



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL 231 OF 2011**

**MARY HANDA MUSINDI ..... 1ST APPELLANT**

**EVANS SHIVONJE ALMASA ..... 2ND APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the conviction and sentence of the Chief Magistrate's*

*Court at Kakamega in Criminal Case No. 2314 of 2010 [P. O. OOKO SRM])*

**JUDGMENT**

The 1st appellant, **MARY HANDA MUSINDI** and the 2nd appellant, **EVANS SHIVONJE ALMASA** were charged with the offence of Arson Contrary to Section 332 (9) of the Penal Code.

The particulars of the offence were that on the 3<sup>rd</sup> day of December 2009 at Mureche village, Virembe Sub-location, Shibuye Location in East Kakamega District within Western Province, willfully and unlawfully set fire to a building namely a dwelling house of **JULIETA MALESI MUSHIRA** all valued at Kshs.36,570/= the property of the said **JULIETA MALESI MUSHIRA**.

The appellants pleaded not guilty to the charge. After a full trial the appellants were convicted and sentenced to five years imprisonment each. The appellants were aggrieved by both the conviction and sentence and appealed to this court.

The appeals filed by both the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant in Criminal Appeal No. 231 and 232 of 2011 respectively were consolidated and heard as one. This judgment is therefore in respect of both appeals.

The appellants raised similar grounds of appeal which can be summarized as follows:-

- The Defence case was disregarded.
- The Charge Sheet was defective.
- Reliance on contradictory, non-corroborative and insufficient evidence that did not link the appellants to the offence.

- Reliance on facts which were irrelevant and leaving out facts that were pertinent to the case.

Ms Andia, Advocate for the appellants relied on her written submissions. The said submissions basically expounded on the grounds of appeal. Mr. Limo, the State Counsel appeared for the State. He relied on the record.

The case for the Prosecution is that on 3.12.09, the 1<sup>st</sup> and 2<sup>nd</sup> appellants were seen setting the complainant's house on fire. The said house stood on **L.P. No. Kakamega/Virembe/508** which the complainant inherited from her father and had it registered in her name as the sole and absolute proprietor. The appellants who are the complainant's neighbours had a land dispute with the complainant over the said parcel of land.

A report was made to the police. Investigations were commenced and the scene visited and photographs taken. The appellants were subsequently arrested and charged.

In her defence, the 1<sup>st</sup> Appellant, **MARY SHEM ALMASI** denied having committed the offence. She stated that her late husband had purchased the land in question from the complainant's late father. That after discovering that the complainant had registered the said land in her (complainant's) name, the 1<sup>st</sup> appellant lodged a caution and filed a case with the Shinyalu Land Disputes Tribunal. According to the 1<sup>st</sup> Appellant, the house in question was built by her late husband for their workers. That the grass roofing materials had been removed from the roof top and placed on the ground but were burned by unknown people. The 1<sup>st</sup> appellant termed the eye witnesses who testified as PW2 and PW3 were son and husband to the complainant.

The 2<sup>nd</sup> appellant, **EVANS SHIVONJE** gave sworn evidence. He denied the charge. He stated that he was at work the whole day on 3.12.09 (material day). That after work he retired to his house for the night. He heard about the house in question the following day and visited the scene. He confirmed the grass thatching material had been removed from the roof top and placed on the ground but the house was not burnt. According to the 1<sup>st</sup> appellant, the house in question and the land it stood on belonged to his father although the complainant holds the title to the land.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (*see **OKENO V R. [1972] EA 32***).

The appellants were charged with arson contrary to Section 332 (a) of the Penal Code. I have scrutinized the charge and the particulars of the offence. In my view the charge is not defective. The ground of appeal that the Charge Sheet is defective appears to have been abandoned as there is no mention of any such defects in the written submissions.

The complainant's evidence is that on the material day at about 2.00 p.m, she had the appellants removing the grass thatching material from the roof of her house then she saw them set the house on fire. She then went to make a report to the Administration Police Officers at Shinyalu District Officer's office who referred her to Kakamega police Station where she made a report but on returning to the scene at about 7.00 p.m. she saw the appellant again setting her house on fire then she rushed back to call the police officers who visited the scene.

The complainant produced the title Deed to L.P. No. **Kakamega/Virembe/508** which is in her name. She pointed out that her said land abuts the land of the appellants. She also pointed out that the light from the fire enabled her to see the appellants during the 7.00 p.m. incident.

PW2, **ALBERT HANDA** who described himself as a distant neighbour to the complainant testified that he witnessed the 7.00 p.m. incident. According to PW2, he was heading home from the market when he heard the quarrel between the complainant and the appellants then he saw the 1<sup>st</sup> appellant light a matchstick and set the complainant's house on fire while the 2<sup>nd</sup> appellant stood by.

PW3, **CHARLES MUSIMI ANDEYE** who described himself as a deacon at P.A.G. Church where the complainant and the appellants are also members testified that he saw the 2<sup>nd</sup> appellant climb to the roof top and remove the grass thatching material from the complainant's house. That later on at about 7.00 p.m. he saw the complainant's house on fire and the complainant and the appellants were present.

The evidence of PW2 and PW3 corroborates the evidence of the complainant. There are no material contradictions between the evidence of the complainant and that of PW2 and PW3. The complainant, PW2 and PW3 and the appellants are people who know each other from the village and from the church. Some of the events took place during the night at about 7.00 p.m. However, each of the said witnesses has indicated in their evidence the light from the fire assisted them to see what was happening. All the three eye witnesses have pointed fingers at the appellants as the culprits.

On the other hand, the first appellant denied the offence. She testified that a land dispute existed between her and the complainant over land bought by the 1<sup>st</sup> appellant's late husband from the late father of the complainant. According to the 1<sup>st</sup> appellant, the house in question was built by her late husband for their workers. According to the appellant, the grass was removed from the house and placed on the ground but got burnt. She however denied anything to do with the removal of the thatching material or the burning of the same and did not know who had burnt the thatching materials.

According to the 2<sup>nd</sup> appellant, he had gone to follow the arrest of his mother (1<sup>st</sup> appellant) when he was also arrested. The 2<sup>nd</sup> appellant also denied the offence. He testified that the complainant is the one who demolished the house in question and that the house was not set on fire.

Both the 1<sup>st</sup> and 2<sup>nd</sup> appellants have testified that there is a land dispute between their family and the complainant over the land parcel where the house in question stands.

DW3, **MARCELINE IHISA**, the area assistant chief testified that she tried to unsuccessfully to resolve the land dispute between the complainant and the appellant's family. According to DW3, the 1<sup>st</sup> appellant wanted the complainant to vacate the land in question saying that the same had been purchased by her late husband from the complainant's late father.

DW3, the assistant Chief confirmed having received the report from the complainant and she visited the scene and confirmed that the house was fully burnt from the roof. The said assistant Chief confirmed that the house belonged to the complainant and that it was the complainant who was staying in it. According to the Asst. Chief, there was a fence that separated the complainant's home from the appellants' home.

The Investigating Officer, PW4, **PC ERICK MUTUMA** and the scenes of crime officer, PW5, **PC DAVID OTIENO OUMA** visited the scene and photographs of the burnt house were taken.

It seems the 2<sup>nd</sup> appellant is the only witness who denies that the house was burnt. The weight of the evidence is against the assertion by the 2<sup>nd</sup> appellant. There is overwhelming evidence from the complainant, PW2, PW3 and the two police officers who visited the scene that the house was indeed set on fire. The 1<sup>st</sup> Appellant has not denied that the house was set on fire. DW3, the area Asst. Chief who is a defence witness has confirmed that the house was set on fire.

The question is therefore who set the house on fire. From the evidence of PW1, PW2 and PW3, there are no doubts that the appellants set the house on fire. The reason behind the arson seems to be the simmering land dispute between the two families. Parties however ought to resolve disputes amicably and not take the law into their own hands. Although the appellants did not manage to produce the documents relating to the purported purchase of the land in question, this did not prejudice their case.

PW2 and PW3 are independent witnesses who are neighbours and members of the same church as the complainant and the appellants. Although the 1<sup>st</sup> appellant stated in her defence that PW2 and PW3 are the son and husband to the complainant, the issue seems to be an afterthought and was not raised when

PW2 and PW3 testified.

I have considered the provisions of Section 78 (1) of the evidence Act Cap. 80 Laws of Kenya which states as follows:-

***“In Criminal proceedings a certificate in the form in the schedule in this act given under the hand of an officer appointed by order of the Attorney General for the purpose who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.”***

The provision is squarely on the admissibility of the certificate for the preparation of photographic print or a photograph enlargement from exposed film and has nothing to do with the actual taking of the photographs.

PW5 the scenes of crime officers unchallenged evidence is that he was appointed by the Attorney General as such vide Gazette Notice No. 407 of 2010 and was therefore qualified when he made the certificate of the photographic prints on 17.3.2011.

Having re-evaluated and reconsidered the evidence on record, I am satisfied that the appellants were convicted on sound evidence.

I therefore uphold the conviction. On sentence, I note that the value of the property is reflected in the charge sheet as Kshs.36,750/=. The sentence of five years imprisonment is therefore excessive. I therefore substitute the said sentence with a fine of Kshs.20,000/= in default six months imprisonment each. The new sentence will take effect from today's date. The bond of the 1<sup>st</sup> appellant MARY HANDA MUSINDI is hereby cancelled.

Orders accordingly.

***Judgment delivered at Kakamega on the 20<sup>th</sup> day of September, 2012***

**B. THURANIRA JADEN**  
**J U D G E**