



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muthecha v Republic (Criminal Appeal E012 of 2025)
[2025] KEHC 11493 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E012 OF 2025**

**J WAKIAGA, J
JULY 15, 2025**

BETWEEN

PETER THUTHO MUTHECHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal
Case No E4026 of 2024 of The Chief Magistrates Court an Makadara)*

JUDGMENT

The appellant was charged with the offence of failing to comply with terms and conditions for transport of special load as provided for under the permit contrary to sections 20 (c) of the [East African Community Vehicle load control \(special loads\) Act](#) as read with sections 21(1) of The [East African Community Vehicle Control Act](#) 2016.

1. The particulars of the offence were that on the 13th day of august 2024 at about 1930 hours along the Northern Bypass Road in Nairobi, being the driver of motor vehicle registration no KBE 926R/ZF 3389 make SHACMAN he drove the said motor vehicle on a road at about 1930 hours in contravention of an exemption permit which requires travel between 6.00AM -6.00PM.
2. The appellant pleaded guilty to the said charge and was sentenced to a fine of three thousand us dollars (\$3000) in default one year imprisonment
3. Being aggrieved by the said conviction and sentence, the appellant filed this appeal initially at the Criminal Registry at Milimani being *criminal appeal no E116 of 2024* and raised the following grounds of Appeal:
 - a. That the court erred in law and fact by failing to see that the plea of guilty by the appellant was not unequivocal as demanded by the law.



- b. The court erred by accepting the plea of guilty from the appellant despite the fact that said charge not being read to the appellant and the appellant allowed to confirm the veracity of the said facts leading to a violation of the appellants right to fair trial
 - c. The court erred in accepting the appellant plea of guilty without warning the same of the severity of the offence and this made the plea of not guilty not to be unequivocal
 - d. That the court erred by sentencing the appellant without affording him the right to mitigation as provided for under the criminal procedure code
 - e. That the court erred in law and fact by sentencing the appellant without mitigation leading to a harsh and excessive sentence.
3. Together with the petition of appeal, the appellant took out a Notice of Motion under certificate of urgency for bond pending appeal which was allowed by a ruling thereon dated 6th September 2024 granting the appellant bond of Kenya shillings one hundred and fifty thousand (kshs 150,000) plus one surety of similar amount or in the alternative cash bail of Kenya shillings fifty thousand.

Submissions

4. This appeal was thereafter transferred to this criminal registry and directions on admission were issued for its determination by way of submissions.
4. On behalf of the appellant, Mr Nyamanga submitted that whereas section 348 of *CPC* states that a person who has pleaded guilty is not allowed to appeal save on the severity of the sentence, the process violated the appellants constitutional right under Article 50 (2) of the *Constitution* which cannot be abrogated under Article 25(c).
6. It was contended that the appellant was not accorded chance to mitigate as per the Muruatetu decision and section 216 of the *CPC*. It was contended that since the court abrogated the appellant's constitutional right he should not be subjected to another trial.
7. On behalf of the respondent, Ms Kariuki submitted that section 348 of *CPC* limits the right of appeal where a plea of guilty is recorded as was stated in *Olel v R* [1989] eKLR but she conceded that the prosecution in this matter did not read the fact but stated that the facts were per the charge sheet and that the appellant was not informed of the facts he was pleading to.
8. On mitigation it was submitted that the court indicates that mitigation was nil and that it did not mean that there was no mitigation. It was contended that if the appellant felt that his rights were abrogated, then the right procedure was for him to file a petition. It was submitted that the matter ought to be taken back to the trial court for the sole fact that the facts were not read.

Determination

9. In this matter the prosecution conceded that the facts were not read to the appellant and therefore the plea of guilty was not unequivocal and as such the appeal should be allowed. The only point of departure between the appellant and the respondent is what to do with the appellant if the court allows the appeal?
10. The court of appeal in *Alexander Lukoya Maliku* [2015] eKLR stated that an appellant court may only interfere with the guilty plea if the plea taking is ambiguous imperfect unfinished or that that the court erred in treating it as a plea of guilty.



11. The proper procedure of recording plea of guilty was stated in the case of *Adan v Republic* [1973] EA 445 as follows;

“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.”

12. This case was followed by *Kariuki v Republic* (1984) 809 where their Lordships reiterated those steps as follows;

- a. the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;
- b. he should then record accused’s own words and if they are an admission, a plea of guilty should be recorded;
- c. the prosecution may 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;
- d. if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.

13. From the record of the proceedings herein it is clear that the trial court did not follow this procedure as the record shows that the court used a template which he ticked and whereas the court takes judicial notice that in a busy station like Makadara, the court may adopt the use of forms and templates, where an accused person plead guilty to the charge, the court ought to adopt the procedure stated herein above.

14. I therefore find merit on the appeal herein which I hereby allow, set a side the conviction and quash the sentence herein.

15. Now that the appeal has been allowed, the next issue is what order the court ought to issue noting that the appeal is allowed on the ground that the trial court failed to follow the procedure of recording plea



of guilty? In *Mwangi v Republic* [1983] eKLR 522, the Court of Appeal restated the principles which must be taken into account before making an order for retrial. At page 523, it was held inter alia;

“That a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potential admissible evidence a conviction might result’.

In *Rubi v Republic* [1985] KLR 373, this court at page 375 expressly stated that before ordering for a retrial, the court must consider whether it is fair and just to do so.

16. In this cause, the appeal is allowed due to a procedural lapse on the part of the trial court and it is therefore only just a prudent that the matter proceed for fresh trial, wherein the prosecution shall be provided with an opportunity of proving the guilty of the appellant herein.
17. I therefore direct that the appellant be tried a fresh before another magistrate rather than Hon. G. Mutiso and it is ordered.

DATED SIGNED AND DELIVERED THIS 15th DAY OF JULY 2025

J. WAKIAGA

JUDGE

In the presence of

