



REPUBLIC OF KENYA



**Omari v Republic (Criminal Case E110 of 2023)  
[2025] KEHC 7993 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7993 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL CASE E110 OF 2023**

**DR KAVEDZA, J**

**JUNE 9, 2025**

**BETWEEN**

**JOSEPHAT ONDARI OMARI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. D. MUTAI (R.M) on 28th July 2024 at Kibera Chief Magistrate's Court  
Criminal Case No. E.1497 of 2023 Republic vs Josephat Ondari Omari)*

**JUDGMENT**

1. The appellant Josephat Ondari Omari was charged and, after a full trial, convicted for the offence of Attempted Arson contrary to section 333 of the *Penal Code*. The Particulars of the offence were that on the night of the 23<sup>rd</sup> day of September 2023 at around 0100 hrs at Magade area in High-rise location of Langata sub-county within Nairobi county attempted unlawfully to set fire to a building namely a dwelling house on the property of Lilian Ongato.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial magistrate demonstrated an open bias towards the prosecution evidence and ignored the defence and he was given a harsh sentence.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. PW1, Lilian Inguto Chitwa, a resident of Magade, Kibera, testified that she resides in house no. 74, while the appellant occupies house no. 76. She knew the appellant and was aware of ongoing



- domestic disputes between him and his wife. She recalled that on the night of 23rd September 2023 at approximately 1.00 a.m., she smelled petrol or diesel and then heard the sound of a matchbox being struck. Upon going outside, under moonlight and security lighting, she allegedly saw the appellant striking a matchbox and attempting to throw it at her house. She raised the alarm, attracting neighbours. They observed that petrol had been poured around the perimeter of her house and on the wall, with an additional bottle of petrol found on the roof. The matter was reported at High Rise Police Station.
5. PW2 corroborated PW1's account, stating he was aware of the marital discord and that PW1 had previously assisted the appellant's wife. He testified that the appellant had confided in him, expressing an intention to retaliate against the woman who had intervened. He cautioned the appellant against such action. However, under cross-examination, he admitted he did not witness the appellant pour petrol or see him at the scene.
  6. PW3 testified that she was awakened around 1.00 a.m. and saw the appellant running. She later learned from Lilian that he had attempted to set her house on fire. She saw a soda bottle containing petrol and confirmed prior involvement in efforts to mediate the domestic issues. She also testified to hearing the appellant threaten Lilian. Upon cross-examination, she stated she saw the appellant dressed in a black trouser and t-shirt.
  7. PW4, PC Joshua Mosoti, based at Lang'ata Police Station, confirmed that PW1 reported the incident and that he accompanied her to the house. He noted a strong smell of petrol at the door. The appellant was not present at the time but was later arrested. The contents of the bottle recovered were labelled as exhibit 1(a), and forensic analysis confirmed the substance was petrol and flammable.
  8. The appellant, DW1, Josephat Ondari, denied the allegations. He stated he left his residence on 15th September 2023 for construction work and returned on 27th September. He claimed he was informed by a neighbour that he was being sought by the authorities, leading to his surrender at the chief's camp and subsequent arrest. He denied involvement in the offence and asserted that no forensic tests such as fingerprinting were conducted to link him to the recovered items. Under cross-examination, he confirmed prior disagreements with his wife and denied owning a black jacket.
  9. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
  10. Section 333 of the *Penal Code* provides that;  
Attempts to commit arson Any person who—
    - (a) attempts unlawfully to set fire to any such thing as is mentioned in section 332; or
    - (b) willfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it, is guilty of a felony, and is liable to imprisonment for fourteen years.
  11. From the record, PW1 gave clear and credible testimony that she saw the appellant through her window attempting to strike a matchbox outside her house. She identified him by recognition under favourable conditions which were security lighting and moonlight, having known him as her neighbour for 19 years. This was not a fleeting encounter but a positive identification based on long-standing familiarity.
  12. Her account was corroborated by PW3, who testified that she saw the appellant running and nearly falling into a ditch shortly after the incident. She recognised him by his features, having also known him well. This strengthens the reliability of PW1's recognition evidence.



13. PW2 further corroborated the account by stating that the appellant had expressed an intention to do something harmful to those who had supported his wife during their disputes. This establishes a motive and supports the inference of intent necessary under Section 333 of the *Penal Code*.
14. The appellant's defence was that he was not present in the area at the time. However, his alibi was uncorroborated despite naming a potential witness, and he failed to raise the alibi during cross-examination. The court finds this defence unreliable and dismisses it. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
15. On sentence, the appellant was sentenced to serve seven (7) years imprisonment. During sentencing, the court considered the pre-sentence report and time spent in custody and exercised discretion. In the premises, I see no reason to interfere with the sentence.
16. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF JUNE 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant absent

Mutuma for the Respondent

Tonny Court Assistant

