



**Wachira & 4 others v Republic (Criminal Appeal E018, E019, E020, E021 & E022 of 2024  
(Consolidated)) [2024] KEHC 10852 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E018, E019, E020, E021 & E022 OF 2024 (CONSOLIDATED)  
LM NJUGUNA, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**DICKSON WACHIRA ..... 1<sup>ST</sup> APPELLANT  
SIMON MBOGO MABABIA ..... 2<sup>ND</sup> APPELLANT  
NICHOLAS MUNYUOKI MUNGUTI ..... 3<sup>RD</sup> APPELLANT  
ROBERT MBOGO NDUMA ..... 4<sup>TH</sup> APPELLANT  
FRANCIS NJIRU MUGO ..... 5<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Siakago Magistrate's  
Court Criminal Case No. E186 of 2022 delivered on 12th January 2024)*

**JUDGMENT**

1. The appellants filed memoranda of appeal seeking that the appeals be allowed, convictions be quashed, sentences be set aside. The grounds of appeal are that:
  - a. The trial magistrate erred in law and fact in convicting the appellants when the prosecution did not prove its case beyond reasonable doubt;
  - b. The trial magistrate erred in law in failing to give the appellants the benefit of doubt entitled to them;
  - c. Part of the proceedings were conducted in a language not understood by the appellants;
  - d. The language used was not recorded in the proceedings; and



- e. The trial magistrate erred in law in convicting and sentencing the appellants when there was completely no evidence to support the charges.
2. The appellants were jointly charged with 2 counts. The first count was conspiracy to commit a felony contrary to section 393 of the Penal Code. Particulars of the first count are that on 27<sup>th</sup> January 2022 at Kanganga village, Kiambere location in Mbeere South sublocation within Embu County, the appellants, jointly with others not before court, conspired to commit a felony namely arson to a dwelling house valued at Kshs.800,000/= a food store valued at Kshs.650,000/= and a 10,000 litres water tank valued at Kshs.100,000/=; altogether valued at Kshs.1,550,000/=, the property of Nicholas Mbogo Magara.
  3. The second count was the offence of arson contrary to section 332(a) of the Penal Code, whose particulars are that on 27<sup>th</sup> January 2022 at Kanganga village, Kiambere location in Mbeere South sublocation within Embu County, the appellants, jointly with others not before court, conspired to commit a felony namely arson to a dwelling house valued at Kshs.800,000/= a food store valued at Kshs.650,000/= and a 10,000 litres water tank valued at Kshs.100,000/=; altogether valued at Kshs.1,550,000/=, the property of Nicholas Mbogo Magara.
  4. The appellants pleaded not guilty and a plea of not guilty was duly entered for each of them. The prosecution called witnesses in support of its case.
  5. PW1, the complainant, stated that on the day of the incident, he was leaving his home while driving his motor vehicle when he saw a group of people being addressed by John Nyaga but when he approached them, they went silent. That he took their actions to mean that he was not wanted at the meeting, which was being attended by all the appellants. That he called to find out what the meeting was about and one Thomas Ndaru told him that he was also not invited to the meeting but the chief had been asked to address the congregants. That the chief told him that the agenda of the meeting was as eviction order from Siakago MCL&E case no. 136/2018 which was executed by Quickline Auctioneers in the presence of the OCS Kiritiri where one of their neighbors had been evicted.
  6. He stated that in the said case, he was the plaintiff who won the case against one Beatrice Mueni Musila, who was evicted. That he went to work and, in the evening, he was given a lift home by his colleague and at 7PM, he was informed by one Boniface Kimotho that the road leading to his home had been barricaded. That the said Boniface became his informer and he told him that the people who had barricaded the road had become more aggressive. That his informer told him that at around 7:30PM, he had heard the crowd saying that they were waiting for petrol. On hearing this, he called his wife and advised her to leave the homestead for her own safety.
  7. He stated that his informer told him that the people had started gathering again on the road and they were armed. That he called the officer in charge of Mutuobare police post who brushed him off and told him that there was a patrol police vehicle headed towards the crowd. That at around 8:30PM, Alice, his neighbor called to inform him that the people were heading towards his homestead and his informer later called to inform him that his home had been set on fire. That since he had reported the matter earlier that day, he went to Mutuobare police station again and reported and then spent the night there. The next morning, police officers told him to go home and assess the damage and he found that his food store and the house were torched and the water tank had been slashed open and the water had spilt. That he lost everything in the fire including his title deeds and he returned to the police station to report the arson.
  8. It was his further evidence that he was informed by Boniface that it was the 1<sup>st</sup> appellant who was inciting the boys to burn the house down. He stated that he bought the land from one Josphat



Mugo who transferred the land to him but his title deed was burned inside the house. He produced a certificate of official search proving that the land was in his name. He stated that the scene was processed by DCI and photographs were taken before the appellants were identified and arrested. That the damage caused is worth approximately Kshs.1.9Million. That after the incident, the 2<sup>nd</sup> appellant threatened him through Boniface Kimotho, saying that he had set aside Kshs.1 million and that it was not yet over. On cross-examination, he stated that Kimotho was his pupil and friend and he believed his word. That the photographs do not show the 1<sup>st</sup> appellant at the home. That he was on his way to work and that is why he couldn't stay to listen to what the village elder was saying to the crowd that morning. That he had not been invited to the said meeting.

9. PW2, Solomon Mureithi Mbui, the chief of Kiambere location stated that John Nyaga, a village elder informed him that he had been summoned by villagers and when he went, the villagers demanded to see the chief to discuss the issue of PW1 who had caused one of their neighbours to be evicted. That he did not attend the meeting and told the village elder that the eviction was done pursuant to a court order and that any grievances should be addressed through the police. That later that evening, PW1 informed him that some people were planning to raid his home and he later talked to the OCS about the issue.
10. That at around midnight, PW1 sent him a message telling him that his home had been torched and the water tank destroyed. He stated that he visited the scene together with PW1's wife and PW1 arrived later with an OB number. That while he was on his way home, he met with John Nyaga and they discussed the occurrence and that the 1<sup>st</sup> appellant and some of the people who were at the meeting he had addressed earlier. On cross-examination, he stated that he did not have any proof that the appellants started the fire and he did not know who committed the offence.
11. PW3 was John Nyaga Gatiti who stated that the 4<sup>th</sup> appellant called him to a meeting where 20 people had gathered and he told him to call the chief because PW1 had caused their neighbor to be evicted. That he called PW2 about the request but he distanced himself from the issue and advised that the eviction had been done pursuant to a court order thus it was not a matter for discussion. That the complainant passed by the gathering but no one spoke to him. That later on, PW2 called to inform him that PW1's house had been burned down and so he called the 1<sup>st</sup> appellant who said that he had also heard about the incident. On cross-examination, he stated that he did not know who committed the offence and how the appellants were identified as the assailants.
12. PW4 was Veronica Ndunge Musyoka who stated that Josphat Mugo told him that there would be a meeting the following day and she went to the venue. That she found other people had gathered and she walked to the meeting with PW3. That the appellants were present at the said meeting where the people demanded audience with the chief to discuss their neighbour's eviction. PW3 called PW2 on phone and put him on loudspeaker for all to hear and the chief said that the issue they had was not one to be discussed since it was done pursuant to a court order. Some people were dissatisfied with the response and they left but others remained.
13. It was her evidence that some people conspired to block the road leading to PW1's home but others spoke of burning his house down. That the 4<sup>th</sup> appellant said that the people who contributed money for petrol should hand it over to him. On cross-examination, she stated that no one contributed money for petrol and that she did not know who burned the house down. That she did not see the 1<sup>st</sup> appellant at the meeting and she did not know how and why the appellants were identified and arrested in connection with the offence.
14. PW5 was IP Sarah Bokosh of Scenes of Crimes Investigation Embu County. She testified on behalf of Cpl. Henry Kiboma who was on transfer and who visited the crime scene and took photographs. She



- produced 10 photographs and the corresponding report. On cross-examination, she stated that none of the appellants were photographed at the scene and that she did not know who committed the offence.
15. PW6 was Cpl. Joseph Ngari of DCI Mbeere South who testified that PW1 reported the incident at Kiritiri Police Station. It was his testimony that from his investigations, he found out that after the chief dispersed the meeting, the village elders left but the people who attended the meeting, including the appellants, proceeded to burn down the home of PW1. He stated that he wrote a letter to the registrar of land to verify ownership of the land in question and obtained an official search which was produced as evidence. That he had the damage from the fire assessed by the subcounty works officer who prepared a report which was produced as evidence.
  16. He established that there had been enmity between PW1 and the villagers who eventually planned to evict him from the land in question. On cross-examination, he stated that the 4<sup>th</sup> accused was arrested because he failed to explain himself sufficiently about his involvement in the incident. That the village elder identified the people who were in the meeting where the incident was plotted. That the meeting was not summoned by the village elder but by the villagers who sought audience with the village elder.
  17. At the end of the prosecution's case, the court found that the appellants had a case to answer and they were placed on their defence.
  18. DW1 was the 4<sup>th</sup> appellant who defended himself saying that on the day of the incident, he was away on a function he had been invited to, and that he had a witness to corroborate his position. He called DW2, Andrew Katiti Aroan as a witness, who stated that on the day of the incident, he was hosting some visitors and so he invited DW1 to his home. That the function at his home began at 6PM and ended at 9:30-10PM when the visitors dispersed.
  19. On cross-examination, he stated that he did not know the time when DW1 arrived for the function but it started at 6PM and there were about 50 guests. That at the time of introductions, DW1 was there among the guests. That his home is about 2KM from PW1's home and that he did not know where DW1 had been before attending the function. He did not know anything about the fire and he stated that DW1's mother had urged him to go and testify that DW1 was at his function that evening. He stated that he did not know that DW1 had told the police that he was at home the whole day on the material day
  20. The 4<sup>th</sup> appellant also called DW3, David Njagi Munyi as a witness, who stated that he was at DW2's function with DW1. That he left the function with DW1 and spent the night at his house. On cross examination, he stated that he went to DW1's home at 1PM and they went together to DW2's home at 4PM. (The trial court noted that he had a shaky demeanor when he was testifying). He stated that he did not know that DW1 had told the police that he was at home the whole day on the material day.
  21. DW4 was the 3<sup>rd</sup> appellant who stated that on the day of the incident, he had gone to Machakos to build a house for one Dennis Mutuku and he spent the night there. That his wife informed him that the DCIO had summoned him and he was surprised because he had nothing to do with the incident. On cross-examination, he stated that he had told the police that he had gone to the shop to buy cigarettes when he came across a meeting where the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants were. That the meeting was dispersed by the chief but before that, the attendants were raising various grievances.
  22. That the 4<sup>th</sup> appellant urged the attendees to come up with a way of living with the complainant. That he left his home at 12noon and returned at 2:30PM. He called DW5, Dennis Mutuku Mutua as his witness, who stated that he called DW4 to go to his place in Machakos so that he could build him a house. That DW4 went on the day of the incident but he arrived late in the day and he worked for a period of 2 weeks. On cross-examination, he stated that the complainant's home is about 20KM



- away from his and that DW4 had mentioned to him that he had been summoned by the DCI over the incident.
23. DW6 was the 2<sup>nd</sup> appellant who testified that he had been requested by a village elder to accompany him to a meeting and while at the venue, he was called by his boss to go and collect goats from Mwingi. That he left the meeting and went to collect the goats and he was away until the following afternoon. That after 2 weeks he was summoned by the DCI over the incident but he denied any knowledge of the incident and how it occurred even though he was tortured by the police.
  24. DW7 testified that he requested DW6's company to go to Kamanongo to buy goats on the day of the incident. He stated that he was with DW6 from 6:30PM on the day of the incident to 3PM the following day. On cross-examination, he stated that he did not know where DW6 had spent his day.
  25. DW8 was the 5<sup>th</sup> Appellant who stated that on the day of the incident, he took his child to school and then he got a customer who wanted to be dropped off at a function. That he dropped the customer using his bodaboda and then waited for the customer until 8PM. That he got home at 11PM then slept until the next morning. He stated that he was not at any meeting. On cross-examination he stated that he left Mutuobare at 8AM with a customer who was going to a function in Makima where they arrived at 2PM and that the customer had hired him for the day. That all the people who mentioned him being at the meeting had lied.
  26. DW8 called DW9, Edward Ileri Njagi as a witness, who stated that he hired DW8 to take him to a function at Makima. That they left at around 10AM and the function ended at 4PM. That DW8 dropped him home at about 11PM. On cross-examination, he stated that the function was at Kavengero in Mavuria and that it was his son who paid for the transport which was Kshs.400/=. That DW8 informed him when he was summoned by the police in connection with the incident.
  27. DW10, the 1<sup>st</sup> accused, stated that he was working as a conductor and on the day of the incident, he went from Embu to Kanyonyo and then proceeded to Makima-Ungoni where he arrived at midnight. That he spent the night there since there was a wedding function and the next day, he took his passengers to Kagondori. That he was surprised to be arrested over the incident. On cross-examination, he stated that he was working with his driver and that he never stepped foot at Mutuobare that day. When referred to his statement to the police he stated that he had been coerced into saying that he had spent the whole day at Mutuobare with a lorry driver and he went home at 7PM.
  28. DW10 called DW11, Paul Kariuki Njogu as his witness, who stated that on the day of the incident, he was with DW10 and they left Kanyonyo, went to Embu then to Kiritiri before heading to Kyondoni to pick some customers. That they left Kyondoni and then went to Ungoni at 10PM and all along, he was with DW10.
  29. At the close of the defense cases, the trial court found the accused persons guilty of the 2 counts and convicted them accordingly. They were each sentenced to 3 years imprisonment for the 1<sup>st</sup> count and 14 years imprisonment for the second count.
  30. The parties to the appeal were directed to file their written submissions and they both complied.
  31. The appellants submitted that they did not understand the language used at the trial which was English and Kiswahili. That before the hearing began, the court had offered interpretation of the proceedings from English/Kiswahili to Kimbeere but at the hearing, they did not understand the language used since the court conducted the proceedings in English. That the court also failed to record the language that was being used by a witness. It was also their argument that they were denied their constitutional right to be represented by an advocate throughout the proceedings. That the prosecution failed to prove the case against them beyond reasonable doubt, citing contradictions in the testimony of the



- prosecution witnesses. That the investigating officer's evidence shows that he did not know who committed the offence. They relied on the cases of *Cisse Djibrilla v. Republic (Criminal Appeal 221 of 2006)* [2008] KECA 303 (KLR) and *David Kariuki Kibuku v Republic* [2017] KECA 759 (KLR).
32. On its part, the respondent relied on the provisions of section 393 of the Penal Code and the case of *Christopher Wafula Makokha v. Republic* [2014] eKLR. It also relied on the meaning of the word 'conspiracy' per the Black's Law Dictionary. It further relied on the provisions of section 332 of the Penal Code and the cases of *Arthur Muya Muriuki v. Republic* [2015] eKLR and *Abanga alias Onyango v Republic*, Cr. App. No 32 of 1990 and urged that the offence of arson was proved beyond reasonable doubt.
33. It submitted that the appellants were offered the languages of Kiswahili and Kimbeere throughout the trial according to the tenets of fair hearing as provided in Article 50(2)(m) of *the Constitution* and section 198(1) of the Criminal Procedure Code. Further reliance was placed on the case of *Abdalla Hassan Hiyesa v Republic* [2015] eKLR. It submitted that the court imposed fair sentences while considering the mitigating and aggravating factors and it cited the case of *Bernard Kimani Gacheru v Republic* [2002] KECA 94 (KLR).
34. From the foregoing, it is my view that the issues for determination are as follows:
- a. Whether the appellants were denied a right to have proceedings conducted in a language which they could understand;
  - b. whether or not the prosecution has proved the case beyond reasonable doubt against the appellants on both counts;
  - c. whether the sentence should be set aside.
35. This court is well aware of its obligations as a first appellate court and it endeavors to review the evidence at trial and reach its own conclusion. In the case of *Okeno v Republic* [1972] EA 32 I agree with the court when it held:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
36. The appellants have contended in this appeal that the trial court proceedings were conducted in a language that they were unfamiliar with and that the trial magistrate, in some instances, failed to state the language that was used by the witnesses. Indeed, the appellants have the right to follow and participate in the proceedings in a language that they can understand, according to Article 50(2)(m) of *the Constitution* which states: “Every accused person has the right to a fair trial, which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial”. In the case of *Elijah Njihia Wakianda v. Republic* (2016) eKLR, the Court



of Appeal addressed itself on the importance of understandable language for the sake of an accused person, as follows:

“We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language.....”

37. From perusing the proceedings, I have noted that at the time of taking the plea, the court recorded that the charges were read to each of the appellants in Kiswahili which was translated to Kimbeere where necessary. This was the occurrence throughout the proceedings. The appellants herein submitted that when the hearing began, they did not understand the proceedings. Once again, from the evidence of the prosecution witnesses, whether or not the trial magistrate indicated the language used by the witness, each of the appellants cross-examined the witnesses and where they did not have questions, they indicated to the court as much. This means that the appellants clearly understood the language that was used and they followed the proceedings enough to participate fully in cross-examination of the prosecution witnesses. Therefore, this ground of appeal fails.

38. The second issue is whether the prosecution proved the 2 counts beyond reasonable doubt. The first count is grounded on section 393 of the Penal Code which states:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

39. In the case of *Lawrence Gitau Karanu v Republic* [2020] eKLR, the court stated as follows;

“The dominant aspect of the offence of conspiracy is that there must be an agreement, a meeting of the mind.”

40. The Black Law Dictionary 9<sup>th</sup> Edition defines conspiracy as follows;

“An agreement by two or more persons to commit an unlawful act coupled with intent to achieve the agreement’s motive and (in most states) action or conduct that furthers’ the agreement; a combination for an unlawful purpose”.

41. In the text by Archibold; *Writing on Criminal Pleadings, Evidence And Practice*, he observes;

“The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons so long as a design rests in intention only, it is not indictable. There must be an agreement; proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.”

(see also the cases of *Ann Wangechi Mugo & 6 others v Republic* [2022] eKLR and *Republic v Anne Atieno Abdul & Others* [2017] eKLR)



42. It was upon the prosecution to prove that the appellants met and agreed by common mind to burn down the complainant's house, food store and destroy the water tank, which conspiracy led to the offence of arson. It requires that a common purpose between them or among the subject parties is proved. Common intention is set out in Section 21 of the Penal Code as follows;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

43. PW1 testified that while on his way to work he found a group of people being addressed by PW3 but when he moved closer, they went quiet and he figured out that he was not welcome and so he went on his way. That one Boniface Kimotho became his informer and he told him that the people who had gathered that morning had blocked the road leading to his home and then later they set his house on fire.

44. According to the testimony of PW1, PW2 and PW3, all the appellants were at the meeting whose agenda was to address the reason why a neighbour had been evicted through a court order obtained by PW1. PW3 stated that when he arrived at the meeting, he was addressed by the 4<sup>th</sup> appellant who demanded audience with PW2, the chief. PW4 also stated that she attended the meeting where she saw all the appellants and the 4<sup>th</sup> appellant was mobilizing the group to contribute money for petrol.

45. In his defense, DW1, the 4<sup>th</sup> appellant, called DW2 and DW3 as witnesses and he stated that he was at a function that evening from 6PM until late in the night. Even though DW3 stated that the function at DW2's home began at 2PM, this evidence does not help to account for the 4<sup>th</sup> appellant's whereabouts that morning and it does not exclude him from the said meeting. DW4, the 3<sup>rd</sup> appellant said that on the day of the incident, he went to Machakos to build a house for DW5, who corroborated his evidence. DW4 also admitted on cross-examination that he was part of the meeting and then he left for Machakos at about 2:30PM.

46. DW6, the 2<sup>nd</sup> appellant said that he was at the meeting but he left shortly after arriving and went to purchase stocks with his boss, DW7, who corroborated his testimony. DW8, the 5<sup>th</sup> appellant said that he spent the whole of that day with a customer and he knew nothing about the meeting since he got home at 10 or 11PM. He stated that he got his customer after he had dropped his child at school at around 8AM. His evidence was corroborated by DW9, his customer for that whole day but he stated that they met at 10AM. DW10 and DW11 both stated that they spent the day together ferrying customers in the matatu they operate from one town to another. DW10 stated that he never spent time at Mutuobare but he told the police as much because he was coerced to do so.

47. From the evidence, which is considered wholesomely, it is my considered view that in as much as all the appellants presented alibis, they were raised too late in the day and the prosecution did not have an opportunity to interrogate them by way of cross examination. This makes the defense evidence unbelievable because the alibis were brought into the picture after the close of the prosecution's case. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the Court of Appeal stated the following on the issue of alibi:

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, see also *Karanja vs. Republic* [1983] KLR 501 where the court held that in a proper case a trial court may, in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilt is established beyond all reasonable doubt, take



into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

48. The prosecution witnesses consistently testified that the agenda at the meeting was to address reasons why the complainant caused their neighbor to be evicted from her land. In his evidence the complainant produced evidence to prove that the land in issue is registered in his name and the eviction was lawful and it was pursuant to a court order issued in Siakago MC/E136/2018. When PW3 arrived at the meeting and the members sought the audience with PW2, he confirmed to PW3 that the eviction was lawful and if any of them had any issues, they should make a report to the police. Despite the meeting being dispersed by the chief through a phone call, the appellants stayed on and plotted by common intention to commit an unlawful act against the complainant. To this end, it is my finding that with regards to the 1<sup>st</sup> count, the prosecution did prove the case against the appellants beyond reasonable doubt.
49. As pertains the 2<sup>nd</sup> count, Section 332(a) of the Penal Code stipulates:
- “Any person who willfully and unlawfully sets fire to:
- a. Any building or structure whatever, whether completed or not ..... is guilty of a felony and is liable to imprisonment for life.”
50. There may not be direct evidence showing that the appellants committed the offence of arson. However, where direct evidence fails, there is need to explore circumstantial evidence, albeit cautiously. In the case of *Sawe v Republic* [2003] KLR 364, the Court of Appeal stated that:
- “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused.”
51. Additionally, in the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court had this to say on circumstantial evidence:
- “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”
52. PW1 testified that while on his way to work on the morning of the incident, he saw the appellants at the meeting and when he moved closer, they stopped talking and so he went away. PW2, PW3 and PW4 stated that the agenda of the meeting was to have the area chief (PW2) address them on the issue of one of their neighbours who had been evicted pursuant to a court order obtained by PW1. PW4 testified



that at the meeting, after PW2 told them to disperse, the attendees stayed on and became rowdy and some of the people proposed that they burn down PW1's house while others said that they should barricade the road leading to PW1's home.

53. She also stated that the 4<sup>th</sup> appellant led the people in a suggestion to buy petrol and that he would be collecting contributions for that purpose. PW1 testified that his informer, one Boniface continually updated him throughout the day on what the villagers were doing against him as expressed in the meeting, including the barricading of the road leading to his home and eventually the acts of arson. PW1 stated that the informer told him that the 1<sup>st</sup> appellant was the one inciting young boys to burn down the structures.
54. From re-evaluation of the evidence as stated in my previous paragraphs, I have established that there is indeed a strong chain of circumstantial evidence given that the appellants jointly had a motive to burn down the complainant's house as a way of evicting him for causing one of their other neighbours to be evicted from the land. In other words, it cannot be a coincidence that the complainant's house was burned down on the same day when the meeting was held, a meeting at which the idea was hatched, nurtured and actioned a few hours later. Furthermore, in light of section 21 of the Penal Code, and having established the common intention and their insufficient alibis, it is my finding that each of the accused person was liable for arson, as correctly found by the trial court.
55. Therefore, in the end, I find that the appeal lacks merit and it is hereby dismissed.
56. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellants

.....for the State

