



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: D.K. Kemei – J

**CRIMINAL APPEAL NO. 124 OF 2018 (CONSOLIDATED**

**WITH**

**HCRA NOS.131/2018,128/2018,129/2018 AND130/2018)**

**JOSEPHAT WAMBUA KITONGA.....1<sup>ST</sup> APPELLANT**

**TITUS NDONYE MIHO.....2<sup>ND</sup> APPELLANT**

**JOHN NZIOKA MUSEMBI.....3<sup>RD</sup> APPELLANT**

**PATRICK KIVINDYO KIKOVE.....4<sup>TH</sup> APPELLANT**

**JAPHETH MULINGE KIKOVE.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal arising from the conviction and subsequent sentence in the Kithimani

Senior Resident Magistrate's Court in **Criminal Case No. 298 of 2016**

delivered by Hon. Gilbert Shikwe (Mr.) SRM on 22<sup>nd</sup> November, 2018)

**JUDGEMENT**

1. The Appellants herein were charged before Kithimani Law courts vide **Criminal Case Number 298 of 2016** with two counts of robbery with violence contrary to Section 296(2) of the Penal code and two counts of arson contrary to Section 332 (a) of the Penal Code.

The particulars of the first count are that on the 23<sup>rd</sup> day of February, 2016 at Duka Moja stage in Masinga Sub-County within Machakos County jointly with others not before the court and being armed with pangas and runqus robbed Josephat Mutuku Mbatha of one mobile phone make **Tecno Bs** valued at Kshs. 10,000/= and cash **Kshs. 30,000/=** all valued at **Kshs. 40,000/=** and immediately after the time of such robbery wounded **Josephat Mutuku Mbatha** and **Daniel Mutua Mbaluka**.

The particulars of count two are that on the same date and place jointly with others not before court willfully and unlawfully set fire to an office and office equipment all valued at Kshs. 131,500/= the property of **Masinga Natural Resources Management Society**.

The particulars of the third count are that on the 29/02/2016 at Musingi market in Masinga Sub-County within Machakos County being armed with runqus and pangas jointly with others not before court robbed **Patrick Mulumba Kilolia** of cash Kshs. 22,000/= and immediately after the time of such robbery threatened to use actual violence to the said **Patrick Mulumba Kilolia**.

The particulars of the fourth count are that on the 29/02/2016 at Musingi market in Masinga Sub-County within Machakos County jointly with others not before court willfully and unlawfully set fire to an office and office equipment all valued at Kshs. 56,210/= the property of

**Masinga Sand Harvesting Co-Operative Society.**

2. The Appellants were subsequently convicted and sentenced to several periods of imprisonment on the 23/11/2018. The Appellants were aggrieved and lodged their appeals which were consolidated with HCRA No.124 of 2018 being the lead file. They raised the following common grounds of appeal namely:-

- (1) That the trial magistrate erred in law and facts in convicting the appellants on insufficient evidence.**
- (2) The trial magistrate erred in law and facts when he made determination that the 1<sup>st</sup> Appellant was a principal offender.**
- (3) The trial magistrate erred in law and fact in convicting the Appellants without any evidence of identification by witnesses.**
- (4) The trial magistrate erred in law and fact in convicting the appellants without any corroborating evidence.**
- (5) The trial magistrate erred in law and fact when he casually rejected the Appellants defence of alibi.**
- (6) The trial magistrate erred in law and facts when he shifted the burden of proof to the appellants.**
- (7) The trial magistrate erred in law and fact in failing to give reasons for committing appellants to custodial sentences without taking into account their ages.**
- (8) The trial magistrate erred in law and fact in failing to give the appellants the benefit of doubt owing to several material contradictions in the prosecution's case.**
- (9) The trial magistrate erred in law and fact in failing to evaluate the weight of evidence of a co-accused.**

3. As a first appellate court my duty is to re-evaluate the evidence afresh and subject it to analysis so as to reach a conclusion as to whether or not to uphold the decision of the trial court. I also have to bear in mind that I did not have the benefit of seeing or hearing the witnesses.

4. **PW.1** was **Josephat Mutuku Mbatha** who testified that on the 29/02/2016 he was seated in his offices belonging to Masinga Natural Resources Management Society when he saw a group of about 45 people armed with pangas and rungas and who stormed the office and removed him outside while beating him and then snatched from him Kshs. 30,000/= and a mobile phone make Tecno Bs. He stated that the 2<sup>nd</sup> Appellant slashed him with a panga while the 5<sup>th</sup> Appellant pierced his right foot with an iron bar while the 1<sup>st</sup> Appellant in company of others punched him. On cross – examination, he stated that the attackers were about 45 in number and could not identify all of them and also would not identify the person who snatched the mobile phone.

5. **PW.2** was **Japheth Mutie** who testified that he was at the market with his wife when he found vehicles blocking the road and that bonfires had been lit. He saw PW.1 lying on the ground and being beaten by a group of about ten people who included the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants. He also stated that he saw some furniture burning.

6. **PW.3 Boniface Mutua** stated that he was ferrying a customer when he met some demonstrators near the offices of Masinga Natural Resources Management and that the demonstrators were about 20 – 30 people. He stated that he did not witness the incident in which the first complainant Josephat Mutuku Mbatha was attacked.

7. **PW.4** was **Patrick Mulumba Kilolia** who testified that he was attacked by a group of about 20 people who snatched some Kshs. 22,000/= that he had in his pocket and was able to identify the 5<sup>th</sup> appellant as among the attackers who also removed furniture from the offices and torched them on the road nearby.

8. **PW.5** was **Beatrice Nzwii** who stated that she was at her farm harvesting maize when she heard noise and on rushing to the source found a structure belonging to Masinga group had been damaged and that the attackers had left the scene.

9. **PW.6** was **Benson Kyalo** who is the Manager Masinga Sand Harvesting Society rushed to the scene but found the structure and office equipment burnt. On cross–examination, he exonerated the 1<sup>st</sup> Appellant as he confirmed that the said appellant did not participate in the alleged crimes.

10. **PW.7** was **Carol Mwembe** a clinical officer at Kithyoko dispensary stated that she treated two of the complainants namely Josphat Mutuku Mbatha and Daniel Mutua who sustained injuries. She produced the P.3 forms as exhibits.

11. **PW.8** was **No.36358 PC. Mohammed Isokha** from Kikumini police patrol base stated that he received two victims who had injuries and he issued them with P3 forms. He added that he visited the scene and recovered some charred remains of items that had been burnt and learnt that there had been 27 suspects but only managed to arrest ten of them. His investigations revealed the existence of business rivalry among the groups of sand harvesters in the area. He further stated that he received photographs capturing the images of the suspects involved in the arson and robbery. He produced several of the photographs as exhibits. He was later recalled upon request by the defence whereupon he stated that the Appellants had earlier approached the area DC seeking to hold a demonstration but which request had been declined and then the Appellants went ahead to hold it thus leading to the chaos.

12. The trial court established that the appellants had a case to answer and were thus placed on their defences.

13. **Josephat Wambua Kitonga** who is the 1<sup>st</sup> Appellant herein stated that on the material date his vehicle had some mechanical problem and took it to Matuu for repairs. He stated that he was not part of the demonstration against sand harvesters and only came to learn of the incident from the area chief. He vouched for his good record in the area as a peace crusader and produced his official ID regarding his organization. He added that the first complainant Josephat Mutuku Mbatha in his police statement did not mention his name and produced same as D. Exhibit 3. On cross examination he confirmed that he was a member of Titmap which is a rival group to those ran by the two complainants' employers and that he had been aware of the plan for a demonstration. He stated that he is the chairman of the group while the 2<sup>nd</sup> appellant is the secretary. He maintained that he had been included as a suspect due to bad blood between his family and that of Mbaluka Advocate over some past unresolved differences.

14. The second Appellant **Titus Ndonge Miio** led the court to the two scenes of crime at Duka Moja and Musingi markets. At the first scene at Duka Moja market, the court noted that the structure belonging to the Masinga Natural Resource Management Centre was only damaged and not burnt. The appellant pointed out that the structure had been earmarked for demolition by the relevant bodies as it had been affixed with an "X" mark as it was on a road reserve. He maintained that he was not part of the demonstrations and that members of public who comprised of squatters in the area had removed iron sheets from the structure. The appellant then led the court to the second scene at Musingi market which is 1.7 km away where the court noted some remnants of burnt wood and iron sheets. The appellant went on to state that the community had earlier organized for setting up a bridge at great expense and which was being damaged by lorries ferrying sand in the area and which issue had been relayed to the authorities including NEMA which led to the banning of sand harvesting in the area. He went on the state that a rival group reneged on the memorandum of understanding in which each side was to stop sand harvesting and this angered his group leading to the demonstration. He confirmed that the first complainant confronted the demonstrators and was assisted by the other two complainants while using iron sheets as weapons but accidentally got injured by his colleagues as confirmed in their police statement which was produced as Exhibit 1 and 2. He also maintained that no phone was stolen as neither its IMEI number or purchase receipt were produced in court and further the claim that the stolen money of Kshs.30,000/= could not be established since the person who is alleged to have passed it to him namely Onesmus Musyoka was not called to corroborate it. He maintained that squatters are the ones who caused damage to the structures and that the case has been brought by their rivals to settle scores over sand harvesting squabbles. On cross – examination, he confirmed that he had led his group to the DC for permission to hold a peaceful demonstration against sand harvesting in the area. He disputed the claim of loss of 30,000/= being toll proceeds since sand harvesting had already been banned in the area.

15. The third Appellant **John Nzioka Musembi** stated that he had gone to bury a dead donkey and was thus not among the demonstrators and was only arrested at the police station when he went to bail out the 1<sup>st</sup> Appellant and one Simon Muli. He denied committing the offences.

16. The 4<sup>th</sup> Appellant **Patrick Kivindyo Kikove** stated that he joined the demonstrators as they belonged to his Titmap group and while heading to Duka Moja the first and second complainants confronted them and tried to cause chaos by trying to fight with the group by using some iron sheets which accidentally injured them. He denied that any money was stolen from the complainants and that no kiosk was burnt and that any kiosks in the area were subsequently demolished by a road authority (KENHA). He added that the area chief was aware of the demonstration aimed at stopping sand harvesting in the area.

17. The 5<sup>th</sup> Appellant **Japheth Mulinge Kikove** stated that he had joined the demonstrators but denied entering the kiosk and stealing from the 1<sup>st</sup> complainant. He maintained that the complainants were injured when they attempted to use iron sheets to fight off the demonstrators. As far as he was concerned no panga or iron bar had been used to injure the 1<sup>st</sup> complainant. On cross-examination, he confirmed that the group comprised about 100 in number including squatters and that he saw the 1<sup>st</sup> complainant fighting with one John Mutinda. He added that Mbaluka had thrown an iron sheet which accidently injured the first complainant.

18. One of the accused persons who had been charged alongside the Appellants and who was subsequently acquitted is Peter Mbithi Mule who stated that on the material date he was approached by the 2<sup>nd</sup> Appellant who requested him to go to a certain shop in Katisa and fetch some fuel. He stated that he duly delivered the same to him and he later met the first complainant Josephat Mutuku who informed him that the fuel he had ferried had been used to burn some properties and that the said complainant had threatened to have him arrested so as to ensure that he spoke the truth. On being cross-examined by Appellants counsel, he confirmed that the 2<sup>nd</sup> Appellant needed the fuel for the purposes of fixing the 1<sup>st</sup> Appellant's car that had some mechanical problem. He denied being bribed.

19. As a result of the defence evidence of Peter Mbithi Mule, Appellants counsel sought to recall the 1<sup>st</sup> and 2<sup>nd</sup> appellants with a view to responding to the evidence levelled against them by Peter Mbithi Mule, an accomplice. The 1<sup>st</sup> appellant maintained that there was no petrol in his shop as he did not engage in sale of the same. He denied that his vehicle needed fuel during its repairs at Matuu. He denied seeing the said Peter Mbithi Mule in his shop and added that there were no petrol station in the area.

20. The 2<sup>nd</sup> appellant vehemently denied ever requesting the said Peter Mbithi Mule to go fetch petrol from the 1<sup>st</sup> Appellant's shop since he had his own motor cycle which he could use if needed. He denied that the said Peter Mbithi Mule was a boda boda operator in the area since he lived in Nairobi and therefore he should not shift responsibility to other people but to carry his own cross.

21. The 1<sup>st</sup> Appellants also called **Margaret Munini Mawia (DW.12)** who stated that the 1<sup>st</sup> Appellant is a relative and that she used to work in his shop. She vehemently denied that one Peter Mbithi Mule who was a neighbour visited her shop to purchase petrol in that shop. On cross – examination, she confirmed knowing the said Peter Mbithi Mule who was her neighbour and who lived in Nairobi and who is a driver and maintained that she did not see him at her shop that day and that she had never differed with him before.

22. **Harrison Mutiso Makau (DW.13)** stated that he had been hired by the 1<sup>st</sup> Appellant to repair his vehicle at Matuu on the material date and maintained that he was with him the whole day and denied having been induced to testify in his favour.

23. **Gregory Kitonga (DW.14)** stated that the 1<sup>st</sup> Appellant was his father and that Advocate Mbaluka is a neighbour with whom they have differences over political inclinations. He stated that sometimes ago the said Advocate had lodged a false claim with police on grounds that his family had intentions to kill him and that the matter is still pending investigations. He maintained that the said Advocate is behind the criminal case facing his father.

24. **Titus Mwendwa Musembi (DW.15)** a brother to the 3<sup>rd</sup> Appellant stated that he and the 3<sup>rd</sup> Appellant had gone to bury a dead donkey on the date in question and thus the 3<sup>rd</sup> Appellant was not part of the demonstrators. On cross – examination, he confirmed that they had left the wife to the 3<sup>rd</sup> Appellant at home and that he was not aware of the demonstrations though he is a member of Titmap.

25. **Thomas Matheka (DW.16)** stated that the 3<sup>rd</sup> Appellant was his uncle and that he had joined him on the material date in Kitui to bury a dead donkey.

26. Parties agreed to canvass the appeal by way of written submissions.

27. Mr. Machogu, learned counsel for Respondent raised three issues for determination namely: - whether the prosecution proved its case beyond reasonable doubt; whether the 1<sup>st</sup> Appellant was a principal offender against the weight of the evidence adduced; whether a custodial sentence was called for in this case.

On the first issue it was submitted that the circumstances under which PW.1, 2, 3 and 4 alleged identifying the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants as the attackers was so questionable since on cross -examination he confirmed that he only gave out names to the police as he could not identify the attackers as they were many. Likewise, for the rest of the witnesses they could not be sure of the real attackers from the large crowd. Counsel placed reliance in the case of **Kimotho Kiarie –vs- Republic [1984] eKLR** where the court held that where evidence relied upon to implicate an accused is entirely of identification then the same should be watertight to justify a conviction.

On the charge of arson, it was submitted that the same was not proved since the issue of structure/building did not arise as items were allegedly burnt outside on the road. No building or structure was burnt as alleged. If anything the alleged building may have been damaged. Further the trial magistrate acquitted one of the accused persons namely **Rose Miiro (8<sup>th</sup> accused)** despite having been alleged to have lit the fire and as such it is possible that some other persons could have been the arsonists other than the appellants. It was submitted that there was doubt created in that the one who lit the fire is left off the hook while those present are convicted. As regards the role of 1<sup>st</sup> appellant as a principal offender, it was submitted that none of the witnesses saw him giving a hand in the commission of the offence. On the issue of custodial sentences, it was submitted that the same were excessive in view of the mitigation tendered and also the fact that the appellants and complainants were business rivals should have been taken into account by the trial court. Learned Counsel conceded to the appeal and urged the court to interfere with the conviction and sentence.

28. Mr. Langalanga for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants submitted that the conviction was based on insufficient evidence in that the circumstances of identification of the appellants as the attackers was quite wanting as no identification parade was conducted so as to pinpoint out the real culprits from the large crowd. On whether theft of money from the complainants took place, it was submitted that the same was not proved since Onesmus Musyoka who had handed over the money to PW1 was not called to corroborate the same. Likewise, the other complainant (PW.4) did not avail evidence to back his claim that he had money in the absence of receipts. On the issue of the appellants' alibi, it was submitted that the trial court made an error when it failed to consider the Appellants alibi as true and which raised doubt upon the prosecution's case. Reliance was placed in the the case of **Said –vs- Republic [1963] EA** cited in **Kimotho Kiarie –vs- Republic [1984] eKLR**.

29. No submissions were tendered by learned counsel for the 2<sup>nd</sup> Appellant.

30. I have considered the entire evidence presented by the Respondent as well as the Appellants in the trial court, I have also considered the submissions presented. I find the following issues for determination namely:

**(i) Whether the prosecution's case was proved beyond reasonable doubt.**

**(ii) Whether the appellants alibi were considered by the trial court.**

**(iii) Whether the 1<sup>st</sup> appellant was a principal offender against the weight evidence adduced.**

31. As regards the first issue, it is noted that the Appellants had been charged with two counts of robbery with violence contrary to section 296(2) of the Penal code and two counts of arson contrary to section 332 (a) of the Penal Code. The prosecution was under a duty to prove the essential ingredients in the said two sets of offences. Starting with the offence of robbery with violence under Section 296 (2) of the Penal code provides as follows:

**“if the offender is armed with any dangerous or offensive weapon or instrument or is in the company with one or more other persons or if at or immediately before or after the time of such robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”**

The essential ingredients needed to be proved for the offence under section 296(2) of the Penal code are that; the occurrence of theft; that the offenders are armed with dangerous or offensive weapons; that the offenders are in the company of one or more persons; that personal violence or threats are meted out on the victim and finally that the perpetrators were positively identified.

In respect of the offence of arson the same is provided for under Section 332 (a) of the Penal Code which states:-

**“Any persons who willfully and unlawfully sets fire to any building or structure whatever whether completed or not is guilty of a felony and is liable to imprisonment for life.”**

The key ingredient is the wilful and unlawful burning of a building or structure. The prosecution tendered evidence to the effect that two offices belonging to Masinga Natural Resources Management Centre had been burnt by the Appellants on the material date. Some of the witnesses testified that the mob entered the offices and removed furniture and equipment and burnt them outside. The 2<sup>nd</sup> Appellant led the court to the two scenes at Duka Moja and Musingi markets where it was established that the structure at Duka Moja market had not been burnt but had only been damaged by the removal of iron sheets. The second scene namely Musingi market revealed that there was no structure save for some remnants of burnt wood. The evidence of PW.1 and PW.4 is that the perpetrators removed items from the buildings and placed them on the road and then burnt them. The two witnesses confirmed that the demonstrators were many but they were able to pick out the Appellants plus others who have been acquitted of the charges. The Appellants herein in their defence disputed being at the scene and have raised their alibi. There is evidence that indeed items were burnt on the material date. The issue that remains for determination herein is whether the appellants were positively identified as the perpetrators of the crimes alleged.

A perusal of the charge sheet in counts 1 and 3 together with the evidence of the complainants in the said counts indicate that property in the form of money (cash) and mobile phone were stolen and that the victims sustained bodily injuries inflicted upon by the use of dangerous or offensive weapons in the form of pangas and rungas. Two P.3 forms were duly produced by the prosecution as exhibits. I am satisfied that the first ingredients have been met.

On the issue of theft of property I note that the complainants in counts 1 and 3 (PW.1 and PW.4) claim to have lost a mobile phone and money. They also claim that the monies had been proceeds from toll collections. However, there is no evidence of any documents such as receipts or books of account to back up the claim and further their employer did not see it fit to avail evidence to the effect that the two had been employed and to collect money on their behalf. Again the first complainant had claimed that he had been handed over the sum of Kshs.30,000/- from one Onesmus Musyoka who had completed his shift but the said Onesmus Musyoka was not called to testify and to confirm the existence of the sum of Kshs.30,000/- that was thereafter stolen during the demonstration.

On the aspect of the positive identification of the appellants as the perpetrators of the offences, I find that there exists some doubt in that regard for a number of reasons. Firstly, there is concurrence in both prosecution and defence evidence that on the material date there had been a huge demonstrations involving several villagers in the area who were against the activities of sand harvesting in the area and that the crowd or the mob is reported to have been quite large. PW.1 stated that the crowd was around 45 people while PW.3 and 4 stated that they were about 10 -30 people. The Appellants on their part maintain that the crowd comprised about 100 – 200 people. The photographs produced indeed showed that the crowd was large thereby raising the possibility that the positive identification of the perpetrators might not have been accurate after all. Secondly, the alibi raised by the Appellants was not resoundingly rebutted by the prosecution and which had the effect of casting doubt upon the evidences led by the prosecution. It emerged from the evidence of the 2<sup>nd</sup> appellant that the first emerged from the evidence of the 2<sup>nd</sup> appellant that the first complainant (PW.1) had emerged from the kiosk and started fighting the demonstrators and upon being joined by one Mutua Mbaluka an iron sheet they were trying to use accidentally cut him. This was corroborated by the two police statements produced as D. Exhibit 1 and 2 in which they confirm having taken an iron sheet with which to threaten and disperse the demonstrators. Thirdly, it emerged from the evidence of prosecution and defence that there had been some business rivalry between the Appellants camp and that of the complainants' employers over sand harvesting in the area and therefore the possibility of bad blood between the two groups. It is instructive to note that the area local administration such as the chief and Administration police officers were at the scene and none was even called to testify in the case so as to enable the trial court reach an informed decision.

The trial court needed to receive the requisite evidence especially on the identification of the appellants and which evidence should be watertight in order to justify a conviction. It is trite law that evidence sought to be relied upon in capital offences such as in the present case must be of high quality, credible and beyond reasonable doubt.

32. As regards the second issue, it is noted that all the appellants presented their respective alibi. It is trite law that an alibi raises a specific defence and that an accused person who presents an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The 1<sup>st</sup> appellant maintained that he had taken his vehicle to Matuu Town for repairs and he called the mechanic to prove the same. The evidence of the said mechanic was not discredited in any material respect. Even though the 1<sup>st</sup> appellant was the chairman of Titmap conservation group, he denied being involved in the demonstration. His evidence was corroborated by that of Benson Kyalo (**Pw6**) who exonerated him during cross examination by the defence counsel and who maintained that the 1<sup>st</sup> appellant was not among the demonstrators. The learned trial magistrate held him as a principal offender pursuant to Section 20(1) of the Penal Code as the trial court felt that he must have organized for the demonstrations or that they had his blessings. This assumption was erroneous since no tangible evidence was presented to the effect that he procured the crowds to commit the offences or aided any of them in the commission of the offences. The trial court seemed to suggest that the 1<sup>st</sup> Appellant being the chairman of the rival group should be held responsible for the misdeeds of that group. The rest of the appellants in their defence evidence appeared to have raised credible alibi warranting consideration by the trial court. It seems the trial court wholly relied on the defence evidence of the 10<sup>th</sup> accused person Peter Mbithi Mule who was eventually acquitted to disbelieve the evidence of the 2<sup>nd</sup> appellant regarding the issue of the petrol allegedly used in the alleged arson. The said Peter Mbithi Mule (10<sup>th</sup> accused) in his defence stated that it was the 2<sup>nd</sup> appellant who requested him to go and fetch some petrol from a certain shop belonging to the 1<sup>st</sup> appellant. Both the 1<sup>st</sup> and 2<sup>nd</sup> appellants vehemently denied the assertions and called Margaret Munini Mawia (DW.12) who denied having met the said Peter Mbithi Mule or that she gave him petrol. The 1<sup>st</sup> Appellant stated that he does not sell petrol in his shop. Upon the 1<sup>st</sup> and 2<sup>nd</sup> Appellants presenting their version of events the said Peter Mbithi Mule sought to be given leave to controvert the same but the trial court did not grant the request. Hence it appeared that the Appellants alibi and defence had some weight and did cast doubt upon the prosecution's evidence. The trial court ought to have considered the said alibi and the evidence by granting the appellants the benefit of doubt. The trial court considered the evidence of one of the accused persons namely Rose Miio (8<sup>th</sup> accused) who was reported to have lit the fire after the 2<sup>nd</sup> appellant had allegedly poured petrol on the items and proceeded to give her the benefit of doubt by acquitting her. This is quite unusual

in that it cannot be that a person who lites or strikes a match thereby burning property will be let to go scot free while another who allegedly handles the fuel is blamed. If the trial court could not believe the witnesses who implicated the said 8<sup>th</sup> accused, then it ought to have as well disbelieved the same witnesses from implicating the appellants. Hence the trial court ought to have given the Appellants the benefit of doubt and to acquit them of the charges. Suffice to add that during the demonstration several villagers joined in the free for all and in the circumstances it was not easy to pin-point exactly as to who did what during the melee.

33. As regards the third issue, the trial magistrate held the 1<sup>st</sup> appellant as a principal offender on the ground that he was the chairman of Titmap sand conservation group and also the fact that the petrol allegedly used in the arson originated from his shop at Kitasa. Section 20(1) of the Penal Code provides that when an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it:

- (a) Every person who actually does the act or makes the omission which constitutes the offence.**
- (b) Every person who does or omits to do any act for the purpose of enabling another person to committing the offence.**
- (c) Every person who aids or abets another person in committing the offence.**
- (d) Any person who counsels or procures any person to commit the offence.**

It is not in doubt that the 1<sup>st</sup> appellant is the chairman of Titmap group that had organized the demonstration. However, the fact of being its chairman does not *ipso facto* mean that he is criminally liable for actions or omissions of the group members. The 1<sup>st</sup> Appellant presented his alibi that on the material date he was at Matuu Town repairing his vehicles and he called the mechanic to corroborate the same. He also denied the allegation that petrol was fetched from his shop for use in the arson. Further the prosecution's witness (Benson Kyalo **Pw6**) in his evidence on cross examination exonerated the 1<sup>st</sup> appellant when he confirmed that the said appellant was not among the demonstrators on the material date. The lady who was then at the shop (DW.12) testified and refuted the allegations of Peter Mbithi Mule (10<sup>th</sup> accused) and maintained that no petrol was being sold in the said shop. Having presented the said alibi then the prosecution was to rebut the same. However they did not manage to discredit it. All the prosecution witnesses appeared to lay blame on the 1<sup>st</sup> Appellant by virtue of being the chairman of Titmap which is a rival group to that of the complainants as one behind the demonstrations. However the evidence tendered did not link the 1<sup>st</sup> Appellant to the offences through the operation of Section 20(1) Penal Code. It was therefore erroneous for the trial magistrate to find that the 1<sup>st</sup> Appellant was in control expressly or remotely over the demonstrations which led to the commission of the offences. I am satisfied from the evidence adduced that the 1<sup>st</sup> Appellant was not a principal offender.

34. On the last issue, it is trite law that sentencing is at the discretion of the trial judge. However, in view of my finding above I need not delve into it.

35. In the result, it is my finding that the prosecution's case had not been proved against the five appellants beyond any reasonable doubt. The conviction arrived at by the trial magistrate was unsafe and thus the need to interfere with it. The appeal is allowed. The trial court's conviction and sentence is hereby quashed and sentences set aside. The appellants are each ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at **Machakos** this **11<sup>th</sup>** day of **May, 2020**.

**D. K. Kemei**

**Judge**