Macharia v Republic (Criminal Appeal E077 of 2022) [2025] KEHC 6427 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E077 OF 2022

E OMINDE, J

MAY 22, 2025

BETWEEN

JOHNSTONE MACHARIA KETERIE ALIAS DAVID MACHARIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the decision in Eldoret Chief Magistrate's Court Criminal Case No. E634 of 2022)

RULING

1. The Appellant, was convicted and sentenced on his own plea of guilty in Eldoret Chief Magistrate's Court Criminal Case No. E634 of 2022; for the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994.

2. The particulars of the offence were on 17/04/2022, at Ancilla village in Kesses Sub-County with Uasin Gishu County, jointly with others not before Court, was found trafficking in narcotic drugs namely cannabis (bhang) to wit 80 stems of cannabis plant weighing 7000 grams, one bale of dry cannabis weighing 2500 grans, loose dry cannabis weighing 1000 grams and 275 rolls weighing 275 grams, all with a street value of Kshs. 538,000/= in contravention of the said Act.

3. On 19/4/2022, the Appellant was arraigned in Court and the record shows that Interpretation: Kiswahili and that the substance of the charge(s) and every element thereof having been stated by the Court to the Appellant, in the languages that he/she understands who being asked whether he/she admits or denies the truth of the charge replies in Kiswahili " Si Kweli".

4. However, on 23/06/2022 when the matter came up for hearing, the Appellant informed the Court he wished to charge his plea. The record of the Court shows that the charge was read out to the Appellant in Kiswahili and the accused and the Appellant's reply was "Ni Kweli" and a plea of guilty was entered.

Similarly, after the facts were read to the Appellant by the Respondent, the record indicates that he replied: The facts are correct.

5. In mitigation, the Appellant stated that he looks after his family, he is a son to a single mother and he did not know that it was a serious offence. The Appellant prayed for leniency and added that he has a wife and two children.

6. The Court then proceeded to sentence the Appellant to serve 25 years' imprisonment and in addition he was fined Kshs. 1,616,250/=.

7. Aggrieved by the conviction and sentence, the Appellant by an Amended Petition of Appeal dated 25/07/2024 has approached this Court on 11 grounds of appeal as outlined below:

    1. The learned Magistrate erred in law and fact by failing to find that the plea of guilty entered by the Appellant was not unequivocal.

    2. The learned Magistrate erred in law and fact by failing to ensure that the Appellant fully understood the nature and consequences of his pleas, particularly given the gravity of the charges.

    3. The trial Court failed to exercise due caution before accepting the plea of guilty in view of the seriousness of the offence.

    4. The Court did not conduct a proper inquiry to ascertain that the plea was made voluntarily and with full knowledge of the consequences.

    5. The trial Court did not comply with the sentencing guidelines as required,

    6. No probation report was considered, which is crucial in assessing the appropriate sentence, especially for a first offender.

    7. The Court did not take into account that the Appellant was a first offender and failed to consider mitigating circumstances.

    8. That the sentence of 25 years' imprisonment and a fine of Kshs. 1,616,250.00 is excessive and disproportionate to the offence.

    9. The Court did not consider that there were no aggravating circumstances to justify such a harsh sentence.

    10. The sentence imposed is unlawful and not in line with the principles of fairness and justice.

    11. The learned Magistrate erred in law and fact by failing to find that the charges were defective and the ingredients of the offence thereof were not proved.

8. The Appellant urged the Court to allow the appeal and set aside the conviction and the sentence and to further order for a retrial.

9. At the hearing, the Appellant and the Respondent chose to prosecute the appeal by way of written submissions which they duly filed.

The Appellant's Submissions

10. Regarding the unequivocal plea of guilty, the Appellant's Counsel, Mr. Kamau Lagat, submitted that the Appellant's that the plea of guilty was not unequivocal. Counsel added that in the case of Adan v Republic [1973] EA 445, the Court of Appeal held that a plea of guilty must be entered unequivocally.

Counsel urged that trial Court must ensure that the accused understands the nature and consequences of the plea. Counsel contended that the record does not demonstrate that the Appellant was fully informed of the serious consequences of pleading guilty to such a grave offence.

11. In regard to lack of caution in accepting plea, Counsel cited the Court in the case of Boya v Republic [2015] eKLR, where the Court emphasized that trial Courts must exercise caution before accepting a guilty plea in serious offences. Counsel submitted that trial Court did not conduct a sufficient inquiry to confirm that the Appellant's plea was made voluntarily and with full understanding of the consequences. Counsel urged that given the gravity of the offence, the Court should have ensured that the Appellant was fully aware of the repercussions of his plea.

12. With regard to non-compliance with the Sentencing Guidelines, Counsel submitted that the Sentencing Policy Guidelines (2016) require that the Court considers a probation report, especially for first offenders, to aid in determining an appropriate sentence. Counsel contended that the trial Court failed to order for and consider a probation report and did not take into account the Appellant's status as a first offender. Counsel relied on the holding in the case of Opicho v Republic [2009] KLR, the Court of Appeal held that failure to consider a probation report for a first offender can result in a miscarriage of justice.

13. Regarding the sentence, Counsel submitted that the sentence imposed is manifestly excessive and harsh. Counsel relied on the case of Wanjema v Republic [1971] EA 493, where the Court held that an appellate Court can interfere with a sentence if it is excessive or based on wrong principles. Counsel urged that there were no aggravating circumstances warranting such a severe sentence. Counsel maintained that the Sentencing Policy Guidelines advocate for proportionate sentencing, considering the mitigating factors, including the offender's age, health, and lack of previous convictions.

The Respondent's Submissions

14. State Counsel, Mr. Thuo, submitted that Section 4(a) of the said act provides that any narcotic drugs psychotropic substance shall be guilty of an offence and is liable to a fine of Kshs.1 million or three times the market value of the narcotic drugs, whichever is greater .and in addition to, imprisonment for life.

15. Counsel submitted that the sentence meted on the Appellant was lenient and was exercised with exceptional judicial discretion in that the market value of the narcotic drug being Kshs. 538,750 multiplied by 3 tallies with the fine imposed of Kshs. 1,616,250/= and the sentence of 25 years was less than life imprisonment.

16. Counsel further submitted that 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 subordinate Court, except as to the extent or legality of the sentence. Counsel urged that this position was affirmed very recently on the 29/2/24 by RL Korir J sitting in the High Court at Bomet in Fredrick Kiplangat Mutai VRC APP E026/2022. Counsel maintained that the procedure for plea of guilty in the instant case was fully compliant with section 207 (1) and (2) of the criminal procedure code as the charges were read out in Swahili, language the Appellant understood very well, the facts read out and the response recorded in exactly the own words of the Appellant.

17. Counsel also relied on the Court of Appeal decision in Nelson Ambani Mbakaya vs Republic (2016| eKLR where the Court stated;

> "Sentencing of an accused person after conviction involves the exercise of discretion by the trial Court. That discretion must be exercised judiciously rather than capriciously depending on the circumstances of each case. What is challenged herein is essentially the

exercise of discretion by the trial Court and this Court must be slow to interfere with that exercise of discretion unless it is demonstrated that the trial Court: -

acted on the wrong principle:ignored material factstook into account irrelevant considerationson the whole sentence is manifestly excessive"

18. Counsel urged that the Appellant's plea was unequivocal and that the Appellant was fully conscious of the consequences of his pleading guilty since on the said day he was aware that 3 witnesses had been lined up to testify against him. Counsel submitted that there is no requirement for Courts to mandatorily order for probation a report which is a discretionary exercise and insist that the sentence was lenient and lawful.

19. In the end, Counsel urged the Court to uphold both the sentence and conviction.

Analysis and Determination

20. This being the first appeal Court, I am therefore required to re-evaluate and subject the evidence before trial Court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial Court. The Court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed by the EA Court of Appeal in Okeno vs. Republic (1972) EA 32 at page 36.

21. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate Courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence by providing 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 and legality of the sentence.

22. In the case of Olel v Republic [1989] KLR 444, it was held that: -

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

23. It worth noting that the bar only operates where the plea is unequivocal.

24. Article 50 (2)(b) of *the Constitution* states that: -

> " (2) 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."

25. Section 207 of the *Criminal Procedure Code* states as follows:

> "
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> " (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;
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> (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."

26. Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial Court. In the case of Adan vs R (1973) EA 445 445 where it was held:

> " 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.
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> The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
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> 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.
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> 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.
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> If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

27. Similarly, in the case of K N vs. Republic [2016] eKLR, it was held 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;
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> '...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.'
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> 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
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> 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. We think 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 present the exhibits that they would have relied on at the trial."

28. It is the practice in our Courts that where an accused is charged with a serious offence that may attract a long prison term the trial Court should inform the accused of the consequences of pleading guilty. In Elijah Njihia Wakianda –Vs- Republic Nakuru Criminal Appeal Number No. 437 of 2010 (2016) eKLR the Court of Appeal stated that: -

> " … 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.
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> … 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. In Simon Gitau Kinene –Vs- Republic [2016] eKLR where the accused faced a charge of trafficking in narcotic drugs, Joel Ngugi J. held the following on the issue: -

> " 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:
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> 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."

30. In Fidel Malecha Weluchi –Vs- Republic [2019] eKLR Odunga J. held that: -

> " In this case since the charge which the appellant faced carried a prima facie minimum sentence of twenty years, it is my view that in such serious offences where the sentences may either be long or indefinite, the Court must ensure not only that the accused understands the ingredients of the offence with which he is charged at all the stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty. That in my view is what is contemplated under Article 50(2) of *the Constitution* which provides for the right to a fair trial. Whereas the said Article prescribes certain ingredients of a fair trial, the Article employs the use of the word "includes" which means that what is prescribed there under is not exclusive but just inclusive since Article 19(3) of *the Constitution* provides that (3) The rights and fundamental freedoms in the Bill of Rights "do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter" while Article 20(3)(a) thereof

enjoins the Court to "develop the law to the extent that it does not give effect to a right or fundamental freedom".

31. Regarding a retrial. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In Obedi Kilonzo Kevevo –Vs- Republic (2015) eKLR the Court of Appeal held that: -

> " Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of Muiruri –Vs- Republic (2003) KLR 552, the Court considered a similar situation and held as follows, inter alia: -
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> "Generally, whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not. "In the criminal justice system, the law requires that the right of the appellant must be weighed against the victim's right. In this case the appellant has been in confinement for three (3) years. Balancing the two competing interests, we believe justice demands that the case be re-heard in the subordinate Court."

32. I have perused the pleadings of the lower Court the subject matter of the impugned conviction and sentence. I have considered the fact that 19th April 2022 when the appellant first appeared in court for plea, he pleaded not guilty to the charge. On 23rd May 2022, about 4 weeks later when he again appeared in court, he sought to change his plea to a plea of guilty and the court proceed to take the facts of the case to which the accused confirmed were correct and the court then convicted him on his own plea, recorded that he is a first offender, took his mitigation and then convicted and sentenced him.

33. The proceedings were conducted in Kiswahili which the accused understood. Indeed, I have noted that his responses to both pleas taken were recorded in Kiswahili. Having considered and addressed my mind to the lower court proceedings that led to the conviction and subsequent sentencing of the appellant as herein summarised as against the main ground of appeal that the plea was unequivocal, I am satisfied firstly that the Hon Magistrate did take the plea in compliance with the provisions of Section 207 of the CPC and also in conformity with the principles laid out in the case of Adan v Republic [1973] EA 445.

34. Further, in my considered opinion, the requirement that an Appellant ought to have been cautioned on the nature of the punishment upon conviction as can be gleaned from the authorities that I have herein cited is not a mandatory requirement, but is stated to be a good practice that courts are urged to adopt and apply, and particularly in situations where the circumstances clearly demand. In my well-considered opinion, such situations and/or circumstances are where the prescribed mandatory sentence is the death sentence and/or life imprisonment. In this case, Section 4(a) of the Narcotics and Psychotropic Substances (Control) *Act No. 4 of 1994*, Cap 245 Laws of Kenya under which the appellant was charged does not provide for a mandatory sentence of life imprisonment. It states that a person convicted under this Section is liable to imprisonment for life

35. Further, in the instant case, the circumstances under which the accused was convicted are also are different from those of an accused person who is appearing before a court for the very first time. This appellant was not appearing before the court for the first time. In his first appearance he did in fact deny

the charge and was remanded in custody. During this intervening period, he must have considered, mulled over, appraised himself of and weighed the consequences of changing plea and then decided to take his chances by pleading guilty.

36. Over and above that, he court cannot also not close its eyes to a matter that in my view has now gained the status of public notoriety and that is that in this day and age, there are paralegals who are based in almost every prison in this country who assist prisoners and/or remadees with their legal issues, sensitize them on their basic statutory and constitutional rights rights and often times are the ones who draft for them pleadings and submissions that are filed in court in the names of the accused persons

37. This therefore in my view is not the kind of person who it can be said had just appeared before a court, may be for the first time in his life, who then it can be presumed was so lost and confused and therefore vulnerable for this court to demand that even in the face of a plea that was clearly taken in conformity with the laid down principles and procedures of plea taking, because the Trial Magistrate failed to inform him of the nature of the punishment before taking plea, then the court should find that the said plea was unequivocal.

38. In light of my observations above, and in light of the provisions of Section 348 of the *Criminal Procedure Code* herein cited, I am not persuaded that this ground of appeal has sufficient merit to warrant the setting aside of the conviction of the Appellant on his own plea of Guilty. I am satisfied that the plea as taken was unequivocal and in this regard, I uphold the conviction of the appellant.

39. On the ground that the sentence is harsh and excessive, the sentence prescribed under the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 Cap 245 Laws of Kenya is as hereunder reproduced;

    4. Penalty for trafficking in narcotic drugs, etc.

        1. Any person who traffics in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—

            a. in respect of any narcotic drug or psychotropic substance—

                (i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;

                (ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;

40. The appellant herein was found trafficking in narcotic drugs namely cannabis (bhang) to wit 80 stems of cannabis plant weighing 7000 grams, one bale of dry cannabis weighing 2500 grans, loose dry cannabis weighing 1000 grams and 275 rolls weighing 275 grams, all with a street value of Kshs. 538,000/= in contravention of the said Act. As pointed out by the Counsel for the State in his submissions, the market value of the narcotic drug being Kshs. 538,750 multiplied by 3 tallies with the fine imposed of Kshs. 1,616,250/= and the sentence of 25 years was less than life imprisonment.

41. The court notes that under the provisions of Subsection (2), the Hon Magistrate also had the option of imposing a fine of Ks. 50,000,000/= as opposed to the one he imposed which he calculated at three times the market value of the narcotics that the appellant was arrested with which fine the came to the

Ks. 1,616, 250/- imposed. This is despite the fact that that subsection requires that the greater of the two fines be imposed. The Court also notes that the Hon Magistrate did not impose the life sentence but meted out a term sentence of 25 years. The sentence therefore was very well within the provisions of Section 4 and is therefore in no way illegal and/or unlawful.

Further, I have read the Hon Magistrate's reasoning in sentencing. He observed that given the size of the consignment recovered, it appeared that the appellant was a seasoned dealer in drugs that has ruined the lives of many young people. I see no justifiable reason to disagree with these sentiments. In contrast to the range of sentences that were available to the Hon Magistrate to mete out to the Court, I am not persuaded that the sentence meted out to the accused was also harsh and excessive and I therefore see no reason to disturb the same. I therefore uphold the sentence.

42. On the ground that the Hon Magistrate did not consider that the Appellant was a 1st Offender and therefore ought to have called for a Probation Officer's report for his consideration before sentencing the accused as provided in the Sentencing Policy Guidelines, again let me just point out that this requirement for a Probation Report is proffered as a good practice but is not a mandatory requirement such that if not effected then this renders a Trial Court's decision defective in substance.

43. It should further be noted that the recommendations made in a Probation Report do offer good insights and are a useful guide particularly in bringing to light the circumstances pertaining to an accused person, the circumstances surrounding the case at hand, the views of a victim, et al which are issues that the Court would wish to appraise itself of but is not in a position to avail to itself except that the relevant information be availed by way of a Probation Report. Despite being the case, it should be noted however that the recommendations and/or conclusions therein made are not binding to a court at all but only act as a guide in helping the Court make a more informed decision than it would have made if these circumstances had not been brought to its attention.

44. In this regard, I am guided by the decision of the Court of Appeal decision in Nelson Ambani Mbakaya vs Republic (2016| eKLR where the Court stated;

> "Sentencing of an accused person after conviction involves the exercise of discretion by the trial Court. That discretion must be exercised judiciously rather than capriciously depending on the circumstances of each case. What is challenged herein is essentially the exercise of discretion by the trial Court and this Court must be slow to interfere with that exercise of discretion unless it is demonstrated that the trial Court: -acted on the wrong principle:ignored material factstook into account irrelevant considerationson the whole sentence is manifestly excessive"

45. Being satisfied that the Hon Magistrate exercised his discretion properly and the same is in alignment with the principles set out in the above cited case, I find no merit on this ground of appeal together with its offshoots. All considered therefore, I find no merit in the Appeal against conviction and sentence and the same is dismissed in its entirety. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 22ND MAY 2025

E.OMINDE

JUDGE