**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 880 of 2003**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 962 of 2002 of the Chief Magistrate's Court at Kibera (Miss Mwangi – PM)**

**ISABELLA GACHERI NKANDO…….……..……..APPELLANT**

**VERSUS**

**REPUBLIC…… ……..……..……....RESPONDENT**

**J U D G M E N T**

**ISABELLA GACHERI NKANDO** was convicted for two offences; **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and **ARSON** contrary to **Section 332(a)** of the **Penal Code**. She was sentenced to 3 years imprisonment on each count. She was aggrieved by the court's findings and therefore lodged this appeal.

The facts of the prosecution case were that the Complainant, the owner of the vehicle registration No. KAC 073J, PW2 **Maina**, was a former fiancé of the Appellant. On the material day, 11th December 2001, the Appellant approached PW2's driver, PW1, to give her a lift back to Kabete Campus where she was doing a masters programme. PW1 **Gitau**, knew the Appellant as **Maina'**s girlfriend so he obliged. On the way **Gitau** was told by the Appellant to pick her cousin whose vehicle was stuck somewhere near the campus. The said cousin was buying fuel at a petrol station in town and so they picked him together with his jerry can of petrol. On reaching Kabete campus, **Gitau** put out a signal indicating he was turning into the campus. That is when the Appellant ordered him to stop turning and to drive on since her cousin's vehicle was a little down the road. **Gitau** refused to go any further due to insecurity in the area they were directing him. The Appellant's companion then held a knife at the driver, **Gitau** and ordered him out of the vehicle. The Appellant using the jerry can of petrol poured its contents on the vehicle and set it ablaze. The Appellant had also taken **Gitau's** mobile phone.

The Appellant's defence was that she was not at all involved in the arson. She stated that she had been preparing and doing exams during the period in question.

She called a witness who testified that on the material day and night, the Appellant had not left the campus grounds.

There are six grounds of appeal raised in the Appellant's petition which are repetitive and can be summarized thus

1. The learned trial magistrate failed to consider the contradictions in prosecution case.

2. That trial magistrate shifted burden of proof against the Appellant.

3. The prosecution did not prove their case as required and that the court failed to consider that the Appellant and the Complainant PW2 were former lovers.

The Appellant was represented by Counsel, **Mr. Nyakundi** Advocate while **Miss Gateru** represented the State.

I have analyzed and evaluated afresh entire evidence adduced before the lower court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

**Mr. Nyakundi** for the Appellant submitted that there were several material contradictions in the evidence of the Complainant in the first count. Appellant's Advocate submitted that initially the Complainant stated that he was held backward. That later in cross-examination he said that a knife was held at him. **Mr. Nyakundi** further submitted that there were other contradictions in the evidence of PW1 and PW2 who was Complainant in count 2. That while PW1 stated that he was present when the vehicle was bought, he said that it cost Kshs.100,000/- while PW2, the vehicle owner, stated it cost him Kshs.70,000/-. The Appellant's Advocate submitted that all the contradictions went to show that the Complainant, PW1, could not be believed. **Miss Gateru** for the State submitted that if there were any contradictions existing in the case, that they were minor and did not shake the prosecution case and ought in the circumstances to be ignored. Learned Counsel also submitted that it was immaterial whether the vehicle cost Kshs.70,000/- as PW2 said or Kshs.100,000/- as PW1 said, because, in her view, the value of the car was not material to the charge of arson.

I have considered the alleged inconsistencies in the evidence of the two Complainants to this case. I find that the inconsistencies complained of are very minor indeed and that they do not go to the substance of the case. They do not affect the weight or tenor of the prosecution case, and can be overlooked. In any event, I am satisfied that the alleged discrepancies have not occasioned any injustice to the Appellant. The inconsistency alleged in PW1's evidence is whether a knife was held at him or he was held backward are not evidence in the record of the proceedings.

The second issue raised by the Appellant's Advocate was that the prosecution had failed to call several key witnesses whose evidence was key to prove the Appellant's guilt. **Mr. Nyakundi** cited the failure to call police officers from Kikiyu Police Station to confirm that PW1 had reported the matter there. Counsel also submitted that there was poor investigations carried out in the case since the police did not require PW1 to prove he owned a mobile phone alleged to have been stolen from him by the Appellant in this case.

**Miss Gateru** submitted that the prosecution had called sufficient evidence to prove the charge against the Appellant. Learned State Counsel submitted that the two eye witnesses to the incident, PW3 and PW4 were the ones who persuaded PW1 to take the Appellant where she had requested to be dropped saying they knew her. PW1 had declined to take the Appellant beyond the Kabete Campus gate due to insecurity in the direction she wanted to be dropped. Learned State Counsel submitted that both PW3 and PW4 knew the Appellant before and they identified her subsequently in connection to the offence, therefore corroborating the evidence of PW1.

The prosecution duty in a trial is to call sufficient evidence to prove its case. It does not have the duty to call a battalion of witnesses for the sake of it but just those that are enough to enable the court arrive at a just conclusion of the case. I do find that the prosecution called all the key witnesses in the case who were material and sufficient to prove the case. The police officer whom **Mr. Nyakundi** submitted required to be called as a witness was not a material witness and his evidence was neither important nor helpful in assisting the court arrive at a just conclusion of the matter. To my mind, the only person not called or charged, and who was important to the case was the Appellant's accomplice. The person that

the Appellant introduced to PW1 as her cousin and who actually bought the fuel that was subsequently used by the Appellant to set the vehicle in question on fire. He should have been charged in this case with the Arson. I do find however, that PW5, the Investigating officer of this case gave a reasonable explanation why he was not charged. He was never found and the Appellant was the only person who knew how he could be found. I am also satisfied that failure to trace the Appellant's accomplice has not occasioned any prejudice to the Appellant. The evidence adduced through the witnesses called was enough to prove the prosecution case.

**Mr. Nyakundi** submitted that the learned trial magistrate failed to consider the fact that the Appellant and PW2 were former lovers prior to the arson incident. **Miss Gateru** did not think that the failure occasioned any prejudice to the Appellant. In my own opinion after an evaluation of the facts and circumstances of the case, the fact PW2 and the Appellant were former lovers went further to prove a possible motive for the attack and may only have affected the consideration of sentence in the case. Overall, I do not believe it was an important consideration but one which occasioned no miscarriage of justice.

**Mr. Nyakundi** submitted that the learned trial magistrate failed to consider the Appellant's defence. That is not the correct position.

The learned trial magistrate considered the Appellant's alibi defence and that of her witness, DW2 and found it inconsistent at page J3 of the judgment.

In **PETER NJUGUNA MURIU VS. REPUBLIC [1982-88] 1 KAR 376** the Court held:-

"***The failure by the lower court to make any finding on the alibi was fatal on the conviction because the second appellate court, not having the benefit of its evaluation by those courts, could not say that the alibi would inevitably have been rejected."***

The learned trial magistrate made a finding on the alibi defence raised by the Appellant. However, the court may have applied incorrect principles in considering this defence and therefore I have subjected it to a fresh analysis. In **LEONARD ANISETH VS. REPUBLIC 1963 EA LR 206** the court held: -

"***In other words, if the evidence in support of an alibi raises a reasonable doubt as to the guilt of an accused person, it is sufficient to secure an acquittal."***

All the Appellant needed to do was raise a reasonable doubt as to her guilt and if such a doubt was raised, she was entitled to an acquittal. In considering whether a reasonable doubt was created by an alibi defence the court in **UGANDA VS. SEBYALA & OTHERS 1969 EA 204** set out what a court needed to put into consideration before making its conclusion. It held thus: -

"***The accused does not have to establish that his alibi is reasonably true. All he has to do is to create sufficient doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."***

The court went on to say:

"***It was suggested by the learned State Attorney that since certain persons named in the alibi as originally put forward had not been called as defence witnesses I ought to assume that if they had been called they would have been adverse to the accused. If there is any inference to be drawn, I think it is the other way. The alibi was put forward at the first available opportunity, in answer to the charge, it was therefore, the duty of the police to check it."-***

I have carefully analyzed the entire evidence and nowhere does the record show that the Appellant ever raised the alibi defence until she did at the defence case. The Appellant cannot therefore be said to have raised the alibi defence at the earliest opportunity.

I also analyzed the evidence of PW2. PW2 was himself a student at the same campus as the Appellant. It was his clear evidence in cross-examination that the Appellant completed her exams on 11th December 2001 and that she travelled home on 14th December 2001 two days after the incident in issue. The evidence of PW2 was that he knew of the arson on morning of 12th December 2001. This witness explains why the Appellant was arrested 2 months after the incident. The delay in arresting the Appellant was not due to inordinate delay or lack of diligence on the part of the police but because she left the jurisdiction of the police station where the incident occurred. Taking into consideration the Appellant's defence that she did one exam paper at 10.30 a.m. on 11th December 2001 then spent the day in field work. That she went back to her room at 5.00 p.m. and read up to 10.00 p.m., then slept. The learned trial magistrate's finding that the Appellant's defence was contradicted by her witness was in all circumstances of the case a correct finding of fact. DW2 said she went to see her sister, the Appellant on 11th at 6.30 p.m. That she had found her in her room with a law student to whom she was introduced. DW2 said she had taken Kshs.1000/- to the Appellant at her request and that she left for their rural home the next day.

DW2's visit was very important to the Appellant if DW2's evidence is anything to go by. Why then would the Appellant fail to mention DW2's visit to her room from home, on the evening of 11th December 2001. Further, even if the Appellant may have forgotten to mention that her sister had taken her money for the holidays, how could she forget to mention her lawyer visitor? That evidence was doubtful. I also considered the uncontroverted evidence of PW2 that 11th December 2001 was a Friday. The next day 12th December 2001 was a Public Holiday and 13th December 2001 a Sunday. If the Appellant left the campus on 14th December 2001 and if she had finished her exams on 11th December 2001 why was she studying for exams on the night of the 11th? The Appellant was not telling the truth. Most importantly, her alibi defence did not raise any doubt, reasonable or otherwise, to the prosecution evidence.

After carefully subjecting the entire evidence in this case to fresh analysis as required of a first appellate court, I am fully satisfied that the learned trial magistrate's finding of guilt and conviction was safe and should not be disturbed. I find the appeal against conviction without merit and so dismiss it in its entirety.

On the sentence, I will set aside the sentences of 3 years imprisonment on each count. I will consider the Appellant's mitigation before giving new orders as to sentence.

Dated at Nairobi this 28th day of February 2007.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant - present

Mr. Nyakundi for the Appellant

Miss Gateru for the Respondent (State)

CC: Tabitha

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**LESIIT, J.**

**JUDGE**