**Mbira v Republic (Criminal Appeal E051 of 2023)**
**[2025] KEHC 10329 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10329 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAMIRA**

**CRIMINAL APPEAL E051 OF 2023**

**WA OKWANY, J**

**JULY 3, 2025**

**BETWEEN**

**JOSHUA TUKA MBIRA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment and Sentence in the Chief Magistrate's Court at Nyamira, CMCCR No. E210 of 2023 delivered by Hon. C.W. Waswa, Senior Resident Magistrate on 15th March 2023)***

## JUDGMENT

1. The Appellant herein was convicted, on his own plea of guilty, for the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. The particulars of the charge were that on the night of 10th and 11th February 2023 at Eburi village, Nyakenimo Sub-Location, Bokeira location in Nyamira North Sub-County within Nyamira county, jointly with others not before the court unlawfully killed Judy Moraa Nyambane.

2. He was, upon conviction, sentenced to serve thirty (30) years imprisonment.

3. Aggrieved by the said decision, the Appellant filed the present Appeal challenging both the conviction and sentence. He listed the following grounds of appeal in his Petition of Appeal: -

    1. That the trial magistrate erred in both law and fact when convicting the accused person while relying on the facts adduced in court which facts were not proved to the required standards of law given that the accused pleaded guilty to the alleged charges.

    2. That the learned trial magistrate did not warn the Appellant on the consequences of pleading guilty.

3. That the learned trial magistrate faulted both in law and facts by failing to enquire the reason as to why the Appellant pleaded guilty.

4. That the learned trial magistrate equally erred in both law and facts without ordering for a mental assessment before passing the judgment.

5. That the judgment of the court was a nullity as the trial proceeded without the court warning the Appellant that he had a right to a fair and impartial trial as enshrined in *the Constitution* as per Article 50 (2) (h) i.e. the right to be presented by an advocate.

6. That the Appellant was not accorded a fair and impartial trial as guaranteed by Article 25 (c) of *the Constitution* as the trial commenced without the court having received a report as to his mental fitness to stand trial to prove to the court that his plea of guilty was voluntary.

7. That the sentence awarded was highly excessive and punitive.

4. The Appeal was admitted for hearing on 23rd July 2024 when parties took directions to canvass it by way of written submissions which I have considered.

5. The duty of a first appellate court was discussed in the case of David Njuguna Wairimu vs. Republic [2010] eKLR where the Court of Appeal held that: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

6. I have considered the grounds of this appeal and the submissions. The main issues for my determination are as follows: -

i. Whether the plea of guilty was unequivocal.

ii. Whether the sentence passed by the trial court was harsh and excessive.

**Analysis and Determination**

**i. Whether the Plea of Guilty was Unequivocal**

7. It is trite that no appeal can be allowed where a party pleads guilty to an offence unless such appeal is only on sentence. Section 348 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) provides that: -

SUBPARA 348.

No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a sub-ordinate court except as to the extent or legality of the sentence.

8. It is also trite that an appellate court can only interfere with a plea of guilty, on appeal, where an appellant can establish that the plea taken was ambiguous, imperfect, unfinished or where the trial court erred in treating it as a plea of guilty. (See Alexander Lukoya Maliku vs. Republic [2015] eKLR).

9. The procedure for recording a plea is provided for under Section 207 (1) (2) and (3) of the *Criminal Procedure Code* as follows: -

207.(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.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

10. In the case of Adan vs. Republic [1973] EA 445 the court outlined the steps that ought to be taken by the court when recording or taking pleas as follows:-

> " (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 facts relevant to sentence together with the accused's reply should be recorded."

11. I have considered the manner in which the plea was recorded by the trial court and I note that it was as follows: -

> " 17/2/2023
>
> Magistrate: Hon. C.W. Waswa
>
> Prosecutor/State Counsel
>
> Court Assistant – Brenda
>
> Accused present
>
> English/Kiswahili/Ekegusii

....The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charges) replies – Ekegusii

Accused – It is true

Court – Have you understood the charge?

Accused – Yes I killed my wife.

Court – Mention on 1/3/2023

1/3/2023

.....

Prosecutor: (Facts are read)

Accused – Facts are true

Court – A plea of guilty is entered

Prosecutor – No records

Accused Mitigation – I have nothing to say

Court – A pre-sentence report to be filed-----"

12. From the above extract of the trial court's proceedings, I find that the plea, as recorded by the trial court, was not proper and was not unequivocal for the following reasons: -

13. Firstly, the trial court merely indicated the three languages that were used in court during the proceedings but did not state which language the accused understood before taking plea. My humble view is that it cannot be assumed that he understood Ekegusii and elected it as his language of preference during the proceedings. I find that it was incumbent upon the trial court to clearly indicate the language that the Appellant understood in the proceedings.

14. Secondly, I note that the trial court did not take any measures to ensure that the Appellant understood the consequences of a guilty plea in view of the seriousness of the charge more so considering that the Appellant was not represented by legal counsel. In the cases of Paul Matungu v Republic [2006] eKLR and Boit vs. Republic [2002] KLR 815 it was held that a court that accepts a plea of guilty must warn the accused person of the consequences of a plea of guilty and that the accused must be made to understand what he is pleading guilty to.

15. I further note that there was also no indication that the trial court explained, to the Appellant, his rights to legal counsel. In Abdallah Mohammed vs. Republic [2018] eKLR Korir J. (as he then was) expressed himself as hereunder: -

> " In a case where an accused person who is undefended pleads guilty to a charge, the court has a duty to ensure that the plea is unequivocal. As pointed out, the Appellant had no legal representation and the trial court ought to have taken steps to ensure that the Appellant understood every element of the charge and the facts read out to him. He also ought to have been warned, and that warning captured on record, that the offence he was about to plead to carried a prison sentence of not less than fifteen years. In my view, extra caution includes the question as to whether or not the facts as read out are true and whether the accused person would wish to make any comment. In fact an accused person should be asked what he means by saying that the charge read to him is true. His explanation should then be captured on

the record so as to form part of his plea. From the record, it is apparent that the Appellant was just but a lad aged 21 years and the trial court ought to have gone the extra mile to ensure he understood the consequences of entering a plea of guilty.

16. The importance of the need for the court to be cautious when accepting a plea of guilty from an undefended accused person was emphasized by Joel Ngugi, J (as he then was) in Simon Gitau Kinene vs. Republic [2016] eKLR when he stated that: -

> " 19. 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:
>
> 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 behooved the Court to warn the Accused Person of the consequences of a guilty plea.'"

17. I therefore find that the manner in which the charge was read out to the appellant was not in strict compliance with Section 207(1) and (2) of the *Criminal Procedure Code*. In the circumstances of this case, I find that the appellant's plea cannot be said to have been unequivocal.

18. Moreover, I have already noted that the Court did not inform the Appellant of the seriousness of the charge that he was facing and the sentence that he was likely to face in the event of a conviction.

19. I also note that the trial court merely employed and narrated the standard template of recording pleas and was not diligent enough to make reference to the substance of the specific charge with respect to this particular offence. This was demonstrated by the fact that the court recorded the word "the charge(s)" as indicated in the trial record and not "the charge" which was the appropriate position in this case where the Appellant was only facing one charge. This ambiguity and use of standard templates in recording pleas cannot be overlooked in a case where an accused pleads guilty as it goes against the principle of a plea being unambiguous. I am guided by the decision in the case of Elijah Njihia Wakianda vs. Republic [2016] eKLR where the Court of Appeal held thus: -

> " Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the offence charged. He is also at liberty to testify on his own behalf and call

evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of plea of guilty present a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same was entered consciously, freely and in clear and unambiguous terms.

....With respect, we find this disturbing. It seems to us that this part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and rather odd "in a language he understands" when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea if one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring that a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of offence are not complete if the sentence, especially if it is severe and a mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his viral 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. 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. (Emphasis mine)

20. Guided by the reasoning in the above cited case, I find that the safeguards, procedure and requirements of recording a guilty plea were not adhered to in this case and as such the plea of guilty was not unequivocal. In the premises, I find that the conviction was not safe and I hereby quash it.

21. Having found that the guilty plea was not unequivocal, I find that the next issue for my consideration is the course available to the Court in such circumstances. In other words, should the Court order a retrial? The Court of Appeal offered the following guidance in the case of Ahmed Sumar vs. R (1964) EALR 483: -

> " ...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes 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;....."

22. Similarly, in Samuel Wahini Ngugi vs. R [2012] eKLR the Court of Appeal had the following to say : -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows: -
>
> > 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

23. In Muiruri vs. Republic (2003), KLR, 552, Mwangi vs. Republic (1983) KLR 522 and Fatehali Maji vs. Republic (1966) EA, 343 the view expressed was that: -

> " Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

24. In the case of Issa Abdi Mohammed vs. Republic [2006] eKLR Makhandia J. (as he then was) opined that: -

> " An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

25. In the instant case, the Appellant first appeared in court on 17th February 2023 when he pleaded guilty to the charge of manslaughter. He remained in custody as he awaited the pre-sentence report and was thereafter sentenced on 15th March 2023. This means that the Appellant has been in custody for over 2 years. The Prosecution did not submit on the issue of a retrial and I find that owing to the period that the Appellant has already spent in custody, it will not be just to order for a retrial.

26. Consequently, I set aside the 30 years imprisonment sentence and direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

27. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY 2025.**

**W. A. OKWANY**

**JUDGE**