



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.E016 OF 2020

ANDREW ESENYI ODATOPROSECUTOR

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

[1] The appellant, **ANDREW ESENYI ODATO** and others appeared before the Chief Magistrate at Busia charged with five counts of Arson, contrary to s.332 (a) of the **Penal Code** and four counts of malicious damage to property, contrary to s.339 (1) of the **Penal Code**.

It was alleged that on the 12th June 2016, at Kamora village, Teso South, Busia County, the appellant, jointly with others set on fire property belonging to African Revival church, Simon Oduya, Samuel Orubia Ong’amo, Francis Ong’amo and George Ong’amo Olugari and also damaged and destroyed food crops belonging to the said persons.

[2] After a full trial before several magistrates within a protracted period of time, the appellant was convicted on counts one (1) to five (5) relating to arson and sentenced to twenty three (23) years imprisonment on each count to run concurrently. He was acquitted of counts six (6) to nine (9) for lack of evidence. His co-accused were found not guilty on all the counts and acquitted accordingly. Being dissatisfied with his conviction and sentence by the trial court, the appellant preferred this appeal on the basis of the grounds set out in the petition of appeal dated 11th November 2020.

[3] At the hearing of the appeal, the appellant appeared in person via video link and relied on his written submissions filed herein on 15th January 2021. The State/respondent was represented by the learned prosecution counsel, **Mr. Gibson G. Mayaba**, who opposed the appeal and filed his submissions on 4th May 2021.

[4] Having considered the appeal on the basis of the supporting grounds and those in opposition thereto and in the light of the rival submissions, the duty of this court as was laid down in the case of **Okeno vs Republic [1972] EA 32**, was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[5] In that regard, the prosecution case was briefly that prior to the material date there was apparently a dispute involving the family of one Ong’amo which was referred to the area Chief **Vincent Ojiamo Echakara (PW 1)** amid protests from those involved. On the material date, 12th June 2016, at about 10.00p.m. the Chief received information from a church bishop, **Simon Oduya Ong’amo (PW 6)**, a member of the family, that some people were planning to set on fire several houses.

[6] The Chief in turn passed over the information to his superior officers and the area police. Thereafter, he directed the bishop to vacate the targeted houses along with all other members of the family. They did as much before the police arrived at the scene. The Chief proceeded to the scene on the following day and found that some houses had already been set on fire which was at the time smoldering.

[7] The police on arrival at the scene confirmed that several houses had been razed to the ground and some crops destroyed. Investigations commenced and thereafter several suspects including the appellant were arrested and charged with the present offences.

The appellant denied the offences and stated in his defence that he was at the time an assistant chief of Ongara sub location and that his “constituents” included his co-accused and the complainants in this case. That, on the material date at about 10.00p.m he received information that houses within the homestead of one Francis Ong’amo were being set on fire. The information came from Simon (**PW 6**) son to the said Francis Ong’amo.

[8] The appellant then called the area Chief on phone but could not raise him. He (**appellant**) then called the Assistant County Commissioner (**formerly D.O**) from Chakol sub division and he was directed to call the Officer Commanding Adungosi police station (**o.c.s**) who told him that the information had already been received by him (**o.c.s**) and that he was on the way to the scene. He (**appellant**) stayed at his home for lack of security. He proceeded to the scene on the following morning and found a group of people including the area Chief, the

OCS, District Criminal Investigations Officer (**D.C.I.O**) Teso, Assistant County Commissioner (**ACC**) and Others.

[9] The appellant indicated that he was aware of the dispute within the Ong'amo family and that at one point it had been referred to him, but when he failed to resolve it he referred it to the area Chief who could also not resolve it. He further indicated that he took a neutral stand in the dispute but the area Chief appeared to have sided with part of the disputants. He thus implied that he was arrested and charged with the present offences after being implicated by the area Chief, his immediate superior officer.

[10] After considering the evidence in its totality, the trial court concluded that the prosecution case against the appellant had been proved beyond reasonable doubt with respect to counts one (1) to five (5). In arriving at that conclusion, the trial court found that the appellant was placed at the scene of the crime by most of the prosecution witnesses who said that they identified him either by voice or physical appearance.

[11] A first consideration of the evidence by this Court reveals that there was no dispute that several houses were on that material night set on fire by an individual or group of individuals for unknown reasons or for reasons revolving around a family dispute involving the larger Ong'amo family. It appeared that the dispute led to intense animosity and acrimony among the family members such that it was referred to the local district or County administration for a solution and remedy.

[12] However, it seems that before a lasting solution could be found through the local administration, some individuals who may have included family members took upon themselves to disregard Law and Order and execute a criminal transaction of setting on fire houses and even damaging property belonging to the complainants. The resultant effect was the arrest and arrangement in court of the appellant and others for the present offences. Fortunately or unfortunately, the appellant's co-accused were all acquitted of all the counts. The appellant was the last person left standing. He was found guilty of unlawfully setting the houses on fire and convicted on counts one (1) to five (5) of the charges. He was found not guilty of maliciously damaging property and was acquitted on counts six (6) to nine (9).

[13] Basically, there having been no dispute that the offence of arson was indeed committed against the complainants, African Revival Church (ct 1), Simon Oduya Ong'amo (ct 2), Samuel Orubia Ong'amo (ct 3), Francis Ong'amo (ct 4) and George Ong'amo Olugari (ct 5), the only issue for determination was whether the appellant was positively identified as being part of the group of people who committed the material concurrent acts of arson.

[14] The defence raised by the appellant was a denial and a contention that he was maliciously implicated by his superior officer, the area Chief. At the time, the appellant was the area assistant Chief. The obligation to prove his guilty beyond reasonable doubt lay with the prosecution. He had no obligation whatsoever to prove his innocence (see, **Mkedesha vs Rep (2002) 1KLR** and **Chemagong vs Rep (1984) KLR 611**)

[15] Apparently, the appellant's conviction was grounded on evidence of identification availed by some of the prosecution witnesses including Mary Ong'amo (PW 2), Melda Mkata (PW 3), Nicholas Omkaka Barasa (PW 4), Serah Amoiti (PW 5), Simon Oduya Ong'amo (PW 6), Jesica Oduya (PW 8), Francis Ong'amo (PW 10) and George Onyamu (PW 11). Most of these witnesses indicated that they were able to identify the appellant through his voice and/or by visual identification.

[16] Undoubtedly, the offences occurred in the hours of darkness. The exact time was not ascertained by the prosecution as some of the witnesses said it was 9.00p.m or 10.00p.m or midnight. Nonetheless, the alleged identification of the appellant in particular, the visual identification occurred in very difficult and chaotic circumstances. It was therefore incumbent upon the prosecution to provide credible and reliable evidence of identification of the appellant as having been part of the group that set the material houses on fire. Such evidence was required to be watertight as to leave no room for mistaken identification.

[17] In this court's opinion the visual identification of the appellant by Mary (PW 2), Melda (PW 3), Nicholas (PW 4), Simon (PW 6), Jesica (PW 8), Francis (PW 10) and George (PW 11) was more of dock identification as they did not credibly indicate how, and in what manner they were able to see and visually identify the appellant during those hours of darkness. It was not enough for them to merely state that they knew the appellant and were able to identify and/or recognize him as one of the offenders. None of them indicated what source of light enabled them to identify the appellant and even if they mentioned a particular source of light, they did not indicate whether the intensity of whatever light was strong or bright enough to enable positive and reliable identification of an offender. The witness did not also state the distance between each one of them and the appellant for them to properly see and identify him especially in circumstances which were chaotic and most unfavourable for proper identification.

[18] It is this court's opinion that the alleged visual identification of the appellant by the witnesses aforementioned was neither reliable nor free from possibility of error or mistaken identify. It is instructive to note that a witness may be honest but mistaken in some particular facts such as identification (see **Kamau vs Rep (1975) EA 139**). On the alleged voice identification of the appellant, the evidence of PW2, 3,4,6 and PW 8 was also not reliable as they each did not clearly state at what juncture and in what manner they were able to identify the voice of the appellant amid the chaos, shouts, screams and noises at the scene of the offence at the material time. It was not enough for them to say or imply that since they knew the appellant, then they also could identify his voice in chaotic and noisy circumstances. In any event, it is not unusual or strange that some completely unrelated and/or unfamiliar people could have voices which are more or less similar.

[19] Basically, the finding of this court is that the evidence of identification which led to the conviction of the appellant by the trial court was not credible and reliable. It strongly implied that the appellant was identified simply because he was one of the suspects in the dock and not necessarily because he was seen and heard when the criminal transaction was in progress.

Dock identification is never cogent and reliable especially where the all important identification of an offender at the scene was faced with difficulties and uncertainties.

[20] Therefore, the appellant's conviction on all the five counts of arson was neither safe nor sound and is hereby quashed with the result that the concurrent sentence of twenty three (23) years imprisonment imposed upon the offender by the trial court is hereby set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Delivered and signed this **10TH** day of **JUNE 2021**]