Too v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 16052 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E039 OF 2023

DKN MAGARE, J

DECEMBER 20, 2024

BETWEEN

DAVIS KIPRONO TOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. F. Muguongo (Principal Magistrate in Nyeri CMCR No. 1649 of 2019 delivered on 8/6/2023)

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by Hon. F. Muguongo (Principal Magistrate) in Karatina CMCR No. 1649 of 2019 delivered on 8/6/2023. The Appellant was tried and found guilty of arson and sentenced for Ksh.3,000,000/= fine, in default 7 years imprisonment.

2. The Appellant had been charged with the offence of Arson contrary to section 332(a) of the Penal Code. The particulars were that on 22/9/2019 at about 3 am, at Thuguma Police Post in Nyeri town within Nyeri county, the Appellant willfully and unlawfully set fire to a building namely a police post, which is the property of the National Police, valued at approximately Ksh. 2,850,000/= belonging to the National Police Service and staff.

3. The court indicated that she was bothered on the catastrophic effect it had on the people in the building. The Appellant walked away from the building.

4. The section establishing the offence of arson provides as doth;

   Any person who willfully and unlawfully sets fire to

   (a) any building or structure whatever, whether completed or not; ... is guilty of a felony and is liable to imprisonment for life.

5. After plea being taken the matter proceeded to full hearing. A total of five witnesses testified for the prosecution. The Appellant testified and gave sworn evidence. The court analyzed evidence after submissions and found the Appellant guilty. The Appellant was aggrieved and filed a Memorandum of Appeal and set out a total of 13 grounds. The same raised only 3 issues: -

    a. Whether the court erred in finding the Appellant guilty against weight of evidence.

    b. The court erred in disregarding the defence.

    c. The conviction and sentence was without sufficient proof.

6. Though the grounds are 13 in number, they are prolixious, repetitive and unseemly. Precision is key to proper analysis of issues and presentation of the Appellant's case.

Evidence

7. The matter started on 22/11/2021 when Corporal Kennedy Agiza of Pap Ondit police station but formerly of Thuguma Police Post testified. He testified that on 22/9/19 he had just done a morning call. Later at 4.30 am he heard unusual noise outside Thuguma Police Post. He was residing just outside the police station. He immediately woke up and saw fire from inside the home of PCW Rose Ekai. This house was in front of the police post. He alerted the OCS CI Joseph Kamonde and he asked that he calls fire fighters. The said firefighters arrived immediately and stopped the fire. He tried rescuing several firearms – 2 scorpions, 1 G3 Riffle, he handed these to the OCS. The fire started from the house of PCW Rose Ekai and gutted down all the properties of the officers at the post. Only lives and firearms were saved. The Appellant was the husband of PCW Rose Ekai.

8. It was his evidence that the Appellant was a temporary resident in the home of PCW Rose Eka at the police line. He called neighbours and the OCS for help. Neighbours came to help together with the firefighters but the entire block got burnt to ashes.

9. PW2 was PC Andrew Kipkoech Limo of Buruburu Police Station. He testified that he was formerly attached to Thuguma Police Station and was on night duty. He had gone to his house when PW1 knocked on his house and said the police line was on fire. He saw fire coming from the house of PCW Rose Ekai. The fire then spread to all houses.

10. He stated that the Appellant was the husband of PCW Rose Ekai. He saw the Appellant during the fire incident as he was around the fire incident. On cross examination, he stated that the incident was on the night of 21/22/9/2019. It was his evidence that he was staying in a house directly opposite that of home of PCW Rose Ekai. He stated that the fire started in the house of home of PCW Rose Ekai and spread. He stated that he lost all valuables. He stated that the Appellant was around the police station during the morning earlier in the day. And was generally around that day. He clarified that he saw the fire in the celling of his house as it came from the house of home of PCW Rose Ekai.

11. PW3 was PCW Rose Ekai, who testified that she was then stationed at Dagorreti Mutuini Police Station. But previously she was attached to Thuguma Police Station. She stated that the Appellant was her ex-boyfriend. The Appellant objected to the testimony on grounds that PCW Rose Ekai was a wife and her evidence should be excluded under Section 127 of the *Evidence Act*. The court stood down the witness for later.

12. PW4 was Scola Alila Ekamasi a resident of Nairobi. She is a sister of PCW Rose Ekai. She stated that on 22/9/2019, she was in the house at Thuguma Police Station, together with her child, her small brother and PW3's child. The Appellant, whom she knew as the husband to PW3, called and inquired on the whereabouts of PW3. He called PW4, who went to pick him and brought him into the house. In the

house, initially there was a police officer called Bett, PW3, PW4 and now the Appellant. The Appellant and Bett had a quarrel on why Bett was in the house with the wife. They then switched the quarrel into Kalenjin language.

13. PCW Rose Ekai, PW4 Bett and the Appellant went to a club on invitation of the Appellant. There appeared to have been a détente between PCW Rose Ekai, PW4 and Bett. After an hour PW4 went to another club, where she stayed and went back to the police line after 30 minutes. They slept in their different rooms. She later heard PW1 calling that there was fire. She got the children out from the two roomed house they were staying in. She went to PCW Rose Ekai's house, where the fire started. She did not get the children. After a while the Appellant emerged with children saying they were not dead. PW3 asked for her children and was given. Appellant and PCW Rose Ekai had 2 children together, though there was no dowry paid. Upon the Appellant giving the children to PCW Rose Ekai, he was arrested.

14. On cross examination, she stated that the Appellant called her on phone. She was the one who picked him around 6-9 pm. The Appellant had asked Bett, whether he was the one who had taken his wife. She stated that she went back to the house around 11 pm. She stated that she was woken up at 3 am but did not see the Appellant when she woke up. The time she was woken up, only smoke had reached the room. On re-exam she stated that she could not tell whether the Appellant also called PCW Rose Ekai.

15. Subsequent to this, the court ruled that PCW Rose Ekai was a competent witness as protection under section 127 does not extend to casual relationships. The court found that there were no attempts to prove the marriage. Reliance was placed on the case of Maxwell v Mwaingoto (2021) eKLR.

16. PW3 was thereafter recalled and testified that the Appellant was an ex-boyfriend. On 21/9/2019, the witness received a call from the Appellant stating that he had just arrived in Nyeri. At the time the Appellant called, they were already in Nyeri with PW4 and another officer, Bett. There was a brother who had left for the house as he was not feeling well. The Appellant then called PW4 to ask where they were and she stated that they were near 2NK Sacco main Stage. They all linked up.

17. They went to the police canteen for some drinks where they ate and drunk. The Appellant and Bett had a discussion in Kalenjin language, but the same did not appear friendly. PW4 left them at 2300 hours. She also indicated to leave and join PW4 at the police canteen. She realized that the Appellant was not comfortable with the witness smiling to other officers. She decided to leave and join PW4 at Bourbon. The Appellant was right behind her on a motor cycle and started biting and pinching her. When they reached Skuta, Bourbon, she alighted and did not know where the Appellant went. She entered the club with Bett and left the Appellant outside.

18. PCW Rose Ekai stayed at the bar until 0300 hours, in the morning. Her morning of coral was suddenly cut short by an eerie call from P4, that her house was on fire. She reached home almost morning, where she found the house burnt down and fire put off. She started looking for her children and did not find them. Other police officers came at 0600 hours. At that time the Appellant came with her children stating that PW3 should not touch the children. They were given to PW4 as the Appellant was arrested. She stated that the Appellant came running stating that his children were safe.

19. On cross examination, she stated that the Appellant called PW4 first on 21/09/2021. The entire afternoon PW4 and PW3 were in hospital. They subsequently met the Appellant before proceeding to the police canteen and spent about 4 hours before PW4 left. She stated that Bett and the Appellant were arguing but in their native language. It was her evidence that she reached her place between 0400-0500 hours, though she was called at around 0300 hours.

20. PW5 was PC Josephine Asimit of DCI. She stated that she was the investigating officer, that after DCI she was transferred to Trans-Nzoia. She handed a match box which was recovered in the suspect's pocket. In spite of the court's directions on the import of not cross examining, the accused did not cross examine.

21. The Appellant was placed on his defence. Requirements of Section 211 were explained to the accused who opted to give sworn evidence and was not to call witnesses.

22. The Appellant testified that he was a marketing manager of a multinational company. He stated that on 21/9/2021 he was in Nyeri at the invitation of PCW Rose Ekai, the mother of his child and a police officer attached to Thuguma Police Post. They had 2 children aged 3 and 1½ years. He generally came to visit. He found PCW Rose Ekai in the house and her brother, with 2 children. He then went to the shopping centre and came back. He thought that PW3 was at work. He stated that he called PW3 and told her that he wanted to meet and wanted to go back. The first person who arrived was PW4 and Bett. They went to the police canteen and club. At 2230 PW4 left the canteen. He asked PW3 that they go and buy supper at club 019. They proceeded to club Bourbon. At that time PW4 had left. He left PW3 with Bett and went to Thuguma Police Post. He found children asleep and PW4 was also sleeping. He lit an electric coil, and warmed food. He ate and slept. At 0330 hours, he woke up with a big fire inside the house.

23. He woke up and found the entire house on fire. He rescued the first child. He went back and took Abigael and rescued her. They slept along the road until morning. He got on a motor bike and went back to Thuguma. He stated that everything in the house was burnt; these were things he bought. He could not have burnt the police station.

24. On cross examination, he stated that on the material day, he was at Thuguma Police Post. He testified that PW3 and the children resided at the post and he could visit. He stated that he did not suspect that PW3 had another boyfriend. He also stated that a matchbox was recovered in his pocket upon arrest. He denied setting the house on fire. He stated it was only the children and himself who were in the house at the time of the fire.

25. The Appellant did not want to submit. The court gave a judgment date for 13/4/2023. It was delivered later on 8/6/2023.

Submissions

26. The Appellant filed submissions dated 16/7/2024. It was submitted that the Respondent did not prove the four ingredients of the offence of arson which are; proof of ownership of a building or structure, proof that the building or structure was set on fire, proof of the assailant and proof that the assailant set the building or structure on fire without any lawful justification.

27. It was also submitted that the evidence of the prosecution did not meet the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial. Reliance was placed on Abanga alias Onyango v. Republic CR. App No. 32 of 1990(UR) based on which it was submitted that the threshold of (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete – that these were not established.

28. On sentence it was submitted that the trial court applied wrong principles and gave an unfair sentence. Reliance was placed on the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, where the court pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.

29. The Respondent did not file submissions.

Analysis

30. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

31. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the Appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

32. The appellate court must first weigh itself conflicting evidence and draw its own conclusions as held in the case of Okeno v Republic [1972] EA 32 at 36 where the East Africa Court of Appeal stated on the duty of the court on a first appeal as doth:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

33. The issue in this case is whether the prosecution proved its case to the required standards. It is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity under section 12 of the penal code, intoxication under section 13 of the penal code, and subject also to any statutory

exception. The court is also alive to Section 7 of the Penal Code which provides that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence. Further, Section 11 of the Penal Code provides that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

34. Further exception is set out in section 325 of the Penal Code for person suspected of having or conveying stolen property. The said section provides that any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.

35. Except as for the foregoing, the burden of proof remains with the state. Therefore, if at the end, and on the whole of the case, there is a reasonable doubt created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him and the prosecution has not made out the case, the accused is entitled to an acquittal. The Most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

36. It should never be forgotten that the presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied beyond reasonable doubt that the accused is guilty. This means that the accused enters the arena as an innocent man and can only be tilted to the other side, if evidence of such character as to prove the case has been tendered. If there are holes in the case, such as an opportunity that someone else could have committed the offence, the entire evidence tendered becomes otiose. This spirit was captured succinctly in the Canadian case of R vs. Lifchus {1997}3 SCR 320, where the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove

anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

37. In criminal matters there is no balancing of scales. Where the court is unsure of what happened or there is some degree of opaqueness in evidence, there is a presumption that such evidence is in favour of the accused. The burden of proof is called a burden since someone must lift it up. There is no room for belief, conjecture or surmise. This burden normally rests upon the party desiring the court to take action. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> "The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

38. The burden can be paper thin or absolute. In criminal cases there are standards set. It is not to the civil standards, on who to believe, but what evidence tells you. Gut feelings have nothing to do with the criminal trial. The standard is thus high due to the possibility that the accused may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

39. The state has a duty to prove that the Appellant was guilty by proving the following ingredients of the offence of arson contrary to Section 332(a) of the Penal Code : -

    a. Proof of ownership of a building or a structure;

    b. Proof that the building or structure was set on fire;

    c. Proof of the assailant;

    d. Proof that the assailant set the building or structure on fire without any lawful justification.

40. What is not in doubt from the evidence is that the building or structure or whatever, whether completed or not, in this case Thuguma Police Station, was burnt. There was no dispute on the value

of the properties burnt. 6 houses were burnt to ashes. The fire started in the house of PW3 while she was on a night of carousal and merriment. It was agreed that 3 adults had access to the house, that is the Appellant, PW4 and PW3. At some stage there was one Bett, who disappeared from the scene.

41. The three issues the court will need to answer is whether the prosecution proved that:

    a. The setting on fire was done by the Appellant.

    b. The same was willful.

    c. The same was unlawful.

42. To start with, it must be remembered that this was a case based on circumstantial evidence. The court must as a corollary analyze the actions of key actors in this case. PW1, PW4 and DW1 agree in principle that PW4 was asleep at the time of the incident. She was woken up and she ran helter-skelter to get her children and those of PW3. Secondly, she had no motivation, intention or any reason to start a fire. She is therefore not a possible suspect. It was equally agreed that PW3 and Bett went into the last bar alone. She was drinking from 7pm at least. When called, she did not have the presence of mind to understand what was going on. She only came to look for her children.

43. Though she indicated that she was drinking until 3 am, she may have disappeared with Bett in circumstances that the court will deal with shortly. PW3 stated that she had an incident with the Appellant. PW4 confirmed an altercation with Bett. This resulted in switch of clubs. In the last club, the Appellant stated that he left PW4 with Bett. It is not a normal behavoiur for a man to leave behind his fiancée, when the sole purpose of coming was to see her. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

44. After ruling out PW3 and PW4 as persons of interest with the fire, we have to go back in time. There were differences between the Appellant and PW3 over one Bett. This resulted in a heated argument in Kalenjin dialect. This argument was corroborated with the evidence of PW3 and PW4. The only person whose whereabouts are not known is the Appellant. The fire did not start generally but in the house of PW3. At the time of starting of the fire, there were 3 people inside the house – a 1½ year old child and 3 year old child. The Appellant testified, he was placed in the locus in quo. It is only him who knew what transpired. Section 111 of the *evidence Act* provides as follows:

    (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

45. In this respect, the Appellant attempted to state that he used an electric coil to warm food. This may well be true. However, it then rules out electric fire since he never testified that he may have left the coil on. Secondly, when arrested he had a match box. This single item was odd in that it was not explained. The witness who produced the same was not cross examined. This means his evidence was uncontroverted. The arrest was almost simultaneous with the fire.

46. The next question is whether the court considered the defence raised by the Appellant. His defence was that he found the fire. He rescued the children and ran. He then went to sleep by the roadside by morning. Why will anyone, who sees a loving fiancée's house on fire, run away to sleep by the roadside? Why not do what PW1 did, call for help? Why leave a scene of active fire. More poignantly, the 'sister in law'- PW4 and others were sleeping in adjoining houses.

47. The Appellant saw the fire at 3.30 am. He left the scene for PW1 to find later at 4.30. Had this fire been alerted upon at the time he stated, it would definitely have been put out. This is because, the witnesses who learnt an hour later, were able to rescue themselves and their firearms. PW2 placed the Appellant in the locus in quo. They had no grudge and had no interest in the escapades by PW4.

48. The complainant's evidence together with that of PW1, PW2, PW4 and PW5 corroborated in material particular. In the case of Tekerali s/o Korongozi & 4 Others –vs- Rep (1952) 19 EACA 259 the importance of the first report was appreciated, where the court posited as follows:

> " Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

49. Proof beyond reasonable doubt is not to be based on certainty or proof beyond a shadow of doubt. However, it should derive from evidence that is so strong against a man as to leave only a remote

possibility in his favour. This was the finding of the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

50. The Appellant alleged inconsistencies and contradictions in the evidence proffered by the prosecution case and argued that the trial court failed in convicting him when the evidence tendered did not prove the offence against him to the required standard. On this, this court has to establish whether the alleged discrepancies and contractions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi vs. Republic *CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

51. The Appellant was placed in the locus in quo and placed himself in the same locus in quo. Though he stated that he was hungry and was warming food at 1.30 am, this could not be true as his evidence was as follows: -

> 'She asked I take them 'out' and went to AP canteen and club. It was now 2230 hours. They ordered drinks and after like 30 minutes, Schola left for club Bourbon on her way home so I remained with Bett and PW3. PW3 asked I go buy her super at club 019 which I did after eating (sic).'

52. He had already taken super less than 2 hours earlier and there was no question of hunger. The evidence was inconsistent with the Appellant's innocence. He set the house on fire, ran away with his children and was only brought back by pangs of guilt and the desire to see the effect of the work of his hands.

53. I am unable to find anything in the court's finding that is consistent with the Appellant's innocence. The only question lingering is how the matchbox was used to light the electric coil.

54. The Appellant feebly raised the question of ownership of the building. All parties agreed that the building was Thuguma Police Station. The Appellant was definitely not claiming that the building was part of his houses that he had found to be flea infested so he set them on fire. I take judicial notice that Thuguma Police Station is a gazetted police post. Whether the station owned the same by leasing or grant, the property belonged to the National Police Service and the staff of the National Police Service. Surely, it cannot be that the guns recovered or rescued were part of the Appellant's arsenal. All witnesses including the Appellant agreed that the incident happened in a police post.

55. The Appellant testified that the building was on fire. The circumstantial evidence showed the Appellant was the only aggressor. In absence of any explanation, or in the presence of evidence of

reckless endangerment of lives and property, the arson is presumed to have been willful and unlawful unless shown otherwise. There is no evidence of any order allowing the building to be put on fire. The duty was on the Appellant to show that the fire was accidental, not on the state.

56. Black's law dictionary 11th Edition, page, 1916 defines willful, as an adjective meaning voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves wrong conscious or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term willful is stronger than voluntary or intentional; it is traditionally the equivalent of malicious, evil, or corrupt.

> " The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent." Rollin M. Perkins & Ronald N. Boyce, Criminal Law875-76 (3d ed. 1982).

57. On the other hand, unlawfully is fairly straightforward, as defined in Black's law dictionary 11th Edition, page, 1850 as follows:

> Unlawful, is an adjective meaning not authorized by law; illegal Criminally punishable, involving moral turpitude, or conduct that is not authorized by law; a violation of a civil or criminal law.

58. Controlled burning or even burning rubbish may sometimes be authorized. If the fire gets out of hand, it is different from willfully placing a matchstick against a matchbox, striking and placing the resultant flame on a flammable material without consideration or being reckless as to the result. It is not enough to change one's mind. In this case, I find and hold that the circumstantial evidence irresistibly pointed to the Appellant and no other person. In the circumstances the conviction was safe.

59. On sentence, the Appellant did not raise much except disregard of evidence while sentence for arson is life imprisonment. In the case of Otieno v Republic (Criminal Appeal E014 of 2022) [2022] KEHC 13802 (KLR) (14 October 2022) (Judgment), RE Aburilli J, posited as doth:

> Back to the main question of whether this court should interfere with the sentence imposed on the Appellant, the law is now settled that the appropriate sentence to be meted out in a particular case is basically an exercise in the discretion by a trial court. An appellate court is only entitled to interfere with the exercise of such discretion where it is shown that in arriving at the sentence, the trial court took into account an irrelevant factor or that it failed to take into account a relevant factor or failed to appreciate the nature of the evidence or that looked at dispassionately, the sentence is harsh and excessive as asserted by the Appellant in this appeal. (See James Gichuru Ndungu v Republic (2010) eKLR (Court of Appeal).

60. As stated above, the trial court considered the mitigation and the fact that the Appellant herein was a first offender and the court exercised its judicial discretion and sentenced the Appellant accordingly.

61. The Appellant deserved a life imprisonment. The court however gave two sentences – 7 years imprisonment and a fine of Kshs.3,000,000/=.

62. Fine is provided under Section 28 of the Penal Code. The provision for non-expressed fine is limited to 12 months where there is no provision. In this case the provided sentence is life imprisonment. There

is no option of the fine. It is not understood where the court got the sentence of Kshs.3,000,000/=. It is an illegal sentence. A sentence cannot be arbitrary.

63. Section 26 of the Penal code states as follows:

> A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.
>
> (2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.
>
> (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that-
>
> (i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

64. Sentencing guidelines point to the provisions of section 28 of the penal code regarding fine as follows:

> 2.7.13 Courts should be cognizant of the limits of the term of imprisonment that can be applied in the event of default of payment of a fine. This is normally six months unless a period of imprisonment in default of payment of a fine is explicitly stipulated under the relevant law.
>
> 2.7.14 Under the Penal Code, the fallback position rests in Section 28 of the Penal Code where a scale is set out, the maximum being just 12 months' imprisonment in default of non-payment for any fine that exceeds Kshs. 50,000.
>
> 2.7.15 Where a court imposes separate fines for individual offences, it must indicate a separate sentence in default of payment of each fine. For further guidance on totality in relation to fines, see paragraph 2.3.30 above.

65. The Offence under which the Appellant was charged, the sentence that was due to the Appellant was life imprisonment. The court could give a shorter sentence as provided by Section 26 of the Penal code. There is however no fine prescribed. Whereas there could be debate on the issue of 'liable to life imprisonment', there is no debate on the fine.

66. That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition, which permits balanced and fair sentencing as a hallmark of enlightened criminal justice. To that effect, Court of Appeal [Musinga, M'inoti & Murgor, JJ.A] In the case of Dismas Wafula Kilwake v Republic [2019] KECA 5 (KLR), stated as follows regarding sentencing and discretion of the court:

> In State v. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular: "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to

these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.

And in Mithu Singh v. State of Punjab, 1983 AIR 473, the Supreme Court of India grappled with the same issue when the constitutionality of a provision of law prescribing a mandatory sentence of death was challenged. In holding that the provision was unconstitutional, the Court stated as follows: "...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

67. Whereas sentencing is a discretion, it is not a basis for meting out illegal fines. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) The supreme court addressed the issue of sentencing as follows:

> We also note that the Court of Appeal concluded its decision in this present matter by reducing the Respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter. 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that

> nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

68. There was thus no basis to impose fine of Kshs. 3,000,000/= for the offence of arson. I find and hold that the court had no authority to impose such a fine. It is accordingly set aside. There was no cross appeal on sentence. Further, the court had not warned the Appellant of the possibility of enhancing. In the circumstances the period of 7 years imprisonment shall remain without an option of a fine. Section 332(a) of the penal code does not call for a fine.

69. In the circumstances, I dismiss the feeble attempt to appeal on sentence. Nevertheless, the imposition of a fine of 3,000,000/= was unlawful and cannot be sustained. The sentence of 7 years is lawful and as such is retained. Though the said sentence is light, it was the discretion of the court below to impose the same. The discretion has not been challenged.

70. Before I depart from this matter, I note with concern that as days move by, it may not be possible to know what life sentence means. In this case, the court gave the Appellant a slap on the wrist by sentencing him to 7 years imprisonment, with a real option of coming out upon paying a fine. In departing from the sentence allowable, a court must as a corollary justify the marked departure. The Appellant herein set a police post on fire for reckless reasons. He differed with a woman who had been having an affair with him. He proudly pronounced her to be a fiancée. The status of fiancée is not a permanent status. It is a wooden barrier to a lion's den. Either the lion keeper or the lion can break out and enter into another compound. We are supposed to let go and move to the next den. The advice given sometimes back by Kiage JA seems to be falling on deaf ears. The good Appeal Judge in Walutsachi v Mary's Mission Hospital [2022] KECA 1023 (KLR), mused as hereunder:

> The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two- or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.
>
> 16. For the Appellant herein, whose sad tale is well-captured in the judgment of my learned sister Mumbi Ngugi, JA, with which I am in full agreement, the lesson learnt is that the wounds of love find scant balm in the courts of law. Love's ills and woes can only be found in lovers' return and reconciliation, failing which, in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving Love's threshing floor altogether, paying heed to Kahil Gibran's The Prophet: "But if in your heart you would seek only love's peace and loves pleasure, then it is better for you that you cover your nakedness and pass out of love's threshing floor …."
>
> 17. I agree that if a man takes the woman he loves to a hospital labour ward, for she is heavy with child, while happily believing himself the father, but upon the child making a landing, the woman by subterfuge eludes him, and leaves the hospital in the company of another man, a shadowy rival, judges may empathize with the deceived first man, but cannot in law agree with him that the hospital should compensate him for not detaining the woman, till the man

> who brought her in should claim and discharge her. Adult she is, a free moral agent (though the man may protest the word 'moral') and, in a free country, she is perfectly free to associate with and,

71. Instead of the Appellant quenching the fire of love through getting new love, he refused to cover his nakedness and pass out of love's threshing floor. As stated in Prophet (Knopf, 1923), referred by Justice Kiage JA above, the field of love is not for the selfish or the fired up for the sake of love. The poem in its penultimate paragraphs posits:

> Then it is better for you that you cover your nakedness and pass out of love's threshing-floor, Into the seasonless world where you shall laugh, but not all of your laughter, and weep, but not all of your tears. Love gives naught but itself and takes naught but from itself.
>
> Love possesses not nor would it be possessed;
>
> For love is sufficient unto love.

72. If a party is unable to handle love, it does not pay to be haughty with anger. Holy Scripture states that a man of wrath stirs up strife, and one given to anger causes much transgression. It advises that we should not be quick to become angry, for anger lodges in the heart of fools. The actions that the Appellant took in a fit of anger, will keep him behind bars for 7 years.

73. The sentence of 7 years was not challenged and remains lawful. The Appellant was not remorseful. His actions were premeditated. He left the object of his anger back in the bar with her newly acquired catch and went to set the police post on fire.

74. The best order that commends itself is that of dismissal of the appeal save for the order related to the legality of the fine of Kshs. 3,000,000/= imposed.

Determination

75. Consequently, I make the following orders:-

    a. The appeal on conviction lacks merit and is accordingly dismissed.

    b. The appeal on sentence of 7 years is dismissed.

    c. The sentence of Kshs. 3,000,000/= is unlawful as Section 332(a) does not provide for an option of a fine.

    d. Consequently, the Appellant shall serve 7 years imprisonment with effect from the date of arrest excluding the period when the Appellant was on bond between 16/10/2019 to 7/6/2023.

    e. The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 20th day of December, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by:-

Muthui Magaret & Co. Advocates for the Appellant

Mr. Mwakio for the State

Court Assistant – Jedidah

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