Case Number:	Criminal Appeal 319 of 1971
Date Delivered:	12 Jul 1977
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Alister Arthur Kneller, Surrender Kumar Sachdeva
Citation:	Charles Lusiti v Republic [1977] eKLR
Advocates:	Mrs S Chana State counsel for the Republic.
Case Summary:	High Court, Appellate side, Nairobi 12th July 1977 Kneller & Sachdeva JJ ***Criminal law*** *- trial – plea of guilty - unequivocal plea - duty of Court to ensure plea unequivocal - recording of verdict - Criminal Procedure Code (cap 75), section 207(2).* Section 207(2) of the Criminal Procedure Code empowers the Court to convict a defendant who admits the truth of the charge. The following *proviso* was added to section 207(2) by the Statute Law (Miscellaneous Amendments) Act 1974: “Provided that after such conviction and before passing sentence or making an order the Court may permit or require the complainant to outline to the Court the facts upon which the charges is founded.” On a plea of guilty being received the Court, notwithstanding the *proviso* to section 207(2) of the Criminal Procedure Code, should ensure that the defendant wished to admit without any qualification each and every essential ingredient of the charge, especially if he is not asked to admit or

	deny the facts outlined by the prosecutor. *Adan v The Republic* [1973] EA 445, EACA, and *Lebiringin v The Republic* [1974] EA 103 considered. Observation on the form in which pleas of guilty should be recorded. **Cases referred to in judgment:** *Adan v The Republic* [1973] EA 445, EACA. *Desai v The Republic* [1971] EA 542, EACA. *Kato v The Republic* [1971] EA 416, EACA. *Lebiringini v The Republic* [1974] EA 103. **Appeal** Charles Lusiti appealed to the High Court (Criminal Appeal No 319 of 1971) against his conviction and sentence by FG Hiuhu Esq in the Resident Magistrate's Court, Nairobi (Criminal Case No 708 of 1977) for burglary and theft. The appellant did not appear and was not represented. *Mrs S Chana* State counsel for the Republic.
Court Division:	Criminal
History Magistrates:	F G Hiuhu
County:	Nairobi
Docket Number:	-
History Docket Number:	Criminal Case 708 of 1977
Case Outcome:	Appeal Allowed.
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

information.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 319 OF 1971

CHARLES LUSITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the Judgment of F G Hiuhu in the Resident Magistrate's Court, Nairobi in Criminal Case No 708 of 1977)

JUDGMENT

The appellant was convicted on his own plea by the Resident Magistrate, Nairobi, of the offences of burglary contrary to section 304(2) of the Penal Code and stealing in a dwelling-house contrary to section 279 of the Penal Code. It may be pointed out that the second limb of the charge should have been laid under section 279(b) of the Penal Code.

Be that as it may, when the appellant first appeared before the Chief Magistrate he pleaded not guilty and was remanded for hearing. However when he subsequently came up for trial, the trial magistrate recorded:

Charge is read over to [the appellant] and all ingredients explained. [The appellant] replied 'It is true and I admit. I stole those things of that woman. They were recovered'. Guilty on plea and convicted.

Order: Accused remanded in custody for seven days for record and sentence.

The offence of burglary is completed by breaking into (or out of) a dwelling-house at night time in order to commit a felony, which in this case was clearly theft. It is not apparent from the record that the appellant admitted that he had broken into the complainant's house, and if so, how, or whether it was at night time, and whether he had the intention of stealing at the time of the breaking. As to the second limb of the charge, there is no admission on record that he stole from the dwelling-house of the complainant or that the property stolen was worth more than Shs 100. The attention of the trial magistrate is drawn en *Lebiringin v The Republic* [1974] E A 103, where Sir James Wicks C J and Hancox J very succinctly reviewed the various authorities on the taking of a plea, and pointed out that it was important that there should be no ambiguity in the plea and that the magistrate is, so to speak, a trustee to ensure that the accused person wishes to admit his guilt, and to satisfy himself on this point, and thus relieve the prosecution of that may sometimes be the onerous task of proving all that they allege beyond reasonable doubt. Attention is also drawn to the decision of the Court of Appeal for East Africa in *Kato v The Republic* [1971] EA 542.

In *Adan v The Republic* [1973] EA 445, the Court of Appeal for East Africa considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines: (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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 the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and (v) if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded. In the present appeal, the prosecutor did not outline the facts until a later date and the appellant was not asked to admit or deny those facts. It is true that by virtue of the Statute Law (Miscellaneous Amendments) Act 1974, a new *proviso* has been added to section 207(2) of the Criminal Procedure Code which reads as follows:

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

However, in our view this *proviso* does not lessen the need to ensure that an accused person wishes to plead guilty unequivocally. On the contrary, it enhances the necessity of being certain that an accused person wishes to admit without any qualification each and every essential ingredient of the charge, especially if he is not asked to admit or deny the facts outlined by the prosecutor.

From the facts in the instant appeal it emerged that as soon as the complainant discovered the offences, she suspected the appellant and found him drinking in a bar on the same night. The appellant had allegedly stolen property with him. When called upon apparently to speak in mitigation, the appellant stated that he had not broken into the house but had opened it with a key. In his petition of appeal, the appellant alleged that the complainant was his wife and that they had had a domestic quarrel, as a result of which she decided to report to the police. In the circumstances, this might well be so.

In any event, we are not satisfied that in the circumstances of the case, the appellant's plea was unequivocal. Accordingly, we declare his conviction a nullity and set aside the sentence imposed upon him. He will be taken before the Chief Magistrate's Court expeditiously so that he can be retried before another magistrate of competent jurisdiction. In the meantime, he will stay in remand.

We consider it pertinent to point out that where there is a composite charge, as the present one of burglary and theft in a dwelling-house, it is not sufficient to record: "guilty on plea and convicted". The magistrate should record words such as: "The accused is found guilty on his own plea on both the limbs of the charge and convicted accordingly". Furthermore, the record does not show the language in which the accused pleaded guilty to the charge. In *Desai v The Republic* [1974] EA 416, Spry V-P stated at page 418:

We would interpose here that we are of the opinion that whenever interpretation is required in any court proceedings, the fact should be recorded and the name of the interpreter and the language used should be shown.

Appeal allowed.

Dated and Delivered at Nairobi this 12th day of July 1977.

A.A.KNELLER **S.K.SACHDEVA**

JUDGE **JUDGE**