



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Criminal Appeals 75 & 76 of 2008 (Consolidated)**

**TONGI ONDONGA OTERO )**

**DAVID OGINGA ONYANGO ) ..... APPELLANTS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From the original conviction and sentence in the Senior Resident**

**Magistrate's Court at Rongo Criminal Case No.95 of 2004 by**

**D. KIMEI ESQ., S.R.M)**

**JUDGMENT**

The appellants were charged with arson contrary to **section 332(a)** of the **Penal Code**. The particulars of the offence were that on the 23<sup>rd</sup> day of March 2004 at Nyaisero sub-location, Gucha district, and the appellants, jointly with others not before court willfully set fire to dwelling houses belonging to **Paskaliah Nyaboke**. After a full trial the appellants were found guilty and sentenced to 3 years' imprisonment. They were aggrieved by the said conviction and sentence and preferred appeals to this court. They stated, **inter alia**, that the learned trial magistrate misdirected himself in law when he failed to find that the initial report by the complainant to the police was that some unknown thugs had set her houses on fire and not the appellants herein. They further stated that the complainant's evidence against them was actuated by an existing grudge between them.

**Mr. Kemo, Principal State Counsel**, conceded the appeal. He stated that the complainant testified the second appellant was her stepson and was thus well known to her. However, when she went to make a report regarding the arson incident she told the police that the houses were burnt by thugs. She did not specifically name the appellants as the people who had set her houses on fire.

**Paskaliah Nyaboke, PW1**, stated that the first appellant was a son-in-law while the second was her stepson. On the material day at 1 a.m. PW1 was sleeping in her house when she heard noise from outside. She woke up to find that a group of people had entered into her compound and was busy slashing down her banana plants. The people proceeded to set fire on her five houses. She alleged that she recognized the appellants as having been in that group of people. On the following day she reported the incident at Ogembo Police station. The evidence of PW1 was corroborated by that of **Jared Nyambane Onyango, PW2**, who said that he was also able to recognize the two appellants. PW1 and PW2 stated there was sufficient light from the houses that were burning.

However, **Inspector Francis Osamo, PW3**, who was the officer in charge of crime at Ogembo police

station told the trial court that PW1 reported that some thugs had set her houses on fire. She did not state that it was the appellants and other people as claimed by PW1 and PW2.

**Constable Maurice Adwao, PW4**, was one of the police officers who went to the scene of the crime. He found members of the public at the scene. He did not state whether the complainant ever reported to the police whether the appellants were among the people who burnt her houses.

The appellants denied having committed the offence and alleged that there existed a land dispute between them and the complainant. They called several witnesses who testified that the appellants were not at the scene when the complainant's houses were torched.

I have carefully re-evaluated the evidence that was tendered before the trial court. The offence was committed at night. There was sufficient light from the burning houses as would have enabled the complainant to see and recognize the appellants if indeed they were among the arsonists. These were her close relatives. In the circumstances, one would have reasonably expected her to report to the police at the earliest opportunity that the two appellants and other people had torched her houses. But according to PW3, PW1 reported that her houses had been set on fire by thugs. She did not name the appellants at all. It is thus doubtful if the complainant recognized the appellants. The trial court should have given the benefit of doubt to the appellants. I agree with the learned State Counsel that in the circumstances as aforesaid the appellants' conviction was unsafe.

I allow the appeals, quash the convictions and set aside the sentences that were pronounced by the trial court. The appellants are set at liberty unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at KISII this 29th day of October, 2008.**

**D. MUSINGA**

JUDGE

Delivered in the open court in the presence of:

1. The Appellants
2. Mr. Ombachi for the Appellants
3. Mr. Kemo, Senior Principal State Counsel for the Republic

**D. MUSINGA**

JUDGE