



REPUBLIC OF KENYA



KENYA LAW

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**Director of Public Prosecutions v Nyasinya & 12 others (Criminal Appeal
21 of 2021) [2024] KEHC 1823 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 21 OF 2021
PN GICHOHI, J
FEBRUARY 29, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

ANNE KWAMBOKA NYASINYA 1ST RESPONDENT

OMARI NYASIMI 2ND RESPONDENT

HUDSON NYASINGA 3RD RESPONDENT

JOHNSON MUINDI WAKO 4TH RESPONDENT

WYCLIFFEE OMARI NYASIMI 5TH RESPONDENT

CORNELLIUS NYAMBATI NYASINGA 6TH RESPONDENT

ABEL MUONA MIYENI 7TH RESPONDENT

EVANS MOGAKA BOSIRE 8TH RESPONDENT

VINCENT BOSIRE MUONNA 9TH RESPONDENT

JOHNSON NYAMBATI MOSETI 10TH RESPONDENT

NELSON NYAMBATI MOSETI 11TH RESPONDENT

PAUL NYAMYEYA RATEMO 12TH RESPONDENT

JAPHET OTIONGO MOSETI 13TH RESPONDENT

*(Arising from the conviction and sentence delivered on 24th February
2021 by Hon. S.K.Onjoro PM, in Kisii Criminal Case No. 1030 of
2012 Republic versus Anne Kwamboka Nyansinga & 12 others)*



JUDGMENT

1. The Respondents herein were jointly charged in the Kisii CMCR *Case No. 1030 of 2012* with three counts as follows:
 - i. First Count: Arson contrary to Section 332 (a) of the *Penal Code*. The particulars of the offence were that on 30th day of May 2012 at Rianyamwamu sub-location in Kisii District within Kisii County, jointly with others not before court, wilfully and unlawfully set fire to a dwelling house valued at Kshs.1,347,700/= belonging to Joel Otoigo Nyasinga.
 - ii. Second Count: Malicious damage to property contrary to Section 339(1) of the *Penal Code*.
The particulars of the offence were that on the 28th day of May 2012 at Rianyamwamu Sub-location in Kisii district within Kisii County jointly with others not before court, wilfully and unlawfully destroyed the demolition of a dwelling house of Paul Simba valued at Kshs. 700,000/= the property of the said Paul Simba.
 - iii. Third Count: Injuring animals contrary to Section 338 of the *Penal Code*.
The particulars of the offence were that on 30th day of May 2012 at Rianyamwamu sub-location in Kisii District within Kisii County, jointly with others not before court, wilfully and unlawfully killed an animal capable of being stolen namely a cow valued at Kshs. 40,000/= the property of Joel Otoigo Nyasinga.
2. The accused persons denied the charges.
3. The first prosecution witness (PW1) who was the complainant in Counts 1 and 3 stated that on the material date at about 08.00 am, the 1st Accused descended on his crops destroying them and thereafter went to his son's house whose doors and windows she broke using a stone. He stated that the 2nd, 3rd, 4th, 6th, 8th, 11th, 12th and 13th Accused persons followed the 1st Accused but did not tell what role they played in the commission of the offences. The witness rushed to the police station to report the incidents and upon returning with police found his house had been torched and his son's house had been partially destroyed. He stated that the destruction of his son's son took two (2) days.
4. According to 2nd witness, it was the 1st, 3rd and 6th Accused persons that destroyed her brother's house on the first day whereas the 1st, 3rd, 4th, 6th, 7th, 8th, 9th and 10th Accused continued with the destruction the following day. According to her, it was the 3rd Accused who was in company of the 2nd, 6th and 10th Accused persons that torched her father's house.
5. According to the 3rd witness, it was the 5th Accused that torched the house of the 1st witness whereas Accused 2 and 3 cut the cows.
6. The value of the damage crops was assessed and a report was tendered before the court as PEXH. 2. The value of the dead cows was also assessed and a report tendered before the court as PEXH. 3. Photographs of the dead cows, destroyed crops and house were also tendered as evidence together with the supporting report and certificate.
7. At the close of the Prosecution case, the 4th, 7th, 11th, 12th and 13th Accused persons were acquitted of Count 1. The 1st, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th Accused persons were acquitted of Count 3. All the Accused persons were placed on their defence in regard to Count II.



8. After the conclusion of the whole trial, the magistrate acquitted all the Accused persons except the 1st Accused who was convicted of Count II and was sentenced to serve 2 years' probation.
9. Aggrieved, the Appellant moved to this Court vide a Petition of Appeal dated 02/11/2021, faulting the trial court for failing to find that the prosecution case had been proved to the required standard.

The Appeal

10. The Appeal was canvassed by way of written submissions. While the Appellant filed his submissions on 27/06/2022, the Respondents did not file any. The submissions basically reiterated the grounds of appeal and maintained that the prosecution had discharged their burden of proof and urged the Court to set aside the trial court judgment and the order of acquittal against the Respondents, and replace the same with a conviction and an appropriate sentence or any order that this Court may find fit to grant in the circumstances.

Determination

11. The jurisdiction of this court in an appeal such as this was well stated in the often-cited case of *Okeno v Republic* [1972] EA 32, that the Court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. This Court has indeed done so and has considered the evidence on record vis-à-vis the grounds of appeal and the submissions by the Appellant.
12. Regarding the burden of proof, the Court of Appeal in *Mkendesbwa v Republic* [2002] 1 KLR 461 stated:-

“In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.”

13. Further, the degree of proof in criminal cases was established in the House of Lords in the English case of *Woolmington v DPP* [1935] AC 462. Similarly, in *Bakare v State* 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis added).

14. With those parameters in mind, the first issue for consideration is whether the evidence presented by the Prosecution witnesses proved the case beyond doubt.
15. In regard to the 1st Count (Arson), the 2nd witness stated that it was 3rd Accused who was in company of 2nd, 6th and 10th Accused that torched her father's house. The 3rd witness renounced her evidence implicating any of the Accused persons leaving the uncorroborated evidence by the 2nd witness as the only one implicating 2nd, 3rd, 6th and 10th Accused.
16. Concerning the 2nd Count (malicious damage to property), the only evidence that was corroborated was that of the 1st and 2nd witnesses who implicated 1st Accused. There was no evidence on which the



trial court could have convicted any of the other Accused persons and their acquittal was therefore well founded on law and facts.

17. As regards the 3rd Count (injuring animals) , the evidence by the 2nd witness being the only evidence implicating 1st ,3rd ,4th ,6th ,7th ,8th ,9th and 10th Accused fell short of prove beyond any reasonable doubt.

18. This Court is persuaded by Mativo, J (as he then was) in *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR where he stated as follows:

“ The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him ...”

19. From the foregoing analysis, this Court is satisfied that the trial court correctly applied the law and fact. The trial court’s finding that the Accused persons were entitled to the benefit of doubt cannot be faulted.

20. Consequently, this Court finds the Appeal devoid of merit and therefore dismissed.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29TH DAY OF FEBRUARY, 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kihara for Appellant

N/A for Respondents

Saewa/ Aphline , Court Assistant

