he was remorseful, that it was not his wish and it was due to drunkenness.
14. Accused 2 stated that he was remorseful. He did not know if the ammunition was used or not, that it was children who were playing with the same at a plot he resides in. He contended that he took the ammunition from them and gave to accused 1 who is his friend. He indicated he was drunk then.
15. Accused 3 was remorseful for what happened.
16. The Trial Court noted the mitigation and found that Accused 2 is much older than accused 1 and he is the one said to have given the ammunition to accused 1 and 3. That accused 1 was also found in possession of mobile phones that were stolen giving the impression that the three were engaged in a crime syndicate or racket of some sort. The Trial Court indicated that the mitigation offered did not persuade exercise of its discretion to interfere with the penalty provided under law.
17. In Count 1, each Accused person was sentenced to serve seven (7) years imprisonment.
18. In count II and III, 1st Accused person was sentenced to serve 1 year imprisonment on each count.

The Appeal

19. Dissatisfied by the conviction and sentence, the 1st, 2nd and 3rd Appellants each filed a supplementary Memorandum of Appeal all filed on September 12, 2022 asking the Court to allow the Appeal, quash the conviction and set aside the sentence.
20. The grounds of the Appeal for the 1st Appellant are that;
 - i. The Trial Magistrate erred both point of law and fact by failing to warn him of the consequences of pleading guilty.
 - ii. The Trial Magistrate erred both point of law and fact by failing to note that the words 'true' were not adequate to constitute to a guilty plea.
 - iii. The Trial Magistrate erred in law by failing to concede that he plead guilty to the charge due to the unfamiliarity with the court procedures.
 - iv. The Trial Magistrate failed to put in a clear way whether the 1st Appellant was addressed individually concerning the language he understood. Record not recorded nearly as possible in his own words.
21. The Appeal was disposed of by way of written submissions.



1st, 2nd & 3rd Appellant Submissions

22. The submissions were filed on September 12, 2022 in which the 1st Appellant submitted that the trial court did not warn him that the outcome of pleading positive, he would be sentenced to 7 years. The 1st Appellant therefore contended that the plea was unequivocal and failure to warn him of the serious imprisonment deprived him a fair trial. Further, that his contention of the influence of alcohol was a negotiation of the plea of guilty.
23. It was submitted that the word ‘true’ was not adequate to constitute a plea of guilty and that the record does not show that the Appellant understood the facts and knew what he was pleading to. He contended that the words ‘true’ and ‘facts are correct’ without more words do not convince the court that the Appellant pleaded guilty to every element of it. Reliance was placed on the case of *Bolt vs Republic (2002) 1 KLR 814* and *Njuki vs Republic (1990) KLR334*.
24. On the issue of the language that the 1st Appellant understood, it was submitted that it is not clear whether the accused told the court which language they understood and the court ought to have recorded his answer nearly as possible in his own words. It was submitted that the elements of the offence were not complete if the sentence wasn’t brought to his attention. The 1st Appellant relied on the case of *Adan vs Republic (2973EA 445* and [*Njihia Wakianda vs Republic Criminal Appeal No 437 of 2020*](#).

Respondent Submissions

25. The Respondent filed submissions on June 29, 2022 in which counsel submitted that the facts were read to the Appellants at plea stage in accordance with Section 207 of the [*Criminal Procedure Code*](#) and they accepted facts as correct.
26. It was also submitted that the trial court cautioned the Appellant on the consequences of pleading guilty of the offence, especially count 1. Reliance was placed on the case of *Abdalla Mohammed vs Republic [2018] eKLR*.
27. It was submitted while relying on the case of *John Muendo M vs Republic [2013] eKLR* that the Trial Court followed the procedure of plea taking as required by law and the only issue was that the trial court failed to caution the Appellants before conviction and sentence. The court was invited to vacate the conviction and sentence and issue an order for retrial.

Determination

28. This Court considered the Trial Court record, the Appeal and the submission of the parties on record.
29. This being a first Appellate court, the duty is to evaluate afresh the evidence adduced before the trial court in order to arrive at an independent conclusion bearing in mind that it neither saw nor heard the witnesses testify. This was stated in the case of *Okeno vs Republic (1972) EA 32*
30. From the record the Court note that the Appellants were convicted on their own plea of guilty. 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.



31. In this case the Appeal can only be on the sentence. However, the Court of Appeal in *Alexander Lukoye Malika vs Republic [2015] eKLR* held that: -

' A Court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.'

32. The procedure for recording a plea of guilty is provided under Section 207 of the Criminal Procedure Code as follows: -

- (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 plea agreement;
- (2) If the accused person admits the truth of the charge otherwise than by 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.”

33. According to the Trial Court record, the above legal provision was fully complied with. This procedure was expounded in the case of Adan vs Republic [1973] EA 445 where the court outlined the following procedure for plea taking:-

- a. The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands.
- b. The accused's own words in reply should be correctly translated into English and carefully recorded.
- c. If the accused admits the charge, then the facts pertaining to the charge shall be read out to the accused, still in vernacular or in some other language that he understands.
- d. The accused shall then be asked to confirm to the court whether or not he admits the facts as given and in this regard, his full answer shall be recorded by the court.
- e. Where the facts as given are admitted, the court shall proceed to confirm the plea of guilty and to convict the accused.
- f. Where the accused's response to the facts suggests a change of plea, the same shall be recorded and a plea of not guilty entered.

34. In this case, the charge and all its ingredients were explained to the accused persons in Kiswahili, the language they told the court they understood. The Appellants contend that the words ought to have been recorded nearly as possible in their own words. According to the Adan case supra, the accused's own words in reply should be correctly translated into English and carefully recorded which was done



by the Trial court. The next action is to read the facts which was done by the prosecutor, to which they admitted. The court then proceeded to convict them on a plea of guilty.

35. In *John Muendo Musau –vs- Republic [2013] eKLR*, the Court of Appeal while reiterating the law on plea taking held that; -

' We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence. The procedure laid out in *Adan vs Republic* (supra) is also provided for under section 207 of the Criminal Procedure Code.'

36. In this instance, the 1st Appellant in mitigation says that it was not his wish to commit the offence it was because he was drunk while the 2nd Appellant contends that it was children who were playing with the same at a plot he resides in and he took the ammunition from them and gave accused one who is his friend. As far as proceedings were at this stage, the plea should have been changed to a plea of not guilty.

37. As regards the 3rd Appellant, there is no evidence that he said anything that could change the plea. The only issue would be whether he understood the consequences of pleading guilty.

38. The Respondent has conceded to the allegation by the Appellants that the Trial Court did not caution them before conviction and sentence. This would indeed be important as an accused person will fully understand what they are pleading to. The issue of unfamiliarity with court procedures is plausible, although the Appellants were given a chance to get legal representation they could not afford/access legal representation. Therefore, they chose to represent themselves. Courts have always held that extra caution is required with undefended/unrepresented accused persons and the duty of the Trial Court is to ensure that the plea of guilty is unequivocal and caution is heightened in serious cases and unrepresented Accused persons; as was stated in the case of *James Kbisu v Republic [2019] eKLR*.

39. The Respondent conceded the appeal and requested that the court should order for retrial. This issue was espoused by the Court of Appeal in the case of *Fatehali Manji Vs Republic [1966] EA 343*, where the court gave the following guidelines:-

' In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.' (See *Philip Kipngetich Terer –vs- Republic [2015] eKLR*).

40. Also, in the case of *Muiruri Vs R [2003] KLR 552*, the Court held that: -

' It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala Vs Republic* (Criminal Appeal No 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's.'



41. This Court finds that the plea was not equivocal and therefore the conviction and sentence are set aside and the matter is taken for retrial. This Court notes since the Appellants have already stayed in prison from October 19, 2021, should they be found guilty after trial, this period should be taken into consideration in sentencing to avoid occasioning the Appellants any injustice.
42. As regards count 2 and 3, it is not clear from the Trial Court record whether the 1st Appellant was/is to serve the term consecutively or concurrently.

Disposition

1. The conviction and sentence are set aside.
2. This Court directs that the Appellants be arraigned before another competent Court in Kangundo within 30 days from today.
3. In the meantime, the accused persons should be released and held at the nearest police station awaiting arraignment to Court.

It is so ordered.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

STEPHEN K. MUSAU

Sammy N. Mutua Appellants

PETER K. MUSEMBI

MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK COURT ASSISTANT(S)

