REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 109 OF 2016

(ARSON)

(CORAM: J.A. MAKAU – J.)

ERICK OTIENO PAUL……APPELLANT

VERSUS

REPUBLIC……..…...…..…RESPONDENT

(Being an Appeal against conviction and the sentence dated 05.09.2013 in Criminal Case No. 702 of 2012 in Bondo Law Court before Hon. B.R. Kipyegon - R.M.)

J U D G M E N T

1. The Appellant **ERICK OTIENO PAUL** (***herein the Appellant***) and another were charged with the offence of **Arson contrary to Section 332(a) of the Penal Code**. The particulars of the charge are that on the 20th day of September 2012, at Maranda High School in Bondo Sub-County within Siaya County, jointly with others not before Court willfully and unlawfully set fire to a building namely Ayany Dormitory with students property therein all valued at Kshs. 4,100,000/= the property of Maranda High School. He faced a second count of Assault causing actual bodily harm contrary to **Section 251 of the Penal Code**. The particulars of the offence are that on the 20th day of September 2012 at Maranda High School in Bondo District within Siaya County unlawfully assaulted **SAA** thereby occasioning him actual bodily harm.

2. That after full trial, the Appellant was found guilty, convicted and sentenced to serve 10 years imprisonment in respect of Count I and 1 year imprisonment in respect of Count II.

3. Aggrieved by the conviction and sentence, the Appellant preferred this appeal setting out the following three major grounds as follows: -

a. That the Trial Magistrate failed by over ruling the evidence of respondent on record as was inconsistent and incredible and thereof the judgment was obtained by fraud and conclusion hence incompetent.

b. That had the Trial Magistrate noted the enormous contradictory and planted evidence adduced in this instant case, he will not have arrived at the above verdict.

c. That the Appellant's right for fair trial was breached especially under Article 50(2) that the Appellant was not served with witnesses' statement hence Article 25(c) was contravened.

4. I am first Appellate Court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:-

> ***"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

5. The record of appeal contains the Prosecution case and I need not reproduce the same but shall summarize the Prosecution case and the defence.

6. The Prosecution case is as follows: on 20.9.2012 at around 5:30am, the students at Maranda High School were settling in for morning prep when the students heard some noises at the main road from the gate to the Administration Block. The students then moved out of the classes and dormitories as one dormitory called **Ayany** was on fire. PW1, SAA ran towards the dormitory which was already on fire. The students attempted to put off the fire using water, soil and other things. It was at that time near day break at the same time the students started ransacking and combing the school compound for suspects. PW1 then saw two people running away near the toilet, one of whom was in a red shirt and white trouser while the other was in a sweater, with white collar and navy blue trouser. That as there was light PW1 followed the suspect up to the field and as PW1 was about to turn to join the other students on the road, two people bumped on PW1 being the two people PW1 had seen earlier on. That he recognized the Appellant as he was dressed in school uniform, thus trouser, sweater and white shirt, who got hold of PW1's small finger of the right hand and bit PW1's finger and kicked PW1 at the ribs and he crossed the main farm. PW1 was injured, forcing him to alert the other students who apprehended the Appellant; by which time the Appellant had removed the sweater and his trouser was already falling. PW1 was subsequently taken to Bondo District Hospital for treatment, He identified sweater which was worn by the Appellant as MFI-P1; trouser as MFI-P2; shirt as MFI-P3; Doctor's notes as MFI-P4. PW1 reported the matter to Bondo Police Station and was issued with P3 form, MFI-P5. PW1 stated he was familiar with the Appellant's face and stated he knew that he was not a student at the school.

7. PW2, UFO, a student at Maranda High School testified that on 20.9.2012 at 4:40am, he proceeded for his breakfast and on the way saw a person dressed in school uniform and thought that it was a prefect because he had a red tie. As he proceeded to the class, he heard shouts of *"fire fire, Ayany is burning"*. He turned and rushed to the dormitory, saw a light in the farm which he and other students followed but before he reached it, it went off. He crossed the fence towards the tarmac road when he heard fellow students shouting *"here they are"*. He and others chased a man who had a torch wearing a sweater which was either blue or black, who on reaching at the fence, he removed the sweater as students followed him until he entered a house from where they found the man under the bed occupied by two women as he tried to remove his black trousers while under a bed. He had a white shirt and tried to escape through the window but failed. PW2 and his fellow students arrested the man outside the house and took him away. PW2 identified the man they arrested as the Appellant, who they handed over to the Boarding Master, who handed him to the D.O's Office. The Police came later, recovered the pullover, left behind by the Appellant, a pair of trouser (MFI-PII), and white shirt.

8. PW3, COA a former student at Maranda High School testified that on 20.9.2012 at around 5:30am while at the school, he heard shouts that there was fire in Ayany dormitory, rushed to the scene to put out the fire and at the same time he heard his fellow students shouting that the suspect was on the run and joined in the chase with other students. That the suspect ran into a residential estate and entered in one of the houses; which PW3 and his fellow students surrounded. In the house they found two ladies and a

child. PW3 and his fellow students carried a search in the area whereby a half-naked man was arrested as he tried to escape, who PW3 identified in court as the Appellant. The suspect was rescued from the students by the teachers, taken to D.O's Office Maranda. PW3 identified clothes which the suspect wore, the cardigan MFI-P1 as belonging to Maranda High School, which the suspect had removed and threw away as he tried to escape.

9. PW4, Aron Chebon, a Clinical Officer at Bondo District Hospital produced P3 form and treatment chit of SA, PW1, who was treated on 24th September 2013 after allegedly having been assaulted on 20th September 2012, by a known person. PW4 noted PW1 had bruises and swollen scalp and minor bleeding; tenderness on right anterior chest wall, assessed the degree of injury as harm. P3 form produced as exhibit 5 and treatment chits as exhibit 4.

10. PW5, Erick Omondi Midega from Maranda High School, a Teacher and Boarding Master at the school, testified that on 20.9.2012 at 5:00am, he was at his residence at the school when he heard noises from Ayany Dormitory, rushed there and saw students running across towards the school fence and farm. Then he reached at the dormitory and found it on fire and nothing could be salvaged. PW5 went back, picked a motorbike and followed the students, who told him they were pursuing a man who was running away from the school's burning dormitory. That PW5 followed the students to a house from where a man was pulled out who PW5, identified as the Appellant herein, who had a black long trouser similar to the trouser of Maranda High School which is navy blue, with sweater and shirt similar to that of the school. PW5 saved the man from being lynched, led him to D.O's Camp in Maranda. Later, police came and arrested the Appellant. PW5 identified the white shirt (MFI-P3), trouser (MFI-P2) and a sweater (MFI-P1) which were worn by the Appellant at the time the dormitory was burned.

11. PW6, Vincent Okoth Awiti, a Building Technician with Ministry of Public Works, whose duty is to design and value costs of a building, prepared a report on fire tragedy in dormitory Owino and Ayany, located in Maranda High School under the request of the Deputy Principal on 16.9.2012 and 20.9.2012 respectively. The request in respect of Ayany was on 20.9. 2012. PW6 made a finding in his report that the cause of fire would not have been an electrical fault, which occurs at one spot, as electrical fire only burns at one spot, as it cuts all other connections. That only one student was injured as he tried to save his property through the window. The report was produced as Exhibit 6.

12. PW7, No. 85655 PC Emanuel Ekali, from Kisumu Scenes of Crime Office, a gazetted officer in Dec. 2011, on the request of IP Tarus on 20.9.2012 proceeded to Maranda High School and photographed the scene of crime. He took 8 photographs of the burnt dormitory and prepared a certificate of the same. He produced the 8 photographs as P.Exhibit P7 and certificate as P 8.

13. PW8, Bob Otieno Oyugi, Deputy Principal Maranda High School, testified that on 20.9.2012 at 5:20am, he found Ayany Dormitory on fire, called Fire Brigade from Kisumu, as students tried to put off the fire. He heard students shouting *"huyo huyo"* as they chased somebody towards the hockey pitch. That later PW8 learned the person the students were chasing was apprehended. That the Fire Brigade and Police came to the scene and found the fire had been put off by the time they arrived.

14. PW9, No. 233456 Inspector Kiriwa Tarus, the Investigating Officer testified that on 20.9.2012 at about 5:30am, he received a phone call from DCIO instructing him to proceed to Maranda High School. He and other officers proceeded to Maranda High School, where they were informed of the arrest of a suspect by students, who they rescued and took him to Bondo Police Station. That the suspect they rescued was one Erick Otieno, the Appellant. PW1 complained that the Appellant had also assaulted him during the chase within the school compound. PW9 went to the burnt dormitory and collected ash samples which were sent to the Government Analyst, they took statements from students and arrested the night watchman from the school for interrogation; thus the 1st Accused at the Lower Court. PW9 obtained the clothes which the Appellant was wearing during the time of the arrest which resemble Maranda High School uniform, though he was not a student at the said school. PW9 identified the Appellant as the person he rescued. He produced the sweater as Exhibit 1, shirt as Exhibit 3 and trouser as Exhibit 2.

15. The Appellant gave unsworn statement and called no witness. The Appellant gave a defence of alibi. He stated that on 19.9.2012, he proceeded to his farm where he worked upto 3:00pm. That he returned home and after supper, he went to bed at around 8:00pm, however at dawn he was awakened by some noises. He woke up and found the door was wide open. That students entered into his house armed with pangas, who assaulted him and pulled him out of his house. That his wife was also assaulted before she escaped. That he was assaulted till he lost consciousness only to find himself at the hospital bed, from where he was taken to Bondo Police Station. That he was forced to put on the recovered clothes and was later charged with the offence.

16. At the hearing of the appeal, the Appellant appeared in person while M/s. Maureen Odumba, Learned Prosecution Counsel, appeared for the State. The Appellant relied on his written submissions which he handed to the Court whereas the State Counsel opposed the appeal against both the conviction and sentence orally.

17. The Appellant in his had written submissions urged that his constitutional rights to a fair hearing was violated as he was not supplied with copies of witnesses statements, charge sheet and investigation diary; that the Prosecution case was riddled with contradictions and inconsistencies and lastly the Prosecution did not prove their case to the required standard of proof.

18. M/S Odumba, Learned State Counsel, on her part urged that the Prosecution proved the charge of arson; as a dormitory was burned; that the fire was proved was caused by the electrical fault but was caused by people; that the Appellant and another were linked to the arson, and was pursued from the scene of incident till he was arrested by the students while he was in school uniform. That PW1 identified the Appellant as one of the arsonists. On sentence, the State Counsel, urged the offence attracts life imprisonment and in view of the value of properties damaged and a fact that one student was injured, she submitted the sentence meted was very lenient, urging the Court not to interfere with the sentence.

19. The Appellant's 1st ground of appeal is that the trial court failed to consider that crucial and essential witnesses were never summoned to give evidence in court. The Appellant in his written submissions, did not urge this ground at all. He did not state the witnesses who he considered crucial and essential in this case and who were not called. The Court can't be left to speculate on who were crucial and essential witnesses and who were not called.

20. In the case of **Michael Kinuthia Muturi V Republic [2011] eKLR**, Court dealing with an issue similar to the one raised by the appellate Court of Appeal held as follows: -

> ***"Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."***

21. In the instant case, the evidence on record is sufficient to sustain the conviction and failure to call more witnesses than the Prosecution had attracted no adverse inference as the Appellant did not even disclose the witnesses which the Prosecution would have called and failed to call them and what kind of evidence they would have given.

22. The Appellant under Ground No. 2 of this appeal, contends that the trial court failed to furnish him with witnesses statements before the case commenced hearing. I have perused the trial court proceedings and it is clear that immediately after taking of the plea, the trial court ordered that the accused persons be supplied with copies of witnesses' statements at their own cost. That when the case came up for hearing for the first time on 4th October 2012, the appellant did not raise the issue of not having been supplied with copies of witnesses statements but indicated the to court he was unwell but he could proceed with the hearing. That on 18th October 2012, the Appellant was eager to proceed with the case opposing adjournment for 2 weeks and sought adjournment for one week. That it was only on 31st October 2012, when the Appellant raised again the issue of statement telling the court he needed them that day, and the

Court ordered the accused be given statements, that day at their own cost and the Prosecution directed to facilitate the same before the hearings. That on 6.11.2012, the Appellant complained of the delay of the case on part of the 1st accused and he informed court he was ready. Once again on 21.11.2012, the Appellant told court that he was ready and needed statements consequently the case proceeded to hearing.

23. Article 50(2)(b)(j) of the Constitution of Kenya provides:-

> ***"50. (2) Every accused person has the right to a fair trial, which includes the right -***
>
> > ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"***

24. I have very carefully perused the trial Court's proceedings, in regard to the Appellant's contention that the above Article was violated by the Court's failure to have statements of witnesses supplied to the Appellant. Indeed the Court's record is clear as from the time of plea taking, the court ordered the Appellant be supplied with copies of the statements at his own costs. The Appellant did not raise the issue to the effect that he could not raise the cost for the statements nor did he inform the court that indeed he raised the costs for the statements and he was denied the same. He did not inform the Court that he could raise the costs and sought to be supplied with statements and that was denied. The Appellant on several occasions informed the court he was ready to proceed with the case notwithstanding having not obtained the statement. He frequently complained of the delayed hearing of the case. I find that the Appellant had adequate time to obtain the proceedings and facilities to prepare his defence. He had opportunity to get the evidence the Prosecution intended to rely on in advance. The Court gave him reasonable access to the evidence when it made an order that copies of statements be supplied to him at his own costs but failed to comply with order of meeting the costs. In view of the above, it is my finding that the Court did what was required of it to actualize the Appellant's enjoyment of his constitutional rights as enshrined under **Article 50(2)(b)** and **(j)** and the **Constitution of Kenya, 2010**, and cannot be faulted in anyway.

25. The Appellant contends the Prosecution case is riddled with inconsistencies and contradictions and that the trial court erred in failing to consider the contradictions in the Prosecution's case. He based his argument on the fact that the Prosecution failed to agree on how the suspect was dressed. That the witnesses urged the suspect was wearing a white shirt but a brown one was produced before court. He urged PW1 talked of a white shirt while PW2 talked of a white T-shirt. That some witnesses talked of a sweater and others of pullover. I have perused the evidence of the Prosecution witnesses. PW1 talked of the suspect wearing clothes similar to the school uniform. That the shirt was white. PW2 testified the suspect had a whitish T-shirt, when they arrested him from under the bed. PW1 was categorical, the suspects was wearing a white shirt but the one produced was brown, white and blood stained. PW5 talked of a white shirt and having blue sweater all similar to the school uniform.

26. In the case of **Njuki V Republic (2002) KLR 77**, the Court addressed itself in respect of discrepancies in evidence of witnesses in criminal cases thus: -

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such nature as would create a doubt as to the guilt of the accused……however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".***

27. In the instant case, the witnesses were many, PW2 talked of a white T-shirt whereas PW1 and PW5 talked of a white shirt and it could have been a T-shirt or a shirt depending on what one saw. The only question that needs to be answered is whether there was sufficient light for the witnesses to see and identify or recognize the Appellant. The incident occurred as per PW1 when daylight was setting in. PW2 stated he followed the light when he heard his fellow students state *"here they are"*. PW2 ran after the suspect's light as it was still dawn. The suspect removed a blue or black sweater, continued running until he entered a house. All Prosecution witnesses confirm the suspect that they followed entered the

house from which they arrested him. That during the chase they did not loose sight of him. That during the chase they did not loose sight of him. His clothes were similar to the school uniform, though he was not a student of Maranda High School. I have considered the evidence of PW1, PW2 and PW3 as well as evidence of other Prosecution witnesses and from their evidence, I have noted some contradictions, are minor and should be overlooked as where in criminal cases witnesses are many, discrepancies are in many instances inevitable. All witnesses are not given some evidence. The contradictions put forward by the Appellant do not in my view dent the Prosecution case in anyway. I therefore disregard the contradictions and inconsistences raised by the Appellant. I find even if the trial Court did not consider such contradictions, the same were so minor that they could not affect the trial Court's judgment in anyway. The contradictions and inconsistencies raised by the Appellant are so trivial that they would not have affected the outcome of the case.

28. Whether the Prosecution proved the case against the Appellant to required standard of proof? The Appellant faced two counts; Count 1 of arson and Count II of assault. **Section 332(a) of the Penal Code: -**

> ***"322. Any person who wilfully and unlawfully sets fire to –***
>
> ***(a) any building or structure whatever, whether completed or not; or***
>
> ***(b) any vessel, whether completed or not; or***
>
> ***(c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or***
>
> ***(d) a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.***

Section 251of the Penal Code provides: -

> ***"251. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years."***

29. As regards the Count II, the complainant PW1 stated that he bumped to the people who he had seen earlier on running as they were searching for the arsonists. He was very close to them and described how they were dressed. That one of them was dressed in school uniform of Maranda High School, thus the Appellant. That the Appellant got hold of PW1's small finger of the right hand and bit PW1, kicked PW1, who pushed his face and he crossed the main road. PW1 alerted the other students, that the suspect was running away. PW1 joined other students, when the suspected had been apprehended. PW1 was treated at Bondo Sub-County Hospital. PW1 identified the doctor's notes as MFI-P4 and P3 form as MFI-P5. PW1 stated he was familiar with Appellant's face and identified him in court. PW4, a Clinical Officer, at Bondo District Hospital produced P3 forms as Exhibit 5 and a treatment chit as Exhibit 4 of PW1 who was treated on 24th September 2012 after assault on 20th September 2012 at 5:30am. He assessed the degree of injury as harm. The evidence of PW1 on his assault was corroborated by PW4 and the medical documents produced as exhibit 4 and 5. The treatment chit exhibit 4 and exhibit 5 show the PW1 was attended to on 20.9.2014. I therefore find the Prosecution proved beyond any reasonable doubt that Count II which the Appellant faced.

30. I now turn to Count I, where the Appellant faced an offence of Arson. In this case, there was no eye witness and the Prosecution case is entirely based on circumstantial evidence.

31. The principle applicable when considering circumstantial evidence was discussed in the case of **Abanga alias Onyango V Republic, CR. No. 32 of 1990 (UR)** at *page 5* where the Learned Judges of the Court of Appeal stated: -

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: -***

i. The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

ii. Those 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 conclusions that within all human probability the crime was committed by the accused and none else."

32. I have considered the evidence of PW1, PW2, PW3, PW5 and PW8. The evidence show that the school dormitory was at around 5:30am burned. That some suspects, one of whom had a school uniform and who was not a student of Maranda High School was spotted running away from the scene of the burning dormitory by several students who set up to arrest him. The suspect met PW1, bit his small finger and kicked him and PW1 raised alarm. That the other students chased the suspect without loosing his sight, till he entered a house from where he was arrested as he was hiding under a bed. The clothes he was wearing were similar to Maranda High school uniform were recovered from the suspect and produced as exhibit 1, 3 and 2. PW6, a Building Technician from Ministry of Public Works produced a report on fire tragedy in dormitory Ayany within Maranda High School which he had personally prepared on the request of the Deputy Principal on 20.9.2012. He made a finding that the cause of the fire would not be an electrical fault but was caused by people thus the report was produced as exhibit 6. PW7, No.85655 PC Emanuel Ekali of Scenes of Crime Office at the request of PW9, IP Kiriwa Tarus took photographs of the scene of crime at Maranda High School on 20.9.2012 at 1100hours. He produced 8 photographs as exhibit P7 and certificate as exhibit P8.

33. It is clear from the evidence of PW1, PW2, PW3, PW5, PW7 and PW8, the Appellant and another were the last persons seen by the students running from the scene of burning dormitory, was pursued by students, till he was apprehended from the house, he had run into from underneath the bed. The students from the time of chase upto the time of arrest of the Appellant never lost sight of the Appellant. I find the circumstance from which the inference of guilt was sought to be drawn was cogently and firmly established. The circumstances relied upon established the Appellant was at the school compound near the dormitory dressed in school uniform of Maranda High School when he was not a student at the school and was there at around 5:30am not being a watchman. He is therefore the only person who can tell how the school dormitory got burned as PW6 ruled out electrical fault. The circumstances relied upon were definite and unerringly pointing towards the guilt of the Appellant. I have further considered the entire evidence and find that there was no co-existing circumstances which would destroy or weaken the inference of guilt on the basis of the evidence before court. I find therefore the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that with all human probability, the crime was committed by the Appellant and none else.

34. The Appellant gave unsworn defence. He stated he knows the charges. He stated that he was at the material time of commission of offence asleep at his house; when he was awakened by some noises. He woke up and found his door and the window wide open. He saw some students besides his house standing with pangas. That he was with his wife in the bed. That he was assaulted till he lost consciousness, only to find himself in a hospital bed later. He was later charged with this offence. I have considered the Appellant's defence and find that the Prosecution witnesses placed him at the scene of crime. PW1 saw him and identified him when he bit his small finger and kicked him. PW2, PW3 and PW5 saw the Appellant running from the scene of the incident and pursued him to his house. PW5 rescued the Appellant from students who were assaulting him, took him to the D.O's offices and police came later and re-arrested him. The Appellant as per PW9, who rescued him and took him to Bondo Police Station never lost consciousness nor was he taken to the Hospital. The Appellant never raised his defence of alibi with any of the Prosecution witnesses. The same cannot be sustained as it was raised too late for the Prosecution to challenge it and I note PW1, PW2, and PW3 placed the Appellant at the scene of crime. I find the defence of the Appellant to be an afterthought and find it to be meritless.

35. I therefore find that Prosecution proved their case beyond any reasonable doubt. I find no merits in

this appeal.

36. The upshot is that the appeal is dismissed, conviction is upheld and sentence confirmed.

DATED AND SIGNED AT SIAYA THIS 27TH DAY OF JULY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Laban Odhiambo

2. Leonidah Atika

Appellant: in person, present

M/S Odumba: for State

J.A. MAKAU

JUDGE