



REPUBLIC OF KENYA



**Mutai v Republic (Criminal Appeal E026 of 2022)
[2024] KEHC 1895 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E026 OF 2022
RL KORIR, J
FEBRUARY 29, 2024**

BETWEEN

FREDRICK KIPLANGAT MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of arson contrary to Section 332(a) of the *Penal Code*. The particulars of the offence were that on 3rd July 2022 at Sigor in Chepalungu sub-county within Bomet County, the Appellant wilfully and unlawfully set fire to a dwelling house belonging to Janet Chepkirui Ngetich valued at Kshs 70,000/=.
2. The Appellant was convicted on his own plea of guilty and was sentenced to serve 20 years imprisonment.
3. Being dissatisfied with the conviction and sentence delivered on 6th July 2022, Fredrick Kiplangat Mutai through his Petition of Appeal appealed against the conviction and sentence and relied on the following grounds:-
 - i. That I pleaded guilty to the charge because I was a laymen in law.
 - ii. That my right to a fair trial under Article 50(2) of *the Constitution* was violated since I did not have a chance to cross examine witnesses.
 - iii. That I was sentenced to prison terms.
 - iv. That may the court grant the prayer herein under Article 50 (6) (b) of *the Constitution*.
 - v. That may the court consider giving me a chance to be heard.
 - vi. That the court has jurisdiction to hear, determine and grant a re-trial.



- vii. That I am innocently serving 20 years imprisonment in a case which was not heard and witnesses not cross examined.
 - viii. That the learned trial Magistrate erred in law and fact by not considering that the plea of guilt entered was not unequivocal.
 - ix. That the learned trial Magistrate erred in law and fact in failing to observe that there were threats, intimidation or blackmail.
4. Subsequently, Ms, Chepkoech came on record for the Appellant on 1st December 2022. She sought leave to amend the grounds of appeal. Subsequently, without withdrawing or amending the home made petition of appeal filed by the Appellant on 28th November 2022, filed another Memorandum of Appeal dated 2nd December 2022. I shall in the interest of justice consider the earlier memorandum withdrawn and consider the later Memorandum.
5. Counsel listed the following grounds: -
- i. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant basing his Judgment on an equivocal plea and without any justification whatsoever.
 - ii. That the procedure for plea taking was deficient and failed to meet the high threshold stipulated in section 207 of the *Criminal Procedure Code*.
 - iii. That the Accused being a first time offender was unrepresented during plea taking as provided for in Article 50 of *the Constitution* and hence did not understand the consequences of pleading guilty as the court record is devoid of such explanation.
 - iv. That the Accused was highly intoxicated i.e. drunk when he took the plea and therefore could not understand the implications of pleading guilty.
 - v. That no evidence was adduced to show that the Accused indeed committed the offence of arson.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated in *Odhiambo vs Republic* Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:-
- “On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”
7. I observe from the Record however that the Appellant was convicted on his own guilty plea and therefore there was no evidence recorded. I shall therefore be relying on the proceedings in this appeal.
8. On 1st December 2022, I directed that this Appeal be canvassed by way of written submissions.

The Appellant’s written submissions.

9. The Appellant submitted that the plea that he took was equivocal. He relied on *Ombena vs Republic* 1981 KLR 450 and *Adan vs Republic* (1973) EA 445.
10. It was the Appellant’s submission that when taking plea, an Accused must understand the language used and appreciate all the essential ingredients of the offence for the plea to be unequivocal.



11. The Appellant submitted that his right under Article 50(2) of *the Constitution* was infringed upon as the trial court failed to inform him of his right of representation by an advocate and that he had a right to legal representation assigned by the state. That the value of legal representation could not be gainsaid. He relied on *Pett vs Greyhound Racing Association* (1968) 2 All E.R 545 and *Republic vs Karisa Chengo & 2 others* (2017) eKLR.
12. It was the Appellant's submission that he was highly intoxicated when he took the plea and therefore he could not understand the implications of pleading guilty. That he was not in full control of all his faculties which made him misunderstand the charge he faced. He relied on *Grace Nyoroka vs Republic* Criminal Appeal No. 246 of 2006 and *Justus Wariomba Githua vs Republic* Criminal Appeal No. 261 of 2006 where the court set aside the conviction of an Accused with mental disorder as he was deemed unfit to take plea and stand trial.
13. It was the Appellant's prayer that he was dissatisfied with the conviction and the sentence of 20 years. He prayed that this court quashes the conviction and sets aside the sentence.

The Respondent's written submissions.

14. The Respondent filed a Notice of Concession on Sentence on 11th May 2023.
15. Regarding the conviction, they submitted that the Appellant's plea was unequivocal. That when charges were read out to him on 4th and 6th July 2022, he pleaded guilty and when the facts were outlined to him, he accepted them as a true reflection of the circumstances of the offence.
16. Regarding the sentence, they submitted that the sentence was excessive and conceded to its reduction. The Respondent further submitted that although they abhorred violence, they believed that the alternative means of correction was viable in the circumstances of this case.
17. I have gone through and given due consideration to the trial court's proceedings, the Appeal, Memorandum of Appeal dated 2nd December 2022, the Appellant's written submissions dated 2nd December 2022, and the Respondent's undated Notice of Concession of Sentence. The two issues arise for my determination are:-
 - i. Whether the plea was unequivocal
 - ii. Whether the Sentence was harsh and excessive.

i. Whether the plea was unequivocal.

18. I have noted that the Appellant was unrepresented during the trial and that one of his grounds of Appeal was that the plea he entered was equivocal. To ensure that the Appellant was accorded a fair trial in accordance to Article 50 of *the Constitution* of Kenya, I shall relook the plea process in the trial court.
19. The process of plea taking is provided under Section 207(1) and (2) of the *Criminal Procedure Code* which states :-
 - (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.

20. In the case of *Ombena vs Republic* (1981) eKLR, the Court of Appeal held that:-

“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. It is appropriate to set out the holding in full —

“Held:

- (i) 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;
- (ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) 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;
- (iv) 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;
- (v) 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.”

21. I have gone through the trial court proceedings and I have noted that the Appellant took plea on 4th July 2022. The Coram shows that there were two court assistants interpreting English/Kiswahili and Kipsigis languages. The substance of the charge was read and explained to him in a language he understood and he replied “true”, a response which was recorded by the trial court. The Prosecution Counsel then requested for an adjournment as the photographs (Exhibits) were yet to be certified.

22. On 6th July 2022, the Appellant took plea again. Before the substance of the charge and every element thereof was read out to him in a language he understood, he was cautioned by the court. The charge was then read out to him and he replied “it is true”, a response which was recorded by the trial court.

23. Thereafter, the facts of the case were read out to him. When he was asked how he pleaded, he said that the facts were true. The trial court then entered a plea of guilty and cautioned him again before convicting him. The same was recorded in the trial court proceedings.

24. From my appreciation of the proceedings above, It is my finding that the trial court complied with all the requirements and followed the proper procedure in taking the Appellant’s plea. Plea was taken twice and each time the Accused accepted the charge as true meaning that he was clear in his mind when he pleaded guilty. The Appellant’s plea was therefore unambiguous and unequivocal.

25. At ground 4 of the Memorandum of appeal, the Appellant stated that he was highly intoxicated or drunk when he took plea and therefore could not understand the implication of pleading guilty.

26. This ground must be dismissed as it lacks logic. Pleas was initially taken. According to the charge sheet, the offence occurred on 3rd July 2022 and the Accused was apprehended the same day. He was arraigned in court on 4th July 2022 before Hon Kibelion (PM) when he answered true to the charge. The charge was read to him again on 6th July 2022. He was in police custody between 3rd July and 6th July when



he appeared in court to complete his plea. There is no evidence that he got drunk while in custody and there is also no evidence that if he was drunk on 3rd July, he remained so upto the 6th July when he took plea.

27. Having found that the plea was unequivocal, it is necessary to state that an Accused cannot appeal against a conviction if he/she pleaded guilty at the trial court. Section 348 of the [Criminal Procedure Code](#) (CPC) states that: -

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.

28. Ground 5 of the Appeal which states that no evidence was adduced to prove the offence. Sadly, such a ground has been drafted by Counsel who is well aware that the Appellant pleaded guilty and therefore there was no further need for evidence to be adduced. The ground therefore stands dismissed.

ii. Whether the Sentence was harsh and excessive

29. In [Nelson Ambani Mbakaya vs Republic](#) (2016) eKLR, the Court of Appeal stated that:-

“Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.....”

30. Similarly, in [Mkirani vs Republic](#) (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) (17 December 2021) (Judgment), Mativo J. (as he then was) stated:-

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.....”

31. The Appellant was charged and convicted of the offences of arson. Section 332 of the [Penal Code](#) provides that:-

Any person who wilfully and unlawfully sets fire to—

- (a) any building or structure whatever, whether completed or not; or
- (b) any vessel, whether completed or not; or
- (c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
- (d) a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.



32. The Appellant was sentenced to 20 years for an offence which carried maximum a sentence of life imprisonment.
33. I have considered the circumstances of the case and I have noted that the Appellant was the complainant's husband and on the material day he had threatened to kill the complainant and their children because of a domestic quarrel. The Appellant set ablaze their house when the complainant threatened to leave and thereafter chased her away with a panga. The Appellant also threatened anyone who tried to assist in putting out the fire. The trial court also noted that the Appellant did not show any remorse during his mitigation.
34. I have considered the Respondents' willingness to have the sentence reduced to a non-custodial sentence to give the Appellant a chance to rebuild his family. I respectfully disagree with that level of magnanimity. The circumstances of the case paint the Appellant as a violent man who resorted to death threats against his own family and set ablaze his house when the wife threatened to leave. These are not the actions of a man who deserved leniency. The trial court was therefore right in handing down the 20-year sentence.
35. I have however considered that the offenders' family has had a change of mind about his prosecution and long sentence. It has attempted, through a homemade affidavit prepared by the wife who is the complainant to absolve him from the offence, while on his side the Appellant offered to rebuild the house and family. In the circumstances, I will tempter justice with mercy and reduce his 20-year sentence. He shall however remain in prison for rehabilitative purposes.
36. I set aside the 20-year sentence and substitute therefor a sentence of 7 years' imprisonment. This sentence shall run from the date of his conviction in the trial court being the 6th July, 2022.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief Mr. Njeru for the State, Appellant present in person and Siele (Court Assistant)

