REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 21 OF 2018

NICHOLUS KYALO WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Makueni PMCR No. 409 of 2016

Republic vs* Nicholus Kyalo Wambua *delivered by Hon. J. Mwaniki, Ag. PM on 11/6/2018)

JUDGEMENT

1. The appellant herein Nicholus Kyalo Wambua was convicted for the offence of Attempted Arson contrary to section 332 (a) of the Penal Code. He was sentenced to serve 4 years imprisonment on 11/6/2018. The appellant Aggrieved by the said sentence moved to this court challenging both the conviction and sentence.

2. The particulars of the offence were that on the 24th June, 2016 at Itangani Village, Kilala Location in Makueni District within Makueni County the accused unlawfully attempted to set fire to a dwelling house the property of one Petronilla Syomwiti.

3. This being a first appeal, the role of this Court as an appellate Court of first instance is well settled, it should re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion. This was held in the case of ***Okeno vs. R (1977) EALR 32*** and in the Court of Appeal case of ***Mark Oiruri Mose vs R (2013) eKLR*** that the Court on first appeal is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter in while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify.

4. Consequently, this Court guided by the aforesaid legal requirement, therefore should delve into the review of the evidence adduced at the lower court with a view of arriving at its own conclusion. The prosecution called a total of 3 witnesses and the accused opted to remain silence when put to his defence. The evidence of the three witnesses can be summarized as follows.

5. **PW1 Petronila Syomwiti**, the complainant testified that on 20/6/2016 at about 7.00pm, while walking home he was hit by the appellant from behind knocking her down, and that the appellant told her that he would kill him as he collected a jembe and took off. It was her further testimony that when she reached home she found many people and she was told that the appellant had attempted to torch her house and that her mattress and some clothes had been burned. She then reported the matter to the police. She produced the photographs of the burnt clothes and the house.

6. **PW2 Peter Muunda** testified that on 24/6/2016 he heard the voice of a screaming woman, and when he came out he heard the voice of the appellant, being a person known to him extensively, and that he rushed to PW1 house where he found the appellant who took off and that he attempted to chase after him then came back and screamed for help as they put off the fire. He stated that others joined him and they managed to put of the fire.

7. He further stated that the appellant came back at around midnight making noise and threatening to kill someone. It was then that the appellant was arrested and handed over to the police. On cross exam he stated that he has known the appellant since he was child as they are neighbors.

8. **PW3 Catherine Kamindia** the investigating officer stated that she was on duty on 26/6/2016 when PW1 came and registered a complain that someone had attempted to burn her house, it was then that she visited the scene and collected evidence including burnt clothes and also took photographs of the scene. She stated that later that night the appellant was arrested by public and beaten up and handed to the police.

9. Upon evaluating the above evidence, the trial magistrate concluded that the appellant had a case to answer. The appellant was put on his defence, but opted to remain silent. The learned Magistrate convicted the appellant and sentenced him to 4 years imprisonment.

10. Aggrieved by the said finding, the appellant appealed to this court against both conviction and sentence. The appellant advanced four grounds of appeal in urging the court to set aside the conviction and sentence and set him free, these are:

> **1) That the trial learned magistrate erred both in law and fact by conducting trial without benefit of a psychiatrist to gauge the accused mental health.**
>
> **2) That the learned trial magistrate erred both in Law and fact when he convicted and sentenced the appellant over an offence that was not proved to the required standard of proof.**
>
> **3) That the learned trial magistrate erred in law and fact by relying on evidence that was not sufficient to sustain the charges facing the accused and as such caused a miscarriage of justice.**
>
> **4) That the learned trial magistrate erred in both law and fact when he convicted the appellant against the weight of evidence.**

SUBMISSIONS:

11. The appellants through their written submissions dated 4th March, 2019 and filed on even date argued all their grounds collectively. They began by submitting that the prosecution failed to discharge the burden of proof to the required standards. In this regard, they referred the court to section 107, 111 (1) and 119 of the Evidence Act cap 80 Laws of Kenya. It is their submission that the burden of proof cannot be assumed by the accused.

12. The next issue addressed by the appellant is that the evidence tendered against him is marred with contradictions and controversies. For instance he alleges that the evidence of PW1 that he was attacked by the accused at around 7pm cannot be believed as 7pm is too dark to identify a person. In this they relied in the case of ***Francis Mwita Teben v Republic (2007) eKLR*** where **J. B Ojwang** noted that the word night is a legal term and that sometimes it would be completely dark and sometimes broad day light.

13. Further, the appellant submitted that PW2 in his evidence stated that when he arrived at PW1 House he saw someone coming out of the house and at the same time he says to have run after the accused arguing that the same is contradictory and ought to be dismissed. Additionally, they submitted that the cause of the fire remains unresolved. On controversy of evidence, they rely on the Tanzanian case of ***Dickson Elias Nsamba Shapwata & another vs The Republic Criminal Appeal 92 of 2007*** where the court held that a court has to isolate and consider contradictions and controversies with a view of establishing whether they are minor or go into the root of the matter.

14. The other issue covered in the Appellants submissions is that the sentencing by the trial magistrate was against the weight of the evidence tendered by the prosecution. In this regard they relied on the case of ***Alister Anthony Parira vs State of Maharashtra,*** where it was held that the primary objective of criminal law is imposition of appropriate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime was committed.

15. The final issues addressed by the appellant in their submission regards the issue that the trial magistrate erred in law and fact by proceeding with the appellant case without gauging the accused mental status. This was despite the trial magistrate directing on 26/6/2016 that the accused be escorted to a mental hospital, thus he missed the benefit of the accused mental status. In this respect they referred the court to section 11 of the Penal Code and section 162(1) and (2) of the Criminal Procedure code which provides that when a court has a reason to believe that an accused person is of unsound mind and incapable of making his defence, the court shall inquire into the fact of unsoundness.

ISSUES AND ANALYSIS:

16. In my view the issues arising herein can be summarized into two issues these are:-

> ***(a) Whether the learned trial magistrate erred both in law and fact by conducting trial without benefit of a psychiatrist to gauge the accused mental health.***
>
> ***(b) Whether the evidence tendered was sufficient to sustain the conviction.***

a) Whether the trial learned magistrate erred both in law and fact by conducting trial without benefit of a psychiatrist to gauge the accused mental health:

17. According to the learned Counsel for the Appellant he seems to allege that the Appellant was of unsound mind. He stated that on 26th June, 2016 the Learned Magistrate directed that the accused be led to a mental hospital for assessment, which order which was never executed.

18. In sum it is their submission that the learned trial magistrate erred in conducting the trial without the benefit of the appellant mental report. They seem to blame the court for not following and securing the same.

19. In this regard **Section 11 of the Penal Code** provides that;-

> **"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes to question, until the contrary is proved."**

20. Consequently, the onus of alerting the court of the mental status of the Appellant lay with the Appellant himself. The court would also probably know of mental unfitness of an accused by the conduct of the accused himself. It is my view that this scenario did not present itself in the trial court and so the trial court would not have assumed that the Appellant was of unsound mind. Therefore the provisions of section 11 of the Penal Code and section 162(1) and (2) of the Criminal Procedure code hereinabove relied by the appellant does not suffice in my view.

21. Further, it is apparent from the record that the Appellant did not raise the defence of insanity, when put to his defence he opted to remain silent, and there was no material brought to the trial court to show that the Appellant was of unsound mind and therefore not mentally fit to stand trial.

22. In the case of ***Mohamed Sonar Noor vs Republic [2013] e KLR, H.C at Garissa Criminal Appeal No. 197 of 2013*****,** the learned **Mutuku, J.** delivered himself as follows;

> **"…The law presumes any person presented in court to be of sound mind until contrary is proved (See Section 11 of the Penal Code). It is unfortunate that other than the practice in murder trials, the accused persons are not automatically examined to determine their mental status before the plea is taken. It is my view that every accused persons, especially those facing serious offences, must as of right be subjected to medical check-up in regard to their mental status before a plea is taken. This would not be asking for too much given the guarantees, inter alia, to rights to a fair trial in our Constitution. The trial court in this case acted properly just like in all other criminal cases before him. The accused or his family ought to have furnished the trial court with information that the he suffers from a mental illness to prompt the court to order for a medical report to determine if he was fit to take the plea and stand trial."**

23. In ***Republic v Jacob Njue Daniel [2007] eKLR, H.C at Embu, Criminal Appeal No. 9 of 2007,*** the learned **Khaminwa J.** observed as follows;

> **"There is also the case of Republic vs Madaha EA [1973] 515 where the court in Tanzania held that where there was a report of unsoundness of mind at the time of offence that it was to be proved first if he was fit to plead and thereafter decide whether on evidence the accused was insane at the time of committing the offence. The burden of proof of insanity is on a balance of probabilities to be proved by accused and question may be raised by the court."**

24. Consequently, it is my view that the appeal on the above ground does not stand as it was upon the accused to bring to the attention of the court his insanity situation, and even if he fails to do, the court on its own observation can be able to question the accused person mental status. In this case, it seems the court never saw the need to call for the accused mental report implying that he was fit to stand trial.

b) Whether the evidence tendered was sufficient to sustain the conviction:

25. The appellant has submitted that the evidence tendered by the prosecution was not enough to convict the appellant. They allege that the same does not prove beyond reasonable doubt that the appellant committed the offence charged with.

26. It is my considered opinion that the prosecution proved its case beyond reasonable doubt. The evidence of the three prosecution witness stands unchallenged. PW2 in his testimony stated that the appellant was his neighbor and a person well known to him, and that on the material day he saw him run after committing the offence, and that he ran after him and he came back to put off the fire started by the appellant.

27. It was his evidence that the appellant came at night shouting and threatening to kill someone, and that it was at this point that he was arrested and beaten up before being handed over to the police.

28. PW2 evidence, which is key was corroborated and buttressed by the evidence of PW1 and PW2 and therefore it is beyond any doubt that the accused committed the offence charged with, this is also in view of the fact that he never challenged the evidence tendered against him. Therefore in my view this court finds no reason to disturb the trial court conviction.

CONCLUSION:

29. Section 333 of the Penal code creates the offence of attempted Arson, and section 333(b) provides for the punishment and it states that a person who willfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it, is guilty of a felony and is liable to imprisonment for fourteen (14) years.

30. Sentencing is purely in the discretion of the court, but it should not be so harsh as not to serve the purpose as a deterrent measure. The sentence of 4 years in my view is commensurate in view of the circumstances of this case. The appellant will have learnt his lesson.

31. Thus the court makes the following orders:-

> ***i. The appeal is dismissed, conviction is affirmed and sentence of four (4) years confirmed.***

> ***ii. The sentence to run from the date of arrest.***

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MAKUENI THIS 12TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE