REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 95 OF 2007

JAMES MURIUKI KARANJA…….. APPELLANT

V E R S U S

REPUBLIC ……..…….. RESPONDENT

(From decision by M.W. Murage P.M. in criminal case 399 of 2006 (Kikuyu)

J U D G M E N T

James Muriuki Karanja (***the appellant herein***) was charged with the offence of Arson contrary to Section 332 (a) P.C. that on 2nd day of April, 2006 at Riu-Nderi Village in Kiambu District within Central Province, willfully and unlawfully set fire to a building, namely a dwelling house belonging to Magdalene Njeri Mburu. The appellant pleaded not guilty to the charge and after completion of the hearing, the learned trial magistrate found him guilty of the offence as charged and sentenced him to a prison term of ten years. The appellant now appeals against both sentence and conviction. In her testimony in the trial Court, P.W.1 Magdalene Njeri Mburu testified that she has her residence at Nderi. On 2/4/06 at 7.00 pm, she heard a bang and on coming out, saw a fire from her son's house. She then saw the accused (appellant) running. She screamed and neighbours came. The house was built in 1997 at a cost of 50,000/-, everything burnt down. P.W.1 says she saw the appellant through the window about 6 meters away. P.W.2 Joyce Wanjiku Kamau also confirms hearing a blast and coming out with a lamp – she saw the appellant coming out through the window and the house was on fire. The appellant tried to run away but was arrested. Joseph Waweru (P.W.3) had gone to visit P.W.1 on 2/4/06 and then left for his home. Thirty minutes later, he heard screams and proceeded to P.W.1's house. He met a young man running wearing a black jacket. P.W.3 went to help put out the fire, and later on they found appellant at his grandmother's house and P.W.3 identified him as the person he had seen running. A visit to the scene by Police Constable Douglas (P.W.5) and other police officers confirmed that the house was completely burnt – pieces timber and iron sheets left at the scene were collected and paraded as Exhibits in court.

The appellant in his unsworn defence says he had gone to visit his grandmother on 2/4/06 – arriving there at 9.00 am. He went to bed at 10.00 pm. As he went out, he met complainant who said that appellant had her radio and they beat him up and when they got to the Police station, they said he had burnt a house. His defence witness James Muriuki Mungai says he heard someone screaming and he went out and saw a neighbour's house burning. He went to help. At 9.00 pm, appellant arrived soaked by the rain and P.W.2 gave him clothes to change into.

The learned trial magistrate noted that the prosecution witness's (P.W.1 – 3) all testified to seeing the appellant at the scene at the time the incident occurred at 7.00 pm and that appellant had not challenged their evidence. She noted that appellant did not state where he was at 7.00 pm and his defence witness

only saw him much later at 9.00 pm.

The learned trial magistrate's concerns was-

"*….. the accused was seen at the scene at the time when the incident occurred. He was running away at the time. Only he could have committed the offence."*

Appellant in his amended memorandum of appeal states that his constitutional rights under section 72 (3) (b) of the Constitution were infringed and as such the entire trial was a nullity secondly that the learned trial magistrate erred in holding that the offence was proved to the required standard Thirdly – that the trial magistrate erred in shifting the burden of proof to appellant and ignoring his defence. Appellant submitted that although he was arrested on 3/4/06, the offence was not booked into the OB until 4/4/06 and he was only arraigned in court on 7/4/06, five days after his arrest, which therefore constrained the constitutional limit of 24 hours. – he has cited the decision in ***Albanus Mwasya Mutua – Vs- Republic Criminal Appeal No. 120 of 2004*** in support of his contention. He also took up issue with the question of identification saying that according to the evidence on record, it is not known who set the house on fire and that P.W.1, 2 and 3 simply saw a person whom they likened to him running from the scene. He says P.W.1 did not state what aided her to make an identification at night and that she did not give any description of clothing or features that could have convinced her on the identity of the person she allegedly saw jumping out of the window of the burning house. As regards P.W.2's use of a lamp, he says the light intensity was not disclosed, thus leaving it to conjecture citing the decision in ***Cleopas Otieno -Vs- Republic Criminal Appeal No. 20 of 1989***. He also questions P.W.3's evidence on identification based on clothing saying no black jacket was recovered from him. He also points out that the prosecution made a fatal omission by not taking the exhibits to the Government Chemist for analysis to prove the definite cause of the fire and the appellant suggest that the fire may have been started by an electrical problem, gas explosion, lightening, a carelessly left lamp – the probable causes of the fire are innumerable and subject to different interpretations. Appellant submits that since there are various explanations as to the causes of the fire, then the court shouldn't have relied on the circumstantial evidence in convicting him relying on the decision of ***Mzungu Chimera –Vs- Republic - Criminal Appeal 56 of 1998*** – Mombasa which held that –

"*When a case rests on circumstantial evidence, such evidence must satisfy three factors, namely –*

(1) The circumstance from which an inference of guilt is sought to be drawn must be cogently and formally established.

(2) The circumstances should be of a definite tendency unevenly pointing towards guilt of the accused.

(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else."

The appeal is opposed, and the learned State Counsel Miss Gateru supported both conviction and sentence. She submitted that there was evidence which confirmed that there was a house which was burnt on that day – I think the evidence proves that there was a house which burnt down on that day- as to whether it was burnt, is the question to be considered. She has not herein addressed the various possibilities of the cause of the fire as touted by the appellant in his submissions – Could there have been another possible cause such as an electric fault or lightening? Indeed the trial court did not address the various possibilities of the cause of the fire nor was there any forensic evidence led to prove its cause. However the learned State Counsel says P.W.1 and P.W.2 confirmed having seen appellant running away from the scene and that evidence is strong circumstantial evidence to place the appellant at the scene and show that he is the one who burnt the house, even though there is no eye witness who saw him set the fire. Again the learned State Counsel did not address the court on the circumstances leading to identification, which appellant, so elaborately argued in his submission. 7.00 pm is generally the early hours of darkness and it is not clear how P.W.1 was able to see and identify the appellant. In fact

according to P.W.1 on cross-examination she saw the appellant at 7.30 pm – clearly it was necessary to establish the conditions or circumstances whether they favoured identification – this is where the decision cited of Charles O. ***Maitangi –Vs- Republic – Criminal Appeal No. 6 of 1986*** comes in handy that-

"***It is essential to ascertain the nature of light available, the size and position relating to the suspect, are all important matters to help test identification evidence with greatest care."***

It was therefore essential to ascertain the nature of light available that enabled P.W.1 to identify appellant as he fled from the scene – there is no evidence with regard to P.W.1 on that. The evidence available is from P.W.2 who says she had a lamp and was also to see the appellant as he fled through the window of the burning house – very well – but do the circumstances rule out the possibility of appellant having gone into the house through the window to maybe steal, then before he could carry out his mischief, there was an explosion and he fled through the self same window for his life? That is a possibility especially given that the cause of the fire was not established – so that the circumstances would not inculpably point to the appellant as the cause of the fire to the exclusion of all else. How far was P.W.2 from appellant when she saw him? It is not disclosed nor is the intensity or size of the lamp described. Was it a lantern, a pressure lamp, a tin lamp? Of course appellant did not explain where he was between 7.00 pm, and 9.00 pm yet given the loop holes in the present case, that explanation would not be a requirement as it is not for the appellant to seal the loopholes or gap left by the prosecution. Then of course there is the evidence of P.W.3 who says he met the appellant running away – again it is not clear how he was able to see and identify the appellant in the dark and in a black jacket. Consequently the conditions for identification were not favourable and were not well established by the prosecution.

For good measure the appellant cited infringement of his rights under Section 72 (3) (b) of the Constitution, to which the learned State Counsel responded that appellant had first introduced the issue of delay in his submissions and that it was not in his original grounds of appeal – there before? In the amended memorandum of appeal which is filed and which appellant sought to rely on in arguing his appeal, that is the first issue. The learned State Counsel then submitted that being arraigned in court at a delay does not necessarily result in an automatic acquittal and that appellant should have raised it in the lower court to enable prosecution respond. Well spoken, but that chance is no longer there, he is now before this court and would have expected learned counsel to at least have sought an explanation even by way of affidavit from the police officers regarding the delay – here there is no explanation being given whatsoever and I cannot even send appellant back to the lower court to now raise the issue because that court became ***functus officio*** upon pronouncing conviction and sentence. This situation is therefore different from that which was obtaining in the case of ***Eliud Njeru –Vs- Republic - Criminal Appeal 182 of 2006***. Due to the aforegoing then, his appeal must succeed and the conviction is quashed and sentence set aside. Appellant to be set at liberty forthwith unless otherwise lawfully held.

Delivered, Signed and dated at Nairobi this 16th day of April, 2008.

H.A. Omondi

Judge.