Kimameri v Republic (Criminal Appeal E001 of 2021)
[2024] KEHC 14104 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CRIMINAL APPEAL E001 OF 2021

AC MRIMA, J

NOVEMBER 13, 2024

BETWEEN

BENARD KIMAMERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the conviction and sentence of Hon. S. K. Mutai (Senior Principal Magistrate) in Kapenguria Senior Principal Magistrate's Court Criminal Case No. 560 of 2019 delivered on 15 th January, 2021)

JUDGMENT

Background:

1. The Appellant herein, Benard Kimameri, [hereinafter referred to as 'the Appellant'] was charged with the offence of arson contrary to Section 322(a) of the Penal Code. The particulars of the offence were that on 16th day of May, 2019 at Kaplelach Koror village in West Pokot County, with others not before Court, willfully and intentionally set fire to seven buildings [Four dwelling houses and three stores], belonging to Dickson Kibet Lokwangole valued at Kshs. 870,000/=.

2. The Appellant pleaded not guilty to the charge. After a full trial, he was found guilty as charged and was accordingly convicted. He was sentenced to a fine of Kshs. 50,000/= in default to serve 3 years' imprisonment. The Appellant paid the fine and was accordingly released from prison pending the outcome of the instant appeal.

The Appeal:

3. The Appellant was aggrieved by the conviction and sentence and preferred the instant appeal. He was represented by Counsel both at trial and on appeal.

4. The Petition of Appeal raised ten, rather repetitive, grounds impugning the trial Court's findings. The Appellant mainly contented that the offence was not proved, that the evidence was contradictory, that the investigations were shoddy, that ownership was not proved and that the burden of proof was shifted to the Appellant. He prayed that the appeal be allowed, conviction quashed and sentence set-aside.

5. The appeal was opposed by the State.

6. Parties were directed to file written submissions in hearing the appeal. Whereas the Appellant duly complied, the State did not. The Appellant urged this Court to allow the appeal and referred to various decisions.

Analysis:

7. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

8. In discharging the above duty, the Court must appreciate the trial Court for summarizing the evidence adduced at the trial so well such that this Court hereby adopts the same, by way of reference, as part of this judgment.

9. Having carefully considered this matter, upon perusal of the record and consideration of the decisions referred to, this Court finds that there is largely one main issue for determination in this appeal. It is whether the criminal case was proved considering the challenges raised.

10. The prosecution called six witnesses in a bid to establish that the Appellant, in conjunction with others, committed the offence that he was charged with. The witnesses were Dickson Kibet Lokwangole, the Complainant who testified as PW1, Priscilla Chemutai Lokwangole (PW1's wife who testified as PW2), Susan Chemtai Etom (PW1 and PW2's neighbour and who testified as PW3), Fridah Chelimo Lochale, a cousin to the Appellant and a neighbour to PW1 and PW2 testified as PW4, No. 57551 PC Milton Otenyo attached to Kapenguria Police Station and who was the investigating officer who testified as PW5 and No. 85551 PC Caleb Sambili, a Scenes Of Crime expert attached to Trans Nzoia DCI Headquarters testified as PW6.

11. PW1 and PW2 were a couple. They established a home at Kaplelach Koror village in West Pokot County and generally carried out farming activities. PW1 was also in the cattle trade.

12. The prosecution case, in brief, was that the Appellant and his family members were engaged in a dispute with PW1 concerning the position of a footpath. As a result, the Appellant and other members of his family burned PW1's homestead. PW2 and PW4 confirmed seeing the Appellant using a matchbox to torch the houses while the rest kept any other person away from the scene including PW2 who was chased with a bow and arrow. PW2 and PW4 knew the Appellant so well and the offence was committed during daytime. A total of seven buildings were razed downed and photographs were produced in evidence to attest to that.

13. The matter was reported to the police and investigations were commenced. On completion, the Appellant was the only one who was arrested and charged since the rest were at large.

14. When he was placed on his defence, the Appellant, in an unsworn statement, denied taking part in the offence and that he was not at the scene. That, he was only arrested much later.

15. In its analysis in the impugned judgment, the trial Court identified the ingredients of the offence and found that the Appellant was one those who committed the offence and convicted him.

16. In this appeal, this Court will ascertain if the ingredients of the offence of arson were proved. Section 332 of the Penal Code creates the offence of arson. It states as follows: -

    Any person who willfully and unlawfully sets fire to-

    a. any building or structure whatever, whether completed or not; or

    b. any vessel, whether completed or not; or

    c. any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

    d. a mine, or the workings, fittings or appliances of a mine, is guilty of a felony and is liable to imprisonment for life.

17. The Appellant was charged under Section 332(a). He was alleged to have torched seven buildings belonging to PW1.

18. From the definition of the offence of arson and the charge facing the Appellant in this case, the following arise as the ingredients of the offence to be proved: -

    i. Whether PW1's buildings were set on fire;

    ii. If so, whether by the Appellant.

    iii. If further so, whether willfully and unlawfully.

19. The Court will consider the issues in seriatim.

Whether PW1's buildings were set on fire:

20. Having carefully perused the record, suffice to say that there is ample evidence to confirm that indeed seven buildings were set ablaze. As to whether the buildings belonged to PW1, several witnesses attested to as much. PW1 stated that he established his homestead whereon stood the seven buildings. PW2 affirmed as much. She was the wife. PW3 and PW4 were neighbours to PW1. They also confirmed that the homestead that was torched belonged to PW1.

21. The evidence of PW1 was, therefore, well corroborated by PW2, PW3 and PW4 to the extent that indeed the seven buildings that were set on fire belonged to PW1.

22. The first issue is hence established in favour of the prosecution.

Whether the Appellant was the assailant:

23. The Appellant contended that the offence was not proved. In essence, he challenged the aspect of identification as well.

24. PW2 and PW4 testified that they witnessed the torching of the buildings during daytime. They recognized the assailants as among the Appellant, who were all members of the family of Kimameri and who were their neighbours.

25. In giving guidance on how the issue of recognition ought to be distinguished from that of identification by a stranger, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

26. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court had the following to say on recognition: -

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

27. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> > "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
> >
> > The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

28. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

29. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

30. The witnesses testified before the trial Court. The Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

31. There is no doubt the offence was committed during day time. There is, as well, no dispute that PW2 and PW4 knew the Appellant quite well and that they all along lived within the neighbourhood with no grudges.

32. The Appellant did not expressly deny the fact that he was known to PW2 and PW4. He, however, raised his defence to the effect that he was not at the scene at the alleged time. He gave an unsworn defence. This Court has, on a number of occasions, reiterated that unsworn statements amounts to untested evidence with a party being denied an opportunity to challenge that evidence by way of cross-examination. As such, it is evidence with quite low probative value, if any.

33. In this case, by placing the evidence on recognition by PW2 and PW4 against the Appellant's denial that he was not at the scene, it is this Court's finding that the evidence by PW2 and PW4 was not sufficiently challenged as to raise any meaningful doubts. This Court now holds that it was the Appellant who, in the company of others, torched the PW1's seven buildings.

34. The issue is also answered in the affirmative.

Whether the setting ablaze of the buildings was willfully and unlawfully:

35. There was evidence that the buildings were torched as a result of a dispute over a footpath. The Appellant did not challenge that evidence. This Court, therefore, believes as much. The Appellant and his mates then set ablaze the buildings in a bid to settle scores over the dispute. The choice of the mode of settling the dispute was definitely against the law. The act was unlawful and since it was the Appellant who purposed to undertake the unlawful act, and so did, he acted willfully.

36. This Court finds no difficulty in holding, and so holds, that the Appellant set ablaze the buildings willfully and unlawfully.

37. This issue is also answered affirmatively.

Other issues raised by the Appellant:

38. There are some other two issues that were raised by the Appellant worth consideration. One of them was that the evidence was contradictory.

39. It is a fact that witnesses cannot give exact similar accounts of how events unfolded. This may be attributed to how people perceive things differently. Therefore, when discrepancies are not grave to cause any miscarriage of justice or as to create reasonable doubts in the mind of a Court, Courts usually overlook such. [See Ahamad Abolfathi Mohammed & Another vs. R (2018) eKLR].

40. The contested contradictions in this case related to the value of the buildings and the time of the attack. The Appellant is offended that PW1 stated that the value was Kshs. 6,500,000/= whereas PW2 stated that the value was Kshs. 5,600,000/=. Further, the Appellant was aggrieved by PW1 stating that the attack was at 5pm while PW2 stated that it took place at 6pm.

41. This Court has patiently considered the record. Whereas there may be some inconsistencies in some aspects, such are not of such a magnitude as to amount to objectionable contradictions. For instance, the value of the buildings per se cannot, in the circumstances of this case, be said to result to the charge not proved. Likewise, the time difference is only one hour. That cannot adversely affect the prosecution's evidence. The issue, therefore, fails.

42. There was also the contention that the investigations carried out were shoddy. Having gone through the record and the exhibits produced, this Court is unable to agree with the Appellant. There is ample evidence proving that the offence was committed courtesy of the prosecution. That argument is dismissed.

43. Drawing from the above, this Court is not convinced to find that the trial Court erred in the manner it analyzed the evidence. The Court hereby buttresses the position that the offence of arson was proved as required in law and the conviction was sound. It cannot be disturbed.

44. Consequently, the appeal against the conviction is hereby dismissed.

The sentence:

45. On the appeal against the sentence, the High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

46. The trial Court properly dealt with the issue of sentencing. It received mitigations. The Court then fined the Appellant. As the Appellant did not point out how the sentencing Court erred in arriving at the sentence, the contention is unmerited.

47. This Court equally finds the appeal on sentence unmerited.

Disposition:

48. On the basis of the above, the appeals against the conviction and sentence are hereby dismissed.

49. As the Appellant already paid the fine and he has since then been out of prison, he, therefore, regained his liberty and no further action in these criminal proceedings will be taken against him.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Chebii, Learned Counsel for the Appellant.

Mr. Mokaya, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Juma/Duke – Court Assistants.