REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 121 OF 2017

JOSEPH MUTINDA DAVID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Hon. M. Opanga (SRM) in Kangundo SPMCR. No. 281 of 2017 on 16th November, 2017)

JUDGEMENT

1. The appellant was charged with two counts of arson contrary to section 332 (a) of the Penal Code and convicted of the second count and sentenced to seven years imprisonment.

2. He submitted that he is a first offender and is remorseful. That he is transformed to a resourceful person and a potential citizen. He urged this court to substitute the sentence meted on him with a lesser charge or non-custodial sentence to allow him to take care of his young family. He urged this court to exercise its original jurisdiction to review the sentence. That the court is not only meant to sentence but also has a duty to promote justice and reconcile parties.

3. The respondent in opposition submitted that while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality the court ought to consider mitigation and aggravating factors. That considering the provision of section 332 of the Penal Code, this court has no reason to interfere with the sentence. That the appellant has not raised sufficient reason to warrant the interference with the discretion exercised by the trial court. In support thereof, the respondent relied on the case of **Shadrack Kipchoge Kogo v. Republic Eldoret C.O.A. Criminal Appeal No. 253 of 2003** in which it was held:

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."**

4. The principles upon which an appellate court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now sell settled. The Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-**
>
> > **sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

5. Applying the test, the appellant has not established that the trial court has acted upon wrong principles or overlooked some material factors".

In sentencing the appellant, the trial court considered that he was remorseful and that he is a first offender and passed down a sentence of 7 years. Section 332 of the Penal Code provides that a person found guilty and convicted of arson is liable to imprisonment for life. The Appellant was sentenced to a lesser sentence which I find to be not excessive in any way. I am unable to interfere with the sentence imposed by the trial court as there was no error of principle.

6. In the result, I find no merit in the appeal. It is dismissed. The sentence imposed by the trial court is upheld.

Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **November, 2018.**

D.K. KEMEI

JUDGE