Kibet v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 14861 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14861 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E003 OF 2025

JRA WANANDA, J

OCTOBER 3, 2025

BETWEEN

TITUS KIPROTICH KIBET ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. E. Kigen-PM, delivered on 2/09/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E075 of 2024)

JUDGMENT

1. The Appellant was charged with the offence of threatening to kill contrary to Section 223 of the Penal Code. The particulars of the offence were that on 17/08/2024 in Koibirir Location, Marakwet East Sub-County, within Elgeyo Marakwet County, he wilfully and unlawfully uttered the words "If I don't kill you today, you better kill me" while threatening to beat one Wilson Kirotich Kisang, said to be his own father.

2. The record indicates that the Appellant took plea on 19/08/2022 and pleaded guilty to the charge, whereupon he was convicted. The Learned trial Magistrate then requested for a Pre-Sentence Report, and upon receiving the same, on 2/09/2024, sentenced the Appellant to 3 years imprisonment.

3. Aggrieved by the conviction and sentence, and upon obtaining leave to appeal out of time, the Appellant, through Messrs Tarigo Kiptoo & Co. Advocates, filed this Appeal on 5/2/2025. He preferred 3 grounds of Appeal as follows:

    i. The learned trial Magistrate erred in law when he entered a plea of guilty that was unequivocal.

    ii. The Learned Magistrate erred in law by imposing a manifestly excessive sentence, harsh and oppressive.

iii. The Learned trial Magistrate erred in failing to inform himself as to the proper sentence to be meted on the Appellant in view of the mitigation made.

4. The Appeal was canvassed by way of written submissions. The Appellant filed the Submissions dated 18/06/2025, while the Respondent, through Prosecution Counsel, Ms. Mwangi filed its Submissions on 29/05/2025.

5. Counsel for the Appellant, in respect to the procedure for recording a plea of guilty, cited Section 207 of the Criminal Procedure Code and also the case of Adan v Republic [1973] EA 445. He then submitted that the Prosecution Counsel read out the facts of the case Appellant but the Court failed to record the Appellants' answer when he was asked whether the same were correct. He thus basically termed the plea as not being unequivocal, and in violation of Article 50[2] of *the Constitution*. On sentence, he submitted that the Court failed to consider the circumstances under which the alleged offence was committed, specifically that the Appellant was not armed during the accident, never used violence towards the complainant, and also did not have a criminal history. He then cited several further authorities.

6. On her part, Counsel for the Respondent readily conceded to the Appeal as she agreed that the plea was not unequivocal. She cited the case of Paulina Amana v Republic [2013] KECA 402 [KLR]. She urged the Court to order for a retrial.

Determination

7. This being a first appellate Court, the duty bestowed upon it [seen Okeno v Republic [1972] EA 32] is to re-examine the facts and evidence presented before the trial Court and evaluate the same. Even where, as herein, no evidence was adduced by the prosecution witnesses 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 process was lawful and legal.

8. The issue that arises for determination herein is "whether the plea of guilty by the Appellant before the trial Court was unequivocal, thus capable of sustaining his conviction and sentence, and if not, whether the Court should order for a retrial."

9. The procedure of taking a plea is set out in Section 207 of the Criminal Procedure Code, which was expounded upon in the celebrated case of Adan v Republic [1973] EA 445 [supra]. The procedure requires that 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. The accused's own words should then be recorded and if they are an admission, a plea of guilty should be recorded. The Prosecution should then immediately state the facts and the response made by the accused thereto must also be expressly recorded. The accused should then be given an opportunity to dispute or explain the facts, or to add any relevant facts. If he does not agree with the facts, or raises any question of his guilt, his reply must be also recorded and change of plea entered. A conviction should thus only be made if there is no change of plea.

10. In the instant case, it is evident that the trial Court's record does not indicate the response given by the Appellant after the facts were read out to him. It cannot therefore be ascertained whether he even understood the facts as read out, and by extension, the charges that were read to him and the ingredients thereof, and thus, what he was pleading guilty to. Nonetheless, the record indicates that the trial Court proceeded to convict him on his own plea of guilty. This was clearly a lapse on the part of the trial Court.

11. It is very possible that considering the heavy workload and pressure that judicial officers work under, the trial Magistrate, as often happens, may have simply suffered a moment of honest oversight as recording the response given by the Appellant after reading out of the facts where a plea of guilty is concerned, is a routine matter obviously well-known to her. Having handled many Appeals emanating from her decisions, I can confidently vouch that she is experienced and very well-versed with the procedure for taking plea. This nature of unintended lapses is clearly a one-off, though common with us judicial officers. The trial Magistrate should not, at all, be crucified for the same. It was I believe, wholly inadvertent, and an omission of human nature.

12. Be that as it may however, for a guilty plea to be termed unequivocal, the steps set out in Adan v Republic [supra] must be strictly followed. The record must be such that it leaves no doubt as to whether the accused understood the charges and confirmed the same, as read out to him, as true and correct. Whatever the explanation for the above lapse therefore, even if unintended as most likely, the plea of guilty herein and the conviction based thereon cannot be sustained. Indeed, as aforesaid, the Prosecution has readily conceded to this position. In the circumstances, I find that the plea of guilty entered at the trial Court was not unequivocal, and hereby quash the conviction and sentence.

13. Having quashed the conviction, the question is now whether the Appellant should be set free, or whether the Court should order for a retrial. On this point, Prosecution Counsel Ms. Mwangi appearing for the State, having conceded to the Appeal, prayed for a retrial.

14. In determining the above question, I take guidance from the Court Appeal case of Samuel Wahini Ngugi v R [2012] eKLR, in which the following directions were offered:

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar v R [1964] EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> > " 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"

15. The Court of Appeal, again, in the case of Fatehali Manji v Republic 1964 E.A 481, stated that:

> " even where a conviction is vitiated by a mistake of the trial Court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and a order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

16. In yet another of its decisions, the Court of Appeal, in Muiruri v R [2003] KLR 552, held as follows: -

> "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. [See Zedekiah Ojuondo Manyala v Republic [Criminal Appeal No. 57 of 1980]; the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the Court's."

17. In this case, there is no dispute that the mistake was the Court's, with no apparent blame attributable to the Prosecution. Further, the Appellant having been convicted and sentenced on 2/09/2024, he has already served 1 year in prison. This is a 1/3 of the sentence of 3 years imposed. Considering these facts, and noting that each case must be determined on its particular facts and circumstances, I find that ordering for retrial, would not, in the circumstances of this case, serve the interests of justice, and will, on the contrary, only cause an injustice to the Appellant.

Final Orders

18. In the end, I issue the following orders:

    i. The conviction of the Appellant in Iten SPMC Criminal Case No. E075 of 2024 is hereby quashed, and the sentence set aside.

    ii. Consequently, the Appellant is hereby set at liberty forthwith, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Appellant absent

Advocate for the Appellant also absent

Ms. Mwangi for the State who was present in the morning virtually, is also now absent

C/A: Brian Kimathi