



REPUBLIC OF KENYA



**Ilelu v Republic (Criminal Appeal E030 of 2022)
[2024] KEHC 9069 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E030 OF 2022**

MW MUIGAI, J

JULY 24, 2024

BETWEEN

JULIUS MUTUA ILELU APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an Appeal against the conviction and sentence of C.M. ONDIEKI, PM,
delivered on 21st June, 2022 in Machakos Criminal Case number E299 of 2022)*

JUDGMENT

Background

1. The Appellant herein JULIUS MUTUA ILELU was charged with five offences. In count 1, he was charged with the offence of burglary contrary to Section 304 (2) of the Penal Code.
2. The particulars of the offence are that on the night of 28th April 2022 at unknown time at Machakos Administration police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, broke and entered the dwelling house of No 254852 APC DENNIS LIKHAYA with intent to steal from therein.
3. In count two, he was charged with stealing from a swelling house contrary to section 279 (b) of the Penal Code.
4. The particulars of the offence are that on the night of 28th April 2022 at unknown time at Machakos Administration police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, stole one 32 inch TV make Vitron, one woofer make club- box, one 6kgs progas, belt, two police beret, one padlock and four mobile phones make x-tigi, techno spark 2 , two Samsung (black and golden) all valued at Kshs 62,400, the property of No 254852 APC DENNIS LIKHAYA .



5. In count three, he was charged with burglary contrary to Section 304 (2) of the Penal Code.
6. The particulars of the offence are that on the night of 10th March 2022 at unknown time at Machakos police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, broke and entered the dwelling house of No112148 PC SHADRACK MUSOMBA with an intent to commit a felony therein namely theft.
7. In count four, he was charged with burglary contrary to Section 304 (2) of the Penal Code.
8. The particulars of the offence are that on the night of 6th December 2021 at unknown time at Machakos police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, broke and entered the dwelling house of No258508 PC LUCAS MUKWABI with an intent to commit a felony therein namely theft.
9. In count five, he was charged with stealing from a swelling house contrary to section 279 (b) of the Penal Code.
10. The particulars of the offence are that on the night of 10th March 2022 at unknown time at Machakos police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, stole 32 inch TV make Vitron, one blue police rain coat all valued at Kshs 16,000, the property of No 112148 PC SHADRACK MUSOMBA.
11. In count six, he was charged with stealing from a swelling house contrary to Section 279 (b) of the Penal Code.
12. The particulars of the offence are that on the night of 6th December 2022 at unknown time at Machakos police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, stole one 32 inch TV make Infinix X1, Ampex 2.1 woofer, 3 pairs if suits, a pair of police handcuffs, a 6kg Hashi gas cylinder all valued at Kshs 65,000, the property of No 258508 PC LUCAS MUKWABI.
13. The particulars of the offence are that on the night of 10th March 2022 at unknown time at Machakos police lines within Machakos sub- county within Machakos county jointly with another already before court and others not before the court, broke and entered the dwelling house of No 258508 PC LUCAS MUKWABI with an intent to commit a felony therein namely theft.

TRIAL COURT PROCEEDINGS

14. The matter came up for plea taking on 25th May 2022 and statement and particulars of each offence was read to the Appellant the Appellant pleaded as follows;
 - a. Count one It's true- Plea of Guilty
 - b. Count two it's true- Plea of Guilty
 - c. Count three It's true- Plea of Guilty
 - d. Count four it's true- Plea of Guilty
 - e. Count five It's true- Plea of Guilty
 - f. Count six It's true- Plea of Guilty
15. The plea of guilty was entered on each count and on 26/5/2022 the prosecution gave the Facts related to each offence on various/different dates in a language he understood to which the Appellant stated



that the facts were correct and true. The accused was then convicted on his own plea of guilty on all counts.

16. The Facts indicate the Police Officers who found items stolen from their houses within the Police Lines traced the footsteps up to the Accused person's house. Therein some of the stolen items were recovered and produced as exhibits in the Trial Court and included parts of Police uniform attire.
17. After mitigation, the Trial Court wrote the Sentence of the Court and considered in detail the principles of sentencing spelt out in the Sentencing Guidelines 2016 & 2023. The Trial court outlined both aggravating factors and mitigating factors as mitigated by the Appellant. The Trial court factored in the requirements of Section 333(2) CPC computing sentence including the period the Appellant was in custody before sentencing.
18. Appellant was sentenced to serve imprisonment as follows;
 - a. Count one 6 years
 - b. Count two 2 years
 - c. Count three 6 years
 - d. Count four 6 years
 - e. Count five 2 years
 - f. Count six 2 years
19. The Trial Court clustered the sentences to 1 & 2, 3 & 5 and 4 & 6 and indicated that these sentences would run concurrently as they arose from the same set of facts.

The Appeal

20. Dissatisfied by this sentence, the Appellant filed the Appeal herein on 1st July 2022 seeking to have the sentence reduced on the grounds that
 - a. He is the breadwinner of the family
 - b. He has a family that depends on him
21. The Appeal was canvassed by way of written submissions.

Appellant Submissions

22. The Appellant filed submissions on 11th March 2024 and stated that the procedure which was undertaken during plea was not safe because the right procedure was not adhered to.
23. Secondly, it was submitted that only one complainant explained that he found his house broken at 7.00am while the other complainants have not. It was contended that the particulars of the offence were vague and thus left room for speculation.
24. Thirdly, it was the Appellant's submission that the Trial Magistrate was required to explain to the accused person all the essential elements of the offence charged in accordance with section 207 of the Criminal procedure code and the case of Adan vs Republic (1973) EA 446.
25. According to the Appellant, the facts were read the next day after he took plea this the prosecution was afforded space to influence the facts as the prosecution knew his position. He contended that he was not warned about the seriousness of the offence.



26. Fourthly, it was submitted that the evidence and exhibits were illegally admitted and the later was not marked. He said that the court cannot exclude evidence that may be obtained by violation of the *Evidence Act* or the Fundamental freedoms of the accused person as was the case herein. There was need for the police to arm themselves with at least an investigation diary or a chain of custody form. According to him, there was need for the police to swear an affidavit of facts articulating their reasonable grounds to believe that an offence had been committed.
27. Lastly, it was submitted that the sentence of 18 years imprisonment was excessive and asked the court to find that the plea of guilty entered was unequivocal, thus the conviction and sentence were not safe and should be set aside.
28. The Appellant relied on the following cases; *Baya vs R* [1984] KLR 657, *Korir vs R* [2006] EA 124, *Henry O. Edwin vs R* [2015] Cr case no 645 of 2010, *Simon Gitau Kinene vs Republic* [2016] eKLR, *Mwahima Mwalimu Masudi vs Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, *Kioko vs R* [1983] KLR 289, *Jon Croydon Wagner & 2 others vs R* [2011] eKLR, *JNM vs R* [2013] eKLR and *Onkoba vs R* [1989] KLR.

Respondent Submissions

29. The submissions were filed on 16th November 2023 in which it was submitted while relying on the case of *Benard Kimani Gacheru vs Republic* [2022] eKLR, *Mokela vs The state (135/11) ZASCA 166* and *Ogolla s/o Owuor vs Republic* that the sentence is appropriate and not excessive. That the Appellant has a habitual habit of stealing from police officers' houses in Machakos and a deterrent sentence was mandatory in this circumstance.

Determination

30. This court has considered the Trial Court record, the grounds of appeal and the submissions on record and find the issues for determination to be as follows;
 - a. Whether the plea was unequivocal
 - b. Whether the Appellant can appeal on the conviction in the circumstances
 - c. Whether the sentence should be set aside and or varied.
31. This being a first appeal, the Court shall analyze and evaluate afresh all the evidence adduced before the Trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. These duties were elucidated in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal stated 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 conclusion; it must make its own findings and draw its own 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] E.A 424.”



32. The Appellant pleaded guilty to all the counts that were read to him in the Trial Court. Section 348 of the Criminal Procedure Code 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 or legality of the sentence.”
33. The Court of Appeal in the case *Ndede vs Republic* [1991] KLR 567 the learned judges observed as follows;
- “This court held that the court is not to be bound to accept the accused persons admission of truth of the charge of conviction as there may be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused person to court from the date of arrest. In the appeal before us, we reiterate our satisfaction that the plea of guilty was unequivocal.”
34. The procedure for taking pleas is provided in section 207 of the Criminal Procedure Code to be as follows:
- “(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 plea agreement.
- (2) If the accused person admits the truth of the charge otherwise than by 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.”
35. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan vs Republic* [1973] EA 445 where the Court held as follows: -
- a. 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.
 - b. The accused’s 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 and change of plea entered.
 - e. 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.”
36. I have carefully considered the Trial Court record.



37. On 25th May 2022 the Appellant informed the Court he understood both English & Kiswahili languages. The charge of each offence and particulars of each offence was read to the Appellant in English and he stated that they were true in English. He pleaded as follows;
- a. Count one It's true
 - b. Count two it's true
 - c. Count three It's true
 - d. Count four it's true
 - e. Count five It's true
 - f. Count six It's true
38. The Trial Court entered Plea of guilty.
39. The State Counsel/Prosecutor sought adjournment to allow the Investigating Officer to bring exhibits recovered from the accused person.
40. On 26th May 2022, the Facts to each offence were read out to the Appellant as follows;
41. On 28/4/2022, APC Dennis Okanga arrived at his house at the Police Lines and found the padlock broken and found his belongings stolen. He followed footsteps and on the way found his neighbor APC Bwire Omondi and they followed footsteps upto the house of John Mutinda and they found the footsteps ended at the Appellant's house. They entered the house searched and recovered some of the stolen items which were produced in Court as exhibits among them Police regalia.
42. On 10/3/2022 at the Police Camp APC Shadrack Musomba's house was broken into his TV & raincoat were stolen. On 6/12/2021, the house of APC Lucas Mukwadi was broken into and TV, I phone, pair of handcuffs, suits and gas cylinder were stolen.
43. The Prosecution during plea-taking presented recovered items as exhibits; namely; Hooper Club box, Jungle green Police Belt, 2 Police Berrets, 4 Phones Make Black Samsung, Techno & X-Tigi and 1raincoat.
44. The Appellant said the facts as read were correct and true.
45. It is on that basis that the Trial Court convicted the Appellant on his own plea on all 6 Counts and Particulars of offence and the Facts read out in relation to the offences.
46. The Trial Court sought a Probation Officer's Report on Pre-sentencing and the Appellant was remanded in custody. The Prosecution produced the Appellant's previous criminal record.
- a. Criminal Case 440/39/2013/ Criminal Case 154/2013; Escape from Police Custody sentenced to 6 months on 12/3/2013
 - b. Criminal Case 440/33/2013 Criminal Case 148/2013;
Count 1 Robbery c/s 295/296 Penal Code
Count 2 Personation c/s 382 Penal Code
Count 3 Possession of Public Stores c/s 324 of Penal Code
Count 4Housebreaking c/s 304 & Stealing c/s 279 Penal Code
He was sentenced to 3 years & 6 months imprisonment.



47. On 20th June 2022 before sentencing, the Trial Court asked the accused person in Kiswahili whether he still maintained his plea of guilty to which he responded;

“I still maintain that I committed the offences.”

48. Upon, the Appellant mitigating; That he is a family person, was a caretaker and the sole breadwinner and promised not to repeat the offence, the Trial Court wrote the Sentence of the Court and delivered on 21/6/2024.

49. In the case of Wangila v Republic (Criminal Appeal E089 of 2022) [2024] KEHC 3028 the court stated as follows;

“This court finds that the Appellant’s plea was unequivocal. The process before the trial Court was procedural and lawful. The Appellant was not coerced or misled into pleading guilty. He knew what he was doing and despite being warned of the repercussions, he proceeded to plead guilty.

In the circumstances, the conviction was proper. This Court will not entertain the invitation by the Appellant to alter the Trial Court’s finding.”

50. From the summarized outline above of the plea-taking process that culminated to the conviction and sentence the Appellant is currently serving, I find that the plea in the case herein was unequivocal.

51. The Trial Court record confirms that the Trial Court read the statement and particulars of each offence to the Appellant in English a language he stated he understood. The response was recorded verbatim on each Count; ITS TRUE then plea of guilty was entered. The facts were read to the Appellant on a later date to have exhibits produced and he responded unequivocally, the facts are correct and true.

52. The allegation that the Respondent was afforded space to influence the facts as the prosecution knew his position cannot stand because the Appellant was not bound by the said position. He still would have refuted the charges if he felt otherwise. In addition, on 20/6/2022, the Trial court asked the Appellant maintained his plea of guilt and he maintained he committed the offences. The Appellant maintained his position of admission of guilt before sentencing to which he stated that he was maintaining his plea. The Trial court complied with Section 207 CPC and plea-taking process outlined in Adan vs Republic case supra. I therefore find that the Appellant can only appeal on the sentence under the circumstances.

53. With regard to issues of defective charges under Section 89 (5) CPC and ensuring safeguards of plea-taking under Section 207 CPC were not borne out by evidence and Trial Court record.

54. As regards production of exhibits without the Inventory, Investigation Diary and/or Chain of custody of the exhibits, these are processes and /or documents that are produced during trial and subject of cross examination to test veracity of evidence and credibility of the witness/testimony. In the instant case, the Appellant was presented with statement and particulars of each offence, facts and exhibits and to ALL he admitted without question on each occasion. If he took the view that exhibits produced were not proof of commission of offence(s) nothing would have been easier than to recant plead not guilty await trial and interrogate process and outcome of investigations during the hearing. Having agreed and accepted, the issue of investigations recovery, record and chain custody of exhibits cannot legally be addressed after unequivocal plea of guilt.

55. The Appellant submitted that he was denied legal representation and was not informed/explained to the consequences of plea of guilt as this was a complex case.



56. In the case of *William Oongo Arunda (alias Patrick Oduor Ochieng) vs Republic (Criminal appeal 49 of 2020* Kairu, Mbogholi Msagha & Nyamweya JJA) legal representation is triggered in criminal proceedings where substantial injustice would occur arising from the complexity and seriousness of the charge(s) against the accused person. In that case, the right to legal representation ought to be raised during trial which the Appellant herein did not and not raise the issue for the 1st time on appeal. Secondly, he pleaded guilty at the earliest opportunity and ably communicated his answers to the charge read over and facts thereof. The appellant's right to fair trial were complied with.

Sentencing

57. We move to the second issue as to whether the sentence should be set aside and or varied. This court is guided by the finding in the case of *Nelson vs Republic* [1970] E.A. 599, following *Ogalo Son of Owuora vs Republic* (1954) 21 EACA 270 where the court held as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewcity* (1912) C.CA 28 T.LR 364.”

58. The Appellant was charged with as charged with the offence of burglary contrary to section 304 of the Penal Code which provides as follows:

“304. Housebreaking and burglary

(1) Any person who—

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years”.

59. The Appellant was also charged with stealing from a dwelling house contrary to Section 279 (b) of the Penal Code which provides that;

“if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.”



60. The Trial Court delivered a detailed and well thought out pre-Sentence proceedings, principles of Sentencing as outlined by the Sentencing Guidelines 2023; that include;

Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence.

Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing and

Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, considering the offending behavior as a whole.

61. The Trial Court considered both mitigating circumstances, that the Appellant pleaded guilty at the earliest opportunity and expressed remorse in mitigation. Aggravating circumstances included the fact that he has previous criminal record and therefore a habitual offender and not 1st offender. The Trial Court also took into account *the Constitution* and other legislation, judicial precedents laying down the principles for purposes of sentencing and found aggravating circumstances outweighed the mitigating circumstances. Of importance, the Appellant targeted those working in the public sector and/or providing service to the public and there seems to be a pattern of repeat offending as disclosed by the previous and instant offences that the Appellant pleaded guilty to. The Trial Court meted appropriate sentences for these offences on sound legal reasoning based on the sentencing policy guidelines.

Disposition

1. It is my considered position that the Trial Court did not err in sentencing the Appellant. Considering that the appellant was not a first offender, the circumstances where various offences are disclosed and recovery of some stolen items from Appellant's house the sentence was reasonable. I will therefore not disturb the sentence save for computation of sentence from the date of plea and days in custody before conviction and sentence as provided by Section 333 (2) CPC. As such, the Appeal fails and the Trial Court conviction and sentence is upheld and the Appeal is dismissed.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH JULY 2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In The Presence of:

Ms Kaburu -ODPP- Present

Geoffrey/Patrick – Court Assistant(s)

