REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE

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Criminal Appeal 69 of 2003

(From Original Conviction and Sentence in Criminal Case No. 972 of 2002 of the Senior Resident Magistrate's Court at Kajiado: Ndungu H. N. (Miss) on 4.3.03)

PAUL MBUTHIA ……...…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G E M E N T

This is an appeal against the judgement of the Senior Resident Magistrate Kajiado in Criminal Case 972/2002/. The appellant was charged with the offence of arson contrary to section 332(a) of the Penal Code. He was convicted after a trial and sentenced to serve 3 years imprisonment. Being aggrieved he filed this appeal. He cited 7 grounds in his petition of appeal.

In summary his grounds on appeal are that he was not identified as the arsonist, that there was no sufficient evidence to connect him with the offence and hence the offence was not proved against him and lastly that the sentence of 3 years is harsh and excessive.

Briefly, the facts of the case before the lower court are that P.W.1 and 2 were watering P.W.1's garden at about 11.30 p.m. when they heard appellant call the complainant P.W.1 by the name 'Mary'. He was near the house of the complainant. P.W.1 and 2 also said they were a few metres from the house. P.W.1 did not respond because the appellant had been threatening P.W.1. Suddenly the house went up in flames as the arsonist ran off. They gave chase. It is not clear where the appellant was arrested.

The appeal was opposed by the State. The Learned State Counsel submitted that the appellant was positively identified and that his voice was identified by P.W.1 and 2 as appellant who called out the complainant's name.

It is not in dispute that the complainant's house was set ablaze and burnt on the said date. The question should have been who burnt it.

The incident occurred at 11.30 p.m. it was night. The witnesses never adduced any evidence regarding the light available for them to see anybody on that night. P.W.1 cannot then have positively identified the complainant physically because she did not tell court the intensity of light on that night and whether it was sufficient to see anybody.

Both P.W.1 and 2 told court that they identified the appellants voice when he called the complainant's name "Mary' three times. Both P.W.1 and 2 agree that the appellant once lived with the complainant. Though the complainant denied that the appellant lived with her as husband and wife, P.W.2 seemed to

agree that appellant lived with complainant and worked with him elsewhere. On the other hand the complainant had said that appellant just worked for him and lived with him because her house is in a remote area and she needed company and security. It seems from the evidence on record that there was some relationship between the complainant and the appellant which went sour.

The incident occurred at 11.30 p.m. Nobody actually saw the appellant set the house ablaze. P.W.1 said he suspected the appellant because he had threatened to kill her and burn her house. The court relied on voice identification by P.W.1 and 2 when P.W.1 and 2 say that the appellant called out the name "Mary" three times and soon thereafter the house went up in flames. Firstly there is no nexus between the calling of the name Mary and the house bursting into flames. Secondly I find that the voice identification was not sufficient for the court to find a conviction upon. In the case of **KARANI VS. REPUBLIC 1985 KLR 290**, 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. Further to that in the case of **JOSEPH LEBOI OLE TOROKE V. REPUBLIC CR. APP. 204/1987** the Court of Appeal relied on the case of REPUBLIC V. TUBLIBULL 1976 ALL EA 549 PAGE 552 where it was held

"Recognition may be more reliable than identification of the stranger; but even when the witness is purporting to recognize someone whom he knows, jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made"

I find the words uttered that is 'Mary' to be too fewer to enable one recognise another's voice and there is a high likelihood of mistaken identity. It was not clear where the appellant was arrested or when. I find that whereas the appellant may have been a prime suspect, the evidence of recognition is shaky and not reliable. The court should have given the appellant the benefit of doubt and acquitted him. The conviction is unsafe. It is quashed and sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 19th day of October 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE