



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 5 of 2006

(Appeal against both conviction and sentence of the Chief Magistrate's court at Kakamega in Criminal Case No. 12 of 2006. (E. O. OBAGA ESQ. SRM)

DONALD MIHESO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

DONALD MIHESO, the Appellant in this appeal, was on 3.1.2006 convicted by the Senior Resident Magistrate at Kakamega, E. O. Obaga Esq. of arson in criminal Case No. 12 of 2006 following his own plea of guilty to the charge. The charge read:

DONALD MIHESO ABURI: On the 26th day of December 2005 at Itukhula village, Madivini S/location in Kakamega District within Western Province, willfully and unlawfully set fire on a grass thatched house valued at Kshs.12,500/= the property of MICHAEL SHIMOLI.

The record shows that the charge was read in Kiswahili to the appellant who replied to it and said it was true. The facts constituting the offence of arson were then read to the Appellant. He replied that he had burnt "***the house of the accused.***" The word "accused" was apparently an error as the particulars of the charge clearly stated that the house burnt belonged to one Michael Shimoli, the complainant. The facts read to the appellant also referred to the house of the said complainant. This mishap or flaw did not take away the fact that the appellant's admission related to the burning of the house of the complainant. It occasioned no miscarriage of justice.

The Appellant told the trial magistrate that he had nothing to say in mitigation whereupon the trial magistrate proceeded to sentence him to serve five (5) years in prison noting that the accused was not remorseful.

In his Petition of appeal, the appellant stated that he pleaded guilty but adds that he was not warned of the repercussions of his so doing.

When the appeal came up for hearing on 15.2.2007, the appellant told the court that he relied on the grounds set out in his appeal and that he had nothing to add.

Mr. Karuri, the learned State Counsel, opposed the appeal and submitted that the plea was unequivocal and that the sentence was not manifestly excessive.

I have perused the record of appeal. The charge was read in Kiswahili to the appellant who admitted it as well as the facts which disclosed the offence of arson. There was no duty on the part of the trial court to warn the appellant that a plea of guilty would elicit a sentence. The duty of the court was to ensure that the appellant understood the charge and every element of it.

The decision to plead guilty or not guilty to the charge and to admit or not to admit the facts constituting the offence rested with the appellant and it was immaterial whether the appellant knew or did not know that a severe or a custodial sentence would ensue if he pleaded guilty. What the appellant seems to say in his Petition of appeal is that he did not expect to receive such severe sentence. He is in effect seeking a lenient sentence.

It is my finding that the charge and the facts were duly explained to and understood by the appellant and further that the plea of guilty was unequivocal. I find no merit in the appeal whatsoever in this regard.

As regards the sentence, section 332 stipulates a maximum of life sentence for the offence of arson. The trial court in sentencing the appellant to 5 years imprisonment observed that the appellant was not remorseful because he failed to mitigate. Failure to mitigate is not symptomatic of want of remorse. It should not result in more severe sentence. It merely deprives the appellant of an opportunity to persuade the court to be lenient. The fact that the appellant set the dwelling house on fire and expressed no regret, entitled the trial court to give a deterrent sentence. Human life could have been lost if the complainant had not woken up and the fire put out. I am unable to interfere with the sentence meted out to the appellant as the sentence was neither manifestly excessive nor were wrong principles applied.

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

G. B. M. KARIUKI

J U D G E