



**Sephania & another v Republic (Criminal Appeal 003 & 004 of 2023  
(Consolidated)) [2024] KEHC 1979 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1979 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL 003 & 004 OF 2023 (CONSOLIDATED)**

**HI ONG'UDI, J**

**MARCH 1, 2024**

**BETWEEN**

**PAUL ONSONGO SEPHANIA ..... 1<sup>ST</sup> APPELLANT**

**DISMUS MOGOKA ONDIEKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgement delivered on 27th January, 2023 in Ogembo  
Senior Principal Magistrate's Court Criminal Case No. E728 of 2022)*

**JUDGMENT**

1. Paul Onsongo Sephania and Dismus Mogoka Ondieki hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively were jointly charged with the offence of Arson contrary to section 332(a) of the Penal Code. The particulars were that the 1<sup>st</sup> and 2<sup>nd</sup> appellants with others not before court on the 20<sup>th</sup> day of April 2020, at Nyachogochogo sub-location, Nyamache sub-county within Kisii county, wilfully and unlawfully set fire to a building valued at Ksh 480,000/- belonging to Patrick Nyangweso Mose.
2. Both appellants denied the charge and the matter proceeded to hearing with the prosecution calling four (4) witnesses. The appellants when placed on their defence gave unsworn statements without calling any witness. In his judgment the learned trial magistrate found each appellant guilty and convicted them. Each was sentenced to serve five (5) years imprisonment.
3. Being aggrieved by the Judgment they each filed an appeal. Their grounds of appeal which are similar are as follows:



- i. The learned trial Principal Magistrate erred both in law and fact in holding that the offence of arson as charged had been proved in accordance with the law without taking into consideration the maintenance aside as adduced by prosecution witness.
- ii. The learned trial Principal Magistrate erred both in law and fact in proceeding to convict the Appellants without taking into consideration that the Appellants did not understand the language used by the court.
- iii. The learned trial Principal Magistrate erred both in law and fact in failing to establish the evidence adduced was insufficient and/or was credible to warrant a conviction.
- iv. The learned trial Principal Magistrate erred both in law and fact to misconstrue and/or misapplied the standard of proof as legally required in criminal matters thereby reaching an erroneous finding.
- v. The learned trial Principal Magistrate erred both in law and fact in believing the prosecution case without any regard to the defence testimony.
- vi. The learned trial Principal Magistrate erred both in law and fact in believing the prosecution case without taking and/or exercising reasonable caution thereby convicting the appellant wrongfully.
- vii. The learned trial Principal Magistrate erred both in law and fact in shifting the evidential burden of proof from the prosecution to the defence contrary to the established principal of the law.
- viii. The learned trial Principal Magistrate erred both in law and fact in convicting the appellants without taking into consideration that no independent witness was called hence evidence adduced was far below the required standard.
- ix. The learned trial Principal Magistrate erred both in law and fact in taking into consideration extraneous matters against the evidence as adduced by the prosecution.
- x. The learned trial Principal Magistrate erred both in law and fact in convicting the appellants of the offence of arson without taking into consideration that the charge sheet was defective and bad in law.
- xi. The learned trial Principal Magistrate erred both in law and fact in convicting the appellants without taking into consideration that the appellants were arrested after the elapse of 24 hours as enshrined in *the constitution* hence in total violation of the constitutional rights of the appellants.
- xii. The learned trial Principal Magistrate erred both in law and fact in misdirecting himself when he proceeded to convict the appellants against the weight of evidence adduced in court.
- xiii. The learned trial Principal Magistrate erred both in law and fact and manifested clear bias in total disregard to the provisions of the Criminal Procedure Code Cap 75 Laws of Kenya.
- xiv. The learned trial Principal Magistrate erred both in law and fact in convicting the appellants wrongfully and mounting sentence without taking into consideration the mitigating factors.
- xv. The learned trial Principal Magistrate erred both in law and fact when he misdirected that the trial was a miscarriage of justice and amounts to a nullity and the sentence outlined ought to be set aside.



- xvi. The learned trial Principal Magistrate erred both in law and fact in proceeding to pass a judgment/conviction/ sentence which was harsh and excessive in the circumstances of the instant case.
- xvii. The learned trial Principal Magistrate erred both in law and fact in convicting the appellant without taking into consideration that the charge sheet was fabricated and an after thought in so far as the alleged offence was committed on night of 20<sup>th</sup> April, 2020 and whereas the appellants were arrested two years later and no identification parade was carried out.
4. A summary of the case is that PW1 Patrick Mose Nyangweso was from his place of work on 20<sup>th</sup> April, 2020. Reaching home, he found people on a motorbike looking at his maize. There and then he saw a boy called Samuel coming from his maize farm. Samuel said he had been sent by his father. He knew the people on the motorbike and they were out to kill him. The 1<sup>st</sup> appellant came to him asking what he was doing with Samuel, adding that they were doing witchcraft. He then screamed.
5. PW1 went to the house and called his brother. The 1<sup>st</sup> appellant hit his fence then came to cut his door. He thereafter burnt his house. The 2<sup>nd</sup> appellant who had a petrol pump joined him as the latter lit the fire. His 2 cows, 5 goats and chicken, 2 houses, his brother (Moranga's house) were burnt and their crops damaged. The appellants went to his mother's house and he heard them talking there as they called her a witch. The matter was reported to the police. It was his evidence that there was moonlight on that night and the appellants were among those who burnt his properties.
6. PW2 Peris Gesare was in her house when she heard screams and people saying her people were burnt. She ran out and hid. She heard her door being broken as the people said a witch was inside. Her house livestock and Mose Osuru's house were burnt. She told the court that she saw the two appellants enter her house.
7. PW3 Jairus Mose Nyangusu aged 17 years stated that on 20<sup>th</sup> April, 2020 at 2.00am he was home when the two appellants plus three (3) others (whose names he gave) came screaming while armed and destroyed their fence. He went to the fence. The two appellants put petrol on their roof and set it on fire. They moved to his uncle's house and also set it on fire. They took away two (2) cows and goats before moving to their farm which they destroyed. He escaped to his uncle who lived a little further and he informed him of what had happened. When he fled the group had moved to his mother's house. It was his evidence that security lights were on during the incident.
8. PW4 Sergeant Dominic Odero No. 222678 was the investigating officer. He received the arson report from PW1 on 21<sup>st</sup> April, 2022 at 9.00am while in the office. He told him that he knew the four (4) arsonists who burnt his two (2) houses. Police officers visited the scene and found the houses, two (2) cows and five (5) goats burning. An inquiry file was opened and later on the advice of the DPP arrests were made. Some suspects are still at large.
9. In his unsworn defence the 1<sup>st</sup> appellant Paul Onsongo Zephania denied the charge. He stated that on 20<sup>th</sup> April 2020 he was on the road taking his sister to Nyamambe hospital when he met PW1 and his son. They attacked him for no apparent reason. He was rescued by his uncle and they went to the hospital where they stayed until morning when he reported the attack. He found PW1 there reporting the arson case. He was placed in cells and later released together with PW1's brother. Going home he found PW1's house burnt but he did not know the culprit.
10. The 2<sup>nd</sup> appellant Dennis Mogaka Ondieki unsworn denied the charge. He recalled having been away from home working on 20<sup>th</sup> April, 2020. He came to Ogembo on 24<sup>th</sup> April, 2022 to support his wife who was delivering a baby. He was arrested on 23<sup>rd</sup> May, 2022 while at home.



11. The Appeal was canvassed by way of written submissions.

## Submissions

### The Appellants submissions

12. The firm of M/s Nyangeso & Co. advocates filed submissions dated 15<sup>th</sup> November, 2023 on behalf of both appellants. The appellants similarly filed submissions dated 15<sup>th</sup> November, 2023 which I find to be abuse of process. Counsel submitted that the charge sheet was defective and bad in law for the reasons that it is not supported by evidence. That the value of the burnt property stated in the charge sheet was not proved. Further that no independent witnesses were called and no panga nor jerican were produced by the prosecution. He argued that the evidence is contradictory and tainted with a lot of discrepancies. He added that PW1 was not at the scene so his evidence is hearsay evidence.
13. It is counsel's submission that the standard of proof in criminal cases was not met in this matter. That the prosecution did not prove its case to the required standard. He relied on the case of *Mkendosho Vs Republic* [2002 eKLR 461 to prove this point.
14. Counsel submitted that there was violation of the appellants (not clear which one) constitutional right under Article 49(1) as he was produced in court after the lapse of 24 hours. Secondly there was no evidence on identification adduced. He cited the case of *Huka & others V Republic* [2004] 2 EA 266 in support. Additionally, that the evidence of PW1 & PW2 was contradictory as to what enabled them to identify the appellants at night.
15. He further argued that the appellants were arrested after about two (2) years which renders the prosecution case pre-mature. Counsel pointed out that there is nothing on record showing the language that the court used to communicate with the appellants. Additionally, that the appellants' defence was never considered.
16. He submitted that failure to avail legal representation to the appellants was a violation of their rights under Articles 26 & 50, of *the Constitution* & *Legal Aid Act* No. 6 of 2016. That the appellants were not informed of the need for Legal representation which violated Articles 20, 25, 26, 27 and 48 of *the Constitution*. He further contended that there was a violation of Article 50 (20 of *the Constitution* since the appellants were not supplied with witness statements. Reference was made to the case of *Richard Munene V Republic – Criminal Appeal No. 74 of 2016* [2018] eKLR & *Republic V Karisa Chengo & 2 others* Petition No. 5 of 2015 Supreme Court.
17. The respondent filed submissions by Mr. Brian P. Ayodo assistant director of public prosecutions dated 20<sup>th</sup> November, 2023. On the issue of insufficient and unreliable evidence counsel submitted that the evidence given by PW1 – PW3 was sufficient and reliable. Coming to the issue of the appellants not understanding the language used in court he submitted that from the record the language used was English translated into Kiswahili. The appellants engaged all the witnesses in cross examination and even offered their defence in Kiswahili.
18. It is counsel's argument that contrary to the appellants' submission the learned trial Magistrate considered their defence as stated at Pg 14 (last paragraph) & Pg 15 (first paragraph) of the Judgment. That there was no shifting of the burden of proof, and the court evaluated the evidence adduced by the prosecution against that of the defence.
19. On allegations of a defective charge sheet counsel submitted cited sections 134 & 137 (a) to (j) of the Criminal Procedure Code on what a charge sheet shall contain plus the rules for framing of charges and information. According to him this was complied with as the appellants actively participated in



the proceedings. Further on the claim of violation of the appellants constitutional rights he stated that 21<sup>st</sup> May, 2022 was a Saturday & the earliest date for court appearance was 23<sup>rd</sup> May, 2022, when courts were sitting.

20. Counsel further submitted that the sentence meted out against the appellants was lawful and very lenient as the sentence provided for, for such an offence is Life imprisonment under section 332(a) of the penal code. Further that following the Notice for enhancement of sentence filed and served on the appellants the illegal sentence of five (5) years imprisonment should be quashed and substituted with Life imprisonment.
21. He added that burning houses within Kisii county in the pretext that people are witches is very prevalent and there is need to deter the habit by awarding a harsh and legal sentence as was intended by the law makers. He urged the court to dismiss the Appeal and enhance the sentence.

### **Analysis and Determination**

22. Upon perusal of the grounds of Appeal, evidence on record, parties' submissions and the law I find the following to be the issues for determination.
  - i. Whether the charge sheet was defective
  - ii. Whether the appellants were identified as the culprits
  - iii. Whether the charge against the appellants was proved beyond reasonable doubt

#### **Issue No. (i) Whether the charge sheet was defective**

23. M/s Nyagesoa for the appellants submitted that the charge sheet was defective because it is not supported by evidence. Further that the value of the property as stated in the charge sheet. I have had a chance to look at the charge sheet presented to the trial court on 23<sup>rd</sup> May, 2022. It states the offence as provided for under section 332 (a) of the penal code.
24. The particulars state clearly what the appellants were alleged to have done i.e wilfully and unlawfully setting a building on fire. The value of the burnt building is given as Ksh 480,000/=. Its owner is indicted as Patrick Nyangweso Mose. The date of the alleged offence is given as 20<sup>th</sup> April, 2020.
25. In the case of Isaac Omambia V Republic [1995] eKLR the court had this to say on this issue:

“In this regard, it is pertinent to draw attention to the following provisions of section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge. Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence”.
26. Upon reading the charge sheet complained of I find no defect in it as it correctly states the law under which the appellants are charged. The particulars are also clearly stated. Failure to adduce evidence to prove a charge does not make it defective. Further more the charge was read out to the appellants and they responded and a plea of not guilty entered. The proceedings i.e the prosecution and defence case were conducted in Kiswahili. The appellants have not complained of not knowing Kiswahili the national language. They fully participated in the proceedings.
27. I find no defect in the charge nor any issue in the language used in the proceedings



**Issue No. (ii) Whether the appellants were identified as the culprits**

28. From the evidence adduced this incident occurred at night. Infact to be specific it was at 2.00am. The issue that comes to light is identification of the culprits. Our justice system is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid, that a court must consider identification testimony with great care, especially when the only evidence identifying an accused as the perpetrator comes from one witness.
29. Before basing a conviction on any form of identification the court must be fully satisfied that the said identification had no errors. In doing so, the court will test the truth and accuracy of the averments by the witness/witnesses based on whether he/she had sufficient opportunity to observe the alleged culprit and whether or not he knew him at the time of the alleged incident.
30. In the case of *Mugania & 2 others V Republic & 2 others* (Criminal Appeal No. 21 of 2020 & E003 & E068 of 2021 (consolidated) [2022] KEHC 167 (KLR) Mativo J (as he then was) set out what the court ought to look out for in considering the issue of identification. These are:
- a. What were the lighting conditions under which the witness made his/her observation?
  - b. What was the distance between the witness and the perpetrator?
  - c. Did the witness have an unobstructed view of the perpetrator?
  - d. Did the witness have an opportunity to see and remember the facial features of the perpetrator?
  - e. For what period of time did the witness actually observe the perpetrator?
  - f. During that time in what direction were the witness and perpetrator facing and where was the witnesses' attention directed?
  - g. Did the witness have a particular reason to look at and remember the perpetrator?
  - h. ....
  - i. Did the witness have an opportunity to give a description of the perpetrator? If so to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?
  - j. ....
  - k. To what extent if any did that condition affect the witness's ability to observe and accurately remember the perpetrator?
31. In the case of *Karanja and another V Republic* [2004] 2 KLR 140 the Court of Appeal stated the following on the issue of identification:
- 1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.
  - 2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.



3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.
  4. In this case, while two witnesses claimed to have recognized the first appellant, the sources of light available at the time were torches and moonlight, and no evidence was given as to the strength of the light emanating from those sources. The trial court and the High Court on first appeal did not analyse on the strength and position of the torches.
  5. However, the fact that the first appellant led police to the stolen property was evidence that he knew that it was in the houses where it was recovered. This evidence strengthened the evidence of the complainant on recognition and it was clear evidence of the appellant being in constructive possession of stolen property. He was therefore properly convicted.
  6. As for the second appellant, his conviction was unsafe as it was based on identification by torch light and moonlight the brightness of which was not ascertained by the trial and first Appellant Courts.
  7. Furthermore, as a general rule, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence raised is an alibi or something else. The burden of proving the alibi does not lie on the prisoner and the trial magistrate had seriously misdirected himself on this aspect.
32. Bearing in mind the law and the guidelines stated above I now proceed to re-evaluate the evidence on record. I will start with the evidence of PW1. He said he was from Nyachokochoko Secondary School that night when he found people on a motorbike looking at his maize. At no point did he state who the people on the motor bike were. Besides talking to him he did not say what the boy Samuel did. His two houses were burnt while he was hiding at the fence. He then out of nowhere says there was moonlight. He did not explain and neither was he asked by the court about the nature of the light therefrom.
33. The next witness is PW3. He told the court that on the material night at 2.00am he was at home. Its not stated anywhere what he was doing at that time of the night. While there some people whose names he gave came screaming and he went to their fence and described what he saw. Security lights were on and he knew the attackers. He did not say anything about moonlight and neither did PW1 mention anything about security lights.
34. Identification of a person whether known or unknown at night is an uphill task. The witness must explain in detail how he was able to identify the attacker/attackers in the circumstances. It is not enough just to say there was light/moonlight/security light. The witness must explain further, the nature of the light, whether it was full or half-moon. How far he was from the light, the attacker etc. This instant case neither PW1 nor PW3 fulfilled any of the above.
35. Further in the case of Simiyu & another V Republic [2005] I KLR 192 the Court of Appeal further stated:
1. ....
  2. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.



3. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.
4. In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.
36. The above case still stresses on the need to explain the nature of the alleged moonlight or its brightness. In this case PW4 Sgt Dominic Odero was the investigating officer. All that he told the court was that PW1 told him that his house was set on fire by 4 persons. They arrested the two appellants while the others remained at large. He never at any point told the court of any names and or descriptions given to him by PW1 and PW3 or any of them.
37. In the absence of all this, how did he arrest the appellants? Its true that PW3 gave the names of six (6) persons to the court as is recorded, but were these names ever given to the police? From the evidence the answer is No. The appellants gave an alibi defence. It was the duty of the prosecution to place them at the scene of crime from the evidence adduced.
38. Another unmentioned issue is that of the delay in prosecuting the case. The report was made on 21<sup>st</sup> April, 2020. It was not until 21<sup>st</sup> May 2022 that the appellants were arrested and arraigned in court on 23<sup>rd</sup> May, 2022. There is no explanation given for such a delay. If indeed the appellants were known why were they not arrested immediately?
39. This court is not overlooking the seriousness of what happened to the complainant's family houses. The issue is whether there was proper identification of the wrongdoers. My finding is that the evidence adduced was not sufficient to confirm any identification.
40. On the third issue I find that the charge against both appellants was not proved to the required standard. This is supported by what I have stated in respect of the second issue.
41. The upshot is that the appeal has merit and is allowed. The conviction against both appellants is quashed and the sentence set aside. Both appellants to be released unless otherwise held under a separate warrant
42. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1<sup>ST</sup> DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.**

**H.I.ONG'UDI**

**JUDGE**

