REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 31OF 2010

ARTHUR MUYAMURIUKI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal against conviction and sentence in criminal case number 1092 of 2005, Republic vs Arthur MuyaMuriuki at Karatina, delivered Hon. L. Mbugua, Ag PM on 12.11.2009).

JUDGEMENT

The appellant herein**Arthur MuyaMuriuki**was convicted for the offence of Arson contrary to section **332 (a)** of the Penal Code.[1]He was sentenced to serve **4**years imprisonment on 12.11.2009. Aggrieved by the said sentence, the appellant moved to this court challenging both the conviction and sentence.

The particulars of the offence were that on the 23rd day of November 2005 at Ragati Estate in Nyeri District of the Central Province, wilfully and unlawfully set fire to a building namely a dwelling house belonging to Elisa WanguMurage.

The Appellant faced a second count of attempted arson contrary to Section 333 (a) of the Pnal Code.[2] It was alleged that on the 23rd day of November 2005 at Ragati Estate in Nyeri District the Central Province, attempted to unlawfully set fire to a building namely the dwelling house, the property of Susan WangechiKariuki.

The Appellant faced a third count of creating disturbance in a manner likely to cause a breach of the peace contrary to Section **95 (1)** of the Penal Code.[3] The particulars were that on the 22nd day of November 2005 at Ragati Estate in Nyeri District of the Central Province, created disturbance in a manner likely to cause a breach of the peace by banging the door and window of the house of Susan WangechiKariuki and throwing stones into the house.

This being a first appeal, this court is required to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. (see**Kiilu& another vs Republic**[4]**, Okenovs R**[5]**).**

Guided by the aforesaid legal requirement, I now review the prosecution evidence adduced in the lower court with a view to arriving at my own conclusions. The trial began before **P. C.Tororey** SRM and prosecution called a total of **4** witnesses whose evidence is summarized below.

PW1Elizabeth WanguiMuragerecalled that on 22.11.05 at about 10pm she heard a knock on her door, and shortly the appellant came with her sister's child. The child said told the appellant that was the house a Mama Nyaruai was referring to. The appellant started abusing her. The Appellant was known to her, he abused her calling her a dog alleging that he wa the cause of the problems he had with his wife. She told her child to tell him she was not in, this he walked away. She went to h9s house, found his wife standing outside with the accused who threatened killing her. She returned to her home and at 2am he went back and broke her windows, poured petrol into the house and lit a match forcing her to escape with her children. She found the appellant outside setting his wives house on fire. She telephoned the police who came and saw what was happening. Her household goods valued at Ksh 61,000/= were destroyed. She identified the burnt clothes in court.

PW2 Esther NyarwaiWangu, said she was in class 5. Even though her age was not disclosed, the court takes judicial notice of the fact that a class 5 child must have been a minor, and there is nothing on record to show that the court conducted *voir dire* examination. I will revert to her testimony and the effect of failure to conduct a *voir dire* examination later in these proceedings.

On 9.11.2007, when the mater came up for further hearing, the trial Magistrate had left the station and the matter was placed before **Kimemia B.M. RM** who complied with the provisions of Section **200 (4)** of the Criminal Procedure Code[6] and explained to the appellant of his rights under the said section. The appellant opted for the case to proceed from where it had stopped.

PW3 James MwangiGichohithe area assistant chief testified that on 23.11.05 at 2.30am he was at his home when a crowd knocked at his door, they informed him that they has chased a one Arthur Muya who tried to burn a house, he accompanied members of the public and they apprehended the appellant and took him to Karatina Police Station. He also visited the scene and confirmed and saw the burnt house and the burnt items which he identified in court.

PW4 PC 62263 Christopher Ndegwa a police officer was Karatina Police Station was on patrol duties on 23.11.05 when they learnt about the incidence, they visited the scene and picked some of the burnt items which he produced as Exhibit 1 in court.

After evaluating the above evidence, the trial magistrate concluded that the appellant had a case to answer. The appellant elected to give sworn evidence which essentially was that he was implicated in the case and that he refused to sell some picks to a one Wanja and she said the appellant would face adverse consequences. On the material day, he attended to his picks and at around 1pm he heard a knock on the door, a large crown accompanied by the assistant chief came and implicated him in the offence. He was arrested.

After considering both the prosecution evidence and the said defence, the learned Magistrate convicted the appellant on count one and sentenced him to 4 years imprisonment.

Aggrieved by the said finding, the appellant appealed to this court against both conviction and sentence. The appellant advanced four grounds of appeal which in my view can be summarized into two, namely **(a)** whether the evidence was sufficient to sustain the conviction and **(b)** whether his defence was considered.

The appellant advocates filed written submissions on 2.4.2015 in which he attacked the evidence adduced and maintained that it was not sufficient to support the conviction, and that the ingredients of the offence of arson where not proved.

The State was represented by **Miss Maundu** who also filed written submission and opposed the appeal and urged the court to uphold the conviction and sentence. I have carefully considered the submissions by both the appellant and the learned State Counsel.

Turning to the evidence of PW2 who said she was in class two and who was described as a child by PW1, as stated above I take judicial notice of the age of a class 5 pupil and find no difficulty in concluding that she was a minor. Having so concluded, I also find that the magistrate ought to have conducted a *voir dire* examination before taking her evidence.

The court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muirurivs Republic**[7] as follows:-

"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In ***Peter KarigaKiume***[8] *we said " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, cap 15 Laws of Kenya. The Evidence Act, Section 124, cap 80, Laws of Kenya) (Emphasis added).*

It is important to set out questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"

A similar opinion was expressed by the Court of Appeal in England in ***Regina vsCampell***[9]

" If the girl (ten years) had given unsworn evidence then then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in ***R vsLal Khan***[10] *made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen….(Emphasis added).*

There Lord Justice Bridge said:

"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"

There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive court of appeal……In ***Gabriel Maholivs R****,**[11]* *again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.*

In **KivevoMboloivs Republic**[12], the court held that failure to conduct a *voir dire* rendered the entire evidence of the child of no use to the court. In the case of **MusyokaMwasyavs Republic**,[13] the court held that failure to conduct *voir dire* examination in a situation where it is necessary, like the case before this court renders the evidence of the particular witness of no use.

In **Kibangenyvs Republic**[14] the Court of Appeal stated that:-

'The investigation (voir dire examination) should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge's failure to comply with the requirements of section 19(1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed'

In **GamaldeneAbdiAbdirahman& Another vs Republic**[15] after considering with approval the decision in **KibngenyarapKolilvs Republic**[16] stated as follows:-

"Does the definition of a child of tender year" by the Children Act, 2001 oust the jurisprudence that has been developed in criminal trials" The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated there are specific reasons why voir dire examination is necessary before the evidence of a child of tender years can be accepted by the courts……In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is broughtup……Having reached the above conclusion, it follows that the acceptance of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case….."

The above position was explained more clearly in the case of **Nyasani s/o Bichanavs Republic**[17]where the court held that failure to conduct a *voir dire* examination is fatal to the prosecution case where there is no other evidence sufficient enough to sustain a conviction. I take the view that this is good jurisprudence. The court needs to exclude the evidence of the minor and put to test the remaining evidence. A similar position was held in the case of **Hussein Ali Gengavs Republic**.[18]

Guided by the above position I arrive at the conclusion that the evidence of **PW2** cannot be allowed to stand and ought to be excluded while determining the guilt or otherwise of the appellant.

Next I now pose the question, does the remaining evidence in this case establish a case against the

appellant. In determining this question, I will first examine the ingredients of the offence of arson. Since I have already reproduced the evidence earlier in this judgement, it will suffice for me to state that in my own assessment, the remaining evidence was sufficient to sustain the conviction especially the evidence of **PW1**.

*Section **332** of the Penal code provides as follows:-*

Any person who wilfully and unlawfully sets fire to:-

a. *Any building or structure whatever, whether completed or not or;*
b.
c.
d.

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

The essential ingredients of the offence are the setting of fire *wilfully* and *unlawfully*. The word *wilfully* is defined in the *Black's Law Dictionary* as *'voluntary and intentional, but not necessarily malicious'.* The word unlawful is defined in the same dictionary as *'violation of law, an illegality".* Unlawful *is also said to include moral turpitude.*

PW1's evidence is the most crucial. She explained how the appellant came to her house, broke her windows and poured petrol into the house and lit a match stick, and as flames erupted she dashed out with her child. He was threatening to kill her. Identification is not an issue here. He was known to the witness, he had come moments before, abused her, she went to his home where in her words he hit the ground and threatened to kill her. To me this clearly connects the appellant with the offence. I find that the offence of arson was proved to required standards; hence the appellant was rightly convicted.

Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[19] In **ShadrackKipchogeKogovs Republic**,[20] the court of appeal stated:-

"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

Section 332of the Penal Code provides that a person who is guilty of the offence of arson is guilty of a felony and **is liable to imprisonment life.**The appellant was sentenced to **four** years.Was the appellant sentenced to a lesser term than prescribed by the law"" In answering this question I pose the question *"What is the construction of the terms shall be liable"* In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty.[21] This principle is contained in section **66 (1)** of the Interpretation and General Provisions Act[22] which provides:-

"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed"

My further observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section **26 (2)** and **(3)** of the Penal Code provides:-

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

There is however a proviso to Section **26(3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section **26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the penal code but to offences under other written laws.[23]

The phrase used in penal statutes *(ie shall be liable to*) was judicially construed by the East African Court of Appeal in **Opoyavs Uganda**[24] where the court said at page 754 paragraph B:-

"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatorybut provide a maximum sentence only and while the liability existed the court might not see fit to impose it"

I find that the sentence of life imprisonment prescribed under Section **332** of the Penal Code is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments.

The Supreme Court of India in **State of M.P. vsBabluNatt**[25]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case.* In **Alister Anthony Pareiravs State of Maharashtra,**[26]the court held that:-

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[27]

I have carefully considered the facts of this case, the severity of the offence,the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law[28] which are:-

i. To ensure that the offender is adequately punished;
ii. To prevent crime by deterring the offender and other persons from committing similar offences;
iii. To protect the community from the offender;
iv. To promote the rehabilitation of the offender;
v. To make the offender accountable for his or her actions;
vi. To denounce the conduct of the offender
vii. To recognize the harm done to the victim of the crime and the community prevent

I note that the appellant was sentenced on **12.11.2009** to a prison term of 4 years. He had served eight months by the time he was admitted to bail. I have considered the nature of the offence, the principles of sentencing listed above and I hereby reduce the said sentence to one year and six months. I therefore order that the appellant serves the remaining term of his sentence.

I however give the appellant the option of a fine and order that alternatively, the appellant can be released upon payment of a fine of Ksh. 25,000/= .

The upshot is that I up hold both conviction and sentence but reduce the sentence as aforesaid.

Dated at Nyeri this **Eleventh** day of **December** ,2015

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] Ibid

[3] Ibid

[4] {2005} KLR 174

[5] {1972) E.A, 32at page 36

[6] Cap 75, Laws of Kenya

[7] {1983} KLR 447at page 448-450

[8]Criminal Appeal No. 77 of 1982 (unreported)

[9]Times, December 10, 1982.

[10]{1981} 73 Cr App R 190

[11] {1960} EA 86

[12]HCCR APP NO. 34 OFV 2013 (GARISSA)

[13] HCC CR APP NO 50 OF 2013, Garissa

[14]{1959}E.A.92

[15]HC CR NO. Appeal No. 40 of 2013 Garrissa

[16]{1959} EA 92

{1959} EA 190

[18]HC CR APP NO. 91 OF 2011.

[19]See Makhandia J (as he then was in Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[20]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[21] See Daniel KyaloMuemavs Republic, Court of Appeal Criminal appeal no. 479 of 2007 (Nairobi),

Githinji, Anganyanya&Nyamu JJA.

[22] Cap 2, Laws of Kenya

[23] Supra note 3

[24] {1967}E.A 752

[25] {2009}2S.C.C 272 Para 13

[26] {2012}2 S.C.C 648 Para 69

[27] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[28] Regina vs MA {2004}145A