

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.60 OF 2013

JAMES WANDERA AGWATA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of T.W. Cherere CM delivered on 9th July 2013 in Busia Criminal case no.32 of 2012)

J U D G M E N T

1. When an Appellate Court is asked to revisit the sentence imposed by a sentencing Court, the argument ought to be that the sentence meted out was either unlawful, made in disregard to principles of sentencing, made in the context of extraneous matters, manifestly excessive or manifestly lenient.
2. The Appellant herein was convicted on two counts of offences that happened in one transaction on 30th December 2011. He was convicted of Arson contrary to Section 332 (a) of The Penal Code and Malicious Damage to property contrary to Section 339(1) of The Penal Code. Count 1 attracts a maximum sentence of life imprisonment while in Count 2 liability to imprisonment for five years. On count 1, Trial Magistrate imposed a sentence of 36 months imprisonment and on count 2 of 12 months. Sentences were to run concurrently.
3. Before making the order on sentence the Court invited a plea in mitigation and Counsel for the Appellant prayed;

“I have instructions to plead with court to exercise leniency. Accused is a first offender. The offence can be compensated matter. Accused is a father of 5 children and 3 are still in school. He is the sole bread winner. His family will suffer is he is given a custodial sentence. I ask for a lighter sentence and a non-custodial sentence.

4. Having considered that mitigation, the Learned Magistrate observed;

“Accused and other not only burnt complainants house but also damaged his goods at his business premises thereby destroying his years of livelihood. Although accused is complainants brother his actions are such that they call for a custodial sentence.”

5. The Appellant was a first offender and, correctly, the Trial magistrate did not impose maximum sentences. The finding of the Court was that the offences were committed in one transaction and the Trial magistrate, again, was spot on when she imposed concurrent sentences (see **Ondiek –vs- Republic** [1981] KLR 430). There were no exceptional circumstances to depart from that general practice. The Trial magistrate not only invited mitigation but also considered it before imposing the sentence. I cannot see where the Learned Magistrate erred. This Appeal is without merit and is hereby dismissed.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 9TH DAY OF OCTOBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

APPELLANT IN PERSON

OWITI.....FOR STATE