REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 77 OF 2019

JAGDISH SINGH SURDHAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon J.N Wambilyanga (PM) delivered at Kisumu in Chief Magistrate's Court in Criminal Case No 848 of 2018 on 1st October 2019)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged on two (2) counts of the offence of arson contrary to Section 332 (a) of the Penal Code. The Learned Trial Magistrate, Hon J. N Wambilyanga, Principal Magistrate tried and convicted him on both counts and sentenced him to serve ten (10) years imprisonment on each count. The sentences were to run concurrently.

2. Being dissatisfied with the said Judgement, on 24th December 2019, the Appellant lodged an Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.

3. His Written Submissions dated 14th December 2021 were filed on 15th December 2021 while those of the State were dated 13th January 2021 and filed on 18th January 2021.

4. This Judgment is based on the said Written Submissions which the parties relied on in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal, his Written Submissions and those of the State, it appeared to this court that the issues that had been placed before it for determination were as follows:-

> **a. Whether or not the Prosecution proved its case beyond reasonable doubt; and**
>
> **b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted**.

8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. FAIR TRIAL

9. Ground of Appeal No (3) was dealt with under this head.

10. The Appellant submitted that the Trial Court erred by failing to observe his Constitutional right to fair hearing as enshrined in Article 50 of the Constitution of Kenya, 2010. He was emphatic that the Trial Court had a statutory obligation of informing him of his right to legal counsel to help in his defence during trial. He argued that the Trial Court proceeded with the case without him having legal representation and that there was no record that the Trial Court tried to inform him of his right to legal counsel as to either, one appointed by himself or one provided by the court.

11. He invoked Article 50 (2) (h) & (g) of the Constitution of Kenya 2010 and submitted that the compendium of the criteria on legal services by the state is outlined in Section 29 (1), 30,35 & 36 under the Legal Aid Act No 6 of 2016. He added that although the duty and mechanism against the State to offer legal aid was well spelt out in the aforesaid Act, its enforcement and implementation was still at an infant stage on compelling reasons of budgetary constraints.

12. He argued that notwithstanding that it has not been enforced, the court had a duty to redress and guarantee the said right as put in the Constitution of Kenya. He placed reliance on the case of **Bwam Panye vs Burundi, African Commission on Human Rights Cpmm No 213/99/2000** where the court therein held that in view of the nature of penalty that the accused person therein faced, it was in the interests of justice for him to have the benefit of the assistance of a lawyer at each stage of his case.

13. He also relied on the case of **Pett vs Greyhound Racing Association (1968) 2ALL ER 545** where it was held that not every man has the ability to represent himself and that if justice was to be done, he ought to have the help of someone to speak for him and that the best person to do this is a lawyer who has been trained to do so. He also referred this court to the case of **David Njoroge Macharia [2001]eKLR** where the court therein also held that any accused person, regardless of the gravity of his or her crime was entitled to legal representation. The Respondent did not submit on this issue.

14. Article 50(2)(h) of the Constitution of Kenya stipulates that:-

> **"Every accused person has the right to a fair trial, which includes the right 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."**

15. A perusal of the proceedings showed that at the time the Appellant took plea, he had legal representation. He was represented by an Advocate by the name, Awilo. On 21st January 2019, the said counsel was not present. However, the Appellant informed the court that he was ready to proceed.

16. It was only at the defence stage that he requested for typed proceedings and further that the Probation Officer visits him in prison so as to assist him get legal representation. The matter was mentioned several times between 27th March 2018 when he made the said request for a lawyer and 2nd July 2019, one Mr Ariho Advocate, requested to be put on record for him.

17. Notably, the proceedings showed that the Appellant proceeded with the hearing of all the witnesses

and in fact cross-examined all of them except No 62266 CPL Antony Egesa (hereinafter referred to as "PW 3") who he said he had no questions for. There was nothing on record to suggest that he demonstrated to the Trial Court that he was likely to suffer substantial injustice if the trial proceeded without him being provided legal representation. He could not therefore be said to have suffered any prejudice when the case proceeded.

18. Going further, there was nothing on record that showed that he requested the Trial Court to be provided with legal representation when the Prosecution witnesses were tendering their evidence and the Trial Court declined to accede to his request. It was therefore not an issue that could have been considered on appeal.

19. Be that as it may, this court found it necessary to pronounce itself as the issue had been raised on appeal. It took judicial notice that provision of legal representation to accused persons at the State's expense as enshrined in the Constitution of Kenya is progressive in nature. Indeed, currently, only persons who have been charged with murder and robbery with violence have been accorded such facilities. This court was thus not persuaded that the Appellant's constitutional and fundamental rights had been breached by not having been provided any legal representation.

20. In the premises foregoing, Ground of Appeal No (3) was not merited and the same be and is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

21. Grounds of Appeal Nos (1), (2) and (4) of the Petition of Appeal were dealt with together under this head as they were all related. However, this court looked at different issues that had also been raised therein.

A. IDENTIFICATION OF THE APPELLANT

22. The Appellant submitted that the Trial Court erred in fact and law by failing to fully evaluate the evidence of the prosecution and to take note of the glaring inconsistencies that arose during the hearing of the case.

23. He argued that the standard of proof in criminal cases was beyond any reasonable doubt. In this regard, he relied on the cases of **Stephen Nguli Mulili vs Republic [2014]eKLR** and **Miller vs Ministry of Pensions [1947] 2 ALL ER 372** where the courts therein held that the burden of proof lay with the prosecution to prove its case beyond reasonable doubt.

24. He submitted that Brian Ochieng Oyier (hereinafter referred to as "PW 1") testified that he appeared drunk at the time of the incident and being that he was an eye witness, the Prosecution ought to have considered this testimony together with the fact that he heard the Appellant say that he would burn the house since the tenants had refused to pay him rent.

25. He contended that there were inconsistencies in the testimony of PW 5 and PW 6 as both testified to have seen the Appellant light the fire yet PW 5 indicated that he was the one who saw the Appellant light the fire and informed PW 6.

26. On its part, the Respondent submitted that the Prosecution proved its case beyond reasonable doubt. It submitted that PW 1, Titus Kwakha Omwima (hereinafter referred to as "PW 5") and Martin Otieno Odingo (hereinafter referred to as "PW 6") recognised the Appellant as they knew him as the landlord of the building. It added that they also heard him say that he would set the whole building on fire and also saw him pour petrol on the building and set it on fire.

27. It pointed out that PW 5 testified that he heard the Appellant say, "Nitachoma hii nyumba hawa hawalipi rent" and that when he peeped through a space which was in the building, he clearly saw the Appellant with a container with petrol which he poured and started the fire.

28. It contended that PW 6 testified that it was not the first time the Appellant had threatened to burn the building down and Patiki Rmesh Raja (hereinafter referred to as "PW 9") testified that the Appellant had attempted arson previously in February, 2018.

29. It was not in dispute that the Appellant owned the building in question. PW 5 and PW 6 were eye witnesses and saw him emerge from the building before it started burning. Both of them heard him say in Kiswahili that he was going to burn the building. In his sworn evidence, the Appellant did not deny having been in the building on the material date.

30. Notably, PW 1, PW 5 and PW 6 were at the scene of the crime at the material night. They all recognised the Appellant as the perpetrator of the offence as they knew him as the landlord of the building which housed the shops. They were his employees and had heard him make threats of burning down his house because his tenants were not paying rent.

31. CPL No 71614 Boniface Mukala (hereinafter referred to as "PW 10") testified that in the course of his investigations, he established that there were issues of rent and that the Appellant lived in London but had come to Kenya to collect rent. He tendered in evidence Certificate of Lease for Kisumu/Municipality/Block 6/54 and Kisumu/Municipality/Block 6/60 as P. Exhibit 6 and 7 respectively to that effect which showed that the Appellant was the proprietor of the said building.

32. Having analysed the above evidence, this court was satisfied that the Appellant was positively identified as the perpetrator of the offence on the material night.

B. <u>PROOF OF ARSON</u>

33. CPL No 64266 Antony Egesa, a forensic detective based at Kisumu County DCI Headquaters (hereinafter referred to as "PW 3") testified that he took twenty-seven (27) photographs and described each of them. Photographs in further proof thereof were also produced as P Exhibits 1(i-xxxvii).

34. Karali Omondi Nyumba, the Chief Fire Officer of Kisumu County (hereinafter referred to as "PW 4) produced reports on the aforesaid fire dated 30th July 2018 and report dated 2nd August 2018 as P Exhibit 3 and 4 respectively. He testified that it was a huge fire which kept starting off after they have put it off. He stated that they used five (5) trips of water each truck and fought it for three (3) days

35. It was evident from the evidence of all the Prosecution witnesses and that of the Appellant himself that there was a fire on the material night. While the Prosecution witnesses told the Trial Court that the Appellant started the fire, he denied this fact and contended that the fire was started by his tenants, Kalsa Motors and Amar Motors Shop. He was emphatic that he did not suffer any mental disorder and had not taken any drugs so that he could burn his building.

36. In his Written Submissions, the Appellant contended that a Psychiatrist known as Dr Nyaura David assessed his mental capacity and recommended that he be checked at Mathare Facility for mental therapy and rehabilitation. He submitted that it was highly probable that at the time of the commission of the offence, he was not sane for him to be held criminally culpable for the offence that he was charged with.

37. He invoked Section 12 of the Penal Code and pointed out that he was not in a proper state of mind and that the Prosecution had shifted the burden of proof to him. He was categorical that the Trial Court totally disregarded the psychiatrist report of Dr Nyaura David which had led to his plea being deferred. The Respondent did not submit on this issue.

38. Notably, PW 10 testified that he took the Appellant to a Psychiatric Department at Russia Hospital and the Dr Nyaura David gave a report that he could not stand plea taking as he had mental issues and he referred him to Mathare Hospital for mental therapy and rehabilitation. He testified further that after staying there for two (2) months, the Mathare Mental Facility confirmed that the Appellant was well and could plead the charges. He added that the Appellant was returned to Kisumu and charged with Arson.

39. A perusal of the pleadings on record, showed that the Appellant did not plead insanity as defence in the Trial Court and in fact in his testimony, he denied having suffered any mental disorder or having any psychological problems. However, through his Advocate he raised the issue of his mental state in his Written Submissions at the Trial Court.

40. A reading of the Trial Court's Judgment showed that the Trial Court observed that the Appellant did not provide any evidence to show that he was insane at the time of commission of the offence and consequently, the submissions regarding his insanity were an afterthought.

41. Section 11 of the Penal Code provides that:-

> **"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes to question, until the contrary is proved."**

42. It follows then that the onus of alerting the court of the mental status of the Appellant lay with him and/or his counsel. The court would also have probably known of the mental unfitness of an accused by his conduct. This scenario did not present itself during trial and hence the Trial Court would not have assumed that the Appellant herein was of unsound mind as the report from Mathare Facility had confirmed that he was well fit to stand trial. The Appellant's assertions that the Trial Court disregarded the Psychiatrist Report by Dr Nyaura David was not true.

43. Be that as it may, the Trial Court had observed, there was no material brought before it to show that the Appellant was of unsound mind at the time of the commission of the crime and/or during trial. From the above analysis, this court found that the Trial Court was right in holding that the Prosecution had proved its case.

44. This court agreed with the Trial Court's finding that it was the Appellant that set his own building on fire intentionally and unlawfully as had been demonstrated by the Prosecution witnesses and he was guilty of the offence of arson. The Appellant's argument that the Prosecution's case was full of inconsistences was neither here nor there and was rendered moot.

45. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. <u>SENTENCE</u>

46. Ground of Appeal No 3 of the Petition of Appeal was dealt with under this head.

47. The Appellant urged this Court to set aside his sentence. On its part, the Respondent referred this court to Article 50 (2) (p) of the Constitution of Kenya 2010 and argued that the Appellant was given the benefit of a least severe sentence.

48. Section 332(a) of the Penal Code Cap 63 (Laws of Kenya) that provides that: -

> **"Any person who willfully and unlawfully sets fire to ay building or structure whatever, whether completed or not is guilty of a felony and is liable to imprisonment for life."**

49. Having determined that the Prosecution had proved its case beyond reasonable doubt, this court agreed with the Respondent that the penalty provided by law, for an offence of arson is life imprisonment and in the circumstances, the Trial Court was lenient to sentence the Appellant to ten (10) years imprisonment on both counts which sentences were to run concurrently.

50. It is important to point out that counsel was appointed to act for the Appellant in this matter on a *pro bono* basis at the request of this court as the Appellant was not in proper state of mind to represent himself during the Appeal herein. This court wishes to thank Mr John Ogutu Ochieng of M/S Ogutu John & Associates Advocates for ably representing the Appellant herein and ensuring that he received legal

representation despite the right to legal representation to accused persons being progressive in nature.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 24th December 2019 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as it was safe to do so.

52. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **31st** day of **March 2022.**

J. KAMAU

JUDGE