



**Mogire v Republic (Criminal Appeal E049 of 2023)
[2024] KEHC 12765 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E049 OF 2023
WA OKWANY, J
OCTOBER 17, 2024**

BETWEEN

JOSEPHAT OBONGO MOGIRE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgement and Sentence of the Senior
Principal Magistrate's Court at Keroka MCCR No. E360 of 2023
delivered by B.M. Kimtai, Senior Principal Magistrate on 5th June 2023)*

JUDGMENT

1. The Appellant herein was charged with the offence of injuring an animal and creating disturbance in a manner likely to cause a breach of peace contrary to Sections 338 and 95 (1) (b) of the Penal Code respectively.
2. He was convicted on his own plea of guilty on both charges and sentenced to serve 10 years imprisonment for the first charge and 4 months imprisonment for the second charge. Both sentences were to run concurrently.
3. Aggrieved by the decision of the trial court, he instituted the present Appeal and listed the following grounds of appeal in his Petition of Appeal: -
 1. That he pleaded guilty to the offence with no knowledge of the consequences of the offence and its penalty.
 2. That the offence of injuring an animal was accidental and unfortunate thus he learned the lesson the hard way.



3. That for sure 10 years and 4 months was quite harsh, excessive and punitive considering the circumstances of the offences thus asking this Honourable Court to pardon him or consider him for probation terms or any other order that the court may deem fit and just.
 4. That the complainants are his parents who were now regretting his conviction since they only thought that he was to be given a small discipline but was slapped with a huge sentence.
 5. That his family the complainants wanted him home hence he was asking the Court to grant him the opportunity.
 6. That this was his first time to be in conflict with the law hence he had learned his lesson the hard way.
 7. That he was asking the Court to grant him the benefit of doubt as held in Waita Munyoki case and the authority of Elizabeth Waithegeni Atimu and Another vs. Republic eKLR (2018).
 8. That he had a young family who were now suffering since he was the sole breadwinner.
 9. That more grounds would be adduced during the hearing and determination of the appeal.
4. The Appellant challenges both the conviction and sentence in this appeal and prays that the same be quashed and/or set aside.
 5. The Appeal was canvassed by way of written submissions which I have considered.
 6. The duty of a first appellate court is to re-consider and re-evaluate the evidence presented before the trial court and to arrive at its own independent determination while bearing in mind the fact that it neither saw nor heard the witnesses testify and thus make due allowance in that respect. (see Okeno v Republic [1972] EA 32).
 7. I have considered the grounds of appeal and the parties' respective submissions. I find that the main issue for determination is whether the Appeal is merited.

Analysis and Determination

8. It is trite that where a party pleads guilty to a charge, an appeal can only lie in respect to the sentence passed by the trial court. Section 348 of the Criminal Procedure Code provides thus: -
 348. 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.
9. In *Olel v Republic* [1989] KLR 444, it was held thus:-

“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.”
10. It therefore follows that in an appeal where the Appellant had pleaded guilty, the appeal can only lie on the aspect of sentence unless it can be shown that the plea was not unequivocal. In *Alexander Lukoye Malika v Republic* [2015] eKLR the Court of Appeal held that: -

“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.”

11. One of the grounds listed by the Appellant in the appeal is that he was not aware of the consequences of the guilty plea. I have considered the proceedings of the trial court in this regard and noted that the record reveals, in part, as follows: -

“The substance of the charge and every element thereof has been stated by the court to the accused person in the language he understands, who being asked whether he admits or denied the truth of the charge replies in Kiswahili.

ACCUSED: It is true

OGADA: On 3.6.2023..... (reads facts)

ACCUSED: Facts are correct

Court: Plea of guilty entered and convict on own plea.

OGADA: No records

ACCUSED ON MITIGATION: I pray for forgiveness

COURT: I note accused is a first offender and consider his mitigation. However, this is a heinous act that should not be tolerated.

For Count I, accused is sentenced to serve 10 years imprisonment

For Count II- Accused to serve 4 months....”

12. It is trite that as a safeguard to a fair trial process, an accused person must be informed of the charge(s) that he faces with utmost specificity. This is done by outlining the necessary particulars of the charge so as to enable an accused person answer to the same. Article 50 (2)(b) of *the Constitution* states that: -

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be informed of the charge, with sufficient detail to answer it.

13. The Criminal Procedure Code sets out the manner in which a court should undertake the plea taking process at Section 207 thereof which provides 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.

14. The above procedure has been restated by courts in several cases. In *Adan v R (1973) EA 445* and *Kariuki vs. R (1954) KLR 809* the following process was outlined thus:-



- 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.
 - iv. If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.
 - v. If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.
15. Applying the principles stated in the above cited authorities to the instant case, I note that the trial court did not explain the seriousness of the charges to the Appellant. I also note that the Appellant was not represented by an advocate and this means that he may not have been familiar with the plea taking process.
16. I find that the trial court was therefore required to explain the charge to the Appellant and, in the event of a guilty plea, explain to him the consequences of his plea should he choose to maintain the said plea. I state so because, when an accused person pleads guilty to a charge, it means that they give up their right to be taken through a full trial process which provide specific legal safeguards that ensure that the rights of an accused are upheld, and most importantly, that the presumption of innocence prevails until the determination of the trial. A guilty plea, on the other hand, presents a walk-over for the Prosecution where an accused person's liberty and presumption of innocence ends up the moment he pleads guilty particularly where the charge attracts a custodial sentence.
17. The trial court is therefore required to ensure that an accused person understands what is at stake and the likely consequences of a guilty plea. I am guided by the decision in *Simon Gitau Kinene v Republic* Criminal Appeal 9 of 2016 [2016] eKLR where Prof. Ngugi J. (as he then was) held thus: -

“ 19. 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 Mbusi v R Kiambu* Crim. App. No. 8 of 2016 (unreported) this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, 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 consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.”



18. As I have already noted in this judgment, the trial court did not explain to the Appellant that his guilty plea would lead to a custodial sentence. I find that it cannot be said that the guilty plea was unequivocal.
19. I have also considered the fact that the Appellant was charged with two offences yet the trial court proceedings seem to be only in respect to one charge. It is not clear to this court whether the guilty plea was entered in relation to the first charge or the second one. In *Ombena v Republic* [1981] eKLR, the Court of Appeal held thus: -

“As to the first ground of appeal, we feel that it is not a desirable practice for the trial court to record only one plea in respect of more than one count. It is important that the accused should understand each count, and that the accused should answer separately the charge in each count, and that the words of each answer should be separately recorded. Otherwise the court cannot always be sure that the accused has both understood and applied his mind to each count.”
20. It is clear that the Appellant faced two charges yet the proceedings do not distinguish his plea in respect of each. I find that the plea-taking process was flawed and irregular. The plea of guilty cannot therefore be said to be unequivocal.
21. In sum, I find that the instant appeal is merited. I therefore quash the conviction on both counts and set aside the sentences.
22. Considering the fact that the offences were committed against the Appellant’s family members, who were not averse to his release, I find that it would not serve the interest of justice to subject the Appellant to a retrial. I also note that the Appellant has also served a substantial part of his sentence. For the above reasons, I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.
23. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE

