Musoga v Republic (Criminal Appeal E036 of 2024) [2025] KEHC 10393 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10393 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E036 OF 2024

JN ONYIEGO, J

JULY 17, 2025

BETWEEN

DERRICK MUSOGA 'ALIAS' BRYAN MARWA 'ALIAS' IBRAHIM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from sentence arising from CM's Court at Garissa in Criminal Case Number No. E035 of 2023 delivered on 13.02.2023 by Hon. M. Kimani (S.R.M)

JUDGMENT

1. The appellant was charged with the following counts: Count I: Travelling to a terrorist designated country without passing through designated immigration exit points c/sec 30B (1) (a) and 30B (2) as read with section 30C (1) of the *Prevention of Terrorism Act*, 2012.

2. The particulars were that, on 18.12.2022 up to 10.01.1023, at border point III along Kenya Somalia border he was found having travelled to Somalia a terrorist designated country as per the Kenyan Gazette Legal Notice No. 200 of 09.10.2015 without passing through a designated immigration exit point contrary to section 30b (1) (a) and 30b (2) (a) as read with section 30c (1) of the *Prevention of Terrorism Act*.

3. Count II: Being unlawfully present in Kenya c/sec 53(1) (j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011.

4. The particulars were that on diverse dates between 16.12.2022 and 18.12.2022, at Mandera Township in Mandera East Sub – County, of Mandera County within the Republic of Kenya, being a Ugandan national, he was found being unlawfully present in Kenya without a valid visa, passport or permit authorizing him to stay in Kenya.

5. Count III: Exiting Kenya through a place not designated as a place of entry contrary to section 15(2) (a) as read with section 57 of the *Kenyan Citizenship and Immigration Regulations*, 2012 Legal Notice No. 64. Particulars were that, on 18.12.2022, at around 1000hrs, at Border point III along Kenya – Somali border in Mandera East within Mandera County, of the Republic of Kenya, he exited to Bulla Hawa Somalia through a place not designated as a point of exit.

6. Count IV: Failing to report departure to the Immigration Office contrary to Regulation 17 (1) (a) as read with section 57 of the *Kenya Citizenship and Immigration Regulations*, 2012 Legal Notice No. 64. The particulars being that, on 18.12.2022 at around 1000hrs at Border point III along Kenya – Somalia Border in Mandera East within Mandera County of the Republic of Kenya, he failed to report departure while crossing to Bulla – Hawa Somalia to the nearest Immigration Office as required by the law.

7. Count V: Giving false information to a person employed in a public service c/sec 129 (a) of the *Penal Code*. Particulars were that, on diverse dates, between 10th day of January to the 25th day of January 2022, at Mandera Police station in Mandera East Sub County within Mandera County he gave false information to police officers No. 109031 PC Elijah Nakeel, No. 108822 PC Ebonike Nyandega, and No. 108960 PC Livnack Mbithi that he was Bryan Wekesa Marwa a Kenya national from Kitale and Luhya by tribe while he was Derrick Musoga, a Ugandan national from Kayonga location Jinja district in order to conceal from investigations a fact he knew to be false.

8. The appellant pleaded guilty to Count 1, 2, 3 and 4 while in count 5, he pleaded not guilty. He was consequently convicted on his own plea of guilty in regards to Counts 1, 2,3 and 4. He was subsequently sentenced to 10 years' imprisonment for count I and 1year imprisonment for each of the counts 2,3 and 4. He was however discharged of count 5. The sentences were to run concurrently and upon completion, he be repatriated to Uganda his home country.

9. Aggrieved by both his conviction and sentence, he filed an undated petition of appeal challenging his sentence on the following grounds:

    i. That the learned magistrate erred in law and fact by convicting the appellant on a plea that was not unequivocal.

    ii. That the learned magistrate erred in law and fact by imposing an excessive sentence of 10 years' imprisonment under the obtaining circumstances.

10. The appeal was canvassed by way of written submissions.

11. The appellant filed submissions urging that he was dissatisfied with the sentence meted out by the trial court as the same was unjust and harsh. That he left his country Uganda to Kenya via Busia Border to Kitale and then Malindi enroute to Mandera via Garissa. It was his submission that while passing through these towns, he was not found with any terrorism related material hence the charges were clearly manufactured. He urged that this court be compassionate to him noting that he is an orphan who relies on his aged grandmother who also requires support from him. He decried the sentence meted out by the trial court as harsh and therefore urged this court to reconsider the same and substitute it with one that is lenient.

12. The respondent filed submissions dated 06.05.2025 urging this court not to interfere with the sentence meted out by the trial court that. That the same was not only legal but also lawful. He referred the

court to the holding by the Court of Appeal in the case of *Benard Kimani Gacheru v Republic* [2002] KECA 94 KLR where it was held that:

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already started is shown to exist".

13. Counsel urged that the appellant did not demonstrate to this court how the trial court acted in excess of its powers or acted on evidence that was perverted or that the sentence was harsh and manifestly excessive in the circumstances to warrant this court to interfere with its findings. It was urged that there were no exceptional extenuating circumstances to warrant exercise of discretion so as to tamper with the sentence by the trial court.

14. This is the first appellate court. As expected, I have to re-analyse and re-evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while considering that I neither saw nor heard any of the witnesses. See the celebrated case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as a foresaid.

15. I have considered the proceedings before the trial court, and submissions by the respective parties. The only issues that fall for determination are:

    i. Whether the plea of guilty was unequivocal.

    ii. Whether the sentence by the trial court was legal.

16. On whether the plea of guilty was unequivocal, Section 348 of the *Criminal Procedure Code* (CPC) stipulates as follows on appeal against convictions where the appellant is convicted on his or her own plea of guilty.

    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.

17. 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."

18. The principle that emerges from Section 348 of the CPC is that an appeal does not lie against a conviction where the appellant unequivocally pleads guilty to the charge.

19. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal explained the circumstances under which the court, on appeal, may interfere with a plea of guilty thus: -

> "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."

20. From the above, it follows that in as much as the law does not allow an accused person who has pleaded guilty and has been convicted on that plea, an appellate court can still proceed to examine the plea-taking process in order to satisfy itself on its legality and determine if the guilty plea was unequivocal. Where the plea is found to have been properly recorded and therefore unequivocal, the task of an appellate court will only be limited to determining the legality of sentence passed by the trial court.

21. Section 207 of the *Criminal Procedure Code* outlines how an accused is to be called upon to plead. The same stipulates 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 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. [See also *Adan v Republic* [1973] EA 445].

22. It is also trite that where an accused person pleads guilty to a charge, the trial court must satisfy itself that the plea is unequivocal, especially where the charge is serious in nature, by explaining every element of the charge and going an extra mile to explain, to the accused person, the likely consequences of the plea. In *Hando S/o Akunaay v Rex* (1951) 18 EACA 307 it was held that: -

> " ...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."
>
> [Also see the Court of Appeal in the case of *Elijah Njihia Wakianda v Republic* [2016] eKLR]

23. Having the above in mind, my perusal of the file herein reveals that the appellant was arraigned in court on 27.01.2023 for plea taking. The appellant upon being read the charges, pleaded guilty to Counts 1,2,3 and 4 while in Count 5, he stated that 'kweli, lakini natumia dawa'.

24. The court entered a plea of guilty in counts 1,2,3 and 4 while not guilty in count 5. In his mitigation, he sought for forgiveness by stating that he had since ceased using drugs and that he was an orphan who lived with his grandmother.

25. The trial magistrate deferred sentencing to 13.02.2023 and further ordered for a pre-sentencing report. On the very day, the record notes that the appellant still confirmed to the court by stating that, 'I still admit the charges'. He was thereafter convicted on his own plea of guilty.

26. Having regard to the above narration of the proceedings that were undertaken by the trial court during the plea taking process, I am satisfied that all the elements of the charge were read out and explained to the appellant who proceeded to plead guilty on two different occasions. From the foregoing, I

am satisfied that the appellant not only understood the charges facing him but also pleaded guilty unequivocally.

27. On whether the sentence by the trial court was proper, from the grounds of appeal and submissions filed by the appellant, it is clear that he is aggrieved by the 10-year imprisonment sentence meted out in reference to Count I. The said section states as follows:

30B. Training or instruction for purposes of terrorism

(1) A person who knowingly—

(a) attends training or receives instructions at any place, whether in Kenya or outside Kenya; or

(b) receives instruction or training on the use or handling of weapons, that is wholly or partly intended for purposes connected with the commission or preparation for the commission of terrorist acts, commits an offence and is liable on conviction to imprisonment for a term not less than ten years.

(2) For purposes of subsection (1), it is irrelevant whether—

(a) the person in fact receives the training; or

(b) the instruction is provided for particular acts of terrorism.

30C. Presumption of travelling to a country for purposes of being trained as a terrorist

(1) A person who travels to a country designated by the Cabinet Secretary to be a terrorist training country without passing through designated immigration entry or exit points shall be presumed to have travelled to that country to receive training in terrorism.

28. From the above, it is clear that the notable sentence of the offence under count 1 is that the convicted person is liable to imprisonment for a term not less than 10 years.

29. The above observation does not however mean that this court cannot interrogate the issue whether the sentence was manifestly excessive or harsh.

30. The Supreme Court decision in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR) guided that, in re-sentencing, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; and

(h) any other factor that the Court considers relevant.

31. Similarly, in the case of *[Daniel Kipkosgei Letting v Republic]* [2021] eKLR, the Court of Appeal pronounced itself as follows;

> "… we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to…"

32. As already stated, the appellant upon conviction, was liable to not less than a 10-years imprisonment. In my view, the court was fair in giving the minimum sentence available for this offence hence not harsh. To that extent, I do not find merit in the appeal. Accordingly, the appeal is dismissed. The appellant shall serve his sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JULY 2025.

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J. N. ONYIEGO

JUDGE.