



REPUBLIC OF KENYA



KENYA LAW
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**Lumiti v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 1294 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E001 OF 2023
SC CHIRCHIR, J
FEBRUARY 15, 2024**

BETWEEN

JUSTINE LUMITI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. Alego (SPM) delivered on 5th January 2023 in Kakamega Chief Magistrate's court Criminal case No E019 of 2023)

JUDGMENT

1. The Appellant, Justine Lumiti, was charged alongside one other person, with the offence of burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the [Penal Code](#).
2. The particulars being that on the night of 25th and 26th November 2022, at Ikulywa village, Museno sub-location Khayega location in kakamega East sub-county within Kakamega County, broke and entered the dwelling house of Starico Khamati Lusava with intent to steal therein and did steal Kshs. 130,000/= and one motorcycle registration number KMGG048 N, make Honda, red in colour, valued at Kshs. 139,000, all valued at Kshs.269,900/= the property of the said Starico Khamati Lusava.
3. The two faced an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the [Penal Code](#). The particulars being on the 29th day of December, a November 2022, at Shihuli market Lukose sub-location Khayega location in kakamega East sub-county within Kakamega county otherwise in the course of stealing dishonestly retained one motorcycle registration number KMGG 048 N make Honda Red in colour valued at Kshs. 139,900/= knowing or having reason to believe it to be a stolen property.
4. On 5th January 2023, the two pleaded guilty and were convicted on their own plea.



5. On sentencing, the Trial court observed interalia that the Appellant herein had two previous convictions, and was sentenced to 10 years in prison.

The Appeal

6. The appellant, being aggrieved by the conviction and the sentence filed this petition of Appeal and set out the following grounds:
 1. That the learned trial magistrate grossly erred in law and fact by handing him a harsh and excessive sentence without considering his mitigation.
 2. That the learned trial magistrate erred in law and in facts by failing to give him more time to make a conclusive decision on whether to plead guilty or change his mind given the gravity of the offence and the subsequent punishment.
 3. That the trial magistrate erred in law and in fact by failing to consider his plea of guilt was a sincere act of remorse deserving a less severe sentence.
 4. That the learned trial magistrate erred in law and in facts by failing to observe that the intended effect of the sentence of 10 years could be achieved with a less severe punishment.
 5. That the learned trial magistrate misdirected herself in law and misinterpretation of the word “is liable” to mean a mandatory 10 years imprisonment.
 6. That the learned trial magistrate erred in law and in fact by not considering the circumstances of the offence.

Appellant’s submissions

7. The appellant filed his submission dated 21st June 2023 where he stated that he should have been given more time to consider the consequences of pleading guilty, more time to rethink his decision, and severity of the sentence.
8. He claims that he was intimidated by the police and that he was not in his right state of mind since he was traumatized at the police station. He states that this influenced him to plead guilty.
9. He submits that the sentence was excessive; that he had been remorseful and deserved a less severe sentence or a probationary sentence. He commits to reform and states that he has a young family that depends on him. He relied in the case of *Limbambula v Republic* 2003 eKLR 683 to buttress his submissions
10. The Respondent did not file any submissions.

Determination

11. I have considered the grounds of Appeal and the Appellant’s submissions. Though the Appellant had indicated that his Appeal is against the sentence only, it is evident from ground 2 of his petition of Appeal that he is equally challenging the manner in which the plea was taken.
12. Consequently, two issues arise for determination on this Appeal which are:
 - a. Whether the guilty plea was unequivocal.
 - b. Whether the sentence was excessive.



Whether the plea was unequivocal

13. An appellate court may only interfere with a guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a guilty plea; or where the accused pleads guilty as a result of misapprehension or mistake; or where the charge disclosed no offence known in law. (see *Laurent Mpinga v Republic* (1883) TLR 166 cited with approval in the case of *J.M. v Republic* (2014) e KLR)
14. Further the correct procedure of recording a plea of guilty and the steps to be followed by the court was stated in the case of *Adan v Republic*, (1973) EA 446 where Spry V.P. laid down the procedure at page 446 as follows:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must of course be recorded.”
15. In the instant case, the record shows that both the charge and the detailed particulars of the charge were read over to the appellant, then as Accused number 1, and to which he responded: “*ni kweli*” (it is true) . The presentation of facts was adjourned to the next day. The record further shows that the following day which was on 5.1.2023, the detailed facts of the offence were given to which the Appellant responded to by stating “true”.
16. The plea of guilty was then entered, and the facts were read over to him. To the facts, the Appellant’s response was: “The facts are true and correct”. The trial court then proceeded to convict the Appellant of the offence on his own plea of guilt.
17. In the case of *Olel v Republic* [1989] KLR 444, the court held: “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. I find no ambiguity in the plea process and the Appellant complain in this regard is without any merit.
19. The appellant also contended that he was not warned of the consequences of pleading guilty to the offence. Where the prescribed sentence is severe, courts are under an obligation to explain to an Accused person the consequence of a guilty plea. It is generally accepted that any offence that attracts Custodial sentence is serious enough to warrant such a warning to the accused. In the case of *Simon Gitau Kinene v Republic* (2016) e KLR Justice J Ngugi held: “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 v R* Kiambu Crim App No 8 of 2016(unreported), “this is what I



said , and I find it relevant here: 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 consequence of such plea is heightened”

20. The record shows that the Appellant was unrepresented. Further there is no evidence that he was warned about the seriousness of the offence and the prescribed punishment of the offence he was charged with. I accept the Appellant’s submission that he may not have appreciated the seriousness of the offence he faced. Though the record shows that plea was taken twice, on both instances, there is nothing on record showing that the court did warn the Accused of the consequences of his guilty plea.
21. I have also noticed that though the Appellant and his co- Accused was charged with an alternative count, the record does not indicate to which charge he pleaded guilty to, though from the rest of the proceedings and the sentence passed, one can tell that the Accused had presumably pleaded guilty to the main charge. However, a plea, as often stated, must be unequivocal, it must not be presumed or be left to guesswork. In the case of *simon Gitau* (supra) the Judge further stated: “ ... I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal.....”
22. To the extent that the Appellant did not benefit from the warning, then I do find that the plea taking was irregular.
23. What happens next, is the imperative question. Upon such a finding the options given to an Appellate court is to discharge the Appellant or order for a retrial.
24. The guidelines for a retrial were set out in the case of *Muiruri v Republic* (2003) KLR552, the court of Appeal gave the following guidelines:
 - “ 1. Generally, whether Retrial should be ordered or not depends on the circumstances of each case.
 2. It will only be made where the interest of justice require it and it is unlikely to cause injustice to the Appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the Appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not.”
25. Further as was held in the case of *Samuel Wafula Ominde v Republic* (2017) e KLR “ In general , a retrial will be ordered when the original trial was illegal or defective . Conversely, a retrial will not be considered where the conviction is set aside because of insufficient evidence” .
26. In the case of *Sinaraha & Ano vs Republic* (2004)2 KLR 328 it was held that “a retrial will be ordered only when the original trial was illegal or defective but not for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial” The omissions in this case was not by the prosecution but the court. Thus a retrial will not be about filing the gaps in the prosecution’s case.
27. The Accused was arraigned in January 2023 and convicted the same month. I don’t consider the period of one year unduly long.
28. Am therefore of the view that interest of justice calls for a retrial on this matter.
29. On the severity of the sentence, having arrived at the aforesaid finding, I do not find it necessary to address myself to this 2nd issue.
30. In conclusion, I hereby proceed to make the following orders:



- a). The Appellant's conviction in the Kakamega chief Magistrate's court criminal case No. E019 of 2023 is hereby quashed and sentence set aside.
- b). The Appellant shall be retried before the chief Magistrate's court in kakamega before a different magistrate other than Hon. Alego or Hon. Cheruiyot.
- c). The Appellant shall be presented before court within 14 days from the date of this Ruling for plea – taking.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF FEBRUARY, 2024.

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin- Court Assistant

The Appellant

