Nzioki & 3 others v Republic (Criminal Appeal E038, E039, E040 & E04 of 2022 (Consolidated)) [2023] KEHC 2271 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E038, E039, E040 & E04 OF 2022 (CONSOLIDATED)

MW MUIGAI, J

MARCH 16, 2023

BETWEEN

DENNIS MWANGANGI NZIOKI ..... 1ST APPELLANT

STANLEY MWANGI MUTHUITA ..... 2ND APPELLANT

ANTHONY NJOROGE MUCHIRI ..... 3RD APPELLANT

NICHOLAS MATHENGE MBURU ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Kavata Mwavula Mwandime, Stanley Mwangi Muthuita , Dennis Mwangangi Nzioki, Nicholas Mathenge Mburuand Anthony Njoroge Muchiri were jointly charged with being at a place to which a person results for purposes of smoking, inhaling sniffing or using narcotic drugs and psychotropic substances contrary to section 5(1) (a) as read with section 5 (1) (b) of the *Narcotic Drugs and Psychotropic Substances (control) Amendment Act* No 4 of 2022.

2. The particulars of the offence are that on April 15, 2022 at Joska Trading Centre in Matungulu sub-county within Machakos County, jointly without lawful and reasonable excuse were found at a place to which persons resort for the purposes of smoking, inhaling, sniffing or using Narcotic drugs or psychotropic substances contrary to the provisions of the said Act.

3. In count II ,Kavata Mwavula Mwandimewas charged with being in possession of Narcotic drugs contrary to section 3(1) as read with section 3(2) of the *Narcotic Drugs and Psychotropic Substances (control) Amendment Act* No 4 of 2022.

4. The particulars of the offence are that on April 15, 2022 at Joska Trading Centre in Matungulu sub-county within Machakos County, was found to be in possession of narcotic drugs to wit 87 rolls of bhang which were not in medicinal preparation form.

5. When the matter came up for plea taking, the 1st Accused person pleaded not guilty while the four other accused persons who are the Appellants herein pleaded guilty. The prosecutor gave the chronology of events as follows;

> "On April 15, 2022 at 1700 hours police from Joska and KBC were on operation within Joska after outcry by the public that bhang and other drugs were sold and used by students to nearby schools. The officers went to kiosk by Accused 1 and found a group of youth smoking bhang. On noticing the police, they ran away but were arrested. They recovered 87 rolls of bhang wrapped in a black and white polythene bags. They were escorted to KBC police station. After statements were recorded they were charged."

6. The Appellants all pleaded guilty and said "*Ni Ukweli*".

7. The prosecutor stated that there were no previous records.

8. In mitigation, they stated as follows;

   Accused 2 : I smoke bhang due to my work

   Accused 3 : I ask for forgiveness

   Accused 4 : I smoke due to my work

   Accused 5 : I ask for forgiveness

9. The court noted the mitigation and sentenced accused 2,3,4 and 5 to pay a fine of Kshs 250,000 in default 5 years imprisonment.

The Appeal

10. The Appellants have filed Appeals that were consolidated. I have looked at all the Appeals and the Appellants are all praying for the sentence to be reduced or reduced to time served.

11. The grounds of Appeal are also similar, they are;

    a. The Learned Trial Magistrate erred in both fact and law by explicitly not explaining to them the consequences of the plea of guilty

    b. The Learned Trial Magistrate erred in both fact and law by not considering their mitigation.

12. The Appeals were canvassed by way of written submissions.

1st Appellant's Submissions

13. He filed submissions on November 21, 2022 in which he merged the grounds of appeal and submitted that the plea entered by the trial court was not unequivocal and is contrary to the tenets of fair trial as espoused by Article 50 of the *Constitution*. It was contended that unfamiliarity with the court procedure can be hypothesized to have led to the entering of a plea of guilty and the Learned Magistrate could have been an umpire and shed direction for the interest of justice. Secondly, he contends that he did not understand what he was pleading to. Further that the words 'True' are not adequate to constitute a plea of guilty. Reliance was placed on the case of *Bolt v Republic* [2002] 1KLR 814 and *Njuki v R* [1990] KLR 334.

14. The 1st Appellant submitted that the court ought to have exercised caution by ensuring that he understood the charge and the outcome in a language he understands. He opined that the period spent in custody is enough punishment and subject to the discretion of the court, it can be deemed enough retribution. It was submitted that he was unrepresented by an advocate and he was lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect his rights as envisaged in the *Constitution*. Reliance was placed on the case of *Njihia Wakianda vs Republic* Criminal Appeal 437 of 2020.

15. It was submitted that his mitigation was not considered as looking into the circumstances leading to his arrest within the confines of Joska town in his usual day to day activity by 'msako' at 3.30pm and he contends he was a victim of circumstances and he was not within the confines of the area stipulated under section 5 (1) (b) of the Narcotic Drugs and Psychotropic Substances control Act.

2nd Appellant Submissions

16. He filed submissions on November 21, 2022 in which he merged the grounds of appeal and submitted that the plea entered by the trial court was not unequivocal and is contrary to the tenets of fair trial as espoused by Article 50 of the *Constitution*. It was contended that unfamiliarity with the court procedure can be hypothesized to have led to the entering of a plea of guilty and the Learned Magistrate could have been an umpire and shed direction for the interest of justice. Secondly, he contends that he did not understand what he was pleading to. Further that the words 'True' are not adequate to constitute a plea of guilty. Reliance was placed on the case of *Bolt v Republic* [2002] 1KLR 814 and *Njuki v R* [1990] KLR 334.

17. The 2nd Appellant submitted that the court ought to have exercised caution by ensuring that he understood the charge and the outcome in a language he understands. He opined that the period spent in custody is enough punishment and subject to the discretion of the court, it can be deemed enough retribution. It was submitted that he was unrepresented by an advocate and he was lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect his rights as envisaged in the *Constitution*. Reliance was placed on the case of *Njihia Wakianda vs Republic* Criminal Appeal 437 of 2020.

18. it was submitted that his mitigation was not considered as looking into the circumstances leading to his arrest within the confines of Joska town in his usual day to day activity by 'msako' at 3.30pm and he contends he was a victim of circumstances and he was not within the confines of the area stipulated under section 5 (1) (b) of the Narcotic Drugs and Psychotropic Substances control Act.

3rd Appellant Submissions

19. He filed submissions on November 21, 2022 in which he merged the grounds of appeal and submitted that the plea entered by the trial court was not unequivocal and is contrary to the tenets of fair trial as espoused by Article 50 of the *the Constitution*. It was contended that unfamiliarity with the court procedure can be hypothesized to have led to the entering of a plea of guilty and the Learned Magistrate could have been an umpire and shed direction for the interest of justice. Secondly, he contends that he did not understand what he was pleading to. Further that the words 'True' are not adequate to constitute a plea of guilty. Reliance was placed on the case of *Bolt v Republic* [2002] 1KLR 814 and *Njuki v R* [1990] KLR 334.

20. The 3rd Appellant submitted that the court ought to have exercised caution by ensuring that he understood the charge and the outcome in a language he understands. He opined that the period spent in custody is enough punishment and subject to the discretion of the court, it can be deemed

enough retribution. It was submitted that he was unrepresented by an advocate and he was lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect his rights as envisaged in *the constitution*. Reliance was placed on the case of Njihia Wakianda v Republic Criminal Appeal 437 of 2020.

21. it was submitted that his mitigation was not considered as looking into the circumstances leading to his arrest within the confines of Joska town in his usual day to day activity by 'msako' at 3.30pm and he contends he was a victim of circumstances and he was not within the confines of the area stipulated under section 5 (1) (b) of the Narcotic Drugs and Psychotropic Substances control Act.

4th Appellant Submissions

22. He filed submissions on November 21, 2022 in which he merged the grounds of appeal and submitted that the plea entered by the trial court was not unequivocal and is contrary to the tenets of fair trial as espoused by Article 50 of the *Constitution*. It was contended that unfamiliarity with the court procedure can be hypothesized to have led to the entering of a plea of guilty and the Learned Magistrate could have been an umpire and shed direction for the interest of justice. Secondly, he contends that he did not understand what he was pleading to. Further that the words 'True' are not adequate to constitute a plea of guilty. Reliance was placed on the case of *Bolt v Republic* [2002] 1KLR 814 and *Njuki v R* [1990] KLR 334.

23. The 4th Appellant submitted that the court ought to have exercised caution by ensuring that he understood the charge and the outcome in a language he understands. He opined that the period spent in custody is enough punishment and subject to the discretion of the court, it can be deemed enough retribution. It was submitted that he was unrepresented by an advocate and he was lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect his rights as envisaged in the *Constitution*. Reliance was placed on the case of *Njihia Wakianda vs Republic* Criminal Appeal 437 of 2020.

24. it was submitted that his mitigation was not considered as looking into the circumstances leading to his arrest within the confines of Joska town in his usual day to day activity by '*msako*' at 3.30pm and he contends he was a victim of circumstances and he was not within the confines of the area stipulated under section 5 (1) (b) of the Narcotic Drugs and Psychotropic Substances Control Act.

Respondent Submissions

25. The Respondent filed submissions dated 23.11.2022 in which counsel submitted that the trial court is not bound by any law to caution the appellants on the gravity of the charges. It was contended that this is a practice that courts have developed to caution accused persons in serious felonies. Reliance was placed on the case of *Abdalla Mohammed v Republic* [2018] e KLR.

26. Secondly, it was submitted that the penalty section in Section 5 (1) in count 1 is provided in the law and the trial court acted within the law.

27. While relying on the case of *John Muendo M v Repulic* [2013] e KLR, It was submitted that the Trial Court followed the procedure of plea taking as required by law. The only issue arising is that the prosecution failed to produce any government analyst report indicating that the exhibits produced in court were bhang as per section 77 (1) of the *Evidence Act* that provides;

> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert,

document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

28. Counsel indicated that the State concedes to the Appeal.

Determination

29. The Court considered the Appeals, the Trial Court record and the submissions of the parties.

30. The manner of recording of a plea is provided for in section 207(1) and (2) of the *Criminal Procedure Code* provides as hereunder:

> (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 a plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by a 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.

31. The Court of Appeal In *Adan v Republic* [1973] EA 445 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 was held that:

> (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."

32. The Court of Appeal in *Elijah Njihia Wakianda v Republic* [2016] eKLR that:

> " Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms."

33. In *Jackson Wambua v Republic* [2022] eKLR where it was observed that;

> " In this case the Court informed the Appellant that the charge facing him was a serious one. In my view that was not sufficient. The Court ought to go further and informed the accused what the seriousness of the offence was. Where the seriousness is the sentence which the accused is liable to face, the Court ought to point out that sentence. If it is the fine, then the Court ought to inform the accused of the fine. In this case the minimum prescribed fine is, on the face of it, heavy. Accordingly, the Appellant ought to have been informed of this."

34. This Court finds that from the trial Court record the plea-taking process was conducted as envisaged by the landmark case of *Adan vs Republic supra*. In fact, the issue of not understanding the consequences of pleading guilty cannot be relied on by the 1st Accused who at first pleaded not guilty and was charged with 2 counts. Legal representation is ideal in most/all cases but is not mandatory in all cases except only in felonies namely robbery with violence murder etc. The record does not reflect any request by the Accused persons/Appellants to be allowed to obtain legal representation and/or that any of them was medically unfit /incapable to stand trial.

35. In *Abdalla Mohammed v Republic* [2018] eKLR, the Court Korir J (as he then was) observed as follows;

> " The importance of the need for the Court to be cautious when accepting a plea of guilty from undefended person was stressed by Joel Ngugi J (as he the was) in *Gitau Kinene vs Republic* [2016]eKLR when he stated 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. 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 behoved the Court to warn the Accused Person of the consequences of a guilty plea. "

36. The Trial Court acted within the law in convicting the Appellants as it did. The Act provided for the minimum sentence which is what was given. The conviction was well founded in law. Section 5(1) (a) as read with section 5 (1) (b) of the Narcotic Drugs and Psychotropic Substances (control) Amendment Act No 4 of 2022 provides as follows;

> (1) Subject to this Act, any person who—
>
> (a) smokes, inhales, sniffs or otherwise uses any narcotic drug or psychotropic substance; or
>
> (b) without lawful and reasonable excuse, is found in any house, room or place to which persons resort for the purpose of smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance;
>
> (c) .....
>
> shall be guilty of an offence and liable to a fine of two hundred and fifty thousand shillings or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

37. The only issue that tilts the scales of justice of this case, is that the Expert Report confirming the substance recovered from 1st Accused person and smoked by other Accused persons was not proved beyond reasonable doubt to be bhang and/or prohibited substances as provided for by the Act.

38. In this case, the Appellants were arrested on April 15, 2022, took plea on April 19, 2022 and were sentenced on the same date. I also note that the Respondent has conceded to this Appeal.

39. Makhandia J (as he then was) in the case of *Issa Abdi Mohammed v Republic* [2006] eKLR opined that: -

> "An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

40. Accordingly, the appeals are allowed, the Appellants convictions are hereby set aside and their sentences quashed.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH MARCH 2023 (PHYSICAL/VIRTUAL CONFERENCE)

M W MUIGAI

JUDGE

IN THE PRESENCE OF:

THE APPELLANTS

MR MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT (S)