

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL APPEAL NO. E014 OF 2025**

**ANTONY ODUOR AGOLLA.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**.....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the Judgment of the trial court, Hon. C.N.C. Oruo, Principal Magistrate, in Rongo PMCRC No. E035 of 2022.
2. The Appellant was charged with setting fire to cultivated produce contrary to section 334(a) of the penal code. The particulars of the offence were that on 26.1.2022 at 1900hrs in central Sakwa Location of Awendo sub-county within Migori county, the appellant wilfully and unlawfully burnt down a crop of cultivated produce namely sugarcane valued at Ksh. 235,000/=, the property of Rose Anyango Onyango.
3. The accused person was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. The trial court

granted the appellant a 100,000/= bond with one surety on 2.03.2022. He was released on the same day.

4. The trial court considered the case and rendered Judgment. The Court found the Appellant guilty and convicted him of the offence and sentenced him to serve 5 years imprisonment. The Appellant, aggrieved, lodged this appeal advancing the following grounds of appeal:

- (a) The Appellant pleaded not guilty and maintained this plea.
- (b) The court erred not observing that the issue was land ownership and the Appellant was framed.
- (c) The court erred in ignoring Article 50 (2) (g) (h) of the Constitution as to the Appellant's legal representation.
- (d) The court erred in shifting the burden of proof to the Appellant.
- (e) The court erred in meting out a harsh and excessive sentence.

#### Testimonies and Evidence

5. PW1 was Roseline Anyango Onyango. On 26.1.2022, she was at her father's funeral. Her son, John, called to inform her that her sugarcane had been burnt. The Appellant burnt it. There was a boundary issue. She instructed an agricultural officer who assessed the loss at Ksh. 235,000/=.

6. On cross-examination, she stated that she was the owner of the parcel of land on which the sugarcane grew. She was at her father's funeral when the incident took place. She stated that she came the following day and went to the agricultural officer for assessment of the cane, which was 11 months old.
7. PW2 was Peter Onyango Agutu who stated that the Appellant was his neighbour. On 26.1.2022, he woke up and went past the appellant's home, where there was burning. He saw smoke from PW1's farm. He also saw the appellant setting the complainant's cane on fire using cane waste. He went back to call for assistance. He stated that the appellant was known to him. Some children went to report the incident. He later went to record a witness statement at Dede Police Station.
8. On cross-examination, he stated that he left his house at 7.00 am. His house was 100m away. He saw smoke, then fire. The appellant was where the smoke and fire were coming from and was using trash to put fire on the cane. He stated that family members and neighbours came together with the complainant's children.
9. PW3 was John Onyango George. He was a vet officer. On 26.1.2022, around 7 am, he went to tether cattle. He saw PW1's sugarcane on fire. At the same time, he found the Appellant alone. He went after the Appellant to enquire, but

the Appellant left. The fire spread and covered the entire plantation.

10. On cross-examination, it was his evidence that nobody else was at the plantation other than the Appellant. The appellant saw PW2 around the time the incident took place. The witness was trying to put out the fire. The cane was approaching maturity.
11. PW4 was Maxwel Odhiambo Ondondi. He was the County Agricultural Officer. He relied on the crop damage assessment report dated 3.2.2022. He estimated the crop yield at 62 tons and Ksh. 3,800/= per ton. The total yield would be Ksh. 253,800/=. On cross-examination, he stated that the assessment was done on 3.02.2022, and the whole plantation was destroyed.
12. PW5 was number 107395 PC Gimisi Sarah of Awendo Police Station. She was relying on a report by PC Nicholas Koech, who later transferred. George Onyango made a report that the Appellant burnt sugarcane belonging to PW1. The Appellant was arrested upon investigation.
13. The appellant was placed on his defence, and section 211 of the Criminal Procedure Code was complied with. The appellant opted to give sworn testimony and have one witness.

14. DW1 was the Appellant. On 26.1.2022, he had gone to work at Nyahera. He returned at 500 pm. He was told the police were at his home. He had no differences with PW1. On cross-examination, PW1 hailed from the same village. The farm belonged to the deceased John Onyango, who was his uncle. He stated that the firm belonged to the uncle, who is the complainant's father-in-law. He knew the land parcel to be 795 but did not know the acreage. He was not aware whether there was succession carried out. Despite proposing to have one witness, he closed his defence.
15. The court considered the evidence and found him guilty of the offence charged. The court sentenced the appellant to 5 years' imprisonment. It does not, however, indicate when the sentence was to commence.

### Submissions

16. The Appellant filed undated submissions. He submitted that there were contradictions in the testimonies of PW1, PW2, and PW3. On this, it was further submitted that the testimony of PW1 was hearsay, while the evidence of PW2 and PW3 was not corroborated.
17. On sentence, it was submitted that the sentence was harsh and excessive. He submitted for a probationary sentence.
18. The Respondent also filed submissions dated 19.12.2025 by which it was submitted that the fact that the appellant didn't

have an advocate on record wasn't fatal to this case as the right to free legal representation is not an absolute right under the said Article.

19. It was, according to the Respondent, only mandatory if the accused person is charged with an offence whose penalty is death and substantial injustice would be occasioned against him if such person is unable to afford legal representation. Reliance was placed on **Mokaya v Republic (Criminal Appeal E020 of 2023) [20241 KEHC 4607 (KLR)** where W.A Okwany, J stated that:

**In the instant case, I note that even though the trial Court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation, I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation.**

20. It was also submitted that the ingredients of the offence were proved as the Appellant willfully and unlawfully burnt PW1's sugarcane plantation. The Respondent also submitted

that the sentence of 5 years imprisonment was not excessive, as the term ought to have been 14 years imprisonment per the law.

### Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. However, the treatment of findings of fact by the lower court was addressed by the former Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the

witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

22. What then is the reasonable doubt? In the case of **Moses Nato Raphael v Republic [2015] KECA 787 (KLR)**, the court of appeal [Githinji, Karanja & Mwilu, JJ.A] stated as follows:

What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. 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.”

23. What then is the offence the appellant was facing? Section 334 (a) of the Penal Code provides as follows:

*Any person who willfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures:*

- a) *A crop of cultivated produce, whether standing, picked or cut; or*
- b) *A crop of hay or grass under cultivation, whether the natural or indigenous product of soil or not, and whether standing or cut; or*
- c) *Any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years.*

24. In this appeal the issues for determination is whether the Appellant willfully and unlawfully burnt the crops owned by the PW1. The court should establish whether the acts complained of were wilful and unlawful. In the case of **Libasia v Republic [2023] KEHC 27517 (KLR)**, SC Chirchir, J held as follows:

The ingredients of the above sated offence was set out in the case of Republic v Christopher Bwanga [2019] eKLR, the court held that the ingredients of the offence of destroying a crop of cultivated produce are:

- i. Evidence of destruction of a crop of cultivated produce.
- ii. Whether the act was willful and unlawful
- iii. Whether the crop belonged to the complainant.

46. There is no requirement that ownership of the land must be proved. Therefore, the fact that there was a dispute on ownership is immaterial. In the case

of Director of Public Prosecution v Margaret Shipai [2019] eKLR, the court held that I find that the dispute in ownership of the land where the destroyed crops were growing was not an ingredient of the offence. The prosecution need only to prove that the crops planted by the complainant were wilfully and unlawfully destroyed by the respondent.

50. The prosecution was to prove to the trial court that the crops were destroyed by the appellant wilfully and unlawfully in order to prove its case beyond reasonable doubt.

51. The word wilful when used as an element of offence involves conscious wrong or evil purpose on the part of the actor regardless of whether the act is wrong or right. But when it is coupled with the term unlawful, it means the act was not authorized by law and therefore illegal.

25. The evidence of PW1 was that there was a dispute as to ownership of the land in question. The Appellant, on the other hand, testified that he had not disagreed with PW1. There was no evidence of there being a land dispute.

26. However, it is not lost to this court that the case of the prosecution was that the Appellant was the last person seen at the burning cane. PW2 and PW3 testified that they saw the Appellant at the burning sugarcane plantation. It was around 7.00 am, and it was their common case that the Appellant used trash to light the sugarcane.

27. On the part of the Appellant, he testified that on 26.1.2022, he had gone to Nyahera to work. He, however, did not advance the effect of this defence of alibi. He did not give the exact time he left for Nyahera. He also did not state where he was in Nyahera. Going to Nyahera to work at 7.30 or 8 am is still consistent with burning of the plantation.

28. The so-called defence did not ever rise to the status of an alibi. The duty to prove falsity of an alibi still remained with the prosecution. The appellant, as an accused, had no duty to help the state carry out its case. However, the appellant must set the alibi early enough, or at least with sufficient precision. Going to Nyahera is not good enough. There must be a place where the prosecution, if caught off guard with new evidence, can rebut pursuant to section 212 of the Criminal Procedure Code, which provides as follows:

**If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.**

29. The appellant was not under duty to disclose his defence before being put on the defence. In any case, the state has a chance to call rebuttal witnesses. The case for the appellant, as presented during cross-examination, was that he was not there. It used to be the position that an alibi had to be

disclosed in advance. However, non-disclosure is not fatal. However, it weakens the alibi.

30. In the case of **Wachera v Republic** **[2025] KEHC 11843 (KLR)**, this court posited as follows:

43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.

44. The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant. The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call. With reference to alibi evidence, the court of appeal in *Erick Otieno Meda vs. Republic* [2019] eKLR stated thus:

“In considering an alibi, we observe that: a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view. b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial. c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court. d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the

accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

45. The first aspect was the alibi defence set out. The state did not find it fit to challenge any of the statements made by the Appellant in relation to the alibi. The state, in its cross examination confirmed the consistence of the defence evidence. The appellant was in their home from 5 pm up to 10 pm when the parties took dinner. This piece of evidence was not impeached at all. The Appellant's evidence remained unrebutted. In the case of *Erick Otieno Meda v Republic* [2019] eKLR, the Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] posited as follows regarding an alibi: -In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie - v- Republic* [1984] KLR, this Court stated: "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."

46. In the South African case of *S -v- Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment

of alibi evidence:i. There is no burden of proof on the accused to prove his alibi.ii.If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.iii.An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."iv.If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").v.The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

47.The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge -v- R, [2014] eKLR as follows: -“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution....”

48.In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said: ‘If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

31. The burden of proving the falsity of an alibi lies with the prosecution and was addressed in case of **Victor Mwendwa Mulinge -v- R, [2014] eKLR** as follows:

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32. If on all the evidence there was a reasonable possibility that this alibi evidence is true, it means that there is the same possibility that he has not committed the crime. In a persuasive South African case of *R - v - Biya 1952* (4) SA 514 (A) at 521C D Greenberg JA said:

**‘If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.**

33. The Respondent needed only to prove that the sugarcane planted by the PW1 was wilfully and unlawfully destroyed by the Appellant. PW5 produced his report on the farm, confirming that the sugarcane was torched and its value was ascertainable. His evidence corroborates that of the other prosecution witnesses who observed the torching of the sugarcane.

34. The incident happened during the day and was witnessed by PW2, PW3, and the Appellant was clearly identified. There was

no dispute that there was a sugarcane crop on fire and it was burned.

35. The evidence of PW1 and PW2 placed the appellant at the scene of the crime. They saw the appellant. This was not shaken on cross-examination. The question of malice cannot arise as against PW2 and PW3. They could not unsee what they had seen. Differences with PW1, which were not there, do not in any way explain the evidence of PW2 and PW3. The appellant ought to have raised the questions during cross-examination. The evidence was overwhelming in that respect.

36. The net effect is that the appeal lacks merit and is accordingly dismissed.

37. The next question is sentence. According to the Respondent, the trial court handed down an appropriate sentence as prescribed by statute. Sentencing is discretionary. In the case of **S V Malgas** 2001(!)SACR 469 (SCA) at para 12, it was held that:

A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.....However, even in the absence of material discretion, an appellate court may yet be justified in interfering with the

sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking’, “Startling” or “disturbingly inappropriate”

They also cited the case of Shadrack Kipkoech Kogo -vs- R, Eldoret Criminal Appeal No. 253 of 2023 where the court of Appeal stated that’, “*Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a very wrong principle was applied or that short of these , the sentence itself is so excessive and therefore an error of principle must be interfered.*”

38. The trial court called for a pre-sentence report dated 12.2.2025, which recommended a noncustodial sentence for 1 year and rehabilitation. The appellant, in his mitigation, asked for leniency, and he was the sole breadwinner.
39. The sentence attracts a maximum of 14 years. The appellant did not plead guilty. He went through a full hearing. The fire caused maximum harm as all the canes were burnt. There was also high culpability. The complainant lost everything in the land. This was also carried out in the most unfortunate time, when the complainant had gone to bury her father. There could be no more capricious time to act nefariously.

40. The court, therefore, must look at both the facts that reduce or increase the sentence. The circumstances of the offence are decisive in deciding the sentence. The Revised Sentencing Policy Guidelines provide as follows:

5.1.7 The circumstances of the offence may justify either reducing or increasing the sentence. Here are some factors to consider:

- Was the offence motivated by or did it demonstrate hostility based on race, gender, sex, pregnancy, marital status, health status, ethnicity, age, disability, religion, conscience, belief, culture, dress, language, or birth.
- Was the offence planned or premeditated?
- The length of time over which the offending behaviour took place.
- Did the offence require a high level of planning, organisation, sophistication, or professionalism?
- Did the crime involve sustained or prolonged offending behaviour such as repeated attacks upon the same victim or a spate of robberies?
- Did the accused intend to cause a more severe consequence than what actually occurred?

- Was the offence committed whilst under the influence of alcohol or drugs which were consumed voluntarily and deliberately so as to effect the commission of the offence (i.e., to give the accused 'Dutch courage')?
- Was the offence intended to interfere with or obstruct the course of justice?
- Was the offence committed by a group rather than an individual?
- Did the accused use or threaten to use a weapon? The more dangerous the weapon, the higher the culpability.
  - Did the offence involve a flagrant and excessive use of violence or damage to a person or property in the execution of the offence?
  - Was the offence committed for financial gain? Examples might include a person killed in order to make an insurance claim.
  - Was there a high level of profit - realised or anticipated - from the commission of the offence?
  - Did the offence involve an abuse of trust or position of authority?

- Did the offence involve restraint, detention, inhuman treatment, or other degradation of the victim?
- Was the victim vulnerable, e.g., very young, elderly, or disabled?
- Was the victim providing a public service or performing a public duty at the time of the offence?
- Did the offence cross international borders?
- Was a witness placed in the witness protection programme because of dangers posed to them by the accused person or their agents?
- Was there an attempt to dispose of or conceal evidence following the commission of the crime or did the accused attempt to blame others?
- Was the offence committed whilst the accused was on bail?
- Was the offence committed in the presence of others (especially children)?
- Was the offence committed while the accused was subject to court orders or whilst the accused was in custody?

- Does the accused have relevant previous convictions e.g., of a similar nature to the offence committed?
- Did the accused intend to harm more than one victim.

41. In this case, the sentence given was very lenient. The mitigation tendered by the appellant, was that he was a bread winner and prayed for leniency. Unfortunately, this was after burning the complainant's bread.

42. The court called for and was supplied with a presentence report. Though described as a medium risk offender, he was impulsive, violent, and angered if confronted with a tough situation. He is said to be in need of cognitive behavioral therapy on anger management and on being law-abiding. The PACS recommended that this can be achieved in the home environment.

43. The court below was of the contrary view. A person requiring anger management must be confined to places where his anger can be contained and directed to useful work for the state. Home environment is shown from the report, and the needless and capricious crime, not suitable for the appellant.

44. The appellant does not appear to have learnt that the world is a tough place. What the appellant needs is not a home

environment but a prison environment for him to be suitably rehabilitated and corrected in a command environment. By recklessly burning cane while the victim was away, the appellant forfeited freedom. The court ordered a 5-year sentence. The same is very lenient, given that this was economic sabotage.

45. The offence attracts an imprisonment of up to 14 years, and the trial court sentenced the appellant based on the circumstances before her.

46. I do not see any way in which the fact that the Appellant had no legal representation in the trial court affected his right to a fair hearing. The hearing was conducted in accordance with the law, and the Appellant was given a full opportunity to choose the language he would use and to cross-examine all witnesses. The right to representation is not absolute. The constitutional imperative is set out in article 50(2) (g) and (h) of the constitution. They provide for:

*(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;*

*(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*

47. The rights were promptly informed of the appellant, who noted that he had been informed. There were no submissions that there was a likelihood that substantial injustice would otherwise result. The sentence is only 14 years, and there was no miscarriage of justice. The rights under Article 50 were followed to the letter.

48. In deciding each of the grounds of appeal, the court notes that articles 50(2) (g) and (h) of the Constitution were followed. The court did not ignore the said rights, and it duly informed the appellant of them. The question of land grab is irrelevant as far as the case is concerned.

49. The question of alternative justice was not invoked at trial. There is no material before the court to show any error of law.

50. Lastly, I find that the sentence was lawful and I find no legal basis to interfere with the sentence imposed by the trial court.

#### Determination

51. In the circumstances, I make the following orders:

- a) The appeal on conviction and sentence is dismissed.
- b) The Judgment of the trial court, Hon. C.N.C. Oruo, Principal Magistrate in Rongo PMCRC No. E035 of 2022 is hereby upheld.
- c) Right of appeal 14 days.

d) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **4<sup>th</sup>** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Mr. Kihara for the State

Appellant present at Migori Main

Cpl. Charles Mwikabi at Migori Main

Court Assistant - Michael