REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 64 OF 2010

BENJAMIN KIPSORNO ……………….………………….APPELLANT

VERSUS

REPUBLIC ……………..……………………….. RESPONDENT

J U D G M E N T

This appeal stems from the decision and Judgment of the Senior Resident Magistrate at Iten in Criminal Case No.191 of 2009 in which the appellant, **BENJAMIN KIPSORNO KOMEN**, was convicted and sentenced to serve seven (7) years imprisonment for the offence of Arson contrary to S. 332 (9) of the Penal Code. There were two additional counts for the offences of malicious damage to property contrary to S. 339 (1) of the Penal Code and creating disturbance in a manner likely to cause a breach of the peace contrary to S. 95 (1) (b) of the Penal Code. However, the appellant was acquitted of both counts after the learned trial Magistrate correctly found that the second count was encapsulated by the first count while the third count was not proved for want of a complainant.

The offence of Arson was the first count in which the appellant was convicted and sentenced accordingly. This appeal is focused on that count in which it was alleged that on the 27th February 2009 at Kator village, Baringo District, the appellant willfully and unlawfully set fire to a building namely a dwelling house valued at Ksh.37, 000/= belonging to Mary Kangogo.

The evidence in support of the charge was that on the material date at about 2.00 p.m. the complainant **MARY KANGOGO (PW 1)** was at her home with her three children when the appellant appeared and threw stones at them. The stones hit her house. Her children fled while screaming. She also fled. The appellant was at the time carrying a black jerry can and from a distance, the complainant noticed him pouring its liquid content onto the house which he then set on fire. The appellant fled from the scene when neighbours arrived and assisted in putting out the fire. However, some of the complainant’s property had already been destroyed by the fire.

SYLVIA BOIT (PW 2) was with the complainant at the material time. She heard a scream and saw the appellant. He was shouting that his house was being demolished. He had a black jerry can. He picked a stone and threw it at those at the scene including Sylvia (PW 2). She (PW 2) fled towards a neighbours house and from a distance, saw their house engulfed in fire. The appellant fled from the scene after people arrived and put out the fire.

JACKLINE YEGON (PW 3) was also with the complainant at the material time when the appellant appeared at the scene shouting. She fled from the scene when the appellant threw stones and from a distance saw the appellant pour a liquid on the house. Thereafter, she saw smoke and then fire. A crowd

of people appeared at the scene and put out the fire.

FREDRICK KIPRUTTO (PW 4) was also at the scene at the material time. He saw the appellant appear and throw stones. He (appellant) had a black jerry can. Fredrick (PW 4) fled from the scene and from a distance saw the appellant enter the house. Thereafter, he saw a fire and the appellant fleeing from the scene.

JOSEPH KIPYEGON (PW 5) heard screams coming from the complainant's home. He rushed there and found one of the houses on fire. Together with others, he managed to put off the fire and salvage some items. He did not see the appellant at the scene.

P.C JOHN KOECH (PW 6) of Kabarnet police station received the necessary report and commenced investigations. He proceeded to the scene and found that the fire had been put off. He recovered some burnt items (P. EX. 1–6) and a black jerry can (P. EX 7) which was forwarded for analysis and found to have contained petrol and diesel. He later arrested and charged the appellant.

In his defence, the appellant said that he was at his home on the material date at noon when police officers arrived there accompanied by a person holding an eviction order issued by the High Court at Nakuru. The police officers started to demolish the houses on the land. They entered the appellant's house and locked him there as they proceeded to the appellant's brother's house which they demolished. The appellant left his house after the police had gone away and a group of people had gathered at the scene. He took photographs (D. EX 4) at the scene but at about 5.30 p.m. police officers returned to the scene and questioned him about the complainant's house. He was arrested and was surprised that he was charged. He contended that he was locked up in his house when the complainant's house was burnt by fire. He was not at the scene at the time.

The appellant's wife **SALLY KOMEN (DW 2)** and his sister-in-law, **CATHERINE KOMEN (DW 3)** confirmed that the appellant was locked in his house by the police when the demolition of the houses was in progress. They both said that the exercise took about two (2) hours.

The appellant's brother **KIPKORIR KOMEN (PW 4)**, said that he found the appellant in his house when the door was opened for him by his wife.

JEREMIAH KANGOGO CHEPKETENY (PW 5) also said that he found the appellant in his house after the police had finished the demolition exercise which took about two (2) hours.

After considering the evidence herein above in its totality, the learned trial Magistrate dismissed the appellant's defence as an afterthought and concluded that not only was the complainant's house set on fire but also that the appellant was responsible for the offence. Consequently, the appellant was convicted and sentenced on count one only.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the following six (6) grounds:-

(1) That the learned trial Magistrate erred in law and fact in convicting the appellant only on the contradicting evidence of the prosecution witnesses.

(2) That, the learned trial Magistrate erred in law and fact in convicting the appellant on the evidence of PW 1 with whom they had a land dispute without warning himself of the dangers of relying on such evidence.

(3) That, the learned trial Magistrate erred in law and fact in failing to consider the appellant's defence.

(4) That, the learned trial Magistrate erred in law and fact in failing to consider that proceeding with the trial when in fact there was several pending criminal cases involving the

appellant will interfere with his judgment hence denying the appellant a fair hearing.

(5) That, the learned trial Magistrate erred in law and fact in sentencing the appellant to seven (7) years imprisonment which was excessive.

(6) That, the learned trial Magistrate erred in law and fact in failing to find that evidence of PW 1, PW 2, PW 3 and PW 4 was contradictory to one another.

The grounds were argued on behalf of the appellant by the learned Counsel, **MR. LEL** and were opposed on behalf of the respondent by the learned prosecuting Counsel, **MR KABAKA**.

The role of this Court is to reconsider the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence availed before the trial Court has already been reconsidered herein above and when viewed in the light of the submissions made herein by both the appellant and the respondent, it is this Court's opinion that the occurrence of the offence was not substantially disputed. Indeed the complainant's evidence as corroborated by that of PW 2, PW 3, PW 4, PW 5 and PW 6 confirmed that the complainant's house was deliberately and maliciously set on fire. The evidence was found by the trial Court to be firm, consistent and non-contradictory. This court does not see any reason to depart from that finding.

Basically, the issue for determination was whether the appellant was responsible for the offence. The defence raised was a denial and an alibi. It was the appellant's contention that he was locked inside his house by the police when the demolition was going on and indeed when the complainant's house was set on fire. He therefore implied that he could not have been responsible for the offence and that the evidence by the prosecution witnesses incriminating him was not true. He also implied that he could have been implicated because of a family land dispute. The complainant is his relative.

The learned trial Magistrate gave due consideration to the defence raised and made a finding that it was an afterthought since the appellant was placed at the scene by the evidence adduced by the complainant (PW 1) as well as PW 2, PW 3 and PW 4. These witnesses testified that the appellant arrived at the scene with a black jerry can and poured its contents on the house. Thereafter, he set the house on fire and fled just as neighbours were responding to the alarm raised. These witnesses knew the appellant. The incident happened at about 2.00 p.m. when the appellant could easily be seen and recognized.

The jerry can in possession of the appellant at the material time was recovered and when analyzed by the Government Analyst (see P.EX 9), it was found to have contained inflammable petroleum products i.e. petrol and diesel.

All the foregoing factors prevail upon this court to concur with the learned trial Magistrate and also find that the alibi defence raised by the appellant was an afterthought and was clearly discredited by the prosecution's evidence.

In sum, the appellant's conviction by the learned trial Magistrate was based on sound and credible evidence which evidence renders the appeal on conviction unmerited. The conviction is thus upheld by this Court.

As regards the sentence of seven (7) years imprisonment, it was lawful but rather on a higher side for a person who was apparently treated as a first offender. It is however instructive to note that the offence of arson carries with it a life imprisonment.

Nonetheless, considering the circumstances under which the appellant acted, hitherto, unlawfully and that he expressed remorse for his action, a sentence of three (3) years imprisonment would in the

opinion of this court serve the desired purposes of reforming and deterring the appellant.

In the end result, the appeal fails on conviction and succeeds on sentence which is now reduced by four years. The appellant will serve three (3) years imprisonment instead of seven (7) years.

[DELIVERED AND SIGNED THIS 3RD DAY OF NOVEMBER, 2011]

J.R. KARANJA
JUDGE