REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 11 OF 2018

ABDUSWAMAD SWALEH MOHAMED.....1ST APPELLANT

MOHAMED SALIM MOHAMED.....2ND APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 223 of 2014

of the Principal Magistrate's Court at Lamu Law Court-Hon. V.K Asiyo, RM

dated 22nd march 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Komora for the victims

Mr. Aboubakar for the appellants

Mr. Mwangi for the State

J U D G M E N T

The two appellants **Abduswamad Swaleh Mohamed** and **Mohamed Salim Mohamed** feeling aggrieved with the order on conviction and sentence for the offences of store breaking and committing a felony contrary to Section 306 (a) of the Penal Code and in addition an act of arson contrary to Section 332 (a) of the Penal Code preferred on appeal to this Court. The grievances raised in petition of appeal comprises of the following grounds; -

1. The learned trial magistrate erred in fact and in law in believing the alleged confession of the 3rd Accused Denis Mwangi Ndegwa despite the appellants casting reasonable doubts to the same including the following; -

i. The same was not supplied to the defence during pre-trial. It was supplied later well after a number of witnesses had testified. The only statement supplied to the defence was the statement of the 3rd Accused made under inquiry and his plain statement. This is in violation of article 50 (2) (c) and (j) of the Constitution of Kenya, 2010 which requires that the accused person is to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. He is also entitled to have adequate time and facilities to prepare a defence. The 1st, 2nd, 4th and 5th Accused were denied of that right.

ii. The aforesaid article was intended at eliminating the possibility of fabricating evidence midway a criminal hearing among other reasons. If the prosecution had this confession before the hearing started what prevented them from supplying it to the defence as required by the Constitution? The only possible explanation is that the prosecution was cooking or fabricating evidence against the accused person which renders the alleged confession illegally obtained evidence in accordance with the provisions of article 50 (4) of the Constitution of Kenya, 2010 and therefore the same ought to be excluded from the proceedings herein as its admission would render the trial unfair or would otherwise be detrimental to the administration of justice.

iii. The confession was not tested by the Court conducting a trial within a trial as is required by law. The confession allegedly named the 1st, 2nd and 4th Accused persons among others. Those persons were in Court and ought to be examined on the contents of the same. This was not done and therefore its admission is in breach of well-established decisions of the Superior Courts and renders the same illegal.

iv. The confession was made in violation of the Rules on confessions made under The Evidence Act, Chapter 80 of the Laws of Kenya.

v. The original confession has come places blank yet in the copies supplies dates have been inserted.

vi. The confession is written in black ink but in some places the dates are inserted in blue ink giving the implication that the confession was written elsewhere as an afterthought and the places for dates left blank for them to be filled later after one was sure of the dates.

vii. The confession refers to the date of the planning as 8th April, 2013 while in the statement under inquiry produced as Exhibit 8 it refers to sometime in April, 2014.

viii. The confession states that on 8th April, 2013 the 3rd Accused met Abduswamad, Abu and their employee Body of Already Company while the statement under inquiry states that sometime in the month of April, 2014 the 3rd Accused was called by one Already and met him(alone).

ix. The confession states that on 8th April, 2013 the 3rd Accused met Abduswamad, Abu and their employee Body of Already Company while the statement under inquiry states that sometime in the month of April, 2014 the 3rd Accused was called by one Already and met him(alone).

x. The confession states that the 3rd Accused has engaged himself in duties of a porter at the seafront while in the statement under inquiry he states he is seaman in a dhow christened "Harambee".

xi. The confession states that on 8th April, 2014 the 3rd Accused approached John Garrisa Karume who was staying together with him and Kazungu who was John Karume's friend but the statement under inquiry states that, he later (no date or time stated) met one John Karisa alais Dogo and he explained to him about the mission and he agreed to be his partner. Thereafter he also met one Kazungu who also agreed to be part of the team.

xii. The confession states that he (alone) later went back to Abuswamad and informed him that he had already found two people while the statement under inquiry states that they all (three of them) went to Al-ready's Shop.

xiii. The confession states that Abuswamad instructed him (3rd accused alone) to meet him at Laparda Hotel along the seafront at around 7.30pm while the statement under inquiry states that "it was then that he suggested we (all of them) meet at Labarda Hotel.

xiv. The confession states that "at 7.30pm we, John Garrisa Kazungu and myself accompanied each other to the Hotel and we found Abduswamad, Abu and Bady all standing outside Laparda Hotel while the statement under inquiry states that "on the agreed day we all (3rd accused, John and Kazungu) met Already (not Abuswamad in the company of Abu and Bady) at Labanda Hotel at about 7.30Pm.

xv. The confession states that they accepted to set on fire the building on 10th April, 2014 while the statement under inquiry states that "we thereby agreed to do the assignment on 10th May, 2014."

xvi. The confession states that 3rd accused travelled to Mpeketoni on 9th April, 2014 while the statement under inquiry states that the 3rd Accused went to Mpeketoni on 9th May, 2014.

xvii. In the confession the 3rd accused claims to have informed Abduswamad about the postponement of the assignment on 10th April, 2014 while in the statement under inquiry he informed Already (not Abduswamad) on 8th May, 2014.

xviii. In the confession, the 3rd accused claims to have sat with Abduswamad and planned to set the building on fire on the 24th to 25th April, 2014 while in the statement under inquiry the 3rd accused claims to have met Kazungu and Karisa on 10th May, 2014 where they agreed to undertake their mission on 24th May, 2014.

xix. In the confession, the 3rd accused claims that on "24th day, 2014 (probably the Police were unsure of the date).

a) He found a friend who was a Police Officer standing outside the shop of Jane Njagi Peter.

b) The officer called him into the shop, told him he had no money and requested him to buy for him Kenya Cane Spirit which he did by paying 100/-.

xx. However, in the statement under inquiry the 3rd accused claims,

a) He by passed a shop owned by one Jane (one name only) when a police officer namely Evans Kiptoo called me into the shop.

b) After some talking the officer requested him to buy him some spirit but he told him he was not able at that moment but would probably buy him later.

2. The Learned Trial Court erred both in fact and in law in admitting the 3rd accused's alleged confession without conducting a trial within a trial as it included fellow accused persons who had rejected the confession.

3. The learned trial magistrate erred both in fact and in law in dismissing the appellant's objection to the production and or admission of the alleged confession by Suprintendent of Police Steven Birgen without legal basis.

4. The Learned trial magistrate erred both in fact and in law in again relying on the 3rd Accused person's alleged confession to convict the appellants with the offence of store breaking and arson.

5. The Learned trial magistrate erred both in fact and in law in admitting the alleged confession despite the fact that the same do not amount to a confession under section 25 and 25 A of the Evidence Act, Chapter 80 of the Laws of Kenya.

6. The Learned trial magistrate erred both in fact and in law in finding that the only grounds for conducting a trial within a trial is to determine whether the alleged confession is voluntary or not before its production without considering that collusion between the alleged maker of the confession, complainant and the police is sufficient ground as well.

7. The Learned trial magistrate misapprehended the provisions of section 32 of the Evidence Act, Chapter 80 of the Laws of Kenya in refusing to conduct a trial within a trial.

8. The Learned trial magistrate erred both in fact and in law by failing to take into consideration the many contradictions and outright lies peddled by the prosecution's witnesses including the 3rd Accused person thereby causing a miscarriage of justice.

9. The Learned trial magistrate erred both in fact and in law in failing to take into account that Pw13 Police Constable Evans Kiptoo denied the 3rd Accused person's alleged confession thereby denting its veracity and or reliability particularly the said magistrate ought to consider that the charges against Pw13 were withdrawn apparently for lack of evidence.

10. The Learned trial magistrate erred both in fact in convicting the appellants despite having made a finding that the charge on conspiracy was defective consequently make the charge sheet defective.

11. The Learned trial magistrate erred both in fact in convicting the appellants despite having made a finding that the charge on conspiracy was defective consequently make the charge sheet defective.

12. The Learned trial magistrate erred in fact and in law in failing to consider the apellant's defences at all rendering the judgement illegal.

13. The Learned trial magistrate erred both in fact and in law in considering extraneous issues introduced during the hearing which were not part of the investigations by the prosecution thereby prejudicing his mind at the expense of the appellants.

14. The Learned trial magistrate erred in fact and in law in failing to properly evaluate the evidence on record consequently he reached on the wrong conclusions of facts and law to the detriment of the appellants.

The prosecution called a total of 18 witnesses.

PW1 Said Auni Msellem testified he was the director of Saary General Supplies alongside **Shebe Auni.** He told the court that on 24th may 2014 he went to his office situated near the District Commissioners Office at 8.00 am. He stayed there until 6.00 pm. When he left, he locked the premises using his keys that his assistant **Thabit Salim** had a copy of.

That on 25th may 2014, he received a call from a boat captain called **Faraj** who informed him that his watchman had told him there was smoke coming from his store. He rushed to the store and found it burning. However, the inner door was open. He called Kenya power staff who switched off the electricity and with the help of the police from Lamu, they managed to put off the fire. Later he received a call from the County Commissioner's driver who informed him that he had arrested someone he had found with a car battery. The suspect was taken to the police station and the stolen item recovered. He further testified that other items were recovered but he did not know from who while other items got destroyed in the fire. **PW 2 Swaleh Abdalla Ali** told the court that in 2013 he acquired a Samsung laptop which he gave to his brother **Swaleh Auni** to program it. The said laptop went missing from the store the day the store got burnt. On 27/5/2014 he was summoned to the police station to identify both the laptop and the laptop bag. **PW3 Mohamed Abdi Noor Ali** testified that on 25th may 2014 he was at work guarding speed boats and hand carts. At around 3.30 am, the 4th accused came and asked him for a hand cart but he told him the handcart business had been closed.

The 4th accused moved to the next bunch of handcarts, broke a padlock and took one handcart. He left with the handcart and returned it after

half an hour. After a further half an hour, he saw smoke and thus called his employer one **Faraj.**

PW4 Dennis Kipngien Yego testified that on 24/05/2014 at midnight his cousin called **Kiptoo** a police officer went to his shop drunk and was arguing with a friend about a bag. **Yego** refused **Kiptoo** to leave the bag there but after **Kiptoo** called the owner of the shop he was allowed to leave the bag there. The bag contained a laptop part of the stolen goods. **PW5 Thabit Salim Khamis** testified that he was an employee of Saary General Supplies. He told the court that on 24/5/2014 he left work at 6.00 pm. A 5.30 am on 2/5/2014, he received a call that the store was on fire. He rushed to the store and assisted in putting out the fire. He was then called to identify a jerry can that was found in the possession of the 3rd accused. **PW6 Jaffer Shebe** testified that on 24/5/2014 at around 5.00 am he received a call from **(PW1)** that his business was on fire. On 25/5/2014 at around 8.00am, he went to the police station where he found the 3rd accused with the police. At the police station, the 3rd accused person told Jaffer that he was with **Karisa** who is the 4th accused. **PW7 Auma Shebe** testified that on 24th May 2014 he was doing some auditing at the store with Said. On 25/5/2014 he received a call that the store was on fire. He rushed to the store and assisted in putting out the fire. That a suspect (the 3rd accused) would later be arrested and some of the stolen items recovered. **PW8 Simon Murithi Mutusi** testified that on the night of 245/2014 he was guarding luggage outside Lamu Health offices. At around10.00pm he saw the 3rd accused and the 4th accused walking together. The 3rd accused was carrying a yellow jerry can. The next morning at around 6.00 am he found people putting out a fire. **PW9 CPI Suleiman Simon Tola** testified that on 25/5/2014 there was a fire in a building next to the commissioner's office. The County Commissioner arrived at the scene at around 7.00 am. The county commissioner arrived at the scene at 7:00 am. Thereafter, he escorted the County Commissioner to his house. While walking back to his house, he bumped into a man coming from the bush. The man was carrying a bag on one hand and a box that had a car battery on the other hand. The box had the name Saidi Auni raising his suspicion that the box could be from the building that had caught fire. He then called a colleague **APC Amos Mateteke** from the AP staff headquarters to come and assist him in arresting the suspect whom they took to the police station.

PW10 APC Amos Mateteke testified that on 25/5/2014 he was at the AP line when CPI Suleiman called him. He heeded the call and found him in the company of another man who was carrying a bag and a car battery. They arrested him and took him to the police station. **PW11 Aboud Mohamed Omar** testified that on 30/05/2014 he was booked in to the cells at Lamu police station. Inside the cell, he met the 1st, 3rd and 4th accused. He overheard the 1st accused complaining to the 1st accused why he had told the police that the 1st accused had paid Kshs.2,000 and was to pay him a balance of Kshs.28,000. Further, he heard the 1st accused tell the 4th accused he had no problem with him. **PW12 Jane Gakii** testified that she owned a shop called Upendo shop at Langoni. She told the court that on the night of 24th-25th may 2014 she received a call from a police officer called **Kiptoo** asking if he could leave a laptop at her shop. She allowed him leave the laptop there and after two days she was called to the police station to record a statement. **PW13 P.C Evans Kiptoo** testified that on the night of 24-25th may 2014 at around midnight he was at **(PW12's)** shop talking to his brother.

As he was leaving the shop, he bumped into the 3rd accused who was carrying a black bag that contained a laptop. He asked him whose laptop it was. The 3rd accused told him it belonged to **MP Ndegwa** and that he was his bodyguard. He confiscated the laptop and asked the 3rd accused to pick it up the next day. He left the laptop at **(PW12's)** shop and picked it up the next morning and booked it at the police station. Later at the police station he learnt that there was a building that had been burnt. Thereafter, the complainant came and identified the laptop as his. **PW14 Ali Mohamed Salim** testified that on 24/5/2014 at 10.00 am a person came with fuel in a yellow jerry can. The person who was carrying the fuel was not in court. Later at 2.00 am the 4th accused was accompanied by two people. At 4.00am, he saw a huge black smoke at the county Commissioner's office. **PW15 Abubakar Ali Kassim** was declared a hostile witness. **PW16 Superintendent Stephen Birgen** testified that on 26/5/2014 he recorded the confession of the 3rd accused. He told the court that he followed the laid down procedures and read out the confession and the same was recorded by the court verbatim. **PW17** was stood down.

PW18 PC Daniel Oburi testified that he was the investigating officer. He told the court that on 25/5/2014 at 6.30 he received a call that there was a fire at Lamu Central business. He rushed to the scene and drew a sketch map that was produced in court. He informed the court that the 3rd accused narrated to him what had happened and how it had been planned. Upon being placed on their defence, the 5 accused persons gave sworn evidence.

DW1 Abduswamad Mohamed testified that it was not true that he and the 3rd accused met and planned to burn the complainant's sore. That prior to the incidence, he did not know the 3rd accused. **DW2 Mohamed Salim Mohamed** testified that he did not pan with **(DW1)** and **(DW3)** to burn the store. He stated that **(PW1)** offered him money to frame **(DW1)** and when he turned the offer down he was victimized. **DW3 Denis Mwangi Ndegwa** testified that he was present when the 1st accused, 2nd accused and Abu the1st accused's brother were planning to burn the store. The plan had been hatched at Lambada Hotel on 8/5/2014. He informed the court that the 1st accused had recruited him alongside two others and they were told they would be paid Kshs.90,000. On the night of the incidence, he met with **(PW13),** who took the laptop he was carrying. He was arrested the next day at around 7.30 am and some stolen items were recovered from him. He voluntarily recorded the confession. **DW4 John Karisa** testified that he did not know the 1st accused prior to the case. He denied burning the store. He called a witness **Francis Kaloki**. **DW5 Francis Kariuki Maina** who was called by **(DW4)** said he did not know why he was in court and was shocked to be served with a production order. **DW6 Athman Omar Mohamed** testified that on the night of 24th-25th may 2014 he was asleep. That he was arrested by marine officers for not wearing a life jacket while on a speed boat from Mokowe. That he did not participate in the charges brought against him.

Submissions on appeal

The appellants submit that the confession of the 3rd accused was not supplied to the defence during pre-trial. It was supplied after a number of witnesses had testified in contravention of Article 50 of the constitution and the rules of confession made under the evidence Act. Further, the court did not conduct a trial within a trial in respect of the confession as it included fellow accused persons who had rejected the confession.

The appellants relied on the following authorities; The Constitution of Kenya 2010, The Penal Code, The Criminal Procedure Code, The Evidence Act, **Joseph Ndungu Kagiri V R (2016) eKLR, Thomas Patrick Gilbert Cholmondeley V R [2008] eKLR, George Ngodhe Juma & 2 others V AG[2003] eKLR, R v Endelina Gatiria [2016] eKLR, R V Wilson Mwangi Githinji [2017] eKLR, Anuchpand**

Meghji Rupa Shah & Another V R [1984], Patrick Ngesa Ogama V R [2006] eKLR, R v Elly Waga Omondi [2015] eKLR, Anasuerus Najared Likhanga V R [2006] eKLR, R v County government of Nairobi [2017] eKLR, David Kiprot

The respondent submits that the confession relied on by the prosecution during the trial was obtained within the confines of the law under section 25, 26 and 27 of the Evidence Act. That the conviction was safe and the sentence meted out was legal.

They relied on the authorities of **Arthur Muyamuriuki V Republic Nyeri HCCRA no. 31 of 2010** and of **Erick Onyango Odeng v R Nairobi HCCRA No. 5 of 2013.**

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. **(See Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR).**

I have considered the grounds of appeal, the respective submissions, and the record and the issues for determination are;

a) Whether the confession of the 3rd accused was properly obtained.

b) Whether the offence of Arson and store breaking and committing a felony was proved beyond reasonable doubt.

c) The weight of the new evidence introduced on appeal.

Whether the confession of the 3rd accused was properly obtained.

The basis of the law on confession can be found in the following:

i. Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution.

ii. Sections 25 to 32 of the Evidence Act.

The effect of Articles 49(1) (b), (d) and 50(2) (a) and (4) of the Constitution is that:

(49) (1) An arrested person has the right to:

a) Remain silent

b) Not to be compelled to make any confession or admission that could be used in evidence against him.

(50)(2) Every accused person has the right to a fair trial which includes the right:

(a)To be presumed innocent until the contrary is proved.

(4) Evidence obtained in a manner, that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

The Evidence Act, on the other hand makes the following provisions with regard to confessions by criminal suspects;

Under Section 25 A (1):

i. A confession or any admission of a fact tending to prove the guilt of an accused person is generally not admissible.

ii. Only confessions and admissions made in court before a judge, a magistrate or made before a police officer (not the investigating officer) of the rank higher than Chief Inspector and a third party of the accused person's choice are admissible.

Under Section 26 ***any confession or admission purported to be made by an accused person which appears to the court to have been made as a result of any inducement, threat or promise by a person in authority is not admissible if it gives the accused person grounds to believe that by making it he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.***

Under Section 32(1), ***a confession made by one accused person which affects his co-accused person and the confession is proved, the court may take the confession into consideration as against the co-accused person and the accused person whose confession has been admitted.***

All confessions therefore not made in court must be obtained in accordance with the **Evidence (Out of Court Confession) Rules**

2009. There is no room for admissibility of a confession without the necessary safeguards of the law as provided under **Sections 25** to **32** (inclusive) of the **Evidence Act** and under the Evidence (Out of Court Confession) Rules**. The Evidence (Out of Court Confession) Rules, 2009.**

Turning to the present case, the appellants allege that the confession was not properly obtained, however, they do not show any irregularities that they are contesting. Further, they indicate that the confession was not presented to them during pre-trial. I do note that the advocate for the appellants was the advocate who acted for the accused persons at the trial. There is no record of change of advocate at any given point. I also do not find any record that the appellants had during the trial at any point contested the validity or admissibility of the confession. The confession of the 3rd accused is said to have been given voluntarily and I do not have any reason to believe otherwise.

Whether the offence of arson was proved beyond reasonable doubt

Section 332 of the Penal code provides as follows: -

Any person who willfully and unlawfully sets fire to: -

a. Any building or structure whatever, whether completed or not or;

b.

c.

d.

is guilty of a felony and is liable to imprisonment for life.

The essential ingredients of the offence are the setting of fire willfully and unlawfully. The word willfully is defined in the Black's Law Dictionary as 'voluntary and intentional, but not necessarily malicious'. The word unlawful is defined in the same dictionary as 'violation of law, an illegality".

From the foregone it appears that the ingredients of the offence of arson contrary to **Section 332(a)** of the **Penal Code** are: -

(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

Whether the offence of store breaking and committing a felony was proved beyond reasonable doubt

Section 306 (a) provides: -

"306. Any person who –

(a) Breaks and enters a school house, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling – house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or"

So, was there a break – in? **Section 303 (1)** to **(3)** defines breaking and entering. While Section 303(1) and (2) refer to actual forceful breaking-in and entering Section 303(3) refers to a different scenario. It is important to reproduce that sub-section for better understanding: -

"(3) A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building or who enters any aperture of the building left open for any purpose, but not intending to be ordinarily used as a means of entrance, is deemed to have broken and entered the building."

In the instant appeal, the trial Court record denotes that the 1st appellant, in company of the 2nd accused and 3rd appellant acted in concert in the commission of the crime stated in the indictment of Arson and store breaking. It would be noted that in situations as postulated under section 21 of the Penal Code, the understanding and arrangements between the offenders need not be expressed by them in words. Their subsequent actions may be sufficient to convey the message between them that their minds are at one as to what they shall do, the understanding or arrangement need not be of long standing. It may be reached only just before the doing of the Act or Acts constituting the alleged crime.

The legal proposition is non well settled that Section 20, read with section 21 and 22 impose a joint liability for commission of offences dependent upon the natural of the weapons used, knowledge which each participant had of the fact of unlawful act, the probable consequences of the plan and harm inflicted as a result of that common enterprise. In the case of a premeditated plan to commit the felony of Arson, by the appellants, it is evident form the trial court judgement that an accomplice one Ndegwa admitted to the fact of executing the crime of arson. In this respect the 2nd and 3rd appellant met at Lambada Restaurant where a common agreement was seated to burn the complainant's store. That store was eventually set on fire. In the case of a premeditated plan to commit a crime, the knowledge that one or more participants were in possession of a lethal weapon or material like in the instant case – petroleum gas, is often taken as conclusive proof that the use of it to commit the crime was within the scope of the common intention. In such circumstances the burden of avoiding a conviction for the alleged offence shifts on to every participative, to lead evidence in rebuttal. This can be done only by proof on the part of each participants that he had joined in the endeavor only upon the promise of orders that no crime would ensue.

In this case, it must have been clearly within the contemplation of the appellants as deduced from the evidence of **(PW8), (PW11), (PW14), (PW13), (PW14)** by no stretch of imagination in the opinion of this Court can their evidence be said to be outside the scope of the concerted action of common intention by the appellants. The dicta in **R v Cheya [1975] EA** sums the circumstances of this appeal and the objection raised by the appellants on their clustered grounds to challenge the decision of the trial court. This is what the Court pronounced on the doctrine of common intention.

> ***"It is sufficient for joint responsibility for an offence under this section that the offence actually committed was likely to occur as a result of several persons acting together but that the existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different form his intending that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only when a Court can, with some judicial attitude, hold, that a particular accused must have preconceived or premeditated the result which ensured or acted in concert with others, in order to being that result that this section can be applied." See also Njoroge V R [1983] KLR 197.***

In the instant appeal given the various scenarios as choreographed by the prosecution witnesses **(PW3), (PW8), (PW13)** and **(PW14).** It is manifest form the evidence that the complainant's store was broken into and various good chatted away by the appellants and others not before this Court. The substance and prosecution of the crime did not stop at the stage of breaking into the store and stealing of the goods. The appellants jointly went ahead to set the building on fire bringing into view the offence of Arson. What perspective do I take of the prosecution evidence vis viz the defence trajectory? The law in Kenya on criminal law does not speak of anything but proof of the guilty of an accused beyond reasonable doubt. In the case before I opine that the prosecution evidence taken at its highest discharges the burden of proof as stipulated in **Woolmington V DPP [1935] AC and Miller V Minister of Pensions [A 1942] AC**. The Learned Author in **Black's Law Dictionary of 1891 6th Abridyed Edition 1991** added to the debate in the following words;-

> ***"Preponderance of evidence is of greater weight or more convincing than the evidence which is offered the opposition to it, that is, evidence which as a whole show that the fact sought to be proved is more probable than not"***

At the trial of the applicants on re-appraisal of the entire mind, there was conclusive proof that the prosecution discharged the burden of proof against the appellants for the offences which they were tried and finally convicted of followed by the appropriate sentences. In the grounds of appeal broken down into various such as rational thinking, sensible man.

Fairly and reasonably entertain, not the doubt of vacillating mind that has not the moral courage to decide but shatters itself in a vain and idle skepticism. There must be doubt which a man honestly and conscientiously entertains. Reverting to this appeal, it was the case for the appellants that the evidence of Ndegwa provides a necessary legal perspective to rule the benefit of doubt in favour of the applicants.

I have anxiously and carefully analyzed the original structure on oath by this witness and subsequent narrative on appeal. For the sake of the fidelity and sanctity of the administration of justice the following comments abide. In essence of the legal oath taken by the witness during the initial trial has consequences on appeal he tried to digress into the realm of an attempt of impeaching the evidence given before the Learned trial magistrate, which found part of the decisive factor against the appellants. For the sake of clarity, the witness was committed for trial alongside the appellants. During the trial he made a deposition on the circumstances set out in his statement. The facts so alluded to were statement in a trial tendered in evidence as a declaration by the matter before the magistrate that it was true to the best of his knowledge and belief.

In my conceded substantially the statement on oath concerns admissions within the criteria outlined in Section 17 and 18 of the Evidence Act. To construe the provisions for payments of this appeal, for the admission into evidence of a witness statement in the course of a trial, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecution or the defence. The admission by any party of such fact under the provision of the evidence Act as against that party would be conclusive evidence in those proceedings of the fact admitted whilst the Memorandum of Appeal listed several grounds on this issue contending on the issue of the so-called confession statement, I am persuaded that latest retracted version of the witness borders on perjury. In Halsbury's Law of England Vol (i) 4th Edition perjury is defined as follows;-

> ***"Where any person lawfully sworn as a witness or as an interpreter in a judicial proceeding willfully makes a statement, material in the proceedings, which he knows to be false or does not believe to be true is guilty of perjury and is liable on conviction on indictment" (See section 108 of the penal code).***

*T*his unscrupulous witness, resolved to utter blatant false hood in our Court system resulting in polluting not only the trial before the Lamu court but also in the appeal process with a sole objective to occasion the release of the appellants. Due to the contradictory nature of this witness testimony it has put into focus the question of perjury upon his evidence. The Courts need to come out strongly to prevent the evil of

perjury to stem into the administration of justice. It is common ground that the evidence on appeal by this witness in favour of the appellants did not faulter the direct and circumstantial evidence that the crime of arson and store breaking was committed. The key actors/perpetrators of those crimes remained to be the appellants. It is not surprising that when the stalls are high and sensitive information can make or break a deal or win a case, the temptation to cut corners and steal a match. On the adverse party can be overwhelming the private investigator evidence adduced by the appellants had far-reaching implications and the Court will take judicial notice of illegally obtained evidence.

In terms of admissibility of evidence decisions such as that facing the appellants meant that any evidence which could to go almost any lengths to potentially turn the prosecution case in their favour was welcome. There is obviously a clash of public and private interests in this area of criminal law.

The crux of the matter which is quite capable of appreciating over criminal justification is inclined on an adversarial legal framework. To that extent it may be said once the police agency investigations a cognizable offence, it recommends offence, it recommends to the Director of Public Prosecution under Article 157 (6), (7) (8), (9) and (10) to make a decision to charge the suspect.

Under this procedure the suspect now accused of a known crime is confronted with the evidence lining up the involvement of the unlawful conduct. The accused persons under Article 50 2 (b) of the Constitution are to be informed of the charge, with sufficient detail to answer it. Further under Sub-Section 12 (c) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. Similarly, under subsection (k) to adduce and challenge evidence.

This case is discern for long one because of the appellants' failure to initiate such a private investigation to form part of their defence to challenge the existence or non-existent of facts alluded to by the prosecution as stipulated in section 107 (1) and 108 of the Evidence Act. Apart form the evidence being introduced by the private investigator by the name **(Mugo)** two pieces of direct and circumstantial evidence of the prosecution witness provide a basis of a decisive nature against the appellants. The first as alluded elsewhere in this appeal was the fact that the appellants were positively identified and placed at the scene of the arson, and entry to of the complainant's building prior to setting it on fire. The appellants' purposeful way on which this after though information was brought to the attention of the Court is suggestive to a sharp-witted inquirer namely, that it was put there for the deliberate objective of exonerating the appellants of the alleged crimes, to give way for their acquittal. Secondly, it was rather vague evidence of things being thrown into the prosecution side but on scrutiny it had little probative value to change the trajectory of the entire specimen of the case. The evidence also prevents other disquieting features? Where the appellants denied an opportunity to present that evidence during the initial trial was the private investigator not an agent for hire whose evidence was not availed to the police and Director of Public Prosecution for scrutiny. It is too dangerous to accept as satisfactory privately obtained evidence after conviction of accused persons in any criminal offence unless that other evidence leads to comply with the provisions of the Evidence Act and Article 50 of the Constitution. On the right to a fair trial there is a clear if subtle difference between evidence listed within the trial of a case to shift the burden of proof and on the other hand the one introduced on appeal to shift the evidential burden to show that the primary decision a conviction was wrong. What degree or question of disproof is intended by the defence is certainly a matter of the trial court in the first instance. This question of private investigator evidence in turn raises a fundamental issue of penal policy, how far it is permissible for the purpose of securing a acquittal can the appellant go to obtain any such evidence to cast a doubt against the prosecution case. In my view when certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted in order to reach the crimes with which the public are infested, Courts of justice should not be relax and admit every suspicion or thread of evidence which it considers impacts on the doctrine of equality of arms. The private investigator evidence supposes a dilemma which does not exist, the security of the innocent is in read in the constitution, without the favors of a private investigator something chiefly not on the fairness of the trial but had to get the appellants off the hook.

From the prosecution evidence, the store has closed at 6.00 pm and secured by a padlock whose keys were in the custody of two people. After the fire had been put out, PW1 noticed that the inner door was open. Therefore, it is clear that there had been unlawful entry into the store.

The effect of new evidence on appeal.

I will briefly delve into the merits and demerits of the additional evidence on appeal as this is extensively covered in this court's ruling dated 26th February 2021. What is left of me, is to find the value of that evidence. The evidence in subject is private investigators report by the appellant. This evidence has been brought at the appeal stage as evidence of the appellants. It is my view that the said evidence would have been more helpful at the trial stage as it would have given the prosecution the opportunity to test the same during cross examination. I do not allow myself to be bound by the same as this is a private investigation report by the appellants and not by an independent party thus does not rule out bias.

The perception by the Court is that the activities of the private investigator was obtained after the fact of conviction of the appellant. When I reflect on the one process clauses and right to a fair hearing under Article 50 of the Constitution, the state was entitled to be served with a copy of the so called 'Mugo' report and its probative force. The doctrine of equality of arms is a guiding light and not an empty shell in the administration of criminal justice. The right to a fair trial under Article 50 entails respect for the principle of equality of arms a generally recognized inherent element of the due process of Law in both civil and criminal proceedings. Strict compliance with this principle is a constitutional and statutory dictate for both parties in a litigation.

Following this line of thought adherence to procedural fairness demanded that the appellant provide a copy of the private investigations report to the state. Special attention of this report by the state was necessary at the trial stage as a means to interrogate its legitimacy and credibility. The equality of arms tenets demands attentive compliance and equal participation of both the accused and the state in fair trial processes. It is a linchpin of the whole system of our criminal justice.

As it emerges, the private investigations interplay was an activity carried by the appellants without advance notice to the state and the contentious issues which impacted governing the judicial process. It is clear that our constitution creates a system of courts with fundamental guidelines on the process and procedure. In outlining the contours and ambits of an appeals court it was not meant to extend its jurisdiction to a trial court beyond its statutory and regulatory provisions. The irony in this appeal is that a whole compendium of private investigations report is purposed to be interrogated by an appeals court, while the many challenges to that evidence was never sound upon the

state to afford it an opportunity to present a rebuttal to the claims outlined therein.

There other observations to be made about the private evidence proceeded. There is no information on the compelling and extenuating circumstances regarding the method and the timing of the investigations way after the conviction of the appellants. Given, its infringements of fair trial guarantees, the major concern would be, the motive behind its preparation and pivotal role of the rights of the appellants who gave their defence without the input from extracts of that report. Given the other end users of the report, why the investigator claimed full autonomy to the report in absence of its integrity, legitimacy and credibility being allowed to be used at the initiated criminal proceedings by the state. Within the ambit of Article 50 of the Constitution procedural equality entitles both parties to equality before the Courts as encapsulated in Article 27 of the aforesaid Supreme Law. That is giving each party the same access to information, evidence, the powers of the Court and the same right to present their cases. By way of compliance and minimum guarantees of fair trial rights. The prosecution and the defence enjoy equal rights before trial Courts or an appeal. When the private investigations report is adopted in this appeal in the absence of a strong legal challenge at the trial Court, its purpose behind it read into the right equality will bring tremendous invasion of the fair trial rights at an unprecedented scale. It may be said that **Ms. Mugo's** report as a matter of evidence in respect of both Law and fact may not be objective whether, the investigator has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the Court, is a moot question.

For criminal proceedings of this nature with high stakes, the overriding duty of an investigator is to provide an objective, unbiased opinion. There has been concern for sometime, however that some experts' or so called private investigator, may be tempted to provide an opinion or recommendations which favors his or her paymaster. It is unfortunate that the trial did not feature any of the considerations being advanced on appeal by the private investigator.

Though allowed to be presented on appeal, I find that the new evidence undermines the generally accepted due process rights and the source of information in which the report is based is flawed for lack of being tested or challenged by the state. More worrying still is the motive of the appellants in launching this independent investigations, given the evidence relied on in their criminal proceedings had been properly validated.

In furtherance to that trial, each of the appellant was placed on his defence and finally convicted of the two counts. In short, the so called expert, investigations evidence is of doubtful nature and reliability questionable.

This appeal raises the issue of whether the appellants' rights to a fair trial under Article 50 were violated for reason of non-supply of the confession statement in advance. Procedural justice for accused persons comprises of rights to a fair hearing encapsulated in Article 50 of our Constitution. In the Text Principles of Constitutional Law by Charles Mwaura 2014 Law Africa, the Learned author defined fair in the following terms:

> ***"That it's a requisite hearing that requires the Court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interest of both parties alike for both, and make an estimate of what is reciprocally just … A fair trial, having the above minimum qualities, must be undertaken, prosecuted and concluded within reasonable time before and by an independent and impartial Court established by Law."***

One somewhat ad hoc approach that has been used in our jurisdictions to guide due process in a trial is to be found in the case of **Juma & Others v Attorney General {2003}** in which the Court held as follows:

> ***"It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which he has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favor, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the Law and evidence."***

At the heart of this matter, is the right to be supplied with the confession statement of the witness in advance of him giving evidence in Court. The first question before me, is whether indeed the defence agreed to proceed with the trial of that specific witness without having in possession of the considered statement. In terms of the record the facts which are central to the issues raised before this Court on appeal, illustrate potentially a different narrative. Without question the aforesaid impugned confession statement was a subject matter of the trial Court and unsurprisingly Learned counsel for the appellants cross-examined on matters arising out of that confession. The existence of safeguards to regulate the manner in which confession statement are rendered admissible before a trial Court are presumed to have been legally complied with by both parties to the litigation. It will be naïve for this Court to think that in all other instances the trial Court acted impartially and lawfully but on this issue of a confession statement the Court deliberately infringed the Constitution and Statute Law. Since this issue was not raised by the defence can this Court consider it here as a point of Law or fact misapprehended by the trial Court?

As a general rule, this Court is entitled to examine the evidence, to re-hear the case, reconsider the material before it and each of its own decision thereon without regarding the Judgment of the Magistrate but careful weighing it. **Shantilal Ruwala v R {1957} E.A. 370** and **Answar Kipngetich v R, Criminal Appeal No. 141 of 1985 (unreported).**

In line with the facts of this case, I echo the principles in this case **M'Riungu v R {1983} KLR 455**, I decline to interfere with the decision of the trial Court for it is apparent no evidence or reasons advanced by the appellants that the impugned Judgment was arrived at by applying wrong principles or misapprehension of facts.

Sentence

It is recognized that life imprisonment is the maximum penalty for the offence. Arson is a serious offence, leading not only to damage to property, but also likely to lead to heavy loss of life. However, courts have the discretion, depending on the circumstances, to pass a lesser sentence.

I do note that the trial magistrate imposed the minimum sentences of two (2) years and one (1) year respectively for the offences even when there was no remorse on the part of the appellants. There is no reason for me to upset the decision of the trial court. However, in the present case, there was need for a cross-appeal on the sentence which reliably was never sought by the state. The Court is unable to move *suo moto* to delve into issues not pleaded in the appeal. It therefore, remains a moot question. The other seminal issues in this appeal on sentence stems from the failure by the justice system to comply with the reasonable time requirement to dispose of the appeal in a speedy and timely manner. The practability of it the sentence imposed by that trial Court though not fully served under incarceration has been hanging over the heads of the appellants in the interim period. Before plunging them back to prison the notion of such dynamics weighs upon the Court to take a progressive interpretation of the objects and principles in sentencing offenders.

Why consider alternatives?

The reality is that most of the objectives of imprisonment can be met more effectively in other ways which do not necessarily infringe the loss of liberty. It may be contended that a fine as alternative to imprisonment is a soft landing for an accused or convict. However, the weight of a conviction which remains a permanent scar in the record of a citizen may contribute more psychotraumatic impact in the long run. Given the background on sentence in the primary Court, I am persuaded to vary the custodial sentence to the alternative of a fine of Kshs.100,000/= on each count against each of the appellant in default one (1) year imprisonment. The sentences to run consecutively. Save for that variation on sentence, the impugned Judgment of the trial Court be and is hereby affirmed.

14 days right of appeal explained.

It is so ordered.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 21ST DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the DPP

2. Mr. Aboubakar for the appellants