



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 8 OF 2019

BETWEEN

HENRY KIBET YARAN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence dated 6.6.2019

by Hon. L. G. G. Okwengu in Kapenguria PM Criminal Case no. 288 of 2019)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, HENRY KIBET YARAN was charged in count I with the offence *arson contrary to section 332(a) of the Penal Code*, the particulars being that on the 22nd day of August 2018 at Tapach Location within West Pokot County, he willfully and unlawfully set to a dwelling house of Mr. Clement Kilipaa Lokortai, valued at Kshs.200,000/-.
2. He faced a second count of *arson*, the particulars of which are that on the same 22nd August 2018 at Tapach Village in West Pokot County, he willfully and unlawfully set fire to two dwelling houses, the property of Lonyangaren Lorimen, valued at Kshs. 85,000/-.
3. In count III, the appellant was charged with willfully and unlawfully setting fire to two dwelling houses of Mr. Julius Amolem, valued at Kshs.120,000/-.
4. When the appellant appeared for plea, he denied all the three counts. The case was thereafter set down for hearing. The prosecution called four witnesses to testify against the appellant.
5. At the close of the prosecution case, the appellant was found to have a case to answer and accordingly put on his defence. He elected to give unsworn evidence. He did not call any witness

Judgment Of the Learned Trial Court

6. Upon careful analysis of the evidence that was placed before it, the learned trial court was satisfied that the prosecution had proved the ingredients for the offence of arson in all the 3 counts of arson as charged. The appellant was accordingly found guilty as charged, convicted and sentenced to 15 years imprisonment on each of the counts. The sentences were to run concurrently.

The Appeal

7. The appellant felt aggrieved by the entire judgment, hence this appeal which the appellant filed in person. The appellant contends that the prosecution case against him was full of contradictions; that he was not properly identified; that the investigations were so poorly done; that the evidence gathered was flimsy. He also contends that the learned trial magistrate stage-managed the trial to the appellant's detriment. It is

also the appellant's contention that the learned trial magistrate failed to properly and exhaustively evaluate the evidence adduced by the prosecution, which in any event did not prove the case against the appellant beyond any reasonable doubt. The appellant also accuses the learned trial magistrate of partiality and bias against him. He prays that his appeal be allowed.

8. This being a first appeal, this court is under a duty to reconsider and evaluate the entire evidence afresh with a view to reaching its own conclusions in the matter. Without such an analysis, an appellate court would have no basis for either supporting or rejecting a trial court's findings. The only thing for this court to remember is that it has no opportunity of seeing or hearing the witnesses who testified during the trial, and to make an allowance for the same. In this regard, generally see *David Njuguna Wairimu versus Republic [2010]eKLR* where the Court of Appeal restated the duty of the first appellate court thus:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court.”

9. What is important for the first appellate court is that it must reach its own decision on the evidence, by itself weighing the conflicting evidence on record.

The Prosecution Case

10. PW1, Clement Kilipa testified that on 22.8.2018 he received a call from PW2, Julius Amolem informing him that the appellant had burnt down houses. PW1 set out to look for the appellant and with the help of the police, they found the appellant at his home. On being asked why he had burnt down other people's houses, the appellant responded that he had been tempted by the devil. PW1 put the value of his destroyed house at Kshs.200,000/-.

11. PW2, Lonyangareny Loremen, a KPR officer testified that on 22.8.2018, the appellant burnt down houses all valued at Kshs.820,000/-. PW2's house was valued at Kshs.85,000/-. It was his testimony that he saw the appellant set fire to the house at about 2.00pm before he ran away to the forest. PW2 stated that the appellant burnt the houses in revenge for having been arrested after he stole a goat.

12. In cross examination, PW2 stated that he was not at the scene when his house was burnt, and that he only heard screams from the children when the house was being burnt down by the appellant.

13. Julius Amolem, PW3 stated that on 22.8.2018, he joined other KPR officers in pursuing the appellant who had run away into the forest after stealing a goat. As the appellant escaped from the officers, he went and burnt down PW3's house which was valued at Kshs.120,000/-. According to PW3, the appellant who was armed with an AK47 rifle was found at the scene of crime.

14. PW4 was Richard Simiyu of the NIS in Kapenguria. He is the one who investigated the case. He took photographs of the houses that had been destroyed. The photographs were thereafter verified by one Caleb Simbiri. According to PW4, it was PW2 and PW3 who saw the appellant walking away from the scenes of crime.

Defence Case

15. In his unsworn evidence, the appellant denied committing the alleged offences. He also alleged that initially the police had interrogated him in connection with murder charges. The affidavit of number 64353 CPL Richard Simiyu dated 6.3.2019 confirms that the appellant was being investigated for murder as well as arson allegations.

Issues, analysis and Determination

16. The main issue on this appeal is whether the appellant was properly identified as the culprit in this case, since it is not in dispute that houses were burnt down as set out in the charge sheet. If the identity of the appellant is proved, the prosecution must also prove that the appellant willfully and unlawfully set fire to the three houses as set out in the charge sheet.

17. After carefully reconsidering and evaluating the evidence on record afresh, as well as the judgment of the learned trial court, the grounds of appeal and all the submissions, I find and hold that the said evidence does not prove beyond reasonable doubt that it is the appellant who set the houses on fire. PW2 who alleged that he saw the appellant set his house ablaze told the court during cross examination that he was at the market centre when his house was burnt down. PW2 also gave hearsay evidence to the court when he testified that some children told him it was the appellant who had set the house ablaze. None of those children was called as a witness in the case.

18. PW3 also alleged in his evidence in chief that **“We found him at the scene. He had burnt the house of PW1 and PW2. We tried to pursue him and arrest him, but he ran away.”** PW3 further stated that while the appellant was being pursued, **“he went ahead to burn my house.”** and that the appellant was armed with an AK47 rifle. When the appellant sought to know from PW3 whether he (PW3) had seen the appellant at the scene, PW3 replied, **“There were a lot of people at the scene, but we could see everything at the scene and we identified you.”** In my considered opinion, PW3's answer in the plural does not satisfy me that indeed he himself saw the appellant at the scene. In any event, if the appellant was on the run, it is unlikely that he would have remained at the scene to mingle with the crowd who would be baying for his blood. The evidence by PW3 is therefore not satisfactory as to the identity of the appellant as the person who set PW3's house on fire.

19. Regarding the evidence of PW1, he only received a report that the appellant had set his (PW1's) house on fire. There is no evidence by the person who gave PW1 the report to fortify the hearsay evidence that the appellant had been seen setting PW1's house on fire.

Conclusion

20. In conclusion, I agree with the appellant that the prosecution did not prove the charges against him beyond any reasonable doubt. This means that the conviction of the appellant on each of the 3 counts is unsafe. I accordingly allow the appeal on each of the 3 counts. The convictions are quashed and the sentences of 15 years concurrent imprisonment terms are set aside.

21. Unless the appellant is held for any other lawful cause, he shall be released from prison custody forthwith.

22. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 18th day of September, 2019.

RUTH N. SITATI

JUDGE

In the Presence of

Appellant – present in person

Miss Kiptoo for Respondent

Mr. Juma - Court Assistant