



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kivuva v Republic (Criminal Appeal E059 of 2022)
[2023] KEHC 3980 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E059 OF 2022**

GMA DULU, J

MAY 4, 2023

BETWEEN

DANIEL MUTHYA KIVUVA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Criminal Case No. E102 of 2022 at Tawa Court)

JUDGMENT

1. The appellant was charged in the Magistrate’s Court with arson contrary to Section 332(9) of the [Penal Code](#). The particulars of offence were that on the night of 14th and April 15, 2022 at Kikima market Mbooni West Sub County willfully and unlawfully set fire to a dwelling house valued at Kshs 23,400/= belonging to Magdalene Mueni Ndunda.
2. He was recorded as pleading guilty to the charge and was convicted and sentenced to ten (10) years imprisonment.
3. He has now come to this court on appeal and relied on amended grounds of appeal as follows:-
 1. The learned trial Magistrate did not accord him a fair and impartial trial as per the provisions of Section 25(c) of the [Constitution](#) and indeed he was forced by situation to participate in the contract (sic) of the trial, without being explained well what he was facing and still was sick.
 2. The learned trial Magistrate did not accord him a fair impartial trial as per the provision of Article 50(c)(j) of the [Constitution](#) as was celebrated in the case of [Davidson Kyalo Musau Versus Republic](#) (2019) eKLR.



3. The learned Magistrate made error in law and fact by holding the views above (that is) I find the accused report dated May 3, 2022 and noted the recommendation that the accused person is not suitable for non-custodial sentence without considering the plan and the type of the case.
4. The trial Magistrate did not give the accused person time, facilities and documents the prosecution intended to rely on for a fair trial.
5. That his prayer is this court to order a full retrial and allow agreement between the complainant and accused who were husband and wife as it was a domestic case.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.
5. I note that though the appellant was convicted on his own plea of guilty, he has appealed against both conviction and sentence. In effect, he says that he did not unequivocally plead guilty to the charge for which he was convicted. I thus have to deal with both the conviction and sentence.
6. The procedure for taking a plea of guilty is codified under Section 207(2) of the [Criminal Procedure Code](#) (Cap 75). It is not statutorily detailed.
7. However, courts have over time explained the detailed process or steps to be taken by courts in recording a plea of guilty. In this regard, is the case of [John Muendo Musau Versus Republic](#) (2013) eKLR the Court of Appeal echoed what had been stated earlier in the case of [Adam versus Republic](#) (1973) EA 445 that:-
 - (i) The charge and all ingredients of the offence should be explained to the accused in his language or in a language he understands.
 - (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
 - (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.
 - (iv) If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
 - (v) If there is no change of plea a conviction should be recorded and a statement of facts relevant together with the accused's reply should be recorded.
8. I note that in the above case of [John Muendo Musau versus Republic](#), the Court of Appeal went further to add that even after all the above steps are taken, if the accused person wants to change his plea or in mitigation says anything that negates any of the ingredients of the offence which he has already admitted and been convicted for, the court must enter a plea of not guilty. Thus it means that an accused person can change his plea to not guilty, at any stage before finalization of sentencing.
9. Having perused and also considered the record of the trial court herein, I am of the view that all the required steps of taking a plea of guilty were complied with by the trial court. The charge was read and explained to the appellant in Kikamba language and he admitted the same. Facts of the case were summarized by the prosecutor and he admitted same. In mitigation, he asked for forgiveness and offered to pay for the damage.



10. The plea of guilty of the appellant was thus unequivocal and at no stage did the appellant attempt or indicate a change of plea. He cannot now purport on appeal to have been denied the right to fair hearing under the Constitution or claim not to have been supplied with witness statement by the prosecutor.
11. I will thus dismiss the appellant's appeal against conviction.
12. With regard to sentence, the maximum statutory sentence for the offence of arson is 14 years imprisonment. The appellant was sentenced to serve ten (10) years imprisonment after the trial court received and considered a pre-sentence report.
13. I note however that this was a domestic matter. The appellant has another wife with school going children. The local administration say that he is a responsible father taking care of the children and taking them to school. He was a first offender. He pleaded guilty to the charge and offered to compensate the loss. The appellant and the complainant are either married or lovers, with one child.
14. In those circumstances in my view, the sentence of ten (10) years imprisonment was harsh and excessive. As the appellant was sentenced on May 5, 2022 about one (1) year now and was arrested on March 24, 2022, I will order that he will serve the sentence already served. I will however warn him not to repeat a similar offence or harm the complainant.
15. Consequently, and for the above reasons, I dismiss the appeal on conviction and uphold the conviction of the trial court.
16. I however, set aside the sentence imposed by the trial court and order that the appellant will instead serve the prison sentence already served. The appellant is however warned from repeating a similar offence or harming the complainant herein. In effect, the appellant will be released from custody forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF MAY, 2023 VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the virtual presence of:-

Appellant

Mr. Kazungu for state

Mr. Mwendwa Court Assistant

