



**Simiyu & another v Republic (Criminal Appeal E035 of 2024)
[2024] KEHC 11011 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E035 OF 2024
JM OMIDO, J
SEPTEMBER 12, 2024**

BETWEEN

ISAAC WANJALA SIMIYU 1ST APPELLANT

EUNICE OCHIENG 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the convictions made on 19th March, 2024
and sentences imposed on 25th March, 2024 by Hon. R. Ongira,
Senior Resident Magistrate in Nkubu MCCR Case No. E251 of 2024)*

JUDGMENT

1. The Appellants Isaac Wanjala Simiyu and Eunice Ochieng were jointly charged before the trial court with the following offences:

Count 1:

Selling pest control products that have not been registered contrary to Section 4(1) as read with Section 12(1) of the [Pest Control Products Act](#), Cap 346 Laws of Kenya.

Particulars:

On the 1st day of March, 2024 at Dudupower Insecticides Kenya Limited located at Taifa Business Centre Building in Nkubu Township in Imenti South Subcounty within Meru County, jointly with others not before the court, the two Appellants were found jointly selling unregistered pest control products namely; 1. Dudupower insecticide, 500ml x 14 pieces, and; 2. Dudupower insecticide 300ml x 41 pieces, which the Appellants were passing off as duly registered by the Pest Control Products Board.

Count 2:



Selling pest control products that have not been labelled in accordance with Regulation 3(2)(f) and Regulation 8(1) of the Pest Control Products (Labelling, Advertising and Packaging) Regulations, 1984 ([Legal Notice No. 89 of 1984](#), [Legal Notice No. 127 of 2006](#)) Contrary to Section 4(1) as read with Section 12(1) of the [Pest Control Products Act](#), Cap 346 Laws of Kenya.

Particulars:

On the 1st day of March, 2024 at Dudupower Insecticides Kenya Limited located at Taifa Business Centre Building in Nkubu Township in Imenti South Subcounty within Meru County, jointly with others not before the court, the two Appellants were found jointly selling pest control products namely; 1. Dudupower insecticide, 500ml x 14 pieces, and; 2. Dudupower insecticide 300ml x 41 pieces that lacked a PCPB(CR) registration number and directions for use in Kiswahili language, a requirement of the Pest Control Products (Labelling, Advertising and Packaging) Regulations, 1984 ([Legal Notice No. 89 of 1984](#), [Legal Notice No. 127 of 2006](#)) made under the [Pest Control Products Act](#) Cap 346 Laws of Kenya.

Count 3:

Using unlicensed premises for selling pest control products contrary to Section 3(1) of the [Pest Control Products Act](#) and Regulation 2(1) of the Pest Control Products (Licensing of Premises) Regulations, 1984 ([Legal Notice No. 45 of 1984](#), [Legal Notice No. 124 of 2006](#)) as read with Section 12(1) of the [Pest Control Products Act](#), Cap 346 Laws of Kenya.

Particulars:

On the 1st day of March, 2024 at Dudupower Insecticides Kenya Limited located at Taifa Business Centre Building in Nkubu Township in Imenti South Subcounty within Meru County, jointly with others not before the court, the two Appellants were found jointly selling pest control products namely; 1. Dudupower insecticide, 500ml x 14 pieces, and; 2. Dudupower insecticide 300ml x 41 pieces without a premises licence from the Pest Control Products Board in contravention of the said Act.

Count 4:

Advertising pest control products in a manner that is false, misleading or deceptive contrary to Section 3(2) as read with Section 12(1) of the [Pest Control Products Act](#), Cap 346 Laws of Kenya.

Particulars:

On the 1st day of March, 2024 at Dudupower Insecticides Kenya Limited located at Taifa Business Centre Building in Nkubu Township in Imenti South Subcounty within Meru County, jointly with others not before the court, the two Appellants were found jointly advertising pest control products namely; 1. Dudupower insecticide, 500ml x 14 pieces, and; 2. Dudupower insecticide 300ml x 41 pieces, in a manner that is false, misleading and deceptive in contravention of the said Act.

2. The record of the trial court bears it that both Appellants pleaded guilty to all the four counts and were convicted. The trial court then went on to sentence the two Appellants as follows:

Count 1:

Accused 1: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Accused 2: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Count 2:

Accused 1: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Accused 2: A fine of Ksh.250,000/- in default to serve one year imprisonment.



Count 3:

Accused 1: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Accused 2: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Count 4:

Accused 1: A fine of Ksh.250,000/- in default to serve one year imprisonment.

Accused 2: A fine of Ksh.250,000/- in default to serve one year imprisonment.

The prison sentences to run consecutively. 14 days right of appeal is granted.

3. The Appellants' instant appeal is predicated on both the conviction and sentence of the trial court. The Appellants presented the following grounds of appeal vide their joint Petition of Appeal dated 27th March, 2024:
 - a. That the plea of guilty on each of the four counts was not unequivocal.
 - b. The fines imposed exceeded those provided for under the relevant statute.
 - c. The sentences imposed were harsh and excessive.
 - d. The trial court ought to have ordered that the sentences run concurrently.
4. The Appellants subsequently filed submissions expounding on the above grounds.
5. I have considered the record of the lower court, the Petition of Appeal and the submissions filed. I note, as I have stated above, that the appeal is preferred on the issues of conviction, particularly equivocality of the plea and on the sentences imposed by the lower court.
6. I will first address the issue raised by the Appellants that the plea of guilty on each of the four counts was not unequivocal. I note that when the plea was taken, the Appellants were not represented.
7. The manner of recording plea of guilty was dealt with in *Ombena v Republic* [1981] eKLR where the Court of Appeal held that:

“In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

“Held:

 - (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 the facts relevant to sentence together with the accused’s reply should be recorded.”

In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said “Facts are as per charge sheets”, and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal.”

In the Adan case the court said, at p 447:

“The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.”

We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand.”

8. In the present case, the record of the lower court shows, inter alia, that the facts were read out to the Appellants and both of them stated that the facts were correct.
9. The two Appellants were then given an opportunity to mitigate and they offered the following statements to the court:

1st Accused: I thank the court and I pray for forgiveness as we were found. I had gone to look for work and the said items are not mine. The items are not mine as I am a student and I have a very small family. I pray for leniency and I have a sickly mother and I pray for court’s consideration. I was a sales person.

2nd Accused: I pray for forgiveness. The charges are true. I had just been employed and I had worked for a week. I come from Homabay and I have children. I pray for forgiveness. I was a sales person.
10. From the mitigation, it comes out clear that the first Appellant disputed some facts, particularly when he stated that he had gone to look for work and that the pesticides that were produced as exhibits did not belong to him. On the part of the second Appellant, it is clear that she alleged some additional facts when she stated that she was employed and was a sales person. The information that the two Appellants gave the court in mitigation provided a situation which rendered the plea equivocal. The learned trial Magistrate ought then to have entered a plea of not guilty on the four counts at that stage in respect of both Appellants as it was not safe to convict.



11. Moreover, considering the seriousness of the sentence under Section 12 of the Act, the learned trial Magistrate ought to have cautioned the Appellants on the consequences of pleading guilty.
12. It is reasonable that in cases where the offence committed carries a heavy penalty such as was the case in this matter, courts should exercise great caution when taking a plea of guilty especially where the accused is unrepresented.
13. Further, the court must explain to the accused person the consequences of the guilty plea so that the accused knows exactly what to expect (see Abdalla Mohammed v Republic [2018] eKLR).
14. In *Simon Gitau Kinene v Republic* [2016 eKLR] the court observed that:

“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.”
15. The Appellants were unrepresented when they took plea before the trial court. It was the duty of the trial court to ensure that not only did the Appellants understand all the ingredients of the charges, but they also understood the likely sentence in case they pleaded guilty.
16. The trial court in this case did not warn the Appellants of the consequences of pleading guilty to the charges and the nature of the sentences that the offences attracted. The failure to so warn the Appellants amounted to a breach of the principle of fair trial as prescribed in Article 50(2) of *the Constitution*, and well established judicial practice in plea taking.
17. The upshot is that for the reasons that I have stated above, the plea entered against the Appellants were not unequivocal and the Appeal has merit. I find no reason as to why I should delve into the other grounds.
18. This court having reached the finding that the appeal has merit on the two grounds addressed above, I allow the same, quash the convictions on the four counts and set aside the sentences thereon.
19. This court is now required to determine whether a retrial should be ordered or an acquittal.
20. In the case of *Nicholas Kipngetich Mutai v Republic* [2020] eKLR the Court held that a retrial should be ordered only where the interest of justice so requires.
21. It is apparent that the Appellants have been in prison where the plea was not unequivocal. In my view, it will not serve justice to order for a retrial in the circumstances. I therefore order for the acquittal of the Appellants on all the four counts and further order that they be set at liberty forthwith unless otherwise lawfully detained.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 12TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

Appellants: Both present, virtually.

Prosecution Counsel: Ms. Rotich.

Court Assistant: Mr. Kinoti.

