REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 130 of 2003

{Appeal against both conviction and sentence in the Principal Magistrate Court, Vihiga in Criminal Case No.433 of 2003} – [F. M. KINYANJUI, SRM]}

AGGREY MUTWI ……...…....……. APPELLANT

V E R S U S

REPUBLIC ……...…….. RESPONDENT

J U D G M E N T

AGGREY MUTWI, the Appellant, was on 19.3.2003 convicted of the offence of arson under section 332(a) of the Penal Code by the Senior Resident Magistrate F. M. Kinyanjui in Vihiga SRM Criminal Case No.433 of 2003. He was sentenced to a term of seven years in prison. It is against this conviction and sentence that he appealed on 23.5.2003.

In his petition of appeal, the Appellant put forward four grounds. He criticized the trial court firstly for relying on the evidence of a single identifying witness, secondly for relying on hearsay evidence, and thirdly for relying on insufficient evidence and fourthly and finally for not appreciating that no exhibit was produced in court and no incriminating evidence was found on the Appellant. When the appeal came up for hearing on 2.2.2005, the Appellant stated that he was wrongly convicted. Mrs. Kithaka, Principal State Counsel, who appeared for the Respondent supported the conviction and submitted that the evidence adduced at the trial was overwhelming. She urged the court to dismiss the appeal.

I have perused the lower court record and the evidence adduced in support of the charge. The evidence adduced at the trial showed that the appellant was very drunk on 3.4.2003. The complainant, Hebson Cheiza, (PW1), stated that the Appellant was drunk when he went to his house at about 3 p.m. He did not see the Appellant torch his grass thatched house. He left PW2, Edward Aliguhe, a watchman, to guard it (his house) when he went away. PW2 guarded the house from 8 p.m. He did not see the Appellant torch the house. In his evidence in chief he said *"the accused came and put the house on fire."* Still in examination in-chief, he added, *"I did not see the men who torched down the house."* His evidence was contradictory and unsatisfactory.

PW3, Julius Manani saw the complainant and the Appellant quarrelling on 5.4.2003 near where he worked at Mago trading center. He did not see who torched the house. He had merely heard the Appellant threaten the complainant. PW4, Agnes Kemayo, said she had heard the Appellant say he would torch the complainant's house. She did not see him do it. PW5, PC Michael Njage was taken to the house of the Appellant by the watchman, PW2, from where he arrested the Appellant.

The Appellant gave sworn evidence. He said he had taken changaa and gone home and slept at 4 p.m. on 5.4.2005. He denied having torched the complainant's house. In cross-examination he pointed out that he had quarrelled with the complainant who had hit him earlier. He was firm that even though he was drunk, he knew he had not torched the house. The defence witness, James Iminza Aganga, DW2, a farmer, said he too took the police to the house of the Appellant on 5.4.2003 and that the Appellant was very drunk.

The trial magistrate misdirected his mind when he made an inference that the accused torched the complainant's house because he had contemplated doing so. That may have been indicative of motive. Alone, motive was not enough. Both mens rea and actus reus had to be proved. The trial magistrate failed to appreciate that the Appellant who was very drunk having taken changaa and who had quarreled with the complainant for hitting him (the appellant) had not been seen by anyone torching the house and the fact that he may have threatened to do so was not sufficient. In short, there was no evidence to establish actus reus. The finding by the trial magistrate was erroneous. There was not sufficient evidence to sustain a conviction on the charge.

In the result, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, the appellant shall be released and set free forthwith.

DATED at KAKAMEGA this 22nd day of April, 2005.

G. B. M. KARIUKI

J U D G E