REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 78 OF 2011

PHILIP MAKHOKHA KEYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence contained in the Judgment

of Hon. D. K. Kemei (Principal Magistrate) in Eldoret Chief Magistrate's

Criminal Case No. 1823 of 2011 delivered on 25th May, 2011)

JUDGMENT

Philip Makhokha Keya, the Appellant herein was charged with the offence of arson contrary to Section 332 (a) of the Penal Code. The particulars of the offence were that on the 23rd day of May, 2011 at Kuinet Village, Kuinet Location in Eldoret East District within the Rift Valley Province, willfully and unlawfully set fire to a dwelling house valued at Ksh. 20,000/= belonging to Christine Nanjala Keya.

He was convicted on his own plea of guilty and was sentenced to life imprisonment.

He was aggrieved by both the conviction and sentence and he preferred this appeal. He enlisted the following eight (8) grounds of appeal;

1. That the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant to life imprisonment without taking regard to the evidence adduced in court.

2.That the learned trial Magistrate erred in law and fact in misdirecting herself on the essential ingredients of arson.

3. That the learned trial Magistrate erred in law by failing to independently analyze and/or evaluate the evidence before drawing conclusion as by law required.

4. That the learned trial Magistrate erred in law by convicting the Appellant without taking regard to the weight of the defence evidence adduced.

5. That the learned trial Magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstance considering that the accused was a first offender.

6. That the trial Magistrate erred in law and fact by convicting and sentencing the Appellant on flawed procedures.

7. That the trial Magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt.

8. That the learned trial Magistrate erred both in law and fact by rejecting the Appellant's defence in its totality without giving concise reasons for doing so.

With respect to grounds 1, 2, 3, 4, 6, 7 and 8 it is important to emphasize that, the Appellant having been convicted on his own plea of guilty, no evidence was adduced. As such, the trial court did not have the opportunity of evaluating any evidence that otherwise would have been tendered by the prosecution and the defence. For this reason, any ground of appeal raised to the effect that the trial court did not consider the evidence on record was misplaced.

Be that as it may, the Appellant was represented by the learned counsel, Mr. Balongo who submitted as follows:-

First, that the Appellant was a minor at the time he was charged having been born on 5th August, 1995.

Second, that under Section 207 (2) of the Criminal Procedure Code, the court ought to have informed the Appellant of the consequences of pleading guilty which it did not. He referred the court to the case of **ADAN -VS- REPUBLIC** (citation not given).

Third, on 26th May, 2011, a mental assessment report was made indicating that the Appellant was mentally not fit to stand trial, yet the trial court did not call for this report before taking the plea.

Fourth, that under Section 73 (d) and 191 (1) (a) of the Children's Act, a minor ought not to be imprisoned.

Fifth, life imprisonment was harsh in the circumstances that the Appellant was a first offender.

In response, learned state counsel Mr. Mulati submitted that this being an appellate court, is a court of record. At no time did the Appellant bring it to the trial Court's attention that he was a minor. That defence cannot be available to him now.

He submitted that the plea was taken in a proper manner.

He further submitted that, at no time did the Appellant inform the court that he was of unsound mind as provided by Section 11 of the Penal Code.

He submitted that all the new issues the Appellant raised could only be dealt with under Article 50 (6) of the Constitution under which a convicted person may apply for a retrial.

Finally, Mr. Mulati submitted that the sentence was within the law.

The conviction having been on the Appellant's plea of guilty, it is imperative that I first consider whether the plea was taken in a proper manner. Mr. Mbalongo referred the court to Section 207 (2) of the Criminal Procedure Code and the case of **ADAN -VS- REPUBLIC**. Section 207 (2) of the Criminal Procedure Code should be read together with sub-section (1) as both provide for the brief procedure of taking a plea of guilty. They read as follows:-

207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his

admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

On the case law, I believe the learned counsel was referring to the case of **ADAN -VS- REPUBLIC (1973) EA., 443**. It summarizes the procedure of taking a plea of guilty as follows:-

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

The above procedure was adopted in the case of **KARIUKI -VS- REPUBLIC (1984) KLR, 809**, thus;

*"**1. The word "do" recorded by the trial court as the accused persons answer to the facts of the offence meant nothing and was neither an admission nor a denial of the facts.***

2. The manner in which a plea of guilty should be recorded is:

a) The trial Magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understand;

b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded.

c) The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

d) If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan vs. Republic (1973) EA 4456."

In the present case, the proceedings were recorded in the following manner:-

"25.5.2011

Coram: D. K. Kemei – P.M

C. I. Manuni

Court Clerk: Kemboi

Interpretation: English/Kiswahili

Court: The court has inquired from the accused (s) person as to the language they/he/she understand(s) and they/he/she understands who being asked whether they/he/she admits or denies the truth of the charge(s) replies:-

Accused : It is true

Facts: On the 23.011 at 1 p.m. accused who is the son of the complainant went home while drunk. He armed himself with a panga and jembe and threatened to injure complainant who is his mother. She ran away and accused set fire to complainant's grass thatched house which got burnt completely. The value of the burnt house is Ksh. 20,000/=.

Scene was visited by police officers. Investigations commenced and accused was arrested and charged by Kapsoya Police Station.

Accused: Facts are correct.

Court: A plea of guilty is entered and accused is convicted on own plea of guilty.

Prosecutor: Accused is a first offender.

<u>Mitigation:</u>

Accused: I have nothing to say now.

Court: Mitigation factors considered. Offence is serious and calls for deterrent sentence. Accused is ordered to serve life imprisonment. Right of appeal within 14 days."

The foregoing demonstrates that not a single procedure of taking a plea of guilty was omitted by the trial court. The charge was read in the language the Appellant understood and he replied affirmatively. He also affirmed that the facts were correct. An unequivocal plea of guilty was entered. At no time during this process did he raise an objection that he was not comfortable with what was happening in court. His contention therefore that the plea was not taken in a proper manner cannot hold.

Section 207 (2) does not provide that the court should inform an accused person of the consequences of pleading guilty as contended by learned counsel Mr. Balongo. It provides that if an accused admits the truth of the charge, the court should record his reply as keenly as possible in the words he admitted that truth. And of course, this is what the trial court did in the instant case.

With regard to the age of the Appellant, I agree with the learned state counsel that this is a court of record. At no time did the Appellant bring it to the attention of the court that he was a minor. The trial court could only make a finding on that aspect based on facts brought before it. This was not done and no assumption could be made that the Appellant was seventeen (17) years old. For this reason, that submission must fail.

So then, was the Appellant fit to plead? According to learned Counsel Mr. Balongo, the Appellant was of unsound mind. He stated that on 26th May, 2011, a report in this respect had been made. But who made this report? Where was it? I was dismayed by that submission because, at no time did either the prosecution or the Appellant inform the court that the Appellant was of unsound mind. There was also no report on record in this regard.

Besides, 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."***

It follows then that the onus of alerting the court of the mental status of the Appellant lay with the

Appellant himself. The court would also probably know of mental unfitness of an accused by the conduct of the accused himself. This scenario did not present itself in the court and so the trial court would not have assumed that the Appellant was of unsound mind.

I have noted that the learned counsel may have referred to an annexture marked PMK.4 which was attached to the Supplementary Affidavit dated 20th January, 2012 in support of the Appellant's application dated 27th May, 2011 for bail/bond pending the hearing and determination of this appeal. In paragraph 4 of the said Supplementary Affidavit the Appellant deposed as follows;

> ***"That I am sick and I need special medical attention which is not allowed or accessible for me in prison. Annexed herein is a copy of medical chits marked "PMK 4"."***

Annexture 'PMK 4' was a discharge summary from Moi Teaching & Referral Hospital which showed that the Appellant was admitted to the hospital on 26th May, 2011 and discharged on 2nd June, 2011. The summary discharge reads;

> ***"Diagnosis: Mental disturbance.***
>
> ***Summary - Hallucinations***
>
> ***- Mental upset***
>
> ***- Sensitive to noise***
>
> ***- Frontal headache***
>
> ***- Not stable***
>
> ***NB: Kindly avoid disturbance e.g. noise for quick recovery of the above patient."***

The Appellant was convicted on 25th May, 2011. He was admitted to hospital on 26th May, 2011, a day thereafter. Therefore, in as much as the treatment was accorded to him a day after his conviction and sentence, the mental diagnosis and its history was not availed to the trial court at the proper/right moment as envisaged under Section 11 of the Penal Code and Section 162 (1) and (2) of the Criminal Procedure Code which read as follows:-

> ***"162*. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.***
>
> ***(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case. "***

The trial court could not be faulted for entering a plea of guilty in the circumstances.

Besides, the Appellant did not raise the defence of insanity and as I have already observed, there was no material brought to the trial court to show that the Appellant was of unsound mind and therefore not mentally fit to stand trial.

In the case of ***Mohamed Sonar Noor v Republic [2013] e KLR, H.C at Garissa Criminal Appeal No. 197 of 2013***, where the learned Mutuku, J. delivered himself as follows;

"The taking of the plea in the lower court is a proceeding of that court. This is subject to review by this court if there is reason to believe that it was not conducted procedurally or legally. The mistakes that occurred were not made by the trial magistrate. The law presumes any person presented in court to be of sound mind until contrary is proved (See Section 11 of the Penal Code). It is unfortunate that other

than the practice in murder trials, the accused persons are not automatically examined to determine their mental status before the plea is taken. It is my view that every accused persons, especially those facing serious offences, must as of right be subjected to medical check-up in regard to their mental status before a plea is taken. This would not be asking for too much given the guarantees, inter alia, to rights to a fair trial in our Constitution. The trial court in this case acted properly just like in all other criminal cases before him. The accused or his family ought to have furnished the trial court with information that the he suffers from a mental illness to prompt the court to order for a medical report to determine if he was fit to take the plea and stand trial."

In ***Richard Evans Wafula V Republic [2010] e KLR, H.C at Eldoret, Criminal Appeal No. 113 of 2009*** the learned Mwilu J. (as she then was) held as follows;

> ***"He was convicted and sentenced to life in prison. He now brings this appeal on the grounds that he was mentally ill at trial and did not understand court proceedings during plea and did not know the consequences of a plea of guilty and that he was threatened into pleading guilty...I have evaluated the proceedings. The plea of guilty was clearly an unequivocal one and anything now said by the appellant is a sorry afterthought. The appellant did not raise the issue of being forced to plead guilty by policemen to the trial court. He did not mention to that court that he was threatened for had he done that the court would surely have assisted him and failing which this could would now assist him. The provisions of Section 348 of the Criminal Procedure Code prohibit an appeal from a plea of guilty in the following words:-"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."There then the appeal on conviction falls flat."***

In ***Republic v Jacob Njue Daniel [2007] e KLR, H.C at Embu, Criminal Appeal No. 9 of 2007,*** the learned Khaminwa J. observed as follows;

"There is also the case of Republic vs Madaha EA [1973] 515 where the court in Tanzania held that where there was a report of unsoundness of mind at the time of offence that it was to be proved first if he was fit to plead and thereafter decide whether on evidence the accused was insane at the time of committing the offence. The burden of proof of insanity is on a balance of probabilities to be proved by accused and question may be raised by the court."

In furtherance to the above, it is important that I address the issue of the Appellant's drunkenness notwithstanding that the same was not raised by his counsel. This emanates from the facts of the charge as were read by the prosecutor. It is important that I duplicate the relevant part:-

> "***On the 23.011 at 1 p.m. accused who is the son of the complainant went home while drunk. He armed himself with a panga and jembe and threatened to injure complainant who is his mother. She ran away and accused set fire to complainant's house which got burnt completely ….."***

Section 13 of the Penal Code which addresses the issue of intoxication reads thus;

> ***"13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***
>
> ***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -***
>
> ***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***
>
> ***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.

The courts have interpreted the above provisions as demonstrated under;

In the case of ***Charles Heho Ndirangu v Republic [2009] eKLR, Court of Appeal at Nakuru, Criminal Appeal No. 346 of 2008***, the learned judges Tunoi, Waki and Alnashir Visram JJ.A observed as follows;

"Under section 13 (4) of the Penal Code the trial court was required to take into account the issue of whether the drunkenness or intoxication deprived the appellant of the ability to form the specific intention required for the commission of a particular crime. In the circumstances relating to the killing herein, the learned trial Judge was required to take into account the appellant's heavy consumption of hard liquor during the ceremony in determining whether the appellant was capable of forming and had formed the intention to kill the deceased. Lamentably, her judgment is silent on this. For the foregoing reasons we would think that the conviction for the offence of murder, in the particular circumstances of this case, was and is unsafe. We accordingly allow the appeal against the conviction for murder, set it aside and substitute it with the conviction for manslaughter under section 202 of the Penal Code."

In ***Kupele Ole Kitaiga v Republic [2009] eKLR, Court of Appeal at Nakuru, Criminal Appeal No. 26 of 2007*** the learned judges Bosire, Waki and Onyango Otieno JJ.A reiterated that;

"A clear message must also go out to those of the appellants ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of section 13 of the Penal Code it will not avail an accused and does not avail the appellant in this particular case."

In view thereof, drunkenness/intoxication does not afford an accused person a defence per se. Such defence must be properly demonstrated and proved. In the instant case, the Appellant intended to injure his mother with the panga and the jembe he was holding. But when she ran away, he visited his anger by burning the house. This was a willful act and whether or not he was drunk he must carry his own cross. His drunkenness cannot be claimed as a defence. He ought to have avoided the alcohol, if for any reason it acted as a catalyst into any criminal behaviour.

Further, the plea of guilty herein was unequivocal and so Section 348 of the Criminal Procedure Code bars the Appellant from preferring this appeal. The same reads;

"***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."***

Finally, with respect to sentence, Section 332 defines the offence of arson as a felony and if convicted a person is liable to imprisonment for life. Hence, the penalty handed to the Appellant was legal. But again was it excessive?

Sentencing is purely in the discretion of the court. But it should not be so harsh as not to serve the purpose as a deterrent measure. Imposing the maximum sentence, in my view, was harsh. The trial court failed to take into account that the Appellant was a first offender. It also failed to consider that the

complainant was the mother to the Appellant. The harsh sentence may deter reconciliation of the family members as the Appellant may remain bitter for the rest of his life. In those circumstances, a much lighter sentence ought to have been imposed.

In the result, the appeal on conviction fails. I however set aside the sentence of life imprisonment and substitute it with a six (6) year jail term commencing from the time of the conviction.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 25th day of September, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Balongo for the Appellant

Mr. Mulati for the Respondent