



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAPENGURIA**  
**CRIMINAL APPEAL NO 12 OF 2020**

**NELSON CHAKAILE MUKELEM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original judgement and sentence of Hon L.G. Okwengu, RM, dated 2<sup>nd</sup> June 2020 in Criminal Case No 513 of 2019 in the Senior Principal Magistrate's Court at Kapenguria, Republic v Nelson Chakaile Mukelem)*

**JUDGEMENT**

In his petition to this court, the appellant has challenged the judgement and sentence of six years' imprisonment in respect of the offence of arson contrary to section 332 of the Penal Code (Cap 63), Laws of Kenya.

The appellant has raised six grounds in his petition to this court.

In ground 1 the appellant has stated the undisputed fact that he did not plead guilty.

In ground 2 the appellant has faulted the trial court in law and fact by not observing that there was violation of article 49 () () of the 2010 Constitution of Kenya in relation to the appellant.

In ground 3 the appellant has faulted the trial court in failing to find that there was no direct link between the appellant and the torching of the houses.

In ground 4 the appellant has faulted the trial court in failing to find that all the witnesses mistook the appellant for other persons who torched the houses.

In ground 5 the appellant has indicated that he would seek to amend his petition of appeal during the hearing of his appeal under section 350 (2) (v) of the Criminal Procedure Code after receiving a copy of the typed copy of the court proceedings and judgement.

In ground 6 the appellant has prayed that he be furnished with a copy of the trial court proceedings to enable him raise more grounds during the hearing of his appeal.

During the first appearance of the appellant in court on 1/3/2021, he informed the court that he was going to rely on his grounds of appeal and that he had nothing to add.

Furthermore, on 14/4/2021 the appellant also informed the court that he wanted his submissions in Kiswahili to be translated into English. He was therefore granted an adjournment till 20/4/2021 when he handed to the court his English translation of the written submissions.

On 20/4/2021 the appellant told the court that he was relying on his submissions and thereafter the date of judgement was fixed for 19/5/2021, which was adjourned to 14/6/2021 due to work pressure on the part of the court.

In all the above appearances the appellant did not amend his grounds of appeal. Instead he relied on the grounds as that he had filed.

There is an issue that the appellant and the respondent did not raise; which is fundamental to this appeal. The issue is in relation to the framing of the charge of arson. The charge alleges in the particulars of the offence that:

*“NELSON MUKELEM CHAKAILE AKA LOLIO MERII: On the 25<sup>th</sup> day of April 2019 at Kamelei sub location, Tapach Location within West Pokot county with others not before court you torched the houses of Isiaya Chumaita, Lotukei Seromuk and Clement kilipaa.”*

The relevant law that governs the framing of charges is found in section 137 (a) (v) of the Criminal Procedure Code (Cap 75) Laws of Kenya; which reads as follows: *“where a charge or information contains more than one count, the counts shall be numbered consecutively; ...”*.

It is clear from the charge sheet that there are three complainants in the charge namely Isiaya Chumaita, Lotukei Seromuk and Clement kilipaa. In accordance with the dictates of section 137 (a) (v) of the Criminal Procedure Code, *supra*, each complainant should have been the subject of one count or charge. As it is, the charge contains three counts in one count; which is contrary to the mandatory provisions of section 137 (a) (v) of the Criminal Procedure Code, *supra*. It therefore follows that the count or charge is bad for duplicity.

Furthermore, the provisions of 2010 Constitution of Kenya in article 50 (2) (b) require that the charge should be framed so as to enable the accused: *“to be informed of the charge, with sufficient detail to answer it...”*.

It is clear from the particulars of the charge that the offences were allegedly committed at Kamelei sub location, Tapach Location within West Pokot County. The charges should also have specified the exact location such as the villages or towns where the torched houses were located as opposed to alleging that the torched houses were located within a sub location; for the latter is a vast administrative area.

I therefore find that the charge as framed is not in conformity with the constitutional provisions that require a charge to be detailed to enable the accused to answer it. Furthermore, it is also bad for duplicity for charging three counts or charges in one count, which is contrary to section 137 (a) (v) of the Criminal Procedure Code, *supra*.

In the circumstances, I find that the trial of the appellant was fundamentally defective.

I therefore find that it is moot to consider the grounds of appeal; since they are now moot or academic.

The upshot of the foregoing is that the appellant’s appeal succeeds with the result that both the conviction and sentence are hereby quashed.

The only issue left for consideration is whether I should order for a re-trial or not in terms of section 354 (3) (a) (i) of the Criminal Procedure Code.

In this regard, I find that the appellant has been in both remand and post sentence custody of about two years and one month. The point made here is that if the custody period is long, it militates against making an order for a re-trial.

I find the offence of arson carries a sentence of life imprisonment. I further find that the circumstances if believed are serious. I also find the evidence in support of the charges if believed might result in the conviction of the appellant.

In the premises, I find that an order for a re-trial will serve the interests of justice. Pursuant to the powers vested in this court by section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya, I hereby order that the appellant be tried by another magistrate of competent jurisdiction excluding the one who convicted and sentence him.

In the interim period, the appellant is remanded in custody until he is produced in the magisterial court for re-trial purposes as soon as practicable.

**Judgement dated, signed and delivered in open court at Kapenguria this 14<sup>th</sup> day of June 2021.**

**J M BWONWONG’A**

**JUDGE**

In the presence of:

Mr Juma and Ms Hellen, court assistants.

The appellant

Mr. Sitati, for the Respondent