



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 180 OF 2010

(From original conviction and sentence in Criminal Case No. 5065 of 2008 of the Chief Magistrate's Court at Nakuru - Mrs W. Juma, Chief Magistrate)

ANN NJERI KIBICHIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of Arson contrary to Section 332(a) of the Penal Code (*Cap. 63, Laws of Kenya*). The particulars were that the Appellant on 28th day of September 2008 at Lanet Police Station in Nakuru District within Rift Valley Province, willfully and unlawfully set fire to a building namely a dwelling house belonging to Kenya Police valued at 1.5 million.

The prosecution called PW1, who was the only witness and at the end of his evidence the trial court found that the appellant had a case to answer and put the appellant to her defence. The appellant gave sworn testimony and denied the charge of arson. The trial court, after considering the prosecution as well as the defence evidence, found the appellant guilty and sentence her to three years probation. Being aggrieved both with the conviction and sentence the appellant appealed to this court on three grounds namely -

(1) THAT the Learned Magistrate erred in law and fact when she found, against the weight of the evidence, that the prosecution had proved beyond reasonable doubt that the Appellant (then accused) had willfully and unlawfully set fire to a dwelling house belonging to Kenya Police.

(2) THAT the Learned Magistrate erred in law and fact in determining the matter on speculation and her own advanced theories not canvassed in evidence.

(3) THAT the Learned Magistrate erred in law and fact in failing to give sufficient cognizance and recognition to the Appellant's reasonable defence.

And on those grounds, the Appellant prayed that the appeal be allowed, the conviction be quashed and the sentence set aside.

The appeal was urged before me on 24th November, 2010. Mr. Kanyi Ngure represented the

Appellant, while the State was represented by Mr. Omwega State Counsel. As the State conceded the appeal, it is in order to commence with the arguments of the State Counsel.

In conceding the appeal, Mr. Omwenga, Senior Principal State Counsel submitted that the cause of fire was not established. The prosecution called one witness who was not an eye witness. This witness was informed by an Internally Displaced Person (IDP), that a house was on fire, and he proceeded to the house and found clothes burning on top of a gas cylinder.

Counsel submitted that in these circumstances are not conclusive as to cause of the fire, that no witness can say that immediately the appellant left the house there was a fire. There was no evidence that the fire could have been caused by an electric fault. Even though the appellant accepts that she slept in the house, she insists that she was not the cause of the fire.

Even though the State conceded to the Appeal, it is still the duty of this court as the first appellate court to re-examine and re-evaluate both the prosecution and the defence evidence before the trial court to make its own findings and arrive at its own conclusions.

The charge against the appellant was arson contrary to Section 332(a) of the Penal Code.

Section 332(a) says -

"S. 332 - Any person who willfully and unlawfully sets fire to -

(a) any building or structure whatever, whether completed or not; or

(b) - (d)

is guilty of a felony and is liable to imprisonment for life."

The particulars of the charge included the *"value of the house as Shs. 1.5 million. There is no provision in the said Section 332 for value of a building or structure (S. 332(a)), or vessel (S. 332(b)), or any stack of cultivated vegetable produce, or a mineral or vegetable fuel, (S. 332(e), or a mine, or the workings, fittings or appliances of a mine (S. 332(d)). Notwithstanding the provisions of Section 382 of the Criminal Procedure Code, Cap. 75, Laws of Kenya (that no irregularity in a charge etc) would render the proceedings irregular, unless they have occasioned prejudice to the appellant), reference in the particulars of charge to a value of the burned structure, is not in conformity with Section 332(2) under which the appellant was charged.*

In this case, there is no doubt there was a dwelling house which was completed. This is accepted by both the prosecution and the Appellant. It is also accepted that the house was burnt down. The only question is who burnt it down or put different who caused the fire that burnt the house down. The prosecution alleged from the one single witness (PW1) that it was the appellant who caused the fire that burnt the house down. The appellant denied doing so. The State Counsel has conceded that there was no evidence to support the charge. What are this court's findings?

The expression "**willingly**" is defined in all good English Dictionary as "**ready to consent or undertake.**"

The expression "**willfully**" is defined in all good English Dictionary the Illustrated Oxford Dictionary (1998 - 2003 Edn) of an action as-

"intentional, deliberate (as willful murder, willful neglect, willful disobedience, or as in this case willful arson), and "intentional/deliberate" mean, fully considered, not impulsive, done on purpose."

The issue here is whether the appellant intentionally and deliberately set the house on fire. To

prove so, the prosecution needs to show that the appellant went about the act of burning the house and things in it by intentionally assembling items or instruments that would cause a fire, and lit that fire and then left the premises.

The only evidence on record is that of PW1 and the appellant. In material parts, the evidence of PW1 and the appellant corroborate and complement each other. In his evidence-in-chief PW1 said -

"... on 28/9/2008, I reported to Report office duties at 8.00 a.m. and while there I saw a lady come from Lanet Police lines dressed in red and white sweater. She emerged from a house near our report office at about 30 metres away. She took a footpath leading to a nearby shopping centre. She came back after about 15 minutes and entered the same house she had left which was a house of a colleague, Onesmus Mbogo."

She came out with a towel wrapped her waist and a basin of water. She went to the bathroom. I went back to the office to attend to reports. After finishing, I went out and sat on a bench between the office and the house the lady had spent the night. I now saw her leave the house through the back door. She was holding two paper bags and a hand bag in another hand. She walked - the directions of the main road. I returned to the office. While in the office an IDP who had camped at the Police Post called me saying he had seen smoke coming out of the house of P. C. Mbogo."

In her evidence, the Appellant confirmed that she had 2 small paper bags and her hand bag. **"The paper bags had my clothes and books. As I left - I met Inspector Barasa in charge Lanet Police Post, I did not know him. I bought air time and called Mbogo. I told him I had left. I walked to the Nakuru-Nairobi Highway, 30 metres."**

In her evidence in-chief, the appellant again corroborated the evidence of PW1 in relation to the antecedents to her leaving the house of P.C. Mbogo - who had earlier invited her to visit him at Lanet, and asking her to assist him with shs 300/= which he owed to someone who was threatening him to the OCS. In the event she had travelled from Ol-Kalau where lived, and found PC Mbogo lowering the flag but she proceeded to Mbogo's house. She was joined later by Mbogo and his colleague P. C. Bundi. Mbogo asked her for Shs 400/= which she gave him, they left and did not return.

"On 28/09/2008 I woke up at 7.00 a.m. I went and bought credit. I called Mbogo, and told him I wanted to leave. I came to the house and used a meko gas and warmed water for bathing. The bathrooms were out, I bathed, I returned and made break fast. I ate break fast and called Mbogo. The place was one roof and 4 rooms, the neighbouring had someone, one tank had locks, one was locked."

.... I prepared my tea at 8.30 a.m. I left the house at 9.00 a.m. I did not lock the house. The room had two doors, I locked the front door from inside and left through the rear door, closed it using a wedge. Stephen Mwenda a Constable was outside the Police Station 500 metres away."

In cross-examination the appellant said -

"I went to Lanet at invitation of my ex-boyfriend. I found him lowering the flag, he came to the house. We did not discuss anything. I arrived at 6.30 p.m. I spent the night at his place. He said he was on duty. I left at 9.00 a.m. and he was not back home. I was happy when I left because he had explained to me he would not come back and now he was just a friend. Mbogo called my sister, he did not respond to my call. I do not know why they alleged I burnt the house. I did not know who set fire on the house. I did not set fire to the house. I do not know why they wanted to frame me."

From the above evidence there was no evidence that the appellant willfully set the house on fire. The evidence of PW1 is not that of a witness who saw the appellant prepare and lit a fire before she left the house. The evidence of PW1 is purely circumstantial, of the kind that cannot prove the guilt of the

appellant with any accuracy or the accuracy of mathematics. PW1 saw the appellant walk out and return shortly later. She also saw her leave the house. The appellant has in her evidence confirmed this aspect of the evidence of PW1.

It is much later after the appellant had left that PW1 says, an IDP came and said he or she had seen a fire coming out of Mbogo's house. The IDP did not report that the appellant had set fire on the house. For some inexplicable reason the IDP was not called to testify as to circumstances he saw smoke coming from Mr. Mbogo's house. There is no evidence as to the cause of the fire, and no expert was called to testify as to the possible causes of the fire - could it be a petrol bomb, an electric fault, the scenes of crime personnel were never called to examine the burnt out house. The house was shared - the prosecution did not lead evidence to show that the fire would not have come from the next door.

There was hardly any basis for the lower court's suggestion that the fire was not caused by an electric fault. The appellant and the ex-boyfriend appeared to be on very good terms, the man invited the lady, and the lady donated to him Shs 400/=. Why would she turn around and set his room on fire. There is no evidence of motive at all.

In **SAWE vs. REPUBLIC** [2003] KLR 364, the Court of Appeal held inter alia -

"that in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of guilt."

I think that this is one of those cases where the inculpatory facts are not existent, and the benefit should have gone to the appellant. In commend learned State Counsel for readily conceding to the Appeal. I therefore quash the conviction, and set aside the sentence on probation upon the appellant.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 25th day of February 2011

M. J. ANYARA EMUKULE
JUDGE