



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL 4 OF 2010

SAMWEL KIPNGETICH

RONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(From the decision in the judgment of the Senior Principal Magistrate at Kericho, W. Nyarima Esq., given

in Kericho SPM CR. C. NO. 2146 of 2009)

JUDGMENT

The Appellant, **SAMWEL KIPNGETICH RONO**, was on 9th February, 2010 convicted by the Senior Principal Magistrate at Kericho, Hon. W. Nyarima, in Criminal Case Number 2146 of 2009 on three counts of arson contrary to **Section 332** of the Penal Code, **Chapter 63** of the laws of Kenya. He declined to offer any mitigation before sentence. The trial magistrate sentenced him to imprisonment for a period of five years on each count. It is against this conviction and sentence that he appealed against and proffered the following grounds in his Petition of Appeal. The main grounds were to the effect:-

1. That the trial court erred in law and fact by convicting him without taking his alibi into account. The prosecution called twelve witnesses in support of the three counts. In his judgment, the learned trial magistrate found that the Appellant had a case to answer but the Appellant declined on 25th January, 2010 and again on 8th February, 2010 to make his defence although he had cross-examined prosecution witnesses. The local court therefore set the case down for judgment which it delivered on 9th February, 2010. After analyzing the evidence adduced in the case.

2. That the trial court erred in disregarding the absence of the evidence of the investigating officer.
3. That the circumstantial evidence against the Appellant fell short of the standard of proof required by law, namely proof beyond any reasonable doubt.

The particulars of the three counts of arson against the Appellant were that the Appellant :-

- i) On the 3rd day of September, 2009 at about 7.00p.m at Brooke Centre in Kericho District of the Rift Valley Province, willfully and unlawfully set fire to a building namely a dwelling house valued at Kshs. 60,000/= the property of Stella Fabian.
- ii) On the 3rd day of September, 2009 at about 7.00p.m at Brooke Centre in Kericho District of the Rift Valley province willfully and unlawfully set fire to a building namely business premises valued at Kshs. 30,000/= the property of Paul Odomba.
- iii) On the 3rd day of September, 2009 at about 7.00p.m at Brooke Centre in Kericho District of the Rift Valley Province willfully and unlawfully set fire to a building namely dwelling house valued at Kshs. 3,500/= the property of Pamela Moraa Ongaka

The trial magistrate analyzed the evidence and in part stated;

“The evidence is quite overwhelming. The accused had attacked PW1 that evening over the former husband. He was seen entering the locked house through a window and came out through the same window as the house started burning. He had been heard saying that he would burn the house. PW1 heard him uttering the words in Kiswahili. All the witnesses who saw him were his neighbours and knew him quite well. Their demeanor was good. The fact that accused was seen entering the house with a liquid that appeared like petrol adds credence to the prosecution’s case. The evidence has established that the accused actually planned and sneaked into the house through a window and set it ablaze. Both direct and circumstantial evidence attest to that fact. The fact that a lit lantern was in the house does not mitigate anything unless it is of course the accused person himself, who used it to burn the building. Mens Rea on the part of the accused has been established. The actus reus is obviously discernible from the fact that he actually started the fire as he had threatened to do”.

This is the first appellate court in this appeal and it behoves the court to re-evaluate the whole evidence and make its own inferences and conclusions so as to give the Appellant a fresh reconsideration of the case.

The accused had no legal counsel either at the trial or in this court during the hearing of the appeal. His submission before me was that the evidence at the trial court was not true and that it contained contradictions and inconsistencies especially as regards the time it was alleged that the offence was committed. He told this court that he declined to defend himself in the trial court because the trial court failed to investigate his complaint that the prosecutor “*had been bribed to record statements that were meant to prejudice his right*”. But the statements that the prosecutor relied on in the trial had been recorded, not by him, but by the investigating officer and the allegation by the Appellant did not therefore hold water.

The State Counsel, Mr. P. Kiprop, opposed the appeal as lacking in merit and submitted that the evidence

adduced against the Appellant in the trial was overwhelming. He pointed out that the discrepancy in time as regards the time of commission of the offence was not fundamental as the difference in time was in terms of minutes. He further submitted that darkness had not fallen when the offence was committed and that the evidence of PW1 and PW2 was corroborated. As regards sentence, Mr. Kiprof submitted that the sentence was neither harsh nor excessive.

The evidence adduced in the trial court showed that the Appellant was a former boyfriend of **Stella Fabian** (PW1). On 3rd September, 2009, he asked PW1 to meet him. PW1 agreed to do so. She left her house at Brooke and went to meet him. She found him in company of one Kiptum. He told her to follow him which she did with Kiptum in tow. It was about 5p.m. On the way, they met one Blackie, a former husband of PW1. The Appellant seemed to sulk on account of this. He told PW1 to rejoin her former husband, and the children she had had with him. When the Appellant returned to her house, the Appellant came there and caused a commotion by throwing household effects onto the floor of the house. Clearly, the Appellant was livid with anger. He then tried to rough up PW1 but the latter's brother, Solo Matere, who was nearby, intervened. It is then that PW1 said that the Appellant pulled out a knife and tried to stab Solo Matere but one Zakayo who happened to be there restrained him. PW1 called the police because one Kitur tried to cut her brother. The police arrived late from Chagaik Police Base and arrested Kitur and took him away. PW1 went to the Police Base. It was when she was away at the Police Base that her house-help, one **Jennifer Chepngetich**, (PW4), called her and told her that the Appellant had broken the window of the house and that the house was on fire.

In her evidence, **Jennifer Chepngetich**, PW4, told the trial court that she was in the house on 3rd September, 2009 at 7p.m preparing supper when the Appellant came and called PW1. PW4 knew the Appellant as PW1's former boyfriend. The Appellant kicked open the window of the house and entered as PW4 watched. The house was a room in a building of seven rooms. He was wearing a heavy jacket and she could tell he was carrying something. The rooms of the house had many tenants. After a few minutes, said PW4, the Appellant jumped out of the house through the window and immediately PW4 saw fire. The house was made of timber. She identified the burnt house in exhibit No. 1. When PW1 returned to the house from the Police Base she saw the house on fire.

Zakaria Nyamamba(PW5) was employed by PW1. He testified that on 3rd September, 2009 at about 3p.m the Appellant went to Brooke where PW1 lived and called PW1 and PW5. PW5 knew him as PW1's boyfriend. They once lived together as man and wife. When PW1's children greeted their father who was near, the Appellant slapped her and then removed a knife to stab PW1 but PW5 held his hand. The Appellant threatened that he had other arsenal. Ostensibly to avoid trouble, PW5 left and went next door. It was soon thereafter that he saw the house on fire.

This evidence was corroborated, by the evidence of **Purity Cherono** (PW6) who said that she saw PW5 restraining the Appellant to stop him from stabbing PW1 with a knife which was snatched from him. PW6 saw the Appellant leaving the house which was on fire. PW6 knew the Appellant and she recognized him when she saw him. **Nelson Chirchir**(PW7) who also lived in Brooke saw the Appellant enter the house through the window and leave through the window as the house went on fire. She knew him and recognized him. It was 7p.m.

Mike Ngetich (PW11), a form one student who knew the Appellant as a neighbour, is the one who saw the Appellant on 3rd September, 2009 at 6.40p.m or thereabouts with petrol in a Polythene bag. He said that he could tell that it was petrol from its golden colour. PW11 saw the Appellant knocking the window and then enter the house. At that point, PW11 ran to inform his aunt **Rosa Kogo** (PW8). As he returned, he saw the Appellant leaving the house which was now on fire. It was not yet dark and the Appellant was known to him for a long time.

The evidence of the prosecution witnesses was not rebutted and the cross-examination by the Appellant did not dent it in any way. The alibi alleged in the Petition of appeal was never raised. The prosecution evidence was cogent. It showed quite clearly that the Appellant is the person who committed the offence of arson. The time of day was 6.40p.m to 7p.m. Darkness was falling. The witnesses who saw Appellant knew him well. He had threatened to burn the house. He was in a bellicose mood. He was seen at the

scene entering the house and leaving the house as the house went on fire. I am satisfied that he was rightly found guilty and convicted. The sentence meted out was neither harsh nor excessive. However, the complainant in Count No. 3 never testified and the Appellant should have been acquitted on Count III. I quash the conviction and sentence on Count III but dismiss the appeal as lacking in merit on the conviction and sentence on counts I and II. The Appellant shall serve the sentence imposed on him by the trial Court.

DATED at **KERICHO** this 24th day of November, 2010

G.B.M. KARIUKI,sc

RESIDENT JUDGE

COUNSEL APPEARING

Mr. P. Kiprop State Counsel for the Respondent
Appellant in person