



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
Criminal Appeal 93 of 2011

PETERSON MUTURIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment delivered on 2/6/2011 by S.M. MOKUA - PM in the PM's Court at Siakago in Cr. Case NO.212 OF 2010)

J U D G M E N T

The Appellant was charged before the SPM Siakago vide Criminal case No.212 of 2010 for an offence of Attempted Arson contrary to section 333(a) of the Penal Code. The particulars as stated in the charge sheet were as follows;

PETERSON MUTURI: On the 8th day of March 2010 at Mbita location in Mbeere South District within Eastern Province attempted unlawfully to set fire to a building namely a dwelling house containing chairs, television set, a radio and a bed all valued at around kshs.70,000/=.

The accused pleaded not guilty and the matter proceeded to full hearing. Thereafter the trial Magistrate found him guilty, convicted him and sentenced him to 3 years imprisonment. Being aggrieved by the Judgment he has appealed against both conviction and sentence and he has raised 3 ground of appeal which are;

- 1. That the learned Principal Magistrate erred both in law and facts when he convicted the Appellant without prove as required by the Criminal Procedure Act.***
- 2. That the Principal Magistrate erred both in law and fact when he convicted the Appellant without evaluating properly the evidence before him.***
- 3. That the sentence meted on the Appellant was too harse since the Magistrate did not give option of fine considering that the Appellant was said to be first offender.***

Mr. Kariithi submitted that the evidence of P.W.2, P.W.3 and P.W.5 was contradictory. Secondly, P.W.1 could not have seen Appellant carrying petrol when he was asleep in his house. Thirdly petrol being an inflammable substance could not have failed to ignite when the match was lit. Fourthly the Appellant was

a 1st offender who is also a mental patient.

Mr. Wohoro for the State opposed the appeal saying the facts were not in dispute. The match stick did not light. All the evidence is there. No medical evidence was adduced to show that the Appellant is a mental patient. The brief facts of this case were that the Appellant is the father of P.W.2 and P.W.3 and a father in law of P.W.5. P.W.2 stated that on 8/3/2010 at midday he was at home when he heard the Appellant say he was going to buy petrol. He alerted his mother and went to sleep. Upon being informed by his sister that the Appellant had emerged with petrol he got out and saw him carrying petrol which he poured on him. The Appellant had a match box and a panga. He put some petrol in a Kasuku container. He pursued P.W.1 after pouring petrol on him. He also poured petrol on his house. He also threw a burning container towards his house. P.W.2 was the one who saw the Appellant emerge with a jerrican packed in a polythene. The Appellant was threatening to burn them. He poured petrol on P.W.2 as well as his house. He tried to light them in vain.

P.W.4 heard screams and went to the scene. He found the Appellant holding a panga. There was petrol. Appellant told him he was out to kill one of the children. He dropped the panga. P.W.4 then took the jerrican of petrol and kept it.

P.W.5's evidence confirmed that of P.W.2 and P.W.3. The chief and investigating officer (P.W.6 and P.W.7) testified on how the Appellant was arrested and the exhibits recovered. The Appellant elected to remain silent as an election under section 211 of the Criminal Penal Code.

This being a first appeal this court is enjoined to reconsider and re-evaluate the evidence adduced before the trial court. I am also alive to the fact that I did not see the witnesses. I refer to the case of ***SIMIYU & ANOTHER –VS- [2005]1 KLR 192.***

The evidence of P.W.1 is that he had heard the Appellant state that he was going to buy petrol. He then went to sleep after telling his mother. P.W.2 saw the Appellant emerge with a jerrican in a polythene. Appellant went to the kitchen and took a Kasuku container and a panga and was threatening to kill someone. P.W.2 got out and asked him what it was and the Appellant poured petrol on him. P.W.5 also confirmed that the Appellant poured petrol on P.W.2.

P.W.2 and P.W.3 also saw the Appellant pour the remaining petrol on the roof of P.W.2's house. P.W.2, P.W.3 and P.W.5 all saw the Appellant with a match box. He attempted to light the match box in vain.

The match box, 5 litre jerrican, plastic container and a panga were produced as exhibits.

P.W.1 a Government analyst examined the liquid sent to him and he confirmed that the liquid was a petroleum product and was highly inflammable.

The witnesses have said this liquid was in a 5 litre jerrican and was poured into a Kasuku container by the Appellant. The evidence of the eye witnesses P.W.2, P.W.3 and P.W.5 is that the Appellant poured this petrol on P.W.2. He also poured on P.W.2's house. He was also uttering words to the effect that he was going to kill someone.

When P.W.4 responded to the screams and came to the scene he found the Appellant with a panga and there was petrol. The Appellant was outside P.W.2's house. One would not fail to ask what he was doing there with a panga and petrol.

Contrary to the submissions by Mr. Kariithi the evidence of the prosecution is very consistent and was not shaken even during cross examination. The Appellant had elected not to say anything in his defence. The trial Magistrate analysed the evidence well. The only reason why the Appellant would have been carrying around petrol and match box would be to set something on fire. He poured petrol on P.W.2 and on his house. He was however not successful in lighting the match stick. Had the match stick lit it could have burnt P.W.2 and his house.

Upon re-evaluation of the evidence on record, I do find no reason to make this court interfere with the finding of the court below and uphold the conviction. Mr. Kariithi has submitted that the sentence was too harsh as the Appellant was a first offender and is aged 60 years and is a mental patient. Nothing was laid before the court below and even this court to show that the Appellant has a mental problem.

I however appreciate that the offence the Appellant was convicted of is a felony whose sentence is 14 years and the Appellant was given 3 years.

I also do appreciate that the Appellant is an old man and is the father of P.W.2 and P.W.3. He is also the father in law of P.W.5. This is a delicate relationship which should be salvaged at all costs. And for that reason **ALONE** I will interfere with the sentence.

I set aside the sentence of 3 years imprisonment and substitute it with a fine of shs.40,000/= in default 6 months imprisonment. To that extent only is the appeal allowed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT EMBU THIS 3RD DAY OF MAY 2012.

H.I. ONG'UDI

J U D G E

In the presence of:

M/s Matiru for prosecutor

Appellant

Njue – C/c