



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 12 OF 2017

BETWEEN

MNN.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. Usui Macharia SRM on 18.2.2016 in Kwale CMC No. 692 of 2011)

JUDGMENT

Introduction.

1. The appellant herein was charged with Arson contrary to Section 332 (a) of the Penal Code Cap 63 Laws of Kenya.
2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the offence, and the trial court sentenced him to serve six (6) years imprisonment, after taking into account his mitigation and treating him as a first offender.
3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide a Petition of Appeal dated 22.6.2016 on the following grounds.

- 1. That the learned magistrate erred in law and fact in convicting the appellant when there was no evidence to sustain the charge.**
- 2. That the learned magistrate erred in law and fact in imposing a sentence that was excessive in the circumstances.**
- 3. That the learned magistrate erred in law and fact in failing to consider the defence of the appellant.**
- 4. That the learned magistrate erred in law and fact in failing to consider that prosecution failed to prove its case beyond reasonable doubt as provided under the law.**

4. The prosecution case is that the appellant on 26th June, 2011, at Kwale High School, intentionally set fire to a building namely Zambezi dormitory valued at Kshs. 3, 951, 412, the property of Kwale High School. PW 1 who is the principal of Kwale High School testified that he was not in school when the fire started. He was called by the Deputy Principal who informed him That Zambezi dormitory was on fire. That on arrival at school he went straight to Zambezi dormitory and found it was on fire. He further testified that the school captain informed him in the presence of the DEO, that they got the persons who did it. That the said persons were the 1st, 3rd and 5th accused persons.

5. PW 1 also testified that the police came the following day with a list of nine other students while the prefects reported one more student being the 4th accused person. He produced a suspension form as **prosecution exhibit 1** for the 1st accused person for causing disturbance and unrest at school. He also stated that he never saw any of the accused persons set fire to the dorm. That on cross examination, he testified that the school has security officers, two sit at the gate, one at zambezi dorm, one at the administration block, one at Niger dorm, one at Kaya dorm and two at the teachers quarters, and that they had gone for two months without salaries. That a guard by the name Mr. Mwarino was on duty on the night of 26th June, 2011 and was a witness before the trial court.

6. PW 2 the Deputy Principal of Kwale High School, he testified that he only saw Zambezi dorm in flames on his way to school. He further stated that the prefects' body came up with the names of the 1st, 3rd and 5th accused persons after the fire was out, as the people suspected to have set the dormitory on fire. On cross examination, he stated that he was in his house which is within the school compound when the fire started and that he did not know how the said fire started.

7. PW 3 on the other hand testified that he saw the 1st accused passing through an opening in the fence. That the appellant carried a jerrican in a white paper bag on his left hand, he waited a bit to confirm what he was carrying but when he came out of the bush, he was carrying nothing. He further testified to have witnessed the 1st, 3rd and 5th accused persons holding a meeting outside volts dorm, however he never bothered to find out what they were discussing. PW 3 also stated that he saw the 1st, 3rd and 5th accused persons rushing to class quietly and not screaming

8. He further stated that he was told by AN that they had refused to admit as they were afraid they would be beaten. On cross examination, he stated that the fence has no openings however one can jump over.

9. PW 4 testified that from the evidence collected, they concluded that the cause of the fire was suspected to be arson and that an accelerant was used. PW 6 and PW 7 on cross examination testified that he never saw any of the accused persons burn the school.

10. PW 8 testified that the appellant confessed and admitted that with the other suspects contributed money in order to buy petrol to burn dorm to avoid sitting the mock exams, that the investigating officer then called the OCS who recorded the appellant's statement.

11. At the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. The appellant testified that on 26th June, 2011, a fire broke out at the school and the dormitory got burned. He denied burning the school, he further testified that when the statement which was produced as prosecution exhibit 6 was recorded, he was with the OCS and the OCPD and he was given a paper and told to sign. He stated that nothing was explained to him, he was not informed that his lawyer or parent would be there and that the statement would be used against him.

12. It was the appellant's testimony that on 26th June, 2011 he was in class throughout and he never left the classroom. He stated that he was forced by police to record the statement, he was beaten and injured on his body and that the statement was not recorded of his own free will.

Submission

13. The appeal was canvassed by way of written submissions. The Appellant filed his written submissions dated 8th November, 2020 and relied on the same. The Appellant in the said submissions abandoned ground 2 of the Petition of Appeal. He further submitted that he was wrongly convicted for the offence of Arson under Section 332(9) of the Penal Code. It was submitted by the Appellant that the prosecution failed to prove its case beyond reasonable doubt that the Appellant committed the offence as alleged.

14. In his submissions, the Appellant submitted that the learned trial magistrate in her judgment concluded that there were eye witnesses to the incident when in truth there were none. He further submitted that on cross-examination of PW 4 (pg. 23) there was no evidence of the accelerant used since at the time of the trial, the report was not in court, therefore no conclusive proof that the accelerant used was petrol as stated by the learned magistrate in her judgment.

15. The Appellant submitted that PW 3 on page 18, alleges to have seen the appellant with a jerrican, he however did not know the contents of the jerrican neither did he ever see the jerrican again, therefore concluding that the alleged jerrican had petrol is an injustice. That the evidence of PW 3 and PW 4 failed to prove beyond reasonable doubt the presence of an accelerant in the possession of the appellant. The appellant further submitted that there was no eye witness account of how the fire started.

16. It was submitted by the appellant in his submissions that it is not in dispute that he borrowed money from other students however, there was no evidence brought forth by the prosecution to prove that the said money was used to buy petrol. He further submitted that there was no witness who witnessed the appellant buying petrol. He submits that the court in its judgment relied heavily on the evidence of confession by the appellant.

17. It was the appellant's submission that for a confession to be admissible in evidence, it ought to satisfy section 25 (a) (2) of the Evidence Act, and that the trial court failed to rule on the admissibility of the confession before relying on the same, hence it was an injustice for the court to rely on the alleged confession without first determining its admissibility or inadmissibility.

18. The appellant submitted that PW 9 confirms that the statement was recorded in his presence and does not mention the presence of other persons or witnesses, therefore a case of his word against that of the appellant. The appellant further submitted that the court has a duty to rely on the evidence and the law, it was not enough for PW 9 to certify the statement, there must be a presence of other persons or representative of the appellant to confirm that indeed the alleged confession was recorded in compliance with the Evidence Act. That the appellant having denied causing the fire to Zambezi dorm and having voluntarily recorded a confession in his defence, the court failed to consider his defence.

19. The appellant relied heavily in the cases of **Kennedy Otieno Odeny v Republic [2008] eKLR & Thoya Kitsao Alias Katiba v Republic [2015] eKLR** where the courts held that confession not in strict compliance with Section 25(a) were held to be inadmissible.

20. The prosecution also filed written submissions dated 1st December, 2020 and relied on the same. In its submissions, the prosecution conceded the appeal. The prosecution submitted that in all the 9 witnesses that it called before the trial court, none of them witnessed the arson. It was further submitted by the prosecution that the trial court relied heavily on the testimony of PW 3 who was a fellow student to the appellant and that of PW 9 who was the chief inspector who recorded the appellant's statement under inquiry.

21. Ms. Karanja learned Counsel for the D.P.P submitted that the appellant's statement under inquiry which was produced as prosecution exhibit 8 was self recorded by PW 9 who wrote a certificate after the said statement was recorded and signed it. She further submitted that the trial court relied on the said statement because it was produced without opposition by the accused persons, the statement appeared to have been made voluntarily since the appellant was in court only a day after the statement was recorded and he had no visible injuries, and he did not complain to the plea court of any mistreatment.

22. The prosecution also submitted that the trial court on page 5 of her judgment stated that the statement of inquiry was recorded before Leonard Baraza a chief inspector of police. The investigating officer in this case is PW 8 sergeant Issa Wachifa, I find section 25 (a) (1) complied with.

23. Mr. Karanja further submitted that the appellant was never afforded a third party representative while recording the confession. This being a mandatory requirement, failure to avail this right was fatal to the confession or to relying to the confession in court. It was also submitted that PW 3's version of events was not corroborated by any other witness, therefore taken on its own, the testimony of PW 3 was not sufficient to prove that the appellant was indeed the culprit behind the arson. That despite the fact that it raises good and strong suspicion that he was not involved, the said suspicion does not meet the threshold of beyond reasonable doubt.

24. The prosecution submitted that without an eye witness or a proper confession, the weight of the circumstantial evidence was not enough to prove this case.

Determination.

25. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

“An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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.

26. From the appellant's submissions, It is very clear that the appellant abandoned his 2nd ground of appeal.

27. The appellant's advocate filed written submissions in which he attacked the evidence adduced and maintained that it was not sufficient to support the conviction. The appellant was charged with the offence of Arson contrary to section. 332 (a) of the penal code. For the prosecution to prove this charge, they must prove that a fire was willfully and/or intentionally set to a building and that the accused person was positively identified as the person who set the fire.

28. From the record it is very clear that none of the nine witnesses called by prosecution saw the appellant set the said Zambezi dormitory on fire.

29. I have perused the record and I find that none of the prosecution witnesses testified to the alleged contents of the jerrican that PW 3 saw the appellant carry.

30. The fact that PW 3 alleged saw the appellant together with the 3rd and 5th accused having a meeting and later on run to class is not sufficient evidence to prove that the appellant indeed committed the said offence. It is clear from the record and the testimony of all the prosecution witnesses that they all heavily relied on testimony of PW 3 as their basis of convicting the appellant thus rendering the conviction unsafe for lack of corroboration.

31. PW 8 testified that the appellant confessed to have contributed money together with the other suspects to buy petrol to burn the dorm. There is however none of the prosecution witnesses who positively identified the appellant buying petrol and/or setting Zambezi dormitory on fire. There were night guards on duty but none was called to say what happened while students were in class.

32. The appellant's appeal revolves largely around the admissibility of the appellants confession produced as prosecution exhibit 8. To determine whether the said confession is admissible or inadmissible, I am guided by the provisions of Section 25 (a) of the evidence Act which provides as follows:

“Confessions generally inadmissible

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice”

33. I have perused the record and I find that at the time the appellant's confession was taken and/or was made, he did not have a representative of his choice present and as such the learned trial magistrate erred in finding that Section 25 (a) (1) was complied with.

34. Bearing in mind that the trial court's decision relied heavily on the evidence of PW 3 and the appellant's confession, and considering the Respondent conceded to appeal, the Appeal therefore succeeds, the conviction is quashed, and sentence set aside and the Appellant set at liberty forthwith unless lawfully detained.

It is so ordered.

Right of appeal 14 days.

Dated, Signed and Delivered in open court this 11th day of February, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE