



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 11 & 2770B OF 2011

1. LUBANDO CHIMERA LUBANDOAPPELLANT

2. ZUMA SHABAN LUBANDO APPELLANT

- VERSUS-

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case no. 878 of 2008 of the Senior Resident Magistrate's Court Voi – M.S.G.Khadambi - PM)

JUDGMENT

ZUMA SHABAN LUBANDO and **LUBANDO CHEMEGA LUBANDO** both referred to as the Appellants hereinafter, were charged with the offence of **ARSON** contrary to Section 332(a) of the Penal Code.

The particulars of the charge are that;

“On the 16th day of September 2008, at Kibulu village Mwambo Location in Kwale District, within the Coast Province jointly lawfully and unlawfully set a fire to a building namely a dwelling house valued at Kshs. 70,000 belonging to NDAIKWA TONDA.”

The Appellants were tried, convicted and sentenced to serve 20 years imprisonment each. They are aggrieved and have appealed against both the conviction and the sentence.

The brief facts of the case are that on the 16th day of September 2008, PW1 **NDAIKWA JONDA** went to his rural home at Mwabila following a call from his cousin Ndonge Yawa, that, his wife Fatuma, was unwell. He reached home at 5.00 p.m. and found the wife well. He left for Mariakani to find transport back to Mombasa. He missed transport and decided to spend a night at his father's home.

That at 8.00 p.m., he saw the wife arrive at his father's home with 5 children, three of his and two nephews. The wife reported that the Appellants herein had torched their house that she had escaped to safety and to report the matter. Jonda in the company of his father went to the scene and found the house totally burnt to the ground. He gave the value of the house as over Ksh. 100,000. Nothing was salvaged from the house. He reported the matter at Mariakani Police Station. The Appellants were arrested and

charged.

At the close of the prosecution case each accused was placed on his defence. The 1st Appellant decided to keep silent. The 2nd Appellant Lubando Chimege Lubando in an unsworn statement denied the offence. He told the Court the charges were trumped. That on the 16th September 2008 he was away on his usual business. He returned three days later only to be accused of burning a house. He was arrested on 24th September 2008. He called the village elder who testified exonerated him and testified to the contrary that the complainant burnt his own house and ran away thus exonerate him. That the complainant burnt the house after he cut up one Kombo who had quarreled with his wife.

In the judgment the Learned Trial Magistrate concluded;

“Although the photographs to confirm that the house was burnt down were not produced, I am satisfied from the evidence of DW2 (although I believe the Magistrate meant PW2) that indeed PW1’s house was razed to the ground. I also found PW2 a very straight forward witness who stated what she saw and her testimony stood the test of cross-examination. I am satisfied. She was able to see the culprits and recognize them, as that has not been challenged”.

She convicted the Appellants.

At the hearing of the appeal, the Appellants who were unrepresented, relied entirely on the written submissions they filed in court. In the grounds of appeal, they lamented their rights were violated as they were not given witness statements before the hearing of the case, hence Article 50 of the Constitution was breached. That, the case was poorly investigated, the prosecution witnesses’ evidence had a lot of contradictions and the identification of the appellants was poor.

The appeal was opposed by the Learned State Counsel Mr. Jami. He submitted that on the issue of identification the wife of the complainant testified she saw the appellants set the house on fire. That it was the 2nd appellant who pulled the match box and lit the fire. That she knew the Appellants as neighbours, thus, identification was by recognition. The State Counsel agreed with the finding of the trial court. That one Appellant did not testify and the other gave an alibi defence, which was not believable. On sentence, the Counsel submitted it was relevant and should be confirmed because the maximum sentence is life imprisonment. As a first appellant court, I have considered the evidence and re-evaluated the same. I consider the fact that, I did not have the benefit of the demeanor of the witnesses. **Njoroge –Vs- R 1987 KLR 91** I have considered the evidence adduced, the grounds of appeal, the submission by the parties and I find that the only evidence as to the occurrence of the offence is that of the complainant’s wife (PW2). That evidence remains uncorroborated by any other evidence. Although the evidence reveals she fled with five children, nothing more is said of those children. Their age and why they were not called to testify to corroborate her evidence. Additionally, I find the prosecution casually treated the case by closing their case without any effort put in, to trace and avail the scene visiting officer. Once the Appellants rejected to the application for production of the photographs of the burnt house, by the investigating officer, the prosecutor went ahead and closed their case without producing those photos. How then can the court believe there was a house the subject matter of the case and it was ever burnt?

Again the defence called a witness, the trial Magistrate does not seem to have considered his evidence at all. He was the village elder (Quite influential in village matters). I found his evidence quite interesting. He makes reference to a fight between the complainant and one Kombo. The record shows on the 19th November 2008, when the Complainant started testifying, he too gave evidence concerning the fight between him and Kombo and then the prosecutor applied for an adjournment and stepped him aside. He stated

“It appears the evidence on record is not in support to the charges herein. I pray that the witness be stood down to enable me seek further instructions.”

When the witness returned to the witness box on the 24th March 2010, his evidence had completely

changed. That is after 2 years. For example whereas on **19th November, 2008** he alleged its **Kombo** who told him his wife was unwell he testified on **24th March 2010** it was his cousin **Ndungu Yawa**. Is this witness reliable? What is more puzzling is the fact that throughout the entire proceedings, no motive come out as to why the Appellants could purposely burn the complainant's house. **YET** they are neighbours. Not the complainant, his wife nor the Appellants knew the reason. How? Even more, it puzzles me, that the complainant was called and told the wife was unwell, only to reach home at 5.00 p.m and find she was totally fine. Who had called him? Why? He did not question why he was called for no reason. He takes off. By 6.00 p.m. he is at Mariakani and at 8.00 p.m, the wife follows him to his parents home to report the incident. She does not go to the Chief, the neighbours or the police station. That smells a rat, and his evidence must be treated with a pinch of salt.

All in all I find in the absence of any other evidence to corroborate that of PW2, and in the absence of the photos of the scene, then it's the word of (PW2) Fatuma against that of the accuseds' defence. I give the Appellants the benefit of that doubt. I accordingly quash the conviction and set aside the sentence imposed upon them. In fact, that sentence was too harsh for first offenders. I set it aside. I order each Appellant be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, signed and delivered in an open court this **26th** day of **June 2012** at Mombasa.

G. L. NZIOKA

JUDGE
26.6.2012

In the presence of:

Jamii for the State

Appellant in person

Phillip – Court clerk.