



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 217 OF 1999

**(From Original Conviction and Sentence in Criminal Case No.1854 of 1998
of the Chief Magistrate's Court at Mombasa –G. Aburili, Esq. SPM)**

PETER SYENGO.....APPELLANT

versus

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant was charged with two counts of Arson c/s 332 (a) of the Penal Code in that on the night of 30th/31st May 1998 he unlawfully set fire on two different dwelling houses in Likoni. He was acquitted on the second count for lack of sufficient evidence but was convicted on the first count and was sentenced to serve 5 years imprisonment. The trial Magistrate believed the evidence of the three prosecution witnesses who testified that they recognized the Appellant through the light of a burning log of wood.

The main ground in the appeal is therefore on identification, the contention being that it was a dark night and the witnesses could not possibly identify the arsonist. As the first Appellate Court I must subject the evidence before the trial court to fresh evaluation in considering the Appeal. I must bear in mind that in matters of identification, particularly where prevailing circumstances may be difficult, the court must proceed cautiously and only find for the prosecution when the evidence leaves no doubt that the identification could not but be positive. I must also distinguish between identification of a person previously a total stranger to the identifying witness, and the recognition of a person previously known to the witness.

What is the evidence on the issue?

The complainant (PW.1) was asleep in his house when at 11 p.m. he heard noises outside. He heard his wife asking who it was. Then he went out. The house had no door but only a rug covering the entrance. It was grass thatched. The Complainant then stated:-

“My wife went with a piece of wood which had fire. She then brought it near the face of the person to identify. I then identified him to be Peter Syengo. He was a close neighbour. Having noticed he had been detected he tried to flee. He went to his house. I returned to my house. After less than ten minutes I saw Peter running behind my house. He had a matchbox. He then used it to set my house on fire. The house and some utensils were burnt to ashes. My son Abraham tried to assist me but we did not save much. Peter Syengo returned a third time and burnt the house of my child.”

His wife was PW.2 and she stated:-

“I came out of the house. I went to a small house to get fire to light a lamp. As I was returning I found a man standing. I identified him as Peter who is a neighbour. I called out, he did not respond. Then after repeating I got hold of his hands. He then managed to run off. We wondered why accused (identified) had come there. We went into the verandah. Then me and my husband saw accused return. He came running and set fire to the house.”

The son PW.5 testified that his father PW.1 told him immediately that it was the Appellant who had set his house on fire. The son confronted the Appellant who denied it but shortly thereafter the Appellant returned and set fire to the son's house. PW.5 said there was moonlight and he was able to recognize the Appellant whom he had known for many years as a neighbour. They went to the Police later the following morning.

The learned trial Magistrate believed the evidence of those three witnesses that they were able to recognize the Appellant as they testified they did. He was a better Judge of their demeanor as he saw them in the witness box. I believe the Appellant was at the scene of crime and was recognized by his neighbours, the complainants. His explanation that he was at home reading the Bible was properly dismissed by the learned trial Magistrate. I would dismiss the Appeal on conviction and now do so.

As for sentence the maximum provided for the offence is life imprisonment. Senior State Counsel Mrs. Mwangi who supported the conviction also supports the sentence. Considering that all the complainants' property was reduced to ashes and they were left without shelter which is a basic human right, the deterrent sentence imposed would send the right signals to would be arsonists. I do not interfere with it. The Appeal on sentence is dismissed.

Dated this 26th Day of September, 2000.

F.N. WAKI

JUDGE