



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 37 OF 2012

WILLY KOSKEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Senior Resident magistrate at Sotik court (Hon. M.Okuche) in Sotik Senior Resident Magistrate's court criminal case No.181 of 2012 on 27/06/2012)

JUDGMENT

WILLY KOSKEI, the Appellant herein, was tried and convicted for the offence of arson contrary to **Section 332(a)** of the **Penal Code**. The particulars of the offence were that on the 25th day of June 2011 at Minute village in Bureti District within the Rift Valley Province, the appellant wilfully and unlawfully set fire to a dwelling house valued at Kshs.500,000 belonging to Samuel Kipkemoi Kirui. A total of five witnesses testified in support of the prosecution's case. Three witnesses testified in support of the appellant's defence. In the end, the appellant was found guilty and sentenced to serve six (6) years imprisonment. Being aggrieved the appellant preferred this appeal by putting forward the following grounds in his petition:

1. **That the learned trial Magistrate erred in both law and facts by convicting me the appellant on different dates and times in which the offence was allegedly to have been committed.**
2. **That the learned trial Magistrate erred in both law and facts by convicting me on hearsay and dependent witnesses.**
3. **That the learned trial Magistrate erred in both law and facts by not making a finding that PW2,PW3 and PW4 were incredible witnesses and to base conviction on their evidence was unsafe.**
4. **That the learned trial Magistrate erred in both law and facts by convicting me on contradicted and inconsistent evidence.**
5. **That the learned trial Magistrate erred in both law and fact by convicting me on photographs P.Exh 1&2 which was tailored to suit the case upon me the appellant.**
6. **That the learned trial Magistrate misdirected himself both in law and fact by rejecting my defense without concrete reason and thus shifting the burden of prove to my defense side.**
7. **That the learned trial Magistrate erred both in law and fact by basing conviction on shoddy and fake investigations.**

The case that was before the trial court appear to be largely short and straightforward. It is the evidence of David Kipkoech Kitur (PW2) on 25/06/2011 at about 1.00pm he was at his home in Kapsenetwet, when he saw some billowing from the house of Samuel Kipkemoi Kirui (PW1). PW2 rushed to scene and found that the house of PW1 was burning. PW2 said he saw the appellant at the homestead with a

panga. PW2 and others tried to put out the fire but they were frustrated by the Appellant who instead chased them while armed with a panga. PW2 called PW1 to inform him of the inferno. Police were informed and arrived at the homestead within an hour. The appellant is said to have fled the scene when police from Litein Police Station arrived. Members of the public together with the police gave a chase but the appellant managed to escape using a motor cycle popularly known as boda boda. The appellant went underground only to reappear after six (6) months. C.P.L Juda Kiteri (PW3) a police officer who visited the scene confirmed that he saw the appellant wielding a panga having been shown by PW1 whom the appellant attempted to cut. PW3 confirmed that the appellant fled the scene when he fired shots in the air. It is the evidence of PW3 and P.C Christopher Karumba (PW4) that the appellant attempted to cut the O.C.S Litein police station. When they visited the homestead on the fateful day. Victor Kipchirchir (PW5), the appellant's brother told trial court that he came back home at 2.00pm only to find their home having been razed down. PW5 said he found the appellant at the door steps of the burning house. When placed on his defence, the appellant testified and summoned the evidence of two other witnesses. The appellant denied committing the offence. He claimed at the time of the offence he was in Litein town doing his business and that a friend told him that his father's house (PW1) was burning. He said he resides in Litein town because his father (PW1) had evicted him from the family land. Upon learning of the fire, the appellant states that he rushed to the scene to remove his items only to find the house completely burnt. He claimed he joined hands with his mother and uncles to put out the fire using tree branches and leaves. He claimed someone who was armed with a pistol emerged from a maize plantation and shot in the air prompting him to flee for his dear life. He claimed it was his father (PW1) who shot in the air. He confirmed having escaped using a motor-bike. The appellant narrated the differences he had with his father and the fights he has had with him. He claimed his father framed him to settle scores. The appellant told the trial court in cross-examination that the person who told him his home was burning was one Geoffrey Langat. He also confirmed that the people who were shooting in the air were the police. The appellant alleged that his father does not like him due to the differences he has with his mother. Lucy Kirui (DW2) claimed the appellant did not burn the house. She said she was at home when the house got burnt and that the appellant was not at home. She however confirmed seeing the police chase the appellant as he fled. The trial magistrate did not believe the appellant's story and proceeded to convict him.

On appeal, the appellant was permitted to file and rely on written submissions. I have carefully considered the written submissions. In his first grounds of appeal, the appellant argued that he was convicted on a frame up case. He pointed out that the date the complainant stated his house got burnt was on 23/06/2012 yet the charge sheet states the offence took place on 25/6/2011. The record of appeal is clear that the complainant claims his house got burnt on 23/6/2012 to be fair to all the parties, I think the error is a mistake on recording of evidence. Such mistakes occur in our daily lives hence I will note but overlook the same. Had the issue on dates been raised during cross-examination most probably a clarification could have been sought before releasing the particular witness.

The second ground of appeal is to the effect that the appellant was convicted on contradictory and inconsistent evidence. The appellant pointed out that the evidence of PW3 and PW4 contradicted each other. According to PW3, the complainant (PW1) reported the incident to PW3 at Litein Police Station on 25/6/2011 at 8.00pm. PW4 a police officer from the same station stated that PW1 reported the incident at 3.45pm on 26/6/2011. It is the evidence of PW1 that on 23/6/2012 (which date I earlier stated to be a recording error) at about 1.00pm he was at his place of work when he was called by David (PW2) that his house was burning PW3 claimed he immediately reported to Litein Police Station. Miss. Magoma, did not address this court on this issue. In my view, the contradictions on time appear to be fundamental. PW1 says he reported the incident at around 1.00pm while PW3 says he received the report way back at 8.00pm. PW4 on the other hand states PW1 booked the report at 3.45pm. This inconsistency has created doubt in my mind. There is a further contradiction between the evidence of PW3, the burnt house was never photographed. But according to PW4, the house was photographed. In fact PW4 produced those photographs in evidence.

The third ground argued on appeal is that the appellant's defence was not accorded serious attention. Miss. Magoma was of the view that the trial court considered and properly rejected the aforesaid defence. I considered at length the defence raised by the appellant while setting out the case that was before the

trial court. The trial magistrate considered at length the appellant's defence and came to the conclusion that the same was contradictory hence unbelievable. The learned Senior Resident Magistrate made the following statement at page 5 of his judgment:

“There was no evidence of any grudge between him, PW3, PW4, PW5 and PW2. These witnesses were independent witnesses and had not had any dispute with him like his father.

The accused was a bitter man, he alleged even in his evidence he was not happy when his mother was chased from his house and the house given to someone else, probably her co-wife. His bitterness seemed to have been the motive for burning this house. In fact the grudge is also evidenced when he told PW4 that he will make sure he kills PW1 upon completion of this case.....The accused was finally seen by PW2 burning this house. He has not rebutted that evidence.”

It is apparent from the above excerpt that the trial Magistrate erred in arriving at such a conclusion. The appellant had specifically alleged that the complainant had a grudge against him. It is possible for the complainant had influenced the course the evidence was to take. While cross-examining PW2, it became clear that there was some simmering dispute between the appellant and PW2. A grudge may have developed between the duo. The only eye witness in this saga is PW2. He said he was at his place when he saw PW1's house burning. When he arrived at homestead, PW2 said he found the appellant armed with a panga. There is no clear evidence that he saw the appellant burn the house except for the fact that he found him at homestead with a panga. According to the evidence of PW4 it is the appellant's mother who saw the appellant burn the house. PW4 is the investigating officer of this case. He obviously discounted the evidence of PW2 who was said to have been the one who witnessed the appellant lit the fire. The trial magistrate was therefore wrong when he concluded that PW2 had seen the appellant burn the house yet he was in his house when he realized PW1's house was burning. After a careful re-evaluation of the evidence I am convinced that the appellant had raised a very serious defence which needed a serious consideration and critical examination. The relationship between the appellant and his father (PW1) is so bad that either of them can take steps to fix the other. It is not clear from the record as to how and when the appellant was arrested. It would appear he was arrested from a hospital bed.

In the final analysis, I have come to the conclusion that there are more questions which need answers in this appeal. In other words I have entertained some doubts. The law enjoins me to give the appellant the benefit of doubt. The appeal is allowed, the conviction is quashed and the sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated, Signed and delivered this 22nd day of November, 2013.

J.K.SERGON

JUDGE