



(Appeal against both conviction and sentence of the Butere Resident Magistrate's court Criminal Case No. 305 of 2001. (B. O. OCHIENG ESQ., RM)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 184 OF 2005

CORNELIUS OMITO ::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

The Appellant, **CORNELIUS OMITO**, was on 3.6.2005 convicted in Criminal Case No. 41 of 2005 at Butere by the Resident Magistrate, B. O. Ochieng Esq., of the offence of attempted arson contrary to section 333(a) of the Penal Code and sentenced to 4 years imprisonment. The particulars of the offence were as follows:-

“CORNELIUS OMINDO ANYEMBE: On the nights of 4th and 5th July, 2004 at about 2.00 a.m. at Ibokolo Sub-location, Marama Central Location, in Butere/Mumias District within Western Province, jointly with others not before court attempted unlawfully to set fire to a building namely dwelling house the property of MOSES ANYEMBE.”

Aggrieved by the conviction and sentence, the appellant lodged an appeal in this court on 30.12.2005 after obtaining leave to do so as the period of 14 days stipulated under section 349 of the Criminal Procedure Code Cap. 75 had elapsed.

The main thrust of the Appellant's Petition of Appeal was that there was insufficient evidence to positively identify him as the person who set the complainant's house on fire. When the appeal came up for hearing on 30.5.2007, the Appellant appeared in person and lamented that only three witnesses gave evidence at the trial and submitted that he was mistaken for the real culprit.

Mr. Karuri, the learned State Counsel opposed the appeal. It was his contention that there was both voice and visual identification of the appellant at a distance of 100 metres. He reiterated the evidence adduced in the trial court and contended that the appellant was named at the earliest opportunity and arrested the following morning.

I have perused the record of appeal and am cognizant of the fact that I ought to give the appellant a fresh reconsideration of his case. Section 333 (a) of the Penal Code under which the Appellant was convicted

and sentenced stipulates:-

S. 332. Any person who willfully and unlawfully sets fire to -

(a) any building or structure whatever, whether completed or not;

(b)

(c)

(d)

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

The evidence adduced in the trial court was circumstantial. No one saw the appellant strike a match at eaves or roof of the grass thatched hut. The hut was, however, set on fire as it did not burn due to an act of God. It was 2 a.m. at night. The complainant, Moses Anyembe, (PW1), was asleep in the hut. He said he heard the voice of the appellant talking. It is unlikely that an arsonist would in the hush of the night go to the house he intends to set on fire talking. In normal circumstances, he would stealthily creep to the site and leave in haste. There was no evidence by PW1 that he heard more than one person talking and the likelihood of the arsonist talking to himself at that hour and in those circumstances was also remote. PW1 also told the trial court that he saw the appellant going away at a distance of 100 metres. If this is true, then he must have seen the shadow of the latter's back. Even with a spotlight which he said he had, it is unlikely that he would see him as only the back of the person 100 metres away could be vaguely seen in the dark. I do not think that he could by any stretch of imagination have recognized the person by looking at his back as the person walked away and disappeared in darkness.

The evidence of PW1 in cross-examination was to the effect that it was the appellant he saw and that the latter was wearing a brown jacket. This was either imagination or exaggeration as the circumstances could not have facilitated the identification of colour of the jacket! If the case rested on the evidence of PW1 alone, I would have allowed the appeal without the slightest hesitation.

The evidence in this case shows that the complainant, PW2 and the Appellant were related either as cousins or as step brothers. They knew one another. PW1 in examination in chief and also in cross-examination stated that the appellant was his step brother.

But the evidence of David Okanga (PW2) was more cogent. He said that he heard on the night of 5/7/04 at 2 a.m. a cry near the house of PW1. It is not clear whose cry he heard as PW1 did not testify that he made any and the "talking" of the appellant which PW1 alleged could not be the cry referred to by PW2. PW2 went towards PW1's house and as he did so, he said he met the appellant who was coming from the house or direction of the house of PW1 which he could see was burning. There was moonlight, he said, and he recognized the appellant as he was known to him and was his cousin. He enquired from him what was wrong but the appellant did not answer. PW2 told the trial court that the appellant went into the maize plantation. PW2 proceeded to PW1's house and helped put out the fire. There was no evidence that PW2 told PW1 and PW3 immediately the name or identity of the person he had met.

In cross-examination, PW2 told the trial court that he was a neighbour of PW1 and a cousin. PW2 was said to have informed PW1 that he had met the appellant walking away when the house of PW1 was burning.

In his testimony PW3, a brother of PW1, a Jua Kali artisan from Ibokoro was sleeping at 2 a.m. when he heard screams. He got out of his house and saw PW1's grass-thatched house on fire and the appellant walking away. PW3 got to the house of PW1 first before PW2 did.

No evidence was given to show how far the house of PW3 was from that of PW1. PW3 said he saw the appellant walking away. He did not say at what distance nor how he was able to identify him in

darkness. Like PW1, the evidence of PW3 left a lot to be desired. Even taken together, the evidence of PW1 and PW3 could not establish the identity of the arsonist. It was PW2, who shed more light on the matter.

As PW2 neared the house of PW1, he met the appellant as earlier stated and spoke to him but the latter remained mum. He knew him. He was his cousin. He said he saw him well in the moonlight. Could PW2 have made a mistake as to the identity of the person he saw? Is it likely that PW2 mistook the appellant for somebody else? How close were they to each other? Why did PW2 not tell PW1 and PW3 immediately that he had met the appellant who had disappeared in the maize garden as they put out the fire? This was the only evidence. But PW2 did not say how he was able to identify the appellant in darkness. He did not give any description or nature or colour of the clothes. It is unlikely the culprit would calmly have walked as was alleged without taking cover. There was nothing to lend weight to this evidence as PW1 and PW3 did not see the person.

There was no voice identification in this case. The evidence of recognition was not cogent enough as the circumstances of this case were not conducive to positive identification. There is a shred of doubt. I give the benefit of that doubt to the appellant.

In the result, I allow the appeal, quash the conviction, and set aside the sentence. Unless otherwise lawfully held, the appellant shall be released and set free forthwith.

Dated at Kakamega this 20th day of September, 2007.

G. B. M. KARIUKI

J U D G E