



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO.55 OF 2015**

**BETWEEN**

**PHILIP ASWANI NDUNDE .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal against sentence and sentence of life imprisonment passed on 15/05/2015 in Butere SPM's Cr. Case No154 of 2015 by M.I Shimenga- R.M**

**J U D G M E N T**

**Introduction**

1. The appellant herein was charge with the offence of arson contrary to Section 332 (a) of the Penal Code. The particulars of the said offence are that PHILIP NDUNDE ASWANI on the 8<sup>th</sup> day of May 2015 at Shirotso village Lunza sub location in Butere District within Kakamega County willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs.30,000/= the property of JACKSON ASWANI.
2. On the 11/5/2015 the charges were read and explained to the appellant in Kiswahili and he pleaded guilty to the same. Facts were thereafter read to him and the appellant agreed that the said facts were correct. He was convicted on his own plea of guilty and the trial Court after considering the probation report sentenced him to life imprisonment.

**The Appeal**

3. Being aggrieved and dissatisfied with the conviction and subsequent sentence the appellant has filed this appeal in which he complains that the sentence imposed upon him by the learned trial Magistrate was both excessive and harsh in the circumstances. He also complains that the learned trial Magistrate failed to inform him of his right of appeal, and further that being a layman, he pleaded guilty due to pressure exerted upon him by the Investigating officer. He prays that the appeal be allowed.

**Submissions**

4. In his submissions the appellant stated that although he pleaded guilty to the charges he did not follow the proceedings because they were conducted in English. He also claims to have been coerced by the officer who arrested him to plead guilty so that he could earn his release as the case was a family matter. He submitted further that he was not given ample time to prepare for the case and that the sentence was very harsh.

5. Mr. Omwenga from the ODPP conceded to the appeal. He took issue with the way the plea was taken and explained the rules for plea taking as set out in the case of **Adan –vs- Republic 445 [1973] EA 445** where the Court of appeal set out the rules for plea taking which include a requirement that charges shall be read to an accused person in a language he understood. Secondly that the accused's own words in answer to the charge should be recorded and thereafter facts are read out to the accused. He submitted that the plea by the appellant was not unequivocal on the charge. He explained that arson refers to burning of a house or structure but the facts as presented did not refer to burning of a house. He added that what came out from the facts was that the appellant burnt a mattress and a box and no pictures of the burnt items were produced.
6. Counsel also submitted that though appellant pleaded guilty it is not clear if any house was burnt. He asked the Court to have the appeal allowed, conviction quashed and the sentence set aside.

### **Determination**

7. This being a first appeal this Court is duty bound to analyze and re-evaluate the evidence on record and come up with its own conclusion bearing in mind that it was not present when the plea was taken to see the demeanor of the appellant. See **Pandya –vs- R [1957]EA 336 and Okeno – vs- R [1972] E.A 32**. Section 281 of the Criminal procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The Section however does not set out the steps to be followed by a Court when taking plea. In the **Adan case (supra)** the Court of Appeal set out the steps to be taken in recording plea as follows: “ When a person is charged, the charge and the particulars should be read out to him so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The Magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements then the Magistrate should record what the accused has said, as clearly as possible in his own words and then formally enter a plea of guilty. The Magistrate should next ask the Prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which if true, might raise a question as to his guilt the Magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the Magistrate should record a conviction and proceed to hear any further facts relevant to sentence.” The statement of facts and the accused's reply must of course be recorded.
8. The Court went to explain the purpose of the statement of facts:- that it enables the Magistrate to satisfy himself that the plea of guilty was really unequivocal. It assists the Court to confirm if the accused really understood the position when he pleaded guilty. In **Njuki –vs- Republic 1990 KLR 334** the Court while citing **Hando s/o Akunaay –vs- R [1951] 18 EACA 305** re-emphasized the need for caution in recording a guilty plea. It held that the Court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.
9. From the record in this case charges were read and explained to the accused person in Kiswahili. The trial Court did not record whether Kiswahili was a language that the appellant understood. The facts were read in English a language the appellant stated he did not understand. The appellant says he did not follow the proceedings which he states were conducted in English a language he did not understand. In conclusion, this Court finds that the plea by the appellant was not unequivocal.
10. Regarding the charge the appellant was charged with the offence of arson c/s 332 (a) of the Penal Code it being alleged that he set fire to a dwelling house valued at Kshs.30,000/= the property of Jackson Aswani. The facts as presented did not refer to burning of a dwelling house but that what was burnt were a mattress and a box. There was no evidence produced to show that those items actually burnt. In a nutshell this Court finds that the appeal has merit and the same is allowed.
11. Accordingly, the conviction is quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.
12. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 11th day of April 2016

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in Person For Appellant

Mr. Omwenga (present) For Respondent

Mr. Lagat - Court Assistant