REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 467 of 2004

JOTHAM OKATA OPALA……..…….……..……..……..APPELLANT

VERSUS

REPUBLIC…….....……..…….…....RESPONDENT

J U D G M E N T

JOTHAM OKATA OPALA was convicted of **ARSON** contrary to **Section 322(a)** of the **Penal Code**. The particulars of the charge were: -

"***On 24th day of November 2003 at Soweto village within Nairobi area willfully and unlawfully set fire to a building namely a dwelling house belonging to James Mulwa Sila".***

The brief facts of the prosecution case was that PW3, who lived in the same plot as the Appellant went home at midnight. He said that he found the Appellant seated outside his house. That he noticed a big flame inside the Appellant's house and he went and told him that the fire would burn his house. That the fire exceeded and burnt five rooms in that plot including PW3's house and Appellant's house. None of them were able to salvage anything. PW2 was a police officer on patrol duties. While with other police officers they heard screams and went towards the directions where they saw fire. They went to help put out the fire but five houses burnt down. PW2 arrested the Appellant after a person at the scene whose name he would not remember implicated him.

PW1 was the owner of the plot but he never lived there. PW4 was the Complainant's agent who lived in a neighbouring plot. She did not know who started the fire except that she heard PW3 tell the police in her presence that the fire had started in Appellant's house. PW4 said Appellant had been a tenant for 2 months and paid Kshs.600/- rent. PW5 took photographs of the scene.

The Appellant was put on his defence and he gave an unsworn statement. He said that he had been out working the whole day and when he went home, he found a big fire in the plot where he lived. That he tried to save his property but lost everything. He said that he asked PW3 what happened and that PW3 told him that he, the Appellant had started the fire.

The Appellant raises several grounds of appeal which can be summarized as follows: -

One that the prosecution evidence was insufficient to sustain a conviction since all prosecution witnesses had wholly relied on the evidence of PW3 as to the cause of fire which was itself hearsay evidence.

Two that the prosecution did not adduce evidence to prove beyond any reasonable doubt that the Appellant started the fire.

Three that the learned trial magistrate rejected his defence that he found the houses already ablaze and his attempt to salvage his property was unsuccessful and so his sitting down was due to devastation and desolation. That no reasonable and cogent ground was given to reject his defence.

Four what PW3 told various witnesses was inconsistent with his evidence. That to PW2 he said that the Appellant had thrown him out when he tried to speak to him. That in his evidence PW2 said he found the plot on fire.

The Appeal was opposed.

MRS. KAGIRI, learned counsel for the State submitted that the prosecution had adduced sufficient evidence to sustain the conviction. That the evidence of PW3 showed clearly that there was fire in the Appellant's house and that the Appellant just sat outside doing nothing which was sufficient circumstantial evidence against the Appellant. That the evidence was strong and unchallenged.

I have re-evaluated and analysed the evidence adduced before the Court giving due allowance to the fact that I neither saw nor heard any of the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32.**

It is true, as the Appellant observed in his written submission that the evidence of PW3 was the basis of his conviction. The Appellant has challenged that evidence in his submissions saying that PW3 was not consistent. I did consider that aspect of the prosecution. PW2 in his evidence said that a person who knew about the fire and who lived at the plot in question told him that he had smelt smoke and had gone to his neighbours house where he found the Appellant burning clothes. That when he 'asked' him, the man threw him out. PW2 was the arresting officer.

PW4 said that when police went to the scene, Appellant's neighbours including PW3 told them that the fire had started from the Appellant's house.

The inconsistencies in the evidence are material but I do not find them so important for the simple reason that neither PW2 nor PW4 identified the person who gave the varying versions highlighted herein above. Most importantly however, PW3 who seems to have been the second person at the scene, only found a raging fire. PW3 did not say that the Appellant had lit any fire. PW3 just found a big fire and he went up to where Appellant was to alert him that the fire was big.

For the prosecution to prove the charge they must call clear evidence to show that the Appellant willfully and unlawfully set fire to the Complainants' houses. In the learned trial magistrate's judgment at J3, she observed: -

"…***but PW3 is the only person who is said to have been at the scene when the fire started. He says it started from the accused house who had lit a big fire. He says he tried to plead with the accused to put the fire out but accused never did it."***

Sadly the learned trial magistrate misdirected herself on three aspects of this case. First the learned magistrate found that PW3 was at the scene when the fire started. No such evidence was adduced by the prosecution. Specifically PW3 never said he was present when the fire started. PW3 said: -

"***I found accused sitting at the door and he had no shirt. His house had a big flame."***

Clearly PW3's evidence was that at the time he went home on the night in question he found a big flame. The fire had already started.

The second misdirection was the learned trial magistrate's finding that "***He (PW5) says it started from***

the accused house". If PW3 was not present when the fire started, the conclusion that PW3 could tell anyone that the fire started in the Appellant's house was speculation. That speculation was inadmissible in evidence and by admitting it, the Appellant suffered prejudice.

The third misdirection was the learned trial magistrate's finding that PW3 said that the fire was lit by the Appellant. PW3 did not say at any stage of his examination in court that he knew who lit the fire or even that the Appellant lit it.

The three misdirections were serious misdirections on matters of fact. By so misleading herself, the learned trial magistrate was in error in finding that PW3's evidence was sufficient to sustain the charge.

The Appellant complained that his defence was rejected without reasonable and cogent reasons. The learned trial magistrate observed thus concerning his defence: -

"***I do not believe the accused person that he just found a fire in the plot. I see no reason why anyone would point an accusing finger at him."***

The Appellant's complaint is not without merit. The reason for rejecting the Appellant's defence was primarily due to the misdirections of fact that the learned magistrate had arrived at. The learned trial magistrate did not give due consideration to the Appellant's defence.

I have on my part considered the Appellant's defence and I find it reasonable and plausible. In absence of direct evidence that the Appellant had started the fire, and bearing in mind PW3 went to the scene after the Appellant, the Appellant's defence that he too found the fire burning cannot be disregarded. The other important fact is that the prosecution did not give evidence to prove that the Appellant started the fire or even to disapprove his defence that he too found the fire raging. Most importantly, the burden of proof lay with the prosecution at all times and the required standard was proof beyond a reasonable doubt. The evidence adduced by the prosecution did not meet the required standard. The prosecution did not prove that the Appellant started the fire and further that if he did start it, he did so willingly.

Even without going into all the issues that arise in this appeal, I believe those considered so far are sufficient to dispose of the appeal.

I find that the learned trial magistrate was in error in arriving at the wrong findings of facts and secondly in rejecting the Appellant's defence. I find merit in this appeal and I allow the same. Consequently I quash the conviction for being unsafe and unjustified and set aside the sentence.

The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of March 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mrs. Kagiri for the State

Huka – Court clerk

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LESIIT, J.

JUDGE