Kipchumba v Republic (Criminal Appeal E001 of 2025) [2025] KEHC 14904 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E001 OF 2025

JRA WANANDA, J

OCTOBER 23, 2025

BETWEEN

KEVIN KIPCHUMBA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against the Judgment of Hon. V. Karanja-PM, delivered on 5/11/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E1006 of 2024)

JUDGMENT

1. The Appellant was charged in the said case with the offence of threatening to kill contrary to Section 233(1) of the Penal Code. The particulars were that on 6/08/2024, at around 1000hrs at Moi Garage Village in Marakwet West Sub-County within Elgeyo Marakwet County, he wilfully and unlawfully uttered the word "I will kill you and burn you together with your husband" threatening to kill one Selinah Kosgei, said to be her own mother.

2. The record of the trial Court indicates that the Appellant took plea on 8/10/2024, and he pleaded not guilty. He, however, he changed his plea to one of guilty when the mater came up for hearing one month later on 5/11/2024. He was thus convicted on the same date on his own plea of guilty, and then sentenced to serve 14 years imprisonment.

3. Aggrieved by the decision, the Appellant filed this Appeal on 5/06/2025 by way of the undated Petition of Appeal filed on 2/01/2025. Messrs Tarigo & Co. Advocates later took over conduct of the Appeal, withdrew the said Petition and substituted it with the unnecessarily lengthy Memorandum of Appeal dated 4/06/2025. I say "unnecessarily lengthy" because it contains a long list of up to 14 grounds, which, however, could have been easily condensed into about only 4. The grounds are presented as follows:

i. The learned trial Magistrate erred in fact and law by failing to consider the fact that the Appellant was not well conversant with Swahili language.

ii. The learned trial Magistrate erred in fact and law by failing to consider the demand of the Appellant at the time of taking plea.

iii. The learned trial Magistrate erred in fact and law by failing to order that the Appellant be subjected to mental assessment before taking plea.

iv. The learned trial Magistrate erred in fact and law by failing to consider the fact that the Appellant's parents were willing and ready to withdraw the charges against the Appellant.

v. The learned trial Magistrate erred in fact and law by failing to consider the fact that the Appellant was suffering from mental stress/anguish.

vi. The learned trial Magistrate erred in fact and law by failing to inform the Appellant about his Constitutional rights to legal representation.

vii. The learned trial Magistrate erred in fact and law by engaging the Appellant in verbal altercation.

viii. The learned trial Magistrate erred in fact and law by using the criminal justice to settle personal scores with the Appellant.

ix. The learned trial Magistrate erred in fact and law by failing to record the response of the Appellant in clear manner to reflect what was meant by the Appellant.

x. The learned trial Magistrate erred in fact and law sentencing the Appellant to 14 years imprisonment contrary to maximum sentence of 10 years provided under the law for the said offence.

xi. The learned trial Magistrate erred in fact and law by subjecting the Appellant to illegal, unlawful and unconstitutional sentence of 14 years imprisonment.

xii. The learned trial Magistrate erred in fact and law by handling the Appellant's case with a lot of bias and emotions.

4. The Appeal was canvassed by way written Submissions. The Appellant's Submissions is dated 18/06/2025, while the Respondent's, filed through Prosecution Counsel, Racheal Mwangi is dated 24/04/2025.

Appellant's Submissions

5. Counsel for the Appellant cited "Black's Law Dictionary, 10th Edition" on the definition of the word "unequivocal. He also cited Section 207 of the Criminal Procedure Code on the guidelines to be observed during plea-taking, and also the case of Farahat Ibrahim Ahmed & 2 others vs. Republic, High Court at Kisumu, Criminal Appeal No. 68 of 2016.

6. He urged that where the accused is unrepresented, as it was in this case, it was the duty of the Court to ensure that a plea of guilt is unequivocal and that the trial Court therefore should have taken the trouble to ascertain whether the Appellant understood the charges he was facing. He contended that in this case, there was outright violation of the Appellants' right to a fair hearing as enshrined at Article 50(2)(m) of *the Constitution*, and urged that it cannot be presumed that the Appellant understood the language of the Court, hence there was a mistrial. He cited the case of Albanus Mwasia Mutua vs. R. Counsel submitted further that the Court ought to have warned the Appellant about the veracity of

his plea of guilt since upon pleading guilty in an uninformed manner, the same Court proceeded to jail him for 14 years. He cited the case of Abdallah Mohammed v Republic [2018] eKLR. He submitted that in this case, the record is clear that the Court did not warn the Appellant of the consequences of pleading guilty to this very serious offence which carried custodial sentence, and that the omission is so grave that it renders the plea as equivocal. He also cited the case of Chacha Mwita vs. Republic CRA 33/2019 eKLR, and also the case of Joseph Kiema Philips vs. Republic [2019].

7. He urged further that though the Appellant indicated that he was pleading guilty to the charge, the Court never bothered to explain to him his rights to Counsel and went ahead to convict and sentence him to 14 years imprisonment contrary to the maximum sentence of 10 years provided under the law for the said offence. According to him, the trial Magistrate did not fulfil the requirements of a guilty plea to be considered been explained the consequences of pleading guilty to the offence, and that the same was irregular and a serious derogation of the Appellant's right to fair trial. He also contended that the Learned Magistrate engaged in verbal altercation in open Court with the accused person which then amounted to provocation of the accused person, which then impaired the judgment of the trial Court. He cited the case of Shadrack Kipchoge Kogo vs. Republic, and also the case of Bernard Kimani Gacheru vs. R [2002] eKLR. In conclusion, Counsel submitted that the trial Court did not consider the Appellant's mitigation when sentencing him, particularly that he was a 1st offender, that the complainants in this matter, his parents, were willing to reconcile with him, and that the Appellant suffered from Bipolar 1 Disorder, as was stated in the Mental Assessment Report resulting in a sentence that was harsh and excessive.

Respondent's Submissions

8. On her part, Ms. Mwangi, submitted that on 7/10/2024, the Appellant was arraigned before the Court for purpose of plea taking, however, the plea was differed to 8/10/2024, and on the said date, the charges were read out to the Appellant, who pleaded not guilty, and was supplied with the committal bundles, and the hearing was scheduled for 5/11/2024.

9. She submitted further that on 5/11/2024, the complainant, the Appellant's own mother, through the Court Prosecutor, informed the Court that she had forgiven the Appellant but the Appellant, however, insisted that he wanted the law to take its full course, and he then pleaded guilty. Counsel added that the facts were read out, and the Appellant confirmed their correctness, and was then convicted and sentenced. She observed that that the trial Magistrate observed that the Appellant showed no remorse and, despite the complainant's desire to forgive him, he refused. Counsel also pointed out that Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has been convicted on his own plea of guilty, except as to the legality of the sentence, and the only exception is when the plea is equivocal. She maintained that in this case, the plea was unequivocal, the process was procedural and lawful, and that the Appellant was not coerced or misled into pleading guilty. She reiterated that the charges were read to the Appellant on 8/10/2024, and he pleaded guilty, that a month later, the Appellant appeared before the Court and insisted that he wanted the law to take its full course despite the complainant's willingness to forgive him. Counsel maintained that he therefore knew what he was doing when he entered the guilty plea, and in the circumstances, the conviction was lawful.

10. Regarding legality of the sentence, Counsel submitted that Section 223 of the Penal Code provides that any person who, without lawful excuse, utters, or directly or indirectly causes any person to receive a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for 10 years. She cited the case of Bernard Kimani Gacheru V Republic [2002] eKLR (supra). She thus conceded that the sentence of 14 years meted out by the trial Court was unlawful and manifestly

excessive. She also agreed that the High Court has the authority to intervene in a sentence under Section 362 of the Criminal Procedure Code, which provision empowers the High Court to call for and review the records of any criminal case handled by a subordinate Court to assess the correctness, legality, or appropriateness of any findings, sentences, or orders made therein. She thus agreed that the High Court may step in if it finds that a sentence is unlawful, excessive, or otherwise flawed.

Determination

11. This being a first appellate Court, its obligation (as stated in Okeno v Republic [1972] EA 32), is to re-examine the evidence presented before the trial Court and evaluate the same in order to determine whether the trial Court erred in law and/or fact to the extent alleged in the Memorandum of Appeal. Even where, as herein, no evidence was adduced by the prosecution since a plea of guilty was entered, the appellate Court is still obligated to scrutinize the proceedings in its entirety so as to ascertain whether the sentence was lawful.

12. The issues for determination in this Appeal are evidently the following:

    a. Whether the plea of guilty entered by the Applicant was unequivocal, and thus, whether the conviction was safe.

    b. Whether the sentence of 14 years imprisonment was justified.

13. As correctly observed by Prosecution Counsel Ms. Mwangi, under Section 348 of the Criminal Procedure Code, no appeal is allowed in the case of an accused person who has been convicted on his own plea of guilty, except as to the extent, or legality of the sentence. This was reiterated in the case of Olel v Republic (1989) KLR 444:

14. Apart from "… the extent and legality of the sentence", the other situation where the High Court may entertain an Appeal pursuant to a conviction based on a plea of guilty, is where the plea-taking process was itself flawed. This was reiterated by the Court of Appeal in the case of Alexander Lukoye Malika v Republic [2015] eKLR, in which the following was stated:

> " 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 unfurnished 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 a 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 in law. Also where upon admitted facts, the appellant could not in law have been convicted of the offence charged."

15. The correct manner of the plea-taking process was set out in the leading case of Adan v Republic (1973) EA 445 at 446, in the following terms:

> " When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts

which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

16. In this case, I note that, in his Submissions, the Appellant's Counsel has articulated the Appeal basically on the grounds that there is no indication by the trial Court on which language was used during the plea-taking process, and that although the Appellant was unrepresented, the Court did not explain to him the consequences of pleading guilty.

17. Regarding the issue of language, it is clear that from the time the Appellant took the initial plea on 7/10/2024, up to 5/11/2024 when he was convicted and sentenced, the consistent language used in the trial was "Kiswahili". This is well documented throughout the proceedings. It is the same language that the Appellant conversed in throughout the trial, including when he refused his mother's offer of forgiveness and withdrawal of the case, and, instead, insisted that the trial proceeds to full hearing. His responses are clearly recorded. It is also the same language that he addressed the Court in his mitigation. From his conduct, he obviously understood the charge facing him. This ground is a clear "red-herring".

18. Although the better manner of conducting the plea would have been for the trial Magistrate to have expressly recorded that she had asked the accused the language she understands and also record the Appellant's response thereto before reading out the charge to him, there is nothing in the record to give the impression that the Appellant did not understand the Kiswahili language. If he did not, he would clearly have protested or brought this fact to the Court's attention, or failed to respond at all to the Magistrate's inquiries. In this case, he fully responded. In any case, this is not a case where the plea and conviction took place in a single day. A whole month had lapsed from the time he was arraigned and took the initial plea, and the date when he changed the plea. He definitely must have had sufficient time to reflect and circumspect. His change of plea cannot therefore be said to have been a rash one. This ground cannot therefore be a serious one. It accordingly fails.

19. Although there is no indication whether the Learned Magistrate warned the Appellant of the consequences of pleading guilty to the offence, which carried a custodial sentence, or informed the Appellant of his right to legal representation, assessing and weighing the whole process in totality, I do not think that failure to warn him, assuming that it was not so done in the first place, in any way prejudiced him or vitiated the whole plea-taking process.

20. The ground that the trial Court engaged in a "verbal altercation" with the Appellant, or used the trial process to settle "personal scores", or exhibited "bias and emotions", are not supported by any evidence from the record, and so I have no way of verifying them. In any case, even assuming that these happened, it has not been shown how they rendered the plea of guilty flawed or equivocal.

21. Regarding the Mental Assessment and the Pre-sentence Reports, there is no law requiring these to be procured by the trial Court as a matter of course. Calling for either is completely at the discretion of the Court, to be made on case-to-case basis, and upon assessment and consideration of the circumstances noted by the Court, or brought to its attention, or even upon application of the parties. Regarding the Mental Assessment, there is nothing to show that the Appellant exhibited any disturbing characteristics before the trial Court that would have necessitated the Court to establish his mental condition by ordering for a mental assessment.

22. In any case, Counsel for the Appellant, in his Submissions, did not at all canvass or even refer to these two grounds. I therefore presume that the grounds have been abandoned by implication. Further, I

have seen a Mental Assessment Report in this file, dated 7/04/2025, meaning it was prepared after this Appeal was filed. Although the same recognizes that the Appellant suffers from a condition described as “Bipolar 1 Disorder”, it nonetheless certifies the Appellant as “fit to plead” as he is reported to be “currently stable”.

23. In view of the foregoing, my finding is that it has not been demonstrated that the Appellant’s plea of guilty before the trial Court was not unequivocal. On the contrary, I am satisfied that the manner in which the plea was taken, and the plea of guilty entered, substantially complied with the requirements of Section 207(1) and (2) of the Criminal Procedure Code.

24. Regarding the sentence, the applicable principles in re-considering sentence by a higher Court were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> “ It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist”.

25. In this case, the offence that the Appellant was charged and convicted of was threatening to kill, contrary to Section 223(1) of the Penal Code, which provides as follows:

> “ Any person who without lawful excuse utters, or directly or indirectly causes any person to receive a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years”.

26. In view thereof, it is clear that the sentence imposed by the trial Court was beyond and in excess of the maximum permitted by statute. It was therefore, no doubt, an illegal sentence. This Court therefore has the duty to correct that wrong. by intervening.

27. The Supreme Court, in Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in sentencing, the following mitigating factors are applicable;

    (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

    (g) possibility of reform and social re-adaptation of the offender; and

    (h) any other factor that the Court considers relevant.

28. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ...."

29. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> "............ we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ...."

30. Applying the above principles to the facts and circumstances of this case, I note that the complainant before the trial Court was the Appellant's own mother whom he threatened to kill. From the statement of facts read out at the trial Court after the Appellant pleaded guilty, it is evident that he has been regularly terrorizing his parents. By these actions, the Appellant crossed the accepted societal norms which does not, and cannot, condone such level of indiscipline against one's own mother, a cherished, treasured, and almost sacred figure in our families. In our African belief, a child who has no respect for his own parent is a "cursed" child and borders on being rendered an outcast. Such disrespect cannot be tolerated in any civilized society. The Appellant is not at all even remorseful. The mother even told the Court that she had forgiven the Appellant and requested to withdraw the case. What did the Appellant do in response? He rebuffed the offer and arrogantly declared that he wanted the case to proceed to full trial. Considering this conduct, this Court is even apprehensive on whether the parents' safety can be guaranteed once the Appellant completes serving his prison term and is released. Under these circumstances, one may understand what prompted the trial Magistrate to mete out the long prison term that she did. Clearly, her patience had been pushed to the limit by the Appellant.

31. Nonetheless, I find the existence of some mitigating factors tilting in favour of the Appellant. For instance, he pleaded guilty, and thus saved the Court considerable time, and also saved the Prosecution substantial resources. He was also indicated to be a 1st offender. Although he is said to have been terrorizing his parents and threatening them with harm, there is also no indication that he has used any physical violence against them so far. I also consider that the mother had at the trial Court, told the Court that she had forgiven the Appellant, and even requested to withdraw the charge. It is the Appellant who, in a moment of arrogance, rebuffed the offer. I want to believe that having stayed in prison for about 1 year now, he regrets that action.

32. I find the above to be mitigating factors which the trial Magistrate may have overlooked and thus failed to take into account. As aforesaid, the Appellant is also reported to be suffering from the "Bipolar 1 Disorder" condition, which, as urged by his Counsel, may possibly explain his erratic behaviour. He is also in his prime age. Although the offence he was convicted of merits a severe sentence, under these circumstances, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time, but by giving him a chance to come out of jail after some reasonable

period of time to ensure he reforms, and to give him a chance to be of benefit to the society, once he is rehabilitated.

Final Order

33. In the circumstances, I make the following Orders:

 i. The Appeal against the conviction made in Iten Senior Principal Magistrate's Court Case No. E1006 of 2024, pursuant to the Appellant's own plea of guilty, fails.

 ii. However, the sentence of 14 years imprisonment imposed by the trial Court against the Appellant is set aside, and substituted with a sentence of 18 months imprisonment, to be computed from the date of arrest as per the charge sheet, namely, 6/10/2024.

 iii. However, to ensure the Appellant's parents' safety, the Appellant shall, upon release, serve another 1 year under Probation, during which time, his conduct shall be closely monitored by, or through the Probation Department in charge of the Elgeyo Marakwet County, and appropriate action taken, where necessary.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF OCTOBER 2025

....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

The Appellant (present virtually from Kamiti Prison)

Mr. Tarigo for the Appellant

Ms. Mwangi for the State

Court Assistant: Brian Kimathi