REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 55 OF 2019

FMS .....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J. Mwaniki (SPM) in Makueni Principal Magistrate's Court Criminal Case No. 459 of 2016 delivered on 18th September, 2018).

JUDGMENT

1. **FMS** the appellant was charged and convicted of the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code.

2. The particulars were that the appellant and other on the 23rd July 2016 at [particulars withheld] Secondary School, in Kathonzweni Sub-County within Makueni County, jointly with others not before court, were found in possession of petrol to wit a half litre and a match box.

3. She denied the charge and the matter proceeded to full hearing. Thereafter she was found guilty, convicted and sentenced to serve three (3) years imprisonment.

4. She was aggrieved by the judgment and filed this appeal through P. M. Mutuku & Co. Advocates. The following are the grounds of appeal;

> ***a) That,*** *the learned Magistrate erred in law and in fact when he found that the appellant was preparing to commit a felony when infact she did not.*
>
> ***b) That,*** *the learned Magistrate erred in law and in fact when he failed to consider that all the elements of the offence for which she was charged was not proved.*
>
> ***c) That,*** *the learned Magistrate erred in law and in fact when he handed down an excessive sentence against the appellant.*
>
> ***d) That,*** *the learned Magistrate erred in law and in fact when she used the wrong standards of proof.*
>
> ***e) That,*** *the learned Magistrate erred in law and in fact when he failed to appreciate that the evidence adduced was not sufficient to establish the subject offence.*

5. The prosecution called a total of six (6) witnesses to prove its case. **PW1 MM** aged 15 years was taken

through a voire dire examination and ordered to give unsworn evidence as he was found incompetent to testify on oath. He testified that on 23rd July 2016 he was looking after cattle near the road at Kathonzweni when he heard children calling him. He was then called by one H from [particulars withheld] Secondary School. She was calling from a pit latrine. H was the appellant's co-accused.

6. PW1 went to her and gave him Kshs. 105/= and asked him to buy petrol and a matchbox. Using a motorbike he went to the market and bought the items which he hid on the way. It was getting dark and he left for home.

7. On 24th July 2016 the school principal (PW2) called him as he went to buy milk. She asked him if the children had sent him anywhere. He answered in the affirmative and took her where he had hidden the petrol. She took it away to the school, as he accompanied her. PW2 showed the students the petrol and ordered all of them to go home save for the appellant and her co-accused. He identified the petrol, match box and the sack he kept the items in (EXB 1, 2, 3).

8. **PW2 Ann Kanini Muthiani** the principal at [particulars withheld] Secondary School was out of school on 23rd July 2013 at 5.00 p.m. She was called by her deputy (PW3) who informed her of a plan by the students to burn the school. She reported the matter to the relevant authorities. Students' boxes were searched and 13 of them were found to be empty. On 24th she got some information which led her to contact the boy who had been sent to buy petrol. He led them to where he had hidden it and they recovered ½ litre of fuel and a matchbox (EXB 1 & 2).

9. The next day the OCS Kavumbu police station came and those whose boxes were found open recorded statements. The appellant, her co-accused and PW1 were retained as the rest of the girls went home.

10. **PW3 Rose Ndinda Mutuku** was the deputy principal at[particulars withheld] Kathonzweni. On 23rd July 2016 she was in school and noted some suspicious movements among the students. She approached them and they told her they were sun bathing. She met the same girls with the senior teacher. She had earlier seen something thrown from the toilet and a boy picked it. The appellant gave them a piece of paper that had a conversation saying;

> ***"baada ya hiki kitu kilicho mbele yetu" (after this incident before us)."***

She gave some narratives of what some girls had told her.

11. Together with the senior teacher they inspected Bakita dormitory and confirmed that about 23 girls' boxes were empty. Reports were then made. She identified what she had seen near the school. Upon investigation the boy explained how he had been sent for petrol by some girls. On being asked by the police to identify the girls who sent him for petrol he identified the appellant and her co-accused.

12. **PW4 Berita Wavinya Kamunzu** a teacher at [particulars withheld] went out of the office to receive a call on 23rd July 2016. She spotted a boy standing next to the school fence and speaking to someone within the compound. The boy ran away and a girl opened the toilet. When the girl who she identified as the appellant saw her, she closed the door. She called her and took her to the office. The appellant denied communicating with the boy. She searched her and found her with a paper in which she was communicating with another lady called B M. A report was made and the police took over. In cross examination she said she did not know what the appellant was communicating with the boy.

13. **PW5 Eunice Wamuyu** a government analyst confirmed that the liquid sample sent to them by Sgt Edward Kaisa No. 61030 for examination was found to be petrol, a petroleum product. The report was produced as EXB 4 and the Exhibit Memo (EXB 5).

14. **PW6 Edward Kaisa** as the investigating officer, stated that on 24th July 2016 his OCPD informed them of some people who had attempted to burn [particulars withheld] Secondary School on the night of 23rd/24th July 2016. They went to the school and found the appellant and co-accused arrested and ½ litre

petrol recovered from them.

15. When placed on her defence the appellant elected to make an unsworn statement without calling any witness. She said she was in school, on 23rd July 2016 and at about 7.00 p.m., police officers came and ordered students from Bakita dormitory to open their boxes and it was done. Nothing was recovered and they went back to the lab. She was later informed she wanted to torch the school, and their parents were called. Some petrol was recovered at a nearby primary school. She and her co-accused were accused of wanting to torch the school.

16. Counsel for both parties agreed to dispose of the appeal by written submissions, which they filed. Mr. Mutuku for the appellant on grounds 1, 4 and 5 submits that the evidence of PW1 and PW4 on identification was not corroborative. He argues that PW1 identified one Hellen as the person who sent him to buy paraffin, while PW4 said he saw the appellant (F) emerge from a pit latrine. He further submits that there was no proof of an intention to commit the offence complained of. That there was nothing to establish that the appellant had put in motion an intention in preparation to commit the offence. To support this is the case of **Moses Kabue Karisoya –Vs- Republic (2016) eKLR.**

17. On ground 2 he submits that not all ingredients in the charge of preparation to commit a felony contrary to Section 308 (1) Penal Code were proved. First he says the appellant was not found with anything related to this incident. Further there was no proof of any intention, as she was not seen, heard or associated with petrol.

18. On ground 3 he contends that in passing sentence the trial court based it on a review of the probation officer's report. That the court did not consider that the appellant was aged 17 years at the time she was presented to court. He wondered why the appellant's co-accused was treated differently yet both of them were children and Section 191 (1) (c) of the Children's Act should have been applied to both of them. He referred to the case of **RKS –Vs- Republic [2018] eKLR**. He argues that the sentence of 3 years meted out to the appellant was unfair yet there was no indication that the appellant was incapable of reforming.

19. Counsel submits that the Appellant being a minor was entitled to legal representation as provided for under Section 77 (1) and 186 (1) (b) of the Children's Act. This was never done. Further that she was never issued with witness statements for purposes of preparation of her defence. This amounted to violation of Article 50 (2) (c) of the constitution he says. Lastly that being a minor the appellant was eligible for a non-custodial sentence and a rehabilitative approach ought to have been prioritized.

20. In response Miss Monica Owenga for the respondent in her written submissions states that PW1 categorically stated that the appellant called him and gave him Kshs. 105/= for purchase of petrol and hide it in the school fence. That PW4 stated she had seen PW1 talking to the appellant and when the latter saw her she went back to the latrine and closed the door. This to her was corroborative.

21. In regard to ground 4 she submits that PW1 identified the appellant and her co-accused from a group of three girls as the pupils who sent him to buy petrol. That the two were the ring leaders and the petrol was to be used to burn the school dormitory. To her all this demonstrated the intention, the process of beginning to put the intention to commit the offence into execution and also the avert act which manifests the intention.

22. It was her submission that the intention to burn the St. Batika dormitory had been communicated to some students who even emptied their boxes in readiness. The act of securing the petrol was the avert act and it was her submission that all the ingredients of the offence had been proved.

23. On sentence it was her argument that the trial court in sentencing the appellant considered the sentence imposed by the law, the age of the appellant as well as the recommendations of a pre-sentence report filed in court showing that the appellant was delinquent and unremorseful, for the offence. The co-accused though of the same age was remorseful and her report was favourable.

24. On the authorities cited counsel submitted that the cited case of **Moses Kabue Karuoya –Vs-**

Republic (Supra) supported the respondent's position. She contends that the ingredients mentioned by Justice Mativo were all proved by the prosecution in the instant case. She therefore opposed the appeal.

25. This is a first appeal and this court has a duty to re- analyze and re-consider the evidence tendered before the court with a view to arriving at its own independent conclusion. See **Okeno -Vs- Republic [1972] EA 32.** In **Kiilu and Anor –Vs- Republic [2005] I KLR 174** the Court of Appeal stated thus;

> ***1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

26. The same was reiterated in the case of **David Njuguna Wairimu –Vs- Republic [2010] eKLR** where the Court of Appeal stated;

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

27. I have considered the evidence on record, the grounds of appeal, the rival submissions and the cited authorities. The issue I find falling for determination is whether the offence of preparation to commit a felony was proved.

28. This offence is defined under Section 308 (1) of the Penal Code as follows:-

> ***"Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years."***

29. The prosecution called six (6) witnesses. The first witness (M.M.) testified as PW1. He was said to be aged 15 years and in standard 6 at [particulars withheld] primary school. He was taken through a very brief voire dire examination whereby the court found him unfit to give sworn evidence. He ordered that he gives unsworn evidence. Section 125(1) of the Evidence Act provides;

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, decease (whether of body or mind) or any similar cause."***

Whereas Section 19(1) of the Oaths and Statutory Declarations Acts states;

> ***"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the***

duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with* section 233 *of the Criminal Procedure Code (Cap.75), shall be deemed to be a deposition within the meaning of that section."

30. Both statutes are silent on the definition of who a child of tender years is. A *voire dire* examination serves two purposes namely;

(i) It tests the competency of the witnesses in giving evidence.

(ii) A means of testing whether the witness understands the solemnity of taking an oath.

It follows that if the child does not comprehend questions put to him/her in criminal proceedings they cannot testify. Where they comprehend the questions and give rational answers but do not understand the seriousness of an oath they cannot give sworn evidence.

31. Who then is a child of tender years? Courts have given different interpretations to this. In the case of **Kibagemy Arap Korir –Vs- Republic (1959) EA 92**, the Court of Appeal held that tender years means a child under the age of 14 years. The court in the case of **M. K. –Vs- Republic (2015) eKLR** termed *voire dire* examination unnecessary for a child aged 15 years. (See also high court decisions in **J.G.K. –Vs- Republic (2015) eKLR** and **Gamaldene Abdi Abdiraham & Anor –Vs- Republic (2013) eKLR)**.

32. In the case of **Patrick Kathurima –Vs- Republic 2015 eKLR** the Court of Appeal sitting in Nyeri held as follows;

"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates it to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15.

We have no reason to import it thereto in the absence of express statutory direction given the different contents of the two statutes."

This finding on the child of tender years was followed by the Court of Appeal in **Samuel Warui Karimi –Vs- Republic Cr. Appeal No. 16 of 2014 (Nyeri).**

33. Being guided by the law and the authorities from the court of appeal I find that PW1 being aged 15 years was not a child of tender years. He ought not to have been subjected to a *voire dire* examination in the first place. He should have been sworn before testifying. The learned trial magistrate having ordered him to give unsworn evidence ought to have allowed the appellant to cross examine the witness. There is nothing that precluded her from cross examining the said witness

34. The record (both original and typed) shows that soon after PW1 gave evidence in chief, the trial court proceeded to take the evidence of **PW2 Ann Kanini Muthiani**, another key witness herein. PW1 should have been cross examined unless the appellant by choice elected not to cross examine him. I am satisfied that it is the trial court that denied the appellant and co-accused an opportunity to cross examine PW1. It follows that the veracity of PW1's evidence was never tested which is unprocedural. The said evidence of PW1 cannot therefore be relied on to found a conviction.

35. It is also clear that PW1 testified that the appellant's co-accused (Hellen) is the one who gave him Kshs. 105/= for the purchase of petrol and a matchbox. The appellant is F and not H.

PW4 said she spotted a boy standing next to the fence and speaking to someone within the school compound and he ran away. Thereafter the appellant opened the door of the latrine but on seeing her she

closed the door. She was called and taken to the office. In cross examination she stated this at page 10 lines 5-7;

> ***"You were communicating with the boy through the ventilation of the toilet. I was moving towards the gate when I heard the boy talking to someone. I don't know what you were talking about."***

36. PW4 is a teacher at the said school. If what she stated in cross examination is what she heard and saw there is nothing that stopped her from stating the same in the examination in chief. She said the boy who ran away was talking to someone within the compound. A toilet or toilets is a specific spot on the compound, and not just a place within the compound. She also stated that upon searching the appellant she found her with a paper she was using to communicate with another lady called BM.

37. Three issues come up;

(i) The said paper was never produced before the court as evidence.

(ii) The said BM did not testify.

(iii) What is this unknown communication that the appellant had with B?

38. **PW3 Rose Ndinda Mutuku** who is the deputy principal also talked of a piece of paper with written words, the same having been given to PW3 and others by the appellant. It's not clear if this was the same paper PW4 was talking about. All the same the said paper was not produced as an exhibit.

39. PW2 and PW3 testified that 13 girls had been treated as suspects, and among them were the appellant and her co-accused. The police asked PW1 to identify the girls who had sent him for petrol from the group of 13 girls. PW1 then picked the appellant and co-accused. PW6 the investigating officer was not present when this alleged identification was conducted. The OCS who most probably did it, did not testify. It is therefore not clear how the identification was conducted without an identification parade.

40. Contrary to PW6's evidence no petrol was recovered from the appellant and co-accused. It is PW1 who led the police and teachers to the place where he had hidden the petrol and matchbox. Again the girls whose boxes were found empty on alleged instructions of the appellant and co-accused were not called to explain on whose instructions they emptied their boxes. The appellant in her unsworn defence denied the charge.

41. Finally on the evidence it was the duty of the prosecution to connect the appellant to the plan to burn the school. The key witness did not mention the appellant as having sent him for petrol. The alleged identification of the culprits was not conducted procedurally. Those who told PW3 that there was a plan to boycott examinations and burn the school never testified. The documents allegedly found on the appellant were never produced as exhibits.

42. On the evidence of PW1, I find that it lacks weight as its veracity was never tested since the court denied the appellant and her co-accused an opportunity to cross examine him. Secondly PW1 was over 15 years of age and no reason was given as to why he gave unsworn evidence and was not cross examined. All in all I find the conviction to be unsafe.

43. Briefly on the issue of sentence the record shows that both the appellant and her co-accused were aged 17 years at the time of the alleged commission of the offence. They were therefore children and could not be sent to prison. The filing of a negative report against the appellant by the probation officer was not sufficient ground for the appellant to be sent to prison in violation of Section 191(1) of the Children's Act.

44. I am satisfied that the appeal has merit and I allow it. **The conviction is quashed and the sentence set aside. The appellant to be set free unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 5th day of February, 2020, in open court at Makueni.

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H. I. Ong’udi

Judge