REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.83 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. C.N. Ondieki - RM delivered on 15th December 2013 in Kibera CM. CR. Case No.3161 of 2013)

MOSES GATEMBE GIKUNGU...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Moses Gatembe Gikungu was charged with the offence of **Arson** contrary to **Section 332(a)** of the **Penal Code**. The particulars of the offence were that on 22nd May 2013 at Matasia in Kajiado County, the Appellant willfully and unlawfully set fire to a dwelling house valued at Kshs.641,500/-, the property of Peterson Njau Ngure. The Appellant was charged with other offences which are not the subject of this appeal. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of circumstantial evidence that was not corroborated by any other independent evidence. He was aggrieved that he had been convicted of the charge yet the arson took place at night and no one saw or identified the Appellant at the scene of crime. The Appellant faulted the trial magistrate for not properly evaluating and analyzing the evidence and thereby reaching the erroneous determination that he had committed the offence. He was aggrieved that he had been convicted on the basis of a defective charge which did not identify the Appellant in his proper names. He was finally aggrieved that the trial magistrate had based his findings on assumptions and probabilities with the sole aim of closing up the gaps and inconsistencies in the prosecution's case. The Appellant took issue with the manner in which he was sentenced to serve the custodial sentence. He was of the view that the trial court had disregarded medical evidence which established that the Appellant was not mentally fit either to stand trial or to be punished for any offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, Mr. Gathogo for the Appellant and Ms. Atina for the State filed written submission in support of their respective opposing positions. They further made oral submission urging the court to uphold the positions taken by their respective clients. Mr. Gathogo submitted that the Appellant was convicted on the basis of circumstantial evidence. There was no direct evidence linking the Appellant to the arson. The incident took place at night. He explained that the basis upon which the trial court reached the verdict that the Appellant was guilty of the offence were abusive messages that were allegedly sent by the Appellant to the complainant and his family. He asserted that there was no connection between the said messages and the arson. He noted that there was liquid which was suspected to be petrol which was found in a container at the crime scene. He questioned why the container was not dusted for fingerprints. He submitted that the trial court improperly applied circumstantial evidence to convict the Appellant. He explained that by virtue of the authority of **Jacob Kipchirchir Toroitich –vs- Republic [2005] eKLR** and **Aggrey Mutwi –vs- Republic [2005] eKLR**, the circumstances under which the court could have applied circumstantial evidence were not met. He insisted that threat and mere suspicion cannot form a basis for a conviction. Neither can contemplation alone without motive form a basis for a conviction. He reiterated that the Appellant's conviction on the basis of circumstantial evidence was unsafe.

As regard the Appellant's mental status, learned counsel submitted that the Appellant had requested severally, during trial that he be seen by a psychiatrist. This request was denied by the trial court. It was only allowed after the Appellant had been put on his defence. He explained that the Appellant was not mentally fit to stand trial. He could not therefore have been convicted because at the time of trial, he was mentally unfit. He accused the trial court of failing to investigate the Appellant's mental status before proceeding with the trial. Learned counsel was of the view that this failure vitiated the trial. He submitted that the trial court disregarded the probation officer's report when sentencing the Appellant. If the trial court had considered the report, he could have reached a verdict that the Appellant was not a security threat to the society. In the premises therefore, he urged the court to allow the appeal.

Ms. Atina for the State opposed the appeal. She submitted that there was sufficient circumstantial evidence that connected the Appellant with the arson. The Appellant had on several occasions, prior to the arson, threatened the family of the complainant. The threats were in form of messages sent through their mobile phones and also by the Appellant physically going to the complainant's premises and threatening the complainant's family members. Learned State Counsel submitted that, taken on the whole, the evidence adduced by the prosecution witnesses pointed to the Appellant, and no one else, as the person who could have committed the offence.

On the issue of the Appellant's mental status, she submitted that the Appellant never raised the issue of being mentally unfit to stand trial when he took plea. He proceeded with the hearing without any hitch. The court observed the Appellant's behaviour and noted that he was mentally fit to stand trial. The court was entitled to assume under **Sections 11** and **12** of the **Penal Code** that the Appellant was of sound mind. As regard the Appellant's request to see a psychiatrist, Ms. Atina submitted that the Appellant did not ask for orders from the court to see a doctor. Even when his wish was granted, he did not provide the details of the medical report to the court to assist the court make a decision on whether or not he was of sound mind. She reiterated that the Appellant was mentally fit to stand trial and was mentally fit to serve the sentence after being convicted. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **arson** contrary to **Section 322(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made before this court. It was clear from the evidence that was adduced that the prosecution relied on circumstantial evidence to secure the conviction of the Appellant. No one saw the Appellant set the complainant's house on fire. According to the complainant, on the night of 22nd May 2013, he smelt petrol before he went to bed with his wife PW2 Keziah Wanjiku Njau. They were woken up by a bang. When the complainant went to investigate, he discovered that the house was on fire. He went back to the bedroom, got hold of his wife and managed to escape from the burning house. In the course of escaping from the house, the complainant and his wife sustained burn injuries to their lower limbs. The complainant testified that when he got out of the house, he saw a container thrown outside the house which smelt of petrol. The complainant and his wife immediately suspected that it was the Appellant who had set their house on fire.

What was the basis of his suspicion? The testimony of the complainant, his wife (PW2) and his son PW5 Samuel Ngure Njau was to the effect that the Appellant had developed a grudge against the family over two events. In one of the events, the complainant had reported the Appellant to the police after he had established that the Appellant had stolen a keyboard from the church where the complainant was a pastor. The police took action and recovered the keyboard from the Appellant. Another incident was when the complainant was called to mediate over a domestic issue that the Appellant faced. It appeared that the Appellant formed the view that the complainant disliked him. The concrete evidence that was offered by the complainant and his wife were offensive messages that the Appellant sent to them. According to the complainant and his wife, the Appellant did on 20th December 2012 and 22nd February 2013 sent threatening messages to the couple to the effect that they would be harmed. On one occasion, i.e. on 11th April 2013, the Appellant went to the complainant's home where he found PW5 and threatened him. This was after he had jumped over the fence into the compound. The threats did not abate even after the house was set on fire. It continued in the months of July and August 2013. It was on the basis of these threats that the complainant was of the view that it was only the Appellant who could have committed the crime.

After the arson was reported to the police, PW4 PC Emmanuel Ekai, a Scenes of Crime officer attached to CID Ngong visited the scene of crime and took several photographs at the scene. The photographs were produced as prosecution's exhibits during the hearing of the case. According to PW4, the likelihood that the house could have been set on fire by an electrical fault was remote because the fire did not emanate from the metre box. PW7 Corporal Kopocha Gatwersi based at the Cyber Crime Unit at the CID Headquarters produced data which established that indeed the threatening messages had been sent from the Appellant's mobile phone to the mobile phones of the complainant and his wife. The data was produced as exhibits by the prosecution. The complainant and his wife were seen by PW8 Dr. Zephania Kamau of Police Surgery who noted that they had suffered from burns in the lower limbs as a result of the fire. Their respective P3 forms were produced into evidence. The case was investigated by Corporal Hussein Haile. After concluding his investigations, he found a case had been made to have the Appellant charged with the offence that he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He asked the court to defer the hearing of his defence pending his examination by a psychiatrist to determine his mental status to stand trial. The psychiatrist report was presented to court before the trial court reserved the case for judgment.

The thrust of the Appellant's appeal was that the prosecution failed to establish by circumstantial evidence that it was indeed the Appellant and no one else who could have committed the offence. The Appellant relied on the case of **Jacob Kipchirchir Toroitich –vs- Republic [2015] eKLR** where Dulu J held thus:

> ***"For circumstantial evidence to sustain a conviction, the circumstantial evidence must point to the guilt of the accused and there should be no other reasonable hypothesis. There are several case authorities on this position. I only need to cite the case of Ibrahim Mwita –vs- Republic - Kisumu Criminal Appeal No.86 of 2004 where the Court of Appeal reiterated what was stated in the case of Simon Musoke –vs- Republic [1958] EA 715 stated:-***

> ***"It is trite that in a case depending on circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt."***

In the present appeal, it was the prosecution's case that the Appellant had the motive and the wherewithal to commit the offence. It was the prosecution's case that the Appellant had a grudge against the complainant and members of his family because of a report that the complainant had made to the police that led to the Appellant's arrest. The prosecution established that the Appellant put into effect this grudge when he sent to the complainant and his wife threatening messages through their mobile phones. This was established by the mobile phone data that was produced by the prosecution. The prosecution was also able to establish that the Appellant had not only threatened the complainant and his family by sending threatening messages through their mobile phones but had visited the complainant's home and uttered the same threats.

Whereas it is true that no one saw the Appellant at the scene of crime when the complainant's house was set on fire, this court agrees with the trial court that the culpatory evidence adduced against the Appellant established that indeed it was the Appellant, and only the Appellant, who had reason and motive to have the complainant's house set on fire. The persistence in which the Appellant aggressively pursued the complainant and members of his family by threatening their lives clearly shows that there was a personal vendetta which the Appellant brought to fruition when he set the complainant's house on fire.

The Appellant argued that there was no connection between the threatening messages and the arson. He submitted that there was no basis at all for the trial court to convict him for the arson. He was of the view that he was convicted on the basis of mere suspicion. This court is aware that suspicion, however strong, cannot form a basis of a conviction. In **Republic –vs- Geoffrey Cheruiyot alias Erik Kiprotich Kirui [2015] eKLR**, Ong'udi J cited with approval the case of **Sawe –vs- Republic [2003] KLR 364** where the Court of Appeal held thus:

> ***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

In the present appeal, the evidence adduced against the Appellant by the prosecution was not mere suspicion but evidence that established to the required standard of proof a pattern of behaviour that proved that it was the Appellant who set the complainant's house on fire.

The Appellant also argued that his mental status was not established before he was put on trial. It was the Appellant's appeal that once he informed the trial court that he had a mental disease, it was upon the court to send him to a psychiatrist so that his mental status could be established. In essence, the Appellant was saying that he lacked the mental capacity to be tried by the court or rather he did not have the requisite *mens rea* to commit the offence. The prosecution is of the contrary view. It was the prosecution's case that the Appellant raised the issue of his mental incapacity when he was put on his defence. He did not raise it at any time during trial.

This court has carefully perused the proceedings of the trial court. As asserted by the prosecution, the Appellant raised the issue of his referral to see a psychiatrist when he was put on his defence. There is no indication from the records that the Appellant's behaviour was such that it raised suspicion to the trial court that he was not mentally fit to stand trial. The trial court proceeded as provided under **Section 11** of the **Penal Code** that states that:

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

In the present appeal, the trial court had no reason to suspect that the Appellant was mentally unfit to stand trial. During the entire trial, the Appellant robustly cross-examined the prosecution witnesses. He was aware of the charges that he was facing. He ably defended himself during trial. This court finds no merit with the Appellant's assertion that he was mentally unfit to stand trial. Taking into consideration the totality of the evidence adduced before the trial court, this court was persuaded to the required standard of proof beyond any reasonable doubt that the prosecution did establish that it was the Appellant who set the complainant's house on fire. The Appellant's appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant was sentenced to serve ten (10) years imprisonment on 15th December 2014. The Appellant was in remand custody and in prison for a period of eight (8) months prior to being released on bail pending the hearing of the appeal. This court has considered the circumstances of this appeal, including the fact that the Appellant may have suffered a mental illness after his trial. This court is of the view that custodial sentence is called for. The Appellant shall serve 3 years imprisonment from today's date. Cash bail shall be refunded.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2018

L. KIMARU

JUDGE