



**Mulwa v Republic (Criminal Appeal E064 of 2023)
[2024] KEHC 12527 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E064 OF 2023
MW MUIGAI, J
OCTOBER 15, 2024**

BETWEEN

MICHAEL NDUNDA MULWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being An Appeal from the conviction of Hon. D.N. Sure (Principal Magistrate At Kangundo Law Courts in Criminal Case No. E957 of 2023 Delivered on 17/11/2023)

JUDGMENT

1. The Accused person herein Michael Ndunda Mulwa was charged with Two Counts of offences.
2. In Count 1 the Accused was charged with the offence of Malicious Damage contrary to Section 339(1) of the Penal Code.
3. The particulars are that on diverse dates between 1st September 2023 and 12th September 2023 at Kwakathule village, Katheani Location in Kangundo Sub-County within Machakos County willfully and unlawfully destroyed a dwelling house valued at Kshs.1,858,112/- the property of JANE Mwelu.
4. In Count II: the Accused was charged with the offence of Stealing contrary to Section 275 of the Penal Code.
5. The particulars are that on diverse dates between 1st September 2023 and 12th September 2023 at Kwakathule village, Katheani Location in Kangundo Sub-County within Machakos County stole one steel window, one steel door, 32 pieces of Iron sheet, 1600 feet of Building stones and 32 pieces of timber all valued at Kshs.129,000/- the property of JANE MWELU.
6. The Accused person pleaded not guilty to both charges of 18th September 2023 and the Trial Court fixed the matter for hearing on 3/04/2024.



7. However, on 6/10/2023 the Accused person herein changed his plea and pleaded guilty to both Counts.
8. On 19/10/2023 the Accused person herein was convicted as charged in both Counts as follows;
In Count I: The accused was sentenced to serve Four (4) years imprisonment.
In Count II: The Accused was ordered to pay a fine of Kshs.200,000 in default to serve 3 years imprisonment.
9. The said sentence was to run consecutively.

The Appeal

10. Dissatisfied by the conviction and sentence of the Trial Court the Appellant filed his Memorandum of Appeal on 26/10/2023 based on the following grounds THAT;
 - a. The Learned Magistrate erred in both fact and law by explicitly not explaining to the Appellant the consequences of his plea of guilt.
 - b. The Learned Magistrate erred in matters of law and fact by failing to order that the sentence of 4 years meted out for the Offence of Malicious Damage contrary to Section 339(1) & (3) years for the Offence of Stealing Contrary to Section 268 of the Penal Code to run concurrently.
11. The Appeal was canvassed by way of written submissions.

Written Submissions

Appellant's Submissions

12. On the issue that the Trial Magistrate erred in matters of law and fact by failing to order that the sentence of 4 years meted for the offence of malicious damage contrary to Section 339(1) and sentence of 3 years for the offence of stealing contrary to Section 268 of the Penal Code to run concurrently it is submitted that the two charges in the instant matter were committed in the same transaction as they are connected in kind and time, hence the sentence ought to run concurrently unless there are special circumstances.
13. Reliance is made in the case of *Owiti v Republic* [1984] KLR 73 and in the case of *Nganga -vs- Republic* where it was held that concurrent sentences should be awarded for offence committed in one criminal transaction.
14. It is finally submitted that this Court to reverse the Trial Court judgment since the Trial Magistrate applied wrong principles in line with the tenets of a fair trial as sentence meted out was negating the Judiciary Sentencing Policy Guidelines.
15. Also, the period spent in incarceration is enough punishment subject to the best discretion to this Court as time served can also be deemed enough retribution subject to the Court's discretion.

Respondent Submissions

16. The Respondent filed submissions dated 28th June, 2024 and stated that on the ground that the Trial Court erred in both fact and law by explicitly not explaining to the Appellant of the consequences of his plea of guilt it is submitted that the Trial Court explained to the Appellant the consequences of his plea of guilt twice as exhibited in the Court proceedings before conviction.



17. On the issue that the Trial Magistrate erred in both fact and law by The Learned Magistrate erred in matters of law and fact by failing to order that the sentence of 4 years meted out for the Offence of Malicious Damage contrary to Section 339(1) & (3) years for the Offence of Stealing Contrary to Section 268 of the Penal Code to run concurrently it is submitted that the sentence passed by the Trial Court was within the law as provided under Section 14 (1) of the Criminal Procedure Act. The inference drawn from this Section is that the Trial Magistrate has the discretion to direct that the sentences passed run concurrently.
18. Reliance is made in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where the Court stated thus;
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
19. See also the case of *Mokela v The state* (135/11)[2011] ZASCA 166 the Supreme Court of South Africa held that:
- It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”
20. See the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270, sentence can only be enhanced in clear circumstances that;
- “The Court does not alter a sentence unless the Trial Judge has acted upon wrong principles or overlooked some material factors.”

Determination

21. The Court considered the pleadings and submissions filed and the Court is to determine whether the Trial Court erred for not explicitly explaining to the Appellant the consequences of his plea of guilt and not putting both sentences for 2 Counts to run concurrently as the offences arose from same transaction.
22. 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



23. The Court of Appeal in the case *Ndede v 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.”
24. The procedure for taking pleas is provided in section 207 of the Criminal Procedure Code were complied with. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v 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.”
25. I have carefully considered the Trial Court record. Plea was taken on 18/9/2023 and the Accused person after being explained the gravity of the offence ingredients and particulars of offence stated it was not true on both Counts and plea of not guilty was entered on both Counts for the Accused person.
26. On 6/10/2023 the Accused person stated he wanted to change plea. The Trial Court explained the gravity of offence and the particulars of offence, the facts of the case that between 1/9/2023- 12/9/2023 the Accused damaged Complainants dwelling house a 6 bedroomed house. The Complainant reported to Kwathule Police Post who visited the scene and photographs taken. The Photo graphs were presented to Court and Quantity Surveyor assessed damage and presented Report in Court.
27. The Accused person said facts were true and plea of guilty was entered on his own plea of guilt.
28. On 19/10/2023 the gravity of offence was explained to the Accused person, the Prosecution found no records of previous convictions- possibly 1st Offender.
29. In mitigation he stated he was an orphan he had a wife and 2 children and grandchild who relies on him.
30. The prosecutor informed the Court that the Accused person was brother to Complainant and instead of showing brotherly love was part of the problem. The law was to take its course.
31. The Trial Court considered mitigation and Prosecution sentiments and observed that it was every Kenyan’s dream to own land and build a home. From the photographs it was disheartening to see the level of destruction to the dwelling house and the Complainant his sister was rendered homeless by the Accused person’s action and therefore the custodial sentence as non -custodial sentence was not appropriate.



32. 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.”

25. The Appellant took plea before the Trial Court and was explained to the substance and ingredients of the charges. At each stage he was informed of the gravity of the offence by the Trial Court and he continued to admit the charges the facts and even mitigated before sentence and did not change his mind. There is no evidence of coercion or duress or influence and he did not raise any irregular act or omission by the Trial Court. The plea was in accordance with Section 207 CPC and unequivocal.
26. The Appellant submitted that he was not informed by the Trial Court by explicitly explaining to the Appellant the consequences of his plea of guilt.
27. In the case of *William Oongo Arunda (alias Patrick OduorOchieng) v 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.

25. The Accused person participated in the Trial proceedings through out and at each stage explanations were made on the charge facts and mitigation in Kiswahili. The record show nowhere that he raised any objection, was confused yet he willingly participated /responded to all that was going on in Court. He did not ask for Court’s assistance, legal representation translator or anyone either Paralegal in Court to explain what was going on in the Trial. This Court finds that he ably and willingly participated in the Trial Process, the Court at every stage explained the gravity of the offence. The Trial Court record confirms that o 18/9/2023 after plea taking and he pleaded Not Guilty to both Charges. The Court entered plea of Not guilty and prosecution provided the Accused person with copy of Charge sheet, investigation Diary, 9 Witness statements and was to be given copies of photographs and physical exhibits later. The Accused person stated He confirmed receipt of documents and he was not going to engage a lawyer.
26. In the case of *Nelson v 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.”

25. This Court upon perusal of typed Trial Court proceedings finds that the Trial Court undertook proper legal exercise plea-taking and the Accused person/Applicant ably participated as the Trial Court explained to the Accused person, he responded and at no point did he recant the plea of guilty.
26. As to sentence, although the Accused person upon conviction gave his mitigation, the Trial Court and the Prosecution took into account the extent of damage to the Complainant’s house, the resulting damage incurred as was assessed by the Quantity Surveyor who presented a Report.
27. These facts illicit circumstances which depict the Applicant/Appellant as a danger to the Complainant and rest of his family. I concur with sentiments of the Trial Court he was not eligible for non-custodial sentence.
28. To the issue of sentences running concurrent or consecutive there is no hard and fast Rule it is the Trial Court’s discretion that should be exercised judiciously and in this case it was.
29. This is clearly a family feud, the Accused person took the law in his hands and destroyed his sister’s home rendering her homeless.

Disposition

1. The Court finds no merit in the Appeal and upholds both conviction and sentence. The Appeal is dismissed.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS HIGH COURT ON 15TH OCTOBER 2024.(VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

