



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 12 OF 2015

E K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 402 of 2014** by **Hon. S. A. Ogot R M** on 15/01/15)*

J U D G M E N T

1. **E K K**, the Appellant, was charged with the offence of **Arson** contrary to **Section 332 (a)** of the **Penal Code**. Particulars of the offence being that on the **22nd** day of **December, 2014** at around **06.00 p.m.** at [particulars withheld] in **Mutomo Sub-county** within **Kitui County**, willfully and unlawfully set fire to a building namely kitchen valued at **Kshs. 10,000/=** the property of **K K**.
2. She admitted the charge, was convicted and sentenced to serve **five (5) years imprisonment**.
3. In this appeal, the Appellant mitigates on sentence on the grounds that she has small children who are residing with her elderly mother who cannot fend for them.
4. In a response thereto, **Mr. Njogu**, learned State Counsel urged the court to uphold the sentence meted out because per the probation report filed before the trial court, the Appellant was not remorseful.
5. I did request for a probation report which was filed by the County Director of Probation. Circumstances of the case were that the Complainant in the matter was the Appellant's husband. They had a marital problem. Their families met and failed to resolve the problem. They decided to have the marriage dissolved. Having been in the relationship for a long time the Appellant was aggrieved and decided to set the kitchen ablaze.
6. The social inquiry carried out established that indeed the Appellant is a mother of **five (5) Children**, two of the children stay with her mother who is aged and ailing. The Probation Officer recommended the Appellant for a supervised non-custodial sentence.
7. In the instant case I have been asked to interfere with the sentence meted out by the trial court. In the case of **Owoura vs. Reginam (1954) EA CA 270** the Appellate court set out the principles to guide the court in such a situation where it stated thus:

“The principles upon which an Appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat

different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James vs. Republic (1950) EA CA 147;

“It is evident that the Judge acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”

8. The Appellant herein was a first offender. She was aggrieved by the fact of her marriage coming to an end. Looking at the mitigating factors – she stated that it was a kitchen that she had used from the time she married the Complainant and it was empty. The photographs show that she burnt the grass thatched roof. The initial Probation Report filed before the trial court indicated that she was still bitter with her estranged husband and the community was unwilling to support her rehabilitation.

9. The prevailing situation is that, her children are suffering and the Appellant is now acceptable to the community. She has served **one year imprisonment** out of the **five (5) years** meted out. She was a first offender. Considering the findings of the Probation Officer, it is a case that calls for interference of the sentence imposed.

10. In the premises, the appeal succeeds, the sentence imposed is set aside. The same is substituted by a **Probation Order**. Consequently, the Appellant shall be under probation supervision for a period of **three (3) years** to run from the date of conviction by the trial court.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of August, 2016.

L. N. MUTENDE

JUDGE