REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 49 OF 2018

ABDUL WAHAB SHARIFF ALI.........APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from original conviction and sentence at Lamu Criminal Case No. 108 of 2016 in the Judgment delivered by Hon. Njeri Thuku (PM) on 11th July 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Omwancha for the appellant

Mr. Mwaniki for the State

JUDGMENT

The appellant **Abdul Wahab Shariff Ali** and three others herein was charged and tried with eight counts of arson contrary to Section 322 (a) of the Penal Code. The particulars of the charge were that on 20.2.2016 at Kwa Water Area of Langoni Location in Lamu west within Lamu County, appellant with others before court and others not before court willfully and unlawfully set fire to a building namely dwelling houses, one valued Kshs.56,950/= belonging to **Kadzo**, the second house valued at Kshs.30,800/= belonging to **Jamaa Kadenge,** the third house valued at Kshs.42,000/= belonging to **Wanje Masha** and a fourth dwelling house valued at Kshs.79,250/= belonging to **Furaha Mwamunda**, the fifth house valued at Kshs.93,400/= belonging to **Listra Amabei Jillo**, the sixth house valued at Kshs.72,450/= belonging to **Riziki Masha**.

The seventh count, the appellant with another was charged with taking part in a riot contrary to Section 80 as read with Section 36 of the Penal Code.

Finally, the appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

In the final analysis and findings the appellant was acquitted of counts 1,2,3,4,5 and 8 but convicted of count 7 on taking part in a riot contrary to Section 80 as read with Section 36 of the Penal Code.

The appellant was dissatisfied with the conviction and sentence passed by the trial court and filed this appeal on ground that:

> ***(1). That the trial Magistrate erred in Law and fact when she failed to take into account that there was no sufficient charge to support the charge.***
>
> ***(2). That the trial Magistrate erred in Law and fact that the appellant was not positively identified as one of the arsonists who committed the alleged crime.***
>
> ***(3). That the trial Magistrate erred in Law and fact to appreciate that the prosecution evidence was full of inconsistencies and contradictions to carry any weight against the appellant.***
>
> ***(4). That the trial Magistrate erred in Law and fact for passing a sentence which was punitive and excessive in the circumstances of the offence.***

(5). That the trial Magistrate erred in fact and Law the offence of taking part in a riot was based on assumptions and conjunctures.

Appellant's case

Learned counsel **Mr. Omwancha** submitted that the prosecution did not prove the appellant participated in the riot as alleged in the charge sheet and evidence of the (11) witnesses. He urged that the evidence relied upon by the Learned trial Magistrate was full of inconsistencies and contradictions incapable of sustaining any conviction. That the contradictions being complained of went to the root of the prosecution case and credibility of witnesses to support any existence of a fact in issue. The Learned counsel also contended that one of the key witnesses (PW1) confirmed to the court that the appellant was not one of the participants in the riot.

On identification, Learned counsel submitted that the trial Magistrate failed to take into account that the parade officer admitted to have disregarded the vital rules on conduct of identification parades i.e. height, general appearance and categories of age and other conditions as provided for in the regulations. He added that there was no reliability and safety on the identification evidence to link the appellant to the offence.

According to Learned Counsel, there was no basis for the appellant to have been convicted for the offence of participating in a riot. Regarding the sentence Learned counsel submitted that the sentence was illegal in view of the error on conviction of the offence. He prayed for the appeal to be allowed and the appellant to be set free forthwith.

The respondent's case

The senior prosecution counsel opposed the appeal and submitted that the evidence by eleven witnesses supported the charge in which he was convicted and sentenced. He placed reliance on the principles in the case of **Simiyu v R {2005} KLR 192** to counter appellant submissions that the identification parade was flawed.

With regard to contradictions and inconsistencies, Learned prosecution counsel argued that if they were, he considers them to be of a minor level which did not go to the root of the case. He further submitted that the Learned trial Magistrate factored all these issues and came into a correct conclusion on the matter.

Learned prosecution further contended that there are no grounds to support the appeal. He therefore urged the court to go with the findings arrived at by the Learned trial Magistrate.

Determination

The Court of Appeal in **Okeno v R {1972} EA 32 and Kiilu & Another v R {2005} 1KLR 174,** held that:

> ***"The duty of the first appellate court is to re-examine, rehear, scrutinize and evaluate the evidence on record by the trial court in order to draw its own conclusions and findings. In doing so it has only to bear in mind that the trial court had the advantage to observe the demeanor and credibility of witnesses."***

In this appeal, I have considered submissions of both counsel and the cited authorities for and against the appeal. It is now my task to re-evaluate the evidence with a view to come up with my own findings on the issues raised by the appellant.

The heart of this appeal is based on identification of the appellant. During the trial, the prosecution relied on the evidence by **PW2 (Kadzo Kitsao)** to place the appellant at the scene of the crime to proof that he participated in the riot on 20.2.2016.

According to **PW2** she was summoned by **PW9 – Leornard Ochola** to participate as a witness in the identification parade set to be conducted **PW10 – Chief Inspector of police Pharis Ndungu** at Lamu Police Station. It was at that moment she positively identified the appellant being part of the rioters on the alleged date of the offence. In essence the identification evidence against the appellant was that a single identifying witness.

The Law on identification is now well settled as stated by the Court of Appeal in the cases of **Wamunga v R CR Appeal No. 20 of 1982, Stephen Ndungu v R CR Appeal No. 147 of 2005.** The degree of reliance that could be placed on her evidence quite properly must meet the threshold and guidance outlined in **R v Turnbull {1976} 3 ALL ER 549** where Lord **Widgery C.J** held:

> ***"First, whenever, the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what right? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."***

The same court in **Maitanyi v R {1986} KLR 198** held:

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into."***

Going by the above principles, I shall and subject the evidence of **PW2 Kadzo Kitsao** to afresh, scrutiny and evaluation to establish the cogency and credibility of her evidence, inconsonant with the principles in **Wamunga (supra), Maitanyi (supra)** and **Turnbull case (supra)** case.

In her testimony on the material day less than 15 minutes she saw a mob of people armed with pangas who were all set to burn houses with fire. In that testimony **PW2** gives no physical descriptions of the appellant which made her identify one from the moving crowd.

During the entire trial PW2 made no reference that before this incident she know the appellant and if that be so for how long and what was the last time did she came into contact with the appellant. When **PW2** was called to participate in the identification parade, there seems to be no evidence on the first account given to the police about the appellant. The question is how did she come to be enlisted as a competent witness to be lined up to identify the appellant in the parade organized and conducted by **PW10.**

I observe that the Learned trial Magistrate considered the question of identification parade and from all relevant aspects she did not seem to have warned herself in placing reliance upon the evidence of a single identifying witness.

In view of the strict guidelines on identification parades she needed to satisfy herself that the proper guidelines as to the similar features, height, age, appearance and personal circumstances of the members of the parade were adhered to by PW10.

As summarized earlier in his evidence before court (PW10) this vital compliance rules on conduct of identification parades is missing. All what PW2 said in her testimony was that she went through the parade and identified the appellant without telling the court any special features which made her identify him from the rest of the members of the parade.

To me it is at once apparent that the evidence on identification of the appellant was indeed problematic for reasons stated hereinabove. The conclusion reached by the Learned trial Magistrate was therefore erroneous and the attached weight to convict the appellant unsustainable.

For the aforesaid reason, I find that the appeal by the appellant has merit. In his regard, I fault the Learned trial Magistrate for finding the appellant to have participated in a riot being made without credible evidence.

Again, the rest of the evidence which the prosecution case depended upon was purely circumstantial. In the case of **Ernest Abanga alias Onyango v R CACRA NO. 32 of 1990, Musoke v R {1958} EA F715** the court held thus:

> ***"Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established to irresistibly point to the guilt of the accused in order to sustain a conviction and inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

One cannot get away from the fact that the witness statement of other witnesses never implicated the appellant with the offence of participating in a riot.

Accordingly, as it seems to this court, it is quite evident that discounting identification testimony of PW2 and circumstantial evidence to that effect, the prosecution case against the appellant has no legs to stand on to support the conviction for the crime.

Considering all the circumstances, I am unable to say that the Learned trial Magistrate had in her possession credible evidence to justify a verdict of guilty and conviction of the appellant.

If anything, it was evidence of conjecture and suspicion incapable of discharging the burden of proof of beyond reasonable doubt for the offence of participating in a riot contrary to Section 80 as read with Section 36 of the Penal Code.

The result is that this appeal is allowed on both conviction and sentence. The appellant is to be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT LAMU THIS 22ND DAY OF MARCH 2019 CIRCUIT SESSION

R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. Mr. Mwaniki for the state

2. Mr. Omwancha for the appellant

3. The appellant