



**Omini & another v Republic (Criminal Appeal E140 of 2023)  
[2023] KEHC 22684 (KLR) (Crim) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22684 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E140 OF 2023**

**DR KAVEDZA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**OFEM JAMES OMINI ..... 1<sup>ST</sup> APPELLANT**

**OLUSEGUN ADEWALE POPOOLA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence in Criminal Case E319 of 2023 at Chief Magistrate's Court at Milimani- Before Hon. L. O. Onyina CM delivered on 23/5/2023)*

**JUDGMENT**

1. The appellants were each charged with two counts under the [Kenya Citizenship and Immigration Act](#) No. 12 of 2011 (the 'Act'). The first and second counts were presenting a forged document contrary to section 54(1)(g) as read with section 54(2) of the [Act](#). The particulars of the offence were that the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant, on 8/5/2023 at Namanga Border Control within Kajiado County, being Nigerian Nationals and holders of passport numbers A1253xxxx and A10933xxxx respectively, presented forged Kenyan passports numbers BK330xxx and AK1028xxx, bearing the names Ofem James Omini and Olusegun Adewale Popoola correspondingly, whose Bio Data pages were forged, while departing Kenya for Tanzania.
2. For the 3<sup>rd</sup> and 4<sup>th</sup> counts, the appellants were charged for being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the [Act](#). The particulars of the offence were that the appellants on 8/5/2023 at Namanga Border Control within Kajiado County, being Nigerian Nationals, were found to be unlawfully present in Kenya in that they did not have valid pass or permits allowing them to be present in Kenya.



3. The appellants initially pleaded not guilty to the charges on 9/5/2023. However, on 12/5/2023 the prosecution informed the court that the appellants wished to enter into a plea agreement pleading guilty to counts 1 and 2 on condition that counts 3 and 4 would be withdrawn under section 87(a) of the *Criminal Procedure Code*.
4. The Plea Agreement dated 12/5/2023 was adopted by the court upon it being satisfied that the appellants had understood the contents and that they had executed it voluntarily without promise or benefit of kind and without threats, force, intimidation or coercion.
5. The appellants were subsequently convicted and sentenced to each serve three (3) years imprisonment for counts 1 and 2 of presenting a forged document contrary to section 54(1)(g) as read with section 54(2) of the *Kenya Citizenship and Immigration Act*, 2011.
6. Being dissatisfied with the conviction and sentence of the trial court, the appellants through the firm of Oketch Nyabuto & Associates preferred the present appeal on the basis of the grounds contained in the petition of appeal dated 24/5/2023.
7. The main grounds are as follows: that the trial court convicted the appellants on their own plea of guilty that was unequivocal; that the trial court was not cautious in accepting a plea of not guilty from undefended accused persons who were foreign nationals and not well conversant with the language of the court. Further, that the trial court failed to warn the appellants that the charges they were about to plead guilty carried hefty penalties. In ground 8, it was alleged that the trial court failed to take into account that the appellant's plea of guilty were induced by threats. Lastly, that the sentence meted upon the appellants was harsh and excessive in the circumstances.
8. In response, the respondent filed grounds of opposition. The grounds raised are as follows: the appeal lacks merit, is misconceived and unsubstantiated. The appeal is an abuse of the court process since the appellant was properly convicted and the prosecution discharged their burden of proof. The court was implored to dismiss the appeal.
9. The appeal was canvassed by way of written submissions. Mr. Oketch, learned counsel for the appellants submitted that the appellants are Nigerian nationals and failure by the trial court to inquire which language they understood best prejudiced their right to fair trial. It was therefore submitted that appellants' plea was equivocal and the court ought to have disregarded the same. It was further submitted that the 2<sup>nd</sup> appellant in his mitigation began by thanking the Judiciary, which meant that he did not understand what was going on. Counsel relied on the case of *Bivamunda Erick v Republic* (2014) eKLR to support his argument. On the other hand, it was submitted that the custodial sentence imposed on the appellants being three (3) years imprisonment without the option of a fine was too harsh and excessive considering that they were foreigners, remorseful and first-time offenders.
10. On her part, Ms. Edna Ntabo, Senior Prosecution Counsel, submitted that the appellants' conviction was well merited as the offence the appellants were charged with were proved to the required standard of law. As regards the sentence, the respondent conceded to the appellants' argument that the 3-year custodial sentence without the option of a fine was harsh. The court was therefore implored to substitute the said custodial sentence with an option of a fine commensurate to the offence.

### **Analysis and determination**

11. The issues for determination are whether the appellants' conviction was merited; whether the procedure that the trial court followed was proper and whether the sentence was harsh and/or excessive in the circumstances.



12. At the outset, it is important to note that the appeal arises from a plea-bargaining agreement. In this regard it is imperative that such a plea bargaining agreement be considered in light of sections 137A to O of the *Criminal Procedure Code* (CPC).
13. Although the parties did not particularly raise the point under section 137L(1) there is no right of appeal to this court. This section provides: -

“Subject to subsection (2), the sentence passed by a court under this Part shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed.”

Nonetheless, section 137L(2) further provides as follows: -

“(2) Notwithstanding subsection (1), the Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.”
14. The effect of the above provisions is that no appeal lies to this court from the trial court except on severity or legality of a sentence. A conviction pursuant to a plea agreement may however be quashed on grounds of fraud and misrepresentation (See Court of Appeal CRA No 379 of 2009 *David Irungu Muriithi v Republic* (2010) eKLR).
15. Firstly, is the issue as to whether the plea agreement was marred by misrepresentation, fraud or coercion, it was averred in ground 8 of the Petition of Appeal that the appellants’ plea were induced by threats. The question that therefore begs for an answer is whether the plea agreement was voluntary or vitiated by coercion or threats, and if so, from whom.
16. At the outset, I note that it is expressly stated in the plea agreement that the accused persons entered into the agreement freely and voluntarily, without promise or benefit of any kind and without threats, force, intimidation or coercion of any kind. Even though it was averred that the appellants’ plea were induced by threats, no particulars thereof were given, neither in this appeal nor in the trial court. Without the particulars of coercion or threats, this ground fails.
17. Secondly, it was submitted that the trial court erred in accepting a plea of not guilty from the appellants not knowing if they were well conversant with the language of the court. I have perused the entire record and note that the trial was conducted in English. In fact, when the appellants were first arraigned in court on 9/5/2023 and the charges read out to them, they pleaded not guilty in English. The appellants subsequently changed their plea and entered into a plea agreement in which they conceded to having understood the contents thereof by annexing their signatures. I am indeed satisfied that the appellants understood the proceedings as further evidenced by their mitigation when they both addressed the court in English.
18. Thirdly, the appellants’ counsel submitted that the trial court ought to have entered a plea of not guilty upon considering the 2<sup>nd</sup> appellant’s mitigation in view of *Bivamunda Erick v Republic* (2014) eKLR (*supra*) case where the appellant had initially pleaded guilty and later raised his defence in mitigation. I however find that this is a distinguishable case of plea bargaining. To my mind, the trial court strictly and cautiously complied with the procedure relating to plea agreements contained in sections 137A-O of the *CPC*.



19. With regard to the issue of legal representation under Article 50 of the Constitution, the court has no obligation to provide legal representation to an accused. Nonetheless, it is clear from the record that the trial court informed the appellants of their right to legal representation as well as their right to contact the Embassy. Unfortunately, the appellants neither procured legal representation nor contacted the embassy but rather opted to proceed with the trial by subsequently entering into a plea agreement. I therefore do not find that the appellants' right to fair trial was infringed by failure to have legal representation.
20. Fourthly, is the issue of the trial court informing the appellants about the serious consequences of pleading guilty. Despite this being a distinct case of plea bargaining, I note from the trial record that the appellants understood that the sentence to be imposed upon their conviction was within the sole discretion of the sentencing magistrate. Indeed, I am satisfied that the appellants willingly entered into the plea agreement and knew the consequences of doing so. Having stated so, I affirm the conviction of the appellants.
21. As regards the sentence, the respondent conceded that the sentence of 3 years imprisonment without the option of a fine was excessive considering that the appellants were first time offenders. In considering whether to interfere with the sentencing discretion of the trial court, this court is guided by the decision of the Court of Appeal in *Wanjema v. R.* (1971) EA 493, 494 where it was held that:
- “An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. No account was taken, as it should have been, of the fact that the appellant pleaded guilty: *Skone* (1967), 51 Cr. App. R. 165 and *Godfrey* (1967), 51 Cr. App. R. 449. (This admits no doubt because the magistrate awarded the maximum sentence to this offender; which of itself is unusual.”
22. The offence under section 54(1)(g) as read with section 54(2) of the Kenya Citizenship and Immigration Act, is provided as follows: -
- “54. Offences relating to documents
1. A person who-
- .....
- (g) presents a forged, altered or false document for the purposes of obtaining a passport, travel document, certificate of registration, visa, work permit, residence permit, pass, written authority; Commits and offence
2. Any person convicted of an offence under this section shall be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.”
23. I have considered the circumstances of the case and indeed, there is no evidence that the trial court erroneously exercised its sentencing discretion. The sentences were legal and proportionate. I therefore decline to interfere with the sentences meted out against the appellants.



It is so ordered.

**JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

**D. KAVEDZA**

**JUDGE**

