



**Chitai v Republic (Criminal Appeal E036 of 2022)
[2023] KEHC 19761 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E036 OF 2022**

PJO OTIENO, J

JULY 7, 2023

BETWEEN

GILBERT CHITAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by the Hon. J. Ndururi
(PM) in Kakamega CM's Criminal Case No. E505 of 2022 dated 25/4/2022)*

JUDGMENT

The Background

1. The appellant herein was charge with three counts before the trial court. On count I, the appellant was alleged to have unlawfully assaulted Fredrick Shitoka occasioning him actual bodily harm. On count II, the appellant was charged with offence of escape from lawful custody after damaging the ceiling contrary to section 213 as read with section 36 of the [Penal Code](#) while on count III he was accused of resisting lawful arrest by the police officer contrary to section 254(b) of the [Penal code](#).
2. The appellant during the trial pleaded guilty to the second count and pleaded for forgiveness claiming to have been confused at the time and couldn't understand what was happening. The trial magistrate sentenced him to a three-year imprisonment on the offence of escape from lawful custody.
3. The appellant having been aggrieved and dissatisfied with the conviction and the three-year sentence on the offence of escape from lawful custody contrary to section 213 as read with section 36 of the [Penal Code](#) has lodged an appeal faulting the trial magistrate's decision for being harsh and excessive sentence and not having considered the circumstances of making the plea of guilt. It is his contention that he was tortured, forced and intimidated by the police to accept the charge and to record the plea of guilt having been misled that in doing so, he would be released. He presents that the court never informed him of his rights to legal representation.



4. Both sides filed submissions in canvassing the appeal and the court having read both appreciates the industry employed. As said before, having been convicted, the appellant was sentenced to serve a 3 years' imprisonment.
5. Having carefully examined the trial court records and the submissions I find the main issue for determination to be whether the plea of guilt recorded was in compliance with the law. It is always the burden of the prosecution in availing evidence to prove the accused guilty beyond reasonable doubt save where an accused enters a plea of guilty in which event the court is obligated to be satisfied that the same is unequivocal and further that the availed facts establish offence charged.
6. In *Simon Gitau Kinene v Republic* (2016) eKLR, the court affirmed on need to ensure that a plea of guilty to be clear, unambiguous and unequivocal. Accordingly, I proceed to determine whether the manner in which the proceedings leading to the plea of guilt was in compliance with the law and if the plea was itself unequivocal.
7. The first issue is whether the appellant herein is justified in contending that he was forced and intimidated by the police to accept the charge and to record the plea of guilt having been misled that in doing so, he would be released, and further that the court never informed him of his rights to legal representation.
8. The manner of recording of a plea is provided for in section 207(1) and (2) of the *Criminal Procedure Code* as applied and interpreted in the landmark case of *Adan v Republic* (1973), the court of appeal laid down in simplest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. The law demands 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. The statement of facts serves in enabling the judge to satisfy himself/herself that the plea of guilty was really unequivocal and that the accused had no defence and it gives the judge the basic material on which to assess sentence.
9. In this case, it is noted that the statement of facts was read out by the prosecutor but there is no explanation by court and on the possible sentence. In line with section 207 of the Criminal Procedure Code the accused ought to have been made to understand the nature and elements of the offence in totality as well as appreciating all the essential ingredients of the offence charged and the trial court had the duty to be satisfied that such facts constitutes and the offence. In terms of principle of legality enshrined in article 50(2) (n) of the *constitution*, plea of guilty is only to be entered in respect of an offence known to the law and it is the court's duty to ensure that the plea is unequivocal when regard is given to the fact that the appellant had no legal representation.
10. That was the ration in *Simon Gitau Kinene v Republic* [2016] eKLR it was held that courts in circumstances where the accused is not represented ought to ensure the plea of guilty is unequivocal and that the same is informed by the accused fully appreciating the charge all its particulars and the facts supporting such particulars. The court said:

“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.” (emphasis added)

11. To this court, it is now well established and indubitable that where the accused is not represented, great care should be taken to see that the accused understands the elements of the offence, especially if the facts suggest that he may have some form of a defence. The facts expected to be read out to the accused must contain the details and all elements of the offence charged. The accused is then afforded the opportunity to comment on such fact and accept each and every element of the offence without equivocation. In addition, the consequences of the plea and the extent of the severity of the punishment, if by incarceration, need be explained and a warning administered upon the accused and his comments invited. If his comment on the fact challenges any element or if he becomes ambivalent in regard to any of the elements, then a plea of not guilty must follow. If, however, the court enters a plea of guilty disregarding such ambivalence, the plea is bad for being equivocal and is thus subject to being quashed.
12. As said before, in this matter, even though the facts of the charge were read out to the accused after the plea was recorded but before the sentence was passed, there was never a warning administered upon the accused. That was a violation of the applicable law and it vitiates the plea. In addition, regard ought to have been given to the possible sentence and the accused made aware of the consequences of his waiver of his trial rights that the constitution guarantees him. No warning is recorded to have been administered upon the accused.
13. It is the finding by the court that the plea of guilt was inconsistent with the law and ought not to have been made. As a result, for the interest of justice to be met, the conviction is quashed and the matter remitted to the trial court for a fresh plea taking The appeal is therefore allowed, conviction quashed and the 3-years sentence imposed on the applicant set aside with an order that fresh plea be taken.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

