REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Appeal 99 of 1998

KIPLETING KEINO CHERES &

KIBET MENGICH:.....APPELLANTS

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

This is a consolidated appeal by the two appellants against conviction and sentence on 30th October,1998 in Eldoret SPM.CC. Criminal Case No. 4048/1994. The grounds of appeal in the memorandum of Appeal were similar and drawn by the same counsel who prosecuted this appeal.

The appellants had been jointly charged with nine counts of arson contrary to section 332 (a) of the Penal Code and additional counts of shop – breaking and committing a felony contrary to section 306 (a) of the Penal Code, malicious damage to property contrary to section 339 (1) of the Penal Code and stealing stock contrary to section 332 (a) of the Penal Code. There were a total of 15 counts. After hearing the case against the appellants, the Senior Resident Magistrate at Eldoret, F.M. O. Kadima, acquitted the appellants in respect of all the counts relating to the offences of shop breaking and committing a felony, malicious damage to property and stealing stock. However, the trial magistrate found that the prosecution had proved beyond any reasonable doubt the charge fo arson contrary to section 332(a) of the Penal Code as set out in counts I – IX of the charge sheet. The appellants were sentenced to two years imprisonment but the same was suspended and they were to serve the said period outside custody. They must have served this sentence by the time the Appeal was heard by me on 9th March,2006, of course, this in law does not affect their right of appeal and for the appeals to be heard on their merits.

The appellants have raised 8 grounds of appeal. The first ground is founded on charge sheet. The Appellants contend that by allowing proceedings on an extensive and overloaded charge sheet with numerous counts unknown to the Appellants the trial magistrate erred in law and fact. It is contended that this was contrary to the law. There were 9 counts of arson contrary to section 332 (a) o the Penal Code. The rest of the count relates to the other offences of shop breaking and committing a felony, malicious damage to property and stealing stock. Mr. Ngala for the Appellants submitted that they should have been reminded of the charges throughout the trial and that this was not done yet the trial took a long time. It is said that this prejudiced the appellants rights and any did not have a fair trial as stipulated under sections 77(1) and (2) of the constitution. The Respondent, the Republic and represented by Mr. Omutelema, submitted in reply, inter alias, that:-

· Both appellants were represented by counsel who did not raise any objections but for good reasons.

· Counts 1 – a were based on arson and arose from one incident when houses were burnt down on 5th August,1994.

· The charges were read out and the Appellants understood them and no confusion was created due to the number of counts.

· After the first 9 counts the other 3 counts related to incidents that took place on a different, 22nd August 1994.

· The offences and counts were part of a system, an act in a series of activities.

Both counsel relied on the decision of the court of Appeal in **OCHIENG – v- REPUBLIC** (1985**) KLR 252**, in which the court held:-

"**There is one other matter to which we refer. It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts, upon which it wishes to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under section 87 (a) of the Criminal Procedure Code, which will entitle the prosecution to bring them again if necessary. . . . . .**

moreover the possibility of embarrassment and prejudice to the defence cannot be excluded when there are numerous counts because of the danger of an assumption that because the accused faces so many charges, there must be substance in some of them. In the instant case the magistrate was fully alive to the necessity of considering each charge separately as is shown by his finding no case to answer on some of them and acquitting the Appellant on others, so no prejudice was in fact occasioned. We very much hope that that in future those responsible for the prosecution of offences will heed these remarks."

I have considered the submissions of counsel on this question and the aforesaid decision. The direction and recommendation of the court of Appeal ought to heeded by the Attorney General and others responsible for the prosecution of offences. However, it is my opinion that the said recommendations regarding a maximum of 12 counts in any single case does not lay down a mandatory direction but is one for precaution in order to ensure a fair trial of an accused person. This ought to be the usual trend but is not invariable. The court itself stated:-

"**.....Usually, <u>though not invariably</u>, no more than twelve counts should be laid in one charge sheet....." (emphasis mine)**

This still recognizes the powers and discretion of the prosecution in preferring charges, preparing the charge sheet and prosecuting. However, if this power and discretion is exercised leading to overloading of a charge sheet that could lead to prejudice, it would be subject to challenge and intervention by the courts.

So, in the present case, was it a case of disregarding the recommendation of the court of Appeal or was it a proper exercise of the prosecutional discretion? I have considered that the first 9 counts are based on the offence of arson and were alleged to have been carried out in one incident during one night. The houses were in the same village, neighbouring each other and belonging to members of one family. There were only two accused persons, the Appellants who were charged and prosecuted. The other offences of shop-breaking and committing a felony, malicious damage to property and stealing stock allegedly took place on two other dates, 5th August, 1994 and 22nd August,1994. I have also taken into account that the appellants were initially charged separately and their cases consolidated subsequently.

Considering all the above, I do not think that there was any over-loading of the charge sheet/s. The prosecution exercised its powers and discretion reasonably in the circumstances. The Appellants were each also represented by counsel who had the opportunity of raising objections to the charge sheet if they saw likely prejudice. They did not. Finally, the trial magistrate acquitted the Appellants on all the other charges of arson, shop-breaking and committing a felony, malicious damage to property and stealing

stock. From this it is absolutely clear that the Learned magistrate considered each charge distinctly and separately. As a result there was no prejudice occasioned by the inclusion of 15 counts in the charge sheet.

I also hold that there was no violation of section 77(1) and 2 of the constitution as a result of the alleged overloading of the charge sheet.

The second ground of appeal is that there was no evidence in law to warrant or sustain a conviction at all. The prosecution called 8 witnesses two out of them were police officers including the investigation officer. Their testimonies were formal. the Appellants submitted that all the other six witnesses except one (PW6) stated that they did not see the appellants commit the alleged offences.

They argued that the trial court should have cautioned itself regarding PW6's testimony of identification in the circumstances. It was said that the trial magistrate relied solely on that evidence to convict the appellants. That it lacked quality of identification. The appellant further submitted that the voice identification was in respect of the counts on which they were acquitted.

I have carefully perused the proceedings and the judgement of the trial court. The prosecution's case was that a sister of PW6 and a relative of the direct complainants affected by the alleged acts of arson, shop-breaking, malicious damage to property, and stealing stock died on 4th August, 1994. It was claimed that the appellants with others not before the court made threats to kill PW6 and his children as they had allegedly bewitched the deceased. It is against this background that the next day the complainant's buildings or houses were set on fire. The other offences allegedly took place on the 5th August, 1994 and 22nd August,1994.

The trial magistrate found that the two appellants involved in the burning of the houses of the complainants He relied mainly on the evidence of PW6 who said that he saw the two appellants and identified them since he knew them. He said he saw the appellants set fire on the houses. The trial magistrate also relied on the evidence of PW3 a daughter of PW6 who said that she met the two appellants on the material night near her father's houses.

In the proceedings, PW6 said that on 5th August,1994 he was at the funeral of the deceased when the first accused told him that would kill his children and burn his house. Later in the night he found his house burning. He was 100 metres away. He saw 3 persons burning the house. There was moon light. He identified the appellants because he knew them well as they were neighbours. PW3 who had met the appellants stated that she saw the two appellants burn her father's house. She was 50 metres from where she had met the two. She identified the two appellants from the flames from the burning house. There was also moonlight. She also recognized them from their voices.

I have considered the foregoing I am satisfied that PW3 and PW6 positively identified the two appellants. Nobody identified the third suspect who was not before the court. There was moonlight on the material night and the light from the flames coming from the house assisted PW3 to see the Appellants. I do not think that the threats made by the appellants at the funeral of the deceased and to the complainants can be disregarded. Four witnesses, PW1, PW3, PW4 and PW6 testified that the appellants made threats of killing the complainants and burning their house. This was indicative of the motive behind the burning of the houses. The trial court was entitled to take into account these threats and certainly the motivation for the arson.

As a result, I do hereby hold that the trial court had sufficient evidence before it which it evaluated and made findings upon. The evidence in support of the charges justified and warranted the finding and conviction.

Grounds 3 and 4 related to the evidence and question of identification. All these have been dealt with when determining ground two hereinabove. Ground 5 states that the trial magistrate ignored the entire defence evidence and did not refer it in the judgement. I disagree. The evidence given by the appellants and their witnesses were duly considered by trial magistrate and specifically at page 89 of the judgement.

It was not necessary for the trial court to replicate word four word, the testimonies of the Defence witnesses.

Equally, the defence of Alibi was duly and appropriately considered by the trial magistrate. That is discussed at page 89 of the judgement. With regard to ground 7 on contradictions and credibility of the prosecution witnesses, the trial magistrate weighed the evidence of the prosecution witnesses against that of the Defence and made a considered positive finding.

Lastly, with regard to sentence 1 think that the appellants are ungrateful to the compassion and leniency of the trial court after hearing their mitigations. It is possible that the court was influenced by the ages of the appellants and large number of children who look up to them. First appellant was aged 60 years with 20 children while the second stated that he had 17 children. The maximum penalty for the felony of arson is imprisonment for life. For them to get a two year suspended sentence was a pat on the hand.

The end result is that I do hold that the appeals herein have no merits whatsoever and the same are hereby dismissed

The attack was unprovoked and unjustified. The offence of arson is a felony and quite serious. Since the trial magistrate exercised his discretion for a non-custodial sentence, I think the period ought to have been longer. Accordingly in exercise of this court's powers, I do hereby substitute the sentence and enhance it to a period of 5 years suspended sentence. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF MAY,2006

M.K. IBRAHIM

JUDGE.