



REPUBLIC OF KENYA



**Miruka v Republic (Criminal Appeal E016 of 2024)
[2025] KEHC 6775 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E016 OF 2024
A. ONG'INJO, J
APRIL 10, 2025**

BETWEEN

ELLY OTHIAMBO MIRUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Hon. C. N. C ORUO (PM) delivered on 25th February 2024 in Rongo CR. Case No. E239 of 2020 Republic V Elly Othiambo Miruka)

JUDGMENT

1. The Appellant was convicted and sentenced to serve 10 years imprisonment for the offence of arson contrary to Section 332(a) of the Penal Code whereas his co-accused was acquitted of the charge of arson as no evidence was found against him. For the offence of assault in Count II the Trial Court initially failed to indicate sentence but when matter was referred back the Appellant's sentence was indicated thus:

Count I-Sentenced to 5 years imprisonment.

Count II- Sentenced to 5 years imprisonment. Sentences to run concurrently from 15th February 2024.
2. The Appellant's co-accused was sentenced to serve 1 year CSO at Waware Chief's camp for the offence of assault contrary to Section 251 of the Penal Code.
3. The particulars to the charge in count 1 were that the Appellant Elly Othiambo Miruka and his co-accused on the 5th June 2020 at around 10.00 hrs in Waware Sub-Location in Awendo Sub-County in Migori County jointly willfully and unlawfully set fire to a building namely a dwelling house of Daniel Owawa Miruka and burned household valued at Kshs. 1,000,000/=.
4. The particulars to Count II were that the Appellant and his co-accused on the 5th Day of July 2020 at about 10.00hrs in Waware Sub-Location in Awendo Sub-County in Migori County jointly



intentionally and unlawfully assaulted George Ondoro Miruka thereby occasioning him actual bodily harm.

5. The Appellant was aggrieved by the conviction and sentence and he lodged the appeal herein vide Petition of Appeal filed on 8th April 2024 on the following grounds:

- i. That the plea as taken was not unequivocal
- ii. That the learned Trial Magistrate disregarded all the open discrepancies in the particulars of the offence as captured by the prosecution.
- iii. That the sentence meted was overly harsh inspite of him being a 1st offender.

6. The Appellant prayed that the appeal be allowed , conviction quashed and sentence set aside.

In the Appellant's submission he included additional grounds as follows:

1. That the trial court erred in both law and fact by not complying with Article 50(2) (g) and (h) of the Constitution
2. That trial Magistrate erred in both law and fact by not specifying for which he was sentenced to serve 10years.

7. The Prosecution's case was that PW1's wife called him on 5th July 2021 at around 10.00am and informed him that the Appellant and his co-accused John Oyar Miruka who are his step brothers had set his house on fire. PW1 reported the matter at Awendo Police Station. He said that his brother also went to the police station while bleeding and did not have shoes and said he had been assaulted. Police accompanied PW1 to his home and found the house still burning and roof had caved inside the house. PW1 said they found A1 seated at the scene and he was arrested when he submitted himself to the police. PW1 said he lost household goods worth approximately Kshs. 1,000,000/=. He identified photographs taken at the scene.

8. PW1 in cross examination said he did not see the Appellant burn his house. He said that his brother was to visit him on the material day from Awendo. PW1 also said that his place of work was Awendo. PW1 said that they use firewood and gas for cooking but his wife was not cooking that day.

9. PW1 said he found A2 at the scene. He also said the Appellant and A2 burnt his house using fuel.

10. PW2 Lina Akoth testified that on 5/ 7/2021she went to visit her uncle and found her uncles Elli and John standing outside the house. That the 2asked what she was doing there. That after a short while they took panga and started beating them. That her husband George locked himself in the house and Elli chased her into the sugarcane plantation.

11. PW2 said her husband was injured and he reported at Awendo Police Station and he was issued with P3 which was duly filled. PW2 said it is John Oyar who assaulted her husband and the Appellant burnt Daniel Owaka's house. She said she was in the nearby sugarcane plantation and saw everything. She said Daniel Owaka was at home and his wife was at home.

12. PW2 said the Appellant and John were her brothers in-law and she had known them for one year. She said she was married in the same homestead but resided in Awendo. She said Everline Erasto and George Odoyo witnessed the incident and when the Chief heard them scream he also went to the scene. PW2 said one of the attackers was yet to be arrested. She said the Appellant was armed with a panga and spear. She also said the Appellant had a match box and set the house on fire. PW2 said the Appellant cut her husband on the left wrist. That the husband escaped from the burning house through the roof. PW2 said that after setting the house on fire the Appellant rushed to Awendo Police Station to report.



13. PW2 on being cross examined by A2 said that the accused persons were armed with spears and pangas. She denied that her husband could have burnt the brothers house.
14. PW3 George Ondoro Miruka testified that on 5th July 2021 he left his house and went to his ancestral home in Sakwa where his brother lived. That on arrival he found the Appellant and John Osicho who were his step brothers standing outside their houses.
15. PW3 said further that the Appellant left his house carrying a spear and panga on both hands whereas the 2nd Accused carried a spear. That PW3 stood at PW1's house where he met the wife and the Appellant asked him what had brought him but when he did not answer the Appellant threw the spear at him and he missed it and got into his brothers house. He said that when he got into the house all the 3 went to the house, demolished the door and when he got out they assaulted him and he sustained injuries. PW3 said he escaped into the sugarcane plantation where he met a good Samaritan who took him to the Awendo Police Station and he was advised to go to the hospital. He said that the Appellant told A2 that they wanted to burn all in the house.
16. Pw3 identified Treatment Notes from Awendo Sub-County Hospital. He said the Appellant was arrested together with the 2nd Accused and taken to the station. He said he went and found PW1's house had been torched.
17. In cross examination PW3 said that the Appellant assaulted him using a stick and panga. He said he usually went home and did not have differences with the Appellant before.
18. When cross examined by A2 he said he found Daniels wife at home washing and she did not tell her mention any problem. He said A2 also threw a spear at him and both were armed with pangas. He said he sustained injuries on the left hand and the ribs.
19. PW4 P.C. Murando from Awendo Police Station investigated the allegations of arson and assault against the Appellant and his co-accused. He took photographs at the scene and he produced them as exhibits P1 to 7. He said the Accused persons and the Complainants were step brothers and they had land dispute. PW4 also prepared an inventory of household items destroyed in the arson and he produced it as Ex P5 and approximated the value at Kshs. 1,000,000/= . He said that when the house was set on fire the gas cylinder exploded.
20. PW5 Penina Otaigo a Clinical Officer at Awendo Sub-County Hospital produced P3 form and treatment notes filled by her colleague Lilian Okeyo who examined and treated the Complainant. P3 form was duly filled and degree of injuries assessed as harm. She observed wound on left wrist but it was not bleeding. That there was also bruises on the left side of the abdomen.
21. When the Appellant was placed on defense he gave sworn evidence and said he is an un-trained teacher. He said that he never committed the offence herein. He said that on 5.7.2020 he was with A2 resting under a tree at 10.00am when George Ondoro appeared using a path next to them and assaulted him. He said George was with 3 other people. That the Appellant raised alarm and his co-accused tried to help him and some villagers also responded to the alarm and George ran into Daniel Owawa's house. The Appellant said that villagers who responded to the alarm he raised wanted to know what was going on and there was commotion and George and his companion escaped through the space between the roof and the wall and disappeared into the sugarcane plantation.
22. The Appellant said he reported the matter to police at 16.20hrs and he found George at the station. That at the Police Station he was informed that he burnt a house but it was not true. He said by the time he left home he did not see the house on fire. The Appellant said that the Complainant was not at home and he was only told of the incident. He said he had no grudge with Daniel Owawa.



23. In cross examination the Appellant said that they had a land dispute with the Complainant and there was bad blood between the 2 families. He said that because of the land dispute a fight ensued between him and George but nobody was injured but a house was burnt in the process. The Appellant said George threatened to kill him and he reported the threats. He said that Everlyn and his mother were present at the scene and witnessed the incident.
24. DW2 Bernard Mbogo said that he was at Daniels wife's place when they heard some noise and found Daniels house was on fire and they tried to rescue household goods but the house was locked from inside. That they heard something explode from inside the house. That Daniel and Ondoro went to the scene with police and arrested the Appellant with his co-accused together with Julius Mbogo.
25. In cross examination DW2 said he went and found the house was on fire. He said he saw Liz at the scene. He said he did not see George but he saw A and A2 at the scene. He said even the Appellant's mother was at the scene but she was doing nothing.
26. DW3 the 2nd accused person also gave sworn statement and denied having committed the offence. He said that on 5.7.2020 he was seated under a tree at 10.00am when Everlyn took to him tea. That George Ondoro came with 3 people who were unknown to him and they tried to greet A1. That George got hold of A1's neck and they started fighting. That he tried to separate them but his hand got injured and he raised alarm and villagers responded and George entered into Daniel's house and locked it from inside.
27. That when the villagers came George and the 3 people who were with him escaped from Daniel's house through the opening between the roof and wall and ran into the sugarcane plantation.
28. DW3 said he advised the Appellant to go and report since he had been threatened.
29. That when they saw smoke from Evelyn's house and asked what had happened she said she was cooking. He said that Evelyn had left something in the gas when George entered the house. That as people went to rescue the house they heard an explosion and nobody could get into the house. He said that nobody listened to what he said he had witnessed and he was charged.
30. In cross examination DW3 said that they had land dispute between family members which was being sorted by the Chief. He said George was the cause of the problem. DW3 said that he did not know Liz the wife of George and he could not tell if Elly injured George and he could not tell if Elly was injured. He said that the house burnt after the fight and he witnessed it.
31. DW4 Lucy Sheldon Odongo testified and said that A2 was her husband and that on 5.7.2020 she was at home with A2(DW3) when Everlyn whose house got burnt went to their house and found her with the husband. She said that her husband spoke to Evelyn and in course of it they heard screams and when they rushed to where the noise came from she saw Ondoro get into Evelyn's house. That Evelyn told them to scream for help. DW4 said that Ondoro left Evelyn's house through the opening between the wall and the roof but they did not know where he went to. That they saw smoke come from Evelyn's house. That later Daniel and Ondoro returned in company of police and A 1 and 2 were arrested. DW4 said she did not see George fight with the Appellant. She said Evelyn the wife of Daniel was present.
32. This Appeal was canvassed by way of written submissions.
33. The Appellant's submissions were filed on 18th September 2024. He submitted that when the Trial Magistrate took over the proceedings on 9th August 2023 from his predecessor he did not enlighten the Appellant about his right under Article 50(2), (b), (g) & (h) of *the Constitution* and that in the circumstances the plea was not safe and a gross violation of his constitutional rights.



34. The Appellant further submitted that the Trial Magistrate was biased as he had already convicted him in another matter for which he appealed in CRA No E061 of 2023 and it was against the provisions of fair hearing to proceed with the matter herein.
35. The Appellant submitted further that the Prosecution case was riddled with contradictions and the court's decision to believe PW2's evidence was wrong. The Appellant said that PW2 could not have seen who set the house on fire if the Appellant chased her into the sugarcane plantation and the trial court erred to change the evidence of PW2 to the effect she saw A1 set the house on fire. The Appellant urged the court to dismiss PW2's evidence and alleged she was coached.
36. The Appellant additionally submitted that PW3 did not indicate the nature of injuries he sustained and that the Clinical Officer who treated PW3 did not indicate her name and License Number on the P3. The Appellant also wondered whether a spear and panga can inflict blunt injuries.
37. On sentence the Appellant submitted that the Trial Magistrate in sentencing him did not specify for which offence the was applicable. He further submitted that the offence of assault was not proved to the required standards to enable court convict and sentence him harshly.
38. The Respondent's submissions are dated 22nd October 2024. The Respondents submitted that the Prosecution discharged the burden under Section 107 of the *Evidence Act* beyond reasonable doubt as PW2 testified that she saw the Appellant set the house on fire and then rushed to Awendo Police Station to report. It was submitted that all the ingredients of the offences of arson and assault were proved by the prosecution.
39. The Respondents also submitted that prosecution proved that the Appellant assaulted PW3 as confirmed by Pw2 who said her husband was cut on the left hand wrist and that PW3 and PW5 confirmed the injuries.
40. In regard to the Appellant's submissions that the sentence was harsh the Respondents submitted that the Appellant was accorded the chance to tender his defense and the sentence meted was lenient as the Trial Magistrate used his discretion and the sentence was within the provisions of the prescribed law.
41. In regard to the ground that the court did not comply with Article 50(2) (b), (g) & (h) the Respondent submitted that the same was complied with as shown at page 3 and that the Appellant was supplied with copies of statements and all evidence that the Prosecution relied on before the case proceeded to trial.
42. On the submission that the Trial Magistrate was biased the Respondent submitted that in *Kinyatti v Republic* [1984] Eklr it was held that the mere fact that a magistrate has heard a similar case involving same witnesses does not necessarily disqualify him from hearing another case. It was submitted that the Trial Magistrate exercised discretion to mete out lenient sentence and cannot be said to have been biased.

Analysis and Determination

43. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose v. R* [2013] eKLR thus;

“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”



44. Similarly in the case of *Okeno v Republic* [1972] E. A 32 the East Africa Court of Appeal held:
- “An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exclusive examination.”
45. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:
- (a). Whether the prosecution proved the charges against the Appellant beyond reasonable doubt.
 - (b). Whether the learned Trial Magistrate disregarded the discrepancies in the particulars of the offence as captured by the prosecution.
 - (c). Whether the sentence meted was overly harsh.
 - (d). Whether the trial court erred in both law and fact by not complying with Article 50(2) (g) and (h) of *the Constitution*
 - (e). Whether the trial Magistrate erred in both law and fact by not specifying for which he was sentenced to serve 10years.
46. Section 332(a) of the *Penal Code* it is provided that:
- Any person who willfully and unlawfully sets fire to—
- (a) any building or structure whatever, whether completed or not; or
 - (b) any vessel, whether completed or not; or
 - (c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
 - (d) a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.
47. The Trial Magistrate in finding that the Appellant committed the offence of arson relied on the evidence of Pw2 who said she saw the Appellant set Pw1’s house on fire before chasing her into the sugarcane plantation using a panga. PW2 in her evidence said that the Appellant and his co-Accused suddenly started beating her and her husband using pangas and that the Appellant chased her into the nearby sugarcane plantation from where she saw him clearly setting the house on fire.
48. Although it is not clear how far and in which direction the sugarcane plantation was from the house that was set on fire the undisputed fact which was admitted by the Appellant is that as a result of a scuffle that ensued between the Appellant, the 2nd Accused and Pw3 who are step brothers because of a land dispute PW1’s house was set on fire and household goods whose value is estimated at Kshs. 1,000,000/= was razed down. The Trial Magistrate having heard and seen the witnesses testify cannot be faulted for having arrived at the conclusion that the Appellant herein committed the offence since he was at the scene and admits that there was a scuffle as a result of land dispute.
49. On the issue as to whether PW3 was assaulted PW2 saw the Appellant and the 2nd Accused beat PW3 and medical evidence was produced to that effect. There was evidence that the Appellant was armed with a spear and panga and that when he aimed the spear at PW3 he missed it and that is when he entered into PW1’s house to seek refuge and the Appellant and 2nd Accused in a bid to smoke him out demolished the door and that is when he got a chance to escape and went to report the matter to police and also went for treatment.



50. This court finds that although the Appellant claimed he was the one assaulted and that his co-Accused intervened.
51. This court has considered the Pre-Sentence Report filed in the trial court dated 15/3/2024 which has indicated that differences between the Appellant and his step brothers is a deep rooted family feud that may not be resolved by incarceration of any one of the family members. It is a dispute that involves succession to the estate of their late father and requires the family members to sit down and resolve it once and for all.
52. In consideration of the above matter this court hereby finds that the Appellant's sentence of 5 years having been served from 15th March 2024 is sufficient incarceration save that he will remain on supervision of Probation Officer for one year and 6 months during which period he together with his siblings and step siblings should be able to sort out their differences as far as inheritance of their late fathers' estate is concerned.
53. This court finds that the appeal succeeds partially.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF APRIL, 2025

.....

HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

A. ONG'INJO, J.

