REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 258 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 1100 of 2000 of the Senior Principal Magistrate's Court at Kitui: M. N. Gicheru Esq. on 29.11.2002)

MAIMBO MUNYOKI .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 253 OF 2002

MAINGI MUTIA .... APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 254 OF 2002

TITO MUNYALO :.. APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL 255 OF 2002

MWENDWA ISMAEL..APPELLANT

VERSUS

REPUBLIC... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 256 OF 2002

PHILIP KIMOTHO .... APPELLANT

VERSUS

REPUBLIC... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 257 OF 2002

JUMA MUTINDA ....APPELLANT

VERSUS

REPUBLIC... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 259 OF 2002

JAMES KATIWA .... APPELALNT

VERSUS

REPUBLIC .... RESPONDENT

J U D G E M E N T

This is an appeal that arises out of the judgement of Senior Principal Magistrate's Court in Kitui Cr.C. 1100/00. The 7 appellants were charged before the lower court with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the charge were that on 15.7.2000 at Kangose village Itoleka sub location in Itoleka location of Kitui District, jointly with others not before the court, willfully and unlawfully damaged nine window glasses, four blankets, four curtains, seven doors, one chicken pan, two chairs, one table, two stools, two handbags, 6 long trousers, eight shirts, six pairs of shoes and one wall clock all worth Kshs. 200,000/- the property of Daniel Mutonya Kivindyo. The case proceeded to full hearing after which the 7 appellants were convicted and were sentenced to a fine of Ksh. 10,000/- each in default 9 months imprisonment.

The appellants were aggrieved by the convictions and sentences and filed the appeals. The 7 appeals were consolidated and proceeded as Criminal Appeal 258/02.

A summary of the evidence adduced before the lower court is that the residents of the complaints' village suspected that he had evil spirits and had cast spells on a small child in the village and they wanted him to remove the spell. The complainant denied it. The villagers gathered and threatened to burn the Chief's office where the complainant was given protection. The chief sought assistance from police station Kitui. Meanwhile members of public went to the complainants home, damaged several properties setting others ablaze. P.W.2 and 3, employees of the complainant who were on the compound and who had learnt of the impending attack hid themselves and observed as the intruders damaged the gate and proceeded to damage the other properties. The two claimed to have recognized the 7 appellants as having taken part in the destruction and gave their names to the police who came to the scene later.

In their defences each appellant claimed to have had some disagreement with the witnesses or the complainant but denied having been present at the scene of the crime.

The appellants raised 9 grounds of appeal the key ones being that the charge was defective as it was duplex; that the 7 appellants were not properly identified considering the circumstances in which the

offence was committed; that the magistrate did not consider the evidence of D.W.8 the chief of the area, that no proper investigation was carried out in this case and lastly that the alibis raised by the appellants were never disputed by the prosecution.

I have carefully scanned the evidence before the lower court and reviewed it and will consider both the submissions of the appellants and that of the Learned State Counsel who opposed the appeals as I consider the above mentioned grounds.

Was the charge duplex. It was the contention of Mr. Kilonzi for the appellants that the evidence of the prosecution does not support the offence as charged but that they should have been charged with arson and another charge of malicious damage to property. It is his view that the charges were ambiguous and hence prejudicial to the appellants. In response the State Counsel cited Section 382 Criminal Procedure Code which provides as follows:

"Subject to the provisi ons herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed, or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclam ation, order, judgement or other proceedings before or during the trial on in any inquiry or other proceedings under this code, unless the error , omission or irregularity has occasioned a failure of justice.Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In the present case, though there is evidence that indeed arson was committed, other properties too were damaged in the same transaction. Indeed the appellants could have been charged with both offences but the Attorney General opted to charge them with the lesser offence. The counsel had opportunity to raise this issue even before the hearing as counsels have access to the statements even before hand. It was not raised till submissions time and the magistrate overruled him. I too find that the appellants have not suffered any prejudice in the manner the charge was framed. If anything it was to their benefit.

Coming to the question of identification. It is P.W.2 and 3 who allegedly identified the appellants from their hideout in the complainants compound. Both P.W.2 and 3 said that the attack took place at 11.00 p.m. The other prosecution witnesses said the same save for P.W.5 Cpl. Nzioka who said they arrived at the scene at 6.30 to 7.00 p.m. and that it was still daylight. I have had a chance to review this evidence and P.W.5 either told many lies or was confused. The incident was at night about 11.00 p.m. From the evidence of P.W.2 and 3, the intruders were many. Over 50 of them. At first P.W.2 and 3 hid near the gate on a euphorbia fence. They used the moonlight to see those who broke the gate. Though the witnesses said there was bright moonlight, the court was not told whether it was full moon, half moon or ¼ moon for the court to be able to ascertain whether P.W.2 and 3 could see the people well. P.W.2 and 3 did not tell court how they saw the intruders, whether over the euphorbia fence or through it. P.W.2 and 3 then claimed to have moved to hide behind a tree once the appellants and others entered the compound.

It is amazing that the magistrate did not see this tree when he visited the scene. In his judgement he had this to say

"Though there was no big tree in the compound, there was a place where the witnesses could have hidden. The euphorbia hedge could have hidden them and so could the flower trees we saw when we visited the scene. "

The magistrate did not see this tree from where P.W.2 and 3 hid and were able to see exactly what each appellant did in the complainants compound. If the magistrate did not see it or was not shown then it means the tree does not exist and the witnesses could not have seen the events as they unfolded as they so vividly put. As was held in he case of

PETER KAMAU MAINA V. REPUBLIC CR.APP. 111/03 Before the court can base a conviction on this evidence of identification at night, such evidence should be absolutely watertight. In **REPUBLIC V.**

ERIA SEBWATO 1960 EA 174, the court held that visual identification must be treated with the greatest care.

The two witnesses P.W.2 and 3 also claimed to have recognized the appellants voices. If the crowd came singing as a group, there is no way that the witnesses would have identified the individuals voices. Besides the witnesses never told court the peculiar features that made them identify the voices or how much time they had spent with the appellants to be able to identify their voices. The magistrate in accepting the evidence of voice identification merely jumped to a conclusion without considering this evidence. In the cases of **KARANI V. REPUBLIC 1985 KLR 290;** see also **ANJONINO V. REPUBLIC 1980 KLR** the Court of Appeal held that

“Identification by voice nearly always amounts to identification by recognition however one must be taken to ensure that the voice is that of the appellant” The court never enquired enough to establish whether the voices were those of appellants or not.

P.W.2 and 3 told the court that they gave the names of the appellants to the police who came at the scene. None of the witnesses who testified took these names down. Inspector Kahiga who was supposedly given the names never testified. From cross examination of P.W.2 and 3, it was apparent that when they recorded statements with the police the first time, they never mentioned any names till sometime in August at the time of the appellants arrest. The question is whether any names were given to police or any records were made of them. The appellants having been known to the two witnesses, it would have been expected that the names would have been recorded from the onset right from the scene but it seems this was not the case. One then wonders whether P.W.2 and 3 identified anybody and whether they gave any names to police. The Court of Appeal in the case of **OUMA V. REPUBLIC CR. APP. 222/02** held that the description of the accused should be given to police in the first report.

Having considered all the above I do find that the evidence of P.W.2 and 3 on identification was not watertight as expected in such cases. P.W.2 and 3 having seen the appellants in the crowds that wanted P.W.1 earlier may have taken advantage of that. That may also explain why it took so long to charge the appellants from 15.7.2000 to about 19.8.200 when they were arrested. If they were known on 15.7.2000, they should have been charged immediately as there were no more investigations going on as indeed none have been disclosed.

As regards the evidence of D.W.8 the chief of the area, I would have held the same view with the magistrate that he was not credible. He saw those agitating to attack complainants home as it was broad daylight and yet he totally denies knowing his subjects involved in the attack. Further, being a chief, this situation would have been averted had he taken a firm stand. It seems he was part and parcel of this crowd though he pretended to be assisting the complainant. The magistrate rightly rejected his9 evidence.

He could not have testified as to what happened because he was not present, when offences were committed. He seems to have conveniently kept off. In their defences the appellants raised issues of having standing grudges between them and the complainant. I would hold as the magistrate did that these were afterthoughts. The appellants were represented and it would have been expected that such allegations would be raised during cross examination to enable the complainant respond to them.

The magistrate did not address the alibis raised in the defence. He should have made an independent finding on the alibis.

The investigating officer did not testify. Inspector Karani was said to have joined Interpol in Nairobi but no good reason was given as to why he did not come to testify. Ordinarily on investigating officer need not testify but in such a case where the evidence seems to be disjointed the court would have benefited from the evidence of an investigating officer.

From the foregoing, this court having found that the identification of the appellants was not sound though I do not hesitate to state that they are prime suspects, the conviction was unsafe and it is hereby quashed. Consequently the sentence is also set aside.

Dated, read and delivered at Machakos this 28th day of September 2004 Read and delivered in the Presence of

R. V. WENDOH

JUDGE