Langat alias Florida & 3 others v Republic (Criminal Appeal E030 of 2023) [2024] KEHC 12861 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12861 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E030 OF 2023

RL KORIR, J

OCTOBER 17, 2024

BETWEEN

FLORENCE LANGAT ALIAS FLORIDA ..... 1ST APPELLANT

JOAN CHEPKOECH ..... 2ND APPELLANT

NICHOLAS SANG ..... 3RD APPELLANT

COLLINS SANG ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E2007 of 2021 by Hon. Omwange J. in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellants were charged for the offence of attempted arson contrary to section 333(a) of the Penal Code. The particulars of the offence were that on 3rd October 2021 at Manaret Village in Sotik Sub-County within Bomet County, they unlawfully attempted to set fire to a dwelling house valued at Kshs 20,000/= the property of Edward Otieno.

2. The Appellants were also charged with the second count of damage to property contrary to section 339(1) of the Penal Code. The particulars of the offence were that on 3rd October 2021 at Manaret Village in Sotik Sub-County within Bomet County, they unlawfully damaged one dwelling house, a sky plast container of 110 litres, one Zuku dish and two small solar panels all valued at Kshs 33,000/= the properties of Edward Otieno.

Summary of the Prosecution/Respondent's case

3. It was the Prosecution's case that the Appellants destroyed Edward Oduor Otieno's (PW1) property and thereafter attempted to burn his house. PW1 stated that on the material day, he heard his roof being pelted with stones and other people were trying to access his house by breaking the door. That he smelt petrol and this made him flee and hide in the tea plantation.

4. The Prosecution stated that PW1 had bought land from the late Geoffrey Sang (who was the Appellants' relative) and had put up his residential house. Its case was that Nicholas Sang (3rd Appellant), Florida Sang (1st Appellant), Joan Chepkoech (2nd Appellant) and Collins Sang (4th Appellant) were placed in the scene and were having a conversation saying that "maragoli lazima aende" which loosely translated to "maragoli must go."

5. It was the Prosecution's case that PW1's property was destroyed and a petroleum container was found in the scene.

The Accused's/Appellants' case

6. All the Appellants' denied committing the offence. They told the trial court that they all got home late on the material day and slept. It was their common testimony that PW1 had been found dancing on their relative's graveside.

7. At the conclusion of the trial and vide the judgement delivered on 31st May 2023, the Appellants were convicted and were each sentenced to serve three (3) years imprisonment for the first count and two (2) years imprisonment for the second count. The trial court was silent on whether the sentences were to run concurrently or consecutively.

8. Being dissatisfied with the conviction and sentence, the Appellants appealed aginst the whole Judgement and relied on the grounds reproduced verbatim as follows:-

    i. That the learned trial Magistrate erred in law and fact in finding that the Appellants were accurately and positively identified through dock identification.

    ii. That the trial Magistrate erred in law and fact when he failed to find the inconsistencies and contradictions in the testimonies of PW1, PW2, PW3 and PW4.

    iii. That the trial Magistrate erred in law and fact when he failed to analyse the evidence but chose to make an inference not supported by evidence.

    iv. That the trial Magistrate erred in law and fact when he failed to give consideration to the Appellants' submissions.

    v. That there was no evidence that the Appellants were in possession of any petroleum products used in the attempt to burn the alleged dwelling house.

    vi. That the trial Magistrate shifted the burden of proof to the Appellants by not providing witnesses to their defences.

    vii. That the trial Magistrate erred in law and fact by failing to find that the charges were not proved.

    viii. That the learned trial Magistrate erred in law and fact by failing to establish the ownership of the dwelling house and the alleged property by way of evidence.

    ix. That the learned trial Magistrate erred in law and fact when he failed to address himself on the non-availability of the first Report made to the police in respect of the arson.

x. That the trial Magistrate erred in law and fact when he failed to consider that the complainant could have been motivated by malice.

xi. That the trial Magistrate ignored the fact that at no time was PW1 in close proximity to his attackers as he had taken cover in the tea plantation.

xii. That the burden of proof in criminal trials should never be shifted to the Accused persons.

xiii. That the fact that the Appellants were relatives was no basis to impute knowledge of a conspiracy to burn a house and cause damage.

xiv. That suspicion no matter how strong, cannot be the basis for inferring guilt.

xv. That the trial Magistrate concluded that the value of the property was Kshs 53,000/= without evidence.

xvi. That the trial court made findings not supported by evidence.

xvii. That the sketch maps of the scene were not made available and hence they did not exist.

xviii. That the conviction and sentences of the Appellants were unsafe and were a miscarriage of justice.

xix. That the sentences were harsh and did not take into account that the Appellants were first offenders.

9. The 1st and 2nd Appellants filed supplementary grounds of Appeal which included:-

i. That the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof.

ii. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence which was not adduced in court.

iii. That the learned trial Magistrate erred in law and fact by depending on conspiracy theories between me and the complainant.

iv. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.

10. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This was succinctly stated in Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour."

11. This appeal was canvassed through written submissions. The parties' respective submissions are set out herebelow.

The Appellants' written submissions.

12. The Appellants submitted that they were wrongfully and intentionally placed at the scene as the complainant (PW1) relied on his sense of hearing and did not actually see them. That he did not even

point out which voice he heard. They further submitted that they have lived harmoniously with PW1 as he bought land from their deceased brother and they had no grudge with him.

13. It was the Appellants' submission that they were not properly identified as no identification parade was done as the incident had taken place at night.

14. It was the Appellant's submission that when taking plea, an Accused must understand the language used and appreciate all the essential ingredients of the offence for the plea to be unequivocal. That PW1 did not tell the trial court the source of light that he used to identify them and when he was cross examined, he stated that he had no torch.

15. The Appellants submitted that in regards to the charge of malicious damage to property, the Prosecution did not prove the charge to the required standards. That no iron sheets were presented in court and that the trial court relied on the complainant and his wife's (PW2) evidence without any exhibit. They further submitted that the Prosecution failed to provide an eye witness and hence they failed to link the offence to them.

16. It was the Appellants' submission that the complainant's house was not burnt and still stood to date. That this contradicted the evidence of PW2, PW3 and PW4 who all stated that the complainant's house had been burnt.

17. The Appellants submitted that there was no evidence proving the complainant's assertion that he saw Collins (4th Appellant) trying to burn timber in his compound and that he spilt petrol to his house. They further submitted the complainant's house that was alleged to have been burnt was used as a kitchen and a bedroom and they used firewood which produced smoke. That the soot shown in the photographs came from the kitchen/bedroom that belonged to the complainant.

18. It was the Appellants' submission that the trial court valued the destroyed property wrongly at Kshs 53,000/= without a valuation report.

19. The Appellants submitted that the Prosecution failed to guide the court on whether the complainant's house was burnt or how the burning was attempted.

The Respondent's submissions

20. The Respondent conceded to the Appeal citing the flawed identification evidence. That the trial court should not have relied on the identification evidence of PW1 and PW2 without further independent and corroborative evidence. They relied on Livingstone Kihugo Mwangi vs Republic (2007) eKLR.

21. It was the Respondent's submission that the Appellants gave an alibi defence and it was the Respondent's duty to dislodge the said alibi. That their evidence could not dislodge the Appellants alibi defence.

22. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 13th June 2023, the supplementary grounds of Appeal filed on 23rd June 2023, the Appellants written submissions filed on 19th June 2024 and the Respondent's Notice to concede the Appeal filed on 25th July 2024. The following issues arise for my determination:-

    i. Whether the Prosecution proved the charge of attempted arson beyond reasonable doubt.

    ii. Whether the Prosecution proved the charge of malicious damage to property beyond reasonable doubt.

    iii. Whether the Defence placed doubt on the Prosecution case.

iv. Whether the Sentences preferred against the Appellants were harsh and severe.

i. Whether the Prosecution proved the charge of attempted arson beyond reasonable doubt

23. Section 333(a) of the Penal Code provided:-

> Any person who attempts unlawfully to set fire to any such thing as is mentioned in section 332; is guilty of a felony and is liable to imprisonment for fourteen years.

24. The word "attempt" is described by section 388 of the Penal Code as follows:-

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

25. It was the Prosecution's case that the Appellants attempted to set ablaze PW1's house and in the process destroyed PW1's property. Edward Otieno (PW1) stated that on the material day at 9.00pm he was resting in bed with his wife (PW2) when their house was suddenly pelted with stones and when he smelt petrol, he feared for his life and sought refuge in the nearby tea plantation. He testified that he saw Nicholas Sang (3rd Appellant) talking on the phone, Florida Sang (1st Appellant) throwing stones, Collins Sang (4th Appellant) was armed with petrol and Joan Sang lighting the matchbox. PW1 further stated that he heard the Appellants conversing and saying that "maragoli lazima aende" which loosely translated to "maragoli must go". PW1 also positively identified the Appellants in the dock during the trial.

26. When PW1 was cross examined, he reiterated that he could see Florida (1st Appellant) throwing stones from his hiding place in the tea plantation. That he saw Collins (4th Appellant) pouring petrol on the timber and Joan (2nd Appellant) lighting the matchbox. PW1 further reiterated that Nicholas (3rd Appellant) was talking on the phone.

27. Salome Chemutai Tak (PW2) who was PW1's wife stated that she did not see who lit the fire but saw Florida Sang (1st Appellant), Joan Sang (2nd Appellant), Nicholas Sang (3rd Appellant) and Collins Sang (4th Appellant) who were armed with a torch. That she could see them as there was light from a burning part of the house.

28. When PW2 was cross examined, she stated that she heard the Appellants say that "maragoli must go".

29. The identification evidence in this case has been greatly disputed by the Appellants. They stated that there was no eye witness who could place them on the scene and that the complainant (PW1) could not positively identify them because of the distance between the house and the tea plantation which was about 40 meters and further because the incident occurred at night. The Prosecution in conceding to the Appeal also faulted the identification evidence stating that it was not water tight to guarantee a safe conviction.

30. It was undeniable that the commission of the offence took place at night. It is trite that identification or recognition at night must be watertight and free from error to justify a conviction. See Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739.

31. Further, the Court of Appeal in John Muriithi Nyagah vs Republic (2014) eKLR held: -

> " In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

32. In the English case of R vs Turnbull (1977) QB 224 it was held:-

> " If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger....."

33. The issue of positive identification of the Appellants rested with PW1 and PW2 who were the alleged eye witnesses. PW1 stated that he ran away from his house after it was pelted with stones and after smelling fuel. That he went and hid in the nearby tea plantation which was approximately 40 meters away from his house. He was joined by his wife (PW2) in the tea plantation. That it was from this hiding place that they were able to see the Appellants and they further stated that they used the light from the burning house to identify them.

34. Regarding identification of Florence Langat (1st Appellant), PW1 stated that he saw her throwing stones while PW2 stated that she saw her at the scene. On identification of Joan Chepkoech (2nd Appellant), PW1 stated that he saw her lighting a match while PW2 stated that he simply saw her at the scene. When PW1 was cross examined, he stated that he saw the 2nd Appellant torching his house from a small opening in the timber (presumably his timber house). This was a contradiction to his earlier testimony where he stated that he could see the 2nd Appellant while hiding in the tea plantation.

35. Regarding identification of Nicholas Sang (3rd Appellant), PW1 stated that saw him talking on the phone while PW2 stated that he saw him at the scene. On identification of Collins Sang (4th Appellant), PW1 stated that he saw him armed with petrol which he poured the same on the timber house. PW2 on the other hand stated that she did not see who lit the fire but she saw the 4th Appellant at the scene.

36. Both PW1 and PW2 referred to a certain Emmanuel Kibet whom they placed at the scene through their testimonies. This court however observes that the said Emmanuel Kibet was not charged alongside the Accused and that there was no explanation as to why he was not charged.

37. In considering the evidence above, I have noted the contradiction in PW1's evidence. On one hand, he stated that he could see the 2nd Appellant lighting a match to put his house on fire while hiding in the tea plantation and on the other hand after cross examination, he saw the 2nd Appellant light his house from the spaces between his timber house. They apparent contradiction creates doubt in PW1's testimony. Did he see her while inside the house or from the tea bushes? If the later was the case then it was highly improbable that he could see a matchstick 40 metres away in the night.

38. The offence occurred at night and in my view, the quality of the identification evidence was wanting. PW1 and PW2 relied on the light from their burning house to identify the Appellants and this was done from a distance of approximately 40 meters away. Considering the distance between the burning house and the tea plantation, the light could not have been sufficient to positively identify one person

let alone four people. In the circumstances of the case, the light may or may not have been sufficient to guarantee good quality for the positive identification of the Appellants.

39. The record shows that the complainants and the Appellants were neighbours. This means that they knew each other well and that there was a possibility that they may have seen them commit the offence. Indeed the evidence creates suspicion in the mind of the court that the Appellants may have been identified.

40. It is my finding based on the analysis above that the identification was not beyond reasonable doubt. It is my further finding that the Prosecution had not proved the positive identification of the Appellants and thus they had failed to prove the charge of attempted arson to the required standard.

ii. Whether the Prosecution proved the charge of malicious damage to property beyond reasonable doubt.

41. Section 339(1) of the Penal Code provided:-

> Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

42. Odunga J. (as he then was) in Timothy Mutuku Kitonyi vs Republic (2021) eKLR held:-

> " I agree with Ngenye Macharia, J's finding in Wilson Gathungu Chuchu vs. Republic [2018] eKLR that under the above definition, the elements of the offence may be dissected as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful."

43. In Simon Kiama Ndiagui vs. Republic (2017) eKLR, Ngaah J. held:-

> " In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.....
>
> .....suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state."

44. Similarly, in Republic vs. Jacob Mutuma & another (2018) eKLR, Majanja J. held:-

> " In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands."

45. Edward Otieno (PW1) and his wife Salome Chemutai (PW2) stated that their roof was pelted with stones on the material day. That the stones almost pierced the roof. Edna Sigei (PW3) who was the area Chief stated that when she visited the scene the following day, she found a lot of damage and that

the roof of PW1's house had stones. When PW3 was cross examined, she reiterated that she saw the stones on the roof.

46. When the investigating officer (PW4) visited the scene the following day, he stated that he found PW1's roof had been damaged by stones. That he found damaged property belonging to PW1. That he took photographs of the damaged property and produced the same as P.Exh 4. He further produced a picture of the roof with stones as P.Exh 3c. PW4 produced the requisite accompanying certificate as P.Exh 6. I hereby find P.Exh 3c and P.Exh 4 as admissible evidence.

47. PW4's evidence was unshaken during cross examination.

48. From the above, there was evidence that PW1 and PW2's property was destroyed. But the question as to who caused the damage came down to positive identification of the Appellants. As earlier stated in this Judgment, the Appellants were not positively identified as the perpetrators.

49. In the absence of positive identification of the Appellants, it is my finding that the Prosecution failed to prove the charge of malicious damage against the Appellants to property to the required standard. The evidence raised deep suspicion on the identification of the Appellants. The law however is that suspicion however strong cannot found a conviction.

50. In the final analysis, the Prosecution failed to prove its case against the Appellants on the two counts of attempted arson and malicious damage to property. The conviction on both counts was unsafe.

51. In the end, the Appeal dated June 13, 2023 is allowed. I set aside the Appellants' conviction and quash their sentences. The Appellants are set at liberty forthwith unless otherwise lawfully held.

    Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 17TH DAY OF OCTOBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellants, Mr Waweru holding brief for Mr Njeru for the Respondent and Siele (Court Assistant).