REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 64 of 2014

GEORGE GICHUHI KAMATA…...……..……..…….APPELLANT

VERSUS

REPUBLIC ……..……...…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 2008 of 2012 delivered by Hon. C.N. Ondieki, RM. on 21st May, 2014)

JUDGMENT

BACKGROUND.

George Gichuhi Kamata, the Appellant herein was charged with the offence of arson contrary to Section 332(a) of the Penal Code. The particulars of the charge were that on 18th April, 2012 at Riruta in Nairobi within Nairobi County, jointly with others not before the court willfully and unlawfully set fire to Tunaweza millers and saw mill, the property of John Kibera Njoroge valued at Kshs. 48 million.

The Appellant was found guilty and sentenced to 2 years imprisonment. He was dissatisfied with the decision and he preferred this appeal. He raised the following grounds of appeal.

1. That the learned trial magistrate erred in finding the appellant guilty against the weight of the evidence adduced by the appellant and his witnesses.

2. That the trial magistrate erred by failing to make a finding that the only eye witnesses failed to identify the appellant in court.

3. That the trial magistrate erred in substantially relying on the hearsay evidence on which he used to render a guilty verdict.

4. That the trial magistrate erred by failing to consider the evidence of the defence witnesses who provided an alibi as to the whereabouts of the appellant at the time of the incident.

5. That the trial magistrate erred in failing to consider the corroborative evidence of the two defence witnesses who were also present.

6. That trial magistrate erred by shifting the burden of proof from the prosecution to the defence.

7. That the trial magistrate erred by relying on circumstantial evidence which was not corroborated.

8. That the trial magistrate erred in sentencing the Appellant to serve a custodial sentence without the option of a fine, which sentence, was not justified.

9. That the trial magistrate erred by ignoring the answers advanced by the investigating officer on cross examination to the effect that he relied on the information of the witness to charge the appellant.

10. That the trial magistrate erred by not making a finding that the investigating officer did not dust the scene for finger prints in the absence of corroboration of the eyewitness' evidence.

11. That the learned magistrate erred by convicting and sentencing the appellant.

SUBMISSIONS

The appeal was canvassed by way of filing written submissions. The Appellant was represented by learned counsel, Mr. Makori. He submitted that the evidence of PW1, PW2, PW3 and PW4 did not connect the Appellant to the offence in question. He submitted that the evidence of PW5, who was the key prosecution witness was relied on by the trial magistrate to found a conviction even though the witness could not identify the Appellant in the dock. He submitted that the witness testified that he recognized the Appellant whom he had known for a week but surprisingly he could not identify him in court. He therefore submitted that the evidence adduced was not sufficient to sustain a conviction for the offence charged.

Counsel submitted that the trial court erred in considering the evidence of PW1, PW2, PW4, PW6, PW7 and PW8 as direct evidence when it amounted to hearsay evidence. He submitted that the fact that the alibi defence of the Appellant was never dislodged created doubt in the prosecution evidence that was weak, in any event.

He further submitted that the particulars of the charge as framed were prejudicial to the Appellant as they did not conform to Section 134 of the Criminal Procedure Code. This was because it was alleged that the offence in question was committed by the Appellant jointly with others not before the court whereas the evidence adduced was clear that the offence was committed out by the Appellant alone.

He concluded by submitting that the lower court erred in convicting the Appellant when the only evidence available to link him to the crime was the evidence of a single identifying witness who was not reliable. He therefore prayed that the appeal be allowed.

The Respondent, represented by learned State Counsel Ms. Aluda opposed the appeal. She submitted that the prosecution had demonstrated that the Appellant committed the offence owing to a long standing grudge between himself and PW1. That further the Appellant had issued numerous threats to PW1 to vacate the premises and that the arson was an act in actualization of the said threats. She submitted that the circumstantial evidence pointed at the Appellant as the culprit. In that case, the trial magistrate properly applied the doctrine of common course of natural events and human conduct correctly. She concluded by submitting that he evidence on record was credible, tangible and corroborated by the documentary evidence adduced. She therefore prayed that the appeal be dismissed.

EVIDENCE

This court has a mandate, as a first appellate court, to reconsider the evidence as a whole and come up with its own conclusions. See: **Nzivo v. Republic[2005] 1 KLR 699.** I will accordingly summarize the evidence adduced before the trial court.

The prosecution's case was that the Appellant and the complainant were involved in a tussle over a rent increase that the Appellant, the landlord, wished to implement. The complainant (PW1) refused to comply and so the Appellant decided to evict him forcefully by burning down the premises. He began by pulling down a fence that lay between the saw mill and his house and thereafter torched the place. He was seen by the night watchman.

PW1, John Kibera Njoroge the complainant was a businessman who ran Tunaweza millers and also sold timber. He recalled that on 22nd July, 2009 the landlord (Appellant) had flattened the fence separating the saw mill from his house. The two entered into a lease agreement dated 22nd July, 2009 that was valid for eight years. The rent was payable by a sum of Kshs. 480,000/ that PW1had lent him and a further Kshs. 7,000 monthly rent. He produced a deposit slip paid on 8th May, 2012 and an application for registration of lease dated 22nd May, 2012.

PW1 recalled that on 18th April, 2012 he was sleeping when at around 3.00 a.m. he received a call from one of his employees one Mutinda. He informed him that his business was on fire. He called the OCS, Riruta Police Shtation and informed him of the fire. The younger brother to the Appellant also called him. He went to the site the next morning and found it was all razed down and all the machines had burnt down. He testified that nobody was at the business except his watchman whose name he could not recall.

He testified that the Appellant used to issue threats to him to vacate the premises if he was not willing to pay an increased rent of Kshs. 20,000/-. He concluded by testifying that when he tried to reconstruct the structure the Appellant opposed the action and informed him that he was selling the plot.

PW2, David Mbugua Kamata was a brother to the Appellant. He testified that on 17th April 2012 the Appellant informed him that he wished to sell his land in Riruta. On the fateful night at around 3.00 a.m. he called him again and told that a fire had engulfed the complainant's business. He confirmed the incident later on after visiting the site.

PW3, David Kimani Kibera testified that he learned of the incident from his mother on 18th April, 2012. He visited the scene and confirmed the same. He testified that the watchman informed him that the Appellant had burnt the down the premises.

PW4, Michael Mutinda Mutemi testified that on 18th April, 2012 he heard an explosion from the direction of Tunaweza millers and also saw light emanating from that direction. He opened his door and went out where he saw Tunaweza Timber yard burning. He heard someone shouting for help and he recognized that it was the watchman's voice. He heard the person say that the Appellant had burnt the timber yard. He moved closer and enquired from the watchman why he was mentioning the Appellant's name and the watchman informed him that he saw the Appellant torch the place. They tried to fetch water to douse the flames before the Fire Brigade arrived later and extinguished the fire. He testified that throughout their ordeal the Appellant was in his house and never came to assist them until people forced him out of his house.

PW5, Justus Obara Obae was a watchman on the night duty. His testimony was that at around 1.00 a.m. he went to the sentry box and he heard dogs furiously backing near the machines. He tip toed toward their direction and when he was closer he saw the Appellant. The security lights were on around the structure so he could clearly see the Appellant. He did not move closer and kept vigil to see what the Appellant did next. After a while he saw the Appellant walk away towards his house. He then saw a fire at the structure. He raised loud alarm to attract attention of the people. Fire fighters arrived and helped extinguish the fire. During all this time the Appellant did not arrive. People arrived at the scene and he explained to them what had transpired. The mob then went to the Appellant's house and furiously knocked on his door and he finally emerged. He testified that he knew the Appellant for about a week when the fence separating his house from the saw mill was demolished.

It is worthwhile to note that the witness was asked to identify the Appellant in the dock but was unable to do so. The Appellant was then sitting about two metres away from the witness. In cross examination he

stated that his failure to identify the Appellant was due to the fact that the Appellant was dressed differently.

PW6, David Mwangi Gatheri testified that on 16th April, 2012 he received a call from the Appellant who expressed his displeasure at the amount of rent he was receiving. He advised him to seek higher rent but the Appellant was furious and informed him that he was going to set the yard on fire. He testified that on 18th April, 2012 he heard that the yard had been gutted down by a fire. He visited the site and confirmed the incident.

PW7, Paul Kithuku Kariuki recalled that on 12th April, 2012 he met the Appellant who informed him that he would demolish the entire saw mill premises. At that time, he had already pulled down the fence separating the saw mill and his house. PW7 had been sub- let a business premises by PW1. On 18th April,2012 he went to the site and found that it had been burnt down.

PW8, No. 59859 CPL Jairus Namiti of CID Dagoretti investigated the case. He recalled that on 18th April, 2012 he was on duty when around 2.00-3.00 a.m. he heard communication over the radio that there was a fire along Kikuyu Road. He teamed up with other officers and they went to the scene. They contacted the City Council Brigade who responded immediately and out the fire. He later teamed up with the DCIO Dagoretti and revisited the scene at 8.00 a.m. He arrested the Appellant after the watchman implicated him in the crime. Furthermore, the evidence of the government Chemist was that the fire did not occur naturally.

PW9, Marion Njeri Chege was a Government Chemist. She was tasked to establish the cause of the fire. Her report dated on 14th June, 2013 indicated that the fire was caused by diesel. **PW10, No. 231396 CIP Jackton Bengi** of the scene of crime, Nairobi Area took photographs of the burnt down site and produced them in court. **PW11, Florence Karaya** an advocate of the High Court of Kenya testified that she had drawn the lease agreement between the Appellant and complainant dated 22nd July, 2009 which she produced it in court. **PW12, Gregory Aswani Shikanda** who worked at the county office in Nairobi in the public works department assessed the cost of damage occasioned by the fire. In his valuation report, the cost of the machines and the timber destroyed by the fire was approximately Kshs. 27,426,860. He adduced the report in evidence.

The prosecution then closed its case and the court made a ruling that a prima facie case had been established. The Appellant was called to defend himself. He gave a sworn statement and called two witnesses. He testified as **DW1.** He recalled that on 17th April, 2012 he was at home when at around 2.00 a.m. he heard tenants screaming while calling out his name and stating that the house he had recently built was on fire. He rushed out with his wife and children and participated in putting out of the fire. Later the fire brigade and police arrived. At around 3.00 a.m. they went back to sleep. On the following day police visited his house and arrested him. He was taken to Kabete Police Station and charged with arson. He testified that he did not leave the house on that evening. In cross examination he testified that he wanted the complainant to leave the premises after he was given land by his mother. He stated that the fence had fallen on its own as it was built on a swamp.

DW2, Elizabeth Wanjiku Mbugua, the wife of the Appellant together with **DW3, James Gichuhi**, the Appellant's son entirely corroborated the testimony of the Appellant. They testified that the Appellant was throughout the night of the incident in the house with them until they were alerted about the fire.

DETERMINATION

The issue for determination is whether the case was proved beyond a reasonable doubt. It is clear that the Appellant was convicted purely based on the evidence of PW5, the watchman who was guarding the premises on the fateful night. He testified that he saw him walking to the point where the fire began and after he had returned to his house, he heard loud bang that set off the fire. His further testimony was that he had known the Appellant for about a week before the incident as he lived next to the saw mill. That being the case, PW5 would have identified the Appellant through recognition. In court, he was asked to

identify him as he sat just two metres away from him. Surprisingly, he could not recognize him. It then defeated sense how the trial court arrived at a verdict that PW5' s evidence was strong enough to found a conviction.

In cross examination, PW5 stated that he had been unable to identify the Appellant in court because he was dressed differently. The record speaks for itself. In his evidence in chief, he did not state that he identified the Appellant at the scene because of the manner of his dressing but because he knew him well as PW1's landlord. Further, his evidence was that there were lights on at the site, which, anyway, would have helped him positively identify the Appellant. But this version of story was contradicted by his employer who testified that the lights were off at the location when he was cross examined. PW5 did not also describe how the Appellant was dressed that night and that it was only by his dressing that he could have identified him. It is then safe to conclude that PW5 never at any time saw the Appellant on the fateful.

Although other evidence suggested that the Appellant could have burnt the premises as he wanted PW1 evicted for failing to pay increased rent, that line of argument was not substantiated by any cogent evidence. It amounted to hearsay evidence which the court could not rely upon. Moreover, the prosecution having opted to rely on evidence of identification of the Appellant by PW5 was bound to proof the same beyond a reasonable doubt. The fact that PW5 was unable to identify the Appellant in court meant that he had not seen him burning the saw mill and that he too was relying on hearsay evidence that was based on rumor and suspicion. It is trite the suspicion, however strong can never found a ground for conviction.

My view is that the Appellant tendered a plausible defence that he was not at the saw mill yard when the fire began. The same was corroborated by his two witnesses and the prosecution did not dislodge it at. Effectively, had the learned trial magistrate properly considered the Appellant's defence, he would have vindicated him. And as the law is, the burden of proof remains with the prosecution to proof their case beyond a reasonable doubt. Where that burden is not discharged the court has no recourse but acquit an accused person. I not restate that the prosecution did not discharge this burden. On a summary of the evidence adduced, I cast doubt in my mind that the Appellant committed the offence. I shall resolve this doubt to the benefit of the Appellant.

On whether the charge sheet was defective, the Appellant submitted that the prosecution did not establish that he allegedly committed the offence together with others but solely. In that case, he submitted that the charge sheet contravened Section 134 of the Criminal Procedure Code which provides as follows;

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

I entirely agree with the Appellant that the evidence only demonstrated that the Appellant could have committed the offence alone. However, he pleaded to only one offence of arson. Evidence was tendered in proof of only that offence. He defended himself against the said offence. He was therefore not prejudiced by the manner in which the charge was drafted. As such, no miscarriage of justice was occasioned. In any case, the error being technical in nature is curable under Section 382 of the Criminal Procedure Code.

In the end, the appeal succeeds. I allow the same. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. I t is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST OCTOBER, 2016

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. M.s Makori for the Appellant.

2. Ms. Atina h/b for Aluda for the Respondent.