



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 12 OF 2019

FREDRICK OGOYO OBIERO.....1ST APPELLANT
MICHAEL MWARE OBIERO.....2ND APPELLANT
JOSEPH OBIERO MWARE.....3RD APPELLANT
CAROLINE AUMA OKANYO.....4TH APPELLANT
VITALIS OUMA OGIYA.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction of the Principal Magistrate's Court at Bondo

(Hon. M. Obiero PM) dated the 14th March 2019 in Bondo CMCCRC No. 966 of 2018]

JUDGMENT

The appeal before me was transferred to Kisumu from the High Court at Siaya, by an Order dated 2nd June 2020.

1. The Appellants were convicted for the offences of **ARSON** Contrary to **Section 332** of the Penal Code, and **MALICIOUS DAMAGE TO PROPERTY** Contrary to **Section 339 (1)** of the **Penal Code**.
2. In respect to the offence of Arson, each of the Appellants was fined Kshs 100,000/= or in default, **3 YEARS** Imprisonment.
3. In respect to the offence Malicious Damage to Property, each of the Appellants was fined Kshs 50,000/= or in default, **3 YEARS** Imprisonment.
4. In the appeal, the Appellants raised 8 Grounds of Appeal.
5. In my understanding of the said grounds of appeal, grounds 1, 2, 3 and 4 assert that there was either insufficient evidence or no evidence at all, to sustain the convictions.
6. By Ground 5, the Appellants asserted that the trial court failed to follow the laid down rules for taking the evidence of Minors.
7. By Ground 6, the Appellants asserted that the trial Court failed to take into account, their respective Defences.
8. The Appellants view, as stated in Ground 7, was that the evidence of the 2 minors, who were allegedly the eye-witnesses to the incident did not displace the Appellants' alibi.
9. By Ground 8 of the appeal, it was asserted that there were such serious Discrepancies, Inconsistencies and Contradictions that a conviction cannot have been properly founded upon.

10. Finally, the Appellants asserted that the trial court had failed to give any reasons that could justify the sentences.

11. Being a first appellate court, I am obliged to re-evaluate all the evidence tendered. When drawing up my conclusions from the re-evaluation, I must bear in mind the fact that I did not have the benefit of observing the witnesses when they were testifying.

12. The Charge Sheet cited the following 7 accused persons;

1. Fredrick Ogoyo Obiero;

2. Michael Mware Obiero;

3. Stephen Otieno Oucho;

4. Joseph Obiero Mware;

5. Silvanus Ogiya Ongoro

6. Caroline Auma Okanyo; and

7. Vitalis Ouma Ogiya.

13. After a full trial, the learned trial magistrate acquitted the 5th Accused, Silvanus Ogiya Ongoro.

14. Although six of the accused persons were convicted, the 3rd Accused, **STEPHEN OTIENO OUCHO**, did not lodge an appeal before this court.

15. The particulars of the Charge are that on 6th October 2018, at 2000 hours, at **[PARTICULARS WITHHELD] VILLAGE, BAR KOWINO Sub-location, BONDO Sub-County**, the 7 accused persons **JOINTLY, WILLFULLY** and **UNLAWFULLY** set fires to the dwelling house valued at Kshs 300,000/=, which was the property of **POO**.

16. In respect to **Count II**, it was asserted that the 7 accused persons had, **JOINTLY, WILLFULLY** and **UNLAWFULLY DAMAGED**

“(See the attached list for burnt items)”

17. The said property was said to belong to **POO**

18. It therefore follows that the Complainant in both counts was **POO**.

19. **PW1, VITALIS OWITI OKUNA** testified that he was the Complainant in this case.

20. On the material day, **PW1** was in Bondo together with his wife, **WAO**, (who testified as **PW2**). Both **PW1** and **PW2** said that upon their arrival at home, they found that their house was on fire.

21. When **PW1** and **PW2** inquired from their 2 children, **FO (PW4)** and **MO (PW3)**, about what had transpired, they were told that some people had burnt down the house.

22. According to **PW1**, he returned home on the material night, and found his house burning. However, his 2 children were not at the house. **PW1** traced the children to his mother’s house.

23. The children told **PW1** that the house was burnt down by 8 people. **PW1** gave the following names, as those of the people who burnt down his house;

(i) Obiero;

(ii) Moi;

(iii) Kennedy;

(iv) Brian;

(v) Oganyo’s wife;

(vi) Otis; and

(vii) Boss Okeya.

24. According to **PW1**, Kennedy and Brian were not arrested.

25. He said that those who were arrested, and whom he identified in court were;

(1) Moi Obiero

(2) Michael Obiero

(3) Otis Abonyo

(4) Joseph Obiero

(5) Oganyo's wife;

(6) Boss Okeya; and

(7) Vitalis Ogiya.

26. **PW2, WAO**, testified that her husband's name is **P**. She was with P at Bondo, on the evening of 6th October 2018.

27. Upon their arrival at home, later that evening, they found that their house was on fire.

28. **PW2** said that **PW3** and **PW4** informed her that the 4th Appellant, Caroline, was heard screaming that she would kill **PW1** because **PW1** had taken Caroline's husband to the police, for having illicit brew.

29. **PW2** testified that those who were responsible for the arson were;

(1) Joseph Obiero;

(2) Moi Obiero

(3) Kennedy Obiero;

(4) Brian Obiero;

(5) Michael Otieno;

(6) Otis Abonyo; and

(7) Okiya

30. When she was testifying, **PW2** said that those who were in court were Joseph Obiero, Moi Obiero, Michael Obiero, Otis Abonyo, Caroline Oganyo and Boss Okiya.

31. That implies that Kennedy Obiero and Brian Obiero were not in Court. Secondly, the Michael who was in court is Obiero, whilst the Michael who had been involved was Otieno.

32. **PW3, MOO**, was 15 years old when he testified.

33. He testified that on the material day he saw the following people, when they entered the Complainant's house;

(i) Joseph Obiero;

(ii) Kennedy Moi;

(iii) Michael;

(iv) Brian;

(v) Otis;

(vi) Lebo;

(vii) Boss;

(viii) The unnamed lady, who had been screaming that PW3's father had had her husband arrested for selling chang'aa.

34. According to **PW3**, it was Kennedy and Moi who started the fire.

35. **PW3** testified that his parents (**PW1** and **PW2**) did not return home on that day.

36. **PW4, FOO**, was 12 years old when he testified.

37. He said that on the material day, he and **PW3** were inside their parents' house, studying.

38. He saw 8 people, who entered the house. The said people were;

(1) Moi;

(2) Michael;

(3) Brian;

(4) Kennedy;

(5) Boss;

(6) Otis;

(7) Oganyo's wife; and

(8) Obiero.

39. According to **PW4**, their parents returned home, and found both he and **PW3** at the house of the children's grandmother.

40. When **PW4** was testifying, he identified those who were in court as;

(1) Moi;

(2) Michael;

(3) Lumba;

(4) Obiero;

(4) Okiya;

(5) Oganyo's wife; and

(6) Boss.

41. **PW5, PC CORNELIUS CHERUIYOT** was the Investigating Officer.

42. He testified that **POO** had reported at the Bondo Police Station, about a case of arson that took place on 6th October 2018.

43. **PW5** visited the scene of crime, together with his colleagues.

44. The Complainant led the police to the home of the suspects, where the following 4 suspects were arrested, on 7th October 2018;

(1) Joseph Obiero;

(2) Vitalis Ouma;

(3) Caroline Auma; and

(4) Kennedy

45. On 15th October 2018, the following 2 more persons were arrested;

(i) Stephen Oucho, and

(ii) Fredrick Ogoyo

46. Finally, on 16th October 2018, Michael Obiero was arrested.

47. It was the testimony of **PW5** that the persons who were arrested were present in court when **PW5** was testifying.

48. He also explained that the reason for the arrests was that the Complainant's children had seen all the accused persons in the house at the time of the incident.

49. During cross-examination, **PW5** made it clear that the police did not conduct any Identification Parades. His reason was that the accused persons were known to the witnesses, prior to the incident.

50. After **PW5** testified, the prosecution closed its case. The trial court thereafter placed all the accused persons to their defences.

51. **DW1, FREDRICK OGOYO OBIERO**, testified that on the material day he was at his home. He heard noises and hooting from a motorcycle.

52. **DW1** heard people calling the name of one **P**, saying that they would either kill him or burn his house.

53. However, **DW1** denied having been involved in the offence.

54. **DW2, MICHAEL MWARE OBIERO**, is the 2nd Appellant. He also testified that on the material night, there were boda boda riders who were threatening to kill Peter or to burn his house.

55. Although **DW2** knew **P**, he did not go either to rescue him or to harm him.

56. **DW3, STEPHEN OTIENO OUCHO**, gave evidence similar to that of **DW1** and **DW2**.

57. **DW4, JOSEPH OBIERO OMWARE**, is the 3rd Appellant. He denied having committed the offences that he was charged for.

58. He testified that on the material evening, he did not hear any noises. He said that he has difficulty in hearing.

59. **DW5, SYLVANUS OKIYA OWUOR**, testified that he knew the Complainant, **PO**, as that was his neighbour. However, he denied committing the offences.

60. **DW6, CAO**, was at her home, which is at Rateng Village. On the material day, she was not aware of what was happening at **P**'s house.

61. **DW6** said that she not only knew **P**, but also that **P** was her brother-in-law.

62. Although **DW6**'s husband, **DENNIS OGANYO**, had been arrested by the police, for being in possession of chang'aa, **DW6** denied that the said arrest had been orchestrated by Peter.

63. **DW7, VITALIS OUMA OKIYA** is the 5th Appellant. He is a resident of BarKowino.

64. He testified that on the material day, he was in Bondo Town, at about 8pm. He denied going to the Complainant's home.

65. **DW8, AMBROSE ABONYO**, is a resident of BarKowino. He testified that he was the Village Elder of Udimba Village.

66. On the material day, he was attracted by loud noises, and on approaching the source of the noise, he saw a house burning.

67. However, as the house was located in Migwena, **DW8** did not reach the house as it was outside his jurisdiction.

68. During re-examination, **DW8** said that he saw many people at Peter's house, but he did not know who was responsible for burning down the house.

69. On the one hand, **DW8** said that he did not reach where the house was burning, whilst, on the other hand he said that he went to the scene.

70. After **DW8** testified, the accused persons closed their respective cases.

Identity of Complainant

71. The charge sheet gives his name as **POO**, yet the person who testified as the Complainant is **VITALIS OWITI OKUNA**.

72. In the case of **SILAS KIPCHUMBA KERICH Vs REPUBLIC, CRIMINAL APPEAL NO. 53 OF 2010**, the Charge Sheet indicated that the Complainant was **ELLY KIRUI KIPKOECH**, whilst the “Complainant” who testified was **KIWI HENRY KIPKOECH**.

73. The appellate court held that the difference in the names was not merely of a typographical nature. The court said;

“In those circumstances, it cannot be said that there was simply an error.

But even assuming that there had been a genuine error, it was the obligation of the prosecution to either seek an appropriate amendment to the charge sheet, or to otherwise tender an explanation that would enable the court to be persuaded that the two sets of names refer to the same person.”

74. In this case, all the witnesses appeared to know the Complainant as **P**. Since the charge sheet cited the Complainant’s name as Peter and the Appellants, as well as the other prosecution witnesses knew the Complainant as Peter, it is baffling why the Complainant gave his name as **VITALIS**.

Identity of the Scene of Crime

75. The charge sheet gives the particulars of the Scene of Crime as being **[PARTICULARS WITHHELD] VILLAGE, BARKOWINO SUB-LOCATION, BONDO SUB-COUNTY**.

76. As the Appellants pointed out, both **PW1** and **PW2** testified that they hail from **MIGWENA**.

77. However, it is also evident, that during cross-examination **PW2** said that she lived in [Particulars Withheld] Village.

78. **PW3** and **PW4** testified that they lived in [Particulars Withheld] Village.

79. Significantly, **DW1, DW2, DW3, DW4** and **DW5** all said that they live in [Particulars Withheld] Village. All those Defence Witnesses said that they were neighbours of the Complainant Peter.

80. **DW6** said that she lived in **RATENG** Village; whilst **DW7** and **DW8** said that they live in **BARKOWINO**.

81. Neither **DW7** nor **DW8** said that they lived at a Village called **BARKOWINO**. As [Particulars Withheld] Village is within Barkowino Sub-Location, there is no inconsistency in the evidence tendered by the witnesses.

82. Indeed, when **DW8** testified that he lived in BarKowino, whilst he was a Village Elder of [Particulars Withheld] Village, that appears to confirm that the Odimba Village is within BarKowino Sub-Location.

83. I find no discrepancies between the evidence tendered and the charge sheet.

Identification

84. Both **PW3** and **PW4** said that they heard a lady screaming, whilst she was outside their house.

85. Both **PW3** and **PW4** were inside the house. Contrary to the Appellants’ submissions, the 2 witnesses were not asleep; they were studying.

86. If the identification of the 4th Appellant was founded upon the recognition of her voice, the same would have been of doubtful integrity. I so find because the prosecution did not meet the following requirements, which are essential to sustain the efficacy of voice recognition;

“..... care would obviously be necessary to ensure;

(a) that it was the accused person’s voice;

(b) that the witness was familiar with it, and recognized it and;

(c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

*- per Court of Appeal in **SAFARI YAA BAYA Vs REPUBLIC, CRIMINAL APPEAL NO. 27 OF 2016 (Malindi)**.*

87. In this case, the 2 witnesses (**PW3** and **PW4**) saw all the 8 people when they entered into the house where the witnesses were studying.

88. There was lighting inside the house, provided by the solar lamps.

89. As the witnesses were able to give the names of the 8 persons who they saw clearly, and who even talked to them, I find that the learned trial magistrate was right to have held that this was a case of recognition, from facial appearances.

Voire Dire Examination

90. **PW3** was 15 years old when he testified, whilst **PW4** was 12 years old. In effect, both witnesses were minors.

91. Both of them gave sworn testimonies and were cross-examined by the accused persons.

92. The Appellants submitted that the trial court erred by having the 2 witnesses sworn before the court had satisfied itself that the minors appreciated the necessity of telling the truth.

93. In the case of **REAGAN MOKAYA Vs REPUBLIC, CRIMINAL APPEAL NO. 49 OF 2006** (Mombasa), the Court held as follows;

“On the basis of this preliminary inquiry, the learned magistrate allowed the child to give unsworn testimony. I am satisfied that the trial magistrate applied the correct principle in receiving the unsworn testimony. The proviso to Section 124 of the Evidence Act is categorical that the court must state in the proceedings that it is satisfied that the child appreciated the necessity of telling the truth. This appears to be missing in the entire proceedings. This is a fatal mistake.”

94. The main distinction between that case and the case before me is that the minors in that case gave unsworn evidence, whilst the 2 minors herein gave sworn evidence.

95. If a witness gives unsworn evidence when the court had not verified the appreciation by the said witness about the necessity of telling the truth, the court would be unable to ascertain the efficacy of the evidence tendered.

96. On the other hand, when a witness gives sworn evidence and is subjected to cross-examination, the veracity of his evidence would be ascertainable through the said process of cross-examination.

97. Nonetheless, the Appellants believe that the trial court was obliged to record both the questions and the answers during the voire dire examination, so that it could be verified whether or not the court had a proper basis for concluding that the minors appreciated the necessity of stating the truth.

98. There is no express statutory requirement that the trial court must record both the questions asked and the answers given.

99. But in the case of **JOHNSON MUIRURI Vs REPUBLIC [1983] KLR 445**, at page 449 the Court of Appeal said, inter alia;

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

100. The court went on to underscore the importance of undertaking appropriate steps before the trial court could determine whether or not a minor may give sworn evidence.

101. It was emphasized that there was need for;

“..... an inquiry as to the understanding of a child witness, of the nature and solemnity of an oath and the added responsibility to tell the truth, which is involved in an oath, over and above the duty which is an ordinary duty of normal social conduct.

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

102. In my understanding, the learned trial magistrate conducted an inquiry into the minors’ understanding about the necessity to tell the truth.

103. However, there does not appear to have been any inquiry about the understanding, by the minors, of the realization that the taking of an oath involved more than the ordinary duty of telling the truth.

Inconsistencies

104. I have already held that the two minors had “*identified*” the Appellants through facial appearances. That therefore implies that their respective testimonies ought to find convergence on the identities of the persons they had recognized.

105. **PW1** and **PW2** both said that one of the persons in court is **MOI**. Both **PW3** and **PW4** testified that it was **MOI** who poured petrol outside the Complainant’s house, and then lit the fire.

106. **PW3** and **PW4** said that **MOI** was present in court.

107. First, none of the Accused persons is named **MOI**. Therefore, it is completely unknown who among the 7 Accused persons is called **MOI**.

108. **PW5**, who was the Investigating Officer, did not testify that he arrested anybody by the name **MOI**. On the other hand, **PW1** testified that **MOI OBIERO** was one of the persons who were arrested.

109. The charge sheet did not indicate that any of the accused persons was also known as **MOI**. If any of the accused was also known as **MOI**, it should have been so indicated in the charge sheet.

110. And it is not only in respect of **MOI** that the prosecution failed to give clarity about which of the accused was also called by another name.

111. Although **PW1** testified that among the 7 accused persons, he saw **OTIS ABONYO** and **BOSS OKIYA**, the charge sheet did not have those persons.

112. On his part, **PW3** saw **LEBO** and **BRIAN** amongst the persons who burnt down the house. Although **PW4** also mentioned **BRIAN**, he did not mention **LEBO**.

113. As there was sufficient lighting inside the house at the material time, and because the intruders did not hide their appearances, it should have been expected that they would have recognized the same 8 intruders.

114. I find that the inconsistencies in the identities of some of the persons allegedly recognized by **PW3** and **PW4** casts doubt on the accuracy of the evidence on recognition.

Common Intention

115. If **PW3** and **PW4** had correctly identified **MOI** as the person who poured petrol around the house and who also lit the fire, the prosecution ought to have not only provided evidence to prove that the Appellants were at the scene of crime, but also to prove the role, if any, played by the said Appellants.

116. The charge sheet specified that the accused persons had acted

“jointly, wilfully and unlawfully”,

when they set to the Complainant’s dwelling house.

117. In the circumstances, the prosecution had to discharge the onus of proving that the accused persons acted jointly, wilfully and unlawfully.

118. The evidence on record suggests that **MOI** poured petrol on the house and he also lit the fire.

119. The evidence further suggests that the 4th Appellant screamed, saying that her husband had been arrested at the instigation of the Complainant.

120. The trial court held thus;

“From the evidence on record, it is clear that there was actually no grudge between the accused persons and the complainant.”

121. Notwithstanding the absence of any grudge between the accused and the complainant, the trial court concluded that;

“..... it is clear that the people who went to the complainant’s house had a common intention, and they were part of what happened in the complainant’s house.”

122. On my part, I find that the prosecution proved that the Complainant’s house burnt down.

123. It would appear that it is **MOI** who burnt down the house.

124. However, when it was not demonstrated that the Appellants performed any acts that can be said to have supported the unlawful action of **MOI**, and because there was no grudge between the Appellants and the Complainant, I find that the prosecution failed to prove any common intention between **MOI** and the Appellants, or between the Appellants themselves.

125. Insofar as the conviction was founded upon a perceived Common Intention, I find that the same was not founded on a solid foundation.

126. In the case of **FRANCISCA NGINA Vs REPUBLIC, CRIMINAL APPEAL NO. 264 OF 2007** the Court of Appeal adopted the following definition of Common Intention;

“Common Intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with.”

127. In this case, there is no evidence that the Appellants and **MOI** had any premeditated plan to burn down the Complainant’s house.

128. Secondly, as there was no evidence to prove what action or steps any of the Appellants took, there is no proof that a common intention developed in the course of events.

129. If the Appellants were shown to have aided **MOI** in burning down the Complainant’s house, that would have constituted evidence of their common intention.

130. However, in this case the evidence was to the effect that the person who poured petrol on the house, and who also struck the match which lit the fire that consumed the house and the contents thereof, was **MOI**. There is no evidence that the Appellants aided **MOI** in any manner.

131. I find that the trial court erred when it held that the Appellants;

“..... had a common intention and they were part of what happened in the complainant’s house.”

132. In the result, I find that the convictions were unsafe. Therefore, the same are set aside.

Sentence

133. Pursuant to **Section 332** of the **Penal Code**, a person who is convicted for arson is guilty of a felony, and is liable to imprisonment for life.

134. And pursuant to **Section 339** of the **Penal Code**, a person who is convicted for a Malicious Destruction to Property is liable to imprisonment for 5 years.

135. I find that the sentences imposed upon the Appellants were not only lawful, but also appear relatively lenient. If I had upheld the convictions, I would definitely not have varied the sentences.

DATED, SIGNED and DELIVERED at KISUMU This 26th day of January 2021.

FRED A. OCHIENG

JUDGE