



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

CRIMINAL APPEAL CASE NO. 119 OF 2013

[Being an appeal from Kimilili CR. No. 965 of 2011

By Hon. G.R. Sagero [ag. PM] on 7th October, 2013]

DANIEL WANYAMA CHACHA.....1ST APPELLANT

CHRISTOPHER LUMBASI.....2ND APPELLANT

JUDGMENT

1. The Appellants were charged with the offence of Arson contrary to Section 332 (a) of the Penal Code.

The particulars thereof being that on the 12th of August, 2013 at around 5.00 p.m at Lukusi village, Kuywa sub-location in Kimilili Bungoma jointly, willfully and unlawfully set fire on the complainant's grass thatched house destroying the same and household goods therein.

2. The prosecution had 3 witnesses and the prosecution case was the complainants brother in-law had purchased the portion of land where the house was located from the 2nd appellant Daniel Wanyama and on the material day the appellants went to the said house and asked the complainant and PW2 to move away and the 2nd appellant lit a match where upon the house was razed down. The police appeared at the scene much later and found the scene had been disturbed and kale had been planted thereon.

3. In their defence the appellants denied that there was ever a house at the alleged place and that they neither knew the complainant PW1.

4. In his judgment the trial court believed the evidence of the prosecution, disbelieved the appellants and took into account the fact that the two disappeared and had to be re-arrested at the point when the court wanted to visit the site.

5. At the time of hearing the appeal the 2 appellants relied on written submissions that expounded on their grounds of appeal. They filed joint submissions. Their grounds of appeal summarized below were similar as follows;

- That their rights under the constitution were violated.
- The court did not analyze the evidence on record.
- The charge sheet was defective

- There was misinterpretation of the law.
- The court did not consider mitigation
- The sentences were harsh and excessive

6. The State did not expose the appeal on the grounds that the police arrived at the scene 3 days later, the house had been burnt and the photograph produced was of no assistance;

Further there is doubt in the evidence and that this is a proper case for a retrial.

7. Despite the submissions by the State this court is not bound by the same, the court has to consider the evidence afresh, evaluate the same in order to arrive at a decision **see Okeno Vs. Republic [1973] E.A at 322.**

PW1 informed the court that her husband is deaf and dumb. The space had been purchased for them by a brother in law from the 2nd Appellant (1st accused) and they had lived in the area for 7 years before the house was burnt down. She was clear as to who burnt the house. She knew the two Appellants well.

Her evidence was corroborated by PW2 without any contradiction. PW1 reported the matter to various law enforcement agencies ending at the police who went to the scene and found the same disturbed in that the space had been cultivated and vegetable planted as seen from the photograph. The said photographs may have been taken after some time. This in my view does not affect the case before court.

8. In weighing the cogent and behavable evidence of the prosecution witnesses I am of the view that the defence by the appellants was a mere denial and did not displace the prosecution case.

9. In sentencing the appellants the court did take into account the mitigation. Indeed the 2 were said not to be first offenders and this was considered by the trial court. Arson is a serious offence, as noted by the trial court, it is also noteworthy that the appellants frustrated the court's effort to visit the scene which the court had wanted so as to have a real glimpse of the scene. They disappeared and a warrant had to be issued against them.

10. Although the issue of being brought to court late was not raised at the trial level, should not if even this is so, it would not be a reason to acquit them. They are at liberty to follow the issue at a different form.

10. In the circumstances of this case I find that the prosecution had proven its case and to acquit the appellant would be a travesty of justice. I do not find any merit in the appeal and the same is dismissed.

Dated at Bungoma this 27th day of October, 2016.

ALI-ARONI

JUDGE.