



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 236 OF 2010

(CONSOLIDATED CRIMINAL APPEALS NOS. 236/10, 233/10, 234/2010 & 235/10)

(Appeal arising from original Kakamega Chief Magistrate's Court in Criminal Case No. 125 of 2008 [J. M. GITHAIGA,PM])

**1. CHRISPINUS IKUNZA
2. MARK LUVEMBE.....APPELLANTS
3. EVANS LUVONGA NAPALI
4. WYCLIFFE LUVEMBE SHIKOTO**

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellants were all jointly accused of the offence of arson contrary to **S. 332(a)** of the Penal Code. It was alleged that on 7.12.2007 at Irumbi village, Shirere Sub-location in Kakamega South District within Western Province, they jointly , willfully and unlawfully set fire to a building namely a dwelling house belonging to one Tom Imbenzi, which house was valued at Kshs.2.6 million. They all denied the charge, were tried, found guilty and were sentenced to serve five (5) years' imprisonment. The Appeal herein is against both conviction and sentence and the grounds of appeal are;

“1. That the trial Magistrate erred by disbelieving the alibi of the appellant which raised doubts as to whether the appellant was at the scene of the alleged crime.

2. That the trial Magistrate erred by failing to take into account and analyze all the circumstances under which the alleged offence was committed which circumstances were unfavourable and difficult for any eye witness to identify the alleged perpetrators of the offence charged.

3. That the trial Magistrate erred in law by failing to find that the absence of the Investigating Officer was fatal to the prosecution case.

4. That the trial Magistrate erred in law and fact by relying wholly on the contradictory and incredible testimony of the prosecution witnesses to convict the appellant.

5. That the trial Magistrate failed to find that the testimony of most of the prosecution witnesses was weakened by the fact that the witnesses were ill-motivated, biased and untruthful.”

2. Each of the Appellants filed the same grounds (above) and so in the consolidated Appeal, I will take them into account as reflective of the position taken by each Appellant.

3. In any event, the evidence tendered in support of the charge was as follows;

4. On 1.12.2007, one William Napali was allegedly murdered and PW1, Timothy Imbenzi was present when the incident took place. He was in fact arrested as a suspect in the murder and according to him, he was later released without charge and because of fear for his life, he left his home and went to stay at a hotel in Chavakali.

5. PW1 added that PW2, Benedicto Amboko Mukabwa, informed him that on 7.12.2007, his house had been razed down and so he made a report at Chavakali Police Station and with police officers, he visited the scene and confirmed that fact.

6. PW2 aforesaid stated that on 7.12.2007 at 1 p.m., he saw a group of people numbering 50 or more who entered PW1's house and armed with crude weapons started hitting the windows and doors of the house. According to him, the Appellants were part of the group and his evidence was that;

- i) the 4th Appellant, Francis Napali was the one who was carrying a jerrican with an inflammable substance and poured it through the windows;
- ii) the 3rd Appellant, Mark Luvembe lit the matchstick that started the fire.
- iii) the 2nd Appellant, Wycliffe Luvembe and the 1st Appellant, Crispinus Ikonza spread the fire around the house.

7. After the roof of the house had caved in, the crowd left and PW2 later recorded his statement.

8. **PW3, Silvanus Lihanda**, was with PW2 when the crowd stormed their home and he gave evidence similar to that of PW2 and narrated what each Appellant did (as above).

9. **PW4, Alexander Sihachi**, was also at PW1's house at the time of the incident (they are brothers) and he too gave evidence similar to that of PW2 and PW3.

10. **PW5, C.I.P. Daniel Kinyua**, received the report of the incident on 7.12.2007 at 5 p.m. from PW1 and the next day, he visited the scene with scenes of crime personnel and later arrested the accused persons after they were mentioned as suspects. He arrested them at their homes at night and he was led there by an unnamed person.

- 11.** When they were asked to defend themselves, the 1st Appellant said that on 7.12.2002 he was at Kakamega Town the whole day conducting his boda boda business and he went home at 6 p.m. He was arrested later and he denied the offence.
- 12.** The 2nd Appellant on his part stated that he was a court clerk with the firm of M/S Wamwayi & Co. Advocates and he was at his place of work the whole day and he went home at 5.30 p.m. to attend to the funeral arrangements for William Napali aforesaid and because of tension in the area, he got information that PW1's house had been set on fire. He did not know which particular house had been set on fire and so he denied the offence.
- 13.** The 3rd Appellant said that on 7.12.2007, he had gone with others to collect the body of William Napali for burial and on the way, he saw smoke in PW1's home and he had no clue what had happened. He denied setting the house on fire.
- 14.** The 4th Appellant on his part stated that on the material day he was in Eldoret where he was selling fruits and that he went to his home that evening to attend the funeral of his father, William. He arrived after the funeral and he denied knowledge of the incident of arson.
- 15.** What is my opinion of the above evidence and in line with the issues raised in the Petition of Appeal and in submissions by the advocates for the Appellants and the learned State Counsel?
- 16.** Firstly, it is beyond conjecture that PW1's house was set on fire on 7.12.2007 by a mob of people, angry at the death of William Napali and PW1's alleged role in the death.
- 17.** Secondly, the witnesses, PW1, PW2, PW3 and PW4 all knew the Appellants quite well as they were all from the same neighbourhood. Further, the incident took place in broad daylight and those witnesses were all in close proximity to the crowd that had descended, armed and angry, at PW1's house. The issue of identification is pertinent and therefore;
- 18.** Thirdly, the issue to address is whether the Appellants, acting in concert with each other and being part of the mob, participated in the burning of PW1's house. I am satisfied from the evidence on record that they were part of that mob and that they were properly identified by the witnesses whom I have mentioned above. It has been argued on behalf of the Appellants that it was difficult for any witness to pick out the Appellants from the large crowd, but I find that argument as lacking in weight because the witnesses were close to the burning house and saw what each Appellant did. Their graphic and detailed descriptions of their actions cannot be denied.
- 19.** As for the alibi defences raised, I have said that the Appellants were at the scene and nowhere else. Their defences cannot dislodge the credible evidence against them and I will dismiss them as afterthoughts.
- 20.** For the above reasons, none of the grounds of appeal meets the favour of the court and the Appeal as consolidated is dismissed in its entirety.

21. Orders accordingly.

Delivered, Dated and Countersigned at Kakamega this 13th day of April, 2011.

ISAAC LENAOLA

J U D G E