



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NOS. 53,54,55,61&62 OF 2011

(From the conviction and sentence by J.N. MWANIKI Senior Resident Magistrate at Baricho in Criminal Case No. 1269 of 2010 on 7th April, 2011)

FREDRICK MUTHIKE MWANGI.....	1 ST
APPELLANT	
SIMON GACHANJA MAINA.....	2 ND
APPELLANT	
PAUL GICHIRA MUTUGI.....	3 RD
APPELLANT	
MAGDALENE WANJIKU KARIUKI.....	4 TH
APPELLANT	
BEATRICE WAIRIMU MAINA.....	5 TH
APPELLANT	
VERSUS	
REPUBLIC.....	RESPOND
ENT	

J U D G M E N T

The 1st, 2nd, 3rd, 4th & 5th Appellants herein were the 1st, 4th, 5th, 2nd & 3rd accused persons respectively in Baricho Senior Resident Magistrate Court vide Criminal Case No. 1269 of 2009. They faced two counts viz:

- 1. Arson contrary to Section 332(a) of the Penal Code where they were all convicted and sentenced to five (5) years imprisonment.***
- 2. Assault contrary to Section 251 of the Penal Code. Save for the 3rd Appellant, all were convicted and sentenced to six (6) months imprisonment each.***

They were aggrieved by the convictions and filed the present appeals which have been consolidated.

The grounds of appeal raised are:

- 1. Failure to consider the role of the hostile members of the public in the said crime.***
- 2. The officers who recorded statements and also those who took photos were not called as witnesses.***
- 3. The investigating officer was not called to testify.***
- 4. The court shifted the burden of proof to the Defence.***

5. *Elements of grudges was not investigated*

Mr. Utuku in his submissions reiterated the above grounds. He said that no names were mentioned when the offence occurred. The allegation by the Appellants that grudges existed was never investigated. PW4 produced photos yet he was not the scenes of crimes officer. **HCCRA NO. 153/06 KISUMU, CALEB OSAWA OGOLLA VS REPUBLIC**. He also said the offence occurred at night. There was mention of moonlight and torch light but it was not stated how intensive this light was. He cited the case of **STEPHEN KIBUTHA M'MWONGO & ANOTHER VS REPUBLIC CRA NOS. 357 & 359/09 AT NYERI** to support the point on light.

Finally, he said at page 21 of the record of appeal the court placed the accused on their defence. There is no Ruling of a case to answer.

The state through Mr. Wahoro said he conceded to the fatal omission by the learned trial magistrate in making a Ruling on a case to answer.

This being a first appeal this court has a duty to re-evaluating the evidence and arriving at its own conclusion as was held in the case of **ODHIAMBO VS REPLUBLIC [2005] 1 KLR 564**. In the same case it was held that the court was under no obligation to allow an appeal simply because the stat is not opposed to the appeal

The prosecution case had been that on 6/12/09 11p.m. Jecinta Wairimu Kiti (PW1) received a telephone call from a neighbor Kellen Njeri who informed her that their house was on fire. PW1 was away in Nakuru but her husband (PW3) and son (PW2) were at home. Back at home PW2 and PW3 testified that the Appellants came there. The 2nd Appellant had a panga, while 5th Appellant had a knife. The 2nd Appellant was demanding for a phone he had allegedly left there. The 2nd and 5th Appellants aimed their weapons at PW2. 1st and 5th Appellants poured paraffin on their houses while 2nd Appellant lit the match box. PW1's house was torched. When the panga and knife were aimed at him he blocked them. He was injured on the hand and stomach.

The Appellants were people well known to them. PW2 and PW3 confirmed that the 2nd Appellant had been to their home the previous night with beer, unga and a phone. He even took the beer with PW3. At the time of departure he left the unga, which was safely kept for him. PW2 said there was bright moonlight and he had a torch. PW4 was the arresting officer and he arrested the appellants on different dates. He also produced photos taken at the scene. EXB1a. PW5 the Clinical Officer produced the P3 she filled in respect of PW2. She confirmed that he was assaulted.

The Appellants had each given an unsworn statement. 1st Appellant raised an alibi saying he came home on 7/12/2009 at 8 a.m. PW2 came to borrow his bicycle to assist him go to Sagana to report the arson. He was arrested together with his wife (4th Appellant) and sister in law (5th Appellant). 2nd Appellant said both complainants were his neighbours. He denied any knowledge of what happened on 6/12/2009 and said he was arrested on 25/3/2010.

3rd appellant said on 6/12/2009 he was busy with his work and came home at 5 p.m. He was arrested on 25/3/2010.

4th Appellant gave similar evidence to that of her husband (1st Appellant).

5th appellant said she learnt of this incident on 7/12/2009. She was arrested on 9/12/2009.

There is no dispute that the complainants and the Appellants are neighbours and hence people who know each other very well. Mr. Utuku raised an issue on the role of hostile members of the public and grudges between the parties. It's only PW1 at page 6 line 5 who talks of a hostile crowd who were even shouting at her. This was the next day after the incident. It's not clear what role was to be investigated by the crowd. The issue of grudges was only raised by the 5th Appellant in cross examination of PW2. PW2

admitted there were grudges between PW2's family and that of the 5th Appellant. In cross examination of PW3 by the others, the former denied the existence of any grudges.

Further in their defence none of the Appellants raised anything about grudges. Even the 5th Appellant never pursued it in her defence. Had it been anything serious it would have come up strongly in the defence case.

This offence occurred at night. And the circumstances for identification become very critical. What amount of light was there to enable the witnesses identify the suspects? It's only PW2 who says at page 10 line 21

“There was moonlight and I had a torch.”

It's not even clear where the witnesses and the arsonists were. Was it inside the house or outside? Was PW2's torch on or off? As was held by the Court of Appeal in ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR*** the trial court and first appellate court must make an inquiry about the nature of the light. There was no such inquiry made and neither was there any caution made before reliance on such evidence. I am alive to the fact that the complainants and the appellants are neighbours and they know each other. Even in such cases the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification was favourable and free from possibility of error before it can safely make it the basis of a conviction. This was the holding by the Court of Appeal in ***WAMUNGA VS REPUBLIC [1989] KLR 424***. The court further went forth to hold;

“Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

The lighting that enabled PW2 and PW3 to identify the arsonist was not properly explained.

And finally is he grievous omission by the learned trial magistrate to make a Ruling on the evidence adduced by the prosecution under Section 210 of the Criminal Procedure Code. Once the prosecution closes its case, the court is enjoined to evaluate the evidence and make a Ruling on whether a prima facie case has been made against the accused or not before placing one on his/her defence. The state readily conceded to the Appeal on this ground alone.

For the reasons indicated above I find that this appeal must succeed. I quash the convictions and set aside the sentences. The Appellants to be set free unless held under another lawful warrant.

The learned trial magistrate should get a copy of this Judgment.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT EMBU THIS 21ST DAY OF DECEMBER 2011.

**H. I. ONG'UDI
JUDGE**