



REPUBLIC OF KENYA



**Musyoki v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 138 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E004 OF 2023
FR OLEL, J
JANUARY 17, 2024**

BETWEEN

PATRICK MUEMA MUSYOKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being An Appeal Arising From The Conviction And Sentence Of C.N. Ondieki
(P.M), In Machakos CR Case No. E07 Of 2023 Delivered On 30Th January 2023)*

JUDGMENT

1. The Appellant herein Patrick Muema was on 3rd January 2023 charged with the offence the offence of Cultivating of Narcotic drugs contrary to section 6 as read with section 6(a) *Narcotic's and Psychotropic substances control Act* No 4 of 2022(rectified by hand to read 1994}.The particulars of the offence were that on the 30th day of December 2022 at around 1207 hrs at Mulaani village, Kalama location in Kalama sub county within Machakos county, he was found in cultivating of approximately 400 plants of bhang(rectified by hand to read Cannabis) of street value Ksh 600,000/= which was not for medicinal preparation.
2. The appellant took plea on 03rd January 2023 and stated he understood Kiswahili language. The charge and every element thereof was read out to him, and he did plead guilty by stating, "Ni Kweli." The prosecution was not ready to present the facts of the case as they were waiting for a report from the government analyst. Eventually on 24th January 2023 the facts were read out to the appellant. Before the facts were read out the court asked the appellant which language he understood and he did intimate that he preferred the proceeding conducted in Kiswahili language. The facts were read out to him and the 400 cannabis plants and government analyst report were produced as Exhibits. Upon being asked if indeed the facts as presented were true, the appellant did reply that, "Maelezo ni ya Ukweli".



3. The court considered the appellants mitigation and proceeded to sentence him to pay a fine of Kenya shillings One Million, Eight hundred thousand { Kshs 1,800,000/= } being three times the value of the market value of the 400 plants of cannabis or in default to serve a term of imprisonment of 5 years. The court further directed that the said 400 plants of cannabis be destroyed under the supervision of the court administrator and a certificate of destruction be filed.
4. The appellant being dissatisfied as against the whole judgment, conviction and sentence passed did file his Petition of Appeal and raised the following grounds of Appeal namely;
 - a. That the learned trial Magistrate erred and misdirected himself in convicting the Accused of a charge which was incurably defective as he was charged under the wrong law and wrong provision of the Narcotics and Psychotropic substance control Act No 4 of 2022 instead of *Narcotic's and Psychotropic substances control Act* No 4 of 1994.
 - b. The sentence of a fine of Kshs 1,800,000/= (One million, Eight hundred thousand) and in default to serve a term of imprisonment of 5 years imposed against the accused was manifestly excessive.
 - c. That the learned Magistrate erred in failing to appreciate that section 6 and 6(a) of the *Narcotic Drugs And Psychotropic Substance Control Act* does not provide a mandatory sentence as under section 6(a) of the Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated and the court erred in holding that the sentence was mandatory and failed to exercise his discretion by addressing the appellants mitigating circumstances.
 - d. That the learned Magistrate erred in failing to hold that the accused was coerced by the investigating officer to plead guilty to the charges he did not understand.
 - e. The trial court erred when it failed to indicate the language used when facts were read out to the accused and accordingly the court failed to indicate the language in which the plea of guilt was taken and the plea cannot be safely accepted as unequivocal.
 - f. The trial court erred when he failed to warn the appellant on the consequence of the plea of guilt despite that, the sentence imposed was a long one.
 - g. The trial court erred when it failed to read to the accused the charge, particulars and the facts in his language or in a language he understands. In particular the facts were read out to the accused but it was not indicated in which language this was done and the manner in which the plea was recorded did not strictly comply with section 207(1) and (2) of the *Criminal Procedure Code*.
 - h. The learned magistrate erred in law and in fact when he failed to find that the facts alleged by the prosecution was not accepted by the accused as accurate and were not sufficient in law to constitute and disclose the offence charged as the proof of which must be beyond reasonable doubt as the prosecution did not present the exhibits that is government report as to whether the plants were cannabis (*bangi*) that they would have relied on at the trial.
 - i. The learned Magistrate erred in the manner in which the proceedings were conducted and violated the appellants rights to fair trial and the plea was in those circumstances not unequivocal as the court did not ensure not only the accused understands the ingredients of the offence in which he was charged at all stages of the plea taking but that he also understands the sentence he faces where he opts to plead guilty in that court did not warn the Appellant of the sentence he may face If he admits the offence.



- j. The learned Magistrate erred in law in ordering that the exhibits namely 400 plants of cannabis be destroyed forthwith under the supervision of the court administrator and it would be unjust to subject the appellant to the process of re hearing since there are no Exhibits.
- k. That the learned Magistrate erred in law and in fact in failing to find that the evidence adduced during facts reading did not support the charge read to the accused.
- l. That the learned Magistrate erred in issuing a very high sentence of five (5) years imprisonment and option of Kshs 1,800,000 (One Million, Eight hundred thousand) fine and failed to observe the issue of Minimum mandatory sentence.
- m. That the learned Magistrate erred in law and in fact in failing to find that the mandatory sentence provided in the statutes is no longer binding on the court as was held in the Supreme Court in Francis Muruatetu case and such he never considered the mitigation of the Appellant.

Appellants Submissions

5. The appellant filed length submissions dated 31st May 2023 in support of his appeal. With respect to ground 1 of his appeal, he did submit that the charge sheet was incurable defective as he was charged under the wrong provisions of law i.e *Narcotics and Psychotropic substance control Act* No 4 of 2022 Instead of Narcotics Drugs and psychotropic substance control Act No 4 of 1994. The charge sheet indicated that he had been charged under section 6 & 6(a) of the *Narcotics and Psychotropic Substance Control Act* No 4 of 2022, which did not exist in law. The appellant should have been charged under *Narcotics Drugs and Psychotropic Substance Control Act* No 4 of 1994 and at no point did the prosecution counsel apply to amend the charge sheet. That was a fatal defect which rendered the entire proceedings a nullity.
6. With respect to Grounds 5, 6, & 7 of the petition of Appeal, the appellant did submit that the trial magistrate erred when he failed to comply with provisions of Section 207(1) & (2) of the *Criminal Procedure Code*. The court erred when it failed to read to the accused person the charge, particulars and the facts in a language the appellant understood nor did the court record the same as is mandatorily required. The plea therefore could not be safely accepted as unequivocal.
7. The trial court further erred when it failed to warn the appellant of the consequences of pleading guilty given the fact that the sentence likely to be imposed would be punitive /a long sentence. Article 50(2) of the *constitution* provided an unalienable right to fair trial, which included the sentencing process. Nascent jurisprudence had emphasized that an accused person had a right to be warned of the consequence of pleading guilty in instances where the punishment was likely to be severe and failure of the court to do so, rendered the trial process a nullity. Reliance was placed in *Hussein Ali vs Republic* (2018) eKLR, *Paul Matunga vs Republic* (2006) eKLR & *Bernard Injendi vs Republic* (2017) eKLR.
8. The appellant did further submit in support of grounds 2,3,12 and 13 of the petition of Appeal, that the learned Magistrate erred in failing to appreciate that Section 6 and 6(a) of the *Narcotic Drugs and Psychotropic Substance (control) Act* did not provide for mandatory sentencing and therefore the trial magistrate ought to have exercised discretion when imposing the sentence passed. The aforesaid section had provided for maximum sentence provided and that ought to be construed to mean that a lesser sentence could be imposed. The trial magistrate further erred in believing the prosecution assertion that the street value of the cannabis presented was Kshs 600,000/= as alleged in the charge sheet, yet there was no valuation of the same as required under section 86 of the Narcotic Drugs & psychotropic substance (control) Act. Reliance was placed *Caroline Auma Majabu vs republic* (2014) & *Joseph Mwangi Wanjau vs Republic* (2017) eKLR.



9. The final issue raised by the appellant to support ground 10 & 11 of the petition of Appeal was that the learned Magistrate erred in law in ordering that the exhibits namely “the 400 plants of cannabis” be destroyed under the supervision of the court administrator and a certificate of destruction to be filed. This was an error as the exhibits were destroyed before the appellant exercised his right of Appeal under Section 349 of the *Criminal Procedure Code*. Under the circumstance an order of retrial could not issue in absence of the said exhibits. Reliance was placed on *Hussein Ali vs Republic* (2018) eKLR.
10. The appellant therefore prayed that his appeal be allowed and his conviction and sentence be set-aside.
11. The Respondent did not file any submissions in opposition to this appeal.

Analysis and Determination

12. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno vs. Republic* (1927)E.A 32 & *Pandya vs. Republic* (1975) EA 366.
13. Also in *Peter’s vrs Sunday Post* (1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
14. Before determining this appeal, this court needs to determine the manner which the proceedings were conducted and if they were in compliance with the law. This court is also alive to the issue of the appellant having pleaded guilty, the provisions of section 348 of the *Criminal Procedure Code* comes into play as that provision expressly bars appeals from subordinate court where an accused person was convicted upon a plea of guilt except on the extent and legality of the sentence. The said section 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 a subordinate court, except as to the extent and legality of the sentence.”
15. It therefore follows that the appellant is by virtue of section 348 of the *Criminal Procedure Code* is barred from challenging the conviction and his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court. But it has been held severally by court that this bar only operates where the plea is unequivocal. Accordingly, the court is not barred from inquiring as to whether a prima facie plea of guilty was unequivocal or not. Similarly, it does not bar the court from inquiring as to whether the facts as read out to the accused constituted any offence. See *Anthony Muthoga Munene vs Republic* {2022} eKLR.
16. In *Alexander lukoye Malika vrs Republic* (2015) eKLR the court of appeal did identify the situations in which a conviction based on plea of guilt can be interfered with;
 - a. 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 guilt.
 - b. Where an accused person pleaded guilty as a result of a mistake or misapprehension of facts.



- c. The charges laid against an accused person to which he has pleaded guilty disclosed no offence known to law.
 - d. Where the admitted facts by the appellant could not in law have been used to convict him.
17. Accordingly, if plea is equivocal the court has a duty to step in and intervene. The manner of plea recording is provided for under section 207(1) and (2) of the [Criminal Procedure Code](#). The same provides for;
- a. 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 or guilty to the plea agreement:
 - b. If the accused person admits the truth of the charge otherwise than by pleas 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 be 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.
18. The manner of recording plea of guilty was dealt with in [Ombena vrs Republic](#) (1981)eKLR which quoted with approval on the case of [Adan vrs Republic](#) (1973)EA , where the court held that:
- a. The charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands.
 - b. The accused own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - c. 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;
 - d. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded as and change of plea entered;
 - e. If there is no change of plea a conviction should be recorded and a statement of fact relevant to sentence together with the accused reply should be recorded.
19. The decision of Adan(supra) had also been explained many years before in the case of [Hando s/o Akunaay vrs Rep](#) (1951) EACA 307 as follows:

“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.”

Where an accused person who has been called upon to plead under section 207 of the [Criminal Procedure Code](#) in the subordinate 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 charge, the particulars of the offence contained in the chargesheet or information as the case maybe, as well as the facts outlined where the accused pleads guilty. The facts therefor are as important part of the plea as the charge itself. The nature and element of the offence in totality must be understood by the accused and the trial court must be satisfied about this accepting them as true. We think



the court should explain to the accused person the natural consequence of pleading guilty, the conviction and likely sentence.....it is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibit's that they would have relied upon at the trial."

20. Before the trial court the court asked the accused, the language he understood and he did reply that, "*Naelewa Kiswahili.*" The court record further shows that the charge was read out to the appellant in a language he understood (Kiswahili) "and he pleaded guilty to the same by stating that; "*Ni kweli.*" "The prosecution then sought for time to read out the facts on a different date and also to get a report from the government analyst to confirm if indeed the Exhibits were cannabis plant. On 24th January 2023, the appellant was asked once again the language he understood and confirmed that he preferred to have the proceedings done in Kiswahili language. The facts were read out to him and the Exhibits admitted into evidence. Once again when asked if the facts were true, he did reply in Kiswahili that, "*Maelezo ni ya ukweli.*"
21. The court then proceeded to convict the appellant on his own admission of guilt. The question before this court is simple was the plea equivocal or unequivocal given the circumstance and facts of this appeal?
22. Though the appellant submitted that plea was not taken in a language he understood and that the court failed to indicate the language used for taking plea, the same is not true as borne out from the proceedings. Initially on 03.01.2023, the court did ask the appellant which language he understood, and he clearly indicated that, "*Naelewa Kiswahili.*" The plea was then taken in Kiswahili and the magistrate noted his answer thereto when he pleaded guilty and stated that "*Ni Kweli.*" The appellant even further stated that there were some mature plants (Exhibits) which he could not see before court.
23. The matter was adjourned to enable the prosecution get a report from the Government Analyst and on 24.01. 2023, again the trial magistrate did ask the appellant which language he understood and the appellant once again stated, "*Naelewa Kiswahili.*" The facts were read out to him and Exhibits admitted into evidence and when asked if the facts were true again the appellant clearly stated that "*Maelezo ni ukweli.*" The court then did enter a plea of guilty and reserved sentencing for a different date.
24. It is obvious from the said proceedings that the trial court did strictly comply with provisions of section 207(1) and 207(2) of the *Criminal Procedure Code*. The charge, particulars and facts were read out to the appellant in "Kiswahili" a language which he understood, and his response were recorded verbatim. The appellant thus cannot be heard to complain that the proceedings were conducted in a language he did not understand and this ground of appeal hold no water and is dismissed.
25. The second issue raised in this appeal was that the charge sheet was incurably defective and that the trial court erred in convicting the appellant based on a charge sheet which indicated that he had been charged under section 6 & 6(a) of the *Narcotics And Psychotropic Substance Control Act* No 4 of 2022, which did not exist in law. He should have been charged under *Narcotics Drugs and psychotropic Substance Control Act* No 4 of 1994 .
26. Section 134 of *Criminal Procedure Code* provides for what the components/ingredients of the charge sheet constitutes;

"Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."



27. In determining whether a charge sheet is defective or not the Court of Appeal in *Sigilani versus Republic* (2004) eKLR 480 held as follows;
- “The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
28. In the case of *Isaac Omambia versus Republic* (1995) eKLR the court of Appeal also considered the ingredients necessary in a charge sheet and stated as follows;
- “In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of a charge. Every charge or information shall contain and shall be sufficient, if it contains a statement of the specific offence of offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”
29. Section 6 of the *Narcotics Drugs and Psychotropic Substance Control Act* No 4 of 1994 does provide that;
- Penalty for cultivation of certain Plants
- Any person who-
- a. Cultivates any prohibited plant; or
 - b. Being the owner, occupier or concerned in the management of any premises, permits the premises to be used for the purpose of the cultivation, gathering or production of any prohibited plant,
- Shall be guilty of an offence and liable to a fine of two hundred and fifty thousand shillings or three times, the market value of the prohibited plant, whichever is the greater, or to imprisonment for a term not exceeding twenty years or to both such fine and sentence.
30. The *Narcotics Drugs and Psychotropic Substance Control Act* No 4 of 1994 was partially amended in 2022 by *Narcotics, Drugs and Psychotropic Substances (control), (Amendment) Act, 2022* but it should be noted that none of the said amendment did not touch on provision of section 6 (a) of the *Narcotics Drugs and Psychotropic Substance Control Act* No 4 of 1994. The correct provision of law under which the appellant ought to have been charged was thus the *Narcotics Drugs and Psychotropic Substance Control Act* No 4 of 1994.
31. The charge sheet indeed as presented did indicate that the appellant had been charged with the offence of cultivating of Narcotics drugs contrary to section 6 as read with section 6(a) of the *Narcotic's and Psychotropic substances control Act* No 4 of 2022(amended by hand to show 1994). Further in the particulars the term bhang (was amended by hand to read cannabis). The amendment was countersigned by the prosecutor and having examined the original court record I am satisfied that indeed the error noted was corrected and the appellant did not plead to an unknown charge. The charge sheet as presented was therefore not defective.



32. The appellant in support of grounds 8 & 9 of the petition of appeal did submit that the trial magistrate erred in law in convicting him, yet the prosecution did not present /produce Government analyst report to confirm that indeed the plants were cannabis (*Bangi*) and further failed to warn the appellant of the severe sentence he faced should he opt to plead guilty. The first line of submissions has no basis as the government analyst report was presented into evidence as Exhibit 2. On the other hand indeed it is true that the trial magistrate failed to warn the appellant of the serious consequence of pleading guilty.
33. In the court of Appeal case of *Paul Matungu vs Republic* (2006) eKLR did hold that;
- “ it is essential for the court to warn the accused of the consequences of his pleading guilty; namely that he maybe sentenced to death if he pleads guilty..... What we find difficult to appreciate however, is that after the appellant had stated in response to the charge that " That is true", what followed was that he was warned of the consequence without specifically stating in what way he was warned and what constituted the warning and making it clear in the record that the warning made it clear to the appellant that he faced death as the mandatory sentence for the offence he was pleading guilty to. Further there is nothing, to show that after the warning was administered, the appellant was asked whether he understood the warning so that when he is recorded to have stated after that " That is true", one is not certain whether those words in response to the warning given or whether he was still insisting on his plea of guilty to the charge as the court recorded. In our view, after the warning, the court should have enquired whether the appellant understood the warning and if he said he understood the warning, then the charge should have been put ot him afresh and that all that should have been recorded.
34. In this regard I associate myself with the opinion of the court of appeal in *Elijah Njibia Wakianda vs Republic* (2016) eKLR that;
- “ Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence they are charged with. The criminal process is designed for forensic investigations and determination of guilt with various rights and safeguards built into it to ensure that only the guilty are convicted..... Given all the safeguards that are available to an accused person through the trial process, the entry of plea of guilty presents a rear absolute capitulation, a throwing in of the towel and giving a walkover to the prosecution and often at great cost. A conviction comes with it consequences of varying gravity. Thus it is that the court, at any rate the appellate court, would not accept a plea of guilt unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms.
35. Further in the same decision the appellate court 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. That did not occur here yet the appellant was unrepresented calling for 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 of the process ensuring that an unrepresented accused person Is not at sea in maze of the often-intimidating judicial process.”
36. The law is that it is desirable for the court to explain to the accused the natural consequence of pleading guilty and the likely sentence, especially where the offence carries a heavy penalty. Though this is not



expressly provided for in the Criminal Procedure Code, it constitutes good practice and promotes fair admiration of justice and right to fair hearing as espoused under Article 47 and 50(2) of the constitution of Kenya 2010. In this instance this was not done.” Obviously for the reasons stated above I find that the manner in which the charge was read out to the appellant did not strictly comply with provisions of section 207(1) and (2) of the Criminal Procedure Code. The appellant’s plea was not unequivocal.

37. What course of action is thus available to the court? Relying on the case of *Abmed Sumar vrs Republic* (1964) EALT 483 & *Muiruri vrs Republic* (2003) KLR 552 the courts have held that;

“ whether mistakes leading to quashing of conviction were entirely the prosecution’s making or not; whether on proper consideration of 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 of retrial should be made where the interest of justice requires.”

38. The trial magistrate did at the end of the trial order that the 400 plants of cannabis be destroyed in the presence of the court administrator and a certificate of destruction be filed. This would possess a grave challenge if this court were to order a retrial. Further the appellant also pointed out that there was no certificate of valuation produced into evidence, to prove that indeed, the said market value of the 400 plants of cannabis was Kshs 600,000/= . This was a mandatory requirement provided for under for under Section 86 of the Narcotic Drugs & Psychotropic Substance (control) Act 1994. This too is a fact that cannot be rectified as the Exhibits are already destroyed.

Disposition

39. I do find and hold that, the appellant was not warned of the severe consequences he faced as a result of pleading guilty to the charge of cultivating of Narcotics Drugs contrary to Section 6 as read with section 6(a) of the Narcotics and Psychotropic Substance Control Act No 4 of 1994. The plea of guilty as recorded was therefore not unequivocal.

40. The appellant under ordinary circumstance should have be sent back for retrial given the serious nature of the offence he faced, but since the Exhibits have already been destroyed, it would be an exercise in fruitily to order a re trial. The appellant thus escapes retrial like a bird out of the snare of the fowlers, but is warned that he may not be so lucky next time should he continue down the wrong path.

41. The conviction and sentence passed against the appellant by Principal Magistrate Honourable C.N Ondieki issued/date 03rd January 2023 (Conviction) and on 30th January 2023 (Sentence) in Machakos Chief Magistrate Court Criminal case No E07 of 2023 are hereby quashed and set-aside. The appellant will be released forthwith unless otherwise lawfully held.

42. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY 2024.

FRANCIS RAYOLA OLEL

JUDGE

