REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 186 of 2004

REPUBLIC…….....
…….RESPONDENT

VERSUS

SHADRACK MUSEMBI KALOKI…….....……
APPELLANT

JUDGMENT

This is an appeal from the Judgment of L. N. Mbatia the then Principal Magistrate at Kwale which she delivered in Kwale SRM Cr.C. No. 524 of 2003 on the 21st July 2004.

The Appellant was with another person charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The Appellant was alone also charged with arson contrary to section 332(a) of the Penal Code. After trial they were both convicted as charged. On count 1 they were each sentenced to a fine of Sh. 10,000/= or 12 months imprisonment in default of payment of that fine. In count 2 the Appellant was sentenced to four years imprisonment which was ordered to run concurrently with that on count 1 if he did not pay the fine. The Appellant has appealed against both the convictions and sentences.

The Appellant filed the appeal in person and listed five grounds of appeal. He later instructed counsel who filed a supplementary petition of appeal with 11 grounds. Looking at all of them they gravitate to four main grounds namely:

1. That the learned trial magistrate erred in failing to write a judgment as required by section 169 of the Criminal Procedure Code.

2. That the learned trial magistrate erred in not realizing that there was no proper identification of the Appellant.

3. That the conviction was against the weight of evidence.

4. That the sentence of 4 years imprisonment was harsh.

Arguing the appeal on behalf of the Appellant, on ground 1 Mrs. Ogoti simply stated that the learned trial magistrate did not write a judgment as required by section 169 of the CPC. She did not elaborate. That section requires the judgment to contain the point or points for determination, the decision thereon and the reasons for the decision. This ground has no merit. The trial magistrate set out the charged the Appellant faced, the facts of the case and her decision on the charges as well as her reasons for the decision. This ground is therefore dismissed.

On ground two Mrs. Ogoti submitted that the offences having been committed at night there was no proper identification of the Appellant. The material witnesses were the complainant PW1 and her son PW2. PW1 said that on 15th March 2003 at about 7.45 p.m., she saw her maize store on fire. She went there and found the Appellant, standing nearby. When asked if he was the one who had set the store on fire the Appellant, according to PW1, said he was and that he was going to set on fire all the buildings in

that home. True to his word PW1 said Appellant went and set on fire another store and PW1's main house.

On his part PW2 said that when he saw their maize store on fire he rushed there and saw the Appellant holding dry burning palm tree leaves go and set the main house on fire. When the Appellant saw the witness he dared the witness to try and salvage anything from the burning house if he was man enough.

Neither of the two witnesses said it was dark. The Appellant himself did not put that to them. If it was dark then the light from the burning maize store must have lit the whole place for the two witnesses to identify the Appellant. PW2 also said he saw the Appellant carrying burning dry leaves. That fire must have shorn the whole place also. Besides that the Appellant was a distant relative of the two witnesses. They also talked with them that night. In the circumstances I find that the Appellant was properly identified and that ground 2 has also no merit.

Ground two encompasses the entire evidence adduced in the case both for the prosecution and on behalf of the Appellant. Reading through it what comes out is that DW5, PC Gideon Musyoka's wife had died and had just been buried earlier that day. The family suspected Musyoka's step-mother, PW1, of having bewitched her. PW1 was also suspected of having bewitched other members of the family who had died in the recent past. The Appellant's wife was living in fear and could not sleep. The other accused's mother was forever at logger heads with PW1. That explains the two women's presence in PW1's house that night and why they did not raise a finger when she was being beaten by the Appellant and his co-accused in the lower court. That also explains why both DW5 and his brother-in-law, DW4, falsely testified in favour of the Appellant.

Having re-evaluated the evidence on record I agree with the trial magistrate that the defence evidence was all fabricated. The Appellant was properly convicted and I accordingly dismiss his appeal against conviction.

The appeal against sentence has also no merit. The offence carried a life sentence. The Appellant set ablaze PW1's entire homestead including her food stores. In the circumstances a sentence of 4 years imprisonment cannot be said to be harsh. The appeal against sentence is also dismissed.

In sum this appeal is hereby dismissed in its entirety.

DATED and delivered this 14th day of February 2006.

D. K. MARAGA

JUDGE