REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 487 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 2122 of 2002 of the Principal Magistrate's Court at Thika (Mary Kiptoo –S.R.M.)

SAMUEL MWANGI KAMAU…....…………………..……………..APPELLANT

VERSUS

REPUBLIC…………………… ……………………………..…....RESPONDENT

J U D G M E N T

SAMUEL MWANGI KAMAU, the Appellant herein was charged with **ARSON** contrary to **Section 332(a**) of the Penal Code in counts 1, 4, 5, 6, 7 and 8 and with **MALICIOUS DAMAGE** contrary to **Section 339(1)** of the **Penal Code** in counts 2, 3 and 9. He was found guilty in all these counts, convicted and sentenced to serve five years imprisonment on each count with prison terms running concurrently. He lodged this appeal against both the conviction and sentence having been dissatisfied with the trial courts findings.

The brief facts of the case are that on the night of 12th September 1995 at Minango village, between 9.00 and 2.30 a.m., several houses were set ablaze by a crowd of people estimated to be between 18 and 21.The houses that were burnt belonged to PW1, **JEREMIAH MURIITHI** the Complainant in count 1 and 2, PW3, **KARIUKI WATORO** the Complainant in count 4, PW4, **JOSEPH KAMANDE** the Complainant in Count 5, PW5, **VIRGINIA WANJIRU** the Complainant in count 9; PW8, **ESTHER NJERI KARIUKI** and PW9 **MONICA NJERI**. In respect of the complaints by PW8 and PW9 no charges were preferred.

In regard to counts 3, 7 and 8, the Complainants named in the particulars of the charges as **FLORENCE WAMBUI MARUBU, KINUTHIA MUC** and **WANJIRU MBURU**, respectively, were not called as witnesses. The Appellant in his defence denied committing these offences. He said he was a pastor in the area and that the Complainants were members of his church.He said he had been in the area between 1995 when the arson is alleged to have been committed and 2002 but that no attempt was made to arrest him.

The Appellant called his wife as a witness and she confirmed that he was a pastor and that the Complainants were members of his church and hailed from the same village.

In the petition of appeal, the Appellant raised seven grounds of appeal which were adopted by his counsel in her submission. In summary the Appellant challenges his identification on grounds that no identification parades were carried out to prove his culpability.He also challenges the conviction on

grounds that the evidence adduced against him was insufficient and lacked in corroboration and that the long lapse of time before his arrest was not considered by the learned trial magistrate.

In her submission, **MRS. WAHOME,** learned counsel for the Appellant contended that all the witnesses to the offences in issue in the charge were alone when they witnessed the incidents. That since no evidence was called to corroborate their evidence, and the incident having taken place at night, and since no evidence of lighting was given, it was unsafe to convict the Appellant.The learned counsel also submitted failure to call the Police Officers to whom the incidents were reported and also those who investigated the case, that an adverse inference should be drawn against the prosecution case.

MR. MAKURA, learned counsel for the State opposed the appeal. The learned counsel submitted that delay in the arrest of the Appellant for a period of 5 years (it was in fact 7 years) should not be challenged since the Attorney General had unfettered jurisdiction under **Section 26** of the Constitution to institute proceedings against any individual. He contended that the evidence given by PW1, PW2, PW4, PW8 and PW10 was clear proof that the Appellant had gone underground after the incident and only surfaced in 2002. On this point **MRS. WAHOME** urged the court to find that no such fact was proved.

I have re-evaluated the evidence adduced before the trial court as is my duty as the Appellate court to do.

On the issue of whether or not the Appellant went underground and therefore whether or not efforts were made to get him? PW1 was not present when the arson attacks were committed. Of his own personal knowledge he did not know who torched his property. His evidence that the Appellant went underground was hearsay evidence and ought not to have been admitted in evidence for two reasons. One, he did not disclose the source of that evidence.Two, he did not personally look for the Appellant at any one time.

PW2, PW4, PW8 and PW10 were at their various homes when the incident took place. In their evidence, none claimed to have sought for the Appellant and neither did any disclose the source of their information that he had gone underground. PW11, the arresting officer was clear that he went to Makuyu Police Station in 2000 on transfer from Garissa Police Station. Prior to that period, he was not based in Makuyu where the incidents were reported. His evidence was clear that he visited the Appellant’s home once on 28th April 2000 to look for him in vain. On 29th May 2002, he arrested the Appellant at the Police Station where he had gone to in connection to a different issue.

The evidence of all these witnesses, PW1, PW2, PW4, PW8, PW10 and PW11 cannot be said to have amounted to proof that one, the Appellant went underground between 1995 and 2002 and two, that any efforts were made to arrest the Appellant during the said period.

In my considered view, where a report was made to the police implicating a certain person with an offence, attempts to arrest him should be made within a reasonable time. A lapse of a period of 7 tears cannot be said to be reasonable time. After such a lapse, the arrest of a suspect and his arraignment in court by the Attorney General acting under **Section 26** of the **Constitution** can be subject to question especially when it is shown, here in this case, that the delay may not have been occasioned by the Appellant.The case of **PAUL MWANGI MAINA vs. REPUBLIC CA No. 93 of 2000** is relevant to this case. Just like in the cited case, the Complainants and Appellant were from the same village and the failure by Police to arrest him was unexplained. The Constitutional Court in **GITHUNGURI vs. REPUBLIC 1985 KLR 91** held; -

“The preferment of a charge against any person nine years

after the alleged commission of the offence, six years after a full

inquiry in respect of it and five years after the decision of the office

of the AG not to prosecute and to close the file is vexatious, harassing

an abuse of the process of the court and contrary to public policy unless

a good and valid reason exists for doing so, such as the discovery of important

and credible evidence or the return from abroad of the person.

The Appellant was available all along and no efforts seem to have been made to apprehend him. There is nothing on the record to show that any new discovery of improper and credible evidence other than what the police all along has since been discovered. In my assessment the arrest of the Appellant so many years after the offence was alleged to have been committed smacks of abuse of due process of the law.

MR. MAKURA submitted that generally a fact can be proved by a single witness even without corroboration. Learned counsel submitted further that the witnesses called by the prosecution sufficiently proved each count facing the Appellant.

I have already covered **MRS. WAHOME's** submission in regard to the evidence of the prosecution witnesses and her contention that lack of corroboration rendered the prosecution case insufficiently proved.

In the learned trial magistrate's judgment the evidence of the witnesses was not analyzed. The learned magistrate made the following observations;

"For the evidence on record the arsonists were all well

known to the Complainant. In fact they had been assisted by

the area chief. That they had very powerful spotlights and that

there was a log of light from the houses that had been set ablaze

hence they were able to identify all the suspects clearly positively.

The accused too was positively identified. He did assist the other arsonists

in setting the houses on fire. He actively took part in the burning of the

Complainants' house. I also find the prosecution evidence well corroborated

the witnesses gave their constituted evidence…"

The above observations were so generated that it was difficult to tell who among the witnesses is alleged to have seen the Appellant under what kind of lighting and to tell which role the Appellant is alleged to have played, considering first that the Complainants who are said by the trial court to have known the Appellant before. PW1 was not present at the time as stated earlier and therefore, it was irrelevant whether or not he knew the Appellant before. The Complainants in counts 3, 7 and 8 were not called as witnesses. The trial court dealt so generally with the evidence before her that clearly she assumed two things. One, that these three Complainants were witnesses and two, that they knew the Appellant before. Clearly the two findings in respect of these three absent Complainants were a serious and material misdirection.PW3, **KARIUKI WATORO** the Complainant in count 4 was at home when arsonists struck but his evidence was so clear that he jumped out of his house through the window and immediately proceeded to Makuyu Police Station to report. It was not until the next morning that he went back to the village to find his house razed to the ground. As far as counts 3, 7 and 8 are concerned; no evidence whatsoever was adduced to support the charges. In regard to count 4, PW3 **KARIUKI** did not even purport to identify those who razed his house to the ground. In regard to count 1 and 2, the Complainant was absent that night. However, PW6 **JOSEPHAT MUNARU**, who spent the night in the said Complainant's house and PW2, the said Complainant's house both witnessed the incident. They were

together when the house was lit with fire. Yet PW2 said that it was the Appellant who struck the match then lit the fire but PW6 contradicted her by saying that even though he saw the Appellant in the ground which went to the scene that night, he did not see him do anything.

I have scrutinized further the evidence of PW2, PW1's wife and Complainant to counts 1 and 2. Nowhere does she say by what nature of light she saw the Appellant. PW2 acknowledged that it was 9.00 p.m. and dark when the arsonists went to her home. She even said that at the time she was pulled out by them, they had strong spotlights which they switched off before apprehending her. The issue of light, the nature and extent of it, the distance it was from the witness and the Appellant were all very important and needed to be established to enable the court determine whether the circumstances of identification were positive. See **PAUL ETOLE & ANOTHER vs. REPUBLIC.** Where no inquiry was made by the trial court, in that regard, then the conviction cannot be considered safe.

It is not clear on whose evidence the Appellant was convicted for counts 1 and 2, since as I stated earlier, the learned trial magistrate treated the evidence before her generally without analyzing it as required under **Section 169** of the **Criminal Procedure Code.** That notwithstanding the evidence of PW1, PW2 and PW6, whether together or separately, could not have been sufficient to sustain a finding of guilt.

In regard to count 5, PW4, **JOSEPH KAMANDE** said that he saw the Appellant through the light from the fire burning his house. PW4 did not however disclose the distance at which he was when he saw the Appellant.He did not disclose how far the Appellant was from the burning fire or how big the fire was. Consequently, this court is unable to determine whether the lighting was sufficient and the Appellant sufficiently near to enable the Complainant, PW4 to positively identify the Appellant. It is trite law that the benefit of doubt should always be given to the accused person and in respect to this court, the Appellant deserved to be given such benefit. In regard to count 6, PW9 **MONICAH NJERI** was not home when the offence was committed. PW7 **PAUL MUIRURI** his neighbour did not see those who razed the house. PW7 said he went out to assist put out the fire but on reaching there he found PW9 being beaten. PW7 said he decided to retreat and hide but said he saw the Appellant in the group as they went away. That evidence is insufficient to support count 6 since PW7 did not see the Appellant's role in the offence or at all.

The final count for consideration is count 9 in which PW5 **VIRGINIA WANJIRU** was the Complainant. **VIRGINIA** told the trial court that arsonists went to her house at 11.00 p.m. and that she was in bed already. When she woke up, her door was forced open and she went outside. PW5 said that she was held by one **NGUGI a**nd one **FRANCIS WANJOHI** while the Appellant set the house on fire. PW5 said she saw the Appellant by the light from the burning fire. **VIRGINIA** did not however disclose the distance from which she saw the Appellant, the brightness of the fire and the distance at which the Appellant was at the time she saw and identified him. The court cannot assume the strength of the fire or the light emanating from it.Further, it was the prosecution's duty to establish that PW5 was able to positively identify the Appellant in all the circumstances of the case. I find that that duty was not discharged in respect to count 9 as well. On the issue of identification, the insufficiency of the prosecution evidence adduced to support the charges and on whether an adverse inference could rightly be made against the prosecution case, I find there was total lack of identification in respect of counts 3, 4, 6, 7 and 8 and insufficient and wanting evidence in respect to counts 1, 2, 5 and 9. The evidence was insufficient to sustain convictions in any of the 9 counts. The investigating officer was not called as a witness and his evidence was very important at least to throw some light on certain salient points and issues in this case including the unexplained delay in arraigning the Appellant before the trial court.

Having carefully considered this appeal, I find merit in it. The convictions entered in this case were all unsafe and not backed by cogent and strong evidence. I will allow the appeal quash the convictions and set aside the sentence.

Dated at Nairobi this 21st day of September 2005.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

LESIIT, J.

JUDGE