



**Opiyo & 2 others v Republic (Criminal Appeal E078, E079 & E080 of 2022  
(Consolidated)) [2023] KEHC 1687 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E078, E079 & E080 OF 2022 (CONSOLIDATED)**

**RPV WENDOH, J**

**MARCH 9, 2023**

**BETWEEN**

**ELIJAH OUMA OPIYO ..... 1<sup>ST</sup> APPELLANT**

**HELMAN OPIYO OPON ..... 2<sup>ND</sup> APPELLANT**

**BENARD ONYANGO OWUOR ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. P. N. Averi – Principal Magistrate in Migori Chief Magistrate’s Criminal Case no. E1043 OF 2021 delivered on 27/7/2022)*

**JUDGMENT**

1. The three (3) appellants, Elijah Ouma Opiyo, Helman Opiyo Opon and Bernard Onyango Owuor were jointly charged with two offences namely:
  1. Arson contrary to Section 332 (a) of the *Penal Code*. The particulars of the charge were that on 29/9/2021 at about 1430 hour at Okumbo village in Kamgundho Sub location, Kamgundho Location, Uriri Sub County, willfully and unlawfully set fire to the building (house) valued at Kshs. 3.5 million, the property of John Otieno Kine.
  2. Malicious damage to property contrary to Section 339 (i) of the *Penal Code* in that they willfully and unlawfully damaged a water tank valued at Kshs. 80,000/= the property of John Otieno Kine.
2. After a full trial, the court found the 1<sup>st</sup> and 3<sup>rd</sup> appellants guilty on Count 1. All the three accused were found guilty of count two (II).



3. On Count I the 1<sup>st</sup> and 3<sup>rd</sup> appellants were sentenced to life imprisonment and on Count II each was sentenced to serve five (5) years imprisonment.
4. The sentences in respect of the 1<sup>st</sup> and 3<sup>rd</sup> appellants were directed to run concurrently.
5. The appellants are aggrieved by the trial courts judgment and preferred their respective appeals E075, E079 and E080 of 2022 which were later consolidated to proceed as E080 OF 2022. Counsel for the appellant filed an amended a petition of appeal on 21/12/2022. The grounds are as follows:-
  1. That the trial magistrate erred when he denied the appellants a chance to engage an advocate;
  2. That the court by forcing the appellants to proceed with hearing while ill;
  3. That the trial court erred by failing to consider the appellants' alibi defence;
  4. That the court erred by shifting the burden of proof to the appellants;
  5. That the court erred by convicting the appellants without evidence to support the charge.
6. The appellants therefore pray that the conviction be quashed and sentence be set aside.
7. The prosecution called a total of four (4) witnesses, while the defence called a total of nine (9) witnesses who included the appellants.
8. John Otieno Kine (PW1) identified Helman (2<sup>nd</sup> Appellant) to be his brother while the other Appellants are his sons and their homes are near each other. PW1 told the court that on 21/9/2021, he left his home at Okumbo village and went to run some errands in Migori. About 2:00p.m his wife called to tell him that they had been attacked, and she was hiding in sugar cane farm and had identified the 3<sup>rd</sup> appellant to be amongst the attackers. Shortly, thereafter, the wife called to inform him that their house had been set ablaze. He reported to Uriri Police Station where she was later joined by the wife.
9. They went to Kakrao and next day, he went home and confirmed that his houses and all its contents had been burnt; that the main house was built of bricks and was six roomed and was valued at Kshs. 3.5 million. The second house was made of iron sheets and worth 80,000/=; that a water tank of 10,000 litres was also damaged. PW1 stated that earlier on, Helman 2<sup>nd</sup> appellant had stolen his 7,000/=. He reported to police who arrested him and he agreed to repay and was released. PW1 stated that from then, Helman threatened him and their relationship has not been good. PW1 also stated that before the arson, 1<sup>st</sup> and 3<sup>rd</sup> appellants had assaulted his son PW3 and he had reported at Uriri Police Station.
10. PW2 Mary Atieno is the complainant's wife. She identified Elijah Ouma Opiyo as the brother in law, as he is Elijah's father. PW2 also knew Bernard Onyango 2<sup>nd</sup> appellant. PW2 recalled that on 20/9/2021 about 1:00p.m while at home with her son Kevin Ochieng PW3 who was unwell, she went into the house to cook when she heard noises on the road behind her house. She got out of the house and saw a group of people who included the 3<sup>rd</sup> appellant armed with a panga; that the group was saying that if they found the owner of the home , they would assault them. At that stage she took her children and ran to hide in the Sugarcane.
11. PW3 Kevin Ochieng Otieno, a motor cycle rider recalled that on 20/9/2021 about 1:00p.m when at home, he heard people talking saying that if they get them, they will cut them with pangas. He looked and saw the three appellants behind their house; that 1<sup>st</sup> and 2<sup>nd</sup> appellants were armed with pangas and 2<sup>nd</sup> appellant with a spear. He alerted his mother that people were coming to their home and he ran and hid in the sugarcane plantation which was nearby. His mother also ran and entered the sugarcane farm. He watched from his hide out as 3<sup>rd</sup> appellant (Ben) started to break the windows of the house



- and 1<sup>st</sup> appellant while 2<sup>nd</sup> appellant broke the water tank; that later, 3<sup>rd</sup> appellant entered the house; that 1<sup>st</sup> appellant removed petrol from a motor cycle in a bottle and entered the house; that after the two emerged from the house, smoke broke out and the house got burnt. He only got out of his hide out when he saw the Assistant Chief and police officers arrive. He said that after 2<sup>nd</sup> appellant broke the tank, he went out of view and he did not see what else he did. PW3 identified the photographs of their burn houses, PW3 recalled that on 17/9/2021 the 3<sup>rd</sup> appellant had hit him with a stone without reason and he had reported to police; that 2<sup>nd</sup> appellant had stolen Kshs. 7,000/= from PW1 earlier and the matter had been reported. PW3 further stated that the people who came to assist were repulsed by the appellants and that the said witnesses feared coming to testify.
12. PC Moses Kenya (PW4) the investigating officer recalled that on 20/9/2021 he was sent to OKumbo School where there was chaos. He proceeded there and calmed the situation; that the parents of the school were alleging that the Head teacher was allowing demonic activities in the school. A few minutes later, they saw smoke coming from a certain home. The local administration enquired and learnt that some parents had gone to the home where it was alleged were behind demonic activities; He went and found a big crowd in John Otieno Kine's home, two houses were on fire, and the crowd disappeared. The members of Public at the scene were reluctant to talk. He later found the complainant John Otieno at the police station and booked the report. Next day, the complainant's wife and son recorded statements naming the three appellants as the perpetrators. Next day, the 1<sup>st</sup> appellant was arrested. PW4 produced the photographs taken of the scene and debris he had taken to Government analyst.
  13. The appellants were called upon to defend themselves. The 1<sup>st</sup> appellant Elijah Ouma Opiyo called three other witnesses. DW2, David Otieno Jabwana, DW3 Kenny Ooko Achal and Noel Adero Nyarwali, DW4. DW1 denied the charge and stated that on 19/9/2021 he went to the home of DW2 to pray for a lady who had given birth and he was with his father Noel and Kennedy DW3, and DW4; that they attended the ceremony on 20/9/2021 from 7:00a.m to 5:00p.m and arrived back at their home at 7:00p.m. He then learned that PW1's houses had been burnt and on 22<sup>nd</sup> he was arrested.
  14. DW2 Jabwana recalled that he had a ceremony at his home on 19/9/2021; that guests went to his home on 20/9/2021 at 7:00a.m and left in the evening and they included the 1<sup>st</sup> appellant.
  15. Kennedy Ooko DW3 testified that he went to DW2's home on 19/9/2021 and slept there and they were in a ceremony the next day with 2<sup>nd</sup> appellant, 1<sup>st</sup> appellant and Noel Odero. On returning home, he learnt that John Otieno's house had been burnt.
  16. DW4 Noel stated that he was invited for a ceremony at the home of DW2 on 19/9/2021.
  17. The 2<sup>nd</sup> Appellant, DW5 testified that he left his home on evening of 19/9/2021 for DW2's home. He spent the night there and the ceremony started 7:00a.m till 5:00p.m. He reached home late and on 21/9/2021, learnt that the complainants' house was burnt.
  18. The 3<sup>rd</sup> appellant DW6 – Bernard recalled that on 17/9/2021 Markins Onyango (DW7) invited him to go and cut cane seed. He got two other people Fredrick Ouma (DW8) and George Odhiambo (DW9) and on 20/9/2021 they went to the farm at 6:00a.m and worked till 3:00p.m They saw that PW1's house had been burnt upon their return.
  19. DW7 Markins testified that on he had a job of cane cutting. He met DW6 at 7:30a.m. on 25/9/2021. They worked from 7:30 a.m to 3:30p.m  
DW8 and DW9 reiterated what DW6 told the court.
  20. The appellants' counsel filed submissions. On grounds 1 and 2, counsel relied on the Record of Appeal at page 39 and 40 where the appellants indicated that they were not ready to proceed but the court



insisted on proceeding; that page 40 of Record of Appeal indicates that Mr. Odhiambo Advocate appeared for the appellants but never cross examined the witnesses; that therefore the appellants right to choose and be represented by an advocate was violated when the court refused to grant the appellants time to agree or engage an advocate; that by one appellant having a sick child and one hospitalized, was an indicator that they were not in the right frame of mind to proceed.

21. On ground 3 and 4, it was argued that the court shifted the burden of proof to the appellants when the court found that they had not proved that they were authorized to attend the ceremony as it was during corona period when gatherings were prohibited. Counsel relied on the case of *Erick Otiemo Meda v Republic* [2019] eKLR which confirmed the fact that when an alibi defence is raised the burden of proof always rests on the prosecution to prove its case beyond reasonable doubt and does not shift to the Accused to prove the truth of the alibi.
22. On ground 5, counsel argued that the appellants were not placed at the scene because it was impossible for PW3 to see anybody from 500 metres away; that the charges may have been laid on the appellants because of the bad relationship between the appellants and the complainant.
23. In response to the submissions, the prosecution counsel submitted that the court discharged its duty under Article 50(2)(g) of the *Constitution* when the court explained the right to the appellants and the appellants that indicated that they would represent themselves; that on 27/11/2021 the appellants had counsel to represent them and they cannot allege that they were denied right to counsel. Counsel also submitted that there is no evidence that substantial injustice was suffered as was espoused in *Republic vs. Karisa Chengo & 2 Others* (2017) eKLR and that they have not satisfied the tests set out in the above case.
24. As relates to the allegation that they were denied adjournment when ill, counsel submitted that on 26/1/2022, the appellants had sought adjournment when three (3) witnesses were present; that they were seeking another adjournment on 27/11/2022 which application was opposed; that later in their defence it transpired that the 2<sup>nd</sup> appellant had lied to court about death of his wife and so the first adjournment was granted based on lies.
25. Whether the alibi defence was considered; counsel urged that the appellants gave alibis could not be substantiated and that they contradicted each other and the court found them to have made up the stories and hence the prosecution evidence displaced the alibis.
26. Counsel recalled that the three appellants acted with a common intention and all should have been convicted of the first charge of arson. He urged the court to substitute the acquittal of the 2<sup>nd</sup> appellant in the first count and return a conviction.
27. Counsel urged the court to maintain the sentence meted on the 1<sup>st</sup> and 3<sup>rd</sup> appellants because it is legal and the circumstances call for it the severe sentence.
28. This being a first appeal, this court is required to reexamine all the evidence tendered before the trial court, analyse it and arrive at its own findings. The court has to however bear in mind that it neither saw nor heard the witnesses testify. This court is guided by the principles set out in *Okeno vs. Republic* (1972) EA 32.
29. I have considered the grounds of appeal, the rival submissions and the evidence on record. As regards the alleged violation of the appellant's rights to fair trial, I wish to note that on 26/1/2022 when the charges were consolidated and before the charge was read to the accused, the court explained to the appellants their rights under Article 50(2) of the *Constitution*. Earlier on 23/9/2021 when the first appellant was charged alone, it is clear from the record that Article 50(2)(g) was explained to



the appellants. After the rights were explained to the appellants each replied that they would proceed without an Advocate.

Article 50(2)(g) provides that

“Every person has the right to a fair trial which includes the right....

(g) to chose and be represented by an advocate, and to be informed of this right promptly.

30. The right to be represented by a counsel of one’s choice was explained to the appellants. It was explained promptly as required and there was no violation of that provision of law.
31. On 27/4/2022 when the case came up for hearing each appellant applied for adjournment, the 1<sup>st</sup> appellant said ‘I am not ready to proceed because I am not well. We need time to agree with the advocate.
32. Accused2: I am not feeling well. I pray for another date so that I can seek for medication.  
Accused 3: I am not ready my son is hospitalized.
33. The case had come up for hearing on 26/1/2022 and the prosecutor was ready to proceed with four (4) witnesses but Accused 1 said: I am not ready we have a problem at home. I lost my mother and younger brother. They died.
34. Accused 2: I am not ready. I am bereaved. My son Victor and my wife Rosemary Atieno died.
35. Accused 3: I am not ready because of the death of my mother and brother.
36. The prosecution had no objection to the application and an adjournment was allowed.
37. On 27/4/2022, the court was not satisfied with the reasons advanced by the appellants in seeking an adjournment on 27/4/2022. What a coincidence that two appellants are sick, then they had not engaged an Advocate. Yet they had been on bond since their arrest, 1<sup>st</sup> Appellant was arrested in September, 2021 and the others arrested on 10/10/2021.
38. For seven months, the hearing had not taken off. Under Article 50(2)(e) of the Constitution, it is required that the trial begin and be concluded without unreasonable delay. Article 159 (a)(b) also emphasizes that justice shall not be delayed. In an application for adjournment, the court exercises its discretion in light of the law and Constitutional provisions, which it did and found an adjournment to be undeserving and declined to grant it. Further to the above, it clearly transpired during the defence that the appellants had lied to the court about the death of the 2<sup>nd</sup> appellant’s wife and mother to the 1<sup>st</sup> and 3<sup>rd</sup> appellants, when they first applied for adjournment on 26/1/2022. DW2 and DW4 confirmed that the 2<sup>nd</sup> appellant’s wife is alive and well. DW2 had been with the 2<sup>nd</sup> appellants wife at their church the previous Saturday. In his defence the 2<sup>nd</sup> appellant tried to change the story that it was not actually his wife but his brother’s wife whom he had inherited. It means that all the appellants lied to the court as to the reason for seeking for adjournment on 26/1/2022. They were not keen on proceeding and must have been applying the same tactics 27/4/2022 and the court.
39. The record of 27/4/2022 shows that one ‘Mr. Odhiambo Advocate’, was present appearing for the Accused. The appellant’s Counsel took issue with the said presence of a Mr. Odhiambo who never cross examined the prosecution witnesses. If the appellants were asking the court for an adjournment because they wanted to seek counsel, then it means that they did not have an Advocate that day. It is not understandable why the court’s recorded that Mr. Odhiambo counsel was present. Had ‘Mr. Odhiambo’ been present, there is no reason why he could not have conducted the case for the accused



persons by cross examining the witnesses. Mr. Odhiambo has not come up to claim that he was present and was denied evidence. A court keeps record and had an advocate been present, and had wanted to cross examine the witnesses, the court would have made a record of it. There may have been an intention to have Mr. Odhiambo appear for the appellants but he did not appear on that date and the appellants cannot be said to have been denied the right to be represented by counsel. Had he been on record and wanted an adjournment he would have applied and a record of it made. That ground has no basis and must fail.

40. No doubt the complainant's house was burnt down. The offence was committed in broad day light. The question then is whether the appellants were properly identified as the perpetrators. The appellants are not strangers to the complainant. They are related. From the evidence on record, they were not on good terms. PW1 told the court that the 2<sup>nd</sup> appellant had earlier stolen from him and the matter had been resolved by the Chief. PW1 and PW3 also testified that PW3 had been assaulted on 17/9/2022 by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. PW4,
41. the investigating officer confirmed that they had received a report of assault at the police station. It is not something that was imagined after the arson happened. The key witnesses in this matter are PW2 and PW3 who were at home when the attack happened at about 1:00p.m. PW2 testified to seeing only the 3<sup>rd</sup> appellant before she ran off into the sugarcane plantation. PW3 on the other hand saw the three appellants before going to seek refuge in the sugarcane plantation. PW3 was adamant that he was able to see what was happening in the home from his hide out. Neither PW2 or PW3 was asked how far the sugarcane plantation was from the home. PW4 the investigating officer said in cross examination that it about 500m away. The court has no idea whether PW4 demonstrated to the court how far 500m is. Unfortunately, the trial court did not seriously consider this piece of evidence. However, even if the sugarcane farm where PW2 and PW3 hid was 500 meters away from the house, which the court cannot confirm, they saw the appellants arrive at their home. Whereas PW2 only saw the 3<sup>rd</sup> appellant before escaping into the sugarcane, PW3 saw all of them. They are people they know well and there is no doubt that were able to recognize them. In fact, DW6 admitted in his defence that it was not possible for the witnesses to confuse him for another because they knew each other very well.
42. PW3 narrated in detail what he saw each appellant do. The detail goes to show that he was indeed observing them. I am satisfied that the witnesses hide out and especially PW3 was close to the house enough to enable him see the perpetrators.
43. All the appellants raised alibi defences. The law on alibi defence is settled. In *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the court held that "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. In the case cited by the appellants *Erick Orieno Meda v Republic* [2019] eKLR, the Court of Appeal after comparing several decisions adopted the following as good law;-
  - a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view;
  - b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross examination of the trial;
  - c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court;
  - d) The accused does not need to prove the alibi, but the prosecution must have presented its case that he accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.



45. In the instant case, the first appellant (DW1) and 2<sup>nd</sup> appellant (DW5) claimed to have gone to the home of DW2 for a ceremony described as taking out a child. DW1, DW3, DW4 and DW5 all talked of going to DW2's house for the ceremony on 19/9/2021. However, DW2 was very clear in his testimony. Though he said that he had guests on 19/9/2021, he went on to say "I had a ceremony for my child. They came on 20/9/2021 at 7:00a.m" This is the person who is supposed to have entertained the guests DW1, DW3, DW4 and DW5 from 19/9/2021 to 20/9/2021 and his evidence totally contradicted theirs by stating that they went to his home on 20/9/2021. That contradiction is grave and goes to show that the witnesses were not truthful. Besides, even though the appellants had no burden to prove the falsity or truth of an alibi, yet the defence witnesses were not able to demonstrate that the said event occurred. They could not tell the name of the child and there was no evidence that even a child was born.
46. DW6's alibi was that he was cutting cane with DW8 and DW9 from DW7's land. Interestingly DW7 could not even tell the said parcel of land where cane was being grown. Did the said land and cane exist? In *Ssentale v Uganda* [1968] EA 36 Sir Udo Udoma CJ said:-
- "a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution.
47. The above position remains the law in Kenya today. In *Victor Mwendwa Mulinge v Republic* the Court of Appeal held as follows:-
- "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 *Karanja v Republic* (1983) KLR 501 – this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the 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. See also *Athuman Salim Athuman v Republic* Criminal Appeal No. 44 of 2015 the the sum of these two decisions is that the alibi defence should be disclosed at the earliest opportunity so that the prosecution can have the same tested on cross examination and by those involved in investigation.
49. In this case, the prosecution called four (4) witnesses and the appellants were called upon to defend themselves. The appellants had not disclosed the nature of the alibi till they testified. I find that the alibi defences are an afterthought. As earlier pointed out the appellants and the witnesses were unable to elaborate on the contradictions in the alibi nor was the land worked on by DW6, DW7, DW8 and DW9 disclosed to enable the police investigate. I am satisfied that the alibi defences did not dislodge the prosecution evidence. The prosecution case stands unchallenged.
50. The trial court acquitted the 2<sup>nd</sup> appellant of the charge of Arson. However, from the testimony of PW3, the three appellants attacked the home together. Though PW3 may not have seen the 2<sup>nd</sup> appellant actually enter their house, yet the three appellants in going to the home had a common intention to commit an unlawful act which they did. As a result two houses were burnt and a tank damaged. The 2<sup>nd</sup> appellant did not disassociate himself from the other appellant's actions.



51. Common intention is defined 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 purposes 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”.

52. I agree with the prosecution counsel’s submission that the trial court erred in not convicting 2<sup>nd</sup> appellant for Arson because his intention was to commit unlawful acts with 1<sup>st</sup> and 3<sup>rd</sup> appellant. Unfortunately, the State did not file a cross appeal or give notice to the appellants that they would be asking the court to quash and revise the decision of the trial court to acquit the 2<sup>nd</sup> appellant on Count I. The court will not interfere.

**Whether the Sentence is Harsh and Excessive.**

53. The Complainant lost everything when his two houses were burnt down with all their contents. As submitted by the prosecution counsel, one wonders what would have happened if the complainant and his family had been caught in the house unawares. It would have been a different story all together. The complainant was forced to abandon his home following the attack. Burning ones home in the manner it was done was as good imaging the persons death.

54. The appellants were treated as first offenders and pleaded for leniency. Though the sentence is legal, this court is of the view that it is on the higher side. In exercise of my discretion, I will set the sentence on both counts. I substitute it with the following sentence, on Count I, 1<sup>st</sup> and 3<sup>rd</sup> appellants sentenced to thirty (30) years imprisonment.

55. On Count II, each appellant to serve three (3) years imprisonment. Prison sentences to run concurrently in respect of 1<sup>st</sup> and 3<sup>rd</sup> Appellants.

56. Sentence to run from the date of sentence by the trial court on 27/7/2022.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 9<sup>TH</sup> DAY OF MARCH, 2023**

**R. WENDOH**

**JUDGE**

Judgment delivered in the presence of

Ms. Kosgei for the State

Sagwa for Appellants present

Evelyne Nyauke – Court Assistant

2<sup>nd</sup> Appellant in court

1<sup>st</sup> and 3<sup>rd</sup> Appellants – virtually.

