



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 41 OF 2015
GEORGE OSILIMONG.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*(Appeal against conviction and sentence by Hon. D. O OGOLA, Chief Magistrate in Busia CM
Criminal Case No. 491 of 2015 dated 18th March 2015)*

JUDGMENT

1. George Osilimong, the Appellant herein was charged and convicted for the offence of arson contrary to Section 339(a) of the Penal Code. The particulars of the offence were that on the 17th March, 2015 at Okame Location, Chakol Division within Busia County, the Appellant wilfully and unlawfully set fire to a dwelling-house valued at Kshs. 42,000/= the property of Patrick Omachar.
2. He was convicted on his own plea of guilty and sentenced to seven (7) years imprisonment.
3. The Appellant now aggrieved with the conviction and sentence, has preferred the instant appeal. He lists five(5) grounds of appeal:
 1. That I pleaded guilty to the above appended charges.
 2. That the trial court misdirected itself by relying on my guilty plea in handing both the conviction and sentence the underlying circumstances notwithstanding.
 3. The trial magistrate did not notice my state of mind as my guilty plea was as a result of threats and intimidation.
 4. That my constitutional rights to fair trial were grossly contravened, violated, infringed and threatened as enshrined in Articles 50(1) & (2) of the Constitution of Kenya.
 5. That new and compelling evidence is in my possession which could change the direction of this case and bring alternative dispute resolution with the complaint if my prayers are granted.
4. Apart from the facts of the case which were read out in Court, the prosecution also produced, as exhibits, photographs showing the extent of the damage to the complainant's property.
5. The State, through Mr. Owiti, strongly objected to the appeal. It was argued that the Appellant having

being convicted on his own plea of guilty, was somewhat challenging the conviction. Counsel stated that the plea was properly taken as is required by law, facts were read out to the Appellant and photos produced as evidence.

6. As to the Appellant's condition of mind, the State argued that it was upon the Appellant to inform the trial Court of his mental status.

7. According to the Respondent, the Appellant had also not identified the constitutional right which he alleged was infringed. In this regard he added that the correct avenue available to the Appellant is a constitutional petition and not an appeal.

8. In his concluding remarks, the Respondent's counsel brought to this Court's attention the fact that the correct section of the Penal Code to which the offence in the charge sheet referred ought to have been arson contrary to Section 332(a) and not 339(a). However, it was the prosecution's case that despite the minor error no prejudice was suffered by the Appellant as he was aware of the crime that he was pleading to. The particulars of the offence were clear and thus curable under sections 134 and 135 of the Criminal Procedure Code.

9. The starting point is to determine whether the error in the charge sheet pointed out by the prosecutor prejudiced the Appellant. Section 382 of the Criminal Procedure Code states:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

10. My understanding of the above Section is that it serves as an insulator to a finding or a sentence of a trial Court from challenge on account of any error, omission or irregularity in a charge unless such error, irregularity or omission has occasioned prejudice to an accused person.

11. I believe that the error apparent on the charge did not lead to a miscarriage of justice and is curable under Section 382 of the Criminal Procedure Code as the Appellant understood the nature of charge against him. The particulars of the charge were clear enough. Even on appeal, he still understands the offence that he committed.

12. Now turning to the appeal proper, I note that the conviction was on the Appellant's own plea of guilty. The court then has to consider if the plea was taken in a proper manner. **Adan v Republic [1973] E.A. 445** laid down the procedure to be followed when taking down a guilty plea from an accused person. The Court stated that:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to

“not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

13. The format for plea taking was restated in *Kariuki v R [1985] eKLR*.

14. In light of the foregoing, can the trial Court be faulted for omitting any step of the plea taking process? The record shows that the charge was read out to the Appellant in a language that he understood and he replied affirmatively. He also confirmed that the facts as read out by the prosecutor were correct. An unequivocal plea of guilty was thereafter entered by the trial Court. He did not raise any complaint regarding the process of taking plea. This ground of appeal therefore collapses.

15. The Appellant further alleges that he was not in a correct state of mind when taking plea. After an in-depth perusal of the trial Court record, there is no evidence that the Appellant informed the Court that he was unfit to plead to the charges raised against him. No report was availed to the trial Court showing that the Appellant did not have the mental capacity to plead to the charge. The Appellant himself did not indicate to the Court that his plea was not of his own free will. The magistrate could not have read the mind of the Appellant in order to conclude that the plea of guilty was being made as a result of threats and intimidation as he alleges.

16. Section 11 of the Penal Code provides **“that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes to question, until the contrary is proved.”**

17. In a situation where the Appellant appeared normal, the onus was on him to alert the Court of any medical condition that may have rendered him unfit to take plea. Ordinarily, a Court would raise question with the mental status of an accused person by his conduct. In this case, there is nothing on record to show that the trial Court ought to have detected unusual behavior on the part of the Appellant so as to invoke Section 162 of the Criminal Procedure Code. Even up to this point no evidence has been adduced by the Appellant to show that he was of unsound mind when plea was taken. This Court did not note any untoward behavior on the part of the Appellant when he argued his appeal. The Appellant’s reliance on his state of mind to challenge his plea of guilty therefore fails.

18. The Supreme Court in *Tom Martin Kibisu v Republic [2014] eKLR* defined “new and compelling” evidence as evidence that was not available at the time of the trial and which could not have been availed at the trial despite exercise of due diligence. In this case the Appellant simply alleges that there is new and compelling evidence without tabling that evidence. He has also not demonstrated that the new and compelling evidence was not available at the time of plea. This ground of appeal also flops.

19. The Appellant has alleged infringement of his right to fair trial as enshrined under Article 50 of the Constitution. It has not been demonstrated how this right to a fair trial was infringed noting that he pleaded guilty to the charges as read out to him. He was in total agreement with the facts stated by the prosecutor. The legal principle applicable is that once a person alleges his right has been infringed he must in addition to setting out the right so infringed also detail the particulars of such infringement-see *Anarita Karimi Njeru v Republic [1979] eKLR*. The Appellant’s claim that his constitutional rights were violated by the trial Court finds no support and this particular ground of appeal fails.

20. As for sentence, the offence of arson attracts life imprisonment. It cannot therefore be said that the seven years imprisonment imposed on the Appellant was illegal or excessive. This Court finds no reason for interfering with the trial court’s discretion on sentencing.

21. The upshot is that this appeal fails and is dismissed in its entirety.

Dated, signed and delivered at Busia this 28th day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT