



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 155 'A' & 153 OF 2002**

**(From Original Conviction and Sentence in Criminal Case No 761 of 2001 of the Senior Principal Magistrate's Court at Nairobi)**

**DAVID MUTISO KIILU ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN KASYOKA MAKAU..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellants, David Mutiso Kiilu and Stephen Kasyoka Makau were jointly charged with the offence of failing to prevent a felony contrary to section 392 of the Penal Code. The particulars of the offence were that between the 24th and the 25th of March, 2001 at [Particulars Withheld]Mixed Secondary School in Machakos District being the Headmaster and Deputy Headmaster respectively jointly knowing that there was a threat to set a fire to the school failed to use reasonable means to prevent the commission or completion thereof of the felony namely arson, and as a result the boys' upper dormitory was set on fire whereby sixty seven students were burnt to death and nineteen injured. The appellants pleaded not guilty to the charge and after a full trial were convicted as charged and sentenced to eight months imprisonment. The appellants were aggrieved by the said conviction and sentence and have appealed to this Court.

The two appellants presented more or less similar grounds in their Petitions of Appeal faulting the decision of the trial magistrate. The said grounds of appeal can be summarized as follows;

- (i) The trial magistrate erred in law by failing to analyse and give proper weight and consideration to the evidence of all the prosecution witnesses which evidence was contradictory in material respects.
- (ii) The trial magistrate erred in law in disregarding the evidence that showed that the appellants took necessary action to prevent the felony but proceeded to convict the appellants.
- (iii) The trial magistrate erred in law in failing to apply the required standard to establish that indeed the appellants had failed to prevent the commission of the felony.
- (iv) The trial magistrate erred in law in failing to consider the evidence adduced by the defence before arriving at the said decision convicting the appellants.

(v) The trial magistrate erred in law in failing to consider the totality of the evidence adduced before the Court before arriving at the said decision convicting the appellants.

(vi) The trial magistrate erred in law in considering extraneous circumstances in her judgment and thus convicting the appellants.

(vii) The trial magistrate erred in law in convicting the appellants when the prosecution had not proved its case beyond reasonable doubt.

(viii) The trial magistrate erred in law in sentencing the appellant to a manifestly excessive

(viii) The trial magistrate erred in law in sentencing the appellant to a manifestly excessive custodial sentence putting into consideration the circumstances of this case.

The appeal arose from the convicting of the appellants as a result of the tragic events that took place at [Particulars Withheld] Mixed Secondary School whereby sixty seven students lost their lives as a result of arson. The facts of the events that took place on the material days are not in dispute. PW 1 Jackson Kioko Muindi, a teacher at [Particulars Withheld] Mixed Secondary School (hereinafter referred to as the said school) testified that he was the teacher on duty on the week prior to the arson. He further testified that on the night prior to the arson incident, he went to the school and checked if the students were in their classrooms studying as they were required to do. He moved from classroom to classroom. It was about 8.00 pm. He realized that he did not have a torch. He went to his house which was nearby within the school compound and came with a torch. While outside the Form Four classrooms, he saw a boy squatting behind the hedge. When the boy saw him he ran away. The boy was caught by the watchman. He was F M, a suspect in the arson attack. PW 1 inquired from him what he was doing but he was adamant that he had gone to drink water from the water tap that was next to the classrooms. PW 1 was not convinced by this explanation. He told the boy to wait for him at his classroom. Then there was a blackout. PW 1 with the assistance of 2nd appellant lit pressure lamps to enable the students study. PW 1, apart from the unusual behavior of the student whom he caught behind the hedge, did not witness any unusual activity in the school. He confirmed that he had earlier heard from the 2nd appellant that the watchman had smelt petrol around one of the boys' dormitory. The 2nd appellant told him that a search of the boys' dormitory and the area surrounding it did not yield anything. Later PW 1 went to the said dormitory and was not able to smell any petrol. PW 1 testified that the appellants were in school when the arson took place and assisted in ferrying the affected students to hospital. PW 1 testified that it was raining on the night of the arson. PW 2 Solomon Muteti Malingo, a teacher at the said school testified that in the year 2000 there were two students unrests in the school. In the first incident, the students broke the school canteen and took away everything. In the second incident the students attempted to set fire on the book store. The fire was put off and some students were suspended. The window of the Headmaster's house was smashed during the unrest. PW 2 associated the two incidents to the indiscipline of the students. PW 2 was on duty on the material night. He testified that he returned to the school at about 9.00 pm having obtained permission from the school headmaster to be away during the day. PW 2 went to the school's tuition block. He saw the students were in their classrooms studying. He also saw the Headmaster, his Deputy and the school watchmen were around the tuition block. He went to where they were standing. He greeted them. He was told by the 2nd appellant that the school captain had reported the previous days that there was smell of petrol around the boys' dormitory. PW 2 went to the Form IV block, called out the school captain who confirmed to him the fact that there was smell of petrol outside the boys dormitory. PW 2 then went to where the 2<sup>nd</sup> appellant was talking with the 1st appellant. PW 2 heard the 1st appellant instruct the school watchmen to keep watch at the dormitories and the administration block. He testified that it was unusual for the Headmaster and the Deputy to be in school during prep time. He stated that it was due to the report made of the smell of petrol that necessitated the appellants to be in school at the time. He further testified that the 1st appellant asked the watchmen to be extra cautious during the night. PW 2 confirmed that he was with the appellants until 11.00 pm when he went to his house. He slept at midnight only to be woken up by his wife and told that the boys' dormitory was on fire. He went to the school and assisted in taking the affected students to the hospital. He testified that after each incident of indiscipline in the school, the School Board was convened and implicated students punished. PW 3 Jackson Mutuku Mbonge worked at the said school as a watchman. He had worked at the

said school as a watchman for twelve and a half years. He testified that there were four watchmen in the school but only three worked at any given time. PW 3 testified that on the night prior to the arson, while on duty at the said school, a report was made to him about 9.00 pm by the school captain that petrol was smelling outside the dormitory. He called his two colleagues. They went and searched the dormitory. They confirmed that there was a strong smell of the petrol outside the dormitory but once inside the smell was not there. PW 3 then went and informed the 2nd appellant. The 2nd appellant accompanied them to search around the dormitory including the flower beds and the perimeter fencing. PW 3 testified that even though they could smell the petrol, they were unable to trace its whereabouts. He stated that the 2nd appellant instructed him and another watchman to guard the dormitory while the other watchman was told to guard the gate. On the following night PW 3 reported to work as usual at 6.00 pm. He testified that one of his colleagues, Mr Kamota informed him that three students had been given permission to go out of the school but had not returned. He testified that Mr Kamota gave the list of the three students to the 2<sup>nd</sup> appellant at about 7.30 pm PW 3 saw the 2nd appellant call one of the students who was on the list, talk to him and order him to return to the classroom.

PW 3 was then assigned duty to guard the upper dormitory by the 2<sup>nd</sup> appellant. While there he saw a student running from the classrooms to the upper dormitory. He asked him what he was doing but the boy took off. Just then another student ran towards him. He stopped him and asked what he wanted. The boy said that he was asthmatic and wanted to drink water. At that point PW 1 arrived and told him that he was following the student. He went away with the student who had been detained by PW 3. PW 3 then testified that there was a blackout in the school. It was also raining. When the lights returned, he went with the 1st appellant to the place where the petrol was smelling. They searched the area but found nothing. At that particular moment, the petrol was not smelling strongly as the previous day. He further testified that he saw the appellants and two teachers PW 1 and PW 2 at the school administration block up to 12.00 midnight. He testified that the 1st appellant then assigned the three watchmen to guard the administration block, the upper and the lower dormitory respectively. PW 3 testified that the instructions given by the 1st appellant was unusual. PW 3 further testified how he was informed at about 1.30 pm of the fire in the upper dormitory and the action that was taken by the appellants in assisting the affected students to be taken to the hospital. PW 3 testified that when the report was made to the 2nd appellant about the smell of the petrol he was concerned and assisted the watchmen to do a thorough search of the source of the smell of the petrol.

PW 4 Mutung'a Maku, prior to the arson incident had worked for the said school for a period of thirteen years, nine of which he worked as a school watchman. PW 4 recalled two previous incidents, one in 1997 when the students had burnt the book store and another in the year 2000 when the students had attempted to burn the office of the Headmaster. He also recalled an incident where the students had broken into the school canteen and drank all the sodas. PW 4 testified how on the 24th of March 2004 upon reporting on duty he was informed by the school captain that he could smell petrol outside the upper dormitory. He informed the 2nd appellant who accompanied them to the said dormitory. He testified that they searched the area around the said dormitory including along the fence but could not trace any petrol.

PW 4 testified that he was detailed with another watchman called Kamota to guard the dormitory in question. On the following day, PW 4 reported on duty as usual. He was informed by the day watchman that three students who had been permitted to be out of school had failed to report back. PW 4 took the list of the three students to the Deputy Headmaster (the 2<sup>nd</sup> appellant) at about 7.00 pm with the report that the three students had failed to return to school. At about 7.30 pm PW 4 saw the 1st appellant arrive at the school. He informed him about the report which had been made about the smell of the petrol outside the upper dormitory by the school captain. He saw the 1st appellant walk to the school administration block. At about 12.00 midnight he left the gate as it was the changeover time, to go to the administration block. He met with the appellants with PW 2 at the administration block. They instructed him to guard the upper dormitory. The other watchman Kamota and Jackson were instructed to guard the lower dormitory and the administration block and the gate respectively. PW 4 testified that at about 1.30 am he saw fire inside the upper dormitory. It was spreading from the lower side of the dormitory to the upper side of the said dormitory. He ran, got a bucket of water and tried to put off the fire but he was unable to as the flames were overwhelming. He screamed and two of his colleagues came. He ran to the appellant's houses and informed them of what had happened. He was later sent to get the school driver to

ferry the injured students to the hospital. He testified that they were never asked by the 2nd accused to look inside the dormitory. He stated that upon informing the appellants of the arson incident the appellants acted immediately. He further testified that the main doors of the dormitory were always left opened and never closed. He stated that he was instructed to be vigilant especially on that night.

PW 5 S M M the school captain of the said school testified that on the 23rd of March 2001 when he woke up in the morning he saw a leaflet pasted on the dining hall pillars. It was inciting the students not to go to the assembly due to the fact that the Kenya Certificate of Secondary School Education examinations for the year 2000 were cancelled. He removed the leaflet and handed it over to the 2nd appellant. PW 5 testified that he smelt petrol outside the upper dormitory on the night of the 24th March 2001 at about 9.30 pm. The smell was emanating from the flower bed outside the dormitory. At the time he was with the deputy captain K H M. He alerted the watchmen, PW 3 and PW 4. He testified that the two informed the 2nd appellant. He saw the 2nd appellant and the watchmen search around the dormitory and along the fence. They did not find anything. He stated that the smell of petrol was by then not very strong. The 2nd appellant went to where PW 5 slept and informed him of the search they were conducting outside the dormitory.

The following day, the 2nd appellant met all the boarders and the prefects and mentioned the smell of petrol in the dormitory and warned all the students to be vigilant. He requested the students to report anything unusual to him. He testified that there was a blackout on the night of the 25th of March 2001 when the students were studying in their classrooms. PW 5 saw the 2nd appellant, PW 1 and PW 2 in the compound. They were able to assist the students light the pressure lamps which enabled the students to continue with their studies. After the evening studies, the 2nd appellant conducted a roll-call. It was a bed to bed roll call. PW 5 assisted the 2<sup>nd</sup> appellant. The roll-call ended at about 10.00 pm PW 5 went to bed at 10.30 pm. He was woken up by screams at about 1.00 pm. He saw flames moving towards his cubicle. The fire was burning from the central part of the dormitory. He helped, with other students who were awake, to rescue the students who were asleep in the dormitory. He testified that there were about one hundred and thirty students in the upper dormitory some of whom shared beds. He testified how the 1st appellant assisted to take the injured students to the hospital. He confirmed that there were incidences of student unrest in the school. He said the students were not happy with the cancellation of the examination results. PW 5 testified that they were asked to be extra vigilant especially in view of any student unrest. He further testified that when he smelt petrol he did not conduct any search. He confirmed that there was no smell of the petrol inside the dormitory. He further confirmed that it was unusual for the 2nd appellant to conduct the roll-call at night.

PW 6 Jackson Kilonzo Mbatha was the Chairman of the Board of Governors of the said school. He testified that since he became the Chairman of the school, incidences of indiscipline had been reported in the school. The incidences that he became aware of and dealt with included sneaking out of the school, smoking and affairs between boys and girls. He further testified that towards the end of 2000 some students attempted to set on fire the Headmaster's Office and the book store. Students suspected to being behind the arson attempt were suspended and later in the year the Board of Governors ratified the expulsion of some students. PW 6 visited the school on the 23rd of March 2001. The purpose of his visit was to attend a meeting between the school administration and the parents of the students whose examination results had been cancelled. The appellants were present in the meeting. He testified that the parents of the said students wanted their children to repeat at the school but due to the constraints of space, the 1st appellant said that he could only readmit thirty out of the one hundred and seventeen students who had sat for the examination whose results were later cancelled. He testified that he was not informed of any problem at the school. He only learnt of the arson incident after it had happened. He testified that he was satisfied with the way the 1st appellant handled the issues related to discipline at the school.

PW 7 Phillip Musyimi, a senior electrical works officer testified that he examined the upper dormitory at the school on the 26th of March 2001 and was of the opinion that the fire could not have been caused by an electrical fault. PW 8 Ester Ndunge Mutava testified that on the 24th of March 2001 she sold ten liters of petrol to a young man aged about twenty years at BP Petrol station Machakos where she worked as a petrol attendant. She testified that the young man carried the petrol in a ten litre jerrican. PW 9 Benson

Asymokou, a taxi driver testified that on the 24th of March 2001 he was hired to carry two young men from T-tot Hotel Machakos to Machakos High School. He took the two young men to the school and charged them Kshs 100/=.

PW 10 Stevenson Muema, a teacher at the said school, testified that he was on duty on the 25th of March 2001. He stated that he checked the students as they were studying in the morning and found that everything was okay. Later in the day he was briefed by the 2nd appellant that a strange smell had been felt at the upper dormitory. The 2nd appellant told him that a search of the source of the smell had not revealed anything. He testified that he attended the meeting between the 2nd Appellant and the prefects whereby the 2nd appellant asked the prefects to be vigilant in view of the events of the previous night. PW 10 testified that later in the afternoon, he gave seven students permission to go to the local markets nearby. By 6.00 pm three students had reported back but four other students had not returned to the school. When he left the school compound, he met with three students out of the four missing students about fifty metres from the school gate. When he asked them why they were late, they explained that they had been held up by the tailor who was mending their clothes. However one of the students K Z was missing. The following morning when he reported at the school, he was told by the school watchman that the upper dormitory had been burnt. He confirmed that he saw nothing unusual at the school on the day before the setting on fire of the upper dormitory. He testified that 2nd appellant was concerned about the smell of petrol outside the upper dormitory prior to the fire which destroyed the said upper dormitory. PW 11 Julius Kamotse Mbole, a watchman at the said school testified that he reported on duty on the 24<sup>th</sup> of March 2001 at 6.00 pm. At about 9.30 pm he was informed by the school captain that there was a smell of petrol outside the upper dormitory. PW 11 decided to report the matter to the 2nd appellant. The 2nd appellant immediately accompanied them back to the said dormitory. He further testified that there was a strong smell of petrol emanating from outside the dormitory. He said that the 2nd appellant assisted them to search around the said dormitory. The search was extended to the fence but nothing was found. He further said that the 2nd appellant instructed them to guard around the dormitory until the following morning. On the following morning he reported off duty and returned in the evening. It was now the 25th of March 2001. He testified that he found PW 10 the teacher on duty who gave him a list of three students who had been given permission to leave the compound but had not returned. The list of the names of the students was to be handed over to the 2nd appellant. PW 11 handed over the list to the 2nd appellant at 7.00 pm when the 2nd appellant went to the gate. He further testified that the 1st appellant arrived in school and immediately went to the upper dormitory. PW 11 confirmed that he was with the appellants and two other teachers in the school compound until about midnight when the 1st appellant assigned him to guard the lower dormitory for the night. PW 11 further testified that later in the night he heard screams emanating from the upper dormitory. He went there and saw the dormitory on fire. He blew his whistle and went to assist in the rescue of the affected students. He confirmed that the appellants assisted in the ferrying of the injured students to the hospital. PW 12 Anthony Mwangi Kadima the District Education Officer, Machakos testified that on the 26th of March 2001 he found a note at his office asking him to go to the said school as one of the dormitories had caught fire. He rushed to the school. He went to the dormitory and inspected it. He saw that the doors were opening towards the inside instead of outward. He said this was contrary to the instructions issued by the Ministry of Education, which required the doors to so open incase of an emergency. He said that there was an attempted arson at the school in October 2000 but he was never informed about it by the Principal. He only learnt about it from his officers. He sent two inspectors to the school who confirmed the incident. He further testified that he was not informed about the leaflets circulating in the school. He only learned about it after the fire incident. He confirmed that there were no written guidelines about petrol and fuel smells in schools but the school headmaster was supposed to use common sense to deal with the situation. He further testified that discipline issues in schools were the preserve of the Board of Governors as provided for under the provisions of the Education Act. He further told the Court that even though there were guidelines by the Ministry of Education following the Bombolulu fire incident, the said guidelines were neither written nor circulated to the schools. PW 13 Police Constable Jetmore Malt, a scenes of crime officer took photographs of the dormitory after the fire incident. He produced the photographs in Court as exhibits. PW 14 D M N, a student at the said school testified that he saw a leaflet pasted at the urinal urging students not to attend the school assembly on the 23rd of March 2001. It listed the grievances of the authors of the leaflet as being against frequent sending away students from school for school fees and the demand that the Headmaster had to go. He further testified that on the morning of the 25<sup>th</sup> March 2001, they were

addressed by the 2nd appellant at the school assembly and told to be disciplined, behave maturely and responsibly.

He further testified that the 2nd appellant asked them to report any cases of indiscipline to the teachers. He said that the students were murmuring that the speech of the 2nd appellant had a hidden message. PW 14 testified that later that evening, there was an electrical blackout. He noticed that these appellants and many other teachers were at the school. At 9.30 pm PW 2 told them to go to bed. He further stated that the 2nd appellant later found students still talking. He ordered them to sleep. He said roll-call was taken and the lights switched off in the upper dormitory where he slept. He was woken up when the dormitory was on fire. He managed to escape. He testified that there was tension in the school due to the fact of the students being sent home frequently. He further testified that it was unusual for the teachers and the appellant to be at the school until that late in the night.

PW 15 Inspector John Mwambili an inspector of police testified that he was assigned the duty of investigating the case involving the fire incident at the said school. He recorded statements from witnesses and formed the opinion that since no search of the dormitory had been thoroughly conducted and no comprehensive report had been made after the smell of petrol to the police or experts in petroleum products, the appellants had to be charged with the offence of failing to prevent a felony, a charge which they were convicted. He found that the cause of the fire was petrol. He produced the exhibits which had been marked for identification. After the close of the prosecution's case, and after submissions of a case to answer being made, the appellant testified that he was posted to be the Headmaster of the the said school on the 4th of January 2000. He testified that on the 23rd of March 2001, he held a meeting with the parents of the students whose results had been cancelled. It was the resolution of the said meeting that due to limited facilities only thirty students were to be readmitted to repeat form four. The criteria for selecting the thirty students was agreed upon. After the meeting he remained at the school and confirmed that nothing unusual happened. On the 24th March 2001 he supervised various functions at the school and confirmed that nothing unusual happened. He supervised various functions at the school including seeing off the students who were going to various places on school activities. At 10.00 am he left the school and went to Machakos Boys High School where there were inter-schools games. At 1.00 pm he went back to school and then left for his rural home. He arrived back at the school at about 8.00 pm. He was told by the watchman what had transpired at the school including the smell of the petrol at the upper dormitory. He drove to his house within the school compound parked the vehicle and walked to the school where he found the 2nd appellant, PW 1 and PW 2. He was briefed about the smell of the petrol. He went to the dormitory and was shown the place the smell of petrol was emanating from. He assisted the watchmen and the 2nd appellant to again search the area around the dormitory and along the fence but nothing was found. When the evening studies ended at 9.30 pm he asked the students to go to bed and roll-call be taken. After the students were in the dormitory with the assistance of the watchmen. Nothing was found. He was at the school until after 11.00 pm when he went to his house to sleep. He assigned the watchmen to keep watch. At about 1.40 am, he was woken up by one of the watchmen who told him that the upper dormitory was on fire. He informed his neighbour to call the police immediately. He went to the upper dormitory where a valiant but ultimately useless effort was being made by the teachers, the watchmen and the students to put off the fire. He saw that some students had been injured and decided to take them to the hospital. He also instructed for the school driver to be fetched to take other injured students to the hospital. He returned to the school at about 2.30 am and found the police had arrived. They were assisting the students in putting out the fire. He testified that he had been given the leaflet which was urging the students not to attend the school assembly due to the cancelled results. He never took the threat seriously due to the fact that nothing came to pass from the threat issued as contained in the said leaflet. He confirmed that there had been previous arson attempts which had been dealt with and the suspected students expelled. He further testified that he was responsible for the security at the school and did all that was required of him on the material night and the days prior thereto. He confirmed that upon receiving the report of the smell of the petrol, he took the issue seriously and that was why he ordered the area around the upper dormitory to be thoroughly searched. He testified that the dormitory in issue had been built about ten years earlier and had a capacity of ninety-six students though at the time it was holding one hundred and thirty nine students. He further testified that he did not search inside the dormitory as a report had not been made that petrol was smelling inside the dormitory. He was emphatic that he had done all that was humanly possible in the circumstances to prevent the dormitory from being set on fire.

The 2nd appellant denied that he failed to prevent the occurrence of the fire at the upper dormitory. He testified that on 23rd of March 2001 he attended a meeting with the parents of the students whose results had been cancelled in the year 2000. He was the secretary of the meeting. At 5.00 pm when he was in his office, the school captain informed him that there were leaflets pinned at various places in the school including the girls' bathroom. He took one of the leaflets to the Headmaster. He said that the leaflet was inciting students not to attend the school assembly because of the complains against the school administration for sending away students for school fees and harambee money. There was also a complain related to the cancellation of the results in the year 2000. He testified that in spite of the leaflets the assembly went on without any hitch. The following day the school activities went on uneventfully until early in the evening when a report was made to him about a "funny" smell like petrol outside the upper dormitory. The report was by the watchman who informed him that they had been given the information by the school captain. He took immediate action and went to the said dormitory. He searched around the said dormitory with the assistance of the watchmen but nothing was found. He extended the search to the fence but the search was similarly unsuccessful. He gave instructions to one of the watchmen go guard the said dormitory. On the following day he informed the Headmaster and also held a meeting with the prefects and students. He asked them to be vigilant and be on the lookout for any incidence of indiscipline, which if it occurred it was to be reported to the school administration. Later in the evening of the same day he conducted a search with the assistance of the 1st appellant and the watchmen. Nothing was found. He narrated the events leading upto the fire incident and events that took place thereafter including the actions that he took to assist the students who had been injured and further in assisting to put out the fire which had destroyed the upper dormitory.

The High Court as the first Appellate Court in criminal cases is mandated to look at the evidence adduced before the trial magistrate afresh reevaluate it and reach its own independent conclusion. In reaching its decision the High Court has put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not make any finding in respect of the demenour of the witnesses. The High Court also has to put into consideration the grounds of appeal put forward by the appellants. (See *Pandya –verses- Republic* [1957] EA 570, *Okeno –versus- Republic* [1972] EA and *Kariuki Karanja –versus- Republic* [1986] KLR 190). In the instant case the facts leading to the tragic events at the [Particulars Withheld] Secondary School on the night of the 25<sup>th</sup> March 2001 are not in dispute. Prior to the fateful day, there were incidences of indiscipline in the school. Witnesses gave evidence of various instances before where the students had resorted to illegal activities to gain the attention of the school administration. For instance, in the year prior to the arson incident, the students had broken into the students' canteen and stolen there from. There were two other incidences where the students attempted to set on fire the Headmaster's office and also the book store. In both instances tragedy was averted by the quick action of the watchmen who saw the fire and put it off in time. Prior to the arson incident on the 25th of March 2001, there appears to have been tension in the school caused by two events, which though unrelated, ultimately contributed more or less to the arson by disgruntled students. The two events were the cancellation of the Kenya National Examination results for the candidates who sat for their examination in the year 2000. The second incident was the decision by the school administration to send away students regularly, presumably to get school fees from their parents. Some of the students felt frustrated that the school administration was not sympathetic with the plight of the students. They vented their anger on the 1st appellant. They wanted the first appellant to be transferred from the school. They put their feeling in leaflets which they circulated in the school. The appellants became aware of the contents of the leaflets, but unfortunately, it appears that they did not treat the issue with the seriousness that it deserved. On the night of the 24th of March 2001, the school captain smelt petrol outside the upper dormitory. He immediately informed the watchmen, who in their turn informed the 2nd appellant. The 2nd appellant upon being informed of the smell immediately took action. He went to the upper dormitory accompanied by the watchmen. He felt the smell of petrol outside the upper dormitory. He, with the assistance of the watchmen searched the area around the dormitory. They could not trace anything. The search was extended to the fence nearby. Nothing was found. From the evidence, it appears that the 2nd appellant's instincts as to potentially dangerous situation was aroused. He was very alert. With the benefit of the previous experience in the school where the Headmasters office and the book store had been targeted to be set on fire, the 2nd defendant did not take any chances. It appears that his search around the dormitory and along the fence, though with all the good intentions was misguided. The 2nd appellant searched the area around the dormitory and the area along the fence as if

petrol was something solid which could be found lying around. It appears to have escaped the attention of the 2nd appellant and later the 1st appellant that a search ought to have been mounted for a vessel which could have contained petrol, which by the benefit of hindsight seems to have been spilled outside the upper dormitory. The search was never extended inside the upper dormitory nor were the students involved in the search of the source of the strong smell of petrol. The 1st appellant was later informed and he too conducted a search of the source of the petrol around the upper dormitory and along the fence. His search was however fruitless. The appellants knowing the risk that petrol would pose, instructed the watchmen to be extra vigilant and guard the upper dormitory in particular. The following day, the 25th of March 2001, the 2nd appellant held a meeting with the prefects and later addressed the students. He asked them to be disciplined and report any incidence of indiscipline to the school administration. The 2nd appellant did not specifically tell the students to be vigilant in view of the smell of petrol outside the upper dormitory. In the evening of the 25th of March 2001, the appellants, two members of staff and the watchmen again went to the upper dormitory where a search was again conducted around the said dormitory. The search was further extended to the fence near the dormitory. By this time the smell of petrol had dissipated. It was not as strong as it was on the previous day.

In spite of this fact, from the evidence on record it appears that the appellants were alert. They were in school up to midnight of the particular day. The witnesses testified that it was very unusual for the appellants and the teachers to be in the school up to very late, as they did not on the particular day. A roll call of the students was ordered to be taken after the students had gone to bed. The results of the roll-call however was not mentioned by any of the witnesses who testified. It was raining at the said school on the 25th of March 2001 and in spite of this, the appellants and the teachers decided to be extra vigilant on the particular night. The 1<sup>st</sup> appellant, before going to his house assigned duties to the watchmen and ordered one of the watchmen to guard the upper dormitory. The appellants were woken up at about 1.30 am with the report that the upper dormitory was on fire. They took immediate action, first to try and put out the fire and secondly to try and rescue the injured students and take them to hospital. The entire Government machinery then took over when it became evident that many students had died as a result of the fire at the school. The police became involved. PW 15 Inspector John Mwambii was assigned the tasks of investigating the cause of the arson and to find if any crime had been committed. After investigations, he made the decision that the appellants should be charged. His decision was based on the fact that the dormitory was not thoroughly searched and further no comprehensive report of the smell of petrol had either been made to the police or to the authorities. The appellants were charged with the offence of failing to prevent a felony. When this appeal was argued, both counsels for the appellant and counsel for the State were in agreement that the test as to whether the appellants acted as they were expected to do is the test of a reasonable man. From the scenario narrated above, can it be said that the appellants knew or ought to have known that the smell of the petrol at the upper dormitory would lead to the said dormitory being set on fire? Did the appellants act recklessly and negligently when they learnt of the smell of petrol that they failed to prevent the arson which subsequently took place? This Court will attempt to answer the two questions and in answering them will resolve the issues raised on this appeal. Both counsels relied on the decision of *Njenga –versus- Republic* [1980] KLR 89 to define what constitutes a negligent and a reckless act.

In my re-evaluation of the evidence which was adduced in this case, I am of the humble view that the appellants did what was humanly possible to try and deal with the apparent security risk posed by the smell of petrol at the upper dormitory. The test which I have applied in reaching the said conclusion is the test of foreseeability and the test of a reasonable man. From the evidence on record, it is clear that the appellants were alert that an attempt would be made to set on fire the upper dormitory. This decision was influenced by their previous experience where two attempts had been made to set on fire the Headmaster's office and the book store. When the appellants were told of the strong petrol smell, they did not just sit on the information. They went to the upper dormitory and conducted a search around the said dormitory and also along the fence. They did not conduct the search once but several times. By the benefit of hindsight it can be concluded that the appellants ought to have extended the search inside the dormitory and most probably involve the students in the search of the vessel that contained the petrol. Unfortunately, as is always the case, hindsight is a 20/20 vision. One would wish he had done better or acted differently after the occurrence of an event. But as it were, the decisions then made are influenced by what one perceives to be appropriate in the circumstances that prevailed at the time. The appellants could

not have foreseen that the fire that destroyed the said dormitory could result in the death of so many students and injury to an equally high number of students. Even if the appellants could foresee the tragic events that subsequently took place, I am of the humble view that they could not have acted in a different way than they did. The appellants were dealing with a situation where criminals with intent to harm were determined to set the said dormitory on fire. The appellants reaction to the situation then prevailing was informed by their experiences as school administrators. Their situation was not helped by the fact that there were no guidelines issued by the Ministry of Education on how to deal with the situation that they were faced with. The District Education Officer who testified in this case stated that the appellants, even without any guidelines, ought to have used their common sense to take appropriate action. Unfortunately, in this country the concept of what constitutes appropriate action in the circumstances of a particular case, becomes an issue after the occurrence of the events. In the instance case, the appellants were not helped by the fact that the Ministry of Education has a penchant of reacting to situations rather than being in the forefront of formulating policy especially as regards the administrations of schools. It is not lost to this Court that after the fire at Bombolulu the Ministry of Education instructed all the schools dormitories to have their doors open outward and not towards the inside. Their rationale for this decision was to enable evacuation in the event of an emergency. The Ministry did not address the issue of the way these dormitories ought to be build in order to enhance safety in view of the limited resources of the parents who yearn for good education for their children. Neither did they address the number of the students who ought to be accommodated in such dormitories. Nor did it consider that what happens in schools is a microcosm of what happens in society. To expect the appellants to have acted with the vision of a fire department officer was therefore misplaced.

PW 15 Inspector Mwabili the Investigating Officer in this case made a decision to charge the appellants after coming to the conclusion that the appellants had not searched the said dormitory as thoroughly as was expected of them. He further testified that the appellants ought to have reported the smell of the petrol to the police. With due respect to the said witness, his decision was informed by his experience as police officer. His expectations were that the appellants ought to have undertaken a forensic search of the dormitory. The appellants could only conduct the search according to their understanding of the situation then prevailing. The appellants alleged failure to report to the police, in my humble view was not an issue in this instance. The appellants were of the considered view that they had the situation in control. A reasonable headmaster in the circumstances would have taken the same action that the appellants did. It is the humble view of this Court, that the prosecution in this case seems to have been informed by the fact that the Education Administrators at the time, felt that somebody in the school administration ought to be punished for the tragedy at [Particulars Withheld] . The appellants happen to be convenient targets. To find the appellants guilty of failing to prevent a felony in the circumstances of this case would be taken akin to finding the Mayor of Nairobi guilty of failing to prevent a felony when the City Hall was recently destroyed by fire putting into consideration the fact that the Nairobi City Council had resources to prevent the fire and subsequently when the City Hall was set on fire, the resources to prevent the destruction of the said City Hall.

From the a foregoing, I find that the prosecutions case not proved as a consequence of which the appeals filed by the appellants have to succeed. The appeals filed by the appellants are therefore allowed, their convictions quashed and their sentences set aside. The appellants are set at liberty unless otherwise lawfully held.

**Dated and Delivered at Nairobi this 30th day of April 2004.**

**L.KIMARU**

**AG. JUDGE**