



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 64 OF 2008**

**STEPHEN WANG'ONDU KININI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in criminal case number 141 of 2005, R. vs Stephen Wang'ondou Kinini & Nicholas Nderi Mwangi at Nyeri, delivered Hon. Mrs. Osoro, SRM on 14.3.2008).*

**JUDGEMENT**

The appellant herein **Stephen Wang'ondou Kinini** and **Nicholas Nderi Mwangi** were charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code<sup>[1]</sup> and burning vegetation without authority contrary to section 3 (2) of the Grass Fires Act.<sup>[2]</sup> The learned Magistrate acquitted them of count one and convicted them of the second count and fined them Ksh. 4,000/- each in default to serve three months imprisonment. Both accused persons paid the fine. This appeal is by the first appellant **Stephen Wang'ondou Kinini**.

The appeal is not opposed. Learned State Counsel Festus Njue has conceded to this appeal and in his written submissions argues that:-

- i. The evidence on record demonstrates that the complainant and the appellant were neighbours and the two had a long standing boundary dispute.*
- ii. That from the evidence there was burning of vegetation commissioned by the appellant.*
- iii. That the area in which the vegetation was burnt was the portion in dispute and both the complainant and the appellant believed that they owned the area in question.*
- iv. That the appellant and his co-accused were acquitted on count one purely because they had a boundary dispute.*
- v. That section 3 of the Grass Fire Act contemplates situations in which another person's other than the one setting fire, property/vegetation is burnt. That in view of the fact that there was a boundary dispute between the two, the accused ought to have been given the benefit of doubt.*

I have carefully evaluated the evidence tendered in the lower court and the submissions by both counsels and I am persuaded that on that this is a case where the accused ought to have been acquitted on both counts because the offences were not proved as required and the existing boundary dispute largely negated the existence of the requisite *men rea* and on that ground alone, the appellant ought to have been given the benefit of doubt and acquitted.

The South African case of *Ricky Gandavs The State*<sup>[3]</sup> provides useful guidance. In the said case it was held:-

*“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true.....the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses....it is acceptable in totality in evaluating the evidence to consider the inherent probabilities....*

*The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt”*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.

Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.<sup>[4]</sup> In 1997, the Supreme Court of Canada in *R vsLifchus*<sup>[5]</sup> suggested the following explanation:-

*“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*

*A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.*

*Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.*

*In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt”*

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for creating reasonable doubts as to the guilty of the accused. The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence.

**Dated at Nyeri this 10th day of December 2015**

**John M. Mativo**

**Judge**

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[1] Cap 63, Laws of Kenya

[2] Cap 327, Laws of Kenya

[3] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[4]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[5]{1997}3 SCR 320