Amolo v Rebuplic (Criminal Appeal E010 of 2025)
[2025] KEHC 12679 (KLR) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12679 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E010 OF 2025

FN MUCHEMI, J

SEPTEMBER 10, 2025

BETWEEN

MICHAEL OMONGE AMOLO ..... APPELLANT

AND

REBUPLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Ruiru by Honourable C. A. Okello (SPM), in Criminal Case No. E332 of 2025 on 24th February 2025)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Principal Magistrate Ruiru where he was charged and convicted of the offence of having suspected stolen property contrary to Section 323 of the Penal Code. He was convicted on his own plea of guilt and sentenced to 12 months imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 7 grounds summarised as follows:-

    a. The learned trial magistrate erred in law and in conducting virtual proceedings against the appellant during plea taking without first ascertaining whether the device he used at Ruiru Police Station permitted smooth conduct of the proceedings and whether he was visible and audible.

    b. The learned trial magistrate erred both in law and in fact in failing to establish whether the appellant understood the charges read to him before entering a plea of guilty.

    c. The learned trial magistrate erred both in law and in fact in holding that the appellant had pleaded guilty whereas he had not.

d. The learned trial magistrate erred both in law and in fact in sentencing the appellant without ascertaining whether the plea of guilty was unequivocal or not.

e. The learned magistrate erred both in law and in fact in sentencing the appellant to one year imprisonment without the option of a fine and without giving reasons thereto.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that Section 323 of the Penal Code provides for a special procedure that must be complied with before plea is entered. The trial court must seek an explanation from the accused person how the goods came to his possession before entering a plea of guilty. Relying on the cases of Murigi vs Republic [1983] eKLR and Stephen Chege vs Republic [1983] eKLR, the appellant argues that an accused commits no offence until he fails to give an account to the satisfaction of the court of how he came by the suspected goods. The appellant submits that the trial court did not seek an explanation from him as to how the goods came into his possession.

5. The appellant submits that the trial court had a duty to ascertain whether the plea was unequivocal or not pursuant to Section 323 of the Penal Code. Further, it is not enough that there is a bar under Section 348 of the Criminal Procedure Code. To support his contentions, the appellant relies on the case of Anthony Muthonga Munene vs Republic [2022] eKLR.

6. The appellant submits that in so far as Section 323 of the Penal Code mandatorily requires an accused to justify possession of goods before plea is entered, then the section unduly shifts the burden to an accused hence the section is unconstitutional.

7. The appellant relies on Article 50(1) of *the Constitution* and the cases of Elisha Kare Busienei & 3 Others vs Japhet Kipyego Chepkwony & 3 Others [2020] eKLR; Nathan Ngumabo Kata vs Attorney General & Another [2022] eKLR; Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR and JMK vs MWM & Another [2015] eKLR and submits that failure to call for an explanation before entering a plea of guilty amounted to condemning him unheard.

8. Relying on Section 36 of the Penal Code, the appellant submits that the learned magistrate sentenced him to 12 months imprisonment without an option of a fine and did not give any reason why she did not accord him an option for a fine. The appellant argues that the learned magistrate ought to have taken into consideration the fact that he was a first offender and ought to have given him the option of a fine.

The Respondent's Submissions

9. The respondent submits that the appellant was charged with the offence of having suspected stolen property contrary to Section 323 of the Penal Code. The charge was read out to the appellant in Kiswahili to which he stated was true and the court entered a plea of guilty. The respondent submits that she read the facts to which the appellant stated that it is true. The court thus convicted the appellant on how own plea of guilty. The respondent thereafter indicated that the appellant had no previous criminal records and he did not say anything during mitigation. The court then sentenced him to the minimum sentence, 12 months imprisonment.

10. The respondent refers to Section 348 of the Criminal Procedure Code and the case of Olel vs Republic [1989] KLR 444 and states that an accused person cannot appeal on his own plea of guilty but can only appeal on the legality of the sentence.

11. Relying on Section 207(1) and (2) of the Criminal Procedure Code and the case of Adan vs Republic [1973] EA 445, the respondent submits that the plea of guilty by the appellant was equivocal as demonstrated by the trial proceedings. The appellant further relies on Section 323 of the Penal Code and Section 36 of the Penal Code and submits that the appellant was given the most lenient sentence under the law and thus the sentence is not harsh nor is it excessive.

Issues for determination

12. The appellant has cited 7 grounds of appeal which can be compressed into two main issues:-

    a. Whether the plea was unequivocal.

    b. Whether the sentence meted out against the appellant is justified.

The Law

13. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " 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.

14. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the plea was equivocal.

15. The appellant faults the trial court in conducting virtual proceedings during plea taking without first ascertaining that the device he used permitted smooth conduct of the proceedings and whether he was visible or not. The Court administrator Ruiru Law Courts wrote to the Directorate of ICT Nairobi, to retrieve the recordings of the virtual proceedings on the material day, namely 24th February 2025. The Directorate of ICT advised that on the material day, the trial court presided by Hon. C.A. Okello did not handle pleas virtually. Thus, from the record, it is evident that the proceedings were conducted physically in court and not virtually as alleged by the appellant.

16. The respondent argues that the appellant cannot appeal his conviction as he was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Code provides:-

> 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.

17. In Alexander Lukoye Malika vs Republic [2015] eKLR, the Court of Appeal identified the situations in which a conviction based on a plea of guilty can be interfered as follows:-

> 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.

18. The manner of recording plea is provided for in Section 207(1) and (2) of the Criminal Procedure Code which provides:-

> 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;
>
> 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.

19. The Court of Appeal in Adan vs republic [1973] EA 445, laid down the steps which should be followed in taking plea as follows:-

a. The charge and all essential ingredients of the offence are explained to the accused in his language or in a language he understands.

b. Where the accused's own words in response to the charge are recorded and amount to admission, leading to a recording of a plea of guilty.

c. The facts are stated by the prosecutor and the accused is given an opportunity to dispute or explain the facts or to add any relevant facts.

d. If the accused does not agree with the facts or raises any question of his guilt his reply is recorded and change of plea entered.

e. If there is no change of plea a conviction is recorded and a statement of the facts relevant to sentence together with the accused's reply are recorded.

20. The court record in the instant matter shows that the court used Kiswahili language while taking plea. The charge was read out to the appellant and he replied: - "It is true"

21. The court prosecutor then proceeded to give the facts of the case as follows:-

> " On 23/2/2025, officer from Gatongono Police Station were in patrol. They were informed that the accused had kept stolen goods in his house. They went to his work place. He directed them to his house. They found TV 55' woofer, 13kg cooking gas, make Mpishi. The accused upon interrogation could not explain where he sourced the said goods or show that the goods belonged to him. He was then arrested and later charged with the offence".

22. The admitted the facts of the case by saying: – "It is true".

23. The trial court then convicted the appellant on his own plea of guilty. The appellant did not give any mitigation and he was sentenced to serve 12 months imprisonment.

24. From the above summary of the proceedings during plea, there is no doubt that plea was taken in accordance with the guidelines set out in the case of Aden vs R (Supra). For the court to have the charge read and interpreted in Kiswahili, the court had asked the appellant to choose a language if his choice. As such, the plea was taken in a language understood by the appellant and in my view, the assertion by appellant that he did not understand the charge that he was facing has not been established. In my considered view, the plea taking by the trial court was unequivocal.

25. The appellant alleges that the learned magistrate did not follow the procedure set out in Section 323 of the Penal Code.

26. Section 323 of the Penal Code provides:-

> Any person who has been detained as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

27. In Kimanzi vs R [1983] KLR 325, 326 the court observed as follows:-

> In the case of Koech vs Republic [1968] EA at page 109 the whole procedure of putting a charge under Section 323 of the Penal Code to the accused has been clearly outlined by the Chief Justice Sir John Ainley. The point which he makes very clear under Section 323 of the Penal Code is that even though the accused admits all the assertions which are set out in the charge and assuming for the time being that the charge is properly drawn he must still be asked whether he has any explanation for his possession of the property. The reason for this is because he commits no offence until he fails to give an account to the satisfaction of the Court of how he came by this suspected stolen property. If the court has failed to ask him to give such explanation he cannot be convicted of the offence.

28. Similarly in Chege vs R [1983] KLR 425, the learned Judge emphasized that:-

> Under Section 323 of the Penal Code, it is not sufficient that the charged person was merely in possession or was conveying in any manner anything which might reasonably be suspected of having been stolen or unlawfully obtained. He would in addition be guilty if in addition, he admits to these facts and fails to give an account to the satisfaction of the court of how he came by the property so suspected. (Koech vs Republic [1968] EA 109).

29. In Kipsaina vs R [1975] KLR 253, the Court of Appeal for East Africa (Law Ag., P. Musoke J.A and Trevelyan J.) held that:-

> A charge of receiving stolen property is not established if the explanation given by the accused is reasonable and might possibly be true if the court is not convinced that it is true.

30. From the above it is evident that the trial court is required to consider the explanation by the accused and if the explanation is reasonable, acquit the accused even though the court doubts its truthfulness as it is the duty of the prosecution at all times to prove the guilt of the accused beyond reasonable doubt.

31. On perusal of the record, it appears that the trial magistrate did not ask the appellant to give an explanation of how he came into possession of the stolen goods as explained in the case of Kimanzi vs Republic (supra), However, despite the holding in that case, it is not a requirement of the law that the magistrate should ask an accused person for an explanation on possession of the suspected goods. The accused who admits the offence on his plea of guilty has an obligation to explain the source of the property. As was held in the case of Chege vs Republic (1993) KLR 425 the accused has the obligation to explain. It was held –

> "..... He would in addition be guilty if, in addition, he admits to those facts and fails to give an account to the satisfaction of the court of how he came by the property so suspected."

The same holding was made by the court in the case of Koech vs Republic (1968) E.A. 109.

32. By admitting the facts of the case whereas the prosecution stated that "the police were informed that the accused had kept stolen property in his house" which they proceeded to recover in the presence of the accused, this was a confirmation that the accused admitted the property was stolen. Had it not been stolen property, the appellant would not have admitted the facts of the case as presented by the court.

33. I came to the conclusion that the magistrate did not err by failing to ask the accused person to give an explanation of how he came by the property.

34. I find no merit in this appeal and I dismiss it accordingly.

35. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE