

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. E030 OF 2025

ANYIRA

IVAN.....APPLICANT

-VERSUS-

REPUBLICRESPONDENT

(Being an appeal on conviction and sentence in Chief Magistrate 's Court at
Kithimani in Criminal Case No. E322 of 2024 delivered on 4th May, 2023)

JUDGEMENT

1. The Appellant ANYIRA IVAN was charged with three Counts. In Count 1, he was charged with causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars are that on 25th day of March 2023 at Kasuangore village in Yatta Sub-County within Machakos County, unlawfully assaulted WANEbola SAM thereby occasioning him actual bodily harm.
2. In Count 2, he was charged with causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars are that on 25th day of March 2023 at Kasuangore village in Yatta Sub-County within Machakos County, unlawfully assaulted DAVID NZIOKI MUTINDA thereby occasioning him actual bodily harm.
3. In Count 3, he was charged with causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars are that on 25th day of March 2023 at Kasuangore village in Yatta Sub-County within Machakos County, unlawfully assaulted ROSE NZOLA NGILA thereby occasioning him actual bodily harm.
4. The Appellant was arraigned in court on 28/3/2023. The language of the court is shown as Kiswahili/English.
5. The substance of the charge(s) and every element thereof was shown to have been stated by the court to the accused person in a language that he/she understands, who being asked whether he /she admits or denies the truth of the charge(s) replies:

Count 1:

Accused- Ni Kweli

Count 2:

Accused- Ni Kweli

Count 3:

Accused- Ni Kweli

Court: Plea of guilty entered

6. Prosecutor/Wamuyu- One complainant is admitted at Machakos Level 5 Hospital. Am not ready with facts. I pray for mention in two weeks to give statements, reports and facts.

Court: Mention on 11/4/2023.

7. On 11/4/2023, the Prosecutor was absent and a further mention dated was fixed for 24/4/2023. The language of the court is shown as English/Swahili/Kamba.
8. On 24/4/2023, the language of the court was not shown. The prosecutor, Wamuyu informed court that charges are yet to be enhanced although a P3 Form is on record. She prayed for a mention on 4/5/2023 to avail a fresh charge sheet.
9. On 4/5/2023 again the language of the court is not shown. The Prosecutor informed that court that they would stick to the charges.
10. The Appellant stated that **he wished to change plea.**
11. However, the Prosecutor proceeded to read the facts to which the Appellant responded that the Facts were correct.
12. The trial court then convicted the Appellant on his own plea of guilty.
13. The Prosecutor informed court that the Appellant was serving a 10 years prison term for another Count of grievous harm but the details of the case were not availed before court.
14. In mitigation, the Appellant stated that it was not intentional and prayed for leniency.
15. The trial court noted the mitigation and the fact that the Appellant was already serving sentence in another case. He sentenced the Appellant to serve in prison for period of 12 months on consolidated sentence for all the Counts.

16. The Appellant has now challenged the conviction and sentence based on the following grounds:
- a. ***THAT the learned trial magistrate erred in both fact and law by explicitly not explaining to the Appellant the consequences of his plea of guilt.***
 - b. ***THAT the learned trial magistrate failed to observe that the charges and all the essential ingredients of the offences were not explained to the Appellant in his language or in a language he understands.***
 - c. ***THAT the learned trial magistrate erred in matters of law and fact by failing to order that the 1 year meted out for the offence of Assault and 10 years sentences meted for the offence of Grievous Harm to run concurrently.***
17. In opposing the Appeal, Ms. Agatha Abang, Prosecution Counsel argued that the trial court properly followed the procedure on entering plea of guilt and the sentence was proper and legal.
18. Before I consider the grounds of appeal, I think it is proper to consider the provisions of Section 348 of the Criminal Procedure Code which precludes an appeal where an accused person has pleaded guilty, Section 348 Criminal Procedure Code 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”.***
19. In the case of **Olel v Republic (1989) KLR 444 (C.A. 417/1987)** the Court of Appeal held:
- “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.”***
20. By virtue of the above section and above cited case, the Appellant is barred from challenging the conviction and his only recourse is to challenge the extent or legality of the sentence imposed on him by the trial court.

21. However, where the court finds that the plea was not unequivocal, then it can intervene. Even after a plea of guilty is entered, if the accused raises issues or says anything that seems to suggest that he does not agree with the facts; the court must enter a plea of not guilty or enquire as to what the accused.
22. In the case of **Wandete David Njoki v Republic CRA.56/17 (2015) KLR**, the Court of Appeal said as follows:

“At any stage before passing sentence, the accused person is free to change his plea. Where the accused does not agree with the facts as outlined by the prosecution or where he raises any question of his guilt, his reply must be recorded and a change of plea entered. In that case the court shall proceed to hear the case by calling oral evidence.”

23. The main ground in this appeal is whether the plea was unequivocal.
24. Section 207 of the Criminal Procedure Code 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.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided

25. This section further 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 sentence. The Prosecution 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** stated that the Court of Appeal outlined the manner of recording plea of guilty by quoting:

“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.”***

26. The above section does not give details on how a plea is to be taken. In the celebrated case of **Adan v Republic (1973) E.A. 445** the court went into detail on what plea taking entails. The court held as follows:

“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 possible, then in a language which he speaks and understands. 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 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, or course, be recorded."

27. The court will go through the proceedings of the trial court to establish whether the court complied with the guidelines given in the **Adan case**.
28. I must point out that Section 251 of the Penal Code provides for the offence of assault and its penalty thus:

"S.215 Assault causing actual bodily harm: Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years"

29. The trial court should have warned the Appellant of the consequences of pleading guilty to the charges so that he would know what to expect. In my view, the warning is part and parcel of the charge and particulars that the Appellant needed to be appraised of and failure by the court to do so led to a serious omission of law.
30. Having outlined the proceedings on the trial court's record on how plea was taken, I realize that the trial court's record does not clearly show which language the Appellant indicated that he fully understood at plea taking and at every court session.

31. The record also shows that on 4/5/2023, the Appellant indicated that he **wished to change plea** but the Prosecutor proceeded to read the facts to him instead of re-reading to him the Charges afresh in a language he understood. The trial court as well proceeded to convict the Appellant after he answered that the facts were correct without first considering the Appellant's wish to change plea. The trial court did not explain to the Appellant and record the nature of the sentences he would serve if he continued to plead guilty. I find this omission to have prejudiced the Appellant who would have otherwise changed plea as he had contemplated.
32. In the instant case, the Appellant faced three Counts of assault causing bodily harm; he was sentenced to 12 months imprisonment on consolidated sentence to all counts on **4/5/2023**. Clearly, on **4/5/2024** the Appellant had already served the full sentence and I find that in the premises this appeal is overtaken by events.
33. Had the Appellant not served a substantial part of his sentence by the date of this Judgement; I would have quashed the conviction but the question is whether I should have ordered a retrial. The case of **Fetahali Manyi v Republic (1964) EA 481** set down some of the principles that the court should consider before ordering a retrial. The court said:
- "even where a conviction is vitiated by a mistake of the trial court for 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 an 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'.***
34. Based on the circumstances of this case and on my analysis above, I would have ordered a retrial. The sentence has been served and a retrial will serve no purpose.
35. Otherwise, the Appellant shall continue to serve the sentence for Grievous harm in the other undisclosed case which is not subject of this appeal.
36. Orders accordingly. This file is closed.

JUDGEMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS THIS 18TH NOVEMBER
2025

NOEL I. ADAGI
JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 18TH NOVEMBER 2025

In the presence of:

Appellant in person

Ms. Agatha Abang for Respondent

Milly -Court Assistant