



**Kipkore v Republic (Criminal Appeal E004 of 2024)
[2024] KEHC 13588 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E004 OF 2024
RPV WENDOH, J
OCTOBER 25, 2024**

BETWEEN

BENJAMIN KEMBOI KIPKORE APPELLANT

AND

REPUBLIC RESPONDENT

(Original Conviction and Sentence in Criminal Case No. E850 of 2023 of the SPM's Court)

JUDGMENT

1. Benjamin Kemboi Kipkore was convicted for the Offence of Arson contrary to section 332(a) of the *Penal Code* by PM's Court Kapenguria. The particulars of the charges are that on 16/9/2023 at Psitonu area in Pokot South Sub-County within West Pokot County, willfully and unlawfully set fire to a dwelling house containing household goods and cash Kshs.15,000/= . All valued at Kshs.70,000/= The property of Rose Kemboi.
2. Upon conviction, he was sentenced to serve seven (7) years imprisonment. The appellant was dissatisfied with both the conviction and sentence and preferred this appeal on two broad grounds; that the offence of arson was not proved to the required standard and that the sentence is harsh and excessive. He prayed that the sentence be reduced.
3. This court directed that the appeal be canvassed through written submissions and the appellant filed his submissions on 17/7/2024. The Respondent also filed their submissions on 7/10/2024.
4. The appellant submitted that PW 1 in her testimony never mentioned that PW3 was present at the scene; that PW3 contradicted the evidence of PW1 and 2 yet the court relied on her testimony; that the court did not comply with Section 124 of the *Evidence Act* because there was no corroboration of the evidence, that the prosecution evidence was fraught with contradictions for example, PW3 saying that she was with the mother in the farm and at the same time said that when the appellant came to where



- they were, he asked for the whereabouts of PW3's mother; that there was also contradictory evidence as to whether or not anybody saw the appellant strike the match.
5. In opposing the appeal, the prosecution Counsel, Mr. Majale submitted that the evidence of PW2 and 3 corroborated PW1's testimony as to what the appellant did; that although the appellant denied striking a match, he claimed that the house caught fire when he was preparing vegetables but the defence did not dislodge the prosecution evidence and that the appellants actions of preventing anybody from putting off the fire and throwing other items in the house are evidence of mens rea; that the conviction is well founded.
 6. On sentence, the Respondent Counsel submitted that Section 332 [Penal Code](#) provides for a sentence of life imprisonment upon conviction but the appellant was only handed seven (7) years despite the damage he caused his own family; that the appellant is a danger to his own family and should be kept in prison. Counsel urged the court to consider the Judiciary sentencing policy guidelines (2010). Counsel urged the court to dismiss the appeal.
 7. This being a first appeal, this court is guarded by the decision in *Okeno v. Republic* (1972) EA 32 where it was held that, in a first appeal, the appellant court must re-examine all the evidence tendered in the trial court, evaluate and analyze it and arrive at its own conclusions but bear in mind that this court neither saw nor heard the witnesses testifying, an opportunity which that the trial court had.
 8. PW1 Rose Kemboi, the appellants wife recalled that on 16/9/2023, while on her farm with neighbours harvesting potatoes when the appellant appeared with a panga and people ran off; that he went to their house and set it ablaze and barred anyone from putting off the fire, she reported to police and he was arrested. She lost money and all the household goods.
 9. PW2 Grace Kipkore a sister to the appellant was with PW1 in the farm when the appellant went there threatening to kill PW1; that he entered the house and then she saw the house on fire; that the appellant entered another house, picked some items and threw them in the burning house.
 10. PW3 Gloria Cherotich, daughter to the appellant and PW1 was with PW1 and 2 in the farm when the father went there with a panga and asked where her mother was as he wanted to kill her and people ran away; that he went home and burnt the house, picked her uniform, the books and certificates from a different house, and threw them in the burning house.
 11. PW4 Inspector Nguchu Ongeyo OCS Tapach police station, the Investigating Officer, received a report of Arson from the complainant (PW1) on 16/12/2023 about 6.00p.m. He advised her to get a place to sleep and report next day. He sent officers to the scene who went and took photographs of the burnt house. Police went in search of the appellant and found him hiding in a thicket.
 12. When called upon to defend himself, he gave evidence on oath, he returned home about 2.00p.m. from work. He did not find PW1 at home, and could not get her on phone, that he sat next to the bed and on waking up about 3.00p.m. got a message on phone that there was fire in the kitchen; that he picked vegetables to cook, oil spilt on frying pan fire sparked got onto the roof through the ceiling. He then heard screams outside that the house was burning. On going out, he saw PW1 shouting telling people to confront him; he was therefore arrested by police.
 13. I have duly considered the evidence on record, the grounds of appeal and submissions by both parties. The issues raised in the appeal are, whether the prosecution evidence was contradictory, whether the offence was proved to the required standard and lastly, whether the sentence was harsh and excessive.



14. In an Offence of Arson under section 332(a) of the [Penal Code](#), the ingredients that need to be proved by the prosecution are, whether the appellant set on fire a house or building; whether the act was willful and unlawful.
15. The admitted facts are that the complainants house burnt down on 16/9/2023 and when the fire broke out, the appellant was inside having just entered.
16. The appellant complained that the evidence of PW 1,2 and 3 the key witnesses is contradictory as to whether they saw him light a match. It is only PW3 who claimed to have seen appellant light the match. However, PW3 she did not disclose how she was able to see when she was outside the house. It is trite law that not every contradiction in the prosecution evidence will lead to a rejection of the evidence because people tend to perceive things differently. The court has to consider whether the contradictions were so material that the trial court should have rejected the evidence. In [Twebangane Alfred v Uganda](#) Cri. App. No. 139/2003 UGCA 6, the court said.

“with regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained, will usually lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness, or if they do not affect the main substance of the prosecution case”

17. The question then is whether the inconsistency in the evidence of PW3 is fatal to the prosecution case. PW1 told the court that they were harvesting potatoes very near their/her house about 100 metres away. PW2 confirmed they were together and since the appellant entered the house after which they saw the fire, I believe PW3 exaggerated by alleging she saw the appellant strike the match that burnt the house since nobody saw the appellant actually put on the match, the only available evidence is circumstantial evidence.
18. Circumstantial evidence has been said to be the best evidence. This is what the court stated in [Neema Mwandoro Ndurya v Republic](#) CR.A 466/2007 which the Court of Appeal cited with approval the case of *Republic v Taylor Weaver Donovan* (1928) 21 CRC 20 where the court said

“Circumstantial evidence is often said to be the best evidence. It is evidence of surrounding circumstances whereby intensified examination is capable of proving a proposition with accuracy of mathematics”

19. For the court to base a conviction in circumstantial evidence, the evidence must satisfy the conditions articulated in several decisions.
20. In [Abamad Abulfathi Mohammed & Another v Republic](#) (2018) eKLR the court said. See paragraph 30 CR CA 10/2020 [Francis Matiko Mwita v Republic](#)

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abang’a alias Onyango v R* CR. App. No 32 of 1990, this court set out: -

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;



- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.”

21. All the three witnesses testified to how the appellant came back home, abusing PW1, threatening to kill her entered the house and when he came out, the house was on fire. He did not stop he barred people from helping put out the fire and also collected other items from another house e.g., PW3 books, birth certificates alleging that the children were not even his and threw them in the fire. The appellants conduct speaks volumes. It points to his intention to burn the house with its contents.
22. The appellants defence was totally contradictory. At first, he claims to have been seated on the bed when suddenly he heard screams that there was a fire. Forgetting what he had just told the court, he went on to state how he was cooking vegetables when oil fell in the fire and a fire broke out engulfing the house. He went ahead to contradict himself when he said that PW1 was not home, but later stated that PW1 had refused to cook for him.
23. Lastly, he said PW1 was outside the house. The appellants defence was a total sham and I dismiss it as untrue. In the end, I find the prosecution evidence more believable, that it is the appellant who willfully set the house ablaze.
24. Whether the sentence of seven (7) years imprisonment is harsh or excessive.
25. The appellant is not a first offender. It transpired that he had recently been released from prison for an Offence of threatening to kill. The charge is very relevant to this charge herein. I have considered the judiciary guidelines on sentencing and I think the appellant should be given a deterrent sentence; Under S332(a) of the Penal Code, upon conviction, one is liable to fourteen (14) years imprisonment. The appellant was only given seven (7) years which I find to be lenient considering the aggravated circumstances. The court finds that no good reason has been adduced to warrant interference by this court.
26. In the end, I find the conviction to be sound and I affirm it. The sentence lawful and fair. The appeal is not merited and it is dismissed.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF OCTOBER 2024.

R. WENDOH

JUDGE

Judgement delivered in the presence of

Mr. Majale for the State

Accused- present in person (virtually)

Juma/ Duke– Court Assistants

