REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 23 of 2006

PAUL MWANGI KAMAU ….……..…… APPELLANT

Versus

REPUBLIC ……..……..…… RESPONDENT

(Being an appeal against the conviction and sentence by G. K. MWAURA, Principal Magistrate, in the Senior Principal Magistrate's Criminal Case No. 1687 of 2003 at MURANGA)

JUDGMENT

The appellant was charged in the lower court with the offence of ***Arson contrary to Section 332 of the Penal Code.*** After trial before the lower court the appellant was convicted and on 4th August 2004 was sentenced to five years imprisonment. He brings this appeal against conviction and sentence by the lower court.

This court is duty bound to reevaluate the evidence of the lower court. That duty is susitanly set out in the case of **OKENO vs REP (1972) EA 32.** In that case the Court of Appeal had the following to say:-

"*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424."*

The evidence of PW 1 was that the appellant was known to him. She gave him a job to chase away bees that were in her office called Adult Education Department. The office was made out of timber. She gave the appellant diazinon insecticide. The appellant agreed to do the job on 4th November 2003 in the evening. PW 2 and 3 were Administration Police Officers that were guarding the premises where that office was. They knew the appellant. The appellant on 4th November 2003 in the evening came with insecticide and said to them that he needed to get rid of bees from the office of Adult Education Department. They saw him go into the office where the bees were and he stayed in that place for sometime. When he finished PW 2 and 3 inspected the office and saw some burnt paper. They however noted they were not on fire. Later on in the night they saw a bright fire coming from that office. The fire could not be put off and the entire office was burnt. Prosecution produced the photographs of that burnt

office.

The appellant in his defence said that he was a mason. He had been asked by an officer of the Adult Education Department to assist her to chase away the bees. He agreed to do so and when he went to the premises the Administration Police showed him where the bees were located. The bees were located between the timber walls. He removed some timber and chased away the bees. In his defence he stated:-

"*I did not intend to burn the building. The problem was because I was removed before checking whether the fire had been totally extinguished. …….. I agree that I used the fire to remove the bees. I agree my fire was a cause of fire that burnt the office.*"

The appellant presented the following grounds of appeal:-

1. The learned trial Magistrate erred by convicting the appellant against the weight of evidence.

2. The learned Magistrate erred in law and fact by failing to make a finding that the prosecution failed to establish mens rea and thereby arrived at a wrong decision.

3. The learned trial magistrate erred by giving a severe and harsh sentence and the same be set aside.

In the considered judgment of the magistrate he stated as follows:-

"*therefore putting up a fire there so as to harvest honey and chase away bees would naturally lead to burning the entire building. That is the natural consequence of putting up a fire at such a place. Though his motive was to harvest honey and drive off bees, he must be taken to have intended the natural consequence of his act. I therefore find that he intentionally caused this fire.*"

As stated before the learned magistrate proceeded to convict the appellant and to sentence him to five years imprisonment. At this point it is important to reproduce the section under which the appellant was charged. The section provides:-

"*332. A person who willfully and unlawfully sets fire to:-*

a) Any building or structure whatever, whether completed or not; or

b) Any vessel whether completed or not; or

c) Any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

d) A mine, or the workings, fittings or appliances or a mine,

Is guilty of a felony and is liable to imprisonment for life.

It is clear that the essential ingredients of this offence is the setting of fire willfully and unlawfully. The word *willfully* is defined in the *Blacks Law Dictionary* as:-

"*the voluntary and intentional, but not necessarily malicious.*"

The word *unlawful* is defined in that same dictionary as follows:-

"*violation of law, an illegality.*"

Unlawful is also said to involve moral turpitude.

From the prosecutions evidence the setting on fire by the appellant was not proved to have either been willful or unlawful. He was given a task to chase away bees and he set about to do with insecticide and

fire. In his defence he stated that he was sent away by the Administration Police from the building before he confirmed that the fire had been extinguished. I dare say that the Administration Police may very well have sent away the appellant as he says and therefore exposed the building to the risk of fire. It is very likely that on the Administration Police realizing their mistake may have attempted to cover up the same by laying the blame on the appellant. It is however clear in their evidence that they noted when the appellant left there was no fire in the building. I make a finding that the prosecution failed to prove beyond reasonable doubt that the appellant set the building on fire willfully or unlawfully. In considering the prosecution's evidence I do entertain doubt and that doubt must be exercised in favour of the appellant. I accept submissions by learned Counsel Mr. Wandaka for the appellant when he stated that the learned magistrate's judgment went against the weight of the evidence before him. The weight of the evidence shows that the appellant went about his business of chasing the bees. The fire it does seem occurred accidentally. The learned Magistrate erred in finding that the appellant in lighting the fire was a natural consequence of the burning of the building and hence proof of his quilt. That is not the standard of proving a criminal case. The evidence of the prosecution does not prove guilt on the part of the appellant and accordingly I do hereby quash the conviction of the lower court and set aside the sentence of 4th August 2004. The appellant

is ordered to be released unless otherwise lawfully held.

DATED AND DELIVERED THIS 29TH DAY OF JULY 2008

MARY KASANGO

JUDGE