



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 17 OF 2019**

**MICHAEL NJAGI WANJA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant, *Michael Njagi Wanja* was charged and convicted of the offence of attempted arson contrary to *Section 333 (b)* of the *Penal Code*. The particulars supporting the charge alleged that on 2<sup>nd</sup> April 2017 at about 12:30am at Kanduri village in Embu County, he willfully and unlawfully set fire to clothing in the dwelling house of *Cecily Njoki Njue* which would have resulted into setting the house on fire.

2. Upon his conviction, the appellant was sentenced to serve 5 years imprisonment. He was dissatisfied with his conviction and sentence hence this appeal.

3. In his grounds of appeal as encapsulated in the amended petition of appeal filed on 5<sup>th</sup> July 2019, the appellant's advocates on record enumerated thirteen grounds of appeal which can be condensed into five main grounds as follows:

- i. That the learned trial magistrate erred in law in his finding regarding identification of the appellant as the person who committed the offence contrary to the evidence on record.
- ii. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.
- iii. That the learned trial magistrate erred in law and fact by accepting the fabricated, contradictory and unreliable evidence adduced by the prosecution while disregarding the evidence tendered by the defence.
- iv. That the learned trial magistrate erred in law by convicting the appellant against the weight of the evidence.
- v. That the learned trial magistrate erred in law by sentencing the appellant to serve five years imprisonment even though he was a first offender.

4. At the hearing, both parties chose to rely entirely on their written submissions. The firm of Kithaka & Company Advocates filed its submissions on behalf of the appellant on 3<sup>rd</sup> September 2020 while those of the respondent were also filed on the same date.

5. In submissions filed on his behalf, the appellant faulted the trial court's finding that he was properly identified as the culprit who set ablaze the clothes in the complainant's house. Relying on the authority of *Donald Atemia Sipendi V Republic, [2019] eKLR*, the appellant submitted that the circumstances surrounding his alleged identification were not conducive to a positive and reliable identification. Further, he contended that he was wrongly convicted as the evidence adduced by the prosecution was insufficient to prove the charges preferred against him beyond any reasonable doubt.

6. The State contests this appeal. In her written submissions, learned prosecuting counsel *Ms. Mati* upheld the appellant's conviction arguing that he was properly identified at the scene of crime and that the prosecution had proved all ingredients of the offence beyond reasonable doubt. Counsel further submitted that the appellant's statement in defence and the evidence offered by his witnesses amounted to mere denials which could not dislodge the prosecution case.

7. On sentence, counsel submitted that the sentence of five years imprisonment was too lenient considering that the penalty prescribed by the

law for the offence was fourteen years imprisonment.

8. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which is to reconsider afresh and to re-evaluate the evidence presented before the trial court to arrive at its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing and hearing the witnesses. See: **Okeno V Republic, [1972] EA 32; Kiilu & Another V Republic, [1987] KLR 99.**

9. I have carefully considered the grounds of appeal, the evidence adduced before the trial court as well as the submissions made on behalf of the appellant and the State. I have also read the judgment of the learned trial magistrate.

10. The court record shows that four witnesses testified in support of the prosecution case and in support of the defence case. Briefly, the evidence adduced by the prosecution reveals that on 2<sup>nd</sup> April 2017 at 12:30am, assorted pieces of clothing were set on fire in the complainant's house by a person who the complainant (PW1) and PW3 identified to be the appellant in this case.

11. According to the evidence of PW1, she was in the latrine at the material time when she heard screams. On coming out, she saw the appellant running and at the same time saw fire on her house window. Assisted by her daughter, PW2 and PW3, she put out the fire.

12. The trial court's record shows that PW2 did not see or identify the person who lit the fire but PW3 claimed that he had a torch and he saw someone near the toilet who he identified but disappeared. He identified that person as the appellant.

13. When put on his defence, the appellant gave a sworn statement and called three additional witnesses. He denied having committed the offence as charged and claimed that when the offence was committed, he was in his house; that the charge was a fabrication by PW1 who was his mother in law owing to a dowry tussle between them. This claim was supported by the evidence of DW2. DW4 claimed that she was among the people who helped PW1 put out the fire and she overheard another lady one *Muthoni* tell PW1 that it was the appellant who had lit the fire; that based on this information, PW1 reported the matter to the police. The import of DW4's evidence was to deny PW1's claim that she saw and identified the appellant at the scene soon after the offence was committed.

14. Having summarized the evidence on record, I now wish to turn to the merits or otherwise of the appeal. Starting with the appellant's claim that the learned trial magistrate accepted the evidence offered by the prosecution witnesses and disregarded that presented by his witnesses, my reading of the trial court's judgment reveals that the learned trial magistrate considered the evidence adduced by both the prosecution and defence witnesses but chose to believe the evidence tendered by the prosecution observing that the defence case was materially contradictory and could not adequately support the alibi defence mounted by the appellant. The fact that he rejected the defence case does not mean that he did not consider it. Nothing therefore turns on that ground of appeal.

15. Regarding the appellant's complaint that the learned trial magistrate shifted the burden of proof to the appellant, I have not come across any finding in the judgment of the trial court that suggests or indicates that it shifted the burden of proof from the prosecution to the appellant. The learned trial magistrate was alive to the law on the burden of proof and that is why in convicting the appellant, he specifically stated that he was satisfied that the prosecution had proved his guilt beyond any reasonable doubt.

16. Turning now to the gravamen of this appeal which is the complaint that the appellant was wrongly convicted as he was not positively identified as the person who set ablaze the complainant's clothes, I will start by observing that the learned trial magistrate was correct in his finding that none of the prosecution witnesses actually saw the appellant committing the offence. PW1 and PW3 claimed that they saw him as he ran away from the direction of PW1's house when fire in the house had already started. They both claimed that they identified him with a torch.

17. From the evidence, it is not disputed that the fire started at night at around 12:30am. Though there is no doubt that both PW1 and PW3 knew the appellant well prior to the material date, considering that the incident took place at night, it was incumbent upon the prosecution to tender evidence to prove that the circumstances then prevailing were conducive to a positive, accurate and reliable identification or recognition of the offender.

18. In cases where the prosecution's case is based solely on the evidence of identification such as the present one, such evidence must be interrogated with a lot of caution to ensure that the identification did not leave any room for a possibility of mistaken identity. The court of appeal emphasized this legal position in **Wamunga V Republic, [1989] KLR 424** when it stated as follows:

***“It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction.”***

19. In **Kiarie V Republic, [1984] KLR 739**, the same court gave the rationale for the need to properly assess and weigh the evidence on alleged identification or recognition before making it the basis for a conviction. The court stated that:

***“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”***

20. In this case, in his judgment, the learned trial magistrate accepted PW1 and PW3's evidence that they had seen and identified the appellant near the scene of the crime with the aid of a torch. The learned trial magistrate did not however interrogate their evidence to establish how they had seen the appellant considering that the offence was committed at night and they did not claim that they had shone their torches on his face or any other part of his body.

21. The witnesses only claimed that they had a torch at the time. Being armed with a torch is one thing and switching it on in order for it to provide light is another. In the absence of evidence to establish that there was any kind of light at the scene which could have assisted PW1 and PW3 to see and identify the appellant and considering their claim that they saw him as he disappeared from the compound and they did not disclose the distance at which they allegedly saw him, I find that the circumstances prevailing at the time were not conducive to a proper, positive and reliable identification or recognition of the appellant as the person who perpetrated the offence.

I am thus satisfied that the evidence regarding the alleged recognition of the appellant was not clear and watertight. It left a large room for a possibility of error.

22. The finding by the learned trial magistrate that the appellant admitted to having been present in PW1's compound at the material time is erroneous. A careful and holistic examination of the appellant's statement in defence reveals that in claiming that he had gone to the compound to collect his belongings, the appellant was referring to a different date not the time the incident took place. This position was made clear by his evidence on cross examination when he specifically stated that he was at his home when the offence was committed.

23. In view of the foregoing, it is my finding that the learned trial magistrate erred by failing to carefully interrogate the evidence tendered before him on identification and thereby came to the erroneous conclusion that the appellant was positively identified at the scene of crime in circumstances that led to the conclusion that he was the culprit which was not the case.

24. My independent analysis of the evidence on record leads me to the conclusion that it was insufficient to prove the charge preferred against the appellant beyond any reasonable doubt.

25. For all the foregoing reasons, I am satisfied that the appellant's conviction was unsafe. Consequently, I find merit in this appeal and it is hereby allowed. The appellant's conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED and DELIVERED** at EMBU this 30<sup>th</sup> day of October 2020.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms. Mutegi for the appellant

Ms. Mati for the respondent

Mr. Wambugu Court Assistant