



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 44 OF 2016

JOSEPH KYALO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 179 of 2015 in the Senior Resident Magistrate's Court at Taveta delivered by Hon J. Omburah (SRM) on 10th November 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Joseph Kyalo, was tried and convicted for the offence of arson contrary to Section 332 (a) of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve five (5) years' imprisonment.

2. The particulars of the charge was as follows:-

“On the 28th April 2015 at around 2100 hrs at Chumvini Village within Taita Taveta County, wilfully and unlawfully set fire to a store valued at Kshs 20,000/= belonging to MBETE KIOKO.”

3. Being dissatisfied with the said judgment, on 17th November 2016, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

- 1. THAT he was the sole breadwinner of his family and currently had two (2) children who depended on him.**
- 2. THAT he was the only boy child in his extended family and his elderly parents and siblings depended on him.**
- 3. THAT in view of the circumstances of the case, the custodial sentence if (sic) 5 years was harsh, severe and excessive.**
- 4. THAT he was not awarded remission to the 5 years he was serving.**
- 5. THAT he begged that this court reduce the conviction(sic), give option of fine, slash**

conviction (sic) or whichever the court would deem fit.

4. On 30th November 2016, this court directed the Appellant to file and serve his Written Submissions. His Written Submissions which were in Kiswahili were filed on 9th February while the State's Written Submissions were dated 20th February 2017 and filed on 22nd February 2017.

5. When the matter came up in court on 22nd February 2017, both the Appellant and the counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions, which they did not highlight but relied on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. As can be seen from the Appellant's Mitigation Grounds of Appeal, he was not challenging the fact that the Prosecution had proved its case to the required standard. His substantive submission was that the sentence that was meted upon him by the Learned Trial Magistrate was harsh, severe and excessive.

7. The State submitted that the Learned Trial Magistrate properly exercised his discretion when he sentenced the Appellant to five (5) years imprisonment as Section 332 (a) of the Penal Code provides for a life imprisonment. The Section stipulates as follows:-

“Any person who wilfully and unlawfully sets fire to any building structure whatever whether completed or not is guilty of a felony and is liable to life imprisonment.”

8. It referred this court to the case of **Shadrack Kipchoge Kogo vs Republic** (citation incomplete) where it was held that an appellate court will not interfere with the discretion of a trial court unless it can be shown that the trial court applied the wrong principles. It also placed reliance on the case of **Alister Anthony Pareira vs State of Maharashtra, [26]** (citation incomplete) where it was held that there is no particular formula for sentencing but that it must be proportionate to the offence committed.

9. It was evident that the Learned Trial Magistrate considered the Appellant's age, the fact that he was a first offender and his mitigation before sentencing him to five (5) years imprisonment.

10. A perusal of the proceedings showed that the Appellant was a problematic child and had even threatened to kill his mother, who was the Complainant, Mbete Kioko Ndeti (hereinafter referred to as “PW 1”). From her evidence, the Appellant would demand that she gives him money and would threaten her if she did not have the same. He had even lied to the Trial Court that she was not his mother necessitating his aunt, Nzilani Kanula to be called to court to shed more light on the relationship between him and PW 1.

11. Although the value of the property that was burnt was low, this court was not inclined to interfere with the discretion that was exercised by the Learned Trial Magistrate as a person aged about thirty (30) years ought to have behaved more maturely. He instead acted like a spoilt child and had a sense of entitlement from PW 1 at whatever cost. The fact that he may have felt that PW 1 was not his mother as he had told her was beside the point. Unlawfully and intentionally burning her property was uncalled for irrespective of the magnitude of the difference between them.

12. Accordingly having considered the Appellant's Petition of Appeal, his Written Submissions and those of the State, this court did not find any reason to interfere with the penalty the Learned Trial Magistrate meted upon the Appellant as it was legal and proper. It was also not satisfied that it ought to give the Appellant the option of a fine in view of the negative attitude he had towards PW 1. She must have been greatly pained when she pressed charges against her own child. Giving the Appellant an option of a fine in the circumstances of this case would really be a slap on his wrist and cause great injustice to PW 1.

13. In the case of **Saul Mwakina Mwadoe v Republic [2016] eKLR** this very court substituted a

sentence where the appellant therein had been fined Kshs 200,000/= and in default he was to serve five (5) years imprisonment with a sentence of five (5) years imprisonment without the option of a fine. This is because arson is a very serious offence where a convicted person is actually liable to be sentenced to life imprisonment.

14. Finally, whilst this court noted the Appellant's prayers that he be transferred to Taveta GK Prison from his current prison, this court has no mandate to dictate where convicts are to be incarcerated. The Trial Court becomes *functus officio* once it delivers its judgment. Any processing of a convict falls within the jurisdiction of the Prison authorities. This court was therefore unable to direct that the Appellant herein be transferred to Taveta GK Prison where his family would be able to cater for his personal need.

15. Courts have also no right to order that remission of sentences be given to inmates. It is the view of this court that the same also falls under the Prison Authorities. It would be risky for courts to get involved in the calculation of the periods convicts are to serve in prison as that would be delving into the jurisdiction of other state entities. The most that this court can do is to direct that the period a convict stayed in custody while awaiting his trial be taken into account during computation of the period of incarceration.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17th November 2016 was not merited and the same is hereby dismissed. This court hereby declines to set aside the sentence that was imposed on him by the Learned Trial Magistrate and instead affirms the same.

17. This court hereby directs that the period the Appellant remained in custody to wit from 30th April 2015 when he took plea and until 10th November 2015 when he was convicted by the Learned Trial Magistrate be taken into account while computing his sentence.

18. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2017

J. KAMAU

JUDGE

In the presence of:-

Joseph Kyalo - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk