**Wekesa v Republic (Criminal Appeal E081 of 2022)**
**[2023] KEHC 22365 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22365 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E081 OF 2022**

**AC MRIMA, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**SAMSON WANYONYI WEKESA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***((Appeal arising from the conviction and sentence of Hon. S. N. Makila (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 4332 of 2019 delivered on 14{{^th}} November, 2022))***

**JUDGMENT**

**Background:**

1. The Appellant herein, Samson Wanyonyi Wekesa, (hereinafter referred to as 'Samson') was charged alongside three others with the offence of arson contrary to Section 322(a) of the *Penal Code*. The particulars of the offence were that on 27th March, 2019 at 1300 hrs within Trans Nzoia County willfully and intentionally set fire to a house (bungalow), tractor (Massey Ferguson), maize milling machine, maize store, cattle shed and a tractor trailer, all valued at Kshs. 17,450,000/= the property of Eunice Kamau.

2. When the appellant and the co-accused were arraigned before the trial Court in Kitale Chief Magistrate's Court Criminal Case No. 4332 of 2019, they all pleaded not guilty to the charge. After a full trial, all the accused were found guilty as charged and were accordingly convicted. They were sentenced to 5 years' imprisonment.

**The Appeal:**

3. The Appellant herein was aggrieved by the conviction and sentence, hence the instant appeal. He was represented by Counsel both at trial and on appeal.

4. The Petition of Appeal raised five grounds impugning the trial Court's findings. The Appellant mainly challenged the evidence on his identification as one of the assailants, that the charge sheet was defective, that there was no sufficient evidence to convict the Appellant and that the burden of proof was shifted to the Appellant. He prayed that the appeal be allowed, conviction quashed and sentence set-aside.

5. The appeal was opposed by the State.

6. Parties were directed to file written submissions in hearing the appeal. Both complied. The rival submissions urged the parties' respective positions and referred to various decisions in asking the Court to find in their favour.

**Analysis:**

7. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

8. In discharging the above duty, the Court must appreciate the trial Court for summarizing the evidence adduced at the trial so well such that this Court hereby adopts the same, by way of reference, as part of this judgment.

9. Having carefully considered this matter, upon perusal of the record and consideration of the decisions referred to, this Court finds that there are mainly two issues for determination in this appeal. They are whether the criminal case was proved and if so, whether the sentence was excessive.

10. The Court will deal with the issues in seriatim.

**Whether the criminal case was proved in law:**

11. The prosecution called five witnesses in a bid to establish that the Appellant, in conjunction with others, committed the offence that he was charge with. The witnesses were Eunice Kamau (testified as PW1), Moses Kamau Wangereka (the husband and testified as PW2), No. 23139 Insp. Fredrick Simiyu Sirengo (testified as PW3), Ben Wanyonyi (testified as PW4) and No. 71615 Cpl. Gilbert Chepkok as PW5.

12. PW1 and PW2 were a couple. They had established a home within Trans-Nzoia County and generally carried out farming activities. PW4 was employed by the couple as a helper in their farm. PW3 was an officer from the Scenes of Crime who visited the scene. He took and processed photographs of the scene. PW5 was the investigating officer, then a DCI officer attached at the DCI Kitale.

13. The prosecution case, in brief, was that PW2 was suspected to have been involved in the death of a boy from within the village. The boy had been employed as PW1's farm hand, but he was dismissed due to repeated acts of theft within the home. In response and eager to retaliate and teach PW2 and his family a lesson, the villagers carried the body of the dead boy 9known as Collins) and chanted circumcision songs as they proceeded to PW1 and PW2's house. It was around 1pm on 27th March, 2019,

14. Having been called and informed by the parents of the deceased boy of the death, PW1 was aware that Collins had been interrogated that morning by PW2 and a village elder over the theft of a phone from their home. Collins then died hours after the interrogation.

15. Hearing the songs that were approaching her home, PW1 suspected that it may be well with herself and her family. She retreated at a fence and hid herself from a vintage point, having a clear view of her home. She saw a large group of people carrying the deceased most of whom were from the neighbourhood.

16. PW1 witnessed the massive destruction of her properties including the setting ablaze of his house, tractor, milling machine and a store. Some properties were also stolen. In her words, PW1 saw and knew those involved. She identified the Appellant as one of them.

17. PW4 also witnessed the events at PW1's home. He also hid himself on hearing the villagers chanting circumcision songs and heading to PW1's home. He also identified several people who took part in the attack including the Appellant herein whom he knew quite well.

18. On his part, the Appellant denied taking part in the retaliatory attack. He stated that he was aware that Collins was suspected to have stolen a phone from the home of PW1 and that there had been discussions that morning.

19. The Appellant blamed PW1 whom she alleged was framing him for having refused to help PW2 was had been arrested over the death of Collins.

20. In its analysis in the impugned judgement, the trial Court began by reproducing Section 332(a) of the *Penal Code*. The Court then identified the ingredients of the offence and, being guided by binding precedent, found the definition of the words 'willfully', 'intentional' and 'unlawfully'.

21. The trial Court then addressed the issue of defectivity of the charge and the identification of the attackers. The Court found that the Appellant was one those who committed the offence and convicted him.

22. In this appeal, this Court will deal with the three sub-issues as raised by the Appellant. They are as follows: -

    i. The identification of the Appellant.

    ii. The defectivity of the charge.

    iii. The shifting of the burden of proof.

23. The Court will deal with each of the sub-issues in seriatim.

**The identification of the Appellant:**

24. The mode of identification in this case was by way of recognition. The offence was allegedly committed during day time and mostly by villagers within PW1's neighbourhood.

25. PW1 and PW4 testified on what they witnessed on the day of the attack.

26. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in *Peter Musau Mwanzia v Republic* (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in

contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

27. In *R v Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court had the following to say on recognition: -

> Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

28. Further, the Court of Appeal in upholding the evidence of recognition at night in *Douglas Muthanwa Ntoribi v Republic* (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> > "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
> >
> > The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

29. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & Another v R* (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

30. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

31. The witnesses testified before the trial Court. The Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

32. There is no doubt the offence was committed during day time. There is as well no dispute that PW1 had a home in Matunda area within Trans Nzoia county. That home was razed down on the material day. PW1 stated that she knew the Appellant as he was her neighbour and the Chairman of the boda-boda riders. That, she had known him for over 26 years and that he was known by the nick name of Van Damme. That, she had all along lived well and had no grudge with the Appellant.

33. The Appellant initially denied, but later admitted that he was known by the nick name. He also did not deny knowing PW1 for the period and that they were neighbours.

34. PW1 stated with precision what the Appellant did on during the incident. It is on record that as the Chairman of the riders, the Appellant was the one commanding the rest on what to do. He came with a 10-litre jerrycan of petrol and poured it on the house. He then lit the house using a match box. According to PW1, the Appellant was, therefore, at the heart of the operation.

35. Alongside the foregoing is the Appellant's defence. He denied taking part in the matter. He, however, stated that he had been involved in the issue of Collins having stolen a phone from PW1 that morning. He had proceeded to his home and asked him of the matter, but Collins denied.

36. PW1 heard the crowd approaching her house. She took cover and was not seen by the attackers. She would see what happened. She stated that she lay prostate around 15 meters from her house under a kayaba fence.

37. PW4 corroborated the evidence of PW1. While PW1 was in the house, PW4 was in the farm. He heard the crowd approaching and also hid. He could also see what was happening. He knew the Appellant by his nick name. He stated that he saw the Appellant burn the house using petrol.

38. The Appellant in his submissions argued that there were grave contradiction s between the evidence of PW1 and PW4 which could not favour a conviction. He referred to the Court of Appeal decision in *Ahamad Abolfathi Mohammed & Another v R* (2018) eKLR in buttressing the argument.

39. It is a fact that witnesses cannot give exact similar accounts of how events unfolded. This may be attributed to how people perceive things differently. Therefore, when discrepancies are not grave to cause any miscarriage of justice or as to create reasonable doubts in the mind of a Court, Courts usually overlook such and proceed to convict an accused. This issue was even reiterated in the *Ahamad Abolfathi Mohammed & Another v R* case (*supra*)

40. The contradictions in this case related to the number of people at the scene. Whereas PW1 stated that the people were over 150, PW4 stated that there were around 30.

41. It is on record by PW1 that when the crowd eventually arrived at the home of PW1, the Appellant who was in charge split them into three groups. One of the groups, which the Appellant commandeered, torched the house. That could easily explain the difference. It is also possible that one may not be good in estimation. Many a times, witnesses appear before Court and the issue of inability to give accurate estimates of people or distances arise.

42. To this Court, that contradiction did not go to the root of the matter to create a doubt in the mind of the Court on the Appellant's culpability. That equally applies to the other allegations of contradictions raised by the Appellant.

43. On a careful review of the evidence, this Court finds that the then prevailing circumstances accorded PW1 and PW4 the opportunity to recognize the Appellant, whom they knew quite well, as one of those who took part in the arson attack. The identification of the Appellant was, therefore, not in error.

**The defectivity of the charge:**

44. The Appellant vehemently contended that the charge was defective in that he was charged under Section 322(a) of the *Penal Code* instead of Section 332(a) of the *Penal Code*.

45. This Court will briefly render on this issue. Article 50(2)(b) and (n) of the *Constitution* provides as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right-
>
> (b) to be presumed innocent until the contrary is proved;
>
> (n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –
>
> i) an offence in Kenya; or
>
> ii) a crime under international law

46. Section 134 of the *Criminal Procedure Code* (hereinafter referred to as 'the CPC') provides as follows: -

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

47. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.

48. The then East Africa Court of Appeal in *Yosefu and Another v Uganda* (1960) E.A. 236 held as follows: -

> The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

49. In *Nyamai Musyoka v. Republic* (2014) eKLR, the Court of Appeal expressed itself as follows: -

> The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 *C.P.C.* to cure the defect... (emphasis added).

50. And, in *Sigilani v R* (2004) 2 KLR 480, it was held that: -

> The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

51. The Black's Law Dictionary defines 'defective' as follows: -

> Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

52. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.

53. Therefore, if on examination of a charge, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.

54. Applying the above to this case, the Appellant was charged with the offence of arson. The particulars were given. The Appellant was represented by Counsel throughout the trial. He took part in the examination of witnesses. He even defended himself in stating that he was not among those who torched the property of PW1.

55. The only complaint the Appellant has on the charge is that the section of the law which was captured in the charge sheet was Section 322(a) of the *Penal Code* instead of Section 332(a) of the *Penal Code*.

56. Section 322 of the *Penal Code* deals with the offence of handling stolen goods. There is no Section 322(a) in the *Penal Code*.

57. The trial Court dealt with the issue in the judgment. It found that the error did not occasion any miscarriage of justice as the Appellant was well aware of what he faced before Court and fully participated in the trial. The Court further applied Section 382 of the *CPC* in curing the error.

58. Going by the above discussion, this Court finds that application of Section 382 of the *CPC* was in order and it took care of the error, which error, in essence, did not occasion any injustice to the Appellant. This Court further finds that the application of Section 382 of the *CPC* in this matter does not in any way confront the protections of the right to a fair trial in Article 50(2) of the *Constitution*.

59. Having said as much, the Appellant's contention that the charge was defective does not have any legal leg to stand on. It is hereby dismissed.

**The shifting of the burden of proof:**

60. To this Court, this issue does not seem to be a serious one. The Appellant argues that the trial Court shifted the burden of proof when it declined the defence and stated that even if PW2 had participated in the killing of Collins, the recourse by the Appellant and the others in taking matters into their own hands and setting the properties ablaze was unwarranted.

61. This Court does not think so. The trial Court stated as much when it was settling the ingredient of the offence of arson to wit the unlawfulness of the overt act. That is why the Court further stated that '...two wrongs do not make a right...'.

62. The contention is overruled.

63. On the basis of the foregoing, this Court is not convinced to find that the trial Court erred in the manner it analyzed the evidence. The Court only buttresses the position that the offence of arson was proved as required in law and the conviction was sound. It cannot be disturbed.

64. Consequently, the appeal against the conviction is hereby dismissed.

**The sentence:**

65. On the appeal against the sentence, the High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and

excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

66. The trial Court dealt with the issue of sentencing in such a meticulous way. It gave parties time to prepare for mitigations and even called for a Pre-sentence report. It further accorded Counsel an opportunity to submit on the Pre-sentence report. The Court also gave the rationale behind sentencing and demonstrated why a non-custodial sentence was not ideal in the circumstances.

67. The Appellant did not point out how the sentencing Court erred in arriving at the sentence. With such an offence at hand, the sentence meted was very reasonable.

68. This Court equally finds the appeal on sentence unmerited.

**Disposition:**

69. On the basis of the above, the appeals against the conviction and sentence are hereby dismissed.

70. Since the Appellant is out on bond, the bond is hereby cancelled and he shall be handed over to the prison to complete the sentence.

It is so ordered.

**DELIVERED**, **DATED** and **SIGNED** at **KITALE** this **22nd** day of **September, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Miss. Arunga,** Learned Counsel for the Appellant.

**Miss Kiptoo,** Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Regina/Chemutai** – Court Assistants.