Kimaku & 4 others v Republic (Criminal Appeal E003 of 2022)
[2024] KEHC 8720 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E003 OF 2022

LW GITARI, J

JULY 18, 2024

BETWEEN

DEBORAH KARIGU KIMAKU ..... 1ST APPELLANT

LUCY MUTHINI KIRAGU ..... 2ND APPELLANT

GEORGE MUTEMBEI ..... 3RD APPELLANT

CHABARI RUCHIANGA ..... 4TH APPELLANT

JULIUS MUTHENGI ..... 5TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment in the Chief Magistrate's Court Chuka Criminal Case number 696/2020)

JUDGMENT

This appeal arises from the Judgment in the Chief Magistrate's Court Chuka Criminal Case number 696/2020 where the appellants were charged with Arson Contrary to Section 332(a) of the Penal Code. The particulars are that on the 18/7/2020 at around 1500 hours at Igambang'ombe Sub-County, within Tharaka Nithi County, jointly with others not before court willfully and unlawfully set fire to a dwelling house valued at kshs.200,000/-belonging to Bonface Njue Pius.

1. The appellants denied the charge. The prosecution called witnesses and after a full trial appellants were convicted and sentenced to serve eight (8) years imprisonment each.

2. The appellants were aggrieved by both the conviction and sentence and filed this appeal raising the following grounds:

1. That the learned trial magistrate erred in matters of law and facts by disregarding clear evidence adduced by the Appellants and his witnesses.

2. That the learned trial magistrate erred in matters of law and fact by disregarding the appellants' defence.

3. The learned trial magistrate erred in law and facts and exhibited clear bias by not recording the evidence adduced by the prosecution witness and more so PW4 and Appellants' witnesses.

4. That the learned trial magistrate erred in law and fact by accepting the fabricated contradictory and unreliable evidence adduced by the prosecution while disregarding the evidence of the defence.

5. That the learned trial magistrate erred in law by upholding a charge of arson but failed to note that the evidence before her was full of assumptions, presumptions and theories not supported by the evidence.

6. That the learned trial magistrate erred in law and fact by failing to consider that the evidence of the prosecution was not corroborated by any independent witness save for the family.

7. That the learned trial magistrate erred in law and fact by failing to consider the alibi defence statement of the appellants.

8. That the learned trial magistrate erred in law and fact by disregarding the medical evidence that established that the 1st appellant was not mentally fit to stand trial.

9. That the Honourable trial magistrate erred in law and fact thereby arriving at the wrong conclusion and thereafter erring in a conviction and sentence.

10. That the conviction is against the eight of the evidence and the law.

11. That the sentence of 8 years imprisonment without an option of a non-custodial sentence is manifestly excessive and wrong in law having in mind that appellants were first offenders.

They pray that the conviction be quashed, the sentence be set aside and they be set at liberty.

3. The respondent has opposed the appeal and prays that the conviction and sentence be upheld that the appeal be dismissed.

4. This matter stems from a laid dispute between the complainant (PW1) and the fourth appellant. The complainant testified that the 4th appellant had lodged a caution on his land on 15/7/2020 claiming licencee interest.

He adduced evidence that on 18/7/2020 at around 300pm he was at home with his family who included his wife Catherine Kawira (PW3) and his son Joseph Kaumi and one Kanake Mugambi Fredrick when he saw people coming towards his home while armed with Pangas, Arrows, stones and bows. They were claiming that they could not live on his land. The person who said that was Chabari (4th Accused). The others were Deborah Karigu, who was armed with stones and a sling, Lucy Muthoni (2nd appellant) who was also armed with stones and a sling. George Mutembei (3rd appellant) who was armed with a panga and was saying, "hii shamba ni langu na hakuna mtu atakaa" and the others were saying that the complainant should leave the land of his father. The 5th appellant was armed with a bow and arrows. 2nd and 1st appellants are children of 4th appellant while the 3rd accused is a son in law. The five appellants ascended on the home of PW1 and started demolishing his house and removing iron sheets. 1st and 2nd appellants entered the house and started removing things from the house and

throwing on the fire which was outside the house where (PW3) had been preparing food. A huge fire started burning and the house and other items were burnt. The appellants also threw a motorcycle belonging to the complainant in the raging fire. A wheel barrow was also burnt in the fire. The matter was reported to the police who visited the scene and took photographs.

In cross-examination PW1 stated that the appellants are close neighbours who he knew very well and were in company of others all numbering about twenty (20) all who he knew.

PW2 is Kanake Mugambi Fredrick testified that on that material day he was assisting PW1 to construct a toilet when the appellants and others went to the home and demolish his house which they set on fire together with other items. He corroborated the testimony of PW1 on what happened at the material time. He told the court that the incident took place at about 3.00 pm and he saw the appellants who were all members of the family of Chabari Ruchiaga. Catherine Kaura Njue (PW3) is the wife of PW1 and corroborated the testimony of PW1 & PW3 as to what happened on that material day.

5. Boniface Kahuthu (PW4) is a police officer attached at Kajuki Police Post and testified hat on 18/7/2020 he was at the police post when PW1 went there and reported that his house has been burnt down by people he knew on allegation that he had built and occupied their piece of land. He visited the scene with other police officers and found that mud houses were demolished and items which were inside the house were put together and set on fire. A motorcycle was also burnt down. On 21/7/2021 the OCS went to the scene and arrested Deborah Karigu after the complainant identified her as one of those who burnt the house. Police took photographs of the scene which were produced as exhibits 1 (a), (b) (c) (d). The appellants were arrested and charged. The complainant gave police a copy of the green card and certificate of official search together with a letter written by the Chief and others showing that the land belonged to the complainant (PW1). The appellants were then charged.

Defence Case:

The 1st appellant stated that she could not recall anything as she is mentally challenged. She produced a letter dated 1/2/2021 showing that she suffers from chronic mental illness (schizophrenia) since the year 2003 and has been on monthly treatment at Kajuki Health Centre and Chuka Referral Hospital.

6. The 2nd appellant in her defence stated that she knows nothing about the burning of PW1's house and that he was implicated by PW1. The 3rd appellant testified that on the material day he was at the market and on his way he met the 4th and 5tha appellants when a police vehicle came and they were arrested.

The 4th appellant testified that he was arrested in Chuka town on 18/7/2020 and charged. He stated that there was no house on the land and he did not burn any. He said he had a long standing dispute with PW1.

The 5th appellant also denied that he was involved in burning of the complainant's house.

DW6 stated that no house was burnt on the material day. That PW1's house is still intact and standing. In cross-examination she stated that she did not know where the appellant were on that day.

DW7 testified that she did not see the appellants burning the house, that the house is still intact.

Submissions:

The counsel for the appellant Mr. Kijaru argued all the grounds of appeal together. He submits that he who alleges must proof as provided under Section 107 of the *Evidence Act*. He submits that the prosecution did not produce photographs or adduce any evidence to prove that the complainant's

house was torched. That the trial magistrate believed the complainant and failed to record that the 4th appellant came to learn that the complainant had registered the land in his name illegally.

7. He further submits that the prosecution's case was marred with contradictions and inconsistencies. He faults the complainant for stating that he could not bring witnesses as the appellants were the only neighbours yet PW4 said there were neighbours and DW6 & 7 are neighbours. He relies on Kimani Ndungu –v- Republic (1979) KLR 282 and Jacob Kipchirchir Toroitich –v- Republic (2005) eKLR. The appellants have urged the court to allow the appeal and quash the conviction.

Respondents submissions:-

8 . The respondent submits that the prosecution's case is devoid of inconsistencies and contradictions. He submits that the minor inconsistencies and contradictions. He submit that the minor inconsistencies of sling stone be ignored. He relies on the case of Twehangane Alfred –v- Uganda Criminal Appeal No.19/2001. The respondent submits that the defence was considered. He further submits that the sentence was harsh in view of the fact that the sentence for Arson under Section 332(a) of the Penal Code is life imprisonment and the trial magistrate handed them eight years imprisonment. He submits that the appellants have not demonstrated why the appeal should be allowed.

Analysis and Determination:-

This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is Okeno-v- Republic (1972) E.A 32 where this duty was discussed. This was buttressed in the case of Kiilu & Another-v- Republic (2005) 1 KLR 174 where the Court of Appeal stated:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses."

I have considered this appeal, the proceedings before the trial court and the submissions. The issue which arises for determination is whether the prosecution proved the charge against the appellants beyond any reasonable doubts.

The appellants were charged with Arson contrary to Section 332(a) of the Penal Code. The Section provides:-

> " 332 Any person who wilfully and unlawfully sets fire to-
>
> a. any building or structure whatever, whether completed or not."

The ingredients of the offence of arson are:-

a. Proof of ownership of a building or a structure

b. Proof that a building or structure was set on fire.

c. Proof that the accused person is the one who set the building on fire.

d. Proof that the assailant set the building or structure on fire without any lawful justification.

From the evidence adduced by the prosecution, there is no doubt that a dwelling belonging to the PW1 was set on fire. PW4 testified that he received the report from PW1 and visited the scene where he found – " At the scene we found mud houses demolished and items inside collected together and burnt. A motor cycle was also burnt down." "I also went to homestead of the complainant which is a walking distance from the land where the houses were demolished and burnt down."

PW4 further testified that the scene was photographed and he produced the photograph as exhibits. The photographs are a clear evidence that items were burnt and were still burning at the time the photographs were taken.

PW4 was an independent witness who corroborated the testimonies of PW1, 2&3. The submissions by the appellant that the photographs didn't illustrate the house or household items as claimed by the complainant. The PW4 said that the mud house was burnt, the photographs clearly testify that. PW4 explained that the house which was demolished was in farm and the homestead was a distance from there. There is no contradiction and there is nothing to show that PW1 and his witnesses did not tell the truth. The prosecution relied on direct evidences of witnesses who saw the appellants committing the crime. The offence was committed in broad day light. PW1, 2 and 3 could not have failed to recognize the appellant. The appellants submits that there were no independent witnesses. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that-

> " No particular number of witnesses shall in the absence of any provision to the contrary, required to proof any facts."

The prosecution has the discretion to determine the witnesses to call in support of their case.

In this case PW1, 2 and 3 who were called were at the scene and there is no dispute that they were at the scene and saw the appellants in broad daylight. The circumstances favoured recognition of the assailants. The appellants and the complainants were close neighbours and the witnesses could not have failed to recognize the assailants. I find that the prosecution has adduced sufficient evidence to proof that that the appellants are the ones who set the house and other items on fire. The prosecution also proved that the appellant had malice aforethought motivated by a land dispute. The complainant produced documents to prove that the land was his. He produced a green card for the land in dispute Kajuki/Kamutiria/1171 and a certificate of official search showing that he was registered on 28/11/2014, see exhibit 2 & 3 respectively. The complainant therefor owned the land in dispute to the exclusion of all others. The learned trial magistrate confirmed that the 4th appellant filed the suit in the Environment and Land Court two months after he was charged with this offence. The complainant was registered long before the incident and it is not true that the 4th appellant had just learnt that the land was registered in the name of PW1. The learned trial magistrate based her finding on the facts which were proven before her and cannot be faulted. The appellant submits that there were contradictions and inconsistencies. There were no contradictions on material particulars and the appellants did not substantiate the contradiction and inconsistencies. There were no contradictions and inconsistencies which would lead this court to rule that there were

doubts on the prosecution evidence and therefore not credible. In Twehangane Alfred –v-Uganda (supra) the court stated that;

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that gave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they lead to deliberate untruths or if they do not affect the main substance of the prosecution's case"

See also the Nigerian Case in David Ojeabuo-v- Federal Republic of Nigeria where it was stated in part – "two pieces of evidence contradict one another when they are inconsistent on material facts while discrepancy occurs where a piece of evidence stops short of, or contains a little move than what the other piece of evidence says or contains."

As submitted, for the inconsistencies and contradictions to be fatal to the case, they must relate to material facts and must be substantial. In this base the evidence of PW1, 2 and 3 was consistent and left no doubt in the mind of the court that they were telling the truth this ground of appeal must fail.

9. The defence of appellants was considered by the trial magistrate who dismissed it as it was raised too late in the day and was therefore an afterthought. It is trite that the defence of alibi should be raised early enough to enable the prosecution to challenge it in evidence. Such a defence when brought to late leads to the inevitable conclusion that it is an afterthought and fabrication. I find that the trial magistrate cannot be faulted for rejecting that defence. In any case the defence witnesses were not truthful as they insisted that the land belonged to the 4th appellant even after the prosecution proved that the land lawfully belonged to the complainant. The appellants raised as a ground of appeal that the sentence is manifestly excessive. The counsel for the appellants did not submit on this ground. I consider that the ground was abandoned.

   In any case, an appellate court will not normally interfere with the discretion of the trial magistrate on sentencing unless it is shown that the learned magistrate acted on wrong principles or overlooked some material factors, or short of that the sentence is manifestly excessive. See Ogolla s/o Owuor –v- Republic (1954) E.A.C.A 270.

   This was also stated in the case of Shadrack Kipchoge kogo –v- Republic, Court of Appeal No.253/2003 where the court state that-

   > "Sentence is essentially an exercise of discretion by the trial court and for this court to interfere, it must be shown that in passing the sentence the court took into account an irrelevant factor or that a wrong principle was applied or short of that the sentence was so harsh and excessive that an error of principle must inferred."

   See also Wanjema –v- Republic (1971) E.A 493 and Benard Kimani Gacheru –v- Repulic (2002) eKLR for the same proposition. The appellants were charged with Arson under Section 332(a) of the Penal Code which carries maximum sentence of life imprisonment. The learned trial magistrate considered the mitigation, the possible maximum sentence under the Section and the value of the subject matter.

   I find that the trial magistrate considered relevant factors and this court has no reason to interfere with the sentence.

   The appellants had no legal justification to set the complainant's house on fire. Their action was therefore unlawful. They set the complainant structures on fire as well as his motor bike and other items. The appellants were identified as the ones who committed the offence. The defence of 1st

appellant was aptly considered and dismissed for a good reason. I find that the prosecution discharged the burden to prove the charge against the appellant beyond any reasonable doubts. The upshot is that the appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 18TH DAY OF JULY 2024.

L.W. GITARI

JUDGE