



REPUBLIC OF KENYA



**Baraka v Republic (Criminal Appeal E132 of 2022)  
[2023] KEHC 22741 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22741 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E132 OF 2022  
RPV WENDOH, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**DAVID CHACHA BARAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon M. Obiero – Senior Principal Magistrate  
in Kehancha Magistrate’s Criminal Case No. E915 OF 2021 delivered on 6/4/2022)*

**JUDGMENT**

1. David Chacha Baraka appeared before Hon Obiero Senior Principal Magistrate Kehancha on November 18, 2022 and pleaded guilty to a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
2. The particulars of the charge were that he unlawfully killed his brother Ronald Chacha on November 7, 2022 at Giborori village.
3. Upon conviction, he was sentenced to serve ten years imprisonment. Aggrieved by the conviction and sentence, the appellant filed this appeal contending that he was confused and not aware of what he was doing after being arrested by police; that the trial court failed to comply with Article 50 (2) (g) of the Constitution and lastly that the sentence meted is harsh and excessive. He added that the court did not warn him of the consequences of pleading guilty. He therefore prays that the conviction be quashed, sentence be set aside and the case be admitted to trial.
4. The appellant’s submissions were a mere repetition of the grounds of appeal.
5. Mr. Kaino, the prosecution counsel filed his submissions conceding the appeal. Counsel relied on the decision of Tony Mamboleo vs. Republic (2022) eKLR which relied on Ndiwa Boit vs. Republic (2002) eKLR and Benard Ijendi vs. Republic (2017) eKLR where the courts held that the appellant should



have been warned of the consequences of pleading guilty to the charge and that therefore the plea violated the appellants rights to fair trial as the plea was equivocal and that a retrial should be ordered.

6. Section 348 of the [Criminal Procedure Code](#) bars any appeal from a conviction arising from a plea of guilty except as to the extent or legality of the sentence . It reads as follows:-

Section 348

No plea 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.

7. In [Alexander Lukoye Malika vs. Republic](#) (2015) EKLR the Court of Appeal identified situations in which a conviction based on a plea of guilty can be interfered with when it said:-

“ 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.”

8. The question to be answered here is whether the plea was unfinished, ambiguous or imperfect.
9. I wish to first take up the issue of Article 50 (2) (g) and (h) of the [Constitution](#) was complied with.
10. Article 50 of the [Constitution](#) generally guarantees an accused person’s right to fair trial. It provides: -

“ 50(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

11. Under Sub Article 2 (g), the court is required to inform an accused person of his right to choose counsel to represent him. The said right has to be explained to an accused promptly and the court has make a record of it. The court record is clear that the said right was explained to the accused before plea was taken. After explanation to the appellant, he replied that he was ready.
12. As regards Article 50 (2) (h) it means that an accused be informed of the right to be assigned counsel at the state expenses if ‘substantial injustice would otherwise result’. The said right is not absolute as it has to be demonstrated that substantial injustice would arise. The supreme court in [Karisa Chengo vs. Republic](#) Petition No. 5 of 2015, listed instances when substantial injustice may arise at paragraph 94 thereof i.e. complexity of the charge, the seriousness of the offence; severity of sentence, the ability of accused to afford services of counsel; the ability of the accused to comprehend the proceedings, literacy of accused, if accused is a minor. So far it has not been demonstrated that substantial injustice arose or may have arisen. It has not therefore been demonstrated that the said Constitutional rights were violated.



### Whether the plea was unequivocal:

14. The appellant faced a charge of manslaughter contrary to Section 202 of the Penal Code. It attracts a maximum sentence of life imprisonment upon conviction. This court notes that the appellant was unrepresented. Despite the serious consequences that may have followed a plea of guilty, the trial court which has the mandate to explain to an accused all his Constitutional rights before such plea, did not explain to the Accused or warn him of the consequences of pleading guilty.
15. In *Tony Mamboleo vs. Republic supra*, the court relied on the *Ndiwa Boit* case in which the court held: -

“Stopping there for a moment, it is abundantly clear to us that at no stage did the Magistrate warn the Appellant of the consequences of his pleading guilty to the charge. Indeed, the Appellant’s plea in mitigation that “I am asking for pardon” clearly shows that the Appellant was wholly unaware that he ran the risk of being sentenced to death.”

See also *Lukoye’s case supra*.

In *Elijah Njibia Wakianda vs. Republic* (2010) eKLR, the court said:-

“We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the *Constitution* guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.

The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and advocator of the principles ensuring that an unrepresented accused person is not lost at sea in the maize of the often intimidating judicial process.”

16. The above quote says it all. The plea herein was therefore imperfect and equivocal and must be quashed and the sentence set aside.

### Whether the court should order a retrial?

17. The case of *Ahmed Sumar* addressed what court should consider before ordering a retrial. The court said:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.

18. In this case, the appellant was sentenced to serve ten (10) years imprisonment on November 30, 2022. He has not yet served a year. He will not suffer prejudice if a retrial is ordered. The appellant faced a serious charge of manslaughter where a life was lost. It is only fair that justice be done to both parties. I hereby order a retrial



19. I therefore order that the accused be released to Kehancha Police Station to be presented for plea before a different magistrate other than Mr Obiero Senior Principal Magistrate. The appellant be produced before Migori Senior Principal Magistrate's court on September 25, 2023 for plea and trial. The trial be expedited. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**R. WENDOH**

**JUDGE**

**In presence of; -**

Mr. Kaino Prosecution Counsel

Appellant Present

Ms. Emma/ Phelix –Court Assistant

