



**TK v Republic (Criminal Appeal E010 of 2021)
[2024] KEHC 3971 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E010 OF 2021**

GL NZIOKA, J

APRIL 23, 2024

BETWEEN

TK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon. Liluma Musiega, Resident Magistrate (RM), delivered on 28th April 2021, vide Criminal Case No. 565 of 2019, at the Senior Principal Magistrate’s Court at Engineer)

JUDGMENT

1. The appellant was charged with two others with the offence of attempted arson contrary to section 333(a) of the Penal Code (Cap 63) Laws of Kenya, (herein “the Code”) in count one, and malicious damage to property contrary to section 339(1) of the Code. The particulars of each count are as per the charge sheet.
2. The charges were read out to the appellant and his co-accused and they pleaded not guilty to both charges. The prosecution called a total of seven (7) witnesses in proof of its case. It is the prosecution’s case that at the time of the offences herein, all three accused persons were form four students at [Particulars Withheld] School, a mixed day school and girls boarding school.
3. That on 15th July, 2019, after classes ended at 4:00pm the form four students had a meeting where the stated that they did not want to sit for their mock examinations. That, they planned to strike where the female students would claim that there was Omo, a soap detergent, in the food while the male students would burn one of the girl’s dormitories.
4. That the teachers heard about the meeting and PW2 GT, became suspicious as such meetings did not usually occur and remained behind. After the meeting, PW2 Gabriel saw the appellant and his co-accused leave the school with a back-pack bag (Pexh 4b) while avoiding eye contact.



5. That, less than thirty (30) minutes later, PW2 saw the appellant and his co-accused returning to the school past the main gate with the back-pack bag. PW2 Gabriel attempted to stop them from accessing the second school gate but by the time he arrived he found that the appellant and his co-accused did not have the bag and the two boys ran to class. PW2 left and went to his home near the school.
6. At around 6:30pm, the girls went for supper when they started screaming that the food had been contaminated with Omo. Soon thereafter, the boys including the appellant and one of his co-accused came into the dinning hall throwing stones. PW5 GT, the teacher on duty that evening, and who was in the dining hall ran from the dinning hall to the kitchen and alerted other teachers and the school administration.
7. That, at around 7:30pm the students went to the field and wanted to break into the girls dormitory. PW5, Gideon saw the appellant take a jiko from the watchman's cubicle and toss into the girls dormitory and then went to the boiler room, however, when Pw5 shouted his name the appellant ran away.
8. Later, police officers came and contained the situation. PW7, No. 56xxx CPL Zacharia Nderitu Wachira, the investigating officer went to the school and conducted his investigations that revealed the window panes to the form four classes, laboratories and dormitories had been broken and petrol had been poured in the girls dormitory. Further a brown bag containing a yellow jerrycan of about three (3) litres that contained a small liquid was recovered from the girls dormitory. PW4 CPL Nderitu, forwarded the jerrycan to the government chemist who confirmed that the liquid substance was petrol. After completion of the investigations, the appellant and his co-accused were arrested and charged with the offences herein.
9. At the close of the prosecution case, the appellant was placed on his defence. He told the court that, he used to use a black back pack bag. That, on the day of the offence, after classes ended he did some cleaning between 4pm and 4:30pm and thereafter went for preps from 4:30pm to 5:30pm where they had a discussion. After the preps ended he went home and was arrested four (4) days after the incident.
10. At the conclusion of case, the court found the appellant guilty as charged on on both counts, convicted him and sentenced him to serve five (5) years imprisonment for count 1 and four (4) years imprisonment for count 2 and directed that the sentences will run concurrently.
11. However, he has appealed against the decision of the court based on the following grounds:
 - a. That the conviction of the Appellant was based on presumption and circumstantial evidence not sufficient to justify any or any reasonable inference of guilt on the part of the Appellant.
 - b. That the learned trial magistrate erred in law by holding that the prosecution had discharged its legal burden and proved their case beyond reasonable doubt.
 - c. That the learned trial magistrate erred in law and fact by convicting the Appellant on evidence that was contradictory and uncorroborated.
 - d. That the magistrate erred in relying on the prosecution's evidence which was weak and incapable of sustaining a conviction.
 - e. That the trial court misapprehended the facts, applied wrong legal principles and drew erroneous conclusions to the prejudice of the Appellant.
 - f. That the trial court erred in law by convicting the Appellant on the basis of suspicion without cogent evidence.



- g. That the learned trial magistrate erred in law and fact in advancing theories and speculations to fill the glaring loopholes in the prosecution's case to justify conviction of the Appellant on patently insufficient evidence.
 - h. That the Learned Magistrate erred in law by not considering the reasonable doubts in the case against the Appellant thus denying him the benefit of those doubts.
 - i. That the magistrate erred in law and fact by relying on the wrong principle and giving a wrongful sentence by holding that the sentence was mandatory thus failing to consider the mitigation proffered and exercise his discretion.
12. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 4th April, 2023 argued that, the prosecution did not discharge its legal burden of proof beyond reasonable doubt.
 13. The appellant submitted that the appellant was not properly identified as the evidence of PW1, PW2 and PW6 was hearsay evidence as they were not at the scene. Further, PW3 and PW4, both students, did not point a finger to the appellant and testified that they did not see the appellant at the scene nor partake in commissions of the offence, and that all they heard were rumours that the appellant purchased the petrol.
 14. The appellant submitted that the trial court descended into the arena of investigations and elected to prosecute the case on behalf of the prosecution when it observed that the witnesses were reluctant to implicate the appellant and his co-accuse. He relied on the case of *Burunyi & Ano vs Uganda Uganda Cr. Appeal No. 1968 EA 123* where Sir Udo Udoma held that it is not the duty of the court to stage manage cases for the prosecution or to make a case against the accused. That its only duty is to see that justice is done according to the law.
 15. The appellant further submitted that, the evidence of identification was only by PW5 who was the sole witness at the scene and should have been examined carefully and the trial court satisfied that the circumstance of the of identification were free from the possibility of error as held in the case of *Wamunga vs Republic [1989] KLR 424*.
 16. Reliance was also placed on the case of; *Kiarie vs Republic [1984] KLR 739* where the Court of Appeal stated that it was possible for a witness to be honest but mistaken and where the only evidence of identification it should be watertight to justify a conviction.
 17. The appellant argued that, the events of the day were chaotic as there were rowdy student who were throwing stones that forced PW5 to flee and seek cover in the kitchen. However, he did not testify when he left the kitchen nor where he was at the time the students had gone to the dorm to enable him identify the appellant,
 18. Further, the evidence of PW2 related to having seen the appellant before the commission of the offence and was not tied to the commission of the offence.
 19. The appellant submitted that, the prosecution case was marred by inconstancies and discrepancies as PW2 admitted that the description of the bag in his statement and evidence in court differed as to the colour and type of bag.
 20. Further, the evidence of PW2 and PW5 differed from that of the investigating officer PW7 as whether a jiko was found in the girls dormitory. Furthermore, despite photographs of the scene being taken, no photographs were produced depicting the jiko nor was any jiko produced in court.



21. The appellant relied on the case of; Joseph Maina Mwangi vs Republic CA No. 73 of 1992 (Nairobi) where the Court of Appeal held that while in any trial there are bound to be discrepancies, an appellate court should be guided by section 382 of the Criminal Procedure Code as to whether such discrepancies are fundamental so as to cause prejudice to the appellant.
22. The appellant urged that it was the duty of the prosecution to prove that the appellant was amongst the rowdy group that attempted to burn the dormitories and destroy school property, and further demonstrate that the exhibits recovered were clearly linked to him which he failed to do.
23. The respondent in its submissions dated, 17th April, 2023 conceded the appeal on the grounds that the conviction was based on evidence of suspicion, uncorroborated and contradictory evidence, and that the evidence did not prove the case beyond reasonable doubt.
24. The respondent submitted that, the evidence linking the appellant to the crime was purely based on the suspicion of PW1 who stated that he suspected them. That there was no evidence that, the appellant organised the meeting nor that he was the leader of the meeting as the evidence of PW3 and PW4 stated that all the four students attended the meeting but there was no leader.
25. Further, the evidence of PW2 that the appellant returned with the bag handed it to another student was uncorroborated. That despite the teachers being suspicious of the students behaviour none of them took any action. Furthermore, the evidence that the appellant had a bag containing petrol was based on suspicion as no one inspected the contents of the bag.
26. The respondent argued that, the prosecution evidence was uncorroborated as no witnesses were called to corroborate the evidence of PW5 that he saw the appellant throw the jiko and run away despite him testifying that he was in the company of madam Mutua and Mr. Muthunga, who were never called to testify.
27. Further, the prosecution failed to produce the jiko that was allegedly thrown into the dormitory nor did the photographs taken of the dormitory by the investigating officer reveal the jiko or any charcoal.
28. Furthermore, the prosecution case had contradiction as the colour of the bag whether it was black, brown or grey and who was carrying the bag between the appellant and the 1st accused. That, there was contradiction as to who recovered the bag between the investigating officer and the teachers.
29. Lastly, the respondent submitted that there was insufficient evidence to link the appellant and his co-accused to the offences beyond reasonable doubt and in the circumstances the trial court erred in convicting the appellant.
30. In dealing with the matter herein I note that the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own decision taking caution it did not benefit from the demeanour of the witnesses.
31. In that regard, the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32 stated that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s



findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”

32. The appellant was charged with the offences of attempted arson contrary to section 333(a) of the Penal Code in count one. The provisions of that section states;-
- Any person who—
- a. attempts unlawfully to set fire to any such thing as is mentioned in section 332; is guilty of a felony and is liable to imprisonment for fourteen years.
33. He was further charged with the offence of malicious damage to property contrary to section 339(1) of the penal code. The provision of that section states;-
- (1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.
34. The key question is did the prosecution prove the case against the appellant beyond reasonable doubt on both counts. The prosecution called a total of seven (7) witnesses. The evidence that was led by PW1 JM the principal of [Particulars Withheld] school where the offences were committed was mainly on what he was told other than what he witnessed when he arrived at the scene after the incident. PW2 GT a teacher at the school implicated the appellant in the commission of the offence. I shall revert to his evidence later. PW3 JW and PW4 NN did not implicate the appellant, however, their evidence touched on what transpired generally. PW5 GT a teacher at the school heavily implicated the appellant in the commission of the offence. Therefore I shall analyse his evidence later. PW6 JW the deputy principal was not present when the offence was committed. He therefore testified to the events after the incident or strike. Finally PW7 No. 56xxx Corporal Zacharia Nderitu Wachira led evidence on the investigation and the exhibits produced. He too spoke to the role played by the appellant, as gathered from the other witnesses.
35. On the other part, the appellant who testified as defence witness number three (3) simply stated how he left school after the cleaning, exercise and was arrested thereafter. The other defence witnesses DW4 exonerated the appellant but spoke to other events relating to the strike. DW5, Esther did not lead any evidence either exonerating or implicating the appellant and dealt on the events of the strike. Finally, DW6 SN confirmed there was a strike in school, but categorically stated that, he was not in school that day and could not say what happened.
36. Pursuant to the aforesaid, the evidence of all witnesses reveals that, there was a plan by form fours to strike. That the students did not want to sit for the mock exams. Further the strike actually took place and there was damage to the school property. The evidence to that effect was led by almost all the witnesses across the board. However, at this stage it suffices to note that, the appellant was not charged with organizing a strike. Therefore, all the evidence led to connect him with organization thereof can only be relevant in corroboration of the charges. The observation is based on the fact that the submissions by the respondent seems to have been focused partly on the strike, and the movement of the appellant.
37. Be that as it may, before I embark on the evaluation of the evidence adduced I wish to make an observation that, although the respondent had conceded to the appeal that was done in the submission and there is no response to the appeal or grounds of appeal conceding to the appeal. I say so because the court is inclined to consider whether the respondent can concede to the appeal through submission without filing a formal response whatever the case may be, it is also sufficient to note that, the fact that,



the respondent concedes to the appeal, is not a ground to allow it. The court as already stated herein is duty bound to evaluate the evidence afresh

38. To revert back to the matter herein, I find that the evidence that incriminated to the appellant was led mainly by PW2 and PW5. The evidence of PW2 was that, he saw the appellant and the 1st accused in the matter leave the school after the meeting. That, the appellant had a bag. The witness (PW2) stated that, the appellant was his student. That, when they approached him with other teachers, they were standing on the corridor and the appellant and the others avoided eye contact. He became suspicious. That he became suspicious because form four students did not carry the bags as they would return for prep. That upon return after 30 minutes, he attempted to stop them from approaching the second gate but he found they had already handed over the bag to someone else. That he was helpless as he did not find the bag. He left the school and shortly heard noises and screams. He heard glasses shattered. After the situation calmed down, he witnessed the damaged on the girl's dormitory and library. That, the smelled paraffin in the girl's dormitory. That a charcoal burner thrown into the dormitory and a bag in the dormitory. He identified the bag in court as the one recovered.
39. In cross-examination, the witness maintained that, the appellant was carrying the bad. That, the unique feature about the bag as the colour. That in his statement he said it was greyish and maintained that, the one identified in court was greyish and the same one the appellant had, and recovered in the dormitory. He refuted the defence suggestion that the bag was brown. He also maintained he saw the appellant and another leave as he was standing at the corridor. That, they passed by him. That as they passed they could brush shoulder. Further he did not want to ask them where they had gone so as not to draw attention.
40. I find that several questions arise from the testimony of PW2. First and foremost whether anyone had seen the appellant with a bag that day. Secondly whether in deed a bag was recovered from the girl's dormitory and thirdly whether the bag produced in court was the bag the appellant had. As I consider these questions I shall consider the defence submissions that, the witness PW2 could not describe the bag with precision and colour was different. That, there is no evidence that, the bag found in the dormitory was the same as the one alleged carried by the appellant.
41. In addressing the afore question I note that PW3 Jacinta Wangare Mbugua in cross-examination stated as follows:
- “I did not see Joseph and Thomas leave the meeting the accused's had bags. The 1st accused had a college back. Thomas had a bag pack”
- As such PW3 corroborates the evidence of PW2, that the appellant had a “bag” on the material date.
42. I shall now consider the evidence of PW5, he told court that he saw the appellant and 1st accused run towards the gate throwing stones. That he saw the appellant take a jiko and throw at the girl's dormitory. The witness stated as follows:
- “They (students) wanted to break into the dormitory. One boy took a jiko and threw into the dorm. It was in the watchman cubicle. Outside the dorm. I would identify him. It was Thomas. He noticed it did not light he attempted to break into the dormitory. He went to the boilers where girls collect hot water. I shouted his name he ran away”
43. In relation to the evidence of the witness, the appellant submits that, the charcoal burner was not produced nor a photo thereof. The respondents supports that argument in conceding to the appeal.



44. The question is, has any other witness spoke to the charcoal burner in the girls dormitory. PW2 stated in his evidence as follows:

“We went to the girl’s dorm we smelled paraffin which had not been ignited. We also found burning charcoal which had been thrown into the dorm”

45. PW5 further stated in cross examination

“I saw Thomas take the jiko from watchman cubicle. I was 50 metres away. The place we ran to was dark. The security lights in the dormitory share to the watchman cubicle. I saw Thomas throw the fire into the dormitory. The jiko was made of iron sheet”

Therefore the evidence of PW2 corroborates that of PW5, that there was a charcoal burner or jiko found in the girls dormitory.

46. The question is, does the failure to produce the jiko or photos thereof render the evidence inadequate and/or inadmissible? In answering this question, it should be noted that, the appellant through his counsel in cross-examination did not challenge the prosecution failure to produce the jiko or the photograph thereof. The issue has only be raised in the appellant’s submissions and supported by the respondent’s submissions at the appeal stage.

47. To revert back to the main question as to whether the prosecution adduced adequate evidence to support its case I find that, the evidence of PW2 that, the appellant had a bag, left the school and returned is cogent. The issue of description of the bag as grey or black does not render the rest of the evidence inadmissible. Judicial notice can be taken of the difficulty witnesses can have in clearly identifying colours. In re-examination PW2 stated that, to him, the bag he saw was grey. Even then, the evidence of PW2 should be considered along other evidence adduced.

48. The evidence of PW3 evidence was that she heard Kariuki is the one who went to buy petrol. She thus stated

“I did not see Eunice. I was with her. I heard that Kariuki is the one who went to buy petrol. Chief came. We had agreed in the meeting to burn the dorm. It was the girl’s dorm. That was to be burnt”

In cross-examination she stated

“I heard rumours that Kariuki bought petrol”

49. The question that arises is this, if PW2 states that, he saw the appellant with a bag. He was in the company of 1st accused JK. The bag was found in the dormitory. It had a Jerrycan of paraffin. Is it possible that paraffin is what is referred to as petrol. Is it possible as stated by the witness that paraffin was to be used to burn the dormitory? Does that support and corroborates PW2’s evidence that, the appellant and 1st accused went to purchase the paraffin to burn the dormitory.

50. In addition to the evidence of PW3, PW4 Mary Njoki stated as follows:-

“I heard them coming up with the idea that, they will put Omo in the food. It was the girls to do that. The boys were to purchase petrol”



Again does this evidence support PW2's evidence that, he saw the appellant and another leave with a bag and return and shortly there was commotion screams, property destruction and recovery of a bag a jerrycan containing paraffin?

51. It suffices to note that there is no dispute paraffin was found in the girl's dormitory. The evidence adduced by all witnesses support the fact that, there was a plan to put Omo in the food and burn the girl's dormitory. Apparently it does not appear the only people who were seen leave the school after the plan and court applied wrong legal principles and drew erroneous conclusion that PW3 and PW4 reluctantly gave evidence thus descending in the arena of trial. I do agree with the submission that, the use of the word "reluctant" was not appropriate. However, as stated herein the evidence of PW3 and PW4 was still useful to support the prosecution in so far as it confirmed the plan to strike, put Omo in the food and burn the dormitory thus explaining the presence of paraffin and charcoal burner in the girl's dormitory. The same witness testified that, the form four students agreed to destroy the school property which was actually done. I further find that, the trial court evaluated the evidence in total and relied mainly on the evidence of PW2 and PW5 in finding the appellant guilty and connecting him. As such the submissions by the appellant and supported by the respondent is not tenable.
52. In conclusion taking into account the fact that, the form four students planned to strike, put Omo in food, burn girl's dormitory and destroy property and it did actually happen save, for the failure to light the dormitory simply means most of the students were involved in the commission of the offence and the involvement of the appellant cannot be ruled out. It is not tenable to argue that since the others were not arrested and charged, then the appellant should have been set free. I find that there was adequate evidence to connect the appellant with the offences and the conviction was safe.
53. As regards sentence I find that the sentence meted out was lawful. The trial court justified it and considered the pre-sentence report and the mitigation. The ground of appeal that the sentence meted out is wrong or that the mitigation was not considered is not factually correct.
54. Be that as it were, the law is settled through case law where in the Court of Appeal J.K.K. vs R [2013] eKLR held that if a person committed an offence while a minor and is due for sentence upon conviction while of adult age, the convict can still be sentenced to a custodial under the Children Act. I find the sentences imposed as lawful and legal. However, the appellant was a first offender and of course the offence especially in count 1 was very serious because had the dormitory caught fire the consequences would have been dire. But the appellant has been serving the sentence for about two (2) years. He may have learnt a lesson. His co-accused elected to seek for revision vide HCCR No. E142 of 2023 and orders made. It will be in the interest of justice if the appellant is not appealing against the decision herein to benefit from the orders made therein. However, that is within his choice of the legal redress to take and subject to availability of pre-sentence report.
55. It is so ordered

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF APRIL, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Wairegi for the appellant

Mr. Abwajo for the respondent



Ms Ogutu Court Assistant

