Ngure & another v Republic (Criminal Appeal E010 of 2024) [2025] KEHC 3678 (KLR) (Crim) (25 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3678 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E010 OF 2024

KW KIARIE, J

MARCH 25, 2025

BETWEEN

JOSEPH KAMAU NGURE .... 1ST APPELLANT

BONIFACE KAMANDE MUIRURI .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E320 of 2021 of the Senior Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala –Principal Magistrate)

JUDGMENT

1. Joseph Kamau Ngure and Boniface Kamande Muiruri, the appellants herein, were convicted on two counts of arson contrary to section 332 (a) of the *Penal Code*.
2. The particulars of the offence were that on 11 December 2020, at Sasumwa Dam village, Kinangop sub-county in Nyandarua County, they wilfully and unlawfully set fire to a rental building valued at Kshs 900,000, the property of Joseph Francis Mwai Wanyeki.
3. The appellants were sentenced to ten years in prison. They have appealed both the conviction and the sentence. They represented themselves. They raised the following grounds of appeal:
    a. The trial court erred in finding against the weight of evidence that the prosecution had proved its case beyond reasonable doubt.
    b. The trial court failed to properly analyze and scrutinize the circumstantial evidence to the effect that other possibilities would have caused the fire in the house of P W 1.

c. The learned trial magistrate erred in law and fact in convicting us on weak circumstantial evidence, which was full of co-existing circumstances, weakening the chain.

d.) The learned trial magistrate erred by not recognizing that the prosecution's evidence was fraught with contradictions, outright lies, and half-truths, which created significant doubts that should have been resolved in our favour, ultimately leading to an unjust decision.

e. The learned trial magistrate erred in law and fact by failing to accord our case the probative value it deserved and dismissing our alibi defence, which created a reasonable doubt in the prosecution's case and was not challenged or rebutted by the prosecution.

f. The learned trial magistrate erred in law and fact by failing to appreciate that PW 1 had the motive to lie and framed us because of an existing grudge between the complainant and 1st appellant's father.

g. That the learned trial court magistrate erred in law and fact by not considering that the 2nd appellant was below the age of majority during the alleged commission of the offence and hence proceeded to convict him as an adult.

h. The trial magistrate erred in law and fact by passing a harsh sentence under the circumstances.

4. The state opposed the appeal through Vena Odero, the prosecution counsel. She argued that the offence was proven to the required standards and that the sentence was commensurate with it.

5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh, drawing my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will, therefore, be guided by the celebrated case of Okeno vs Republic [1972] E.A 32.

6. Each appellant presented an alibi. The first appellant asserted that he was in Kinale, where his mother had sent him to harvest Irish potatoes. This was confirmed by his mother (PW3) during her testimony.

7. The defence of Boniface Kamande Muiruri, the second appellant, was that although he was in Njabiini, he was not at the scene of the incident.

8. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of Kiarie vs Republic [1984] KLR, where the Court of Appeal held:

> 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. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

9. Monica Wambui Maina (PW1) testified that the first appellant's arrest triggered the incident following her complaint to the police. The first appellant declared that nobody would sleep in the bar while his father slept on the floor.

10. Samuel Maina (PW3) placed the two appellants at the scene. His evidence was that the duo was denied entry into the bar, and shortly after, a house was set on fire.

11. Purity Nyawira Kareithi (PW5) testified that she observed the two appellants fleeing from the burning house while others were rushing to help extinguish the fire.

12. The evidence presented by the prosecution witnesses displaced the appellants' alibi defence.

13. The conviction of the appellants was, therefore, safe.

1. An appellate court will only intervene in the trial court's sentence when sufficient circumstances permit it to modify its order. These circumstances are well illustrated in the case of Nillson vs Republic [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. (R vs Shershewsity (1912) C.CA 28 T.LR 364).

15. Section 332 (a) of the *Penal Code* provides:

    Any person who wilfully and unlawfully sets fire to —

    a. any building or structure whatever, whether completed or not; or

       ...

       is guilty of a felony and is liable to imprisonment for life.

16. The appellants were influenced by mob psychology. They are young, and the offence of arson is serious. However, their age significantly impacts the sentencing. Therefore, I am inclined to reconsider the sentence imposed by the learned trial magistrate.

17. Each appellant's ten-year imprisonment sentence is set aside and substituted with a five-year sentence. The sentence is effective from the time the trial court sentenced them.

18. The appeal, therefore, is successful to that extent.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 25TH DAY OF MARCH 2025.

KIARIE WAWERU KIARIE

JUDGE