REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 357 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 2711 of 2002 of the Senior Principal Magistrate's Court at Kiambu (L. Muhiu R.M.)

JOHN MBUGUA KIBUGI……..……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant JOHN MBUGUA KIBUGI was convicted by Resident Magistrate, Kiambu, Mrs. Muhiu L. of two counts. Count 1 was ARSON Contrary to Section 322(a) of the Penal Code and count II of MALICIOUS DAMAGE TO PROPERTY Contrary to Section 339(1) of the Penal Code. The Appellant was then sentenced to serve 4 years imprisonment in the first count and 1 year's imprisonment in the second count with prison terms running consecutively.

The facts of the case were that on the night of 13th December 2002 the Appellant's parents, PW1 and PW2 and his sister, PW3 were woken up by screams and knocks on the door.On going outside their house, they found that their old house which they used as a store had completely collapsed and it burnt to the ground. Nothing was retrieved from it. PW1, the Appellants father, accompanied by PW2 Appellant's mother, and others who woke them up went over to the Appellant's house nearby to see whether he was in. PW1 had to break his window pane and inside he says he saw the Appellant sleeping in bed. PW2 said she saw nothing. On the 18th December, five days later, the Appellant found his sister PW3, outside their home and started threatening to kill her. She ran into their home and locked herself inside after unsuccessfully looking for her mother.

The Appellant then broke window panes of the main house before leaving. He was later arrested. In defence the Appellant stated that on the night the house burnt, he was sleeping on his chair because of a dislocated leg. He said that when he was called out by PW1, he could not go because he was to be of no assistance since he could not carry a bucket of water due to the leg injury. On the broken window panes, the Appellant said he had broken them much earlier and had been charged in court for said offence. That his father had later withdrawn the charges.

The Appellant raises one key ground in his Appeal which is that the evidence adduced by the Prosecution was insufficient to sustain a conviction and that the learned trial magistrate erred in law and fact in convicting him on such evidence.

MISS NYAMOSI, learned counsel for the state supported both convictions and the sentences. Learned Counsel contended that there was evidence by PW3 to show that the Appellant had hurled a bottle of paraffin into the house after which a fire broke out. MISS NYAMOSI mixed up the facts of this case. The

bottle hurling incidence which PW3 spoke about took place on the 18th December, five days after the ARSON incident. It was unrelated to arson and no fire broke out on the 18th December 2002.

There was no direct evidence that the Appellant set the house in question on fire. There is also no evidence to show he was an accomplice to the incident. The learned trial magistrate relied on remarks made by the Appellant to his father when questioned about the fire to convict him. According to the learned trial magistrate, the Appellant's remarks

; "Kuchoma nyumba si hoja " interpreted by PW1 to mean "**burning the house is nothing "** was an admission. With due respect to the learned magistrate, the words of the Appellant to his father do not qualify to be regarded as an admission. An admission must admit either the offence or substantially all facts which constitute the offence.

The Appellant did not admit that he burnt his father's house. He did not admit any fact or facts that could constitute the offence of arson. In fact he had a good defence to the charge. His remark was exculpatory and full of indifference or callousness which appears to have been intended to annoy than to admit the offence. See GIDAMEBANYA vs. REGINAM {1953} 20 E.A.C.A. 318.

The learned trial magistrate misdirected herself as to the effect of the Appellant's statement to his father who is the Complainant in this case. As a result, the conviction to the charge of arson, based on the said misdirection, was unsafe and should not be allowed to stand. I quash the conviction and set aside the sentence.

On the charge of Malicious Damage to property there was direct evidence by PW3 who saw the Appellant breaking some of the window panes. Her evidence that the window panes were broken on the material day is confirmed by PW2 who was also at the scene and PW1 who saw the damage much later. The Appellant had no defence for his act. This charge was well proved in evidence and therefore can be allowed to stand. On the sentence imposed of one year imprisonment, it is quite in order and consequently I shall not disturb it.

The upshot of this Appeal is that the Appeal against both the conviction and sentence in the charge of ARSON succeeds but fails in its entirety in respect of the charge of MALICIOUS DAMAGE TO PROPERTY. Since the Appellant will have served the sentence imposed in the second charge, he should be set at liberty unless he is otherwise lawfully held. Orders accordingly.

Dated at Nairobi this 17th September 2004

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE