



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 102 OF 2017 [ASSAULT AND ARSON]

(CORAM: R.E. ABURILI – J)

BARRACK OKELLO OCHIENG..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against conviction and sentence dated 11.10.2017 in Criminal Case No. 292 of 2017 in Ukwala Law Courts before Hon. G. ADHIAMBO – SRM).

JUDGMENT

1. The appellant herein **BARRACK OKELLO OCHIENG** was charged with two counts under the Penal Code. In **Count 1**, he was charged with the offence of **Assault Causing Actual Bodily Harm Contrary to Section 251 of the Penal Code**. The particulars of the offence are that on 24.08.2017 the appellant while at Lolwe village in Ugunja Sub-county within Siaya County jointly with another not before court **willfully and unlawfully assaulted Fredrick Owino Omondi thereby occasioning him actual bodily harm**.

2. In **Count 2** the appellant was charged with the offence of **Arson Contrary to Section 332(A) of the Penal Code**. The particulars of the offence are that on 24.8.2017 the appellant while at Lolwe village in Ugunja Sub County within Siaya County willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs 100,000 the property of **Fredrick Owino Omondi**.

3. The appellant denied both charges and the prosecution called 4 witnesses. After the trial, the trial court found the appellant guilty on both counts and sentenced him to serve 12 months imprisonment on count 1 and four years imprisonment on count 2, sentences to run consecutively.

4. Being dissatisfied with the said conviction and sentence, the appellant filed this appeal setting out 4 grounds of appeal namely:

- 1) That the learned trial magistrate erred in law and fact by failing to consider the defence adduced hence misled in her decision;**
- 2) That the learned trial magistrate erred in law and fact by imposing a harsh sentence for the alleged crime;**
- 3) That I cannot recall all that transverse during the trial hence pray for trial court [proceedings to adduce more grounds;**
- 4) That I wish to be present during the hearing of this appeal.**

5. This being a first appeal, this court is obliged to subject the entire evidence adduced before the trial court to fresh assessment in order to arrive at its own independent conclusion, bearing in mind the fact that it never saw nor heard the witnesses as they testified. See Okeno v Republic.

6. Reexamining the evidence before the trial magistrate, **PW1 Fredrick Owino Omondi** a resident of Lolwe Ugunja testified and recalled that on 24.8.2017 at around 9:00pm he was in his house when he heard Barrack Okello going to his house while making noise and saying that he Barrack Okello was going to burn PW1's house and PW1. That after that, Barrack forcefully pushed the door to the house of PW1 and entered the house and at that time the tin lamp was on inside the house. PW1 stated that Barrack made those utterances while already in the compound. He said that when Barrack entered his house Barrack the started cutting PW1's bicycle, basins and utensils using the panga and slasher that Barrack was carrying.

7. PW1 stated that when Barrack saw PW1 moving to the door, Barrack asked PW1 what he was doing there and yet Barrack did not want him there. He said that after that Barrack slapped PW1 on the chest using the flat side of the panga that Barrack was carrying. PW1 stated that at the material time, he was in the company of his two young children aged 2 years and 1 year whose mother was away. He said that he

escaped and left his children in the house and went to the home of the village elder and the village elder accompanied PW1 to his house where they found Barrack still making noise while armed with a panga and a slasher. He said that at that time Barrack was threatening to cut anyone who would move into that (PW1's) house. He said that the village elder carried PW1's child aged one year and left the child aged 2 years. It was PW1's testimony that the village elder went with the said child aged one year to his home. He said that his 2 year old child was standing at the door stranded. He said that after that the appellant Barrack took the mattress, placed it on the floor of the house and lit a fire on the mattress.

8. He stated that he was then standing 5 metres away from the house and since the door to his one roomed house was open and further the tin lamp was on, he could clearly see what was happening inside the house. He said that he saw the appellant lighting the match stick and placing it on the mattress then the mattress caught fire. He said that after that the appellant walked out of the house and PW1 hurriedly poured water on the mattress. He said that the appellant then asked him whether he was putting off the fire that he (the appellant) had lit. He said that Barrack followed him into the house and the tin lamp was still on. He said that Barrack then cut his left cheek with a panga. PW1 showed the trial court a scar on his left cheek as the part of his cheek that Barrack cut with a panga. He said that after the appellant had cut him with a panga the appellant went back to his home. He said that as he was still outside his house the appellant arrived at his house again while carrying petrol in a black jerrican. He testified that he clearly saw the appellant with the help of the light from the tin lamp that was inside his house.

9. PW1 further testified that after that the appellant entered his house with the black jerrican and while he (PW1) was at the door, he saw the appellant pouring petrol on the mattress that was on the floor, being the same mattress that the appellant had earlier tried to burn, then the appellant sprinkled the petrol on the floor after which the appellant lit a matchstick and threw it onto the mattress and the house started burning. He said that Barrack left the house immediately while armed with a panga and a slasher and said that he would only leave after that house would have burnt down completely. He said that the house burnt and as it was about to cave in, the appellant escaped back to his home.

10. He also testified that by then, he had moved a distance away from his house with his 2 year old child but he could still clearly see what was going on. He said that after that Barrack started chasing him away while armed with the same panga and slasher thus forcing him to spend the other part of the night in the bush with his 2 year old child. He said that the third time that Barrack went to his home he saw Barrack with the light emanating from the burning house. He said that later in the morning as the sun was rising Barrack arrived at his home while still armed with the panga and slasher and wondered why he (PW1) was still in that home and further told him (PW1) that he (the appellant) thought that he (PW1) had already left. He said that after that Barrack started chasing him.

11. He stated that later at around 11:00 am, he reported the incident to the area Chief who advised him to seek treatment first. He said that he went to Ambira Sub county Hospital where the cut on his left cheek was stitched. He said that he thereafter reported the matter at the Ugunja Police Station and the police accompanied him to the home of the appellant but they did not find the appellant. He said that the appellant was found in another home where he was arrested and then they proceeded to his (PW1's) home. He said that at his home the police took photos of the burnt house and the appellant was thereafter taken to the Ugunja Police Station. He identified his treatment notes dated 25.8.2017 and P3 Form dated 27.8.2017 both issued at Ambira Sub county Hospital as PMFI 1a and PMFI 1b respectively.

12. The complainant further testified that the items that got burnt in his house were 3 sacks of maize, half a sack of beans, a bicycle, his masonry tools, his clothes, shoes, sofa set, suitcase, his clothes and those of his children, mattresses and blankets. He stated that the only clothes he was left with were the clothes that he was wearing. He said that even as he was testifying he did not have a house to live in and that he used to sleep under a tree. He identified photos showing the extent of damage caused by the fire as PMFI 2a to 2d.

13. He further identified Barrack as the appellant herein and stated that he had known Barrack for five years. He stated that the appellant used to be furious against him and would even quarrel while calling out his name the entire night. He then said that he had never disagreed with the appellant and that even as he was testifying he had no idea as to why the appellant burnt his house.

14. On cross examination by the appellant, PW1 stated that on the 24th the appellant did not find many people at his (PW1's) home. He said that his door is made of papyrus reeds and that he had used a big stick to close the door. He responded that at that time his wife was at her parents' home and that his wife left their home at 2:00pm. PW1 stated that when he went to call Caleb the appellant was yet to cut him but that the appellant had slapped his chest with a panga. He said that his neighbours are the relatives of the appellant. He further stated that he told the doctor that the appellant had a grudge against him because the appellant had a habit of quarrelling while calling his name and further stated that he had never disagreed with the appellant. He said that Brian Omondi witnessed as the appellant cut him with a panga. He also said that Caleb said that he was unable to deal with the appellant because the appellant was very furious.

15. On further cross examination he stated that the appellant escaped from the fire and that is why the appellant did not burn. He said that Martin Chango arrived as the fire was razing the house and he just stood aside while saying that he would leave after the house would have caved in. He stated that Martin also hit his (PW1's) chest with a fimbo. He insisted that he knew the value of his property that was damaged. He further stated that there was no way the police could have found the weapons that the appellant was armed with because the appellant was arrested the following morning.

16. **PW2 Brian Omondi** a resident of Lolwe testified that he is a conductor of a Public Service vehicle. He recalled that on 24.8.2017 at 9:00 pm he was from work heading home. That he alighted at the Lolwe stage and then started walking home. He said that as he was walking home he heard screams and as he approached their home he realized that the screams were emanating at a place ahead of their home. He said that he ran to where the noise was emanating from and on reaching he realized that the house of Owino the complainant was on fire. He said that he stood aside and watched. He said that he thereafter saw Barrack kicking a basin from outside Owino's house and throwing it into the fire. It was his testimony that the burning house was producing a lot of light which enabled him to see. He went on to state that Owino's house was close to the fence and from the place where he (PW2) was standing at the fence so he clearly saw Barrack and that Barrack is a person well known to him. He stated that when he was going back home from the scene, Owino saw him and told him that Barrack had cut him and burnt his house. He said that since he did not want to involve himself in what was happening and he could not do anything about what was happening, he just left. He said that he had known Barrack for a period of 20 years.

17. On being cross examined, PW2 reiterated his earlier testimony and responded that the appellant had a matchstick which could not light itself and he insisted that the appellant was the one who lit the fire. He said that he found the appellant alone at the home of the complainant. He said that he does not know who recorded a statement about Martin and further stated that he had forgotten the date he recorded his statement. He said that the OCS sent him away because Owino was not supposed to be at the station but in court.

18. PW3 **Victor Odhiambo Achayo** a clinical officer working at the Ambira Sub county Hospital testified and produced the treatment card and P3 Form of Fredrick Owino Omondi the complainant herein aged 25 years from Lolwe village. He recalled that on 25.8.2017 the patient was at the facility with a history of having been assaulted by a person well known to him on the night of 24.8.2017 using a machete while he was at the Lolwe village in Sidindi. He said that when he examined the patient, he found that the patient had a deep cut wound with localized oedema on the left cheek. He said that a diagnosis of a deep cut wound with localized oedema secondary to assault was made.

19. He stated that the treatment given to the patient was stitching under local anesthesia, tetanus toxoid injection, antibiotics being floxapen and painkillers being diclofenac. He further confirmed that he was the one who filled the P3 Form for the complainant and reiterated the details that were in the P.3 Form. He indicated that the probable type of weapon that caused the said injuries to the said patient was a sharp object which weapon the patient reported to be a panga. He said that as at 27.8.2017 the date when he filled the P3 Form the injuries that he saw on the patient's body had lasted for 3 days. He produced the clinic card of Fredrick Owino dated 25.8.2017 as Exhibit 1a and the P3 Form of the said Fredrick Owino dated 27.8.2017 as Exhibit 1b. he stated that apart from the injuries he saw on the patient's left cheek he noted that the patient had a tender anterior chest wall and he had a tender right temporal area.

20. On being cross examined by the appellant, the witness reiterated his testimony in chief and stated that the patient was attended to by his colleague on 25th and that by the time he filled the P3 Form the cut wound had been stitched.

21. PW4 **No. 67179 Corporal James Kirwa** of Ugunja Police Station testified that on 26.8.2017 at about 10:30am he was at the Ugunja Police Station when the complainant Fredrick Owino reported that on 24.8.2017 at around 9:00pm he was in his house together with his young children when the appellant Barrack Okello while in the company of another who was still at large forcibly entered his house. He said that the complainant reported that at that time the tin lamp was on in his house and that he clearly saw Barrack Okello and Martin Chango as they forcibly entered his house and further that it was Barrack the appellant who then armed with a panga and slasher. He said that the complainant also said that Barrack appeared drunk and that when Barrack entered his house he said that he was there to kill the complainant together with his children. He said that it was reported that Barrack slapped the complainant using a panga, an action which terrified the complainant and that Barrack then set fire on to the mattress of the complainant. He said that it was reported that as the complainant tried to put out the fire Barrack cut him on the left side of the cheek forcing the complainant to flee.

22. He stated that the complainant reported that after he fled out of the house the appellant slapped him on the chest with the left side of the panga thus forcing him to seek refuge at the home of the village elder. He said that the complainant further reported that he went to his home in the company of the village elder and on arrival they found Barrack setting fire to the house of the complainant by setting fire on the mattress of the complainant again. He said that it was reported that the village elder on noting that Barrack was violent grabbed the two children of the complainant and fled away with the said children. He said that it was reported that since the complainant feared for his life the complainant remained outside the house as Barrack set fire to all the belongings of the complainant.

23. He further stated that it was reported that as the fire engulfed the complainant's house Barrack and his accomplice who is still at large stood outside the house promising not to leave until the entire house gets burned. He went on to state that since the appellant assaulted the complainant with a panga on the chest and cheek he referred the complainant to the Ambira Sub-County after the complainant recorded his statement. He said that after the complainant was treated PC Kyalo the complainant and himself went to the scene at Lolwe village where they found that the complainant's house which was single roomed, mud walled and had iron sheet roofs as well as the cowshed which was an extension of the said house had been burnt down.

24. The witness further testified that on checking the scene, it was clear that the fire started from inside the house and he noted that there were charred remains of some of the belongings of the complainant that were burnt in the house being remains of a metallic bed, bicycle, grains of maize and the whole house was covered by soot. He further stated that all the beddings and clothes were consumed by fire. It was his testimony that the scene was photographed and the complainant thereafter escorted him to the home of the appellant but they did not find the appellant at home instead they found the appellant at a neighbour's home. He said that they arrested the suspect upon the suspect being identified to them by the complainant and then escorted the suspect to the Ugunja Police Station. He then issued the complainant with a P3 Form which was filled by a doctor and the doctor classified the degree of injuries sustained by the complainant as harm. He said that in the course of investigations he found out that the appellant was accusing the complainant of harboring a petty thief who happened to be the wife of the complainant. He further stated that in the course of investigations he learnt that the wife of the complainant had stolen some food stuff from neighbours and that the matter had been amicably settled.

25. With the leave of court and the consent of the appellant, the photos of the scene were produced as follows: Photo showing the front view of the house was produced as Exhibit 2a, photo showing the side view of the house as Exhibit 2b and two photos showing the inside of the house and also showing the charred remains of the bed, bicycle and other items as Exhibit 2c and 2d.

26. On cross examination, PW4 reiterated his earlier testimony and stated that he recorded his statement a day before the appellant was arraigned in court. He then stated that the appellant's home is very close to the complainant's home. He confirmed that his statement aforesaid was not dated and further stated that it is not wrong for a neighbour to console another but in this case the appellant who was a neighbour of the complainant went to the home of the complainant and committed an offence. He said that the other eye witness Brian recorded his statement on 28th August at 4:00pm and that by then he (PW4) had sought for time to complete his investigations.

27. The witness stated that Brian recorded his statement at his (PW4's) office and that by then Brian was sober. He said that Brian told him that he knows the appellant very well and that he saw the appellant together with another whose name we did not know. He said that he did not recover the weapons that the appellant was armed with at the time of the offence and he said that maybe the appellant disposed of the weapons. He said that it is possible for one to use petrol when a tin lamp is on and for the offender to escape without sustaining injuries. He

stated that the appellant and other neighbours had threatened the wife of the complainant during the day and ordered her to leave the area or else they would kill her which threats he said made the complainant to escape to her parent's home.

28. The witness stated that the wife of the complainant never quarreled with her family. He said that the neighbours of the complainant are relatives of the complainant so they did not assist the complainant to put out the fire. He said that he filled the P3 Form according to the report. He further stated that even though he interrogated the village elder he refused to testify saying that he could not testify against the appellant and yet the appellant was his relative. He said that he disregarded the testimony of the village elder because the village elder confided to him that he is the relative of the appellant and that he cannot testify against the appellant. He went on to state that the complainant sought several interventions from the village elder but the village elder said that he feared the appellant.

29. At the close of the prosecution's case, the appellant was placed on his defence and he elected to give sworn statement of defence and called 3 witnesses.

30. The appellant testified on oath and gave a very long testimony denying committing the offence. He stated that he was 46 years old and a resident of Yiro East South Ugenya. He confirmed that he understood the charges preferred against him and told the trial court that on 24.8.2017 he was not at home as he was away working for an NGO known as One Acre Fund. He said that later in the evening he went home and on his way home he noticed that people had gathered at the home of his neighbour, the complainant. He stated that he went to the home of the complainant to enquire as to what was happening and he found that the wife of the complainant had been found having stolen some foodstuff from the village elder's home which food stuffs were sugar, cooking oil and also a piece of soap.

31. According to DW1, he asked the village elder what intentions he had with the thief because the same thief had committed other thefts in the past and he personally had assisted the village elder by calling Administration Police Officers from Simenya who arrested the thief and took her to the Simenya AP Camp. He said that on that previous incident the complainant followed his wife and procured her release before she could be taken to court. He said that during another incident the said wife of the complainant sneaked into someone's home and stole from therein dry maize.

32. The appellant further stated that on that particular day the 24.8.2017 when the wife of the complainant stole again the neighbours reacted because the Administration Police Officers had previously released her. He said that the villagers beat up the said wife of the complainant in previous incident of the sin committed by the wife of the complainant and the villagers who took part in beating up the complainant's wife were directed to compensate the said wife of the complainant.

33. He further testified that the villagers protested and refused to comply with the chief's directive. Further, that on 18.9.2017, he raised the issue of the theft of the complainant's wife while cross examining the complainant and the complainant denied that his wife committed theft but the investigating officer confirmed that indeed the wife of the complainant had committed theft. He said that the complainant appeared before this court to lie.

34. The witness further stated that on that 24.8.2017 at around 9:00pm he was in his house with his family members and their family friends Mary and Enos Oloo when his first born daughter who was a student at the Simenya Secondary School went to the house and alerted them that the complainant was burning the clothes of his wife following what had transpired during the day. He said that during that day after it was established that the wife of the complainant had committed a theft the complainant resolved to chase her away. He said that while in the company of Mary and Enos they left the house and noticed that indeed there was a fire at the home of the complainant. He said that at that time no alarm had been raised. He said that he sent Enos to call his (DW1's) sister in law because following what had transpired during the day he thought that there was need to go to the home of the complainant as a group.

35. He stated that since there was no sign of danger none of them armed themselves and when they reached the home of the complainant they did not find the complainant but they noted that the complainant's house was on fire. He said that having alerted him that there were cows in the cowshed that was catching fire and that Mary told her to remove the cows from the cowshed. He said that at that time Mary and others raised an alarm to alert the other villagers that the complainant's house was on fire. He said that he rescued the said cows of the complainant and that the other neighbours answered to the alarm that was raised but they noticed that the complainant was nowhere to be seen.

36. He said that the complainant's statement as well as that of the village elder had a lot of contradictions. He said that the complainant in his statement stated that by the time he was being attacked he was in the company of the village elder who was trying to assist him but the village elder recorded a contrary statement. He said that the complainant in his statement recorded that he was assaulted at around 9:30pm but the village elder recorded in his statement that the complainant was assaulted at around 12:30am. He said that further contradictions were noted on the P3 Form. He said that in part 1 of the said P3 Form it was alleged that the complainant was assaulted by two persons known to him and in part two the complainant alleged to the doctor that he was assaulted by one person known to him over misunderstandings in his house.

37. According to the witness, even though the investigations officer indicated in his statement that Brian Omondi was a witness who was at the scene the said Brian denied being at the scene and further said that he never moved close to the scene but he remained out of the compound of the complainant. He said that Brian only said that it is the complainant who told him that he had been assaulted.

38. He further stated that considering the kinds of movements the complainant made that night after he (DW1) went to sleep that is after rescuing the complainant's animals he fails to understand why it was alleged that he (DW1) was the one who had committed the offence of arson. He said that he was held at the Ugunja Police Station for 9 days and the OCS Ugunja Police Station told him that he would not give him cash bail because the chief of that area was heavily behind that case and he wanted the appellant to be taken to court because there were people back in the village who wanted to kill him (the appellant). He said that he had no idea as to what the complainant told the area chief about him.

39. He said that he exercised good neighborliness and went to rescue the animals of the complainant and that he was the only neighbour who tried to put out the fire when it was burning the house of the complainant.

40. According to the appellant, he could not understand why he was associated with the offence. He said that his life is in danger and that his chief should be communicated to, to ensure his safety because he is also a political activist and that the politicians who are against him can take away his life while taking advantage of the ongoing speculations. He said that one of his child is in form four while another is in class 8 and further that the information he has received is that the said children are unable to concentrate because they fear being attacked following the ongoing speculations.

41. DW2 **Mary Agutu Were** a resident of Lolwe Sidindi Ward testified that she used to work with an NGO called One Acre Fund. She said that on 24.9.2017 during the day she was walking from one home to another recording the names of the people who wanted to be members of Acre Fund and in the course of doing so she went to the home of the appellant. She said that as she was about to enter the home of the appellant, a neighbour of the appellant, Consolata told her that no one was at the home of the appellant as all the people had gone to see the thief who had been arrested she stated that on enquiring further she learnt that it was the wife of the complainant a habitual thief who had been found having stolen and the things she had stolen had been placed beside her.

42. She stated that people were saying that they were tired of the complainant's wife and that they were waiting for the husband of the complainant to decide her complainant's fate. She said that the people who had gathered there were from the same village and the neighboring village were furious and she heard people shouting that incase the said woman was not going to leave that area they were going to kill her at night. She said that the village elder called the complainant and he availed himself. She went on to state that when the complainant availed himself he said that he was of the opinion that his wife had demons that were driving her to steal and she begged the villagers not to beat his wife. She said that the complainant said that he was going to give his wife fare so that his wife could leave that area. She said that the wife of the complainant parked her belongings and left while carrying one child and while holding the other child by the hand. She said that as the complainant's wife was leaving and before she could pass the gate she threatened to burn the complainant in the house. She said that after that the crowd dispersed from the complainant's home and that later the wife of the appellant rang her asking her to avail herself at the appellant's home for purposes of recording her as a member of the Acre Fund Project.

43. DW2 went on to state that later on that 24/8/2017 at 9:00pm, she headed to the home of the appellant under the escort of her son Kevin Otieno and on arrival they found the daughter of the appellant in the kitchen while the appellant was in the house together with his wife. She said that as they were seated in the appellant's house Oloo arrived at the house of the appellant and she started explaining to him the importance of joining the Acre Fund. She said that a short while thereafter the daughter of the appellant knocked the door to the main house and told her father that it appeared their neighbour Owino was burning the clothes of his wife or his wife had returned and was burning the house. She said that because the complainant's home was less than 10 metres from the home of the appellant they all walked out of the house and peeped only to see that there was a fire at the home of the complainant. She said that they moved slowly towards the home of the complainant because they were not sure of what was going on in that home and on entering that home they found the complainant's house on fire. She said that they checked and did not see any adult in that home instead they saw the same children whom the wife of the complainant left with seated outside the house. She said that at that time the appellant raised an alarm stating that the complainant's house was on fire. She said that the burning house was attached to a cowshed which had cows in it.

44. The witness further state that the appellant broke into the cowshed and rescued the cows. She said that during all that time they did not see the complainant or even the wife of the complainant. She said that they decided to leave because they could not tell if the house was burnt by the wife of the appellant on the people whose property the wife of the appellant had stolen. She said that the appellant was later arrested on allegations that he was the one who burnt the house of the complainant. He said that on 27th the area chief rang her and told her that the appellant had been arrested but there were no witnesses and that she wanted her to avail herself for purposes of recording a statement that she saw the appellant burning the house of the complainant. She said that the chief told her to remember that the complainant originated from that area and that the complainant was the son of her brother in law. She said that the chief reminded her that she was the wife of a person who originates from that area and further told her that he wanted the appellant to vacate that area. She said that she turned down the request of the chief and told him that she could not give false testimonies against the appellant.

45. DW3 **Elizabeth Awuor Omondi** a resident of Lolwe testified and stated that she was not related to the appellant. She confirmed that she understood the charges facing the appellant. She said that on 24.9.2017 Consolata alerted her that a thief had been caught and she learnt that the thief who had been caught was the wife of Owino the complainant herein, who had been caught having stolen an axe, cooking oil and soap. She said that she wondered what the people were still doing with the thief and yet the thief had persistently stolen their chicken, pants, maize and was even found having stolen a goat and was made to carry the goat on her back like a baby. She said that on several occasions the said thief had been reported to the police officer at Simenya and even taken to the Simenya AP Post but she kept on being released. She said that previously it is the appellant who called police officers who arrested the complainant's wife and then the complainant went to the Simenya AP Post where he procured the release of his wife. She said that during that incident the complainant left his bicycle at the AP Post while procuring the release of his wife and later bragged that he had given the APs from Simenya AP Post Kshs 5000 then they returned his bicycle to him. She said that later on 24.9.2017 at around 10:00pm Oloo called her and informed her that the complainant's house was burning. She said that earlier that day after the complainant's wife was found having stolen, the complainant was told to say what should be done to his wife and the complainant said that he was tired of his wife.

46. She stated that the complainant said that if his wife was going to cause him to be killed it was better for his wife to leave together with the children. She said that the wife of the complainant packed her belongings and walked out of the house with her children and it is at that time that again she was found with the identity card of the complainant. She said as that the complainant's wife was leaving she reminded the complainant of the house she had previously burnt and threatened to burn the complainant's house. She said that later on that 24.9.2017 at 4:30pm she saw Barrack who asked aloud as to what was happening where the people were gathered that is at the home of the complainant. She said that the appellant asked whether the woman had stolen again and the appellant then left.

47. It was the further testimony of DW3 that later at 10:00pm, she heard someone calling out her name and telling her that Barrack was calling her. She said that the person also told her that a house was on fire. She said that she left her home and that when she reached Barrack's home she called Barrack. She said that in the company of Barrack, Marita and Oloo they went to the home of the complainant only to find that the complainant's house was on fire.

48. She stated that she told Barrack to take a fimbo and break the chain that had been used to lock the cowshed so that he could rescue the

cows of the complainant. She said that Barrack complied and that the following day it was alleged that it is the same Barrack who burnt the house of the complainant. She told the court that the whole village was in problems because of the wife of the complainant who is a habitual thief. She said that even after the incident, the complainant and his wife relocated to a rental house within Simenya and they have since constructed another home. She said that after they rescued the cows of the complainant the appellant headed home as she also headed home.

49. DW4 **Enos Oloo Ouma** testified that he was a resident of Lolwe and a bodaboda rider. He said that he used to sleep in one of the houses within the home of the appellant and that on 24.9.2017 he went to the house of the appellant to pick the keys to the house where he used to sleep. He said that at the said house he found the appellant in the company of Mary. He said that Mary asked him what he does for a living and further asked him if he does farming but he said that he answered in the negative. He said that the said Mary started telling him the importance of joining the One Acre Fund.

50. He stated that in the course of the said conversation, the daughter of the appellant knocked the door and told them that Owino, the complainant) was burning the clothes of his wife. He said that they went outside and found out that there was a big fire at the home of the said Owino. He stated that he called Elizabeth who is also known as Nyalego and while in the company of the said Elizabeth, the appellant and Mary, they went to the home of the said Owino where they found the house of Owino on fire and that no adult was in that home. He said that they only found two children and that next to the complainant's house which was on fire, there were cows in a cowshed.

51. It was DW4's further testimony that the appellant opened the cowshed and rescued the cows of the complainant. He said that they then left for home with the appellant and that after that police from Ugunja Police Station arrested the appellant.

52. In support of his appeal herein, the appellant filed written submissions which he adopted as canvassing the appeal and also made highlights of the same.

53. The appellant submitted that the prosecution [sic] ignored the powerful alibi defence which in his view was relevant and admissible but instead relied on the prosecution witnesses. That he was not at the scene scene of the crime when the said crime took place.

54. He also submitted that the prosecution deliberately refused to summon the village elders to shed light on what transpired.

55. That he was inspired by sworn defence of witness No. three (3) who clearly stated that a criminal bragged that he had given the AP's KShs.5000/= as a bribe. That this case needed thorough police investigations because it is classically complicated and manufactured.

56. That his right to access justice under Article 48 of the Constitution was violated.

57. He submitted urging the court to acquit him.

58. I his oral submissions he reiterated that the village elder whose evidence the investigating officer relied on should have been called to testify and that he worked with the village elder who was previously involved in arresting the lady who was a thief.

59. The prosecution led by Mr. Okachi Senior Principal Prosecution Counsel opposed the appeal and submitted that the prosecution proved their case against the appellant beyond reasonable doubt.

60. Counsel argued that PW1 knew the appellant well and his injuries were confirmed by the expert witness. Counsel urged the court to dismiss the appeal.

61. Further, counsel submitted that arson was proved as the witnesses who testified recognized the appellant.

62. On sentence it was submitted that the court gave the appellant an opportunity to mitigate before sentencing him and that the sentence imposed on him was lawful.

DETERMINATION

63. I have carefully considered the appeal, the submissions for and against the appeal and weighed them against the lengthy evidence adduced in the trial court by the prosecution witnesses and the defence witnesses. In my humble view, the issues for determination are

i. Whether the appellant was identified as the complainant's assailant;

ii. Whether the defence of alibi should be sustained;

iii. Whether there was prove that the appellant willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs 100,000 the property of the complainant Fredrick Owino Omondi.

64. The burden of proof in all criminal cases lies with the prosecution throughout the trial to establish the guilt of the accused person beyond reasonable doubt.

65. In the first count, the appellant was charged with assault causing actual bodily harm. **Section 251 of the Penal Code Cap 63 Laws of Kenya** provides that "*any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.*"

66. **Section 332(a) of the Penal Code Cap 63 Laws of Kenya** provides that “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.”

67. PW1 the complainant in his testimony recalled that on 24.8.2017 at around 9:00pm he was in his house with his 2 children aged 2 years and one year with a tin lamp when he heard the appellant, his neighbour moving towards his (PW1's) house while making noise and threatening to burn his house and cut him. He told the court that as he was still listening, the appellant forcibly opened his papyrus reed door by forcibly pushing it and entering the house.

68. He further stated that at that time the tin lamp was still on inside the house and that he clearly saw the appellant who was then armed with a panga and a slasher as the appellant cut his bicycle, basins and utensils with the said panga. That out of fear, he moved towards the door and it is at that point that the appellant slapped the complainant's chest using the blunt side of the panga. The complainant escaped to the home of the village elder and reported the matter.

69. PW1 narrated of how he went back to his home in the company of the said village elder and they found the appellant still making noise at his (PW1's) home while still armed with a panga and a slasher. He said that the village elder feared dealing with the appellant as the appellant was furious and so the village elder carried away the complainant's one year old child and left.

70. PW1 further narrated that after the village elder left, he was left outside the house with his child aged 2 years old. He said that as he was still standing 5 metres away from the house, he saw the appellant inside his (PW1's) one roomed house having placed the mattress on the floor then the appellant lit a matchstick and burnt the mattress. He said that at that time the tin lamp was still lit in the house and the door of his house was wide open so he could clearly see what the appellant was doing.

71. According to PW1, immediately after the appellant walked out of the house, he hurriedly entered into the house and started pouring water on the burning mattress. PW1 stated that the appellant found him trying to put out the fire and asked him whether he was putting out the fire that the appellant had lit. He said that the appellant was talking to him inside the house and since the tin lamp was still on he clearly saw the appellant. He stated that it is at that point that the appellant cut his left cheek using a panga. PW1 stated that after that the appellant left for his home and after a short while went back to his (PW1's) home with a black jerrican containing petrol. He said that by then he was outside the house but close to the house so he could clearly see what the appellant was doing. He stated that he saw the appellant pouring the petrol on the same mattress which the appellant had earlier started burning and further stated that he saw the appellant also sprinkling petrol on the floor after which the appellant threw the lit match stick on the mattress and left the house.

72. He said that the fire raised the house the appellant stood aside and watched while saying that he was not leaving until the house would be burnt completely. He said that at that time he could still see the appellant with the help of the light emanating from the house that was burning. He said that when the appellant spotted him the appellant chased him away while armed with a panga and slasher and by then he was still with his 2-year-old child. He said that he spent the rest of the night in the bush with his 2-year-old child.

73. The testimony of PW1 was corroborated by PW2 who told the court that on the material night of 24.8.2017 at around 9:00pm he had alighted from a vehicle at the stage and was heading to his home in Lolwe when he heard screams. He moved towards his home and when he neared, he realized that the screams were emanating from a place ahead of his home. PW2 stated that he moved towards the direction where the screams were emanating from and on reaching at the fence of the complainant's home he saw the complainant's house on fire. He stated that since the house of the complainant was close to the fence and the burning house was producing a lot of light, he could clearly see what was going on while further corroborating the testimony of PW1 he said that with the help of the light from the burning house he saw Barrack picking a basin from outside the house of the complainant and throwing it into the fire.

74. I agree with the trial court that if the appellant was at the home of the complainant to rescue the property of the complainant as claimed in his defence, and if it is true that he indeed picked a basin and threw it in the fire, then does the act of throwing a basin into the fire amount to rescue of property or malicious damage of property?

75. In my humble view, if indeed the appellant threw the basin into the fire as alleged by PW2 then that corroborated PW1's testimony that it is the appellant who willfully and unlawfully burnt his house and property therein.

76. PW2 testified that after he saw what was happening, he left the scene and just as he was leaving, he met the complainant who told him that the appellant Barrack Okello had cut him on the cheek and burnt his house. This evidence confirms that PW1 did not at any time change his version of what happened on that day and therefore there can be no reason why the complainant would frame the appellant with the offences.

77. From the trial record, the evidence of PW1 was very clear that he saw the appellant who assaulted him using a panga and that it was the appellant herein who torched his house. There was no mistaken identity or at all and therefore I find that the appellant was positively identified as the person who assaulted PW1 and also torched the complainant's house on the material night on account that the appellant was harboring a thief.

78. In my humble view, the visual identification evidence of PW1 and PW2 is reliable albeit the offence took place at night. In **R v Turnbull (1976) 3 ALL ER 549** the court stated that some of the factors to be considered before determining on whether or not to rely on the visual identification evidence of a single eye witness are as follows;

i. Whether the viewer viewed the suspect under sufficient lighting and there was nothing which could have impeded his proper identification.

ii. Whether the viewer was sober.

iii. Whether the viewer had ample time to view the suspect and it was not just a fleeting glance.

iv. Whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect.

v. Whether much time had lapsed between the time the viewer initially saw the suspect and the time the viewer identified the suspect to the police.

vi. Whether the viewer was sober.

79. The court further drew a distinction between recognition evidence and identification of a stranger where the court stated that recognition evidence is more reliable than identification of a stranger.

80. In the instant case, I observe as did the trial magistrate that from the testimony of PW1, he narrated the incident as it allegedly occurred and the fact that the incident did not take place abruptly and there was a sequence of events that took place. I therefore find that PW1 had ample time to view the offender and it was not just a fleeting glance. The time is ample because he viewed the offender at the time the offender allegedly forced his way into his (PW1's) house, threatened him, slapped his chest, the time the offender took to burn the complainant's mattress, the time the offender found him putting off the fire from the burning mattress, the time the offender allegedly cut him on the left cheek and the time the offender allegedly stood out of the house as he watched the house burning and claimed that he was waiting for the house to burn completely.

81. I further find that PW2 had ample time to view the offender and it was not a fleeting glance as he was able to demonstrate that he stood at the fence close to PW1's house and saw the appellant pick a basin from outside the house of the complainant that was burning and threw it into the fire.

82. In addition, it is the view of this court that the circumstances that existed at the time PW1 and PW2 viewed the offender were such that there was nothing which could have impeded their proper identification and recognition of the appellant herein as they were not blindfolded and neither did they state that the offender had a facemask to camouflage his appearance.

83. From the testimony of PW1 and PW2 respectively it is my finding that both PW1 and PW2 viewed the offender under sufficient light and circumstances and from a close vantage position. PW1 demonstrated that he viewed the offender with the help of the light emanating from the tin lamp as well as the light emanating from the burning house.

84. PW2 too testified that he viewed the appellant with the help of the light emanating from the burning house both of which sources of light in my view are sufficient light. I have further observed that PW1 observed the offender from a close position and even the offender slapped his chest with a panga and cut his cheek as he was close to the offender. In my humble view, for one to cut another with a panga, the offending person must have been very close to the victim. PW2 knew the appellant prior to the incident as a neighbour. He stated that PW1's house was close to the fence and that as he stood at the fence of PW1's home from where he clearly saw the appellant.

85. I have further noted from the evidence of PW1 and PW2 that it did not take long before the appellant was identified to the police by PW1 and PW2. PW1 stated that he had known the appellant for five years prior to the incident and PW2 stated that he had known the appellant for 20 years prior to the incident both of which facts were never disputed by the appellant.

86. Accordingly, I find that PW1 and PW2 positively recognized the appellant as a person they knew very well and not a stranger. There was also no evidence on record to suggest that PW1 and PW2 were not sober at the time when they observed the appellant do what he is alleged to have done that material night.

87. In the premises, I find that the circumstances under which PW1 and PW2 said that they identified the appellant meet the threshold set in the **R vs. Turnbull [supra] case**.

88. On whether the complainant sustained injuries associated with the alleged assault by the appellant, PW1 testified that when the appellant attacked him, the appellant slapped his chest with the flat side of the panga and later cut his left cheek with the panga. PW1 stated that following the injuries, he sought treatment at the Ambira Sub county Hospital and reported the assault as well as the arson case at Ugunja Police Station where he was issued with a P3 Form which was filled at the Ambira Sub county Hospital. The testimony of PW1 was corroborated by PW3 the clinical officer who confirmed that he filled the P3 Form of PW1 on 27.8.2017.

89. PW3 the Clinical Officer confirmed that PW1 sought treatment at the Ambira Sub county Hospital on 25.8.2017 with a history of having been assaulted by a person well known to him on 24.8.2017 at 9:00pm using a machete. He confirmed that his colleague who examined PW1 on 25.8.2017 found that PW1 had a deep cut wound with marked localized oedema on the left cheek and a diagnosis of a deep cut wound with local oedema secondary to assault was made. He confirmed that at the time of filling the P3 Form for PW1 on 27.8.2017, he found that indeed PW1 had a stitched cut wound on the left cheek and he had injuries on interior chest wall which injuries were approximately 3 days old.

90. Although PW1 was examined on 27.8.2017, the maker of the P3 Form found that PW1 sustained the injuries on or about 24.8.2017 just as stated by PW1. PW3 found that the injuries sustained by PW1 were occasioned by a sharp object. A panga when used for cutting has a sharp end and a blunt side. In my view the injuries sustained by PW1 were consistent with the particulars of assault as testified by PW1.

91. PW3 also produced a P3 Form and treatment notes for PW1 as Exhibits 1a and 1b with stated injuries which are consistent with the testimony of PW3 and PW1 in terms of the nature of injuries sustained and the particulars of assault. PW3 confirmed that the treatment given to PW1 was stitching of the cut wound that was on his left cheek and he was given painkillers and antibiotics.

92. The testimony of PW4 the Investigating Officer on the report received concerning the assault incident is also consistent with the testimony of PW1, PW2 and PW3.

93. On whether the proved beyond reasonable doubt that the appellant torched the property belonging to the complainant, both PW1 and PW2 were clear in their respective testimonies that the complainant's house and its belongings were torched by the appellant. The appellant confirmed in his evidence and that of his witnesses that the appellant's house was torched the material night. The only question is whether it was proved beyond reasonable doubt that it was the appellant who lit the fire that burnt the complainant's house and belongings.

94. PW4 in his investigations visited the scene and confirmed the existence of the scene and also preserved the exhibits for the trial court to view by having the scene photographed which photographs he produced as exhibits before this court with the leave of the court and the consent of the appellant. The said photographs are available in this appeal file for viewing by this court.

95. I have examined the photographs of the scene produced as Exhibits 2a, 2b, 2c and 2d and noted that Exhibit 2a is a photograph showing the front view of a burnt house, Exhibit 2b is a photograph showing the side view of a burnt house and photograph marked Exhibit 2c and 2d shows the inside of a burnt house with charred remains of a steel bed, a bicycle and other household items which were burnt to ashes.

96. I am persuaded that PW4 saw the burnt house and the charred remains of the property of the complainant that were to be found in the aforesaid house.

97. In addition, PW4 explained why the village elder who was a crucial witness in this case was not called. He stated that after interrogating the village elder, the village elder confided in him that the appellant was his relative and that he was not willing to testify against the appellant.

98. I have, just like the trial court, considered the attitude of the said village elder of Lolwe village with concern because in my view, the village elder is an administrator who is employed to protect the interest of the entire village, and be available to tell the court the truth of the matter to the best of his ability and knowledge.

99. Nonetheless, the trial court assessed the credibility of the prosecution witnesses who testified and was satisfied that they were credible hence the non-availability of the village elder to testify as a witness did not in any way affect the prosecution's case.

100. In the defence by the appellant, he alleged that on 24.8.2017 while he was away from his home area the wife of the complainant was arrested for having stolen foodstuff from the home of the village elder and that fact was even corroborated by PW4 the Investigating Officer.

101. DW1, DW2 and DW3 in their respective testimonies stated that the complainant's wife was a petty thief and that the villagers were fed up with her character. This was not controverted by the prosecution's witnesses.

102. Even if it were to be proved that indeed the wife of the complainant was a habitual petty thief that in itself cannot justify the burning of the complainant's house. The most reasonable thing that ought to have been done is to report her actions to the police for necessary action and not to punish the appellant and his entire family by assaulting him and burning his houses. No two wrongs can make one right.

103. The appellant also raised a defence of alibi. He stated that he was only alerted by his daughter that the house of the complainant appeared to be on fire and that when he went to the said house of the complainant, he found that indeed the said house was on fire. The trial court warned itself that whenever an appellant raises a defence of alibi, as an answer to a charge, the burden does not shift on the appellant to prove his innocence but it remains on the prosecution to prove the guilt of the appellant beyond reasonable doubt.

104. Therefore on the issue of whether the defence of alibi raised by the appellant is sustainable, guidance can be found in **Kossom Okiru v R [2014] eKLR** where the Court of Appeal observed that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established.

105. In the instant appeal, the trial court considered fully the appellant's defence of alibi which was not raised at the earliest opportune time but it was raised for the first time during defence hearing. Had it been raised at the earliest opportune time, the persons tasked with investigations would have weighed its truthfulness and accuracy as well as its correctness. For the above reason, I find that the defence of alibi raised by the appellant is an afterthought. DW2 and DW3 who sought to prove that they were together with the complainant on the night the offence of assault and burning of the complainant's house was committed and who sought to prove that indeed as the house of the complainant started burning, the appellant was not at the scene but at his home, gave contradictory testimonies, as observed by the trial court.

106. DW2 testified in relation to what transpired on the 24.9.2017 and DW3 also testified on what transpired on the 24.9.2017 which is a non-issue because as at 24.9.2017, the appellant was in custody having been unable to get someone to stand surety for him. There is therefore no way he could have been at his house together with DW2 and further gone to the scene together with DW2 and DW3. As at the said 24.9.2017 the scene had already been photographed showing that the house had already burnt down and the fire gone off so it is incorrect for DW2 and DW3 to talk about a fire that burnt PW1's home on 24.9.2017 way after PW1 made his complaint at the Ugunja Police Station and the appellant taken a plea.

107. It is possible, as was observed by the trial court that DW2 and DW3 talked about what transpired on 24.9.2017 because they never witnessed the incident of 24.8.2017 at all and that they just attended court to give false testimony which in their view would favour the appellant, on account that they, too, were fed up with the habit of the complainant's wife stealing people's items.

108. Contrary to the testimonies of DW2 and DW3, DW4 stated that he was with DW1, DW2 and DW3 on 24.8.2017 when they were alerted that the complainant's house was on fire and that they went to the home of the complainant and found that indeed the complainant's

house was on fire.

109. The trial court which had the opportunity to see and hear the defence witnesses noted the inconsistencies in the testimonies of the defence witnesses and found the said witnesses not credible. Accordingly, I find that the defence of alibi brought up by the defence witnesses reigned against the evidence adduced by the prosecution witnesses does not assist the appellant in any way. I therefore find that the trial court rightly rejected the appellant's alibi defence.

110. On the whole, I find and hold that the trial court correctly assessed the evidence as adduced by the prosecution and the defence and arrived at a correct finding that the prosecution had proved its case against the appellant beyond reasonable doubt that the appellant herein did on 24.8.2017 assault the complainant and occasioned him actual bodily harm and further that the appellant willfully and unlawfully set fire to the dwelling house of the complainant.

111. On sentence, I note that the appellant was sentenced after the trial court considered the prosecutor's address to the court that the appellant was a first offender. She also took into account the mitigations by the appellant who stated that he was a parent, the sole breadwinner, a farmer, had 2 candidates, one in class 8 and another in form four and that he prayed for a fair sentence as he had four children who depended on him for their education.

112. However, she also considered the fact that evidence adduced in court showed that this was the second time the appellant was setting fire to the same house when the first attempt was thwarted.

113. The sentence meted out was therefore lawful considering the maximum sentence for assault causing actual bodily harm is 5 years whereas the maximum sentence for arson is life imprisonment.

114. However, this court has the jurisdiction to revise sentence imposed, having regard to the circumstances of each case. The appellant from the evidence as a whole was influenced by the complainant's failure to tame a thieving wife and it was demonstrated that the said wife was protected by the complainant each time she was arrested such that no action was taken against her as he could buy her liberty. She was thus a nuisance to neighbours. The complainant did not even call his wife to deny those allegations. He shoulders part of the blame for aiding and abetting crime in the neighborhood.

115. As the appellant has already served the 12 months imprisonment imposed in count one, I as the appellant has served the 12 months imprisonment on count one for assault, I decline to interfere with it.

116. I would however interfere with the sentence that is unserved by the appellant, I set aside the four years imprisonment imposed on him in count two and substitute it with a prison term of twenty four (24) months to be calculated from the date when the appellant was first arrested on 28th August 2017.

Dated, Signed and Delivered in open Court at Siaya this 26th Day of June, 2019.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi Snr Principal Prosecution Counsel for the State

CA: Brenda and Modestar