REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL N0. 23 OF 2017

TIMOTHY MUTHAMA NZIOKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Honourable C. Kisiang'ani- RM delivered on 16th March, 2017, at Chief Magistrate's Court, Machakos in criminal case no. 1590 of 2015)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

TIMOTHY MUTHAMA NZIOKI .....ACCUSED

JUDGEMENT

1. The appellant, **Timothy Muthama Nzioki**, was charged in the Chief Magistrate's Court, Machakos in criminal case no. 1590 of 2015, with the offence of Malicious Damage to Property Contrary to Section 339(1) of the Penal Code the particulars being that on the 16th day of September, 2015 at Kivandini Village, Mithiini Sub-Location, Masii Location, in Mwala Sub-Location within Machakos County, the appellant, jointly with others not before court wilfully and unlawfully damaged eighty fencing posts all valued at Kshs 66,200/= the property of **Francis Mutua Kivila**.

2. After hearing, the appellant was convicted as charged and he was sentenced to affine of Kshs 15,000/= and in default 6 months' imprisonment.

3. Not being satisfied with the conviction and sentence the appellant lodged this appeal were based on the following grounds:

> **1) The trial Court erred both in law and fact by convicting the Appellant when the Prosecution had not proved their case beyond reasonable doubt.**
>
> **2) That the trial Court erred both in law and fact by convicting the appellant on circumstantial evidence of the weakest kind.**
>
> **3) The trial Court erred both in law and fact by shifting the burden of proof to the Appellant.**
>
> **4) The trial Court erred both in law and fact by failing to appreciate and correctly apply the law on the defence of alibi.**

4. In support of the prosecution case 6 witnesses were called.

5. Pw1, **Francis Mutua Kitheu**, and he stated that he had known the appellant for a long time since the appellant was his teacher at Weta Primary School. On 6th March, 2015 he entered into an agreement with **Alice Musyoka Nzioki** for the sale of land No. 454 and paid Kshs 585,000/= for the same. Pursuant to the said agreement, he on 15th September, 2015, sent Kshs 66,000/- to **Jane**, his cousin for fencing of the plot of land and the same was fenced the same day. However, on 18th September, 2015 he was called and informed by the said Jane, who was managing his farm that the fence was uprooted, burnt and destroyed. On the same day, he went and confirmed the position.

6. On cross-examination he testified that the appellant, who was staying 3 km from his home, taught him in class 8 in 1980. It was his evidence that **Alice Nduku Nzioka**, **Stephen Mumo Nzioka** and **Justus Munyao Nzioka** who were staying in Nairobi, sold him the land. However, however the plot number was not indicated in the sale agreement but he later indicated the same in pencil. He further testified that the vendors were selling to him their father Musyoka's portion though the registered owner was Nzioki Syano who is the father of the appellant who was deceased. He testified that when he went to the plot of land on 18th September, 2015 he found that everything on the land was burnt and that when he went to the police station he found that Jane had made the report but did not name the accused; in addition, he did not name the accused in his statement.

7. Pw2, **Jane Mueni Mwilu**, testified that on 15th September, 2015 at 5pm she was in her shop when PW1, her cousin, told her to go to PW1's farm where holes were being dug for fencing poles. She disclosed that PW1 had given her Kshs 19,000/- to pay the workers and on 16th September, 2015, PW1 sent her Kshs 33,500.00 for the poles. It was her evidence that he organised for the transportation of the 180 poles to the farm each costing Kshs 180/= and confirmed that all the poles were in place. On 18th September, 2015, PW1 sent her Kshs 33,500/= for the barbed wire and he bought 14 rolls of the same and organised for their transportation to the farm. However, she found all the fencing poles burnt. She then informed PW1 who was in Mombasa, who told her to report the mater to Masii Police Station which she did in the company of the workers. It was however her evidence that she did not know who burnt the poles. According to her she was informed about the burning of the poles by one **Sila**, PW3, and she confirmed that information. She also disclosed that she was at the scene when the police took photographs. In her evidence, she was unaware of any dispute in respect of the land though the workers informed her that people were coming to the land.

8. Pw3, **John Sila Kivia**, testified that he knew the appellant as a teacher in Mwala and that PW1 was his brother. On 16th September, 2015 at 9.00 am he was at the farm putting up fencing poles when the appellant went with two people, one of whom was his brother, and informed him that the working they were undertaking was for nothing. He however did not know why the appellant said so. He however proceeded on 17th September, 2015 1t 9.000 am with the putting up of the poles. On the following day, 18th September, 2015, he found the poles uprooted and burnt. According to him the poles were burnt on two occasions, 18th September, 2015 and 19th September, 2015. He however was not aware of the people behind the burning. On 18th September, 2015, he reported the matter. According to him, they thought the appellant was behind the said incident since the appellant had threatened them. It was his view that the appellant meant that they did not want to see them on the farm.

9. Pw4, **Alice Nduku Nzioka**, testified that the accused was her brother in law from another mother. She testified that on 6th March, 2015, while in Masii, she entered into an agreement for sale of a piece of land with PW1. According to her she was selling a piece of land that belonged to her deceased husband which she had been given on 8th September, 2012. She confirmed that she received Kshs 850,000/= in the presence of the Chief, Assistant Chief and the District Officer. It was her evidence that there was no dispute over the land. She disclosed that her father in law had two wives and the appellant was her brother in law from another mother but did not know why the appellant was interfering with her issues. She testified that PW1 later called her and informed her that his poles had been destroyed. It was her evidence that she had not fenced her land and that she sold the land in order to buy a bigger one and that she had no problem with PW1.

10. In cross examination, she stated that the appellant whom she knew as *Mwalimu*, was not related to her husband. She confirmed that she did not have title to the land which she sold to PW1 and that the land belonged to Nzioki Mulee or Nzioki Syano who was deceased though he was alive when she got married in 1977. It was her evidence that he died on 29th January, 1983. According to her the plot was No. 454 though she had no documents. She also confirmed that the agreement did not indicate the plot number and that the land was still registered in the deceased's name and that she had not yet taken out succession proceedings. It was however her evidence that she informed the Chief and the District Officer of the transaction and that her co-wife had sold her portion. Asked about **Peter Muthama Nzioki**, she confirmed that he was her husband's nephew. She however did not see the appellant burn the poles.

11. Pw5, **Robert Musau Musili**, testified that on 17th September, 2015 while fencing, the appellant, whom he did not know save for seeing him in School, went with 2 men and told him that he was doing nothing. He further testified that at 6 pm, the accused went back to the farm and uprooted one pole. The following day on 18th September, 2015 he found that some poles had been burnt but he did not see anyone doing so though he suspected that it was the accused for he saw him uprooting a pole. It was his evidence that the appellant had, in the company of two people started uprooting the poles by the time he left for home. He however did not talk to them and did not disclose this to anyone since it was getting dark. He however admitted in cross examination that he never recorded this incident in his statement to the police.

12. Pw6, **Cpl Joram Karanja**, of Masii Police Station, the investigations officer, testified that on 18th September, 2015 at around 11am he was at the police station when a report was made by **Jane Mueni** that 80 fencing poles had been plucked, gathered together and burnt. Photographs were taken and he gathered pieces of the poles that were not burnt and kept them and exhibits. He testified that upon investigations, he learnt that PW1 had hired workers to fix a fence and when doing so, 3 men went and told them that they were doing nothing as the fence would be brought down and that the names of the three people were given to him by **Sila**. He testified that he learnt that PW1 bought the land from **Alice Nduku** and he saw the agreement which he produced as exhibit. He also produced 4 photographs of the scene. He then arrested the accused charged him with the offence. According to him, the value of the damage was Kshs 66,200/-. On cross-examination, he reiterated that the report was made on 18th September, 2015 by **Jane Mueni Ngwili** and the same did not indicate any names of the people who had destroyed property. He further testified that he did not record a statement from the accused and when he visited the scene, he did not obtain ownership documents from the parties or go to the lands office at Machakos.

13. At the close of the prosecution's case, the appellant was placed on his defence and opted to give sworn evidence. He also called one witness.

14. According to the appellant, he was the head teacher of Mwala DEB Primary School, a day and boarding school. According to him, on the day of the incident, he was at work at the school where he was residing and only used to go home during weekends. According to him, he did not know PW5 as they had never met. In support of his evidence he produced the register prepared by the school's Deputy Head Teacher and signed by himself showing his attendances in the morning and the evening and that on the said day he was at work, both in the morning and in the evening. According to him, though they had a land issue he did not participate in the incident. It was his evidence that PW1

invaded his father's land and when he raised alarm, he was reported to the police in order to silence him. He disclosed that he had commenced succession proceedings. In his evidence the land that was invaded was Title No. Masii/Mithini/576 which was registered in the name of Nzioki Syano, his father who died in 1983 and he produced both the certificate of official search and death certificate. It was his case that he was charged so as to prevent him from defending his father's right.

15. In cross examination, the appellant stated that the register was filled in by his Deputy, Monica but was not signed by individual teachers. On 16th September, 2015, the time when the same was ticked was not indicated According to him, he did not have the daily attendances for teachers neither does he have a record to show that he slept at the school on 16.9.2015. He further testified that the subject land belonged to his stepmother and was allocated to her and he came to know that the complainant bought the same when he started farming. He testified that the complainant has not bought anything allocated to him or to his mother. He further testified that he lived within his father's land and the school is about 15 Km from the farm and that the working hours were 8 am to 5 pm. On re-examination, he testified that he was not near the parcel of land on the date of the offence and in any event the owner of the land is deceased and there is a succession cause thus the estate has not been distributed.

16. In her judgement. The learned trial magistrate found as a fact that the complainant's property was damaged. According to her, based on the evidence of PW5, there was nothing that prevented the appellant from being at the scene at 6.00pm since it was outside school hours and the school was 15 kilometres from the scene. The court found that the evidence against the appellant was overwhelming and was corroborated hence the same was unshaken. In her view the alibi defence was an afterthought since it was not raised early enough to enable the prosecution rebut the same. It was also found that malice was proved by the fact that the appellant did not have proprietary interest in the land yet he went ahead and damaged the property therein. While appreciating that apart from PW5's evidence, the rest of the evidence was circumstantial, the learned trial magistrate found that the evidence of PW3 and PW5 that the appellant had been at the scene earlier on in the company of two other people and their utterances proved that there were no other co-existing circumstances which weakened or destroyed the prosecution's case. It was therefore found that the prosecution's case was proved beyond reasonable doubt.

17. Before this court it was submitted on behalf of the appellant by his learned counsel, **Mr Ngolya**, that none of the prosecution witnesses placed the Appellant at the scene of the alleged crime. According to the appellant, the trial Court appears to have convicted him on the basis of the testimony of PW 5. Though PW5 stated that he was the appellant uprooting the poles, he did not give the police the said information and in his statement to the police, he did not mention the Appellant. It was therefore submitted that the evidence of PW 5 which attempted to link the Appellant to the offence was an afterthought and the trial Court should have rejected it. By relying on such evidence to convict the Appellant, the trial Court misdirected itself both in law and fact as his evidence was worthless, devoid of evidential value and strikingly misleading. Based on **Woolmington –vs- DPP (1935) A. C 462**, it was submitted that the prosecution's case was not proved beyond reasonable doubt. It was submitted that the trial Court convicted the Appellant on the basis of suspicion only, yet it is trite law that suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

18. It was further submitted that the Learned Trial Magistrate, she clearly misdirected herself on the applicable law as far as an alibi is concerned. The law is crystal clear that when an accused person raises the Defence of alibi at whatever stage of the trial, he does not assume the burden of proving it. The burden lies on the prosecution. The prosecution is saddled with the onerous task of calling further evidence to rebut the alibi even if it is raised at the Defence hearing. In the circumstances of the Appellant's trial, the alibi raised was adequately reinforced with a documentary proof namely an Attendance Record and though Section 309 of the ***Criminal Procedure Code***, accords the prosecution an opportunity to adduce further evidence to rebut an accused's alibi, the state did not utilise the said chance. It was therefore submitted that the Appellant's alibi was watertight as it completely removed him from the scene of the alleged crime. In this regard the appellant relied on **Victor Mwendwa Mulinge –vs- Republic (2014) eKLR**. and urged this court to allow the Appellant's appeal herein.

19. On behalf of the Respondent, **Ms Mogoi**, Learned Prosecution Counsel, conceded the appeal. In her view, it is clear that no one saw the Appellant committee the offence or anywhere near or at the scene on the night the offence was create. It is not in doubt that the home of the Appellant was about 3 or more kilometres from the scene and that he was a head teacher to a school.

20. As testified by PW1, PW2, PW3 and PW4, none of them knew who destroyed the poles and the testimony by PW6 confirmed that in the report made at the station, the report did not disclose who destroyed the poles neither did any of the prosecution witnesses mention in t heir statements to the police who had destroyed the poles.

21. The involvement of the Appellant is in relation to the evidence of PW3 who testified that while putting up fencing poles on 16th September, 2015 at around 9:00 am, the Appellant went there with two other men and told them that the work they were doing was nothing and when they found the poles uprooted and burnt the following morning, they thought that it was the Appellant since he had threatened them. During cross examination, PW3 testified that he only saw the Appellant hold a pole but did not see him uproot the same.

22. PW5 who was at the same farm with PW3 doing the same work, on the other hand testified that on 17th September, 2015 while putting poles, the Appellant who was passing by in the company of two other men, told them that they were doing nothing and that the Appellant went there again at around 6:00 pm and uprooted one pole and that he was still in the company of two people and that by the time PW5 was leaving the farm, he left the Appellant uprooting the poles he however did not report the same to anyone nor did he record the same in his statement.

23. The testimony of the two most crucial witnesses PW3 and PW5 who were present when the Appellant was passing by the farm contradict each other from the date the Appellant passed there. PW3 testified that it was on 16th September, 2015 while PW5 testified that it was on 17th September, 2015 the date PW3 stated that they found the poles uprooted and burnt. Their evidence also contradicts when PW3 testified that he only saw the Appellant hold one pole yet PW5 testified that he saw the Appellant uproot a pole and actually left him uprooting them though never mentioned that to anyone and did not record the same in his statement.

24. The testimony of the two only agree to the extent that the Appellant passed by in the company of two other men and told them that they were doing nothing which statement they perceived to be threats and presumed that it was the Appellant who had destroyed the poles when they found them destroyed the following day.

25. The question that comes to mind in view of the evidence by PW3 and PW5 is whether the statement by the Appellant that the work they were doing was nothing amounted to threats. That statement can be given different interpretation but since they found the poles destroyed, they only amounted it to threats meaning that the Appellant meant that what they were doing was in vain since he was going to destroy the poles.

26. It is my view that the connection of the Appellant to the commission of the offence was purely based on suspicion in view of the fact no one saw him commit the offence or at the scene at the time of the commission of the offence nor was anything recovered from him that could connect him to the offence.

27. In support of the submissions, **Ms Mogoi** relied on **Michael Muriuki Munyori [2014] eKLR, Abanga alias Onyango vs. Rep Cr. A No. 32 of 1990(UR) and Sawe vs. Rep [2003] KLR 364** and submitted that suspicion however strong it is, it cannot provide the basis of inferring guilty which must be proved by evidence beyond reasonable doubt and in this case, there was no any other concrete evidence pointing at the Appellant as having been the one who committed the offence.

28. It was noted that the evidence of PW3 and PW5 that the Appellant was in the company of two other men when he passed by the farm and that is clear that the main dispute in this matter is land related and it was a family issue. Though PW1 testified that the land he bought belonged to the father of the Appellant, PW4 seemed to contradict her evidence in relation to her relationship with the Appellant at one point stating that the Appellant was a son of the other wife of her late father in-law then changing her statement at the cross examination and stating that she was not related to the Appellant and further that she did not know the father of the Appellant.

29. The fact from the case, based on the testimony of PW4 and the Appellant, it was clear that there were underlying issues in relation to the division of the property of the late Nzioki Syano and that there was a succession cause pending in Court in relation to the Estate of the said Nzioki Syano hence there was a possibility of bad blood between the two families of the late Nzioki as rightfully demonstrated by the Appellant in his defence and also by the evidence of PW4 who tried to deny that the Appellant was not a son of her late father in-law.

30. Further, the fact that the Appellant was in the company of his two brothers as stated by PW3 and the fact that there were underlying issues in relation to the division of the property of the deceased, the foregoing facts then creates doubt as to whether it was the Appellant exclusively who would have committed the offence. The offence could have been committed by either the two brothers the Appellant was with, any other family member who felt aggrieved or the Appellant no one knows.

31. In view of the foregoing, it was the Respondent's submissions that the evidence adduced by the prosecution herein was not sufficient to prove the offence against the Appellant beyond reasonable hence the Respondent's concession.

Determination

32. Although the appeal was conceded to by **Ms Mogoi**, Learned Prosecution Counsel, who submitted that the evidence fell short of the standards required to prove that the said offence was committed by the appellant, it is trite that a mere concession by the State does not automatically lead to the decision of the lower court being upset. This court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence".**

33. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

34. Similarly, in **Kiilu & Another vs. Republic [2005]1 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. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

35. In this case the main issue for determination is whether the prosecution proved to the required standards that the appellant was guilty of the offence with which he was charged. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in

what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

36. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

37. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

38. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

39. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

40. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

41. In this case no one saw the appellant uproot and burn the complainant's poles. Therefore, the judgement of the Trial Court was clearly based on circumstantial evidence. These were that the appellant had prior to the commission of the offence informed the complainant's workers that they were doing nothing. That was the evidence running across the prosecution's case save for the evidence of PW5 who stated that he saw the appellant uprooting the poles. His evidence was however suspect as this serious issue was never disclosed to the police when he went to record his statement. None of the witnesses including the complainant testified that PW5 disclosed to them this damning information. In my view, PW5's evidence in this respect cannot be relied upon. As was held in in **Ndung'u Kimanyi vs. Republic [1979] KLR 282**:

"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

42. Discounting the evidence of PW5, the rest of the evidence was purely circumstantial. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

43. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held:

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

44. In **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

"The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

45. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction by stating that:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

46. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."

47. Therefore, for this court to sustain the appellant's conviction it must find that the inculpatory facts herein are incompatible with innocence of the appellant and are incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** and **Teper vs. Republic [1952] AC 480** as follows:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

48. It is clear that save for the discredited evidence of PW5, the conviction of the appellant was based on the alleged statement he made to the complainant's workers that they were doing nothing. While that statement could have raised eyebrows considering what took place thereafter, the appellant was in company of other persons when he made that statement. According to him, the land in question belonged to his later father and succession proceedings were still ongoing. His statement that the complainant's workers that they were doing nothing that they were doing nothing cannot therefore be taken to have been made only with reference that he was intending to uproot and burn the poles. It is possible that the said statement, if he made it at all, was in reference to the fact that there were ongoing succession proceedings which could possibly render the sale transaction at nought.

49. Based on that possible explanation, it is my view that the existence of the succession proceedings as well as the fact that other people were with the appellant and their whereabouts were unknown and their role in the incident remains unexplained amounts to co-existing circumstance which weakened and destroyed the inference of the appellant's guilt based on the circumstantial evidence arising from his utterance that the complainant's workers were doing nothing.

50. This is a case where the appellant seems to have been convicted merely on suspicion that on the basis of his utterance, he must have had

something to do with the offence in question. However as was held by the Court of Appeal in **Sawe –vs- Rep [2003] KLR 364**:

> **"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

51. In **Mary Wanjiku Gichira vs. Republic, Criminal Appeal No 17 of 1998,** the same court held that:

> **"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

52. A similar view was expressed by the Tanzania Court of Appeal in **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71** where it was held by the Tanzania Court of Appeal that:

> **"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."**

53. It is therefore my view that the conviction of the appellant, based as it was on circumstantial evidence was unsatisfactory and is unsafe. It cannot be sustained or supported. It also my view that the prosecution failed to sufficiently rebut the alibi defence that was raised by the appellant.

54. The Learned Prosecution Counsel, **Ms Mogoi**, therefore, quite properly in my view, did not support the conviction of the appellant.

55. Consequently, I allow the appeal, set aside the appellant's conviction and quash the sentence.

56. Right of Appeal 14 days.

57. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 4th day of April, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngolya for the appellant

Miss Mogoi for the Respondent

CA Geoffrey