



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 96 OF 2013

G W N APPELLANT

VERSUS

REPUBLICRESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU (T.M. MWANGI – P.M) IN CRIMINAL CASE NO. 785 OF 2010 DELIVERED

ON 2ND MAY, 2013)

JUDGMENT

The appellant herein G W N was convicted for the offence of arson contrary to **Section 332 (9) of the Penal Code** and sentenced to serve one and a half years (1 ½) in prison on 2nd May 2013. Being aggrieved by that conviction and sentence, she has now filed this appeal raising six (6) grounds of appeal.

The State through Mr. Omayo State Counsel opposed the appeal stating that the evidence was over-whelming as she was seen by a witness (PW2) and another who is at large and that the sentence was infact lenient.

I have considered the grounds of appeal and the submissions both by the appellant and Mr. Omayo.

Being the first appellate Court, I am required to re-evaluate the evidence to see if the findings of the trial Court can be supported.

The first ground of appeal is that the trial Court erred in law and in fact by convicting her on the evidence of a child who was the sole identifying witness. The complainant F M N (PW1) is the owner of the house which the appellant is alleged to have unlawfully set fire to on 24th November 2010 . He did not see the appellant or any one else set the house on fire but his testimony was that his daughter C W M (PW2) informed him that she had seen the appellant and one W who are both sisters to the complainant, burning the house. PW2 was aged eleven (11) years at the time she gave evidence following a voire dire examination in which the Court found that she understood the meaning of an oath. However, in the course of his judgment, the trial magistrate made the following remarks about this witness:-

“She was a girl child and she may have exaggerated a little being a child but in the

end she had put things in perspective when she said she had thought that what DW1 was pouring into their house was petrol and that in her imagination, she had believed that the jerrycan had the words “petrol” on it

Later on in his judgment, the trial magistrate said the following with regard to the same witness:-

“I find PW2 to have been a witness of truth -----“

Further still in his judgment, the trial magistrate stated as follows:-

“The fact that the house was burning when DW1 and W were outside the house of PW1 is capable of only one explanation, that is, that the evidence on record is inconsistent with the innocence of DW1 and points a sure finger of guilt upon DW1”

In my view, having found that PW2 had ***“exaggerated”*** in her testimony, it would be dangerous to rely on such testimony particularly where it was the only evidence connecting the appellant to this crime. The trial magistrate appears to have over-looked this by saying that in any event, the witness was a ***“child”*** and therefore that was in order for her to ***“exaggerate a little”***. With respect, that was an error. A witness is a witness and the standard of veracity, consistence, honesty, cogency and clarity required of a witness is not dependant on the age of the witness. All evidence must be judged on the same scale and one cannot get away with exaggeration because he is too young or too old. The moment the trial Court found that PW2 was prone to exaggeration, that casts a serious doubt on the veracity of her evidence. It would not be certain which evidence such a witness may have exaggerated and which one she did not. The benefit of such doubt ought to have been given to the defence.

There was also evidence from PW2 that she was with Alice Wangechi when they saw the complainant’s house on fire and infact Alice took water and poured onto the house in an attempt to put it off. It is clear that this witness did record a statement which was even given to the appellant who referred to it in her defence. This was a key witness because she was with PW2 when the incident occurred. No explanation was given as to why she did not testify for the prosecution. On 6th December 2011, the prosecution sought an adjournment on the ground that ***“a key witness could not be traced”***. Although no name was given to the Court, it can only be that the said witness was Alice Wangechi because the appellant had her witness statement. On 19th March 2012, the prosecution, in response to question by the appellant’s counsel as to why a witness called Alice Wangui was not being called to testify stated as follows:-

“We are not calling Alice Wangui to testify”

This Court is satisfied that Alice Wangechi or Alice Wambu being referred to in these proceedings must be one and the same witness and it is clear from the proceedings of 19th March 2012 that the prosecution abandoned that witness. No evidence was availed that witness summons were applied for or even a warrant for the arrest of the witness. Failure to call such an important witness can only lead to the inference that her evidence would be adverse to the prosecution case. The trial magistrate’s finding on this failure was as follows:-

“Unfortunately, the lady called Alice Wangechi who had sent PW2 for the panga did not testify. Alice was one of the persons who had helped put out the fire. PW3 the Investigating officer had ably explained the failure by Alice to attend Court to testify when she stated that Alice had refused to record her witness statement and attend Court to testify. I find that PW3 had employed due diligence by, albeit without success, in trying to rope in Alice as a witness”

From the record herein, the above finding by the magistrate could not be justified. There was sworn evidence from the appellant that Wangechi had infact recorded a statement as a prosecution witness. In her defence, the appellant stated as follows:-

“Before the material date, I used to see a lady called Wangechi and in her witness

statement, she had stated that she had seen me carrying a yellow jerrycan -----“

Therefore, this potential witness did infact record a statement which the appellant had and it cannot therefore be true, as alleged by the prosecution, that the said witness “**had refused to record her witness statement**”. She did record a statement which the appellant had and no good explanation was given as to why she did not testify. On the authority of **BUKENYA VS UGANDA 1972 E.A 594** as affirmed in **NGUKU VS REPUBLIC 1985 K.L.R 412**, this Court can only presume, which I hereby do, that if the said Alice Wangechi had testified, her evidence would have been unfavourable to the prosecution case.

Having re-evaluated the evidence in this case, I am not prepared to find that the prosecution had proved its case against the appellant beyond reasonable doubt. There was a finding by the trial Court itself that the only eye witness had “**exaggerated**” her testimony and a key witness was not called thus leading to the inference that her evidence would have been adverse to the prosecution case.

I accordingly allow the appeal and quash both the conviction and sentence. The appellant shall be released forthwith unless otherwise lawfully held.

B.N. OLAO

JUDGE

3RD DECEMBER, 2013

3/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Omayo State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 3rd day of December, 2013 in open Court.

Appellant present

Mr. Omayo State Counsel present

Mr. Muriithi Court clerk present

Right of appeal explained.

B.N. OLAO

JUDGE

3RD DECEMBER, 2013