



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 140 OF 2019

(Consolidated with

CR. A. Nos. 142, 143 & 144 OF 2019)

REPUBLIC.....APPELLANT

VERSUS

PETER KIMENCHU MUGITA.....1ST RESPONDENT

DAVID GACITA MACERE.....2ND RESPONDENT

JOSEPH MAORE NCHEBERE.....3RD RESPONDENT

PATRICK GITONGA MALINYA.....4TH RESPONDENT

(Being an appeal from the Judgment and sentence made by Hon. Oscar Wanyaga (SRM) in Maua

CMCr.Case No. 651 of 2017)

J U D G M E N T

1. The respondents were the accused in the **Maua CMCr case No. 651 of 2017** wherein they were jointly charged with the offence of arson contrary to **section 332 (a) of the Penal Code**.
2. It was alleged that on 20/2/2017 at about 0300hrs at Tonya Village, Kianda Location within Igembe South Sub-County in Meru County, the respondents jointly with others not before court wilfully and unlawfully set fire to a three roomed house causing damage to beds, mattresses, blankets, assorted farm tools, 5bags of fertilizer, 5 bags of cement and a water pump all valued at Kshs. 706,500/= the property of **Peter Kiriimi Mbogo**.
3. **Peter Kimenchi Mutiga (the 1st respondent)** faced a second count of Conspiracy to commit a felony contrary to **section 393 of the Penal Code**. It was alleged that on 19/2/17 at around 0300hrs at Tonya Village, Kianda Location within Igembe South Sub-County in Meru County, jointly with others not before court, conspired to commit a felony namely setting fire to a three roomed house causing damage to beds, mattresses, blankets, assorted farm tools, 5bags of fertilizer, 5 bags of cement and a water pump all valued at Kshs. 706,500/= the property of **Peter Kiriimi Mbogo**.
4. The trial Court found the 2nd 3rd and 4th respondents guilty of the offence of arson contrary to **section 322 of the Penal Code** but acquitted the 1st respondent of that charge. It however, convicted the 1st respondent of the charge of conspiracy to commit a felony contrary to **section 393 of the Penal Code**.
5. The 2nd, 3rd and 4th respondents were sentenced to serve ten (10) years imprisonment whilst the 1st respondent was sentenced to serve two (2) years suspended sentence.
6. All the parties were aggrieved by that decision. The appellant lodged this appeal while the respondents lodged **Cr. Appeal Nos. 142, 143 and 144 of 2019**, respectively. By the consent of the parties, all the said appeals were consolidated with this appeal on 15/10/2019.
7. The prosecution case before the trial Court was that **Pw1 Peter Kiriimi Mbogo**, (“the complainant”) is a farmer with several parcels of land within Igembe region but has suffered general robberies and arson. That on 25/1/2017, one of his homesteads was set on fire while

seven of his workers were present. Similarly, on 12/2/2017 unknown people destroyed his tomato plantation valued at 1.1 million, nobody was arrested.

8. On 19/2/17 while travelling to Maua in the company of several people, he saw one **Kaberia** who was one of the assailants sought by the police for the arson of 25/1/2017. The suspect fled leaving his motorcycle behind which **Pw1** took to Tumutumu Ap Camp where it was detained.

9. The said **Kaberia** failed to come for his motorcycle but instead the 1st respondent came in the company of two other people and demanded for the same. The complainant left the Camp but left **Martin Mwendwa PW5** behind. **Pw5** later called him and informed him that while at the said Police Post, he overheard the 1st respondent call several people and tell them to prepare to burn his place.

10. The complainant returned to Tumutumu Police Post and reported the threat. The police promised to patrol the area. In the morning of the following day, he was informed that his three roomed house had been set on fire and the various properties set out in the charge sheet destroyed.

11. **Pw5** confirmed that on the 19/2/2017, The complainant left him at Tumutumu Police Post to monitor the situation. That the 1st respondent came and demanded for the aforesaid motorcycle. That he heard him make calls to various people and arrange for the burning of the house belonging to **Pw1** which information he passed over to the complainant.

12. **Pw2 Kiruma Gikandi** recalled how on the night of 19th and 20th February, 2017 he and his wife were awoken by screams from **Albanus**. They went and hid in a banana plantation that was about 50 metres from where the incident was taking place. He saw the 2nd to 4th respondents among the people at the scene. There was a huge fire at the time and they were able to recognise the 2nd, 3rd and 4th respondents among a group of people who were singing while the house was burning. The respondents were not in a hurry and were hurling insults. He saw **Kaberia** carrying the jerry can that had fuel and after burning the house, the group went to the residence of the 1st respondent. The following day, he saw the 1st respondent ferrying from his home, amongst others, the 2nd to 4th respondents in his motorcycle.

13. **Pw3 Andriano Mutua Henry** testified that on 19/2/17, he was with the 1st respondent at Tumutumu Shopping centre when he heard him ask, who the complainant was to have had a meeting during the day. The 1st respondent promised to have his meeting during the night. On the following day at 2:00 a.m., he was woken by screams and he saw the complainant's house on fire. It is then that he realised what the 1st respondent meant when he stated that he would have his meeting at night.

14. **Pw4 Samuel Kiani** resides about 100 metres from the complainant's house. On the material day at about 2 am, he heard screams and rushed to the scene. He saw a house burning. There was a group of about 15 people out of whom he only recognised the 2nd to 4th respondent from the bright light shining from the burning house. Those present were swearing on evicting the complainant and his workers from the area. After the arson, they proceeded to the residence of the 1st respondent.

15. **Pw6 Pc Matacho** testified on behalf of the investigations officer. He personally had accompanied the investigations officer on the morning after the incident to the scene. He was present when the officers from the scene of crime visited the scene and took photographs which he produced.

16. In his defence, **Dw1 David Gaciata** stated that he was arrested on 20/7/2017 on the basis of being drunk and disorderly. That the police demanded Kshs.1000 from him which he did not have and thereafter detained him. He denied committing the arson.

17. **Dw2 Joseph Ncebere** testified that he was arrested on 28/02/2017. That on that day, he was with the 1st respondent and they had gone to Maua Police Station to report that the 1st respondent's house had been burnt. He denied being at the complainant's residence on the night of 20/02/2017. That he was at the time with one Mbira who had requested for his assistance.

18. **Dw3 Patrick Gitonga** testified that on 15/3/2017 he was arrested while in his farm with his brother **Dw5**. He was later taken to Maua Police Station where they learnt that **Pw1** was the complainant. It was his testimony that he was later brought to court and informed that the same were framed up charges but they will have an advocate. He testified that on the material night he slept in his father's house and was not at the scene of the incident.

19. He testified that the complainant had a dispute with his father in which the complainant had implicated his father with unlawful possession of a gun. He also stated that the complainant had already taken over his father's land and wanted to take over his land through this case.

20. **Dw4 Peter Kimenchu** testified that on 20/2/17 he was at home with his wife. That on 26/2/17 he was arrested by police officers attached to Rigi Ap Post. He was later brought to Maua Police Station. It was his testimony that he was initially charged with robbery. He would later have two arson cases with the complainant. In the robbery case, he was alleged to have robbed goats belonging to the complainant. The first arson case is alleged to have happened in January while the second arson case relates to this case. That all the cases bear the same witnesses and the real and main problem is the land dispute pitting the complainant and the accused persons. He denied having a meeting in his home on 19/2/2017.

21. **Dw5, George Mithika** a brother to **Dw3** testified that he was arrested together with **Dw3** but was released for lack of evidence. That the complainant had framed his brother (**Dw3**) because on 20/2/2017, he was with him at home watering miraa trees at 3:00 a.m.

22. **Dw6 Jane Kanana** testified that she was with her husband **Peter Kimenchu, Dw4** on the night of 19th - 20th /02/2017.

23. The parties raised various grounds of appeal in their respective Petitions of Appeal which can be summarised as follows: -

1) that the trial Court erred in acquitting the 1st respondent of the charge of arson;

2) that the trial Court erred in convicting the 1st respondent on the charge of conspiracy to commit a felony yet he was the only accused charged with the offence;

3) that the trial Court erred in sentencing the 1st, 2nd and 3rd respondents to only ten (10) years imprisonment whereas the gravity of the offence deserved a life sentence;

4) that the trial Court erred in sentencing the 1st respondent to a suspended sentence of two (2) years imprisonment irrespective of the gravity of the crime he was convicted of;

5) that the trial Court erred in finding that the identification was satisfactory and conclusive yet the conditions of the recognition were unfavourable;

6) that the trial Court failed to consider the respondents' defences;

7) that the sentence meted out was excessive in the circumstances; and

8) that the trial prosecution had not proved its case beyond reasonable doubt as required by law.

24. This being a first appeal, this Court is bound to re-evaluate and analyse afresh, the evidence before the trial Court and come to its own independent findings and conclusions bearing in mind that it did not witness the witnesses testify. See **Okeno vs. R [1972] EA 32**.

25. I propose to deal with **ground 1** alone, **ground 2** alone, **grounds 3, 4 and 7** together, **grounds 5 and 8** together and **ground 6** alone respectively.

26. On ground 1, it was the appellant's complaint that the trial Court erred in acquitting the 1st respondent of the charge of arson. The appellant's submissions were not in the file by the time of writing this Judgment. It was therefore not clear how the trial Court erred in exonerating the 1st respondent from the charge of arson.

27. This Court has reviewed the evidence presented before the trial Court. None of the eye witnesses placed the 1st respondent at the scene of the offence. **Pw2, Pw3 and Pw4** who were the eye witnesses were emphatic that among those people they saw that morning, the 1st respondent was not among them.

28. In this regard, I find that the trial Court did not err when it acquitted the 1st respondent of the first count of arson. No one connected him with the offence of arson. That ground is rejected.

29. Ground 2 was that the trial Court erred in convicting the 1st respondent yet he was charged alone. It was submitted by the 1st respondent that the element of agreement was not proved. Learned Counsel referred to the definition of Conspiracy in **Black's Law Dictionary, 9th Edn, Archibold: Writing on Criminal Pleadings, Evidence and Practice, 1999 3rd Edn** and the case of **Christopher Wafula Makokha v. R. [2014] Eklr** in support of his submissions.

30. The testimony of **Pw1** was that, he was informed by **Pw5** that the 1st respondent had incited people to burn his premises. **Pw5** corroborated the evidence of **Pw1**. He and **Pw3** while at Tumutumu Police Post, heard the 1st respondent call people and tell them to prepare and burn the complainant's house. Their evidence remained unshaken throughout.

31. That notwithstanding, **Pw2 and Pw4**, who were eyewitnesses told the Court that after the arson, they saw the attackers head to the homestead of the 1st respondent. The following morning, they saw him escort from his homestead and compound, those believed to have participated in the arson including the 2nd, 3rd and 4th respondent.

32. In cross-examination, the 1st respondent did not seriously challenge the evidence of **Pw2 and Pw3**. He also did not deny that on 19/2/2017, he was at Tumutumu Police Post and that he uttered the words he was accused of by **Pw3 and Pw5**. He also did not specifically deny that there were people who came to his home on the morning of 20/2/2017 and that he later ferried them away in his motorcycle.

33. As regards conspiracy, I note the definition of the term given in **Blacks Law Dictionary (supra)**. In **Archibold: Writing on Criminal Pleadings and Practice, (supra)**, it is stated at pg 2590: -

“Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them”.

34. In **Christopher Wafula Makokha v. Republic (supra)**, the Court held of **section 393 of the Penal Code** that: -

“... it is clear that the prosecution must prove the existence of an agreement between the accused and some other person to do the act complained of”.

35. In the present case, it is true that it is only the accused who was charged with conspiracy. However, the particulars of the charge were categorical that he had conspired with persons not before Court. The firm evidence of **Pw2, Pw3, Pw4 and Pw5** was that the 1st respondent was heard on 19/2/2017 while at Tumutumu Police Post telling people that they should arrange to burn the house of **Pw1**.

36. Evidence was led to the effect that he stated that he would hold his meeting at night since **Pw1** had held his meeting during the day. On the same night, a house belonging to **Pw1** was burnt down. The arsonists were seen going to his house after the arson. The following morning, he was spotted ferrying away those who had slept at his home and who were suspected to have been the arsonists.

37. The only irresistible conclusion is that, the people he had agreed with on phone to arrange and burn the complainant's house came to his house, slept there awaiting to torch the complainant's house and after committing the arson, they stayed for the night and ferried the away the next morning. Surely, the offence of conspiracy was proved against the 1st respondent to the required standard.

38. Next is **ground nos. 3, 4 and 7**. These relate to the sentence of the respondents. Whilst the appellant was of the view that the sentences were lenient, the respondents complained that the sentence were excessive. The appellant preferred life sentences for the 2nd to 4th respondent and seven (7) years for the 1st respondent. The respondents proposed lighter sentences.

39. **Section 332 of the Penal code** provides for a maximum sentence of life imprisonment for the offence of arson. On the other hand, **section 393 of the Penal Code** provides for a maximum sentence of 7 years for the offence of conspiracy.

40. Sentencing is in the discretion of the trial Court. Sentencing is meant for rehabilitation, retribution, restorative justice, community protection, denunciation and deterrence. In **Arthur Muya Muriuki V. Republi [2015] Eklr**, the Court held: -

“... Sentencing is in 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.”

41. The Court will consider whether the accused is a first offender, the likelihood of his repeating the same or other offences, the mitigation of the accused which will encompass the personal circumstances of the accused as well as whether he is remorseful of the offence, amongst other considerations.

42. In the present case, the 2nd respondent never gave any mitigation. The mitigation by the 3rd and 4th respondent were considered by the Court. It came out clear that the respondent held a grudge against the complainant because he is an outsider, a Muimenti owning land in Igembe.

43. Of course land cannot shift yet it is a constitutional right of every Kenyan to own land anywhere within the country. Considering the value of the property destroyed, the circumstances and gravity of the offence together with the mitigation of the respondent's, I am satisfied that the sentence meted out was fair. There was nothing to show that the trial Court exercised its discretion wrongly in meting out the sentence.

44. As regards the 1st respondent, he was the one who marshalled those who committed the offence. The trial Court observed that his wrong was as heinous as that of the arsonists themselves. His mitigation notwithstanding, the likelihood of repeating the offence cannot be ruled out. A sentence commensurate with the seriousness of the offence should have been meted out.

45. In this regard, I find the sentence of 2 years suspended to be too lenient that it amounts to a miscarriage of justice that the trial Court failed to exercised its discretion in this regard. I will interfere with the said exercise of discretion, set aside that sentence and substitute therefore with a sentence of five (5) years imprisonment.

46. Next is **ground nos. 5 and 8**. These were to the effect that the Court erred in convicting on evidence of identification and recognition in difficult circumstances and that the case was not proved to the required standard.

47. The trial Court found that identification of the 2nd to 4th respondent had been proven from the evidence of **Pw2 and Pw4**. In **Wamunga versus Republic (1989) KLR 424**, the Court held: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

48. In the present case, the trial Court considered the evidence of **Pw2 and Pw4**. The two testified that although it was at night, they were able to see the perpetrators because they were about 20 and 50 metres respectively from where the perpetrators were. The light from the burning house was bright enough and they could see the perpetrators well. The perpetrators were not in a hurry. They were singing all the time and took their sweet time before they left the scene. The trial Court held that there was enough opportunity for **Pw2 and Pw4** to recognize the 2nd to 4th respondent.

49. On the part of this Court, having evaluated the evidence on record and the circumstances prevailing at the time and as enumerated by the trial Court, I see no reason to fault the trial Court on its conclusion. There was adequate light and opportunity to recognize and identify the 2nd to 4th respondents.

50. As regards the proof of the case, the ownership of the property was proved, the arson was proved, the agreement between the 1st respondent and the arsonist was also proved. The respondents were properly identified through consistent and firm testimony of witnesses. To my mind, the prosecution case was proved beyond any reasonable doubt.

51. The last ground was that the respondent's defences were not considered. The judgment will show that the trial Court was not convinced with the respondent's defences. It held them to be but a mere sham and they did not displace the prosecution case.

52. The 2nd respondent never explained where he was at the time the incident occurred. His testimony that he was arrested together with the 1st respondent at the Police Station contradicts the evidence of the 1st respondent. He did not explain his whereabouts on the night of the incident. He did not call one **Mbira** in whose house he allegedly he slept on the material night. He did not displace the testimony of the eye witnesses who saw him at the scene.

53. As regards the 3rd respondent, his evidence of where he was on the material night contradicted that of his brother **Pw5**. **Pw5** had told the Court that on the material day at 3 am, he and the 3rd respondent were watering Miraa yet the 3rd respondent had testified that he was asleep at his father's house. His alibi could not therefore stand.

54. As regards the 1st respondent, he never denied that he was heard at the Police Post planning how to burn the house belonging to the complainant. Accordingly, the respondent's defences were but an afterthought and a sham. The trial Court was right in rejecting them. They are accordingly rejected and that ground also fails.

55. Accordingly, I find the appeal by the appellant against the 2nd, 3rd and 4th respondent to be without merit and is hereby dismissed. The appeals by all respondents are also without merit and are hereby dismissed.

56. I find the appeal by the appellant against the 1st respondent on acquittal on Count 1 to be without merit and dismiss the same. However, I find the appeal against the 1st respondent on sentence to be meritorious. I accordingly set aside the suspended sentence of two years and substitute therefor with a sentence of 5 years imprisonment. The sentence is to commence the date of this Judgment.

DATED and **DELIVERED** at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE