



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Chumba v Republic (Criminal Appeal E071 of 2021)  
[2023] KEHC 2075 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2075 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E071 OF 2021  
JWW MONG'ARE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**EDWIN KIPCHIRCHIR CHUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the sentence of Hon. R. Odenyo in Eldoret Chief  
Magistrate's Criminal Court Case No. 120 of 2020 delivered on 26th October 2021)*

**JUDGMENT**

1. The Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on December 9, 2019 at Kipkongot Centre in Ainabkoi Sub County within Uasin Gishu County, armed with a dangerous weapon, namely panga, robbed Francis Rono of Kshs 2,000/- cash and two mobile phones valued at Kshs 15,000 and immediately after the time of robbery injured the said Francis Rono.
2. The Appellant pleaded not guilty on January 13, 2020 but later entered into a plea bargain agreement and upon receiving a pre-sentence report on October 26, 2021 the Appellant was sentenced to 15 years imprisonment.
3. Being dissatisfied with the decision of the trial court, the Appellant instituted this appeal vide a petition of appeal premised on the following grounds;
  1. That (I) am a first offender and thus beg for leniency.
  2. That (I) am remorseful, repentant and reformed since incarceration in prison.
  3. That (I) am a young man and pray to be re-constituted in society to serve as a role model and a teacher/mentor to others of similar behaviour.



4. That may the honourable court consider the time spent in remand custody and be commuted as part of the sentence pursuant to section 333(2) of the *Criminal Procedure Code*.
5. That may this honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary to establish the mitigating circumstances that would lessen the custodial sentence.
6. That more grounds to be adduced at hearing thereof and determination of this appeal.

The parties filed submissions on the appeal.

#### **Appellant's case**

4. The Appellant submitted that from the record of the court, his first appearance in court was on January 13, 2020 and concluded on October 26, 2021 thus the trial took one year and ten months. The trial court failed to consider the time spent in remand as required by section 333(2) of the Criminal Procedure Code.
5. The Appellant urged the court to consider that he is remorseful and repentant. He has undergone rehabilitation and gained some skills in prison. Further, that he is a young man and he would be a productive addition to society. He prayed that the appeal be allowed.

#### **Respondent's case**

6. Learned counsel for the respondent submitted that they conceded to the appeal and were asking for a retrial. This is based on the fact that the charge and all the essential elements of the offence were not read out to the accused in a language he understands which was contrary to sections 137F and 137H of the Criminal Procedure Code. The facts were not read out to him after his plea of guilty. The plea was ambiguous and unfinished and thus the conviction ought to be quashed and the sentence set aside.
7. Learned counsel cited the case of *Samuel Wabini Ngugi v republic* (2012) eKLR in support of the submission that there be a retrial.

#### **Analysis and determination**

8. It is the duty of this court as a first appellate court is to re-examine the evidence (facts and exhibits) presented before the trial court and re-evaluate the same in order to determine whether the trial court erred in law and fact in the extent raised in the petition of appeal. (See *Okeno vs Republic* [1972] EA 32), *Kiilu & Another v Republic* [2005]1 KLR 174) and *David Njuguna Wairimu V – Republic* [2010] eKLR). Even where no evidence was adduced by the prosecution witnesses (for instance where a plea of guilty is recorded), the appellate court is still obligated to scrutinize the proceedings in their entirety so as to ascertain whether or not the sentence was lawful and legal.
9. Although this is an appeal against sentence only, I note that the Respondent has conceded to the Appeal and requests the court to order a retrial. The submission by the Respondent are that the trial court in approving the plea bargain agreement failed to comply with sections of the Criminal Procedure Code on the modalities that the court ought to follow in the circumstances.



10. Counsel for the Respondent urged the court not delve into the merits of the conviction but instead order a retrial. Having analysed the totality of the court record I find that the only issue that arises therefore is;

Whether the plea bargain agreement was unequivocal and entered with the full consent of the Appellant/Accused in the trial court.

**Whether the plea bargain agreement was unequivocal and entered with the full consent of the Appellant/Accused in the trial court.**

I note from the evidence on record that the trial started on January 13, 2020 when the first witness, the complainant in the trial and concluded on October 26, 2021 when a plea bargain agreement was entered. In the interceding period the Appellant remained in custody. Section 137C of the [Criminal Procedure code](#) is to the effect that either party may initiate a plea agreement. The said section provides as follows;

137C. Initiation of plea agreement

- (1) An offer for a plea agreement may be initiated by—
    - (a) a prosecutor; or
    - (b) an accused person or his legal representative.
  - (2) The court shall be notified by the parties referred to in subsection (1) of their intention to negotiate a plea agreement.
  - (3) The court shall not participate in plea negotiation between a public prosecutor and an accused person under this Part.
11. Once a plea agreement has been reached, the law sets up very clear steps that must be followed as set out under section 137H of the [penal code](#) that provides as follows;

Section 137F. Recording of plea agreement by court

- (1) Before the court records a plea agreement, the accused person shall be placed under oath and the court shall address the accused person personally in court, and shall inform the accused person of, and determine that the accused person understands—
  - (a) the right to—
    - (i) plead not guilty, or having already so pleaded, to persist in that plea;
    - (ii) be presumed innocent until proved guilty;
    - (iii) remain silent and not to testify during the proceedings;
    - (iv) not being compelled to give self-incriminating evidence;



(v) a full trial; (vi) be represented by a legal representative of his own choice, and where necessary, have the court appoint a legal representative;

(vii) examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

(b) that by accepting the plea agreement, he is waiving his right to a full trial;

(c) the nature of the charge he is pleading to;

(d) any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge;

(e) any mandatory minimum penalty;

(f) any applicable forfeiture;

(g) the court's authority to order compensation under section 175 (2)(b), restitution under section 177, or both;

(h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence;

(i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement.

(2) The prosecutor shall lay before the court the factual basis of a plea agreement and the court shall determine and be satisfied that there exists a factual basis of the plea agreement.

12. The above provisions are geared in my view in ensuring that the plea agreement doesn't become a trap for the accused person and that he is clear in his mind what the new plea means and the resultant consequences. From the court record, it appears to me that the trial magistrate did not follow the steps set out above under section 137H. Instead, the record reflects that after the accused had changed his



plea, the court stated “the facts are adopted from the evidence of PW1. MFI 1 produced as exhibits” and went ahead to pass sentence on the accused person.

13. In the case of *Adan -v- Republic* [1973] EA 445. The Court of Appeal held as follows:
  - 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 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.
  
14. I note that learned counsel for the Respondent chose to seek a retrial vide stating the same in submissions. The Court of Appeal in the case of *Alexander Lukoye Malika –vs- Republic* [2015] eKLR identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

-

“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?”
  
15. Whereas counsel for the respondent argues that the conviction should be set aside as the facts were not read out to the appellant, I do note that the appellant signed the plea agreement dated September 15, 2021. However, in compliance with the dictates of section 137H the court ought to have provided an opportunity to indeed confirm that the new charge and the facts were indeed correct. It is possible, and we shall never know, that if the facts were explained to the accused person, he may have again changed his plea by denying that the facts were the same as what the new charge that he was pleading to. I find that because the accused had been in custody for a prolonged period of time awaiting the hearing of his case, it is possible that he saw the plea agreement as a means to be released and did not understand that he was accepting to be convicted for a different offence other than he had previously been arraigned for.
  
16. In a situation where an accused does not have the benefit of legal representation, it is incumbent upon the trial court to ensure that the rights of an accused especially the right to a fair trial as envisioned under article 50 of the *Constitution* are protected. Indeed, article 50(2)(b) states as follows;
  - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.



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

- (a) To be presumed innocent until the contrary is proved;
- (b) To be informed of the charge, with sufficient detail to answer it;

17. It is imperative that the courts ensure that a party understands the import and consequences of a change of plea and to ensure that the court first and foremost does not preside over a miscarriage of justice. In the present case, I find that the trial court was quick to record the plea agreement without according the accused opportunity to interact with the facts of the new charge. The testimony of PW1 was indeed in relation to the original charge and the changed plea could not have been presumed to emanate from the same set of facts.

18. Having analysed the court record and the submissions of the parties I find that the conviction on the new plea agreement was not unequivocal. In my view, the court ought to have allowed the accused person to understand the factual situation surrounding the new plea and not to convict based on evidence that had been tendered towards the original charge to which the accused had pleaded not guilty to. I am inclined to hold that this is case of miscarriage of justice and that the conviction of the accused was based on the wrong premises and misinterpretation of the law by the trial court. In the premises therefore, I will allow the appeal and set aside the conviction and sentence forthwith. The Appellant is hereby set free unless otherwise lawfully held. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

.....

**J.W.W.MONGARE**

**JUDGE**

**Delivered virtually in the presence of**

1. Appellant-absent
2. Mr. Rop holding brief for Ms. Okok for the Respondent
3. Brian Kimathi – court assistant

.....

**J.W.W.MONGARE**

**JUDGE**

