



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 2 OF 2020**

GRACE WAMBUI NGANGA.....1<sup>ST</sup> APPELLANT

ANN NJOKI MUNGAI.....2<sup>ND</sup> APPELLANT

NAOMI NJERI.....3<sup>RD</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M. MUKENGA (SRM))*

*DATED 28<sup>TH</sup> NOVEMBER 2019 IN CRIMINAL CASE NO.892 OF 2015 MOLO).*

**JUDGEMENT**

1. The appellants were charged with the offence of Arson contrary to Section 332 (1) of the Penal Code. The particulars of the offence were that 6<sup>th</sup> April 2015 at Cheponde in Molo Sub-county within Nakuru County jointly with others not before this court willfully and unlawfully set fire to buildings namely a dwelling house, a kitchen and a store all valued at Kshs. 1.5 Million the property of Jacob Akanwa Atero.
2. The second count was Malicious Damage to Property Contrary to Section 339(1) of the Penal Code. The particulars of the offence were that 6<sup>th</sup> April 2015 at Cheponde in Molo Sub-county within Nakuru county jointly with others not before this court willfully and unlawfully damaged two motor vehicles valued at Kshs. 300,000/= property of Jacob Akanwa Atero.
3. The third count was Injuring Animals Contrary to Section 338 of the Penal Code. The particulars of the offence were that 6<sup>th</sup> April 2015 at Cheponde in Molo Sub-county within Nakuru county jointly with others not before this court willfully and unlawfully killed 20 heads of sheep and 20 chicken capable of being stolen, all valued at Kshs. 130,000/= property of Jacob Akanwa Atero.
4. The appellants were convicted on count 2 and sentence to 2 years' imprisonment or a fine of Kshs. 150,000/= each hence this appeal. The appellants have raised the grounds of appeal challenging the judgement as follows:

That the learned trial Magistrate erred in law and in fact in convicting the appellants when the evidence before her was flimsy.

*a) That the learned trial Magistrate erred both in law and in fact by ignoring the obvious contradictions of the prosecution evidence.*

*b) That the learned trial Magistrate erred both in law and in fact by misdirecting herself basing a conviction when the circumstances of identification and/or recognition of the appellants was suspect.*

*c) That the learned trial magistrate erred in law and in fact in convicting the appellants for an offence which was not proved to the required standards.*

*d) That the learned trial Magistrate erred both in law and in fact in wrongly summing up the facts thus making findings that were not based on any evidence on record.*

*e) That the learned trial Magistrate erred both in law and fact in convicting the Appellants when the charge sheet did not indicate the identity of the Motor vehicles that were allegedly destroyed.*

*f) That the learned trial Magistrate erred both in law and fact in convicting the appellants for destroying Motor vehicles despite the fact that no expert opinion was produced to corroborate the same.*

*g) That the learned trial Magistrate erred both in law and in fact in finding that the ownership of the Motor Vehicles in question was not proved.*

*h) That the learned trial magistrate erred in law in rejecting the appellants' defence without giving it due consideration.*

*i) That the learned trial Magistrate erred both in law and in fact by shifting the burden of proof from the prosecution to the appellant.*

5. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial in the lower court.

6. **PW1 JACOB AKANGUA ATERO**, testified that he used to stay at his plot in Cheponde and that on 5<sup>th</sup> April 2015, he was called that some people were at his gate. That he went to the police station and came back with police who came and dispersed the crowd who were shouting that they did not want a bar at that place but the OCS told them that his bar was licensed.

7. He testified further, that on 6<sup>th</sup> April 2015 while asleep his wife who was attending the sheep woke him up as the fire was burning their house. He was able to see the appellants who were holding some jerricans. His wife woke him up and as she was attending to the sheep when she found the appellants outside their home with jerricans of petrol. That she came and informed him that fire was burning their house and compound and he was able to see the 3<sup>rd</sup> appellant with a jerricans with petrol. They were accompanied by two men Wachira and one he could not remember. He testified that Wachira hit his door using a metal bar and one door fell down and the house was burning then they started throwing stones at him. He escaped through the door and went to Elburgon and called the police but by the time they got to the house it had been razed down.

8. **PW1** went on to testify that his two motor vehicles were burnt, hardware shop fully stocked, bar, house, children's house, the store with beans and maize, sheep pen with sheep in it about 20 sheep and chicken were razed to the ground. That the fire engine managed to doze off the fire and that the destroyed items were valued about 2,000,000/=. He positively identified PMFI 1(i) – 1(xvi) and the appellants.

9. He testified that the 3<sup>rd</sup> appellant was not his immediate neighbour but he had known her for more than five years. That he used to have a bar and which was licensed and his neighbours were protesting against his bar which he had operated for over 30 years and had never been charged for operating an illegal bar. PW1 testified that his receipts got burnt and that he no grudge against the three accused persons.

10. On cross examination by the advocate for the accused, he testified that the accused were about five in his compound and on the day before the incident that is on 5<sup>th</sup> April 2015 a huge crowd had demonstrated outside his compound. He testified that his bar and house were next to each other and that he had a licence to operate the said bar. That he had always renewed the said licence for over 30 years and that Githinji sold *changaa* but he did not do business with him.

11. He confirmed that the 1<sup>st</sup> appellant was the one pouring petrol on the building and that the 2<sup>nd</sup> appellant had given birth by then but was in the compound and that Wachira who is yet to be charged usually threatened him and his witnesses. Upon being recalled for further cross examination, PW1 testified that the 4<sup>th</sup> accused had a crow bar damaging her door and so did the 5<sup>th</sup> accused. He confirmed that there were 10 people only and the police refused to arrest the 5 other culprits because of the interference from the MP. He testified that did not sign the inventory.

12. **PW2 REBECCA OGANJI NUSU**, testified that on 6<sup>th</sup> April 2015 at about 6.30am she was at home attending to her sheep when she heard people talking outside her gate saying "*oka oka*". They were conversing on their phones and upon looking through the gate she saw women and men. That she saw the three appellants herein in the company of others but she could not remember their names. They then knocked down their gate and she ran into the house to wake up PW1.

13. That the 1<sup>st</sup> appellant lit fire on their motor vehicle after pouring petrol on it. They also proceeded to the sheep pen and the 2<sup>nd</sup> appellant was the one who poured petrol and lit the boma on fire and the 1<sup>st</sup> appellant was also in the crowd. She testified that the men had metal bars which they used to hit the door to the house which was on fire and she just escaped through the fire. The items apart from the vehicles that were burned included assorted household items, foodstuff furniture, clothing's and 19 sheep.

14. She went on to testify that her husband arrived with fire truck but nothing was saved as the house hold items had been destroyed and the crowd was throwing stones at them as they set their house on fire and they wanted them to burn in the house. She testified that she proceeded to AntiStock Theft Unit but they referred PW1 to Elburgon. That the people who set her house on fire were two men and the appellants and that the harvested beans and maize in the store were also burnt to ashes. Witness positively identified the three appellants and PMFI 1(i) – 1(xvi).

15. On cross examination, she testified that the appellants were here neighbours and the 2<sup>nd</sup> appellant was the one who was pouring petrol on the motor vehicle and she knew her as was then pregnant. That the 2<sup>nd</sup> appellant had a two-liter container with petrol in it and that the other two men ran away but they come back. She confirmed that she did not know why her house was torched and that she remembered there was a demonstration alleging that they were selling illicit alcohol. She added that PW1 had a bar within their plot. Upon being recalled

for further cross examination, she testified that the 4<sup>th</sup> accused and the 5<sup>th</sup> accused had crow bar and general hammer and that 3 people set the house on fire and they were women the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

16. Upon re-examination, she confirmed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants entered the house and set it on fire while the 4<sup>th</sup> and 5<sup>th</sup> accused damaged the door.

17. **PW3 PETER ANDAYI OMUSEMBE** testified that on 6<sup>th</sup> April 2015 at 6:00am he saw 10 people 8 women and 2 men in the compound of the PW1 attacking him. The 2 men had 2 crow bars and are the accused in court. That the appellants were also the women he saw but 2 were not present and that the 3<sup>rd</sup> appellant had a jerry can of 5 liters of petrol.

18. He testified that the 1<sup>st</sup> appellant set the house on fire as he was about 4 meters and there were many people present. That he saw the appellant for a whole one hour as there was light from the fire and he had known her for a long time and they were very violent. He testified that PW2 went to the police at Elburgon and the appellants were arrested but the property of the complainant had been destroyed.

19. On cross examination he confirmed that he and PW1 lived at Cheponde and the 3<sup>rd</sup> appellant was a village elder. He testified that PW1 had a licence and it was in 2015 when the accused torched the house. That the 4<sup>th</sup> accused injured PW1 and that there were others who were not in court but he did not know their names. He testified that the 1<sup>st</sup> appellant according to him was Naomi Njeri, the 2<sup>nd</sup> appellant was Annah Njoki and the 3<sup>rd</sup> appellant is Grace Wambui.

20. **PW4 CHARLES OCHIENG**, testified that on 2<sup>nd</sup> April 2015 he was at the station with IP Odenyo their OCS and they learnt that there was a problem at Cheponde area. That they went there and found the road with bottles of beer, stones and many women and when they enquired and learnt that PW1 who had a bar was alleged to be selling changaa. That IP Odenyo pleaded with the members of public to follow the law. He testified further that on 6<sup>th</sup> April 2015, at 6: 00am a relative of the PW1 came to the station and stated that they had been attacked by the same crowd and their house had been set ablaze and their property burnt. He went with the other police officers to the scene and found the houses on fire and there was a main house, store, kitchen, 2 vehicles, saw dust, chicken and sheep. He testified that PW1 alleged that about 20 chicken and 20 goats had been burnt alive. The firefighters from Timsales put out the fire but nothing was saved and the scene was photographed. He identified the 1<sup>st</sup> and 2<sup>nd</sup> appellants as the leaders of the group. He identified the photographs and testified that the same were not marked.

21. On cross examination, he confirmed that he first visited the scene on 2<sup>nd</sup> April 2015 and that PW1 had reported that there were people who wanted to raze his house. He testified that he had the crime incident report which indicated as fire incident report but the same did not indicate the names of anyone at the scene. That the OB of 6<sup>th</sup> April 2015 did not indicate that the house of PW1 was razed down and that he recorded the statements of PW1, PW2, PW3 and others. He testified that PW1 had a licence, that there was no parade and that he PW1 mentioned names. He identified the general crime incident report — DMFI-2 and testified that it took about 15 minutes to mobilize people. That he did not get any fire expert to get an opinion but the fire was man made and the accused were suspected arsonist. He testified further that the 1st accused started the fire but he did not know who razed down houses belonging to PW1.

22. When placed on their defence the appellants gave unsworn evidence where **DW1 GRACE WAMBUI NGANGA** testified that she lived in Cheponde and that on 2<sup>nd</sup> April 2015 there were demonstrations over liquor that PW1 was selling. That the demonstrators were angry about PW1 and 2. She thereafter went away with her husband and came back on 5<sup>th</sup> April 2015. She went to testify that on 6<sup>th</sup> April 2015, she woke up, did general work and they had some construction at home. That as she looked for timber, she learnt that the house of PW1 had been set ablaze and that she saw him with police and he told them to arrest her. She denied the allegations.

23. **DW2 ANN NJOKI MUNGAI** testified that she lived in Cheponde and that on the material date 6<sup>th</sup> April 2015, she had gone to look for vegetables for sale. That she heard screams and rushed to the area where the screams were coming from and after a short while she saw PW1 who slapped her and asked the police to arrest her. She testified further that she was arrested and taken to Elburgon police station where she came to learn about the offences when she was arraigned in court. That she was not present at the scene and had never visited the home of PW1.

24. **DW3 NAOMI NJERI** testified that she lived in Cheponde and on 2<sup>nd</sup> April 2015 there were demonstrations where people wanted to close bars selling illicit liquor. That on 4<sup>th</sup> April 2015, there was a meeting called by DC, DO and OCPD and the matter in respect of the illicit brew was discussed at length. She testified further that on 6<sup>th</sup> April 2015 she was called by the area chief Munyi of Arimi location as a village elder who asked her what had happened. She testified that she was not at the scene, that some 2 women were arrested but she was arrested on 10<sup>th</sup> April 2015 while on the road attending the mourning of a student who had died. She testified that she had no knowledge of why she had been arrested.

25. **DW4 JOHANA MUCHIRI KAFUE** testified that he lived in Cheponde and on 22<sup>nd</sup> June 2017 at about 4:30am, the police officers came and arrested him. That they took him to Elburgon police station and later brought to court. He testified further that he denied the charges as it was after 2 years and PW1 was his neighbour.

26. **DW5 GEORGE WACHIRA MWANGI** testified that he lived in Cheponde and on 22<sup>nd</sup> June 2017 at about 5:00am, he was arrested by the police, taken to Elburgon police station and he was later charged in court. That PW1 was his neighbor and he denied the offence.

27. The court directed the appeal to be disposed by way of written submissions which the parties have complied.

#### **Appellants Submissions**

28. The appellants submitted that the elements in case the of **Wilson Githinji Chuchu v Republic [2018] eKLR** relied upon by the trial court were not proved beyond reasonable doubt. That the said elements entailed proof of ownership, proof that the property was destroyed/damaged, proof that the destruction or damage was occasioned by the accused persons and proof that the destruction was willful and lawful. The appellants submitted further that as per the judgment they were convicted for allegedly destroying two cars by burning them and that the said vehicles belonged to PW1. That from the evidence relied upon by the prosecution neither the registration number nor the identity of the motor vehicles was produced in court. That further no proof that the said motor vehicles were destroyed was produced by the prosecution.

29. The appellants went on to submit that the evidence was flimsy, contradictory and identification of the appellants was suspect and therefore not safe for a conviction. That PW1 evidence was hearsay and that PW3 mixed up the names of the accused persons. That further PW1 stated that he was the one who ran to Elburgon police station but however PW4 stated that it was his relative who reported the matter. They urged the court to allow the appeal, quash the conviction and set aside the sentence. They further urged the court that they be refunded the sum paid as fine.

### **Respondent Submissions**

30. The respondent submitted that the learned trial magistrate after a thorough analysis of the facts and evidence did conclude that the threshold of proving arson was never met and gave the reasons for the acquittal of the appellants. It conceded that there were lapses in the case which it did not avail and if it did then magistrate would have had all the reasons to convict.

31. On ground one of the petition of appeal on flimsy evidence, the respondent submitted that the witnesses did testify and their evidence was well corroborated by PW3 and PW4 but however, the photographic evidence could not be produced as they did not meet the threshold elicited in the Evidence Act. That further, PW1 did not prove ownership over the motor vehicle and land.

32. On ground 2 on the issue of contradiction, it submitted that the bottom line was that its witnesses were credible. On ground 3, it submitted that appellants were neighbours and on previous occasions they had demonstrated saying they would burn PW1's house. On ground 4, 9 and 10 it submitted that the burden of proof lied with it at all times and it did not shift to the defence. That the appellants were only required to defend themselves against the evidence it adduced. The respondent submitted that it conceded to the appellants' appeal as the judgment was rather contradictory. That therefore, PW1 could seek civil remedies to recover what he lost if at all the properties were his.

### **Analysis and Determination**

33. Having perused the entire record herein, the proceedings and the two rival submissions, the duty of the court was clearly spelt out in the case of **OKENO V.REP 1972 E.A. 32**. The Court of Appeal stated that;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 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] EA 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] EA 424.”*

34. Having perused the evidence on record this court appreciates that the respondent conceded to this appeal. The court however in **Peter Njoroge Karanja v Republic [2020] eKLR** the court cited with approval the case of **Genya Mwasaha Vs. Republic [2018] eKLR** where the court's position was that an appellate court is not enjoined to view the concession by the prosecution to the appeal as the sole basis of allowing it. The court may, as it deems fit and appropriate, conduct an assessment of the facts, evidence and the law by itself. The said court stated in paragraph 8 of the judgement as follows:

*“The aforesaid concession notwithstanding, it is still our duty as the appellate court to subject the entire evidence to a fresh examination”.*

35. Further, the same court cited with approval the sentiments of the **High Court in Nyeri in Norman Ambich Miero & Another Vs. Republic, Cr. App. No. 379 of 2005** where the court stated as follows:

*“We restate that this court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants”.*

36. A common feature that runs through the above cited authorities is that before the appellate court allows the appeal in cases where the prosecution concedes to the same, the court must first satisfy itself that the prosecution properly conceded to the appeal. Suffice to say, the court must set out on a sojourn by itself to test the strength of the appeal.

37. In the instant case the appellants were convicted on the second count for the offence of malicious damage of property **Contrary to Section 339(1) of the Penal Code**. For this offence to meet criteria, four ingredients must be proved as follows:

**a) Proof of ownership of the property.**

*b) Proof that the property was destroyed or damaged.*

*c) Proof that the destruction or damage was occasioned by the accused.*

*d) Proof that the destruction was willful and unlawful.*

38. As regards proof of ownership of the property and proof that the property was destroyed, I note upon carefully perusing the court records and from the testimony by PW1 and PW4 that no evidence was adduced in court to support the same. PW4 admits that photographs were taken at the crime scene however none were marked. That further the OB of 6<sup>th</sup> April 2015 did not indicate that the house of the complainant was razed down. The respondent in its submission conceded that PW1 did not prove ownership of any other asset within the compound that was razed or damaged.

39. Regarding the third ingredient on proof that the destruction or damage was occasioned by the accused, PW4 testified that he had the crime incident report which indicated as fire incident report but the same did not indicate the names of anyone at the scene. In addition to this I note from the proceedings that PW3 did not know the names of the appellants. In my view therefore, the prosecution having not proved the first three ingredients of the offence this court need not address the last one as the same has been caught up in the dragnet of the later ones not proved.

40. In view of the foregoing, this court holds that the evidence provided by the respondent felt far short of the required threshold for the offence of **Malicious damage to property contrary to section 339 (1) of the Penal Code** as a result of which the appeal against both conviction and sentence succeeds.

41. The appeal is hereby allowed, the fine imposed against the appellants if paid be refunded to them forthwith.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 17TH DAY OF FEBRUARY 2022.**

**H K CHEMITEI.**

**JUDGE**