



REPUBLIC OF KENYA



**Ngundo v Republic (Criminal Appeal E067 of 2022)  
[2023] KEHC 22603 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22603 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E067 OF 2022  
TM MATHEKA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**JOSEPH KATUA NGUNDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was charged with 2 counts of arson, contrary to section 332(a) of the *Penal Code*, and two counts of grievous harm contrary to section 234 of the same code. The particulars to the 1<sup>st</sup> and 2<sup>nd</sup> count are that on 24/9/2021 at around 1230 hours at Mavindini location, Mavindini sublocation Kathonzweni Subcounty, within Makueni County jointly with others not before the court wilfully and unlawfully set fire to semi-permanent houses - one valued at Kshs. 1,000,000 inclusive of households, the properties of Mariana Kingwaa Kamole and another valued at Kshs. 700,000 inclusive of households the properties of Petronilah Mutinda.

On the 3<sup>rd</sup> Count it was alleged that on the same date, time and place, jointly with others not before court, he did grievous harm to Mariana Kamole.

2. The prosecution called 7 witnesses to prove their case - and at the close of the case, the accused was found to have a case to answer.
3. The record shows that upon Section 211 of the *Criminal Procedure Code* being explained to him, the accused chose to keep silent. He told the court he would not call any witness because they were far.
4. The learned trial magistrate then Hon. J.N Mwaniki upon considering the case from the prosecution found that

“By remaining silent in the face of this accusation, the accused left the evidence against him unchallenged.... from the totality of the evidence I have no doubt that it was the accused



acting in concert with others who torched the complainant's house ... no doubt that the injuries sustained by PW1 were occasioned by the accused....”

He was persuaded that the prosecution proved the charges beyond a reasonable doubt convicted the accused and sentenced him to 30 years imprisonment on each count, for the 3 counts - and the sentences to run concurrently.

5. It is against the convictions and sentence that the appellant brings this appeal - He submits that the learned trial magistrates erred in law and fact by finding that the prosecution had proved its case beyond a reasonable case - that prosecution's case was marred by untruths inconsistencies, and was unbelievable, that there was failure by the court to consider that there was mob injustice incident that caused the offence.

6. Citing *Cholmendeley v R* CA 116/2005 the appellant argues that the duty of the prosecution is not just to get a conviction but to get the truth because they too are “ministers of justice”. He argued that in his case the prosecution failed in this duty.

Further relying on *Ndungu Kimani v R* KLR 282 he argues that the PW1 was a witness who was untrustworthy as can be seen from her evidence.

Citing *Josiah Afuna Augustus* CR Appeal No. 277/2006 (UR), and *Charles Kiplang'at Ng'eno v R* no. 77/2000 (UR) he argued that his defence was dismissed without consideration and that the court had shifted the burden of proof upon him. He further argued that there was no circumstantial evidence to connect him to the offence. He cited *Abanga Alias Onyango v R* CR.App no. 32/199, *Sawe v R* among other cases to point out to the court the requirements for circumstantial evidence.

With respect to the charge of Arson, and the alleged value of the houses, he argued that there was no valuation placed before court to show the value of this houses/goods.

7. The appellant further argued that the state was supposed to dislodge the presumption of innocence of the accused person which runs throughout the trial. Further that a reasonable doubt was not an imaginary issue - but based on reason and common sense - logically arrived at from the evidence or lack of evidence. He challenged even the evidence of arrest, and his alleged holding at Kamukunji Police Station. He urged the court to be guided by *Okeno v R*

8. The ODPP opposed the appeal arguing that they had established the charge of arson and grievous harm.

That the prosecution had established that the houses belonging to PW1 and PW2 had been set on fire by the appellant with others not before the court - that this was on allegations that the PW1 was a witch - that they proceeded to beat her up thoroughly.

9. I have carefully considered the evidence and the submissions by the appellant and the state.

Section 332 of the *Penal Code* provides: Arson

Any person who wilfully and unlawfully sets fire to—

(a) Any building or structure whatever, whether completed or not; or...is guilty of a felony and is liable to imprisonment for life.

And

S. 234 of the same Code states; 234. Grievous harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life



10. The issue is whether, upon scrutiny and analysis of the evidence on record the prosecution proved the charges against the appellant to warrant the conviction; whether the sentence ought to be interfered with.
11. PW1 Mariana Kamote told the court that on 24/9/2021 at 1000am she was at home when about 30 people she did not know came to her home on motor cycles. They went to her son's - one Stephen Ngundo Katua's house who then with the accused who is her husband. The accused told her that he was looking for her to accompany him to the house of Stephen. She took her 1½ year old twins and accompanied them there. On reaching Stephen's home, there were many people making noise. Her husband told her to administer some witch craft stuff on Stephen's wife - and then while armed with a water jerrican , he beat her up thoroughly, boxed, kicked her and broke her hand.  
  
She was then locked up on the claim that she had bewitched someone. She remained locked up for 1½ hours. She was later released and the appellant asked her whether she had reversed the witchcraft she had inflicted upon her daughter in law. The appellant then took petrol and a tyre and threatened to lynch her - after forcing her to sit on the tyre and picked petrol to pour on her. That it was then she heard a gunshot. A police officer arrived and escorted her to her home. She found that her house had been torched to the ground. She was taken to Kathonzweni Police Station and treated at Kathonzweni Hospital and Makueni Referral Hospital.  
  
She produced the P3 and treatment notes. At the hearing her left hand was still in a sling. She also marked photo graphs of the burnt house. She said that her daughter in laws house was also torched. She said the appellant had left home years earlier and had been restrained from coming there. She said she knew that he and her son torched the houses because she heard them saying they would do so - she said that her son Stephen ran away.
12. On cross-examination she said accused had left home in 2014 - that she had built another house - the one he torched after he left home, she denied having affairs, she said they had 6 children between them and after the incident she went to live with one of their sons. She said the house and house hold items torched belonged to her.
13. PW2 Petronila Mutinda - told the court that motorcycles with people passed her place of work at 11.00 pm on 24/9/2021. She heard rumours that her home was going to be torched that day. She went home - only to find that the people had gone to the house of her brother in law Stephen Ngundo. She found the accused beating his wife PW1. He then said he was going to burn the other houses - He got petrol from the motorcycles. That the accused person broke into PW1's house and torched it. He also torched her house. She left when the crowd had gone back to Stephen Ngundo's house where the PW1 was locked up. She said that her house was 4 bedroomed and there were motor vehicle spare parts in it. She identified photos of the burnt house.
14. On cross-exam she said the appellant had told her to remove her items from the house but never gave her sufficient time. She said she saw him torch the houses. She said she had been married to his son for 10 years.
15. PW3 Patrick Mutuku Muia was a taxi driver in Wote. On 24/9/2021 one Evans Katua , a son of PW1 requested him to go to his (Evan's home) and see what was happening. He went there and found a crowd and the mother of Evans was bleeding from the face with an injured head. The people around were accusing her of being a witch. He said he found PW1's house on fire and heard the appellant threaten to set the Evan's house on fire.
16. PW4 Jackson Kathenge was a clinical officer from Makueni Referral Hospital. He completed the P3 for PW1. He confirmed that she suffered a wound on the head and had a fractural hand.



17. PW5 No. 119984 PC Mwangi Njoki from Mavindini Police Station received a report from the area assistant chief on 24/9/2021 at 2.00pm - that a woman in Sheria Village was about to be lynched. He rushed there with his colleague and found 2 houses on fire and a woman surrounded by over 200 people saying that she was to be lynched. The ring leader was the woman's husband. They fired in the air to rescue her - they left with her on a motorcycle - but the husband and the gang followed them, as he demanded for her to be returned to be lynched. They got reinforcement from Kathonzweni Police Station. Two houses were torched.
18. PW6 no 218163 Sgt Dominic Musyoka was in the company of PW5 - when they found PW1 about to be lynched. The accused person was among those who wanted to lynch her - and when they rescued her, the accused and others followed them to the police station and became hostile - the lady had injuries on the head and hand. The witness testified that they could not arrest the accused that day because of the hostility of the crowd - that accused was arrested in Nairobi as he had disappeared.
19. The accused requested and was allowed to recall PW5 and PW6 for cross-examination. PW5 told the court that accused was saying that his wife was a witch who needed to be lynched. PW5 said they rescued his wife - they came back and arrested the accused. PW6 reiterated his evidence on cross-examination. He added that there was a sick person in the home whom the accused was accused of bewitching.
20. Upon the closure of the case from prosecution the accused was placed on his defence. The accused chose to remain silent and did not offer any evidence. He did not call any witness.
21. In his judgment delivered on 2/3/2022 the trial court found that by remaining silent the accused person had left the evidence against him unchallenged.
22. I have carefully considered the submissions and the evidence on record.
23. The onus to prove the charges beyond a reasonable doubt lies with the prosecution and the accused person having been found to have a case to answer was expected to give his statement of defence - he did not.
24. The case for the prosecution is that the appellant and others accused his wife - PW1 of being a witch and set out to compel her to reverse the witch craft she had placed on her own daughter in law who was sick. PW1 testified that it was the appellant who beat her in the presence of the crowd that was cheering him on the allegation that she had bewitched her daughter in law. The police arrived only to find the appellant leading the crowd in an attempt to lynch the PW1 - an had it not been for them, she would have been lynched. The police officers confirmed the appellant and his son led the hostile crowd to the police post seeking the release of the PW1 so that she could be lynched on account of the alleged witchcraft.
25. True - there was a crowd as submitted by the appellant - but the evidence on record indicates that he was at the lead of the crowd. He led them to his home, he picked his wife from her house, and took her to the son's house where the alleged victim of her witch craft was.
26. The 2 houses were torched in the throes of these accusations. Pw2 said she saw the appellant set her house on fire – The evidence shows that the appellant led the crowd - hence he cannot escape the blame of torching the 2 houses in the company of others.
27. While it is true that in our communities people still believe in witch craft and testify to the manifestation of its effects on those bewitched through illness, mental health issues etc. – what I learnt from the stories I grew up on whenever I was in the village is that for every dose of witch craft there was an antidote, and that there were people with the gift or the powers to deal with the evil powers



of witches, and that there were processes for dealing with witchcraft. These did not involve criminal Acts of arson and grievous harm but harm that would come to the witch in the same measure they had unleashed their evil power on the innocent party unless they reversed the thing themselves. Now allegations of witch craft have become the vehicle through which innocent persons are killed, elderly parents who refuse to part with their properties, people are displaced from their homes etc through criminal acts of their accusers. That is unacceptable in a society that prides itself on the respect of the rule of law and respect for human rights.

28. The PW1 also told the court how the appellant assaulted her and his role in the whole saga was confirmed by the police officers and here is no evidence pointing to any other person other than himself - as having assaulted the PW1.
29. In the circumstances I do find that on the evidence on the record the prosecution established the charges against the appellant beyond a reasonable doubt.
30. With respect to the sentence - each of the offences attracts a maximum sentence of life imprisonment and the learned trial magistrate in the exercise of his discretion may have found the long imprisonment sentences justifiable. Be that as it may - the record does not show that the learned trial magistrate took into consideration that this was a first offence and the crime was committed within a family setting. This involved a man, his wife, his two sons and his daughters in law. An unresolved dispute festers and begets others, and when within the family, it can turn into a family heritage, becoming hereditary to the detriment of that family and the society it finds itself in. The need to punish and the search for the healing of broken relations towards the acquisition of justice require that the punishment meted meets at the junction of all these desires.
31. The *Constitution* and the sentencing guidelines require of the judiciary to seek to do justice within its lens of transforming society through access to justice by embracing multi door approach to the resolution of disputes. This case other than the *Penal Code* penalties would probably also benefit from an AJS perspective which is alien to the Criminal Justice System as envisaged under the pre 2010 criminal law jurisprudence. This perspective may, understand the underpinnings of witch craft allegations and how to resolve the same within the confines of the respect for human rights and the rule of law.
32. I therefore find that before I determine the appropriate sentence it is necessary to obtain a social inquiry report from the Prosecution After Care Service Makeni County to be availed within 21 days hereof.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> SEPT, 2023.**

.....

**MUMBUA T MATHEKA**

**JUDGE**

CA - Nelima

State- Ms Omollo

Appellant - present

