# Komu v Republic (Criminal Appeal E080 of 2024) [2025] KEHC 11627 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11627 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL E080 OF 2024**

**EN MAINA, J**

**JULY 31, 2025**

**BETWEEN**

**FRANCIS MUSYOKA KOMU .............................................................. APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(Being an appeal against the Conviction and sentence delivered on the 8th day of March 2024 in the Kangundo Chief Magistrate's Court No. E229 of 2024 by Hon. N. Sure , Principal Magistrate.)***

## JUDGMENT

1. The appellant was charged with the offence of being in possession of Cannabis Sativa [bhang] contrary to Section 3 [1] as read with Section 3 [2] of the Narcotics Drugs and Substances Control Act. The particulars of the charge were that on the 7th day of March 2024 at around 0730 hours at Kithundi village ,Kathome Sub-Location Kathieni location in Kangundo sub county within Machakos County, the Appellant was found in possession of 13 ball rolls of bhang, two brooms of bhang and 250 gramms of suspected narcotic drugs [bhang] worth Kshs 4,260 in contravention of the said Act.
2. The Appellant was convicted on a plea of guilty and sentenced to a term of imprisonment for five [5] years.
3. Being aggrieved by the sentence, the Appellant has preferred this appeal via a Petition of Appeal seeking to have the sentence set aside and liberty granted on grounds that;
    a. The learned Trial Magistrate erred in law and facts by failing to note that my plea taking was unprocedural.

b. The learned Trial Magistrate gravely erred in law and facts by convicting him while failing to observe and find that he was unrepresented a violation that the trial court took advantage of by commencing a trial process

c. The learned Trial Magistrate erred in law and facts by failing to consider and finding that there was no warning administered to him regarding the conviction and sentence.

d. The learned Trial Magistrate imposes five [5] years imprisonment which is manifestly harsh and excessive without noticing that the value of the property does not amount to the sentence imposed.

e. Spent

f. The learned Trial Magistrate erred in law and in fact in failing to properly consider and analyze all the evidence adduced thereby convicting the appellant against the weight of evidence.

g. The learned Trial Magistrate erred in law and fact by disregarding the appellant's mitigation and the fact that he was a first time offender of an advanced age of 54 years old.

h. Spent.

4. The parties to the appeal consented to canvass it by way of written submissions. On his part the Appellant relied on the submissions dated 07/05/2025 in which the Appellant submitted that plea taking was unprocedural as the appellant indicated that his language of preference was Kiswahili and the proceedings were in English and for this reason the plea was unequivocal thus the court should not invoke section 348 of the *Criminal Procedure Code*; that the appellant was denied right to fait trial as he was unrepresented and that the court did not consider that he had pleaded guilty to the charge thereby saving the court's time. He contended that his mitigation was also not considered. That he was not warned of the consequences of pleading guilty by the Trial Court.

5. In support of its submissions, reliance was placed on the following cases; Kariuki v Republic [1984] KLR 809, Njuki v Republic [1985]KLR 22, Anthony Muthonga Munene v Republic [2015] e KLR, Pett v Greyhound Racing Association [1968] 2 ALL ER 545, Republic v Karisa Chengo & 2 others [2017] e KLR, Omar Guyo Omar v Republic [2021] Eklr, Director of Public Prosecutions v Peter Aguko Abok & 35 others [2020] Eklr, George Ngother Juma and 2 others v Attorney General [2003] e KLR, Wanjema v R [1971] EA 493, Abdullah Mohammed v Republic [2018] e KLR, Simon Gitau Kinene v Republic [2016]e KLR and Kimani v Republic , Criminal Appeal no E028 of 2022.

6. On its part, the Respondent contended that the plea was unequivocal owing to the fact that before conviction, the charges were read over to the Applicant in Kiswahili, he was warned that the offence was serious before he entered his plea of guilty and the facts constituting the offence were read out to the Appellant. That the Appellant did not ask for representation at any point and failure to have representation did not result in any injustice to the Appellant. It was submitted that the sentence was within the law and the court was urged to dismiss the appeal and instead uphold the judgment and sentence of the trial court. In support of its case, reliance was placed on the cases; Alexander Lukoye Malika v Republic [2015] e KLR, Bernard Kimani Gacheru v Republic [2002] e KLR , Mokela v the State [135/11] [2011] ZASCA and Ogolla s/o Pwuor v Republic [1954] EACA 270.

**Determination**

7. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses – [see the case of Okeno v Republic [1972] EA 32]. I have also

taken into consideration the rival submissions, the cases cited and the law and I find that the issues for determination are;

a. Whether the plea was unequivocal

b. Whether the Appellant was prejudiced by not having an advocate

c. Whether the conviction should be quashed

d. Whether the sentence should be set aside

8. On the issue of plea, generally where an accused person has been convicted on his own plea of guilty, no Appeal against such conviction would lie. This is provided for under section 348 of the *Criminal Procedure Code* which provides as follows:

> " No appeal 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."

9. The manner of recording a plea is provided for in Section 207[1] and [2] of the *Criminal Procedure Code* as hereunder:

[1] The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

[2] If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

10. In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed as follows;

a. 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;

b. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

c. 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;

d. 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;

e. 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."

11. The Appellant contends that the charges were not read to him in a language he understands nor read in Kiswahili. A perusal of the Trial court record indicates as follows;

> " 8/3/24
>
> Mccr Case No E 229 Of 2024
>
> Before Dn. Sure [pm]
>
> S/c: Ms Mwaura
>
> C/a : James/Eddy
>
> Accused: Present
>
> Interpretation : Eng/Kisw/Kikamba
>
> CT: the gravity of the sentence is explained to the accused. The charges are read over to the accused and he states as follows in Kiswahili:
>
> It is true
>
> CT: the plea of guilty entered
>
> Dn Sure
>
> Facts
>
> On 7/3/24, at around 7.30am, the chief of Kathome and Kakuyuni and their assistant chiefs and Nyumba Kumi officials went to the house of the accsed under a tip off. They found the accused seated outside his house. they requested to search and he accepted. The house was searched and the following recovered:
>
> 13 rolls of bhang -Pexb 1
>
> 2 brooms of bhang –Pexb 2
>
> 250grams of bhang –Pexb 3
>
> They are all valued at Kshs 4,260. They were recovered under the bed. The accused was arrested and taken to Kakuyunu police station and the accused was charged.
>
> Dn Sure
>
> Accused: the facts are true
>
> Ct: the accused is convicted of the charges on her plea of guilty.
>
> Dn Sure

12. From the above it appears that the Appellant was asked which language he understands and he stated Kiswahili and thus it was recorded. That is the reason why the interpretation was into Kiswahili and not in any other language. The facts of the case were read and the record captures the Appellant responding that those facts were true. The Court of Appeal in Alexander Lukoye Malika v Republic [2015] eKLR, identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

> " 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."

13. From the record, the Appellant understood the plea and the court finds that section 207 [2] of the *Criminal Procedure Code* and the requirements in Adan v Republic [supra] were met. We thus find no reason to interfere with the conviction as the plea was not ambigious and it is clear that the Appellant pleaded guilty. There is no mistake or misapprehension of facts and the offence committed is known to law. The section under which the Appellant was found to have offended is Section 3 [1] as read with Section 3 [2] of the Narcotics Drugs and Substances Control Act which provides as follows;

   " 1) Subject to subsection [3], any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

   2) A person guilty of an offence under subsection [1] shall be liable—

      [a] in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and

      [b] in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment."

14. The Appellant faults the Trial Court for not assigning him an advocate and not being informed of this right. He thus contends that his right to fair trial was violated. Article 50[2] [b] [g] [h] of *the Constitution*. The said provisions are as follows:-

   " 50[2] Every accused person has the right to a fair trial, which includes the right-

      [b] to be informed of the charge, with sufficient detail to answer it;

      [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.

15. In Chacha Mwita v Republic Criminal Appeal No 33 of 2019, J. Mrima had this to say on the above right.

> Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett v Greyhound Racing Association [1968] 2 All ER 545 Lord Denning presented himself thus: -It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other

side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;'

whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

In South Africa in Fraser v ABSA Bank Limited [66/05] [2006] ZACC 24; 2007 [3] SA 484 [CC]; 2007 [3] BCLR 219 [CC] the Constitutional Court had the following to say: -Without the recognition of the right to legal representation in section 26[6], the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35[3][f] of *the Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation...."

16. In Karisa Chengo & 2 others [2017] eKLR .the Supreme Court took steps to discuss Article 50 [2][h] of *the Constitution* which takes about the issue of substantial injustice on the issue of legal representation. The court rendered itself as follows;

> "In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include:-
>
> [i] the seriousness of the offence;
>
> [ii] the severity of the sentence;
>
> [iii] the ability of the accused person to pay for his own legal representation;
>
> [iv] whether the accused is a minor;
>
> [v] the literacy of the accused; and
>
> [vi] the complexity of the charge against the accused."

17. From the record, the Appellant understood the issues and the consequences of pleading guilty. The court finds that the appellant did not demonstrate that he would suffer injustice if he proceeded without counsel.

18. Having dealt with the issue of the plea, conviction and representation, we now move to the issue of the sentence. It is trite that sentence is at the discretion of the trial court and that an appellate court can only intervene if the same is excessive or that the trial court applied wrong principles or it took into consideration extraneous factors. See Abolfathi Mohamed & another v Republic [2018] KECA 743 [KLR].

19. The guiding principle in altering sentences was laid down in Ogolla S/O Owuor v R [1954] EACA 270 as follows: -

> " The court does not alter the sentence unless the trial Judge acted on upon wrong principles or overlooked some material factors. To us, we would add, third criterion, namely; the sentence is manifestly excessive in view of circumstances of the case …"

20. The Court of Appeal in Daniel Kayalo Muema v Republic Nairobi Criminal Appeal No. 479 of 2007, held that there was room for the court to exercise discretion in passing sentence under the Narcotic Drugs and Psychotropic Substances Control Act. The court rendered itself as follows:-

> " It is manifest from the judgment of the Superior Court that the court understood the phrase "shall be liable" in Section 3[2][a] of the Act as presenting a mandatory minimum sentence of the offence of possession of cannabis sativa. The 1st observation to make is that generally speaking the penalty prescribed by written law for an offence, unless the contrary intent appears is maximum penalty. This principle is confirmed in Section 66[1] of interpretation of General Principles Act Cap. 21 Laws of Kenya…We have no doubt that the sentences of 10 years and 20 years imprisonment prescribed in Section 3[2][a] for the possession of Cannabis sativa are the maximum and the court can lawfully impose a shorter term. Furthermore, although Section 3[2] does not expressly provide for a fine, the court can lawfully in accordance with section 26[2] of the *Penal Code* sentence the offender to pay reasonable fine in substitution for imprisonment. We conclude the Superior Court misconstrued Section 3[2][a] in enhancing the sentence of imprisonment…"

21. In this case, the trial court imposed a minimum sentence of 5 years for reason that he was a repeat offender and that the exhibits raised are reasonable belief that he is in the business of selling bhang which he indeed admitted to in his mitigation.

22. From the evidence, the value of the Cannabis he was found with was worth Kshs 4,260 and from the grounds of appeal, the Appellant indicates that he is 54 years old but the same is not supported by evidence. Nonetheless, considering that the Appellant is a second offender having been convicted on 4/8/2022 in MCCR E837 of 2022 and the quantity that was recovered, the court finds that the sentence imposed was neither harsh nor excessive and the same is affirmed. Appeal is dismissed.

23. Right of Appeal to the Court of Appeal is explained.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2025.**

**E.N. MAINA**

**JUDGE**

In the presence of;

Ms Nyauncho for the State

Appellant present virtually

Miriam – court assistant/interpreter