



**Mbaja v Republic (Criminal Appeal E049 of 2021)  
[2023] KEHC 2973 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2973 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E049 OF 2021  
PJO OTIENO, J  
MARCH 3, 2023**

**BETWEEN**

**STEPHEN MBAJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon.  
Eric Malesi PM in Kakamega Criminal Case No.3800 of 2019)*

**JUDGMENT**

1. The Appellant was arraigned before the Principal Magistrate at Kakamega in Criminal Case No. 3800 of 2019 charged with the offence of arson contrary to section 332(a) of the [Penal Code](#). The particulars of the offence were that on 20<sup>th</sup> December, 2019 at Makaburini area, Bukhungi location, municipality division within Kakamega county, the appellant willfully and unlawfully set fire to a dwelling house valued at Kshs. 385,000/- belonging to Hellen Makokha.
2. He pleaded not guilty and the case proceeded to full trial with the prosecution calling a total of three witnesses. The evidence of the prosecution was given by the ex-wife of the appellant who was the victim, the brother to that victim and a police officer who investigated the case.
3. PW1, Hellen Makokha, an ex-wife to the appellant, testified that on 20/12/2019 at about 8:30 PM she was in her house when the appellant came and beat her demanding that he wanted to take away their child. She managed to escape and the appellant threatened to burn her house. She went to her neighbors and a few minutes later she saw her house on fire. She called the brother who advised that matter be reported to the police. Thereafter, the appellant continued to call and issue threats to her and she on the advice of her mother released the children to the appellant. She said that she lost every property in the house to the fire and marked photographs of the house as MFI 1a, b & c.



4. On cross examination, she said that she lived alone in a house surrounded by neighbours, was able to see the house on fire while at a neighbour's house and that the incident took place at about 8.30 pm adding that she didn't see the appellant set the house on fire.
5. PW2, George Otieno Makokha, a brother to PW1 gave evidence that on 20/12/2021 PW1 called him crying and informed him that she was beaten and her house burnt. When he arrived at the scene he confirmed the house was burnt and the accused was standing at a distance wielding a knife and warning people not to near him. He confirmed having made a report to the police and identified the photographs marked MFI1. When cross examined the witness told the court that the house was surrounded by neighbours who must have seen it burn but were fearful of the appellant and that it took about 30 minutes to walk to the police station.
6. PW3, No. 83308, Cpl Caleb Wandera, the investigating officer testified that on 20/12/2019 he received a call that there was a house on fire at Makaburini area and rushed to the scene where he found the house was on fire, called fire brigade which arrived after the house had been completely razed down. He came to learn that the appellant had set the house on fire. On being cross examined by the accused the witness told the court that the appellant escaped on seeing the police vehicle and that the residents of the area were afraid of recording statements.
7. After a prima facie case was adjudged having been established, the accused person was put on Defence in which he elected to give sworn statement without calling any other witness. His evidence was that, on 20/12/2019 he went for work, at an undisclosed place, till evening then retired to bed with his family at their home in Khayega. On 27/12/2019 he was arrested but was not informed the reason for his arrest. He admitted to having been in a relationship with PW1 from 2016 to 2019 after which they lost touch. He attracted no cross-examination by the prosecution.
8. Judgment was subsequently delivered in which the appellant was convicted and sentenced to serve a five years' imprisonment term. The judgment aggrieved the appellant who then lodged the instant appeal by petition of appeal which sets out the grounds of appeal to be that; -
  - a) That the appellant's constitutional rights were grievously violated contrary to section 50(2) as read with article 50(4) of *the Constitution* of Kenya.
  - b) That the learned trial magistrate erred in law and facts by believing the evidence of a single witness without inquiring into need for corroboration.
  - c) That the learned trial magistrate gravely misdirected himself in law and facts by convicting and sentencing the appellant in light of inconsistent, farfetched, flimsy, fabricated, disjointed, malice and suspicious evidence of prosecution without noting and considering that the same was not water tight enough to uphold a safe conviction based in law.
  - d) That the learned trial magistrate erred in law and facts in believing the evidence of PW1 regarding who caused the alleged fire without considering that there lacked independent evidence to render credence to such evidence especially that of neighbors since the alleged residence is contested and overpopulated.
  - e) That the trial court erroneously convicted me on the evidence of photographic without noting that the same did not comply with the provisions of section 78 of the *evidence Act* CAP 80 Laws of Kenya.
  - f) That the learned trial magistrate misdirected himself in law by failing to note and consider that there was a boiling grudge between PW1 and the appellant.



- g) That the learned trial magistrate erred in law and facts by shifting the burden of proof to me and thereupon miss evaluated my plausible defence.”
9. The appeal has been canvassed by way of written submissions in which the appellant asserts having been subjected to an unfair trial contrary to article 50(2) (c)(g)(h)(j) and (k) in that the prosecution introduced photographic evidence which the prosecution had not indicated it intended to rely on. He further states that he was not informed promptly of his right to choose and be represented by an advocate of his choice.
10. He also submitted that the evidence against him was marred with inconsistencies and contradictions in that PW2 informed PW1 that they report the fire to the police whereas PW3 indicated that he received a 999 call about the fire. He further questions who took the photographs of the scene since PW1 testified that she did yet the judgment of the trial court indicates the police took photographs. He argues that contradictory statements cannot be admitted in a court of law as evidence of truth and places reliance in the decisions in *Pandya vs Republic* Appeal No. 106 of 10990 and *Richard Aspela vs Rep App* 45 of 1981 for that proposition.
11. On doubtful evidence regarding identification, the appellant submits that PW1 lived in a slum and the house was rented. He questioned why the landlord or even the adjacent neighbors were not called to identify him.
12. The appellant claims that the photographic evidence admitted by the trial court was in contravention to section 78 of the *Evidence Act*, was unlawful and thus occasioned him prejudice. He lastly submits that his evidence of alibi was not considered by the court.
13. For the Respondent, it was submitted that the claim by the appellant of a violation of his constitutional rights should have been brought to the notice of the trial court at the first instance or that he ought to file a constitutional petition to challenge the alleged violation and for damages and not to seek to defeat a conviction on that basis. It was further argued that PW1 lived by herself hence she was the only witness to the threats by the appellant to set her house on fire, that PW2 placed the appellant at the scene of the fire and that the appellant ought to have objected to the production of the photographs when they were being produced and not at the appeal level. On the defence of alibi, the respondent contends that the defence was raised too late in the day and that the appellant did not call any family members to confirm that he was at home at the time of the incident.

### **Issues, Analysis and determination**

14. The court has taken due regard of the, proceedings at trial, the grounds of appeal and the submissions by the appellant and the respondent and identify the following issues to fall for its determination: -
- a. Whether the appellant’s right to a fair trial under article 50(2)(c) (g) (h) (j) and (k) of *the Constitution* of Kenya, 2010 were violated?
  - b. Whether there were contradictions and inconsistencies in the evidence of the Respondent witnesses and its effect on the conviction and sentencing of the Appellants?
  - c. Whether the appellant was properly identified?
  - d. Whether the appellants defence of alibi was considered by the trial court?
  - e. Whether the appellant’s right to a fair trial under article 50(2) c, g, h, j and k of *the Constitution* of Kenya, 2010, were violated.



15. Article 50 (2)(c) of *the Constitution* of Kenya provides that every accused person has the right to have adequate time and facilities to prepare a defence. Whether there was a denial of that right, in the context of proceedings on appeal, must emerge from the record of the trial court. The appellant was first arraigned in court on 30/12/2019 and the trial began on 16/8/2021, after a period of over 17 months. The question that arises is what additional time was required to meet the constitutional requirement? I find that no additional time was necessary to be availed to the appellant and that no violation has been proved on account of sufficient time to enable him prepare for the trial.
16. How about facilities? In the contexts of the constitutional requirement, the facilities needed to afford one a fair hearing would include the notice of evidence the prosecution intends to use at the trial or the evidence to be relied on by the prosecution as espoused under article 50(2)(j) of *the Constitution* of Kenya and to be supplied with an advocate as espoused under article 50(2)(h) which rights the appellant contends were violated.
17. The right to be accorded an advocate is not absolute other than cases of murder. The right to an advocate is subject to the financial capabilities of an accused person and where an accused person is able to afford an advocate, the intent of *the constitution* was to mandate the court to accept representation of the accused by the advocate. The appellant did not indicate inability to instruct an advocate and for that reason I do not find that his rights under article 50(2)(h) of *the Constitution* of Kenya, 2010 were violated.
18. On the appellants right to be supplied with the evidence the prosecution intended to rely on at trial, the appellant argues that he was ambushed by photographic evidence produced by the prosecution evidence which was not in his possession. During the trial and/or production of the photographs, the appellant did not object to their production then went ahead and cross examined the witnesses. For that reason, I find that his rights were not violated. In coming to that conclusion I associate with the holding by the court in Fredrick Oyoo Odhiambo v Republic [2017] eKLR where it was observed as follows: -

“He did not raise the issue of not having been supplied with witnesses’ statements. The same proceeded to hearing and prosecution called PW1 who the appellant cross-examined without any difficulties. That on 14th October 2015 when PW2 gave evidence, the appellant was ready and also cross-examined PW2 without any complaint that he did not have witnesses’ statements. The position was repeated when PW3 gave evidence and PW2 was recalled. I therefore find that Article 50(2)(j) of *the Constitution* of Kenya 2010 was not violated as the appellant had witnesses’ statements as he was able to cross-examine prosecution witnesses without difficulties hence I find he was not prejudiced in any way and his constitutional rights to fair hearing was not violated and/or breached in any way.”
19. The appellant further contends that the photographic evidence was not taken in a manner envisaged in section 78 of *Evidence Act* which stipulates that in criminal proceedings a certificate in the form in the First Schedule to the Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.
20. The photos from the scene of the crime were produced by PW1 who also indicated that she was the one who took the photographs. A reading of section 78 requires that photographic evidence be produced



by officers. This was the holding of the court in *State vs Nelson Otieno Odira & Another* (2014) eKLR where it was observed as follows: -

“The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. Sections 64 and 65 of the *Evidence Act* provide that a document may be proved by either primary or secondary evidence. Section 66 of the *Evidence Act* provides for instances where secondary evidence may be given for example by way of proof of certified copies. A reading of section 78 shows that the exception in relation to photographic evidence is specific to the terms thereof. The purpose of section 78 of the Act is to enable the court admit photographic evidence without calling the maker if certain requirements of the Act have been met. The section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. Section 78 deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the conditions specified in the section are met. Hence the requirement of subsection (2) and (3) of the Act which tend to buttress the issue of authenticity of the photographs.

5. In any other case, any officer who has taken a photograph may testify as to its veracity and contents as the same is primary evidence and subjected to testing by cross-examination by the accused’s counsel.”

21. That said, I find that the trial court erred in admitting the photographic evidence contrary to the requirements of the law.

Whether there were contradictions and inconsistencies in the evidence of the Respondent witnesses and its effect on the conviction and sentencing of the Appellants

22. The appellant has argued that it was the testimony of PW1 that PW2 informed her to report the fire to the police whereas PW3 indicated that he was informed of the fire by way of a 999 call. Another inconsistency cited by the appellant was that PW3 indicated that he called firefighters yet PW1 never saw them at the scene. The appellant argues that these inconsistencies negate the conviction and make same unsafe.

23. Contradiction of that negate the evidence and the proof intended must be material and not merely trivial. Not every contradiction is material for witnesses remember and recount events differently and it is impractical and illogical to expect evidence in a trial with harmony and symphony of an orchestra.

24. In this matter, the court has perused the records and isolated what the appellant terms inconsistencies in the testimonies of prosecution witnesses and it finds same to be mere discrepancies not grave to invite a conclusion that the offence in question never occurred. These discrepancies do not affect the substance of the offence and will thus be ignored by this court. In doing so this court is guided by the Ugandan Court of Appeal decision in *Twehangane Alfred v Uganda Criminal App. No 139 of 2001*, [2003] where it was held: -

“With regard to contradictions in the prosecution’s case the law has set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily 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’s case.”



## **Whether the appellant was properly identified**

25. The appellant was a person well known to PW1 since they shared a child and had been in a relationship previously. The two were close acquaintances hence the evidence by PW1 and 2 were in the nature of recognition rather than identification. The appellant was equally known to PW2 brother to PW1. PW1 stated that the appellant had threatened to set her house of fire and a few minutes later the house was ablaze. PW2 placed the appellant at the scene of the fire. Being that the appellant was a person well known to PW1 and PW2, I find that he was properly recognized with no prospects of a mistake.

Whether the appellants defence of alibi was considered by the trial court

26. To rely on the defence of alibi, an accused person must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth. This was the holding of the Court of Appeal for Eastern Africa in R v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145 where it was held: -

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

27. The appellant appears to have brought up the defence of alibi at the defence hearing, the very tail end of the trial, and in a manner that was equally very casual. Casual because he sought to say that he had gone to work without specifics to aid with verification in cross examination. That action in itself fell short of the criteria set out in R v. Sukha Singh s/o Wazir Singh & Others (supra). But, was that evidence ignore when the trial court paraphrased what he said and went into very deep appraisal on how an alibi ought to be treated! The court finds that the evidence given by the appellant was not only considered but deeply so.

28. Accordingly, and for the reasons set out above, this appeal fails and is thus dismissed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF MARCH, 2023**

**PATRICK J O OTIENO**

**JUDGE**

**In the presence of:**

Appellant present in person

Ms challa for the prosecution Respondent

Court Assistant: Polycarp

