



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 89 OF 2018

SHADRACK KIPTOO SUTER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in Iten SPMCRC No 129 of 2017 by H. Nyaberi (SRM))

JUDGEMENT

1. **SHADRACK KIPTOO SUTER** (the appellant) was convicted on a charge of arson contrary to **Section 332 (a) of the Penal Code**, and sentenced to serve **10 years** imprisonment. The particulars of the charge were that on 11th February 2017 at Sisiya location in **MARAKWET WEST sub-county**, within **ELGEYO MARAKWET** county, he wilfully and unlawfully set fire to three buildings, namely two dwelling houses and a granary belonging to **SELINA JEPTOO CHEOI**, all valued at Kshs.150,000/-. The appellant had denied the charge

2. **BENEDISTA CHERONO (PW2)** was at her home within **SISIYA** sub-location on **11th February 2017 at about 11.00 am**, when she heard the appellant announcing that he had come officially. Upon getting out of the house, she saw the appellant who accompanied by his dog, and armed with a bow and arrows. He asked for **KIPROP** (a brother to PW 2), and she told him the former had gone to see another **KIPROP**. The appellant said he would take vengeance against PW2 and ordered her to set their house on fire, and that if she refused, he would shoot her dead using an arrow.

3. PW2 felt threatened and set their store on fire. The appellant ordered her to set the main house on fire, and when she refused, he took the match box from her and set the main house as well as **KIPROP's** ablaze. When the houses were burning, PW2 managed to escape with her child, and made a report to police at **KAPSOWAR**, who accompanied her back to the scene. She did not know the reason for the appellant's actions. On cross examination she stated: "I did not know whether you had differed with **Kiprop**. I am the one who burnt the store after you commanded me to do so. You threatened me not to scream..."

4. **CELINA JEPTOO CHEBOI (PW1)** was in **NAIROBI** when she received a phone call from **MAMA LINA** (her neighbour), who informed her that her grass thatched-house and store had been set ablaze by the appellant. In the burnt down structures she had kept Kshs.20,000/-, 5 sacks of dry maize, 20 kilograms of beans, household utensils, clothes, and beddings valued at Kshs.55,000/-, all of which were damaged by the fire.

5. A report about the incident was also relayed to the area assistant chief, **PERISH CHEROTICH CHEBOI (PW3)**, who proceeded to the scene and found the appellant in possession of a bow and arrows. She asked the appellant what he had achieved by setting the house on fire, but he teased her a little with the arrow, then went away. On cross examination, PW3 stated:

"I came to hear that you had forced Jerono to set the houses on fire. You are feared by the community members"

6. **P.C. MICHEAL MUTUKU (PW4)** of **KAPSOWAR** police station visited the scene upon receiving a report about the incident. The structures had completely been reduced to ashes, but still emitting smoke.

He took photographs of the scene, and learnt that the appellant who had a hand in the matter, had disappeared. He managed to arrest the appellant a month after the incident.

7. In his sworn defence, the appellant stated that he had differed with the complainant's son who had shot him with an arrow. A promise had been made by the family to compensate him by paying the hospital bill

8. The appellant's defence witness, but, that never happened. He could not remember where he was on the day the houses were torched, but maintained that he did not set the structures on fire, nor did he force PW2 to do so. It was his contention that PW2 had lied against him in court

9. The defence witness (**ANTHONY KIPCHUMBA KISANG**) confirmed seeing the houses burning, and he was among those who responded to the distress call to help put out the fire. On arrival, the roof had already caved in, and maintained that since he was among the first people to arrive at the scene, he would have seen the person who torched the houses. He however confirmed that upon arrival, he found about 8 people already at the scene, and that **JERONO** said it was the appellant who had set the houses on fire. DW2 stated:

"I do not know whether he was the one who set it on fire".

10. The trial magistrate in his judgment that there is no dispute about the fact that the three structures were set on fire which consumed them to ashes. He found that the evidence of PW2 was well corroborated by that of PW3 to the extent that the appellant was at the scene, and he was armed. Further, he teased the chief, and this persuaded the trial magistrate that the appellant had forced PW2 to set the torch ablaze after threatening her life.

11. The appellant was aggrieved with the decision of the trial county and filed this appeal where he argued that the facts did not prove the prosecution's case, and the investigation was shoddy.

12. He argued his appeal by written submissions, where he appeared not to contest the conviction, but urged this court to interfere with the sentence, saying he was apologetic over the incident, and that at the time of the offence, he was under the influence of alcohol. He claims to have now come to the realization that alcohol and drug abuse does not pay. As he has now undergone rehabilitation. He explains that he is a father of 8 children plus his own siblings who were solely dependent on him for their daily upkeep. That he is already serving another 7 year sentence, and urges this court to take this fact into consideration.

13. In opposing the appeal, **Miss Mokuu** on behalf of the State urges this court not to interfere with the sentence, taking into account the traumatic circumstances under which the offence took place. She points out that the appellant is already serving a 7 years sentence in **SPMCrC No 126 of 2017** for the offence of grievous harm, but she urges this court not to order for concurrent running of the sentences, saying that these were two different cases, heard by two different courts, under different sets of circumstances, and the request ought not to be granted.

14. Under **section 332 (2) of the Penal Code:**

Any person who wilfully and unlawfully sets fire to –

(a) any building or structure whatever, whether completed or not;.... is guilty of a felony and is liable to imprisonment for life.

The appellant decided to vent his anger on **Kiprop's** family, destroying both food and shelter. He exposed PW2 to such cruel and traumatising conduct, forcing her to burn her own mother's store, with all the foodstuffs. The sentence in my view, taking into consideration all that has been stated, was lenient. The victim lost her shelter and food, and I am persuaded that the sentence was appropriate. The **10 years** sentence was well meted out. However, taking cognisance of the fact the appellant is also serving a separate **7 year** sentence in **CR.Case No 126 of 2017**,

I find it prudent and fair that the 10 year sentence herein do run concurrently with the sentence from the date of conviction in this matter. It is only to that extent that the appeal succeeds

Delivered, Signed and Dated this 30th day of September 2019 at Eldoret.

H. A. OMONDI

JUDGE