

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.222 OF 2003

(From original conviction and sentence in Criminal Case No.696 of 2003 of the Resident Magistrate's Court at Nyamira –K. W. KIARIE ESQ., S.R.M

HELLEN BOSIBORI NYANGONDI APPELLANT

VERSUS

REPUBLIC RESPONDENT.

JUDGMENT

Appellant was tried and convicted for the offences of Arson c/s 332 P.C. and malicious damage to property c/s 339(1) P.C. by S.R.M Nyamira and sentenced to three years imprisonment in each count. It was alleged that she had burnt a house and damaged three others belonging to Richard Sigira Sanganyi on the 10th November 2002 at Bonyakoni sub location. It was submitted that the only evidence of a eye witness was that of PW3. PW3 was declared a refractory witness on the first day he started to testify.

He was remanded for 8 days. It was after that he gave evidence incriminating the appellant.

The learned State Counsel did not support the conviction. It is clear that evidence of PW3 should not have been relied on to convict the appellant. As submitted he refused to give evidence against the appellant. One cannot therefore rule out that he was intimidated and felt threatened by being remanded and had therefore to give - incriminating evidence. He did not give the evidence voluntarily and the truth of such evidence was suspect. PW1 the complainant had told court that he had been called by two people who had witnessed the destruction. They gave him the suspect's names. These two eye witnesses were never called.

PW3 was declared a refractory witness on an application by the prosecutor allegedly because he was not testifying according to his statement. In essence the prosecutor was saying that he was changing his story. In such circumstances the prosecutor should have applied for him to be declared hostile and not refractory.

He had not refused to answer questions only he was not testifying according to his earlier statement. Declaring him refractory witness was therefore not proper.

All in all I find the conviction was not supported by evidence on record. I allow the appeal, quash the conviction and set aside the sentence on both counts. Appellant be set at liberty unless otherwise legally held.

Dated 29th July 2004 at Kisii.

KABURU BAUNI

JUDGE.

29/4/04