REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 15 OF 2017

1. MASEKE DANIEL GIBAYA..............APPELLANT

2. JOSEPH CHACHA BURUNA.............APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. P. N. Maina, Senior Principal Magistrate in Kehancha Magistrate's Criminal Case No. 789 of 2015 delivered on 19th day of May 2017)

JUDGMENT

1. **Nicholas Nsongo Kimune** (hereinafter referred to as '**PW1**'), hailed from Ihole-Mturi village within Kuria West District in Migori County. As a law-abiding citizen, PW1 had previously led the police into recovery of some iron sheets which had been stolen from a neighboring school. The appellants herein were the suspects and the iron sheets were recovered from the first appellant's house. The appellants were nephews to PW1 and all hailed from the same village.

2. In the night of 07/07/2015 at around 11:00pm, PW1 and his wife, **Marita Boke** (hereinafter referred to as '**PW2**') were asleep in their main house. Their three children were sleeping in an adjacent house which was around 5 metres from the main house. PW1 and PW2 were suddenly woken up by two people who vehemently knocked the door to the house they were sleeping in. PW1 and PW2 readily recognized the two people from their voices. The two people while abusing PW1 also demanded an explanation from PW1 as to why he had led the police to the recovery of the iron sheets as if the iron sheets belonged to PW1's mother or father.

3. During that engagement, PW1 and PW2 saw the house in which their children were sleeping in on fire. They also saw the two people from the light illuminated by the bright fire on the grass-thatched roof which was fiercely consuming the house. They raised alarm and the two people ran away. PW1 and PW2 were assisted by their neighbors to rescue their children from the house but the rest of the items therein got burnt. One of their children also sustained some burns. The incident was reported to Kehancha Police Station and the injured taken to hospital. PW1 and PW2 gave the names of the assailants to the police.

4. Police investigations were commenced, and the second appellant was the first suspect to be arrested and charged with the offence of arson. After three witnesses had testified in the criminal case, the first appellant was also arrested and likewise charged with the offence of arson. The cases were eventually consolidated, and the hearing began *de novo*. PW1 and PW2 testified alongside their neighbor one **Nahashon Wambura (PW3)** and the investigating officer **No. 54282 PC John Meli** from DCIO – Kuria West as **PW4**.

5. The evidence of the four witnesses placed the two accused persons on their defense and they all gave sworn testimonies and did not call witnesses. They raised similar defenses that they had been set up due to a family land dispute, but they did not take part in the alleged act.

6. The judgment of the trial court found both appellants guilty and accordingly convicted them. They were then sentenced to 10 years imprisonment each.

7. Aggrieved by the said conviction and sentences, the appellants preferred a joint appeal which they prosecuted in persons. They challenged the identification of the assailants, argued that the offence was not proved as required in law and that the sentence was so severe and disproportionate to the offence. They filed separate written submissions and highlighted on them in calling for the success of the appeal. The State vehemently opposed the appeal and supported both the conviction and sentences.

8. Being the first appeal the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In determining whether the appellants committed the offence of arson as charged and convicted, this court will deal with the ingredients of the offence of arson, but first the law creating that offence. The appellants were jointly charged with arson contrary to **Section 332(a)** of the **Penal Code**, Cap. 63 of the Laws of Kenya. The said section provides as follows: -

> ***'332. Any person who willfully and unlawfully sets fire to-***
>
> ***(a) Any building or structure whatever, whether completed or not, or***
>
> ***(b) ……***
>
> ***(c) …..***
>
> ***(d) ……***
>
> ***is guilty of a felony and is liable to imprisonment for life.***

10. The particulars of the offence were that '*on the night of 7th July 2015 at Ihore village in Kuria West District within Migori County jointly, willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs. 50,000/= belonging to Nicholas Nsongo Kimune.'*

11. From the foregone it appears that the ingredients of the offence of arson contrary to **Section 332(a)** of the **Penal Code** are: -

> (a) Proof of ownership of a building or a structure;
>
> (b) Proof that the building or structure was set on fire;
>
> (c) Proof of the assailant;
>
> (d) Proof that the assailant set the building or structure on fire without any lawful justification.

12. From the evidence of the prosecution witnesses and the appellants there is no doubt that a dwelling house belonging to PW1 was set on fire on the fateful night. Indeed, one of the children of PW1 and PW2 was injured during the ordeal. Photographs in further proof thereof were also produced as exhibits.

13. The main contention in this appeal is on the identification of the assailants. The appellants contend that the then existing conditions were not suitable to favour a positive identification of the assailants and that they were only framed to settle family scores that arose out of a land dispute. The issue of identification in this matter turned out to be by way of recognition. The recognition was two-fold. One, it was by physically seeing the assailants and two, by way of voice recognition.

14. The attack was at night at around 11:00pm. It was a dark night. PW1 and PW2 were asleep in the family's main house when they were awakened by knocks on the door. They heard two people calling PW1's name and hurled insults as to why PW1 had led the police to recover some stolen iron sheets. Both PW1 and PW2 readily recognized them as the appellants herein. The appellants, PW1 and PW2 are very close relatives. They lived in the same village and interacted on daily basis. PW1 knew the appellants since they were born whereas PW2 knew them since she was married into PW1's family. Further, PW1 had truly led the police to recover of some iron sheets that were stolen from a neighboring school. The iron sheets were found in the first appellant's house.

15. There was also the physical recognition. The house which was torched was just adjacent to the one in which PW1 and PW2 were in. PW1 stated that when the two men knocked the door to his house and insulted him, he was getting out but for PW2 who restrained him. He, however peeped through the door and saw the huge fire on the adjacent house where his children slept. The fire emitted a lot of light and the place was very illuminated. PW1 described the lighting as clear as daylight and saw the appellants and even described how they were dressed. PW2 as well managed to peep through the door and saw the huge light outside. She saw the appellants who were people she knew very well. PW1 and PW2 also gave the names of the appellants to the police at first instance. (See the Court of Appeal decisions in **Morris Gikundi Kamande vs. Republic (2015) eKLR** and **Simiyu & Another vs. Republic (2005) 1 KLR** 192).

16. It is those circumstances which are to be juxtaposed with the legal requirements on identification by recognition. This Court is under a legal duty to weigh that evidence with great care and to be appropriately satisfied that it is safe to act on the said evidence. This is based on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.

17. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

> ***"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 favorable and free from possibility of error before it can safely make it the basis of conviction."***

18. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

19. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***"... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the 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 his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

20. The above does not however mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
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> *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
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> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."***

21. Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

22. On voice recognition, the trial court was guided by the Court of Appeal decision in **Karani vs. Republic (1985) KLR 290** which rightly captured the tenets of identification by voice. The Court stated that: -

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favoring safe identification…"***

23. Going by the cumulative effect of the evidence of PW1 and PW2 and the then existing circumstances coupled with the two versions of recognition and the law, there is no doubt that PW1 and PW2 were able to recognize the people who were outside their house as the appellants. The contention by the appellants that there was no description of the door to enable one to ascertain if PW1 and PW2 were able to see through it cannot create any reasonable doubt. I say so because PW1 and PW2 rightly saw the house in which their children were sleeping in on fire before they went out of their house. There is also no dispute that the assailants knocked the door to the house in which PW1 and PW2 were sleeping inside and that PW1 and PW2 went to the door, saw the two people so close as they were still at the door and saw the happenings outside. That is when they raised alarm and the appellants flee. The truth is PW1 and PW2 could not have raised alarm that the house was on fire if they did not see the house on such fire. If therefore they were able to see the house on fire which was about 5 metres from their house, what of someone who was just by the door in such bright light?

24. This Court must also weigh that evidence against the appellants' joint defence. The appellants contend that they were being fixed due to a family land dispute. None of the appellants raised the matter with the witnesses. Neither was PW4 informed of the issue to enable investigations on the possibility of the appellants being framed up. The matter first came up during the defence hearing without the advantage of the prosecution witnesses having a chance to be heard on it. That aside, the narration by PW1 and PW2 of the events of that night are very clear and straight-forward. They are only but hinged on simple truths. I therefore find the appellants' joint defence not holding and the same does not cast any doubt on the prosecution's evidence.

25. From the evidence and the law, this is a case where even the voice recognition alone was free from error and placed the appellants at the scene of crime. Having said so, there is still no direct evidence that the appellants were seen torching the house. That aspect is hence hinged on circumstantial evidence.

26. The foregone analysis has placed the appellants at the scene at the time when the house caught fire. The appellants had gone to retaliate why PW1 had led the police to the discovery of some stolen items. The appellants fled when PW1 and PW2 raised alarm. When PW1 and PW2 peeped through the door they saw the house in which their children were sleeping inside having been just lit. When the appellants fled, PW1 and PW2 went out of their house and with the assistance of some neighbors managed to break the main door which had been locked from outside using padlocks. The children were rescued before the grass-thatched roof collapsed. That means the house had just been set on fire otherwise the grass-thatched roof would have collapsed long before the rescue. That was the time the appellants were at the home of

PW1 and fled on raising alarm.

27. **But what does the law on circumstantial evidence say?** I recently dealt with the issue in **Migori High Court Criminal Case No. 113 of 2014 Republic vs. Antony Chacha Mwita** (unreported) as follows: -

> *'17..........On the second ingriedient as to whether the accused person caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -*
>
> > ***(i) The circumstances from which an inference of guilt is sought to be drawn, must be congently and firmly established;***
> >
> > ***(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
> >
> > ***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***
>
> *18. The foregone principles were set out in the locus classicus case of* ***R -vs- Kipkering arap Koske & Another*** ***(supra)*** *and have repeatedly been used in subsequent cases including the Court of Appeal cases of* ***GMI -vs- Republic (2013) eKLR***, ***Musii Tulo vs. Republic (2014) eKLR*** *among many others.*
>
> *19. The Court of Appeal in the case of* ***Musii Tulo*** ***(supra)*** *in expounding the above principles expressed itself as follows:-*
>
> > ***" 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of*** *Musoke v. R (1958) EA 715* ***citing with approval*** *Teper v. R (1952) AL 480* ***thus: -***
>
> *'It is also necessary before drawing he inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

28. The events as they unfolded in this matter clearly point to the irresistible inference that within all human probability the crime was committed by the appellants and none else. The circumstances are congently and firmly established; they unerringly point towards guilt of the appellants; and they form such a complete chain that there are no other co-existing circumstances which would weaken or destroy the inference. Further, the appellants disappeared from the village immediately the offence was committed and infact the first appellant was arrested long after the trial of the second appellant had begun. I therefore find and hold that the identification of the appellants by recognition was free from error and that PW1's house was set on fire by the appellants herein.

29. **Was there any legal justification in setting the house on fire?** The appellants were very clear on why they visited PW1 and his family on the fateful day. It was a revenge mission; a vendetta, as they were offended by the role played by PW1 in the recovery of the stolen iron sheets. PW1 had stood out as a good citizen who protected public property. Instead of acknowledging such rare gestures, to the appellants he was an enemy who deserved not less than losing all his three children. I hence see no justification at all in razing down the house. The act remains contrary to law.

30. From the above analysis, I now find that the trial court was right in holding that the prosecution had proved its case. I have carefully read the impugned judgment and fully agree with the analysis of both the facts and the law by the trial court. The court was very clear and rightly determined all elements of the offence. It also relied on binding precedents. It was a well-researched and holding judgment which I hereby affirm. The appeal on conviction is hereby dismissed.

31. On the aspect of sentence, the appellants contend that the sentence of 10-year imprisonment was excessive. The appellants executed the act with an intention of not only destroying the property of PW1 but also killing all the children of PW1. They locked the door of the house in which the children slept using two padlocks as they set it on fire. Had it not been the concerted efforts of PW1, PW2 and the other villagers, the worst would have happened. What had the innocent children done to deserve such a treatment?

32. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act upon in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

33. The circumstances of this case called for a more serious sentence. Since the trial court extended leniency to the appellants, I will not fault that more so given that there had been no cross-appeal on sentence. The appeal on sentence is equally unsuccessful.

34. The upshot is that the appeal is dismissed in its entirety.

DELIVERED, DATED and **SIGNED at MIGORI this 12th day of April 2018.**

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Maseke Daniel Gibaya and Joseph Chacha Buruna - Appellants in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecutor.

Miss Nyauke – Court Assistant.