Mwangi & another v Republic (Criminal Appeal E014 & E015 of 2023 (Consolidated)) [2025] KEHC 14338 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEHC 14338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E014 & E015 OF 2023 (CONSOLIDATED)

NIO ADAGI, J

MAY 20, 2025

BETWEEN

SAMUEL KARANJA MWANGI ..... 1ST APPELLANT

MICHAEL HASSAN SAMBI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. W. Njuguna (RM) in Kangundo CMCRC No. E406 of 2022 delivered on 19/4/2022)

JUDGMENT

1. Samuel Karanja Mwangi(2nd Accused) and Michael Hassan Sambi (1st Accused) were jointly charged with four others (Ezekiel Benson Obanda, Stephen Kalonzo Kingau, Brian Wachira Mwangi and Richard Kirwa) in Count I for being at a place to which a person resorts for purposes of smoking, inhaling sniffing or using narcotic drugs and psychotropic substances contrary to section 5(1) (b) of the Narcotic Drugs and Psychotropic Substances (control) Amendment Act No. 4 of 2022.

2. The particulars of the offence are that on 15/4/2022 at Joska Shopping Centre in Matungulu Sub-County within Machakos County, jointly without lawful and reasonable excuse were found at a place to which persons resort for the purposes of smoking, inhaling, sniffing or using Narcotic drugs or psychotropic substances contrary to the provisions of the said Act.

3. In Count II , Samuel Karanja Mwangi (2nd Accused) was charged with being in possession of Narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances (control) Amendment Act No. 4 of 2022.

4. The particulars of the offence are that on 15/4/2022 at Joska Shopping Centre in Matungulu Sub-County within Machakos County, was found to be in possession of narcotic drugs to wit 10 rolls of bhang which were not in medicinal preparation form.

5. When the matter came up for plea taking, both Appellants herein pleaded guilty. The prosecutor gave the chronology of events as follows;

> "On 15/4/2022 at 1300 hours police officers were sent on patrol at Joska when they got information from the public that area had become rampant with drugs and along Kathiani street, they found youth smoking bhang. They cornered them. Some managed to run away. They conducted search when they found accused with 10 rolls of bhang and was recovered from his pocket. They were escorted to police station. Statements were recorded".

6. Both Appellants pleaded guilty and responded "Ni Ukweli".

7. The prosecutor stated that there were no previous records.

8. In mitigation, they stated as follows;

   1st Appellant/Accused 2: I was smoking at my work

   2nd Appellant/Accused 1: I ask for court's forgiveness. I smoke bhang due for my own use.

9. The court noted the mitigation and sentenced the Appellants to pay a fine of Kshs.250,000 each in default 5 years imprisonment.

10. The 2nd Appellant (1st Accused) was sentenced to pay a fine of Kshs.5,000/= for Count II, in default, 3 months imprisonment. Sentences to run concurrently.

The Appeals

11. The Appellants have filed Appeals that were consolidated. I have looked at all the Appeals and the Appellants are all praying for the sentence to be reduced or reduced to time served.

12. The grounds of appeal are also similar, they are;

    a. The Learned Trial Magistrate erred in both fact and law by explicitly not explaining to them the consequences of the plea of guilty

    b. The Learned Trial Magistrate erred in both fact and law by not considering their mitigation.

13. On 17/12/2024, the 1st Appellant, Samuel Karanja Mwangi informed the court that he wished to withdraw his appeal upon payment of the fine in the trial court's case. The court ordered for the release of the 1st Appellant upon payment of the fine as requested unless otherwise lawfully held.

14. I have perused the trial court's file and the appeal files but I have not come across any proof of payment of the fine by the 1st Appellant. I will therefore proceed to determine the consolidated appeals.

15. The appeals were canvassed by way of written submissions.

Appellant's Submissions

16. The Appellants sought to rely on documents and submissions filed by either of them. They filed joint submissions dated 08/02/2024, in which they merged the grounds of appeal and submitted that the plea entered by the trial court was not unequivocal and is contrary to the tenets of fair trial as espoused by Article 50 of *the Constitution*. It was contended that unfamiliarity with the court procedure can

be hypothesized to have led to the entering of a plea of guilty and the Learned Magistrate could have been an umpire and shed direction for the interest of justice. Secondly, they contend that they did not understand what they were pleading to. Further, that the words "kweli" in answer to plea and "ni kweli" to the facts, these words without much a-do can't convince this honourable court that the Appellants fully understood the charges and hence pleaded guilty to every element of the charges as read to them by the prosecution.

Reliance was placed on the case of Bolt v Republic [2002] 1KLR 814 and Njuki v R [1990] KLR 334 that:

> " Before a court enters a plea of guilty, especially in serious offences, the accused person should be made to understand the consequences of pleading guilty

17. The Appellants submitted that the court ought to have exercised caution by ensuring that they understood the charge and the outcome in a language they understand. They opined that the period spent in custody is enough punishment and subject to the discretion of the court, it can be deemed enough retribution. It was submitted that they were unrepresented by an advocate and they were lost in the intimidatory unfamiliar world of court proceedings and thus relied on the learned Magistrate to protect their rights as envisaged in *the Constitution*. Reliance was placed on the case of Njihia Wakianda vs Republic Criminal Appeal 437 of 2020where the court held that;

> " Pleas recorded in such words as "I admit" or "1plead guilty or "it's true" or "1 accept" cannot be said as unequivocal of pleading guilty. "

18. It was submitted that the beginning point of ensuring that the accused persons entered into a free and conscious plea of guilt is being satisfied that they understood the charge(s) facing them. Indeed, the court taking plea is supposed to read and explain the charge to the accused persons plus all ingredients in a language they best understand. That in the present circumstances, this wasn't the case as the trial magistrate erred in both law and fact by failing to specifically ask the Appellants the language, they understood hence causing prejudice to the Appellants herein.

19. That the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One Ought to know the consequences of his virtual waiver of his trial rights that *the Constitution* guarantees him. That did not occur here and yet the Appellants were unrepresented calling upon the trial court to be particularly solicitous of their welfare.

20. The Appellants submitted that in this case, it is not clear that the prosecutor stated the facts, or he only relied on the facts as stated in the charge sheet(s) or that the Appellants were given an opportunity to dispute or explain the facts or to add any relevant facts before conviction was entered. Byvirtue of Section 362 of the CPC, they submitted that this court may analyse the record and judge the issues raised in the appeals by the record as it is. The plea of the Appellants cannot be safely accepted as unequivocal, and so the conviction of the Appellants should not be allowed to stand as it is not safe. Reference was made onthe case of Rep v Peter Muiruri & Anor (2014) eKLR, where the court considered similar circumstances to instant facts thus:-

> " For a plea to be unequivocal the steps set out in the case of Adan v Republic [1973] EA 445 must be followed. Further the record must be such that it leaves no doubt as to whether or not the accused understood the charges and confirmed the facts are true. In the result we find that the plea in this case was not unequivocal we quash the conviction and sentence"

21. They submitted that the trial magistrate did not use her discretionary powers in sentencing because she could have weighed the seriousness of the offence vis a vis the mitigating circumstances pursuant to Section 216 of the CPC before sentencing the Appellants by looking into the circumstances leading to their arrest, the I[st] Appellant was arrested at around 1.00 p.m on his way from work and escorted to the police station, facts that he explained to the pundit magistrate. The 2[nd] appellant was arrested in his area of work where he sells clothes to earn a living and at around 14:00 hrs, 6 policemen alighted from motorcycles, entered his shop and deemed to do a search alongside his neighbours shop who sells miraa who was also arrested alongside four of his customers and the policemen later called for a patrol car that picked them up for later arraignment in court and as such, from the foregoing, none of the Appellants were anywhere within the confines of an area as depicted under Sec 5(1)(b) of the Narcotic drugs & psychotropic substances control Act Cap 245 and in a nutshell, they strongly feel this is a statute used by the law enforcement officers as a cash cow in extorting members of public who end up being prosecuted for not relenting to their corrupt endeavours.

22. That during their time of incarceration, they have been engaged in the prison's Industrial rehabilitative program in line with the Kenya Prison's service tagline of "Kurekebisha na haki" and as such, they are ready to be integrated back into the society as reformed citizens.

23. They invited the court to be persuaded by this court's findings in their peers who were charged with similar charges in original criminal case No.405 of 2022 and in subsequent appeals No's E038/022, E039/022, E 040/022 & E 041/022, where Justice Mungai reversed the lower courts findings and acquitted the appellants who were released on 16[th] March 2023.

Respondent Submissions

24. The Respondent filed submissions dated 11.12.2024 in which they opposed to the instance application. They submit that the trial court properly followed the procedure on the plea of guilt and the sentence was proper and legal.

25. That this being a first appeal, this Honourable Court has a duty to reevaluate the evidence which was before the trial court and come to its own conclusion.

26. Section 5 of the Narcotic Drugs and Psychotropic Substances Control (Amendment) Act No. 4 of 2022 provides that:

> " Subject to this Act, any person who—
>
> a. smokes, inhales, sniffs or otherwise uses any narcotic drug of psychotropic substance; or
>
> b. without lawful and reasonable excuse, is found in any house, room or place to which persons resort /or the purpose of smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance; or
>
> (c) being the owner, occupier or concerned in the management of any premises, permits the premises to be used for the purpose of the preparation of opium for smoking or sale or the smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance, commits an offence and shall on conviction, he liable to a fine of not less than—

(i) two hundred and fifty thousand shillings or a term of imprisonment of not less than five years or to both such fine and imprisonment if the offence relates to paragraphs (a) or

(ii) twenty million shillings or a term of imprisonment of not less than ten years or to both such fine and imprisonment, if the offence relates to paragraph (c).

27. Section 3 of the Narcotic Drugs and Psychotropic Substances Control (Amendment) Act No. 4 of 2022 provides that: -

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 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 to a term not more than five years or to a fine of not more than one hundred thousand shillings;

28. The Appellants pleaded guilty to the charges as read out to them. As regards Count I they were without lawful and reasonable excuse, found in any house, room or place to which persons resort for the purpose of smoking, inhaling, sniffing or otherwise using any narcotic drug or psychotropic substance. For Count II when the Ist Appellant was arrested, he was searched and 10 rolls of bhang were recovered from his pocket. The 10 rolls of bhang were presented to the trial court as exhibits. He pleaded guilty and confirmed the facts were true. He was thus convicted on his own plea of guilt and was rightfully sentenced as well.

29. The act provides that the sentence for such offences for count I is two hundred and fifty thousand shillings or a term of imprisonment of not less than five years or to both such fine and imprisonment and for count 2 is a term of not more than five years or to a fine of not more than one hundred thousand shillings.

30. They submit that the trial court in sentencing the Appellants was within the law and thus the sentences were proper and urge the court to uphold the same.

31. On whether the correct procedure followed when taking the plea of guilty, the Respondent cited Section 207 of the Criminal Procedure Code which outlines the procedure that is to be followed during plea taking. It provides that:

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

32. This section provides that when an accused person pleads guilty the admission should be recorded as nearly as possible in the words he used and the accused sentenced. The complainant is also awarded an

opportunity to outline to the court the facts upon which the charge is founded. In Jackson Wambua v Republic [2022] eKLR Odunga J (as he was then) in quoting Ombena v Republic [1981] eKLR indicated that the Court of Appeal outlined the manner of recording plea of guilty by quoting in the case of Adan v Republic [1973] EA 445:

33. The Respondent submit that provisions of Section 207 (l) and (2) of the Criminal Procedure Code were followed. Following the authorities quoted above, the trial court also took further caution to explain to the Appellants the gravity of the offence and the sentence they would face would they wish to plead guilty.

34. They further submit that since the conviction and sentence of the Applicant arises from his plea of guilty, Section 348 of the CPC bars appeals from subordinate courts where an accused was convicted upon plea of guilty except on the extent and legality of sentence by providing that:

> " No appeal shall he 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 and legality of the sentence.

35. They cited the case of Olel v Republic [1989/ KLR 444, where it was held that:-

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely"

36. Odunga J in Anthony Muthonga Munene v Republic [2022] eKLR stated that:

> " It follows that the Applicant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court. That bar, in my view only operates where the plea is unequivocal".

37. The Respondent submit that in this instance the Applicants plea was unequivocal making the conviction safe. The trial court considered the Appellants mitigation when sentencing them and the sentences were to run concurrently.

Determination

38. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See Okeno v Republic (1972) EA 32).

39. The Court considered the Appeals, the Trial Court record and the submissions of the parties.

40. The manner of recording of a plea is provided for in section 207(1) and (2) of the Criminal Procedure Code provides 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.

41. The Court of Appeal in Adan Case (supra) 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 was held that:

(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."

42. In this case it is not certain that the prosecutor stated the facts for Count 1, or that the Appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record shows that the prosecutor stated facts for Count 2 only. The record too does not show if all the Appellants understood Kiswahili and that the charge was read over and explained a second time. The foregoing, in my view are not sufficient to enable me to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:

> " The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction. We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."

43. The Court of Appeal in Elijah Njihia Wakianda v Republic [2016] eKLR that:

> " Criminal proceedings have serious implications on the life and liberty of persons accused depending on the offence charged. The criminal process is designed for the forensic interrogation and determination of guilt with various rights and safeguards built into it to ensure that only the guilty get to be convicted. Thus the heart of a criminal trial is the tendering of evidence by the prosecution in an attempt to establish the charge. That evidence is given on oath and tested at trial through the process of cross-examination. The accused person essentially gets the opportunity, if he chooses to, to confront and challenge

his accusers. He also gets to make submissions and to persuade the court that he is not guilty of the matters alleged. He is also at liberty to testify on his behalf and call evidence on the matters alleged against him. He, of course, has no burden of any kind, the same resting on the prosecution to prove the charge against him beyond reasonable doubt. Given all the safeguards available to an accused person through the process of trial, the entry of a plea of guilty presents a rare absolute capitulation; a throwing in of the towel and a giving of a walkover to the prosecution and often at great cost. A conviction comes with its consequences of varying gravity. Thus, it is that the courts, at any rate appellate courts, would not accept a plea of guilty unless satisfied that the same has been entered consciously, freely and in clear and unambiguous terms."

In Jackson Wambua v Republic [2022] eKLR it was observed that;

> " In this case the Court informed the Appellant that the charge facing him was a serious one. In my view that was not sufficient. The Court ought to go further and informed the accused what the seriousness of the offence was. Where the seriousness is the sentence which the accused is liable to face, the Court ought to point out that sentence. If it is the fine, then the Court ought to inform the accused of the fine. In this case the minimum prescribed fine is, on the face of it, heavy. Accordingly, the Appellant ought to have been informed of this."

44. This Court finds that from the trial Court record the plea-taking process was therefore not conducted as envisaged by the landmark case of Adan vs Republic (supra).

45. Another issue that tilts the scales of justice of this case, is that the Expert Report confirming the substance recovered from 2nd Appellant (1st Accused) person and smoked by other Accused persons was beyond reasonable doubt to be bhang and/or prohibited substances as provided for by the Act.

46. In my view, since the prosecution was required to prove the Appellants guilty beyond any reasonable doubt, the unexplained failure of the prosecution to avail the Expert Report in court created sufficient doubt.

47. I thus give the benefit of the adverse inference to the Appellants, which means that the appeals herein will succeed on that account too.

47. I have considered whether to make an order of retrial. In so doing, I have considered that Appellants were arrested on 15/4/2022, took plea on 19/4/2022 and were sentenced on the same date. It is now almost three years down the line, in the circumstances of this case a retrial would cause irreparable prejudice to the Appellants since the prosecution may read the loopholes already alluded to in this judgement and proceed to plug the same. See the decision of Makhandia J (as he then was) in the case of Issa Abdi Mohammed v Republic [2006] eKLR where he opined that: -

> " An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

47. Consequently, and for the above reasons, I allow the appeals, quash the conviction and set aside the sentences. I order that the Appellants be set at liberty unless otherwise lawfully held.

47. I so order and this file is hereby closed.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 20TH MAY 2025

NOEL I. ADAGI

JUDGE

DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH MAY 2025

In the presence of:

In person..... for Appellants

Ms. Agatha..... for Respondent

Milly..... Court Assistant