



**Abalaga v Republic (Criminal Appeal E032 of 2022)  
[2023] KEHC 19493 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19493 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E032 OF 2022**

**GMA DULU, J**

**JULY 4, 2023**

**BETWEEN**

**THOMAS MSAFARI ABALAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction in Criminal Case No. E032 of 2020 at Voi  
by Hon. F. M. Nyakundi (SRM) delivered on 4th October 2021)*

**JUDGMENT**

1. The appellant was charged with Magistrate's court with arson contrary to section 332(a) of the [Penal Code](#). The particulars of offence were that on September 1, 2020 at 11:00hours in Maungu area within Voi Sub County wilfully set fire to a dwelling house valued at Kshs. 4,285,134.50 belonging to James Mathew Hendricksen.
2. He denied the charge. After a full trial, he was convicted of the offence charged and sentenced to ten (10) years imprisonment.
3. Dissatisfied with the conviction, the appellant has come to this court on appeal and relied on three amended grounds as follows:-
  1. That the learned trial Magistrate erred in law and facts by convicting him yet his identification was not positively established.
  2. That the learned Magistrate erred in law and facts by failing to appreciate that the appellant was arrested on suspicion but on proved facts that he had committed an offence. That the learned trial Magistrate erred in law by convicting and sentencing the appellant yet failed to find that his constitutional rights to a fair trial under article 50(g) and (h) were violated.



3. That the learned trial Magistrate erred in law and fact by convicting him yet his defence was cogent and believable.
4. The appeal was canvassed through written and oral submissions. In this regard, I have perused and considered the written submissions filed by the appellant as well as the oral submissions made by the Director of Public Prosecutions.
5. This being a first appeal, this court has an obligation to reconsider the evidence on record afresh and come to its own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
6. I note that in their oral submissions, the Director of Public Prosecutions through Mr. Sirima conceded to the appeal on the grounds that the appellant was not positively identified as being connected with the fire, and that his alibi defence was not considered, by the trial court. The Director of Public Prosecutions emphasized that the investigating officer PW11 PC Julius Mwakandu did not visit the scene of fire.
7. From the evidence on record from prosecution witnesses, the fire occurred and was noticed in broad daylight at around 11a.m. It was a house at a wildlife conservancy in Maungu area of Taita Taveta County.
8. As workers proceeded to the scene, they met a person wearing a mask who claimed to be an AP Officer walking in the restricted area, and that person was armed with a knife and they feared him and let him hide in the bush. The party of workers and others then proceeded to the burning house to put off the fire, and informed the conservancy security personnel and the police.
9. No arrest was made at the scene, and the appellant was arrested later at his home about 5km away the next day. The appellant had a history of having been arrested at the conservancy area previously for cutting trees. The prosecution called a total of twelve (12) witnesses.
10. The appellant on his part, tendered sworn defence testimony, and was not cross-examined by the prosecutor. He also called four (4) other witnesses to support his version of an alibi, that on the material alleged day he attended a meeting a distance away from the scene of the fire.
11. The burden was on the prosecution to prove beyond reasonable doubt that the appellant caused the fire, or that he was one of the people who caused the fire – see *Sawe v Republic* (2003) eKLR.
12. Having perused and considered the evidence on record and evaluated the same, I am of the view that the prosecution did not prove the guilt of the appellant beyond reasonable doubt. The first reason is that, even assuming that the person who was seen in the restricted area was the arsonist, that person wore a mask and there is no evidence on record from any witness that he was identified as the appellant herein. Instead, that person was merely described as short and fat which in my view, cannot be a sufficient identification of anybody let alone the appellant.
13. Secondly, the appellant tendered a sworn alibi defence statement and called a number of witnesses. He did not have the burden of proving his alibi, as it was for the prosecution to disprove the same if they wished to do so. He relied on recorded minutes of a meeting he attended that day. The prosecutor did not ask him any question in cross-examination. Thus his alibi defence remained completely undisturbed.
14. Thirdly, the people who arrested him appear to have arrested him merely because he was said to have had a history of cutting trees in the conservancy area, rather than because they positively identified him as the arsonist on that day.



15. I thus find that the Director of Public Prosecution was correct in conceding to the appeal, because the evidence of the prosecution on record, simply established suspicion against the appellant, but failed to prove beyond reasonable doubt that he caused the fire either alone or with others.
16. I will thus allow the appeal against conviction. I will also set aside the sentence.
17. Consequently, and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JULY 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

The appellant

Mr. Sirima for the State

Mr. Otolu court assistant

