



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**CRIMINAL APPEAL NO.463 OF 2000**

**RICHARD MWAMBI JUMA.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

The Appellant was convicted on two counts of the offence of Arson contrary to Section 332(a) of the Penal Code and was sentenced to serve 3 years imprisonment on each count by Voi Senior Resident Magistrate.

It was alleged that on 24.8.99 at Mgeno Village, Mwatate, he wilfully set fire to the dwelling house of one Pastor David Muli Ndeto and on the 28.9.01 he burned the Lutheran Church of Kenya building in the same place.

The church building and the Pastor's house had been constructed on a 3-acre plot allocated to the church by the Chief and Assistant Chief of the area in 1996. They were constructed with mud walls and were grasshatched. There was also a thorny hedge surrounding the plot. Neighbouring the church plot is the Appellant's land and his home about 200 metres away.

A Church Elder PW.2 Tole Mwamburi (Tole) had been left in-charge of the two buildings by the Pastor. He was informed by the village headman on 24.8.99 that the Pastor's house had been burnt. He went and found it burning. Later in September the church was also burnt. The village headman who found the Pastor's house burning on 24.8.99 at 11 a.m. was PW.5 Jared Mwachofi (Jared). Earlier that day he had received a report from the watchman who is also a church member, James Kithusi that the Appellant had threatened him and damaged the walls of the church. He then went to report that to the Assistant Chief before returning to find the Pastor's house on fire. He also found the Appellant's cows grazing nearby.

James Kithusi himself testified as PW.3. He saw the Appellant setting fire to the thorny fence around the church plot. Then the Appellant took a panga and started demolishing the walls of the Pastor's house. He threatened to shed blood and then drove his cattle away. He then returned with a panga, a bow and arrows and threatened James with shedding blood. James ran off to inform Tole. On his return he found the Pastor's house on fire.

The Assistant Chief himself testified as PW.4 and confirmed that the plot belonged to the church. He also confirmed that he received a report on the burning of church and went there to see for himself. He summoned the Appellant who confessed that he had done it.

The report was made to Wundanyi Police Station on 17.12.99 which was about 4 months after the event.

In his unsworn statement of defence the Appellant said he was at the river with his wife the whole day it was alleged the Pastor's house was burned. His wife supported him saying she and her husband had taken their cattle to the river. She was aware that the church burned that day but could not tell how the fire started. She added in cross-examination that the church was built on their piece of land.

Before me the Appellant challenges the conviction on 5 Grounds of Appeal argued by learned counsel Mr. Mulwa. Mr. Mulwa contended that the charge was defective; the evidence relied on was hearsay; the charges were fabricated since the report was made to the Police late; reliance was made on extraneous matters to convict; the case was not proved beyond reasonable doubt and finally, that the sentence was excessive in all the circumstances.

On the other hand, learned Senior State Counsel Mr. Gumo supported the findings of the Lower Court submitting that there was direct as well as circumstantial evidence sufficient to found a conviction.

I have perused the record and re-evaluated the evidence on record.

On the outset I agree with Mr. Mulwa that there was no evidence directed at the second count relating to the burning of the main church on 28.9.99. There was only a fleeting mention of that incident by PW.2 Pius Tole in a confusing and inconsistent manner. He gave evidence on the burning of the Pastor's house and then said "The church had been burnt earlier". Soon after he stated:-

*"Later in September the Church was also burnt".*

All the other witnesses spoke as if there was only one incident of arson. As no sufficient or any evidence was directed on Count 2 of the offence charged, the Appellant was entitled to an acquittal and I allow the Appeal in that respect, quash the conviction and set aside the sentence.

As for Count 1, the major complaint was that the evidence relied on was hearsay and that the Appellant was framed for the offence. The framing allegation arises because of the delay in reporting the matter to the Police. It is certainly a matter of concern that the incident was not immediately reported and the Appellant taken to court and the delay in so doing should have been explained. But there is no time limit within which criminal offences, except those specifically excluded, may be investigated and charged if there is evidence to sustain them. I perceive no injustice in instituting the charges long after the incident and I have found no other basis for allegation made that the Appellant was framed for the offence.

It is true to say that much of the evidence on record is circumstantial as indeed there is no eye-witness account of the Appellant setting the Pastor's house on fire. I think however, that the circumstantial evidence is consistent and strong enough to sustain the conviction.

The strongest of such evidence is that of PW.3 James Kithusi, the watchman and congregant who shortly before returning to the scene to find the perimeter fence and the Pastor's house on fire, was confronted by an armed Appellant who threatened him and even demolished part of the wall of the house. The witness had to run away to report to the Village Headman Jared Mwachofi PW.5 who also went to the scene and found the house on fire. The Appellant's cattle were grazing nearby. The same Village Headman was aware of the Appellant's dispute with the church. Although the nature of the dispute was not explained, the Appellant's wife in cross-examination stated that the church was built on their land. Other evidence on record however is that the church was built on a plot of land given to the church by the Assistant Chief. That was close to the Appellant's home and it is not unreasonable to reach the conclusion that the dispute revolved around the church plot and its ownership. If it so existed the remedy was not to burn the Pastor's house but to follow legal channels.

The Appellant and his wife may well have taken his cattle to the river on the day the Pastor's house was burnt, but at one point on that day he and the cattle were placed at the scene of the crime by prosecution witnesses whose evidence the trial court believed and I have no reason to doubt. The evidence points irresistibly to the Appellant's guilt rather than his innocence. The offence was proved as charged and I dismiss the Appeal on conviction in Count 1.

As for sentence the maximum sentence is life imprisonment. It is a serious offence and I cannot therefore hold that the discretion exercised to impose a 3-year jail term was wrong in law. I dismiss the Appeal on sentence.

**Dated this 31st day of July, 2001.**

**P.N. WAKI**

**J U D G E**