REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 47 OF 2005

**(*From the Original criminal case no. 1297 of 2004 of Senior Resident Magistrate's Court*

at Mwingi).

NGINA NGONYO …….....…….APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

JUDGEMENT

NGINA NGONYO lodged her appeal against both conviction and sentence meted out against her by the Mwingi Senior Resident Magistrate's Court. The appellant did not wish to appear during the hearing of her appeal and so it was heard in her absence. The appellant had pleaded guilty to a charge of Arson Contrary to Section 332 (a) of the Penal Code. She was sentenced to serve 4 years imprisonment on 22nd February, 2005. The appellant filed six grounds of appeal generally challenging the conviction on grounds she did not follow the proceedings and the rest challenging sentence on account of being below 18 years of age at the time of sentence and mitigating factors dictating otherwise which factors she also included in her petition.

Mr. O'mirera conceded to the appeal. The learned counsel submitted that

the plea was taken twice and irregularly and that the plea of guilty was equivocal. On the plea being taken twice, counsel submitted that the first plea was taken on 22/11/04 by a different magistrate from the one who repeated the plea taking on 22/2/05 three months later. Counsel also submitted that the language used during the second plea was not indicated. He also submitted that the appellants response to the plea raised a reasonable defence. Counsel urged the court to order a retrial as the offence was serious and no prejudice will be suffered by the appellant.

I have considered the appeal, submissions by counsel and the appellants filed grounds of appeal. I have entertained a challenge on the conviction despite the fact that the appellant pleaded on the grounds raised by the learned counsel for the state that the plea was not properly taken. When the appellant first appeared in court on 22//11/04, the charge and facts were read to the appellant and she admitted the charge. However, from the record of proceedings, a plea of Not Guilty was entered. Subsequently on 22/2/05 the plea was read over to the appellant on her request and she admitted the facts. The facts given by the prosecution were as follows.

" COURT PROSECUTOR; the facts are that on 17/11/04 the complainant left home and went to the Children Officers-Mwingi where he had been summoned. At about 4.30 p.m on going back to his house he found his house burnt. He was told that one woman had done so. Police officers proceeded to where the house was burnt where the home is located. They found the accused on the way to the station. They found the accused having torched the house. The house was on fire that had destroyed everything nothing was recovered. The accused was at the station. She was arrested and charged with this offence."

Those facts do not disclose any offence. The complainant is said to have been told that a woman burnt his house whose name he did not disclose. The police are also said to have met the appellant on the way and concluded she had burnt the house. Those facts do not disclose the offence charged. They do not

disclose that the appellant burnt the complainants house. Secondly, they do not disclose that malice was involved, nor that the act was wilful on the appellant's part.

After those facts the appellants statement in mitigation in part read;-

" I did it without knowing. I had stress."

Those words negate a very essential particular of the offence which is that the appellant committed the offence "wilfully". I agree with the state counsel that the said statement raised a reasonable defence. In the circumstances, the learned trial magistrate ought to have entered a plea of not guilty and to have set the case up for hearing . See ADAN VRS REPUBLIC 1973 E.A. The plea of guilty was equivocal, consequently I quash the conviction and set aside the sentence.

On the issue of a retrial Mr. O'mirera was of the view that one should be ordered due to the seriousness of the charge. However that is not the only matter that needs consideration, when assessing which order to make in such a case. T he appellant in her filed petition claims to be under 18 years of age. She was not before us so we could not assess her apparent age. There is no medical report. However, that is a matter the trial court should have mentioned while assessing sentence. If indeed the appellant may be below 18 years of age she ought not to have been jailed. Ordering a retrial in the circumstances will cause her to suffer even more prejudice. The appellant has been in prison since November, 2004. That is a very long time and it will not serve the interests of justice to order a retrial in order to prolong the appellants hardship and subject her to a process of trial once again. I decline to order a retrial. Instead I order that the appellant be set free unless she is otherwise lawfully held.

Dated at Machakos this 22nd day of May, 2006.

J. Lesiit

JUDGE

22/5/2006