4

# CHAPTER SEVEN

# PLEAS

## 7.1 Taking a plea

Once an accused person has appeared or been brought to court under arrest, the next step is for him to be informed of and be called upon to answer the criminal charges preferred against him. This process is known as *arraignment*.

The charge is read over to him in open court complete with the statement of offence and the particulars of each count to which he is required to respond. This is referred to as *taking a plea*.

## 7.2 Possible Pleas

In answer to a charge, an accused person may:[391]

1. Plead Guilty
2. Plead Not Guilty
3. Say nothing: i.e. refuse to plead, assuming that he understands the proceedings
4. Plead:
   a) *autrefois acquit*
   b) *autrefois convict*, or
   c) pardon
5. Say that the Court has no jurisdiction over him
6. Plead guilty subject to a plea agreement

If the accused pleads that he has been previously convicted or acquitted on the same facts of the same offence; or that he has obtained the President's pardon for his offence, the Court must first conduct a *voir dire*, and if the Court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused will be required to plead to the charge.[392]

## 7.3 Recording Pleas

The substance of the charge must be stated to the accused person by the Court, and he must be asked whether he admits or denies the truth of the charge.[393]

The charge should be explained and interpreted to the accused person. Save in

391 Criminal Procedure in Kenya and Uganda, Law in Africa (Number 13, 1964) pp 57.
392 s 207(5) of the CPC.
393 *Ibid*, s 207(1).

simple and straight forward charges, it is not proper for the magistrate to delegate this duty to the Court Clerk and even for simple charges, they must be read under the direction of the Court.[394] It is a fatal omission not to explain to the accused person all the ingredients of a charge: *Charo v Republic.*[395]

Where the accused person does not understand the language of the court, it is mandatory that an interpreter be availed to translate the charge and the proceedings for the benefit of the accused and the court. Such interpreter must first be sworn to faithfully and accurately discharge the task and this should be reflected on the record. In *Republic v Abdi Ali,*[396] the Court said that a plea taken through an unofficial unsworn interpreter cannot be regarded as unequivocal.[397]

The accused person should plead personally and not through his advocate. This was the holding in *Ganji v Republic.*[398] It is only in situations where a statute allows an advocate to plead on his client's behalf, such as in cases involving minor traffic infractions that this rule is qualified.

The plea should be recorded as nearly as possible in the accused person's own words: *Wamithandi v Republic*[399]

In *Republic v Yonasani Egalu and others,*[400] the Court said that it is most desirable that not only every constituent of the charge be explained to the accused person, but that he should be required to admit or deny every constituent part thereof and that what he says should be recorded in a form which would satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally.

## 7.4 Procedure in recording a plea of Guilty

Whereas there is absolutely no reason why the Court should not accept a plea of guilty from an accused person, the consequences of it, in particular the fact that the accused thereby forfeits his right to a trial whereby he can confront his accusers and challenge the evidence against him, counsels caution and circumspection in the manner in which such pleas are taken.

394 Bench Book for Magistrates In Criminal Proceedings.
395 [1982] KLR 308.
396 21 (2) K.L.R. 116.
397 See also *Alwi v Republic* [1990] KLR 191.
398 [1910-20] 2 ULR 101.
399 3 EALR 101.
400 [1965] 9 EACA 65.



The requirements for a plea of guilty were codified by the Court of Appeal in the case of *Adan v Republic*[401] and have since been universally followed by the courts. Courts have always been concerned that before a plea of guilty is accepted and acted upon, certain vital safeguards must be strictly complied with namely:

i. The person pleading guilty fully understands the offence with which he is charged.
   The court taking the plea of guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that, with that understanding and out of his own free will, the pleader admits the charge. This requirement applies not only to offences punishable by death but to all offences.
   In *Ngigi v Republic,*[402] it was further held by the High Court that the accused should be required to admit or deny every element of the charge unequivocally.
ii. Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea.
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 a 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.

In the case of *Kariuki v Republic,*[403] where four accused persons were charged jointly, their responses to the facts of the offence were recorded as follows:

"**Accused 1**- Story is correct
**Accused 2**- Do
**Accused 3**- Do
**Accused 4**- Do
**Court**- Plea of guilty entered by all"

The Court of Appeal said that the word *'do'* recorded by the trial Court as the accused persons' answer to the charge meant nothing and was neither an admission nor a denial of the facts.

401 [1973] EA 45.
402 [1987] KLR 98.
403 [1984] KLR 809.

The Court proceeded to provide an outline of the manner in which a plea of guilty is to be recorded, as follows:

i. The trial magistrate or judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands.
ii. He should then record the plea in the accused person's own words and if they are an admission, a plea of 'guilty' should be entered.
iii. The prosecution must then, immediately, state the facts and the accused should be given an opportunity to dispute, to explain or to add any relevant facts.
iv. If the accused does NOT agree to the facts or raises any question to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused.

In the case of *Republic v B.M. Patel*,[404] the Court said that it is not desirable that a plea of guilty should be accepted where the plea contains no other word than "Guilty" in cases where the accused may not have understood exactly the ingredients of the charge.

In *Njuki v Republic*,[405] the High Court stated, "It has been said time and again that the pleas recorded in the words such as 'I admit,' 'I accept it,' 'I plead guilty,' 'It is true' 'I am guilty' and so on cannot be considered as unequivocal pleas."

The plea must be free and voluntary. It is inappropriate for the judge or magistrate to advise an accused person as to whether to plead guilty or not guilty. His function is only to explain the charge and make sure the accused understands it.[406]

In *Olel v Republic*,[407] the High Court stated that if a plea of guilty is not voluntary or is obtained by force or threats or torture or even deception, it cannot be said to be unequivocal. It would, in these circumstances be a nullity.

In both *Chacha v Republic*[408] and *Mangwera v Republic*,[409] the former Court of Appeal of East Africa held that there is no statutory provision invalidating a conviction on a capital charge on an accused person's own plea where it does amount to an unequivocal admission of guilt but advised caution and went on to

404 [1985] K.L.R. 22.
405 [1990] KLR 334.
406 Law in Africa No 13 Criminal Procedure in Uganda and Kenya.
407 [1989] KLR 444.
408 [1953] 20 EACA 339.
409 [1952] 18 EACA 150.



say that it is generally inadvisable for the trial judge to accept a plea of guilty on a capital charge.[410]

There is merit in the view that the more serious the charge the greater the caution exercised by the Courts in accepting a plea of guilty.[411] As such, rarely is a plea of guilty acceptable in a capital charge but if the court is satisfied that the plea is free, voluntary, informed and unequivocal, there is no constitutional, doctrinal or other bar to its being entered.

In the case of *Boit v Republic*,[412] the Court stated that there is no law in Kenya which would prevent a person charged with an offence punishable by death from pleading guilty to such a charge. That being so, the Courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon, certain vital safeguards must be complied with and it must appear on the record of the Court taking the plea that those safeguards have been strictly complied with. These safeguards are:

a. As with all other offences, the person pleading guilty must fully understand the offence with which he is charged as provided for under the Constitution. The person should be told in detail and in a language familiar to him the substance of the offence; the elements or ingredients which constitute it, the date and the approximate time on which the offence was committed and the person against whom the offence was committed.
b. Where the offence is one punishable by death, the Court recording the plea must show in its record that the person pleading guilty understands that as a consequence of his plea he will face a sentence of death.

If an accused person is fully informed of all these matters, and in particular is cautioned that by pleading guilty he forfeits the right to a trial and that the offence attracts a mandatory penalty of death but has nevertheless chosen to plead guilty, then there cannot be any genuine complaint thereafter.

In *Onkoba v Republic*,[413] the appellant pleaded guilty to the first count of robbery with violence. The learned Principal Magistrate pointed out to him that there was a mandatory sentence of death, and he said that he understood, and still wished to plead guilty. The matter was adjourned and on the date of adjournment the Principal Magistrate again asked the appellant if he realized that the death

410 See also *Ndede v Republic* [1991] KLR 567.
411 *Supra* nt 356 pp 56.
412 [2002]1 KLR 815.
413 [1989] KLR 395.

sentence was mandatory, and whether he wished to maintain a plea of guilty. The appellant said that he did.

He was taken to hospital for mental examination and was found to be mentally alert and fit. Facts were given by the prosecutor after which the appellant said that he understood them and that they were true but went on to tell the court he wished to get his wife back but ended up killing another girl who had stood in his way. The magistrate entered a plea of not guilty in those circumstances and fixed the matter for hearing. During the mention of the case the appellant came to court and said, in English, that he still wished to admit to the offence of robbery. The court reminded him about the intention he had informed the court he had of committing the first offence. He disputed saying that he actually intended to rob the girl he had killed. The court reminded him that if there was a conviction he would be sentenced to death and the appellant said that he understood. The learned magistrate in his notes on sentence said that:

> The accused has pleaded guilty to the offence despite my warning that he would be sentenced to death. He has persisted in wanting to plead guilty. Can the court refuse him from doing so when he himself wants to and fully knows that he has been adequately warned about the consequences that flow on him after being convicted?... I sentence the accused to suffer death as is provided for by law.

The appellant appealed on the ground, *inter alia*, that he did not know what was going on in court. The High Court held that the plea was unequivocal, and from the record, it suspected that the trial magistrate would have liked to direct a plea of not guilty if only he could find a way to do so. The record showed that he had made every possible enquiry advised by relevant case law, and the replies of the appellant left him no way out whatever. The appeal was dismissed.[414]

In *Baya v Republic*,[415] the two appellants were initially charged with murder. This was later reduced to manslaughter. The first appellant pleaded to the new charges saying, "We killed him but that was not intentional." After this it appeared from the record of the case that the trial court entered a plea of guilty to the charge for both accused persons. On appeal the Court of Appeal held that the charge and all its essential ingredients must be explained to the accused in his vernacular or some other language that he understands and the accused person's own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission, a plea of guilty should be recorded.

414 See also *Olel v Republic* [1989] KLR 444.
415 [1984] KLR 657.



Where a plea of guilty is entered on behalf of an accused person who is represented during the proceedings, both the trial and the appellate courts will more readily presume that the said plea was voluntary, unequivocal and well advised. This was demonstrated in the case of *Nyanchuma v Republic*,[416] where the accused person, a 16 year old, was charged with the offence of murder in the High Court. He pleaded "Charge is true" to a lesser charge of manslaughter. The plea was recorded and the particulars of the offence read. Although he admitted the particulars, there were material contradictions therein as to the date when the offence actually took place. After mitigation he was sentenced to detention at presidential pleasure. He appealed claiming that the plea taking was irregular, and that the contradictions in the particulars of the charge rendered the conviction a nullity. In the alternative the appellant attacked the sentence, saying that it was wrongly given on the assumption that the deceased had been convicted of a capital offence. On appeal, the court held that the accused having been represented by counsel, his plea was unequivocal. He did not have a defence to the charge. Hence the irregularities in taking of the plea and contradictions in the particulars were irregularities in form that did not go into the substance and were therefore curable under section 382 of the Criminal Procedure Code.

Once an accused person pleads guilty, the prosecutor is required to state the facts upon which the charge is based. It is not enough for the prosecutor to state "facts as per charge sheet." The statement of facts must be explained to the accused: *Ombena v Republic*.[417]

Similarly, the use of short cuts and abbreviations in the recording of the proceedings and in particular the words spoken are unacceptable. A case in point is *Catherine Nkerote v Republic*.[418] There, the accused was found with 30 litres of *Mugacha*.[419] Before the plea was entered, the magistrate wrote, "CRO and E." The learned judge in this appeal refused to accept the abbreviations, supposedly an acronym for "Charge Read Over and Explained," saying that:

> It is not acceptable in judicial proceedings, where individual rights and liberty are at stake, to take shortcuts. It is not sufficient for the prosecutor to state and for the magistrate to accept that facts are per the charge sheet because charges do not normally contain facts but particulars of the offences.

416 [2004]1 EA 261.
417 [1981] KLR 450.
418 High Court Criminal Appeal No. 166 of 2006.
419 illicit brew.

Even where an accused person accepts the facts stated by the prosecution as true, the court is under a duty to satisfy itself that such admission amounts to an unequivocal admission of the offence charged.

In *Kisivi v Republic*,[420] the appellant was charged and convicted of stealing livestock and sentenced to four years imprisonment with corporal punishment. The appellant was recorded as having said "Yes it is true" to the facts which were read by the prosecution. The accused was recorded as the one who locked the shed from which the cattle was subsequently stolen before being found in the compound of one Dzuya. There was no evidence linking the accused with the movement of the animals to Dzuya's compound. On appeal, the Court said that the prosecution did not in any way demonstrate how the appellant was connected with the animals which were recovered. It said that unless the magistrate elicits and gets enough detail of what happened and how the accused before him was connected with the offence charged, it is likely that the plea will not be unequivocal.

The Court should also be satisfied that the accused wishes to admit, without any qualification, each and every ingredient of the offence charged: *Lusiit v Republic*.[421] If so satisfied, the Court is to record that the accused has been convicted on his or her own plea of guilty.

The general rule[422] is that no appeal is allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea, except as to the extent or legality of his sentence. However in the case of *Ndede v Republic*,[423] the Court said that it has inherent and/or residual powers to entertain appeals against guilty pleas where the proceedings are found to be a nullity:

a) Because a plea of guilty has been entered as a result of undue pressure[424]
b) Where there was doubt as to whether the accused had complete freedom of choice whether to plead guilty or not guilty[425]
c) Where there has not been a free plea because the plea has been made under threats or pressure from the Court[426]
d) Where an accused has pleaded guilty to an offence that does not, in fact exist or the facts do not disclose any offence.

420 [1991] KLR 125.
421 [1977] KLR 143.
422 See ss 348 & 379(3) of the CPC.
423 [1991] KLR 567 See also *Olel v Republic* [1989] KLR 444.
424 *R v King* [1920] 15 Cr App R.13.
425 *R v Turner* [1970]54 Cr App 2352.
426 *R v Inns* [1974] 60 Cr App R 231.



In all these cases referred to by the Court of Appeal, the conviction founded on a plea of guilty was quashed in exercise of the Court's inherent jurisdiction and either a fresh trial ordered or the Court itself dealt with the matter with finality.

The Court went further to state that where, as happened in the instant case, at the time of taking the plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to Court from the date of arrest, then an explanation as to the circumstance must form an integral part of the facts to be stated by the prosecution to the court. The court should then put that explanation to the accused and inquire of him if it affects his plea. In the current case the learned judge had erred in making a finding on the issue of voluntarinness of the appellant's plea without considering any evidence thereon and occasioned a miscarriage of justice to the appellant. The appeal was allowed.

As already seen, after a plea of guilty has been entered and the accused has been convicted on his own plea, the court will pass sentence or make an order against him. Before doing so, however, the court may permit, or in fact require the complainant to give an outline found in the charges. The prosecution, in giving the said outline, is under a duty not to embellish or exaggerate. Thus in *Ndabi v Republic*,[427] the High Court stated that it is improper for a prosecutor, after conviction and before sentence, to make any statement to the court against the convict, which if challenged he would be unable to prove by legally admissible evidence. Thus under section 207 of the Criminal Procedure Code, the prosecutor is restricted to facts upon which a charge is founded.

## 7.5 Plea of Guilty in the Absence of the Accused

The trial of an accused person should take place in his presence.[428]

In the case of *Narotthands Vithlam v Republic*,[429] the Court held that a trial held, even partly, in the absence of the accused person is a nullity. However, if the accused conducts himself in such a way as to render continuation of the trial in his or her presence impossible, such accused person may be removed from Court and the trial may proceed in his or her absence.[430]

427 [1987] KLR 304.
428 s 50(2) of the Constitution.
429 [1957] E.A. 343.
430 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi Kenya pp 26.

In some minor offences, the personal attendance of the accused may be dispensed with. If the offence involved is not a felony and is punishable only by a fine or by imprisonment not exceeding a period of three months, or both, and there is reason to do so, the Court may dispense with the personal attendance of the accused if he pleads guilty in writing or if he appears by advocate.[431]

And in *Manager, Tank Building Contractors v Republic*,[432] the Court said that before the advocate can plead guilty for the client, the issue of the appearance of the accused should be dispensed with first.

## 7.6 Procedure on the Plea of Not Guilty

The Court enters a plea of Not Guilty where:[433]

1. The accused does not admit the charge
2. The accused does not admit the statement of facts
3. The accused refuses to plead

If an accused person does not admit the truth of the charge, the Court proceeds to hear the complainant and his witnesses and other evidence (if any).[434]

The accused person or his advocate may put questions to each witness produced against him.

Where an accused person in an answer to a charge at his arraignment makes an inculpatory statement, that is to say one that does or tends to suggest that he is guilty of an offence, even as he pleads not guilty, such a statement should not be used against him when the court considers the case.[435]

## 7.7 Refusal to take a Plea

### 7.7.1 In the High Court

If an accused person arraigned upon information stands mute of malice, or neither will nor by reason of infirmity can, answer directly to the information, the Court may order the Registrar or other officer of the Court to enter a plea of "not

431 *Ibid* pp 27.
432 [1968] EA 143.
433 *Supra* nt 357 pp 27.
434 *Ibid*, s 207(3) .
435 *Republic v Atanas* 17 KLR 50.



guilty" on behalf of the accused person. A plea so entered has the same force and effect as it the accused person had actually pleaded it.

The Court may also proceed to try whether the accused person is of sound or unsound mind, and, if he is found of sound mind, it proceeds with the trial. If he is found of unsound mind, and consequently incapable of making his defence, the Court shall order the trial to be postponed and the accused person to be kept meanwhile in safe custody in such place and manner as the Court thinks fit, and shall report the case for the order of the President.[436]

### 7.7.2 In Subordinate Courts

If the accused person refuses to plead, the Court shall order a plea of "not guilty" to be entered for him.[437]

In *Wachira and others v Republic*,[438] when charged, the accused person refused to plead. He proceeded to create uproarious raucous in Court raising doubts as to his sanity. After medical examination, a psychiatrist gave evidence that the accused person was mentally normal and was merely simulating disease of the mind. The accused continued to cause disturbance such that it was not possible for the trial to be conducted in his presence. A plea of not guilty was entered, the accused was removed and most of the trial took place in his absence. The Court of Appeal held that the course adopted by the trial court was strictly correct.

## 7.8 Pleas of Several Accused

Where there are two or more accused persons each accused person pleads separately to the charge or charges. The plea of each accused person should be recorded separately and as far as possible exactly in his or her own words.[439]

It appears largely to be a matter of discretion for the magistrate to convict the person who has pleaded guilty before hearing the case of the others who pleaded not guilty.

In *Karuma Bukenya v Republic*,[440] the Court said that where an accused pleads guilty, and he is convicted, it is desirable that he be sentenced before the court

436 s 28(1) of the CPC.
437 s 207 (4) of the CPC.
438 [1956] 23 EACA 562.
439 *Harrison Muli Muliti and another v Republic* Criminal Appeal No 57of 1986, (unreported) see also the case of *Baya v Republic* [1984] KLR 657.
440 [1952] 19 EACA 23.

proceeds with the trial of his co-accused and calling him as a witness. There can then be no suspicion that his evidence is coloured by the fact that he hopes to get a lighter sentence.

However, as was held in *Mutuku v Republic*,[441] failure to do so is a curable defect and there may be merit in postponing the sentence in order to hear a full account of the incident[442] and thereby arrive at a more just decision in the matter of sentencing.

This is the approach of English courts. It was laid down by the Court of Criminal Appeal in *Republic v Payne*[443] that where there are two or more accused persons and one of them pleads guilty, he should not be sentenced until the trial of the others is concluded, when the position of the accused person can be considered and their relative degrees of guilt assessed for the purpose of sentence.

## 7.9 Pleas to Several Charges against an Accused

Where the accused is charged with more than one count, the Court should record a plea on each count separately.[444] The aim is to ensure that if there is a plea of guilty, the same is unequivocal.

## 7.10 General Provisions relating to the Pleas of *Autrefois Acquit* and *Autrefois Convict*

A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence, while the conviction or acquittal has not been reversed or set aside, is not liable to be tried again on the same facts for the same offence.[445]

However, such convicted or acquitted person may afterwards be tried for another offence:

a. with which he might have been charged on the former trial under section 135 (1) of the Criminal Procedure Code.[446] Such offence, whether a felony or misdemeanour, is one which might have been charged together in the former information having been founded on the same facts, or formed or was part of a series of offences of the same or a similar character.[447]
b. causing consequences which constitute a different offence from that for which he was convicted or acquitted. Such a person may be afterwards tried for the last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened at the time when he was acquitted or convicted.[448]
c. constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.[449]

441 [1982] KLR 313.
442 Law in Africa No. 13: Criminal Procedure in Kenya and Uganda.
443 [1950]1 All E.R. 102; 34 Cr App R 43.
444 *Ombena v Republic* [1981] KLR 450.
445 s 138 of the CPC.
446 *Ibid*, s 139.



## 7.11 Pleas of *Autrefois Acquit*

It is a fundamental principle of law that a man may not be put twice in jeopardy for the same offence. The term *autrefois acquit* means that if a man has been tried and found to be not guilty of an offence by a Court competent to try him, the acquittal is a bar to a second charge for the same offence.[450]

A *conditional* discharge is a bar to a plea of *autrefois acquit* but an *absolute* discharge is not.[451]

An absolute discharge occurs when the magistrate finds the accused guilty and considers that the case is such that he wishes to award no punishment and discharges the accused person by merely cautioning him. He may consider that no useful purpose may be served by punishing him. The fact that he has been found guilty is sufficient punishment. The magistrate has discretion to convict and caution the accused.[452] The discharge is absolute and the accused may plead *autrefois convict* to a subsequent charge on the same facts.

A conditional discharge occurs when the prosecution requests that the charge be withdrawn at any time before the accused is called upon to make his defence and the magistrate discharges him. Such a discharge will not operate as a bar to subsequent proceedings and he may not plead *autrefois acquit*.[453]

In *Republic v Nathu and another*,[454] the appellants were charged with certain offences but were later on discharged. As the magistrate did not make a note of this in the case file, there was some doubt as to whether the prosecutor did

447 *Ibid*, s 135(1).
448 *Ibid*, s 140.
449 *Ibid*, s 141.
450 Douglas B. (1964) Criminal Procedure in Uganda Kenya (Law in Africa) (No. 13) pp 58.
451 *Ibid*, pp 58.
452 See s 35 of the Penal Code (Cap 63 Laws of Kenya).
453 See s 87(a) of the CPC.
454 [1944] 11 EACA 62.

specifically ask to withdraw in this instance. The appellants were subsequently charged with the same offences on the same facts. The Court of Appeal held that the magistrate had rightly applied the section, had discharged the accused and had not acquitted him. As such, the plea of *autrefois acquit* was not available to him.

## 7.12 Plea of *Autrefois Convict*

The rule against double jeopardy applies with equal if not more force to convictions.

The test is not whether the facts relied upon in the two trials are the same but whether the accused has been convicted of an offence which is the same as that with which he is subsequently charged. This test was illustrated in the English case of *Republic v Thomas*[455] where the accused was convicted of wounding his wife with intent to murder her and sentenced to seven years' imprisonment. Within a year and a day, the wife died of the wounding. The Court of Criminal Appeal held that although the accused had been convicted and sentenced for the wounding, he could properly be tried for the murder and could not plead *autrefois convict*. This is the very principle that underlies section 140 of the Criminal Procedure Code, under which supervening consequences or those not known at the time of the former trial are excluded from the operation of double jeopardy.

A person convicted or acquitted of an offence constituted by any acts may, notwithstanding the conviction or acquittal, be subsequently charged with and tried for another offence constituted by the same acts which he may have committed, *if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.*[456]

A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person convicted, together with proof that they belong to the accused person.[457]

## 7.13 Procedure in case of Previous Conviction[458]

Where an information contains a count charging an accused person with having been previously convicted for an offence, the procedure is as follows:

(a) the part of the information stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he has either pleaded guilty to or been convicted of the subsequent offence;
(b) if he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the information;
(c) if he answers that he has been so previously convicted, the judge may proceed to pass sentence on him accordingly; but if he denies that he has been so previously convicted, or refuses to or does not answer the question, the Court shall then hear evidence concerning the previous conviction:

Provided that, if upon the trial of a person for a subsequent offence that person gives evidence of his own good character, the prosecutor, in answer thereto, may give evidence of the conviction of that person for the previous offence or offences before a verdict of guilty is returned, and the Court shall inquire concerning the previous conviction or convictions at the same time that it inquire concerning the subsequent offence.

## 7.14 Objection to Jurisdiction

An objection as to the jurisdiction of the Court can be taken as a preliminary point and can be raised in criminal cases in much the same way as in civil cases. This was well captured in the case of *Mukisa Biscuit Co. v Westend Distributors Ltd.*[459] The Court said:

> . . .a preliminary objection constitutes a pure point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. . .

And at page 701, Sir Chirles Newbold, P said:

> [A] preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.

Objections to the jurisdiction of a court embarking upon the trial of an accused person ought to be raised *in limine* at the earliest opportunity because jurisdiction is foundational to the very validity of the entire proceedings.

455 [1949] 2 All E.R. 662.
456 *Supra* nt 406, s 141.
457 *Ibid*, s 142(3).
458 *Ibid*, s 277.
459 [1969] E.A. 696.

## 7.15 Change of Plea

The Court has discretion at any time to allow, before sentence, an alteration of pleas. This was held in the case of *Republic v Mwangi s/o Kamuhi and another*[460] The Court of Appeal in *Kioko v Republic*[461] stated that an accused person may apply to change plea after the prosecution has opened its case and at any time before sentencing; and that it was within the discretion of the Court, taking into account the demands of justice, to decide whether to allow or disallow the application.

In *Chacha v Republic*,[462] it was held that if after pleading guilty to a charge, discussion follows and the accused is intending for any reason to amend his plea, the charge should be read to him afresh whereupon his new plea shall be recorded.

For a long time it was held that once an accused person entered a plea of guilty, the plea could not be changed because, ostensibly, the court became *functus officio*.[463] This, however, is no longer good law. The Court of Appeal in the case of *Kamundi v Republic*[464] held that a magistrate has a judicial discretion to allow a change of plea before passing sentence or making an order finally disposing of the case.[465]

This power is discretionary and it is not necessarily a wrong exercise of the discretion for a magistrate to refuse to allow an accused person to change his plea from "Guilty" to "Not Guilty" just before the magistrate is about to pass sentence. It was so held in *Joseph Mugola s/o Pudha v Republic*.[466]

The accused person is also allowed to change his plea from not guilty to guilty of a lesser cognate offence. This is within the discretion of the Court depending on the demands of justice. The Court is, therefore, not bound to accept the offer even if the prosecution is not opposing. It ought, however, to accept the change of plea to a lesser charge where it has already accepted that of a co-accused.[467]

460 [1920] 2 KLR 72.
461 [1983] KLR 289.
462 [1953] 20 EACA 339.
463 See also *Okello v Republic* [1969] EA 378 and *Kibilo v Republic* [1971] EA 101.
464 [1973] EA 540.
465 Judiciary of Kenya, Bench Book for Magistrates in Criminal Proceedings Nairobi, Kenya pp 29.
466 EACA Cr App 55 of 1952see also Munguti v Republic [1984] KLR 727.
467 *Kioko v Republic* [1983] KLR 289.



## 7.16 Retraction of Pleas

In the case of *Republic v Fulabhai Patel and another*,[468] the Court said that once sentence has been passed upon an accused person who has unequivocally pleaded guilty to a charge, he cannot afterwards be allowed to retract that plea: unless he pleaded guilty to a charge which in fact disclosed no offence:[469]

## 7.17 Plea Bargaining[470]

The concept, process and procedure of plea bargaining is a most recent introduction into our Criminal Procedure Code. Indeed, it is a procedure that is yet to gain currency at the criminal bar and it is doubtful that its postulates have received judicial consideration or been otherwise tested before the Superior Courts.

In England, where the phenomenon of plea bargaining has had a much longer history, Lord Parker CJ in *R v Turner*,[471] set out some guidelines on plea bargaining:

1. It may sometimes be the duty of counsel to give strong advice to the accused that a plea of guilty with remorse is a mitigating factor which might enable the Court to give a lesser sentence.
2. The accused must ultimately make up his mind as to how to plead
3. There should be open access to the trial judge and counsel for both sides should attend each meeting, preferably in open Court; and
4. The judge should never indicate the sentence which he is minded to impose, nor should he ever indicate that on a plea of guilty he would impose one sentence, but that on a conviction following a plea of not guilty he would impose a severer sentence.

The judge could say what sentence he would impose on a plea of guilty but without mentioning what he would do if the accused were convicted after pleading not guilty. The only exception to this rule is where a judge says that the sentence will take a particular form, following conviction, whether there has been a plea of guilty or not guilty.

In a properly functioning system, it may be argued that plea bargaining constitutes a mutuality of benefits or advantage in that if properly managed, it guarantees that the interests of the State in ensuring offenders are punished is

468 [1946] 13 E.A.C.A 179.
469 See also the case of *Republic v F J Patel* 13 EACA 179.
470 See the CPC (Amendment) Act, Kenya Gazette Supplement 2008.
471 [1970] 54 Cr App 2352.

satisfied while according the accused an opportunity to bargain for some leniency instead of each party facing the burden of time and expense culminating in an uncertain outcome.

In Kenya, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of –[472]

(a) reduction of a charge to a lesser included offence;
(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

An offer for a plea agreement may be initiated by the prosecutor or an accused person or his legal representative.[473] The parties then need to notify the Court of their intention to negotiate a plea agreement but the Court must not participate in plea negotiation.[474] This is meant to preserve the court's necessary impartiality as an independent arbiter between the parties.

A plea agreement may provide for the payment by an accused person of any restitution or compensation.[475] It is entered into only after an accused person has been charged, but before judgment.[476]

Where a prosecution is undertaken privately no plea agreement can validly be entered into without the written consent of the Attorney-General.[477] This must be in deference to the Attorney-General's over-arching and residual powers of control over all criminal proceedings. It also ensures that there is no collusion between private prosecutors and suspects which may lead to future pleas of *autrefois convict* being mounted as an ambush against the Attorney General should he decide to bring the said suspect to justice.

A plea agreement on behalf of the Republic is entered into by the Attorney-General, the Director of Public Prosecutions or officers authorized by the Attorney-General as well as by any other person authorized by written law to prosecute.Any person authorized by the Attorney General to enter a plea agreement must get a written permission from him to conduct the same.[478]

472 Sub-s 137 A(1).
473 Sub-s 137 C(1).
474 Sub-s 137 C(2)&(3).
475 s 137 A( 2).
476 *Ibid*, subs A(3).
477 *Ibid*, sub-s A(4).
478 *Ibid*, sub-s B.



A prosecutor can only enter into a plea agreement:[479]

(a) after consultation with the police officer investigating the case*
(b) with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;
(c) unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to him regarding the contents of the agreement.

A plea agreement must:[480]

i. Be in writing and accepted by the accused person; or explained to him in a language he understands
ii. if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement
iii. state fully:
    1. the terms of the agreement
    2. substantial facts of the matter
    3. all other relevant facts of the case and any admissions made by the accused person
iv. Be signed by the accused person or his legal representative
v. Be signed by the complainant if a compensation order has been included in the agreement

## 7.18 Recording of Plea Agreement by Court[481]

Before the Court records a plea agreement, the accused person is placed under oath and the Court addresses him personally in Court. He is informed of, and Court determines that he understands –

(a) the right to –
    (i) plead not guilty, or having already so pleaded, to persist in that plea;
    (ii) be presumed innocent until proved guilty;
    (iii) remain silent and not to testify during the proceedings;
    (iv) not being compelled to give self-incriminating evidence;
    (v) a full trial;
    (vi) be represented by a legal representative of his own choice, and where

479 *Ibid*, sub-s D.
480 *Ibid*, sub-s E.
481 s 137F.

necessary, have the Court appoint a legal representative;

(vii) examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution;

(b) that by accepting the plea agreement, he is waiving his right to a full trial;
(c) the nature of the charge he is pleading to;
(d) any maximum possible penalty, including imprisonment, fine, community service order, probation or conditional or unconditional discharge;
(e) any mandatory minimum penalty;
(f) any applicable forfeiture;
(g) the Court's authority to order compensation,[482] restitution,[483] or both;
(h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence;
(i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement.

The prosecutor must lay before the Court the factual basis of a plea agreement and the Court must determine and be satisfied that there exists a factual basis for the plea agreement.[484] In other words, the court is not bound to accept any or all plea agreements negotiated by parties.

## 7.19 Rejection of Plea Agreements[485]

Where the Court rejects a plea agreement –[486]

(a) it must record the reasons for such rejection and inform the parties accordingly;
(b) the plea agreement becomes null and void and no party is bound by its terms;
(c) the proceedings giving rise to the plea agreement become inadmissible in a subsequent trial or any future trial relating to the same facts; and
(d) a plea of not guilty is entered accordingly.

Where a plea agreement has been rejected by the Court and a plea of not guilty consequently entered, the prosecution may, upon being informed of the rejection of the plea agreement, proceed to try the matter afresh before another court. The accused person may waive the right to have the trial proceed before another court in which case the trial will proceed[487] before the one that rejected the plea agreement.

482 s 175(2)(b) of the CPC.
483 *Ibid*, s 177.
484 s 137 H(2).
485 *Ibid*, Sub-s J.
486 *Ibid*, J(1).
487 *Ibid*, J(2).



Upon rejection of a plea agreement, there MUST be no further plea negotiation in a trial relating to the same facts.[488]

Where the Court has rejected a plea agreement, no party can appeal against, or apply for a review of the order.[489]

## 7.20 Withdrawal of Plea[490]

An accused person may withdraw a plea of guilty pursuant to a plea agreement –

(a) prior to acceptance of the plea by the Court, for any reason; or
(b) after the Court accepts and convicts on the plea, but before it passes a sentence, if the accused person can demonstrate, to the satisfaction of the Court, a fair and just reason for requesting the withdrawal

## 7.21 Finality of Judgment

The sentence passed by a Court under a plea agreement is final and no appeal lies therefrom except as to the extent or legality of the sentence imposed.[491]

The Attorney-General, in the public interest and the orderly administration of justice, or the accused person, may apply to the Court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on grounds of fraud or misrepresentation.[492]

Notwithstanding anything contained in any written law for the time being in force, the statements or facts stated by an accused person in a plea agreement must not be used for any other purpose except for the purpose of that plea bargaining.[493] The same are considered to be privileged.

488 s 137J (3).
489 *Ibid*, Sub-s J4.
490 *Ibid*, Sub-s K.
491 *Ibid*, Sub-s L(1)
492 *Ibid*, Sub-s L(2)
493 *Ibid*, Sub-s L(3)