



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL 123 OF 2011

LOICE LOPEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appeal arises from the decision of the Honourable H.M Nyaga, Principal Magistrate, Kabarnet delivered on the 30th June, 2011.

A brief summary of the facts is that the Appellant, herein was charged with the offence of Arson contrary to Section 322 (a) of the Penal Code.

The particulars of the offence are that on the night of the 3rd March, 2011 at about 11.00 p.m. at Kampi Turkana in Marigat the Appellant willfully and unlawfully set fire to a dwelling house belonging to Michael Lobosi.

The Appellant was convicted and sentenced to five (5) years imprisonment and being aggrieved with both conviction and sentence preferred this appeal.

In the Petition of Appeal the Appellant had listed several Grounds of Appeal which were not numbered and she acted in person and chose to argue her appeal orally without having to put in any Written Submissions.

The State was represented by the Learned State Counsel Mr. Kabaka and the State conceded the appeal

on the grounds that the Charge was fatally defective which defect was not curable by the provisions of Section 382 of the Criminal Procedure Code.

The Counsel submitted that the Appellant was charged with Arson contrary to Section 322 (a) of the Penal Code and that the charge did not fall under the cited section and the penalty clause was not provided for and/or was omitted on the Charge Sheet therefore rendering the Charge defective.

It was also the Learned Counsel for the State's contention that the Appellant was convicted on mere "**suspicion**" and circumstantial evidence which could not sustain the said conviction.

Counsel argued that the prior to the fire incident the Appellant had threatened PW1's wife with dire consequences. That on the material date of the fire, PW1 & PW2 stated in their evidence that they saw the Appellant standing outside their house and the Appellant then fled from the scene.

That there were no eye witnesses to the incident and all the evidence was based on suspicion leveled at the Appellant.

Counsel submitted that the Appeal be allowed and that the conviction be quashed and the sentence set aside.

The Appellant had nothing to add to the submissions made by the State.

Upon perusal of the court record and upon hearing the submissions of Counsel for the State the finds the following issues for determination;

a) The defective charge sheet.

b) Conviction.

This being the first appellate court it is the duty of the court to re-evaluate and reassess the evidence on record and come to an independent conclusion. Refer to **OKENO -VS- REPUBLIC (1972) E.A 32.**

PW1 in his evidence states that when they were rescued from the burning house, he saw the Appellant outside his house and she later fled. In cross examination he stated that he did not see the Appellant

setting fire to the house.

PW2 also narrated in her evidence that on the fateful night when they had been rescued from the burning house she saw the Appellant standing outside their house outside their house that the Appellant shouted that she had finished the job.

She too stated in cross examination that she did not see the Appellant actually burning the house.

The trial magistrate in his judgment stated that

“...the cause of the fire was unknown. It was suspected that it was the accused who did it.....”

Based on this suspicion and circumstantial evidence the trial magistrate concluded that the evidence was sufficient to support a conviction.

This court concurs with the submissions of Learned Counsel for the State that suspicion is not a basis that can support a conviction. Refer to the case of **DAVID MUTUA –VS- REPUBLIC HCCR APP. NO. 166 OF 1999** (unreported) where the Court of Appeal held that:

“.....suspicion, no matter how strong is not sufficient to warrant a conviction. The prosecution has to prove its case beyond reasonable doubt.....”

The court therefore finds that the Grounds of Appeal relating to suspicion has merit.

On the other issue relating to the defective charge, the court concurs with Learned State Counsel's submissions that the Charge of Arson is not provided for under Section 322 (a) of the Penal Code.

The trial magistrate and the prosecution did not detect this error. It is noteworthy to note that the trial magistrate made reference to this charge under the erroneous section in his judgment and went on to convict the Appellant under the same section.

The court has perused the court record and the Penal Code and finds that, indeed the charge is preferred under the wrong section. The court also finds that the Charge Sheet does not also contain the penalty clause.

The court concurs with Learned State Counsel that these errors are not curable as provided by the Criminal Procedure Code.

This court also finds that the error and omission has occasioned failure of justice and has prejudiced the Appellant as she was wrongly convicted on a defective charge.

For the reasons stated above this court finds that the appeal has merit and the same is hereby allowed. The conviction is hereby quashed and the sentence set aside.

The Appellant unless otherwise lawfully held, shall be entitled to her liberty.

It is so ordered.

Dated and delivered at Eldoret this 19th day of July 2012.

A.MSHILA

JUDGE

Coram: Before Hon. A Mshila J

CC: Andrew

Appellant in person

Kabaka for State

A.MSHILA

JUDGE