



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 109 OF 2009**  
**(Being an appeal from original conviction and sentence of the RM's court**  
**at Kilgoris in criminal case No. 170 of 2008 - R.A. Oganyo, SRM)**

**BETWEEN**  
**VALENCE MOMANYI OGARO ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**  
**JUDGMENT**

The appellant was charged with the offence of arson contrary to **section 332 (a)** of the **Penal Code** and grievous harm contrary to **section 334** of the **Penal Code**. The particulars of the offence in the first count were that on the 14<sup>th</sup> day of February, 2007 at Mungei village, Olomismis location in Transmara District, the appellant willfully and unlawfully set fire to a dwelling house of **Sofia Oyaigo** valued at Kshs. 180,000/=. In the second count it was alleged that on the same day and place as in the first count he unlawfully did grievous harm to the said **Sofia Oyaigo**.

The appellant denied the charges and after a full trial he was convicted on the two counts and sentenced to imprisonment for life.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his self drawn petition of appeal, he stated that the learned trial magistrate erred in law and in fact by convicting him without satisfactory evidence. He further stated that the learned trial magistrate shifted the burden of proof to him. Lastly, he stated that the sentence imposed upon him was harsh and excessive.

During the hearing of the appeal the appellant opted to rely on written submissions which he presented to court. I shall advert to the main issues raised therein at a later stage.

Mr. Gitonga, State Counsel, opposed the appeal and submitted that there was overwhelming evidence in support of the prosecution case. He also supported the sentence that was passed.

This being the first appellate court, it is enjoined to consider afresh the evidence that was tendered before the trial court, evaluate the same and reach its own conclusion. I will proceed to summarize the evidence that was adduced before the trial court.

**Sofia Robi Peter, PW1**, told the court that on 14<sup>th</sup> February, 2007 at about 2.00 p.m., she was at her home when she saw fire on top of the roof of their grass thatched house. She rushed into the house to pickup her four months old baby who was sleeping therein. She met with the appellant who was coming from one of the rooms. She had earlier seen him pouring something from a plastic container in the fire place that was in the house. She further stated that they used to keep a power saw and petrol in the house. The appellant had recently bought the petrol. The complainant was stumbled by a jerrican of petrol but managed to pick the baby and threw her out while she remained trapped inside by the fire. She sustained grievous burns all over her body. Meanwhile the appellant had disappeared. He was eventually found at Keroka where he was arrested at.

**Anna Karunde Mose, PW3**, was a co-wife of PW1. On the material day at about 3.00 p.m. she was at her home when she saw the house of PW1 on fire. She found PW1 rolling on the ground shouting:

**“Mkisii umenichoma”** meaning **“a Kisii man has burnt me”**

She was referring to the appellant. They rushed her to a hospital for treatment.

When she got to the home of PW1, the appellant was there. He was holding a plastic container trying to pour some liquid on the roof of the house.

**Dr. Robert Mutula, DW2**, testified about the injuries that were occasioned to PW1 as a result of the fire

incident. He described the injuries as grievous harm.

**Police Constable Stephen Onchari, PW4**, was stationed at Kilgoris police station. He testified that on 15<sup>th</sup> February, 2007 at about 2 p.m. a person by the name Peter Miwani reported that his house had been burnt and his wife had sustained severe burns and had been admitted at a local hospital. He visited PW1 at the hospital and observed that she was in a bad condition. He then proceeded to her home. He found a timber house that had been burnt down to ashes. He was informed that the house had been burnt by a person who had been engaged as a mason by the owner of the home. The person had disappeared.

The witness further testified that on 27<sup>th</sup> March, 2008 the complainant was at Keroka when she spotted the appellant and showed him to the police who arrested him.

In his defence, the appellant stated that on 13<sup>th</sup> February, 2007, he was at the complainant's home. He had been engaged by the complainant's husband to split timber for him for building a house. While there PW1 asked him to help her with some chores in the home. She wanted him to remove soil from the floor of their newly built house in the sitting room. At about 1.30 p.m. he was about to complete his work when PW1 left the house after preparing lunch. She returned after a while with a sufuria. Shortly thereafter he heard an explosion. At the time PW1 was in a different room where she was cooking. She screamed and called on him to help her. He tried to reach where she was but some plastic jerricans which had water had caught fire. The complainant was also on fire. He rushed out to bring water to quell the fire but it could not go off. Shortly thereafter the complainant came out with a jerrican of petrol. She started crying that he had refused to help her. He responded that she was in a place where there was petrol and so he could not get near her. She was rushed to a hospital and he remained at her home. He remained there up to the evening of that day when he decided to go to Keroka.

After the complainant was discharged from the hospital, she went to Keroka and found him staying with his wife and children. He alleged that the complainant admitted that she was the one who had been careless with petrol which was kept near the fire place in her house. He was arrested after about a year and taken to Keroka police station.

In his written submissions, the appellant alleged that his constitutional rights were violated because he was not arraigned in court within 24 hours of his arrest as required under **section 72 (3) (b)**. He said that he was kept in police custody for nine days. The charge sheet shows that he was arrested on 27<sup>th</sup> March, 2008 and arraigned in court on 4<sup>th</sup> April 2008. Although that issue was not raised in his petition of appeal, I realize that before the trial commenced the appellant raised it up before the trial court. The police explained that the appellant could not be arraigned in court within 24 hours because the complainant had been gravely injured and was still undergoing treatment. The police also explained that the appellant had another case at Keroka Law courts and he had been ordered to remain in custody. The trial court was satisfied by the explanation advanced by the police and commenced the hearing. No appeal was preferred against that ruling which was delivered on 20<sup>th</sup> May, 2008.

With regard to the charge of arson, the appellant submitted that there was insufficient evidence that he was the one who had set complainant's house on fire. He said that petrol used to be kept in the house where there was also a kitchen. It was possible that the fire broke out accidentally, he submitted.

I have carefully evaluated the evidence on record. I have also considered the appellant's submissions.

It is not in dispute that on the material day the appellant was inside the complainant's house when PW1 realized that the roof was burning. She rushed in to rescue her child who was sleeping therein. It is instructive to note that the fire started on the grass thatched roof and not from the ground. If the petrol and/or the power saw that were usually kept in the house were the ones that had accidentally caught fire, the same would have been visible at the place where the said items had been kept. The complainant saw the appellant pouring petrol on the fire place immediately after she had rescued her baby and went out having sustained severe burns. The appellant disappeared from the home on the same day. Although he alleged that he remained there until the evening, both PW1 and PW3 stated that he took off shortly after the house was razed down by the fire. PW3 said that when she got to the home of PW1 she found the appellant holding a plastic container trying to splash some liquid onto the burning roof.

Even if it were to be assumed that the liquid stuff was water and the appellant was trying to put off the fire as he alleged in his defence, it is still unclear why he disappeared that same day and never bothered to return until he was spotted by PW1 at Keroka. In my view, this act of disappearance pointed to his guilt.

No doubt the complainant sustained very severe burns. The injuries were classified as grievous harm. The evidence that was adduced by the prosecution was sufficient to warrant the appellant's conviction on the two counts. Before sentence was passed the trial court ordered for a probation officer's report and the

same was prepared and filed. The report indicated that the appellant had several previous anti-social tendencies.

In the circumstances, the sentence that was handed down by the trial court cannot be said to be harsh or excessive. Consequently, I dismiss this appeal in its entirety.

**DATED, SIGNED AND DELIVERED AT KISII THIS 22<sup>ND</sup> DAY OF JULY, 2010.**

**D. MUSINGA**

**JUDGE.**

**22/7/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State

Accused present

**Court:** Judgment delivered in open court on 22<sup>nd</sup> July, 2010.

**D. MUSINGA**

**JUDGE.**