



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 65 OF 2015

(CORAM: J. A. MAKAU – J.)

KENNEDY ODERO OKUMU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 1206 of 2014 in Bondo Law Court before Hon. M. M. NAFULA – S.R.M.)

JUDGMENT

1. The appellant **KENNEDY ODERO OKUMU** was charged with an offence **Arson Contrary To Section 332(a) Of The Penal Code**. The particulars of the offence are that on 26th/27th December, 2014 at about 2400 hrs at Dienya, West Sub-Location in Siaya County, wilfully and unlawfully set fire to a building namely a dwelling house of grass thatched, assorted goods all valued Kshs.20,000/= belonging to M A O.
2. The complainant M A, PW1 testified that on 25th December, 2014 at Midnight she was asleep when her child informed her that her house was on fire. She came out and found her kitchen where her daughter (PW2) was sleeping was on fire. She attempted to put off the fire. PW2 her daughter told PW1 that her husband Kennedy Odero, the Appellant had come and asked her to open the door and the kitchen was on fire. PW1 called the village elder, Assistant Chief and village elder of the Appellant. PW1 was then advised to report the matter to Akala Police Station. PW1 did not witness the Appellant set the fire to the house and identified MFI (a) and (b) as the kitchen. During cross-examination PW1 confirmed the Appellant was married to PW1's daughter for 5 years but the two had differed. PW1 testified PW2 told her the Appellant came and called her and confirmed that the Appellant always comes to her home at night and abuses her.
3. PW2 Judith Achieng on her part testified that the Appellant is known to her and he is her husband for 15 years. That on 26.12.2014 at 12.00 a.m. she was at her home when the Appellant came and called her by her name PW2 confirmed she knows the appellant's voice very well. That after 30 minutes PW2 saw fire lighting up on the house which was from all directions. PW2 screamed and PW1 came to assist put off the fire. The house got burnt up as per photo 1 (a) and (b). That when PW2 went out she didn't see the appellant. PW2 called village elder from Appellant's place and also reported the matter to the Assistant Chief then to Akala Police Station. PW2 testified she had a grudge with the appellant and that is why she had relocated to her parent's home. During cross-examination PW2 testified that she had differences with the appellant and that the appellant knew PW2 was at her parent's home. PW2 testified that the appellant had always been going to her parent's home and calling her by her name. She testified that she was sleeping in the house

with her daughter. She denied having framed the charges against the appellant. Testifying she is the person who saw the appellant burning the house and stating she can call another witness.

4. PW3 No. 67148 Cpl. John Turunya of Akala Police Station testified that on 27.12.2014 at 10.00 a.m. a report of arson was made to the station by one Judith (PW2) daughter to the complainant (PW1). That he took witnesses statement on 28.12.2014 and traced the Appellant at Akala Trading Center and then arrested him. PW1 identified the Appellant at Police Station on 29.12.2014. PW3 visited the scene and found that the whole house had burnt to ashes. He too photographs of the burnt house. He produced photos as exhibits 1 (a) and (b) and later charged the appellant with this offence. During cross-examination PW3 testified he did not find the appellant with anything when he arrested the him. That he relied on evidence of witnesses and also visited the scene and confirmed burnt house. He added he did not know what burnt the house.
5. The Appellant when put on his defence stated that he would give unsworn statement. The Appellant testified that on 28.12.2014 he was at 3.00 p.m. at Akala Market when a Police Officer took him to Akala Police Station and later charged him with this offence.
6. The trial Magistrate evaluated the prosecution's evidence and convicted the appellant for the offence of arson and sentenced him to imprisonment for 5 years. On convicting the appellant the trial Magistrate expressed herself as follows:-

“I believe that the house had been burnt down completely in as much as PW2 did not see the accused person burn down their kitchen physically, she heard his voice and after a while their kitchen was on fire. He is the person who set the kitchen ablaze he was the only person who was at the scene at that time.”

7. Aggrieved by the decision of the trial magistrate, the appellant has lodged this appeal dated 21st May, 2015 challenging the trial Magistrate's Court dated 30th April, 2015 raising the following grounds:-

- a) **That the appeal be allowed.**
- b) **That I may be present during the hearing of the appeal.**
- c) **That I be served with copies of proceedings to enable me submit further grounds.**
- d) **That may this conviction be quashed, sentence be set aside.**

8. This is first appellate Court and as first appellate Court I have subjected the entire evidence adduced before the trial Court to a fresh evaluation and analysis and have come to my own conclusion while bearing in mind my limitation since I neither saw or heard the witnesses and have given due allowance. I am in this regard guided by the case of **Odhiambo V Republic (2005) KLR Page 565** in which Court of Appeal addressed itself as follows:-

“On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial Court did and therefore cannot tell their demeanor.”

9. The evidence against the appellant is that of recognition through voice identification by a single witness, PW2.

10. I have very carefully considered the evidence of PW2 who claimed to have known the appellant as her husband for the last 15 years. PW2 testified that on 26th December, 2014 at 12.00 a.m. the appellant called her by her name and testified she knew his voice very well. That after 30 minutes PW2 saw fire lighting the house. That when PW2 went outside she did not see the Appellant PW2 testified she had grudge with the appellant. PW1 testified that when she went out

PW2 told her, her husband, that is the appellant, had come and asked her to open the door. Then at the same time the kitchen went on fire. PW3 in his evidence did not testify PW2 in her reporting, reporting having given the name of the person who set the house on fire. He testified PW2 made a report of arson. He did not state on what basis he traced the appellant at Akala Market and why he had to have PW1 identify the Appellant if she knew him and what kind of identification was carried out on the Appellant.

11. In the case of **Roria V Republic [1961] E.A. 583** it was held:-

“a fact may be proved by a evidence of a single witness but this rule does not lessen the need for testify with the greatest care the evidence of a single witness in respect of identification specially when it is known conditions favouring a correct identification were difficult that in such circumstances there is need for other evidence.”

12. In case of **Karani V Republic [1985] KLR 290** it was held:-

“identification by voice nearly always amounts to identification by recognition however care must be taken to ensure that the voice is that of the appellant.”

13. I must consider now whether PW2 was able to recognize and identify the voice as that of the appellant. PW2 in her evidence testified the attacker called her by her name. She did not state exactly what the attacker called her, whether by her Christian or tribal name or that of her father. That if she was called by her name then the calling was short and brief. PW2 did not mention the attacker telling her anything else. PW1 testified PW2 told her the attacker asked her to open the door. She never mentioned the attacker calling PW2 by her name. I note PW2 did not state in her evidence in what language the attacker was speaking to her. PW2 and PW1 did not inform PW3 that they had identified the appellant by his voice none of the two witness stated they could identify the appellant by voice. PW2 in her evidence testified she knows appellant's voice very well. She stated the appellant was her husband for 15 years. PW1 stated that the appellant was husband to her daughter for 5 years. From the evidence of PW1 and PW2 the appellant was a person well known to them by name. When the Village elder and Assistant chief were called by PW1 and PW2 one would wonder what was difficult in giving the name of the appellant as the person who set their house on fire. This causes doubt as to the identity of the attacker.

14. In the case of **Simiyu & Another V R [2005] 1 KLR 192** it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on quality of identification and a great danger on mistaken identity arises. In the case of **R V Alexander Mutwiri Rutere alias Sanda & Others [2006] eKLR** it was stated that if a witness is known to an accused but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence given is not liable.

15. PW2 in her evidence in chief stated that when she went out she did not see the accused but in cross-examination she stated she saw the appellant near the house. PW2 did not state the source of the light that enabled her to see the appellant. Indeed had she seen the appellant she would have told PW1 and PW3 and given his name. The trial Court quite correctly found that PW2 did not see the appellant. I find as submitted by the appellant her evidence to be riddled with inconsistencies as regards what she heard and saw. As regards her evidence in the case of **Dankerai Ramkisham Pandyo V. R [1957] EACA page 336** it was held:-

“Where the evidence is contradictory or is inconsistent it would not be lied upon.”

16. In view of the inconsistencies of the evidence of PW2, and that of PW1, the contradictions of PW2's evidence and the admission of the existing grudge between PW2 and the appellant by PW2, I find such evidence which is riddled with contradictions and/or inconsistency unreliable and not suitable to sustain a conviction. Further as stated by prosecution witness that the appellant used to visit PW1's home and used to use abusive language against her and the fact that, he had grudge

with PW2 it cannot be ruled out as the basis of PW2 having thought the person who called her by her name during the material night was the appellant. In this case it cannot be ruled out that the person who had called 30 minutes before the setting of the house on fire was not the appellant but indeed it might have been another person other than the appellant. The prosecution did not call any other evidence to connect the appellant with the setting PW1's house on fire. I find the prosecution failed to establish case against the appellant beyond reasonable doubt and I have no alternative but to give the appellant the benefit of doubt.

17. In the instant case the evidence of the appellant though unsworn evidence the same was not considered by the trial Court. I note the appellant did not respond to the events of 26th/27th December 2014, but on the events of arrest. The Court could and should have considered the accused defence before the Court found a decision on the same. That though the accused said nothing about the date of the offence, the accused had no obligation to prove his innocence. The burden always lies with the prosecution.

18. Having come to the conclusion I have come to find that the conditions were not favourable for proper, reliable and correct recognition for the appellant and that there is no other evidence available to connect the appellant with the commission of the offence of arson to justify to convict, I accordingly quash the conviction and set aside the sentence. I order the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 18 DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2015.

In the presence of:

M/s. Odumba State Counsel – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akida

J. A. MAKAU

JUDGE