



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 258 of 2010

STEPHEN OMITO OSERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **STEPHEN OMITO OSERA** was charged with the offence of setting fire to crop of cultivated produce contrary to Section 334 (b) of the Penal Code.

The particulars of the offence were that on the 2nd day of February 2008, at Mahola village, Mung'ang'a Sub-location in Nabongo Location of Mumias District within Western Province, wilfully and unlawfully set fire to Nucleus sugar cane plantation – Mung'ang'a Block E104 measuring 1.35 hacteres, valued at Kshs.179,159.50 the property of Mumias Sugar Company.

The appellant pleaded not guilty to the offence. After a full trial, the appellant was convicted and sentenced to two years imprisonment. The appellant was aggrieved by both the conviction and sentence and appealed to this court.

The main grounds of appeal can be summarized as follows:-

- The ingredients of the charge sheet were not proved.
- The charge sheet was defective.
- The incident was on Act of God.
- The matter before court was civil and not criminal.
- Prosecution evidence was not sufficient to sustain the charge.
- The proceedings and judgment were defective.
- The trial magistrate shifted the burden of proof to the appellant.

- The sentence imposed was harsh.

As a the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see **Okeno v Republic [1972] EA 32***).

The case for the prosecution was that on the material day at about 11.00 a.m., the appellant was working at the land adjacent to the complainant's. The appellant lit a fire to burn some sugarcane waste. The appellant lost control of the fire and the fire spread to the complainant's land and burnt the complainant's sugarcane. Efforts made to put out the fire were not successful. The appellant was arrested by the complainant's company's security officers and escorted to the police station. After investigations the appellant was charged.

In his defence the appellant stated that he was working on the land that borders the complainant's. He then lit some fire to burn some waste. The wind then carried away the fire and it spread to the complainant's sugarcane.

PW2, JONATHAN OKUMU WERE and PW3 MILTON WANYONYI who were security guards at the complainant's company premises have given a consistent and corroborative account of evidence that shows the appellant lit the fire which spread to the complainant's farm. From the evidence of these two witnesses it is clear that the fire was lit to burn sugarcane waste in the farm where the appellant was working. The fire then spread to the complainant's farm. There is no evidence that the appellant wilfully set the sugarcane on fire.

The appellant has not denied having lit the fire. What the appellant stated is that the fire was spread by the wind.

Although the appellant was charged under Section 334 (b) of the Penal Code instead of Section 331 (a) the charge he faced was clear. I have considered the provisions of Section 382 of the Criminal Procedure Code. I find no prejudice was suffered by the appellant. I would say likewise about the reliance on Section 179 Criminal Procedure Code by the trial magistrate.

Section 179 Criminal Procedure Code is for conviction for a lesser offence than the offence charged. Both section 334 (a) and (b) provide for the sentence of 14 years. Section 179 of Criminal Procedure Code was therefore erroneously applied.

Section 200 (3) Criminal Procedure Code was complied with although the trial magistrate did not reflect specifically that there was compliance with Section 200 (3) Criminal Procedure Code. I say so because the reply by the accused was:

"I will give unsworn evidence. No witnesses."

In his judgment, the trial magistrate analyzed the evidence on record and gave his reasons for the conviction. Section 169 Criminal Procedure Code which provides for the contents of a judgment does not provide for any specific manner of setting out the points for determination. The appellant was convicted on 30.1.10 and the sentence meted out on the same day according to the court record.

Having found that the appellant did not wilfully set the sugarcane on fire, the conclusion of this court is that the prosecution evidence failed to prove the charge.

Consequently, the conviction is quashed and sentence set aside. The appellant is at liberty unless otherwise lawfully held.

Dated, delivered and signed at Kakamega this 31st day of July, 2012

B. THURANIRA JADEN
J U D G E