REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL CASE NO. 18 OF 2014

(From the original conviction and sentence in Criminal Case no. 41 of 2013 of the Senior Resident Magistrate's Court at Garsen before Hon. J. Kituku – SRM)

ANGOGO JOEL OGADA …..... ACCUSED

VERSUS

REPUBLIC ….....APPELLANT

JUDGMENT

The appellant was charged with the offence of Arson contrary to Section 332 (a) of the Penal Code. The particulars of the offence were that the Appellant, on the night of 6th and 7th day of February, 2013 at midnight at Tana Salt company in Tana Delta District, the appellant willfully and unlawfully set fire to a building namely Tana Salt Administration Block, valued at kshs. One (1) Million, and during the process the items inside the building got burnt all valued at kshs. 2,000,000/- totaling to Kshs. 3,000,000/- belonging to Dickson Ngowa Ziro care of Tana Salt Company Limited.

The Appellant was convicted and sentenced to serve seven (7) years imprisonment. Counsel for the Appellant filed nineteen grounds of appeal. They can be summarized as that the evidence on identification was not conclusive, that the court erred by failing to expunge the evidence of PW1 and PW2 from the record, that there was no evidence to prove that the fire was caused by an act of arson, that the prosecution failed to discharged the burden of proof, that the Appellant's defence was not considered and that the evidence on record was not properly analysed.

Mr. Onyango, Counsel for the Appellant combined the nineteen grounds during his submissions. Counsel submitted that the conviction is based on alleged recognition. There is no evidence on the nature and intensity of the light used to identify the Appellant. The trial court expounded this evidence and in its judgment stated that the fire was intense and big. Counsel relies on the case of **PETER MBURU & OTHERS -VS- REPUBLIC (NYERI CRA 292/2011**). Mr. Onyango further submitted that PW1 and PW2 did not give the Appellant's names to the neighbours who went to the scene. The Appellant's name was given after three days and this was an afterthought. Counsel relies on the case of **JAMES JINENGA -V- REPUBLIC (NAKURU CRA No. 59/2011).**

It was further submitted for the Appellant that no one saw the Appellant setting the building on fire. There was no professional evaluation of the cause of the fire. It was mere suspicion that it is the Appellant who caused the fire. The defence applied for the recalling of PW1 and PW2 for further cross-examination. The application was granted but the two witnesses were never recalled. This led to violation of the Appellant's constitutional right to a fair trial. The two witnesses were being shielded away from further

cross-examination and their evidence ought to have been expunged from the record. Counsel further contends that the trial court was biased. Several applications made by the Appellant during the trial were dismissed. The Appellant's alibi defence was dismissed yet he called one witness. There was material inconsistencies in the prosecution case. PW1 gave the name of PW2, his workmate as Hussein and not Abdulla. The Appellant denied knowing both PW1 and PW2 and therefore the two witnesses lied to the court. PW1 testified that the Appellant was at the fence yet his statement to the police indicated that he was on top of the burnt building. The date of arrest of the Appellant is also contradicting. PW1 alleged that he was arrested on the 7th day of February, 2013.

Mr. Onyango maintains that there was a grudge between the Appellant and the Complainant based on land dispute. There were other civil criminal cases in court involving the parties. The Appellant's house was brought down the following day after he was convicted.

The State opposed the appeal. Mr. Monda submitted that the conviction was based on recognition. PW1 and PW2 knew the Appellant. There was enough light and the conditions were not difficult. PW4 was given the Appellant's name by PW1 and PW2. PW5, the area Assistant chief was an independent witness and was given the name of the Appellant. The trial magistrate correctly analysed the evidence and warned himself on the reliance of the identification evidence. Further, Mr. Monda maintains that the alibi defence was correctly dismissed. The recalling of PW1 and PW2 was for further cross-examination. The two witnesses had been duly cross-examined. There was no violation of the Appellant's Constitutional right. The case was proved as required.

I am duty bound to evaluate the evidence before the trial court and make my own analysis. The record of the trial court shows that five witnesses testified for the prosecution. The Appellant testified and called one witness. ABDI MOHAMED was PW1. His evidence was that he was a night watchman employed by Tana Salt Company. He knew the Appellant as a neighbour. On the night of 6th February, 2013 at about midnight he was on patrol when he saw fire emanating from the company's office. He saw two men nearby. He recognized the Appellant and he called his name. The Appellant ran away. He called his bosses who went to the scene at about 2.00am. He was with his fellow watchman, PW2. PW1 further testified that he took the police to the Appellant's home and the appellant was arrested. He saw the Appellant at the scene at a distance of about five (5) metres. He had known the Appellant for about five (5) years. The company offices had their made of *makuti* (thatches).

PW2: ABDULLAH BALALI testified that he was employed by Tana Salt Company as a night watchman. He too knew the Appellant. On the night of 6th February, 2013 he was on duty when he saw fire burning the offices. He went to the scene and saw someone running towards the gate. He recognised the person as the Appellant and called his name. He ran away. The fire was big and they were unable to put it off. Their supervisor, Abdalla, went to the scene at 2.00am. They gave the Appellant's name to the police.

PW3: ABDALLA SWALEH OMAR was a supervisor with Tana Salt Company. He was called that night by PW1 and informed that the company offices were on fire. He contacted the manager (PW4) and they agreed to go to the scene that night. At the scene PW1 and PW2 told them that they had seen two men at the scene. The witness was recalled but by then he was sick and could not attend court.

PW4: DICKSON NGOWA was a manager with Kurawa Industries Ltd. He was contacted by PW3 and went to the scene. They found the office roof had been completely burnt. The two guards who were on duty told them that they had identified the Appellant. The matter was reported at the Garsen Police station. It was his evidence that Kurawa Industries Limited is a sister company to Tana Salt Company. He estimated the loss caused by the fire at Kshs. Three (3)million. The witness was recalled and reiterated the same evidence.

PW5: BARISA SHAMBARO was the area chief. He got information at about 1.00am on 7-2-2013 from PW3. They went with PW3 and PW4 to the scene and arrived at about 2.00am. It is his evidence that the security guards told them that they had seen two people but only recognised the Appellant. They were given his name as Ogada. PW5 was also recalled and his evidence was the same.

PW6: P.C PETER AUKA was based at the Garsen Police Station. He investigated the case. The incident was reported to the police station on 7th February, 2013 at 2.00pm by PW4. PW6 visited the scene and found PW1 and PW2. It is his evidence that PW1 and PW2 told him that due to the big fire they were able to recognise the Appellant and even called his name. The Appellant was arrested on 17th February, 2013 and charged with the offence.

The Appellant was put on his defence. In his sworn evidence he stated that he is a farmer from Kanagoni in Magarini District. On 6th July, 2013, he was at his home at Kanagoni. His neighbour JONATHAN KAHINDI (DW2) was sick and in serious condition. He stayed with his neighbor the whole night at the neighbbour's house. In the morning he took him to Marereni private hospital for treatment. He was arrested on 17th February, 2013 and charged with the offence. He denied that PW1 and PW2 were known to him. He further testified that he lives near Kurawa and Kemu Salt Companies but not near Tana Salt Company which is about 30 kilometres away. He had differences with PW4, Dickson who took surveyors to his land and started demarcating it. He objected to the demarcation and together with neighbours filed Malindi CMCC No. 73 of 2004 and obtained a restraining orders. It was his evidence that Kurawa Salt wanted to extend their land and the extension would have annexed his land.

DW2, JONATHAN KAHINDI BAYA testified that he is a farmer from Kanagoni Village. He knows the Appellant. On the 6th February, 2013 he had an appendix problem and the appellant stayed with him the whole night. The Appellant went to his house at 6.00pm and stayed with him until morning. He does not know PW1 and PW2. It is his evidence that Tana Salt Company is about 12 kilometres from their place. They have a land dispute with Kurawa Salt Company and his son and the Appellant's wife were charged in a criminal case.

The main issues for determination are whether the trial court ought to have expunged the evidence of PW1 and PW2 from the record, whether there was need for a specialist's report on the cause of the fine, whether there was violation of the appellant's constitutional rights, whether the appellant's evidence was considered and whether the prosecution proved its case.

Although the petition of appeal contains eighteen (18) grounds of appeal, several of those grounds deal with the evidence of PW1 and PW2. The two witnesses testified and were cross-examination by the appellant. The evidence of PW1 and PW2 shows that they informed the court that they were staying at Tana Salt Company where they were employed as watchmen. According to them the company is neighbouring the appellant. The two witnesses did not tell the court that they were original residents of that area they testified on 11-3-2013.

The record also shows that the prosecution proceeded with the case and called all its witnesses before the appellant retained the services of an advocate. It appears that the prosecution case was closed on 13th May, 2013 when PW3, PW4, PW5 and PW6 testified. The case was listed for defence hearing on 12th June, 2013. The appellant informed the court that he would call two witnesses. On 12th June, 2013 the appellant informed the court that he had an advocate on 30th July, 2013, the prosecutor informed the court that PW1 and PW2 had left employment at Tana Salt Company and he did not have their contacts. By that time Mr. Gekanana Advocate, was appearing for the appellant. Mr. Onyango came on record on 11th October, 2013. By then the order for recall was for PW3 to PW5. The prosecutor had indicated that PW1 and PW2 could not be traced. Mr. Gekanana informed the court that he had no objection on the issue of not recalling PW1 and PW2 but wanted typed proceedings to help him deal with PW3, PW4 and PW5. The prosecutor reiterated his position about PW1 and PW2 on 11th October, 2013. Given the record of the trial court, I do find that there was no intention to block the defence counsel from cross-examining the two witnesses. The witnesses according to the prosecutor were from a nomadic community. Had the appellant brought in an advocate right from the beginning, those two witnesses would have been cross-examined by the advocate. It is true that they were the main backbone of the case but their failure to attend a second time for further cross-examination cannot be held to have been deliberate. Efforts were made to trace the witnesses. The other witnesses were recalled and subjected to further cross-examination. The trial court made the investigating officer swear an affidavit on the efforts he had made to trace the two witnesses. The affidavit of chief inspector Joseph Lagat sworn on 20th March, 2014 indicates that the two witnesses had their services terminated by their employer and could

not be traced. The trial court made its ruling on the matter.

Counsel for the appellant contends that the evidence of PW1 and PW2 ought to have been expunged from the record. It is clear that the two witnesses had already testified and cross-examined by the appellant. There is no legal requirement that if a witness is not cross-examined by an advocate then his/her evidence should be expunged from the record. The recalling of the witnesses was for further cross-examination. Their evidence was already part of the record and the trial court correctly allowed their evidence.

The next issue relates to the cause of the fire. Counsel for the appellant maintains that the cause of the fire ought to have been subjected to expert analysis. Section 322(a) penalizes any one who willfully and unlawfully sets fire to a building. The prosecution alleged that it was the appellant who had unlawfully and willingly set the building on fire. The prosecution had to prove that allegation and did not require to go into the details as to whether the person they were accusing had used petrol, paraffin or just match stick to cause the fire. The prosecution was not alleging that the fire was caused by an electric fault but by the appellant. The contentions by the appellant's counsel are misplaced and would make investigations of such cases expensive.

I have gone through the judgment of the trial magistrate. I do find that the trial court evaluated the evidence of both parties in great detail. The analysis by the trial court is quite informed and fair. The appellant's evidence was considered. Whenever an accused is put on his defence, he is under a duty to give his side of the story and rebutt the prosecution evidence. This cannot be held to be shifting the burden of proof to the accused. All what the court is saying is “what is the accused's response to the evidence adduced by the prosecution witnesses which evidence points to the accused's guilt”

The appellant brought in DW2 who was his neighbour. The appellant gave an alibi defence. DW2 alleged that he was sick on the night the offices were burnt and the appellant was with him the whole night. He was taken to hospital the following morning. The trial court currently doubted that evidence as no medical notes or record was produced. A criminal trial as an inquiry on the truth of the prosecution's allegations against the accused as well as the accuseds denials against those allegations. The appellant was expected to prove his alibi and fortify it with concrete evidence. The evidence of the defence showed that DW2 was taken to a private hospital, the question then is, where was the medical card or treatment notes. DW2 Jonathan Kahindi Baya was alleged to have been in serious health condition. He was taken to a private clinic at Marereni. I am satisfied that the trial court properly evaluated the entire evidence and the grounds of appeal on the basis of analysis of the evidence must fail.

The next issue is whether he prosecution proved its case to the required standard. As indicated hereinabove, the prosecution case was mainly built on the evidence of PW1 and PW2. According to the two witnesses, they saw the appellant at the scene. They called the appellant by his name. Counsel for the appellant submitted that the appellant's names were not given to the neighbours who went to the scene and were given after some time. It is clear from the evidence of PW3, PW4 and PW5, that they arrived at the scene at 2.00am and PW1 and PW2 gave them the appellant's names. According to PW2, the fire started at midnight. PW4 found PW1 and PW2 at the scene. According to PW5, they reached the scene at 2.00am. The names of the appellant were given to the witnesses at the scene and therefore the contention by counsel for the appellant that the names were given late is not true. The matter was reported at the Garsen Police Station the following afternoon.

According to PW2, they were unable to put off the fire as it was big. It is the big fire which enabled them identify the appellant. Counsel for the appellant submitted that the source and intensity of the light was not explained. It is evident that the source of light was from the fire. The evidence shows that the roof of the burning house was made of *makuti* thatches. It is general knowledge that such roof made of *makuti* is inflammable. The trial court did not bring in the issue of a big fire as alleged but its part of the record. PW1 and PW2 testified that they knew the appellant and even called his name. There is no evidence that the two witnesses had been couched to implicate the appellant.

The appellant is of the view that he is being framed as he had a land dispute with the complainant company and that PW4 was against him. The civil suit number 73 of 2004 before the Malindi Chief

Magistrate's Court has thirteen plaintiffs. There is no evidence that the appellant had been singled out and was being targeted. The trial court dwelt on this issue and dismissed the suggestion that the fire could have been deliberately started with the intention of implicating the appellant.

Other issues raised by the appellant are that the trial court was biased since most of the applications by the appellant were dismissed. It is also submitted that there were material inconsistencies such as PW1 referring to PW2 as Hussein yet PW2 is Abdula. The appellant denied knowing PW1 and PW2 yet the two witnesses alleged that they knew him. The totality of the record of the trial court shows that indeed the trial court was fair to all parties. The dismissal of the applications were done within the law. PW1 referred to PW2 as Hussein Abdi. PW2 gave his name as Abdullahi Balali. PW2's surname could have been Balali and his other name could have been Abdi. PW2 testified that they were in night patrols. PW1 stated that his fellow watchman was with him all along. I don't find that there is any inconsistencies on the names of the two witnesses to create doubt on their testimonies. The appellant was within his right to deny knowing the two witnesses. However, such information could have come out clearly during his cross-examination of the witnesses. PW1 informed the appellant during cross-examination that the appellant used to buy milk from his home and PW1 went to the appellant's home to demand his milk debt. There was no denials of those allegations.

In the end, I do find that the appeal on conviction lacks merit and is disallowed. There was no violation of the appellant's constitutional rights. The appellant was accorded all the time to cross-examine witnesses as well as to defend himself. The non-recalling of PW1 and PW2 is not a violation of the appellant's rights.

Under Section 332 the maximum sentence for the offence of arson is life imprisonment. The appellant was sentenced to serve seven (7) years imprisonment. Taking into account the long wrangles between the appellant and the complainant, it is evident that the appellant took the law into his own hands. He has now been in prison for about one (1) year. He must have learnt his lesson the hard way. I will set aside the seven (7) year imprisonment sentence and replace it with two (2) years imprisonment from the date of conviction.

The up shot is that the appeal on conviction lacks merit ad is disallowed. The sentence is reduced to two (2) years imprisonment.

Dated and delivered this **13th** day of **March, 2015**

Said J. Chitembwe

JUDGE