



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

HCCRA NO.38 OF 2010

(From the judgement of E.H. KEAGO Senior Resident Magistrate in Busia criminal case no.884 of 2009)

ALEX TAABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant Alex Taabu was convicted by the Busia Senior Resident Magistrate of the offence of setting fire to trees contrary to section 334 of the Penal code and was convicted and sentenced to serve twelve (12) months imprisonment.

The petition of appeal sets out the grounds. Basically the appellant contends that there was no sufficient evidence to support the charge; that the defence was not considered; that the charge was defective and that the judgment was not in compliance with Section 169 (1) of the Criminal Procedure Code.

The State opposed the appeal arguing that the evidence of the prosecution was overwhelming and that the conviction should be upheld.

The facts are that on the 7th March 2009 around 6.00p.m., the complainant (PW2) was informed that his trees were burning having been set on fire by someone who was later to be identified as the appellant. He went to the scene and found PW3 his neighbour trying to put off the fire. The matter was reported to the police. PW1 the livestock officer Bunyala assessed the damage caused by the fire on 12/03/09.

PW3 testified that on the material day around 5.00p.m. he saw the appellant pass his home going to the shamba. After a short while, PW3 saw the appellant leave the land. There was fire on the portion the appellant had been working on which was spreading towards the complainant's land. The witness joined PW4 and the two tried to put off the fire. PW3 had cows he was grazing nearby. He drove them away to avoid the spreading fire. It was during the dry spell and the fire was spreading very fast destroying about

half (½) an acre of the PW2's land which had eucalyptus trees. PW5 did not witness the incident but he found fire burning the chaff on the land where the appellant was said to be working and burning trees on complainant's land. PW5 did not see the appellant. He was told by other people that the appellant is the one who lit the fire.

The evidence of PW3 was that he was at his home. He saw the appellant pass and go to work on some land whose owner PW3 did not know. What he saw was fire burning on the portion of land. He said he went to the scene and found it was the appellant who had lit the fire which spread to PW2's parcel.

Mr. Makali for the appellant argued that the prosecution did not prove any criminal intent on the part of the appellant. The offence requires that there be evidence to prove that the act was willful and unlawful.

The evidence of PW3 is that the appellant was burning chaff on the land he was working on. PW3 went on to say that the appellant kept spreading the fire till it caught the trees of PW2. PW3 did not explain clearly whether he was present as the fire was spreading or whether he was watching it from his home. The distance between the home of PW3 and the land was not given to assist the court to assess whether PW3 could see what the appellant was doing from his home. PW3 says the fire was lit to burn the chaff on the parcel neighbouring that of PW2 (complainant). Assuming that the appellant is the one who lit the fire, as suggested by the circumstantial evidence of PW3, it is important to investigate what his intention was. Did he intend to burn the chaff on the land he was working on or to burn the trees of the complainant? Did he spread the fire maliciously with intent of destroying PW2's property? From the evidence of PW3 and PW4, it was not established that the act of the appellant was intended to destroy the property of the neighbor. The appellant was blamed by the witnesses for leaving the scene instead of trying to put off the fire. The act of leaving the scene does not prove that the appellant's act was willful. In offences where the charge includes the word "willful" the prosecution must prove that the accused out of his own free will did the act in question. PW4 testified that the weather was dry. The magistrate said in his judgement that the weather was dry and windy. This kind of weather is conducive to fire spreading very fast. The appellant may have lit the fire to burn the chaff on the two acres he had cleared but the fire spread beyond his control causing damage to a neighbour's property.

The word "unlawful" in the charge calls for evidence to prove knowledge on the part of the accused that his act will lead to damage, loss or harm. In the present case, the evidence of PW3 and PW4 does not support the allegation that the appellant had such knowledge when he lit the fire.

On the defective charge, the law requires that where one section provides for different categories of offences, the specific subsection under which the accused is charged must be cited. The court on convicting must indicate under what Section and sub-section (if any) it has convicted. The offence in the charge under section 334 deals with setting fire to crops. It has three subsections each dealing with a different category of crops. It was imperative that the subsection under which the appellant was charged be indicated for purposes of clarity. The magistrate was wrong to convict on the general section.

The defence submitted that the appellant was charged under the wrong law. The Grass Fire Act, cap 327 deals with control of grass fires. Under the interpretation section of the Act, "grass" includes vegetation. "Vegetation" is defined as growing or standing vegetation, and includes any tree and any part thereof, and any bush, shrub, brushwood, undergrowth, grass, crops and stubble. The evidence in this case is that the appellant was burning chaff gathered after clearing land for cultivation. The fire became uncontrollable and spread to the farm of the complainant thereby causing damage. The relevant offence was "burning vegetation without authority" as provided by Section 3(2) of the Grass Fire Act whose particulars read:

“No person shall wilfully or negligently kindle any fire which by spreading may damage or destroy the property of any other person”

It is noted that the section covers a situation where the act is either “willful” or “negligent”. The appellant was therefore charged under the wrong provisions of the law.

On the judgement, I find that the magistrate had his points of determination although they were not specifically set out. Reasons for determination of the said issues were given. The judgement was not in contravention of section 169 of the Criminal Procedure Code.

I come to a conclusion that the Appellant was charged under the wrong provisions of the law as discussed in the foregoing paragraphs. Even assuming that the law was correct, the fact is that the ingredient of the offence of willfully and unlawfully setting trees on fire was not proved to the standards required.

The conviction is hereby quashed and the sentence set aside. The fine paid to be refunded to the appellant.

The appeal is therefore successful.

**F.N. MUCHEMI
J U D G E**

Judgement delivered and dated this 15th day of December 2011 in the presence of the appellant and the State Counsel Mr. Okeyo and Mr. Makali for the appellant.

**F.N. MUCHEMI
J U D G E**