REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 266 of 2010

TERESIA KISOMO ……..APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(*Being an appeal from original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No.530/08 by Hon E.Juma Osoro. -SRM on 1/7/2010)*

JUDGMENT

The Appellant, **Teresia Kisomo** and six other accused persons jointly faced the offence of arson contrary to section 332 of the Penal Code in the Chief Magistrate's Court at Kitui. The particulars of the offence were that the appellant, and co-accused on the 5th day of June, 2008 at around 8.00 p.m. at Kalunduni village, Kathuma sub-location, Mutulu location in Kitui District of Eastern Province, jointly willfully and unlawfully set fire to a building namely kitchen and animal shed with ten goats and fifteen chicken and property of **Musyoka Kisomo.**

The appellant and co-accused all denied the charge and were subsequently tried. The evidence adduced by the prosecutor in brief was that the appellant and co-accused who are close relatives of the complainant, infact they are siblings suspected that the complainant's wife had bewitched all of them. The appellant was accused 4. Accused 2 therefore summoned the complainant from Nairobi where he worked for a family meeting. Besides his wife he was also suspected of harbouring jinis. He came home on the June 1st 2008 and accused 2 set the date for the entire family to be subjected to Ngata oath (*Kamba traditional anti witchcraft oath*). Despite the complainant telling the 2nd accused to set the date earlier, i.e 3rd June 2008, the 2nd accused insisted on 15th June 2008. The complainant then returned to Nairobi. However, on 3rd June 2008, the 2nd accused called PW1 and informed him that a mob was bent on burning his house. The complainant suspected that his wife could be in mortal danger and advised her to report the threat to the D.O and await for him there. The complainant arrived and took his wife from the D.O's office to Kitui Police Station where they reported the matter. The police advised them not to return home for their own safety. The complainant and his wife spend the night in Kitui town on that day. On 5th June 2008 at about 7p.m, the 2nd accused telephoned him once more and informed him that a crowd had gathered at his home to burn the house. PW1 rushed back to the police and informed them of the developments. The complainant's son (*PW2*) **Mutemi Musyoka** who was in the meantime at 8.00 about p.m retiring to bed in the main house after studying when he heard a bang on the roof of the brother's

house. Some people were pelting the house with stones. He ran out and hid in a bush, where he witnessed a group of people damaging their house and set the kitchen a blaze. As a result the goats and chicken therein were burnt to death. The complainant's neighbor, **Boniface Munyithya Kaleve** (*PW3*) also heard the commotion at the neighbour's house. He proceeded to the scene and just like PW2 he recognized the accused persons at the scene. The evidence of PW3 is that he recognized accused 1, 2, 3 and 6 at the scene. However, PW2 recognized the appellant, all the accused and other relatives including DW8 at the scene. The police officers later visited the scene and photographed the damaged property. The culprits were all subsequently arrested and charged with the offence.

In their defence all the accused gave unsworn evidence and called one common witness, their mother. They denied committing the offence, nor being at the scene. They each maintained that they were framed with the case owing to family feud between them and the complainant.

Defence witness, their mother, testified in support of the appellant and the co-accused. She confirmed that they did not commit the offence. She also confirmed that, the appellant, co-accused and herself had irreconcilable differences with the complainant who was her first son.

The learned magistrate having carefully examined the evidence adduced by the prosecution and the defence, reached the verdict that all the accused persons were guilty as charged. Upon convicting them, she sentenced the appellant, 1st, 2nd, and 3rd co-accused to imprisonment for a term of four (4) years whereas 5th, 6th and 7th co-accused were each sentenced to serve three (3) years probation.

It would appear that from the entire team, only the appellant was aggrieved by the conviction and sentence. She therefore lodged the instant appeal through **Messrs T.M. Musyoki & Co. Advocates** on the grounds that she was wrongly convicted as she was not at the scene nor was she identified. Burden of proof was shifted to her contrary to law, she was discriminated against in terms of sentence, the conviction was against the weight of evidence and finally, the sentence imposed was too harsh in the circumstances.

When the appeal came before me for plenary hearing on 2nd May, 2012, the appellant fired her counsel in his absence and elected to prosecute the appeal in person. She submitted that she was sick during the trial, the complainant was her brother and that she was not seen at the scene of crime.

Mr. Mukofu, learned State Counsel conceded the appeal on the ground that there appeared to be a family dispute. In the circumstances the State did not support the conviction and sentence.

Though the learned State Counsel conceded the appeal, I am still under duty as a first appellate court to rehear the whole case with a view to reaching my own independent decision on the evidence. This duty was cast upon me by such decisions as **Pandya vs Republic [1957] EA 336, Okeno vs Republic [1972] E.A. 32** and **Kariuki Karanja vs Republic [1986] KLR 190.** In all these cases, it was held that an appellant on a first appeal expects the appeal court to exhaustively examine the evidence afresh, remembering always though that the court does not have the privilege and opportunity of hearing and seeing witnesses as they testified. As I consider and evaluate the evidence afresh, I am also reminded that I should not ignore the judgment of the trial court, but I should carefully weigh and consider it.

I have carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the trial court. I note right from the outset that the conviction of the appellant turned on the evidence of identification. The offence was committed at night. The only witness who purported to identify the appellant at the scene was PW2. According to this witness, as he retired to sleep, he heard a bang on the iron roof of his brother's house. He came out of the house, and saw a crowd of people in the compound baying for his parents blood. Fearing that the crowd would injure him as well, he ran into the bush and hid about 150 metres from the scene of crime.

It is from this distance that he purported to identify the appellant courtesy of the blazing fire from the kitchen which had been set on fire. I doubt very much that from the distance where the witness had taken cover, he could have been in a position to see the appellant sufficiently to be able to identify her. By his

own account there were very many people in the compound. I doubt that in those circumstances, the witness would have been able to identify the appellant.

In any event, out of fear, this witness escaped from the house. Having been overcome by fear for his own life, I do not think that he would have recollected and composed himself in good time to be able to focus on the crowd in such a manner as to be able to identify them or any one of them, the appellant included. Again by his own account, this appellant was sick. If she was sick, how could she again have been at the scene of crime?

In the case of **Mohamed Rama Alfain & 2 Others vs Republic,** Court of Appeal at **Mombasa– Criminal Appeal Number 223 of 2002 [UR],** the court reiterated the well known principle that where the prosecution was entirely relying on the evidence of identification at night in unfavourable circumstances, then such evidence should lead to a conviction only when it is found to be watertight. The case of **Maitanyi vs Republic [1986] KLR 198** also says that in testing the reliability of the evidence of identification at night in circumstances that appear difficult, the court is under a duty to make an inquiry of the relevant circumstances such as the nature and strength of light, the size of the light, the position relative to the suspect and such other matters. No such inquiry was undertaken by the learned magistrate in this case. Failure to undertake such an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

The alleged identification of the appellant was by a single witness in difficult circumstances. It behooved the learned magistrate to approach such evidence with a lot of caution and circumspection. Indeed he was required to warn himself of the dangers of acting on and convicting the appellant on such evidence. She did not.

There is no doubt at all that, all was not well in the family. There seems to be deep rooted hatred of the complainant by the other members of family and vice versa. The rest of the members of the family including his mother all seem to gang up against the complainant. However, the genesis of the hatred is not clear. Given this background, the learned magistrate should have been weary of the possibility of this criminal proceedings being used for ulterior motives, mainly to settle family scores.

When it came to sentencing, the learned magistrate appeared to have fallen in the family trap. Although she had found all accused persons guilty as charged, nonetheless she proceeded to impose different sentences without any legal or factual basis. There is no reason why some of the accused including the appellant were sentenced to jail while others were given probation sentence. The learned magistrate did not say that those awarded probationary sentence, their role in perpetrating the crime was minimal as compared to those he gave a jail term. In the premises, the sentences imposed as aforesaid were discriminatory and led to a travesty of justice.

The upshot of what I have said above is that I am in agreement with the learned State Counsel that the conviction of the appellant was not safe. Consequently I allow the appeal, quash the conviction and set aside the sentence. Unless otherwise lawfully held, the appellant is to be set free forthwith.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE - MAKHANDIA
JUDGE