REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 15 OF 2018

ROBERT KIPKEMOI RONO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Kericho Chief Magistrate's Court Criminal Case No. 2248 of 2018 (Hon. B. Limo (RM) dated 10th August 2018)

JUDGMENT

1. The appellant was charged with the offence of arson contrary to section 332(a) of the Penal Code. The particulars of the offence were that on the 11th day of June 2018 at Kiptome village in Bureti sub-county within Kericho County willfully and unlawfully set fire to a dwelling house valued at Kshs 70,000 belonging to Justice Kiptoo Rono.

2. When the appellant appeared before the court on 23rd July 2018 to take plea, the charge was read to him in Kiswahili. He stated in response *"Kweli"* and a plea of guilty was entered. The facts were then read to the appellant, and he stated that the facts were correct. He was therefore convicted on his own plea of guilty. The prosecution indicated that the appellant was a first offender. The appellant did not offer anything in mitigation.

3. The court then directed that a pre-sentencing report be prepared. However, the report was not ready as scheduled on 24th July 2018, nor was it ready on 10th August 2018, the date the matter was rescheduled for sentencing. The appellant then asked the court to finalise with the matter on that date as he could not wait any longer, and the court dispensed with the pre-sentencing report and sentenced the appellant to life imprisonment, noting that this is the penalty required by law.

4. In his petition of appeal filed in court on 7th January 2019, the appellant argues, if I understand him correctly, that he pleaded guilty 'without his consent'; that he was sentenced to life imprisonment without his plea being taken again ("without re-plea"); that the court did not take his mitigation that his brother (presumably the complainant) had used abusive language and had destroyed his trees and maize in the shamba. He prayed for a re-trial and for the case to be properly investigated.

5. The appellant filed a further petition of appeal (though it does not bear the court stamp) in which he argues that the court erred in convicting him and sentencing him to life imprisonment on his plea of guilty 'which was not proved' in violation of section 137 of the Criminal Procedure Code. His second ground in this petition is that the court erred by relying on the facts read by the prosecutor without considering that they were false.

6. Thirdly, it is his contention that the court erred by not considering his prayer for a 're-plea'; that the court failed to quote the law that required that the appellant should be sentenced to life imprisonment; that the court failed to find that the charge sheet was defective; and that the court erred by not finding that the date of the incident was 11th June 2018 and not considering the date of 20th July 2018 read in the facts by the prosecution.

7. The appellant filed brief submissions in which he notes that there was contradiction in the date of the incident; that the facts read by the prosecutor were too shallow to support a sentence of life imprisonment; and that the facts did not indicate whether the incident occurred at night or in broad daylight. He therefore urges the court to quash his conviction and set aside his sentence.

8. At the hearing of his appeal, the appellant stated that he would rely on his written submissions. He however wished to add that the language used in the lower court was Kiswahili, which was not the language he best understood. The charge sheet was also read to him in Kiswahili which he did not understand, and he pleaded guilty without knowing, and had requested that the charge be read over to him in Kipsigis.

9. In submissions in response, Senior Prosecution Counsel, Mr. Ayodo, noted that the accused was charged with the offence of arson

contrary to section 332(a) of the Penal Code. The appellant had pleaded guilty to the offence and a plea of guilty was entered. After the facts were read to him and 3 photographs produced as exhibits, he had stated that the facts were correct. He was sentenced to imprisonment for life in accordance with section 332 (a) of the Penal Code.

10. Mr. Ayodo noted that the appellant had responded "*Ni kweli*" meaning "it is true" to the charges when they were read to him in Kiswahili. He had actively participated in the proceedings, which were conducted in Kiswahili, when the matter came up on 24th July 2018. The matter came up again on 7th and 10th August 2018, and the appellant again participated in the proceedings which he followed. It was the state's submission therefore that the issue of not being able to understand the language used in the proceedings was an afterthought for purposes of this appeal.

11. Mr. Ayodo further observed that the appellant had not said anything in mitigation after the state said that he was a first offender. The court could therefore not be faulted for not considering his mitigation as none was offered. The prosecution therefore urged the court not to interfere with the decision of the trial court and to dismiss the appeal.

12. In his submissions in reply, the appellant urged the court to order a re-trial as he did not understand the charges in the lower court.

13. I have considered the record of the lower court on this matter. I note that the appellant pleaded guilty when the charges were read to him. The record indicates that he stated in Kiswahili "Ni kweli", meaning "It is true". The facts were read to him, and the photographs of the house he was charged with setting on fire were produced. He stated that the facts were correct.

14. An order was made for a pre-sentencing report to be prepared. When it was not filed in court, he asked that the court completes the matter even without the report. Nowhere in the proceedings is there even a hint or a suggestion that the appellant did not understand the proceedings, or that the language used was not one he understood.

15. It is also useful to consider the facts to which the appellant pleaded guilty. These are the facts as read by the prosecution:

> ***"On the material date, the complainant, one Justice Rono, was in his father's land pruning cypress when the cypress fell on the accused's land. The accused when cutting the branches (which) had fallen on his land became furious, arned himself with a panga, and chased the complainant who went to lock himself in the house. The accused went to destroy the iron sheets so as to harm the complainant. The complainant raised an alarm and the public came. The accused went away and later the complainant rushed for his safety. The accused later came and set ablaze the complainant's house. The alarm was raised by the complainant. The public came after all valuables had been razed down. The accused ran away. The matter was reported at Litein Police Station on 20.7. 2018. The accused was traced and arrested by AP officers from Gesaibut AP post. The officers visited the scene and photos taken. The photos show a burnt house."***

16. In my view, the appellant's plea of guilty before the trial court was unequivocal. Consequently, having been convicted on his own unequivocal plea of guilty, he only has a right of appeal against sentence. Section 348 of the Criminal Procedure Code provides as follows:

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."***

17. The impression one gets of the appellant is that of a person who did not understand the seriousness of the charges facing him. He pleaded guilty to burning his brother's house. The facts indicate that he had chased his brother with a panga, it would appear with intent to harm him. His brother hid in his house, then raised an alarm and was able to get away from the accused. Unable to reach and harm his brother, he went back and set his brother's house ablaze.

18. The penalty provided in law for the offence of arson is life imprisonment. Section 332 of the Penal Code under which the appellant was charged provides as follows:

> ***Any person who wilfully 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.*** (Emphasis added)

19. The appellant in this case wilfully and unlawfully set his brother's house on fire. He was therefore liable, as provided under section 332(a), to imprisonment for life. The sentence passed on him was therefore legal. The question, however, is whether the trial court should have passed the maximum sentence prescribed for the offence, bearing in mind that the appellant was a first offender.

20. As the courts have observed in other decisions when interpreting penal statutes in which the terms used are *'is liable'* or *'shall be liable'*, the court has a discretion to determine whether or not to pass the sentence prescribed in the statute, or to pass a lesser sentence.

21. In the case of **MK v Republic [2015] eKLR,** the Court of Appeal stated as follows:

> ***"19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James vs Young 27 Ch. D. at p. 655 where North J. said:***
>
> ***a. "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".***
>
> ***We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are "shall be sentenced to death".***

22. In its decision in **Daniel Kyalo Muema vs Republic [2009] eKLR**, the Court of Appeal, which was engaged in construction of the provisions of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994** where the term 'shall be liable' is used, expressed the following view:

> ***"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs Uganda [1967] EA 752 where the Court said at page 754 paragraph B:***
>
> ***a. "It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".***
>
> ***We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment."***

23. I have considered also cases in which courts have had to pass or consider the propriety or legality of sentences passed on persons convicted of the offence of arson. It is recognised that life imprisonment is the maximum penalty for the offence. Arson is a serious offence, leading not only to damage to property, but also likely to lead to heavy loss of life as we have seen in a number of incidents in this country. However, courts have the discretion, depending on the circumstances, to pass a lesser sentence.

24. In **Erick Otieno Paul v Republic [2017] eKLR** the court upheld a conviction and sentence for arson in which the appellant had been sentenced to 10 years imprisonment for the offence of arson committed at a school. In **Philip Makhokha Keya v Republic [2014] eKLR**, the High Court sitting in Eldoret reduced a life sentence to 6 years imprisonment. As in this case, the appellant in the **Makhokha** case had been convicted on his own plea of guilty to setting his mother's house on fire.

25. The appellant in this case set his brother's house on fire. It may be necessary to advance reconciliation within the family, and a life sentence for one child for an attack on the property of another may not be in the best interests of the family. However, the appellant must understand that arson is a serious offence, and that is why it carries such a severe maximum penalty. Accordingly, the appeal against conviction fails. However, I hereby set aside the sentence of life imprisonment and substitute therefore a term of imprisonment for 8 years.

26. The appellant has a right of appeal within 14 days.

Dated and Signed this 7th day of March 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 9th day of April 2019

GEORGE DULU

JUDGE