REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL CASE NO. 30 OF 2017

(ARSON)

(CORAM: R. E. ABURILI - J.)

IBRAHIM ONYANGO OMONDI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 2.03.2017

in Criminal Case No. 565 of 2016 in Ukwala Law Court

before Hon. G. ADHIAMBO – S.R.M.

JUDGMENT

On 2.3.2017 the Appellants herein **Vitalis Okoth Omondi, Ibrahim Onyango Omondi** and **Cornel Oketch Ochieng** were convicted and sentenced by the SRM at Ukwala, in Ukwala SRM, Cr. Case No. 565 of 2016.

They faced the charges of **Arson contrary to Section 332(a) of the Penal Code** and in Count two, they were charged with Assault Causing Actual Bodily Harm contrary to **Section 251 of the Penal Code**.

In the Arson charge, it was alleged that on 6.9.2016 at 2100 hours in Mungao Village, Mungao Sub-Location, in East Uholo Location, in Ugunja Sub-County within Siaya County, they willfully and unlawfully set fire to a dwelling house valued at KShs.250,000/= belonging to Joseph Ochieng Wasonga.

In the Count two, the three Accused/Appellants herein were alleged to have assaulted Joseph Ochieng Wasonga thereby occasioning him actual bodily harm. The place and time of the offence is the same as in Count 1 of Arson. The Appellants who were unrepresented pleaded not guilty to the charges. The Prosecution called 5 witnesses to prove its case against the Appellants. The Appellants were placed on their defence. They testified and gave unsworn evidence. They denied the charges against them. They also called two witnesses DW4 Zakari Oyula Nyanjai and DW5 Jennifer Auma Otieno.

The trial Magistrate Hon. G. Adhiambo, SRM, after considering the Prosecution and defence case was satisfied that the Prosecution had proved its case against the Appellants beyond reasonable doubt as required by Law. She accordingly convicted them as stipulated in **Section 215 of the Criminal Procedure Code.**

On sentence, she received a report from the Prosecution showing that the 1st and second Appellants had earlier on 26.1.2017 been convicted for the offence of assault and were each fined KShs.10,000/= in default to serve 6 months imprisonment before Hon. Wanyama. The 3rd Appellant was however found to be a first offender. She therefore sentenced the Appellants as follows:-

1. Vitalis Okoth Omondi:

Count 1: to serve 6 years and 11 months imprisonment.

2. Ibrahim Onyango Omondi: and Cornel Okech Ochieng:

Count 1: to each serve 7 years imprisonment.

3. Count II: Each Accused to pay a fine of KShs.20,000/= in default be imprisoned for 4 months. The sentences were to run consecutively.

Being dissatisfied with the conviction and sentence, the Appellants herein and on 8.3.2017 lodge then appeals to this Court contending that:-

1. The evidence on record was not sufficient to warrant a sound conviction;

2. The defence was not duly considered.

3. I cannot recall all that transverse (sic) during the trial hence pray for the trial proceedings and order for habeas corpus so as to adduce sufficient grounds.

On 2.2.2018 the Appellants' Appeal was admitted to hearing by Hon. Justice A. Makau, for hearing of the Appellants' application for bail pending appeal and the record shows that the Appellants applied and were allowed to withdraw the said Application. This was before the appeals were admitted to hearing.

On 23.5.2018 the appeal came up before me for mention and all the three Appellants were present.

The proceedings were conducted in English with interpretation done in Dholuo language which the Appellants indicated that they all understood.

Each Appellant individually stated that they wished to abandon their respective appeals on conviction and would only challenge sentence

The Court after hearing the Appellant's respective pleas and the Prosecution not objecting thereto, ordered that their appeals against conviction were marked as abandoned and set the date for hearing of the appeal against sentence only.

On 13.6.2018 the Appellants were brought to Court and interpretation done in Dholuo which language they said they understood. They each stated that they had abandoned their respective appeals against conviction and were ready to address the Court on sentence which they did.

The 1st Appellant Vitalis Okoth Omondi stated:-

"I abandoned my appeal against conviction. I only want the Court to consider reducing my sentence. I have small children. I am the sole breadwinner. I need to take care of them. I am a Mason.

The 2nd Appellant Ibrahim Onyango Omondi stated:-

"I abandoned my appeal against conviction. I pray for leniency on sentence. I have an aged mother and a wife and children who depend on me. I am a peasant farmer and do some little Masonry."

The 3rd Appellant Cornel Oketch Ochieng stated:-

"l am aware I abandoned my appeal against conviction. I wish to plead with the Court to reduce my sentence. I am alone at home with my aged mother."

In response, M/s. Odumba, Prosecution Counsel, submitted that she had no objection to the Appellants abandoning their appeals against their conviction. She submitted that they were however, not remorseful. That the 1st and 2nd Appellants are not first offenders and that in the trial Court, only the 1st Appellant mitigated.

M/s. Odumba, submitted that the offence of arson attracts life imprisonment. That the sentences meted out was lenient and that the Appellants were malicious, injured the complainant and wanted to burn the children alive hence the Court should not interfere with the sentences because the sentences were lenient.

In a rejoinder, the 1st Appellant stated that he was sorry and that he would not repeat it again. The 2nd Appellant stated that he had a land issue with the complainant whereas the 3rd Appellant submitted that he urged the Court to forgive him as he was 27 years old.

I have carefully considered the appeal against sentence by the Appellants who abandoned their appeals against conviction. I have also considered their submissions and the opposing submissions by the Prosecution Counsel.

The offence of Arson falls in Chapter XXXIII. Division VI of the Penal Code on Malicious injuries to property. It is an offence causing injury to property.

The offence is created under **Section 332(a)**.

The Section stipulates:

"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. On the other hand, assault causing bodily harm as stipulated in **Section 251 of the Penal Code** attracts a Maximum sentence of five years on conviction.
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> The offence is a misdemeanor. It therefore follows that the sentences meted out by the trial Court to the Appellants herein were lawful as they fall within the parameters set by statute. The legality of such sentences being 6 years and 11 months for 1st Appellant in Count 1 and 7 years for the 2nd and 3rd Appellants, in Count 1 and 4 months or a fine of Shs.20,000 each in Count 2 of the charge were and are not illegal sentences.
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> The only issue for this Court to consider is whether the said sentences are excessive in the circumstances of the case.
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> The object of sentencing is primarily to punish the offender for the offence and at the same time reform to rehabilitate them in such a way as is appropriate having regard to the circumstances of the case.
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> Punishment is equally intended to deter recidivists or repeal offence and other intending offenders taking into account the prevalence of similar offences as well as the situation of the Appellant/convict himself (See **Chacha Mwita – J, in John Shikoli Atsuriza Vs Republic**) eKLR 2018.
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> In considering what is the appropriate sentence to impose, it is important that similar offences attract family similar punishment in terms of sentences meted out so that there is uniformity and certainty in sentencing.
>
> In applying the above established principles, the Appellate Court must nonetheless bear in mind the fact that sentencing is at the discretion of the trial Court and therefore an Appellate Court should be cautious not to interfere with that discretion of the trial Court unless there are reasonable grounds to do so.
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> In **Wanjema Vs. Republic [1971] E.A. 493**, it was stated that "An Appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in thee circumstances of the case."

In the instant case, the trial Magistrate, as earlier stated, imposed a sentence which was lawful and much less than the maximum prescribed by law.

In Fatuma Hassan Salo Vs. Republic [2006] eKLR the Court stated:

> "Sentencing is a matter for the discretion of the trial Court. The discretion must however be exercised judicially. The trial Court must be guided by evidence and sound legal principle. He must take into account all relevant factors and exclude extraneous factors? ……."

Hon. Willy Mutunga, the retired Chief Justice of Kenya, commenting on the sentencing Policy guidelines stated:

> ***"Sentencing has been a problematic area in the administration of justice. It is one of those issues that have constantly given the judiciary a bad name and deservedly so. Sometimes out rightly absurd, disproportionate and inconsistent sentences have been handed down in criminal cases. This has fueled Public Perception that the exercise of judicial discretion in sentencing is a whimsical exercise by judicial officers."***

The sentencing guidelines require the trial Court to not only consider the nature of the offence and character of the offender but must it also be guided by whether the offender pleaded guilty or not. The guidelines nonetheless caution the Court not to discharge an offender if to do so amounts to "an injustice and the offender is simply spared from taking responsibility for him or her action:-

Where the Accused person pleads guilty to a charge and is remorseful then his sentence ought to be reduced.

Against the above background, the question is whether the sentence imposed on the Appellants were proportionate to the offence or were manifestly excessive or whether the trial Court failed to take into account relevant factors or whether she took into account irrelevant considerations in passing sentence. All the three Appellants pleaded not guilty to the two charges of Arson and assault causing actual bodily harm. They were found guilty on both courts and convicted accordingly. They were given the opportunity to mitigate. The Prosecution submitted that the 1st and 2nd Appellants were not first offenders. They had previously been convicted of assault on 26.1.2017 and fined Shs.10,000/= each and in default to serve 6 months imprisonment. The 1st and 2nd Appellants conceded that indeed the Prosecution had given the true position as far as their criminal records were concerned. They were then accorded an opportunity to mitigate. The 1st Appellant stated in mitigation.

> **"I am innocent. I have a child who is in form four who needs were for school fees. I leave it to Court."**

In her sentencing remarks, the trial magistrate stated:-

"I have considered the nature and gravity of the offence with which the 1st, 2nd and 3rd Accused are convicted, their respective mitigations and the fact that the 1st and 2nd Accused are not first offenders. I have also observed that the 3rd Accused is a first offender. I have noted the value of the property that was burnt and the nature of the injuries that the complainant sustained. I am of the view that person with the character of the Accused persons need to be rehabilitated before they can be released the society. I have noted that during the hearing of the case, it became evident that the Accused were malicious and were even interested in burning the house together with the children of the complainant therein. The offences which the Accused have committed is prevalent and I find that they each deserve a deterrent sentence. The sentence will be slightly different because only the 1st Accused had mitigation. I hereby sentence the Accused as follows:-

Count 1:

The 1st Accused to serve 6 years and 11 months imprisoned and the 2nd and 3rd Accused each to serve 7 years imprisonment.

Court:

Each of the Accuseds to pay a fine of KShs.20,000/= in default be imprisoned for 4 months.

The sentences to run consecutively. Right of appeal within 14 days."

From the above sentencing remarks, I am satisfied that the trial Magistrate considered the circumstances under which the offences were committed, the Appellants' mitigating factors, the 1st and 2nd Appellants' antecedents or past criminal records and the fact that the offence is prevalent hence the need to give deterrent sentences and to have the offenders rehabilitated she also considered the fact that the Appellants had the intention of not only burning down the Complainant's house valued at KShs.250,000/= but also burning his children in the said house.

On appeal, the Appellants claimed they are innocent yet they voluntarily withdrew their appeals against conviction.

The maximum sentence for arson which is a felony is life imprisonment whereas the maximum sentence for assault causing actual bodily harm which is a misdemeanor is five years imprisonment if prison sentence of between 6-7 years imprisonment which is way far below the life imprisonment maximum prescribed by law cannot be excessive in the circumstances, having regard to the serious heinous crime of Arson. It was in my view, very lenient sentence. In addition, a fine of KShs.20,000/= in default, 4 months imprisonment for assault causing actual bodily harm, considering that the 1st and 2nd Appellants are previous convicts for the same offence cannot be said to be excessive sentence which would run consecutive to the prison sentence for Arson. The Complainant lost a house valued at KShs.250,000/=. He also risked loosing lives of his children as the Appellants were determined to burn them in the house. Mitigation or remorse on appeal is an afterthought, on the part of the Appellants who have now tested loss of liberty for a few months.

In my view, the Appellants who have now tested loss of liberty for a few months. In my view, the Appellants deserve to live in prison to fully reform so that when they get out, they are fully rehabilitated to respect the rights of others as far as property and life is concerned. That the time of committing such crime as arson, they knew and ought to have known that it was a crime to do so and that in the process, even innocent life could have been lost.

They cared less and therefore they must live with their malicious act and carefree attitude which has landed them in jail. They must, while in jail, learn that crime does not pay.

For the above reasons, I find no reason why I should interfere with the lawful sentences imposed on the Appellants by the trial Magistrate as the same were lenient sentences and to reduce them would in my view occasion a miscarriage of justice.

The discretion exercised by the trial Magistrate was judicious and took into account all relevant factors in sentencing the Appellants. The sentences are accordingly upheld. The appeal herein by all the three Appellants is hereby dismissed. The Appellants to serve their full sentences and be prepared to reform while in prison during the imprisonment period.

Orders accordingly.

Dated, Signed and Delivered in Open Court at Siaya this 28th day of August 2018.

R.E. ABURILI

JUDGE