



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 189 OF 2003**

BETWEEN

REPUBLIC APPELLANT

VERSUS

NTONGAI LINTARI RESPONDENT

JUDGMENT OF THE COURT

The respondent herein, Ntongai Lintari was charged with one count of arson contrary to section 332(a) of the Penal Code.

The particulars of the offence were that on the 16th day of February 2002 at Rwanda Location in Meru North District within the eastern Province, willfully and unlawfully set fire to a dwelling house belonging to Joseph Mutwiri, valued at Kshs. 10,000/=. The facts of the case are that on the 16.2.2002, while in Isiolo Town, the complainant (PW1) learnt that his house had been burnt down by the respondent. PW2, Ruth Ature's evidence was that at about 5.00pm on 16.2.2002, while she was at her home, which borders the home of PW1, she saw fire coming from PW1's shamba. When she went there to see what was happening, she found a house burning and the respondent standing there holding a sword. The respondent who was alone started chasing PW2 who then returned to her home.

PW3, Misheck Mwenda, a standard 6 pupil at Kiburu Primary School told the court that on 16.2.2002 at about 5.00pm, he was in the complainant's house at Kandebene. That he used to sleep in that house which was grass thatched with wooden walls. Then the respondent came to the house and found PW3 sitting outside the house. The respondent was armed with a panga and a simi. The respondent chased PW3 away and as he (PW3) ran he screamed. Then the respondent set the house on fire although PW3 did not know where the respondent had got fire from. Later PW3 reported the matter to PW1 and subsequently recorded a statement with the police.

While under cross-examination by the respondent PW3 stated that though he raised an alarm when chased by the respondent none of the neighbours came in answer to the screams. The only person who came was PW2.

After investigations which were carried out by PW4, Corporal James Mungai, the respondent was charged.

The respondent gave sworn testimony in which he told the court that in April of same year, the complainant uprooted his fence whereupon he complained to the chief. The respondent denied that he set the complainant's house on fire. He stated that the case against him was a frame-up because he had made a complaint to the chief against the complainant. When cross-examined by the prosecutor, the respondent said that on the material day he was at home with his wife and children and that his complaint to the chief was never heard because the complainant refused to appear.

The respondent called one witness, one Laibu Nturuti who told the court that he heard about uprooting of the respondent's fence but that he did not know who had uprooted the fence. That on the day in question the respondent was in his shamba harvesting his beans.

After hearing the case, the learned trial magistrate concluded that he could not believe the prosecution evidence and expressed his doubts that the respondent burnt the house. He found the respondent not guilty and acquitted him accordingly. It is against that acquittal that the appellant has appealed. In its petition of appeal dated 21.5.2003 and filed on 22.5.2003, the appellant sets out three (3) grounds of appeal, namely:-

1. That the learned magistrate erred in law and fact by taking into account irrelevant considerations thereby arriving at wrong decision.
2. That the learned magistrate erred in law and fact in finding that there were contradictions between the witnesses when there was no such contradiction thereby prejudicing his mind in arriving at his decision.
3. That the decision of the learned magistrate was against the weight of the evidence.

The issue to be determined by this court is whether the evidence adduced by the prosecution proved beyond any reasonable doubt that it was the respondent and no one else who set the complainant's house on fire. In determining this issue this court has to consider each of the appellant's complaints and decide whether all or any of them are meritorious. In other words, as the first appellate court my duty is to evaluate and reconsider the evidence adduced before the trial court and to make my own independent finding as to whether the learned trial magistrate had any basis for reaching the conclusions that he reached. See **OKENO V REPUBLIC (1972) E.A. 32.**

I will deal with the three grounds of the petition of appeal, which were argued together by Mr. Oluoch for the appellant. Mr. Oluoch contended that the learned trial magistrate disregarded the evidence of PW2 and PW3, which evidence he said corroborated each other materially. According to Mr. Oluoch both of these witnesses saw the respondent set the complainants house on fire.

From the evidence on record PW2 Ruth Atune gave the following statements:-

“On 16.2.2002 at about 5.00pm, I was at my home. I then saw fire in the next shamba of Mutwiri. I went to see. I saw the accused holding a sword and he chased me away. I found a house burning. the accused was all alone there.

From this evidence, I am unable to see where PW2 says that she saw the respondent commit the offence. The fact that the respondent may have been standing where a house was burning is not tantamount to the respondent being seen committing the offence. It is clear that PW2 went to the scene after the house had already been set on fire. Mere suspicion that the respondent may have been the one who set the house on fire is not sufficient evidence to show that it is in fact him who committed the offence.

PW3, Misheck Mwenda said that he saw the respondent set the house on a fire but he did not know where the respondent got the fire from. The evidence of PW3 is not corroborated by any other evidence on record. So the appellant's contention that there was corroboration of the evidence of PW2 by the evidence of PW3 is not supported by the record.

I have also considered the evidence of these two witnesses in detail and find that the evidence is not consistent and is contradictory in material respects. According to PW3, the respondent chased him away as soon as he arrived at PW1's house. PW3 then ran away screaming. In spite of the screams, none of the neighbours went to his rescue. It is not clear from PW3's evidence how far he ran from the scene. It is not clear whether he stopped to look back to see the respondent putting the house on fire. The evidence from PW2 is that the respondent was a much feared man and if it is true as stated by both PW2 and PW3 that the respondent was armed, then it can only be inferred that PW3 ran for his dear life. My view is that

PW3 never saw the respondent setting the house on fire as alleged.

PW2's evidence does not show that she heard any screams by PW3. The question that goes begging here is:- Did PW3 actually scream? PW2 went to the complainant's home when she saw fire from the direction of the complainant's home. When she got there, she saw the respondent who was armed but never talked to him. She was chased by respondent and then returned to her home. No evidence was given of any attempt by PW2 to get other neighbours to come around and help in apprehending the respondent. The question to ask here is whether the circumstances were such that an inference can be drawn that it is the respondent who set the complainant's house on fire? What comes out from the evidence of PW2 is that after the respondent set the house on fire he stood there and PW2 found him and that he chased her away from the scene. I have considered all the circumstances surrounding this case and I find that those circumstances do not lead me to the conclusion that without doubt, the respondent was connected with the offence. If the evidence of PW3 was such that there was no doubt in my mind that he saw the respondent set the house on fire I would have duly warned myself about convicting on the evidence of a single witness, and would have found reason to interfere with the learned magistrate's findings.

For the reasons that I have given above, I do not find any reason to interfere with the judgment of the learned trial magistrate. In the result, the appeal is dismissed. The judgment of the learned trial magistrate passed on 7.2.2003 is confirmed. It is so ordered.

Dated and delivered at Meru this 4th day of May 2005.

RUTH
Ag
4.5.2004

N.

SITATI
JUDGE