



REPUBLIC OF KENYA



**Kisangau v Republic (Criminal Appeal 025 of 2019)
[2023] KEHC 2068 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 025 OF 2019
F WANGARI, J
MARCH 17, 2023**

BETWEEN

WILFRED KATULU KISANGAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon PM
Mayova (PM) in Mutomo PM Criminal Case No 054 of 2020.)*

JUDGMENT

Background

1. The appellant was charged with 2 counts of the offenses. In count I, he was charged with the offence of arson contrary to section 332 (a) of the [Penal Code](#). Particulars of offence were on November 2, 2020 at about 0300 hrs at Kasyelie village, Mutomo location of Mutomo sub-county in Kitui County, willfully and unlawfully set fire on a store containing bags 90kg each of maize, 4 bags 90kg each of cowpeas, 2 bags 90kg each of green grams, 3 bags 90kg each of sorghum, assorted farm equipment, 2 bicycles, a 30kg empty gas cylinder, 2 gas cookers and a bed and other assorted home items all valued at Kshs 330, 301/= the property of Elijah Kisangau.
2. In count II, he was charged with the offence of assault causing actual bodily harm. He was however acquitted of the charges under section 210 of [CPC](#).
3. The appellant was convicted in count I and sentenced to serve 10 years imprisonment. Being dissatisfied by the decision of the magistrate's court, the appellant lodged this appeal against the conviction and the sentence.
4. This being the first appellate court, I am guided by the principles as set in the case of [Ganpat v State of Haryana](#), as cited by Mativo J in [Makau v Republic](#) as hereunder;



- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
 - b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial court has breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
5. Also in Okeno v Republic and Kiilu & ano v Republic , the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

Grounds of appeal

6. The appellants relied on grounds of appeal which are summarized as hereunder;
- a. The trial magistrate erred in matters of law and fact by failing to consider that the appellant was framed with a view to settling scores
 - b. The trial magistrate erred in matters of law and facts by convicting the appellant on charges that have not been sufficiently established
 - c. The trial magistrate erred in matters of law and by sentencing the appellant harshly
7. The Hon Limo J directed that the appeal be canvassed by way of written submissions. As at the time of writing the judgment, none of the parties had filed their submissions.

Summary of the prosecution's evidence

8. Elijah Kisangau Katulu (PW 1), gave evidence that on November 2, 2020 at around 2.30 am. He was at home with his wife when his wife woke him up and alerted him that there that their granary was on fire. That is where they had kept all their farm produce and farm equipments. They suspected their son, the appellant, who had earlier been looked for by community policing group on suspicion that he had stolen. They got out of the house, including their other son, one Kemboi. The wife went behind the house and found the appellant and she alerted them of his presence.
9. They went and found that he had already climbed to the roof top using a ladder. He was removing iron sheets from the house. They convinced him to come down. He was violent and he started attacking them, but they managed to hold him down. They called the police and the appellant was arrested. PW 1 confirmed that the items as listed in the particulars of offence had been burnt in the granary fire.
10. Rhoda Kisangau Katulu (PW 2), the wife to PW 1 and the mother to the appellant gave similar evidence to that of her husband PW 1. She however admitted that she did not see the appellant burn down the granary.



11. Rotich (PW 3), the investigating officer was allocated the matter to investigate after it was reported to the police. He visited the scene and confirmed that the granary had been set on fire. He took photos of the scene which he produced as exhibits. He reiterated the evidence as reported by PW 1 and PW 2. It was also suspected that the appellant had plans to burn the main house as there was a mattress next to the main house. The prosecution's case was closed and the appellant put on his defence.

Summary of the defence evidence

12. In his defence, the appellant said that on the material date at around 10pm, about 6 armed men stormed into his house but he managed to escape. He went to spend the night in a nearby plot where he was constructing. At around 1am, he heard his mother screaming. Ongoing to check, he found their granary on fire. His father said that it was the appellant who had burnt it and he called the police on him. He said his father was eager to have him jailed and he even went to the extent of forging his mother's statement at the police station. He denied committing the offence.

Issues for determination

13. The paramount issue for determination is whether the elements of the offence of arson were proved beyond reasonable doubt. Further, there being no eye witness to the commission of the crime, whether the circumstantial evidence was sufficient to point to the guilt of the accused person. The issues therefore arising from this appeal are;
 - a. Whether the elements of arson were proved
 - b. Whether circumstantial evidence pointed at the guilt of the appellant.

Elements of the offence of arson

14. Section 332 of the [Penal Code](#) under which the appellant was charged provides as follows:

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.
15. From the above, in an offence of arson, it must be proved that;
 - a. There was an act of starting a fire
 - b. The act was done unlawfully and willfully; the intent
 - c. Property was destroyed as a result of the fire
16. From the evidence of the prosecution witnesses, especially that of PW 1 and PW 2, there was indeed a fire that was started in their granary and the farm produce and equipment that had been stored therein were destroyed. There was no other cause of fire that was established other than an unlawful and willful act of the arsonist. The issue now is who was the culprit.
17. The parents to the appellant gave evidence that they found the appellant hiding behind the house. The appellant had earlier ran away after the community policing group came for him after it was alleged that he had stolen. There was no other person in the home compound other than the family members of the appellant. The conduct of the appellant, that is his hostility towards his family members and destruction of the iron sheets, was also wanting. The appellant in his defence said that he was framed



and the father forged the statement by his mother so as to implicate him. When the mother was testifying, that issue was not brought up. I therefore find that this line of defence was an afterthought.

Circumstantial evidence

18. On circumstantial evidence, In *Sawe v Rep [2003] KLR 364*, the Court of Appeal held 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...”

19. The parents of the appellant said they found him behind the house. He did not come to the rescue of the family or respond to the fire. The appellant was also hostile towards his family and he had to be tied in order to contain him. Even though the appellant said that he was spending the night in the plot where he was building, I find the same is unbelievable based on his conduct. There is no grudge that was established to warrant the father and the mother to the appellant to give false evidence against him.

Conclusion

From the above analysis, I find that the circumstantial evidence pointed at the guilt of the appellant. I therefore uphold the conviction by the trial court.

20. On sentencing, I note that the provisions of penalty in section 332 of the *Penal Code* as stated herein above, is life imprisonment. I equally take notice that sentencing is in discretion of the trial court, and for this court to interfere, it was stated in the case of *Shadrack Kipkoech Kogo v Republic* (UR) that;

“it must be shown that in passing the sentence, the trial court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered...”

21. In the present case, the appellant was sentenced to serve 10 years imprisonment, and I therefore find no reason to interfere with the trial court’s discretion. I uphold the sentence. The appeal therefore lacks merit and is hereby dismissed.

22. It is so ordered.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 17TH DAY OF MARCH, 2023

F WANGARI

JUDGE

In the presence of;

Pauline Mwaniki SC for State

Appellant present

Guyo, Court Assistant

