



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APEAL NO. 375 OF 2002

(From the original conviction and sentence in Criminal Case No. 2174 of 2002 of
Principal Magistrate's Court at Nyahururu – K. A. Owuor)

ISAAC WAMBURI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Criminal Case No. 2174 of 2002 of the Principal Magistrate's Court, Nyahururu. In that case, the appellant had been charged for the offence of creating disturbance in a manner likely to cause a breach of the peace, contrary to Section 95 (1) (b) of the Penal Code.

The second charge against the appellant is that of malicious damage to property, contrary to Section 339 (1) of the Penal Code. The third charge against the appellant is that of arson, contrary to Section 332 (a) of the Penal Code. After a full trial, the appellant and his co-accused were found "guilty" and convicted accordingly for all the three counts. Consequently, the learned Magistrate passed the following sentence on the appellant:

Count I: Appellant to serve 6 months imprisonment.

Count II: Appellant to serve 2 years imprisonment.

Count III: Appellant to serve 6 years imprisonment.

During the hearing of the appeal, the appellant recalled that the PW3 had stated that he never saw the panga nor the barbed wire on that fence. In addition to the above, the appellant also noted that the PW2 never carried the barbed wire despite being asked about the same in Court. According to the appellant, the learned trial Magistrate interfered with his cross examination. Apart from the above, the appellant also lamented that the PW3 had been forced to give evidence after being placed in the cells.

As far as the arson charge is concerned, the appellant stated that the evidence of the PW1, PW2 and PW3 contradicted each other. To support his arguments, the appellant pointed out that whereas the PW1 had claimed that the house got burnt at around mid-night, the PW2 had stated that the house was burnt at around 11.00 a.m. On the other hand, the PW3 denied that he had made any report about the said arson. That apart, the appellant took issue with the failure by the Court to visit the scene of the crime. Lastly, he concluded by complaining that his brother viz, Gerard Ndung'u Macharia had a grudge against him.

On the other hand, the State through Mr. Gumo, Assistant Deputy Public Prosecutor supported the conviction and sentence on the ground that it had been proved beyond any reasonable doubt that the

appellant with another had attacked the complainant as demonstrated by the testimony of the PW1. Besides the above, Mr. Gumo pointed out that the appellant had been recognized by his own brother when he was carrying a panga at around 7.00 p.m.

Thereafter, the police managed to arrest the accomplice of the appellant. Subsequently, the appellant came back to the scene while armed with a panga and tried to set the house of the complainant on fire. Mr. Gumo recalled the testimony of the PW1 that at around 12.45 a.m. he was woken up by the shouts of the appellant who was shouting threats at him. Later, at around 2.00 a.m., the complainant smelt smoke and on waking up, he found that his house was on fire. In addition, he submitted that the omission to carry the fencing wire by the PW2 was not fatal. Mr. Gumo denied that there was any contradiction between the PW1, PW2 and PW3. However, he conceded that if there was any contradiction, then the same was very insignificant. Lastly, he concluded by submitting that there was nothing on record to show that the appellant had been threatened by any person.

This Court has carefully perused the above together with the record of appeal that contains the judgment of the learned Magistrate. This Court being the first appellant Court has to examine and evaluate the evidence afresh and reach an independent decision. This Court is alive to the fact that it never had the advantage nor opportunity to see the manner and demeanour of the witnesses. Apart from the above, this Court has an obligation to consider the grounds of appeal that have been forwarded by the appellant. See – **Okeno Vs Republic [1972] E. A.** Having gone through the entire record of appeal, I hereby concur entirely with the submissions of Mr. Gumo on how the offences were committed. Since the said narrative is accurate, and factual, it is unnecessary for me to repeat what has already been clearly stated. Besides the above, I also agree with the findings of the learned Magistrate who evaluated the evidence properly and reached a proper conclusion. The evidence on record clearly show that there was no mistaken identity of the appellant. The appellant was properly recognized by both the complainant and the sister – PW3 – Lucy Wairimu. Though the appellant and the father correctly felt incensed by the abuses by the children of the complainant they had no justification to take the law into their own hands. Apart from the above, the Court notes that the PW2 never stated that the offence was committed at 11.00 a.m. as alleged by the appellant. He only stated that the offence was committed during the day. In any event, the PW2 was not present at the scene and was only relying on information given during investigations. In addition to the above, the failure by the Court to visit the scene was **not** fatal.

This Court finds as a fact that the convictions are safe and well-merited. In view of the above, I hereby uphold the conviction for each count. Besides the above, I hereby find that the sentence for each count is **not** only valid but also lawful. The upshot is that I hereby confirm the sentence for each count.

In conclusion, the Court hereby dismissed the appeal which has **no** merits at all. Right of appeal explained.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of the appellant and

Mr. Gumo, Assistant Deputy Public Prosecutor.

MUGA APONDI

JUDGE

6TH APRIL, 2005