



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 35 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 36 OF 2017

BETWEEN

DAVID OOKO AROKO.....1ST APPELLANT

JOANES OMONDI OKEYO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of Hon. S.O. Ongeri, SRM, in Mbita PM's Court Criminal Case No.431 of 2017 dated 20/07/2018)

JUDGMENT

[1] The appellants, **DAVID OOKO AROKO** and **JOANES OMONDI OKEYO**, appeared before the Principal Magistrate at Mbita charged with Arson, contrary to **Section 332 (a)** of the **Penal Code**, in that on the 25th December 2017 at Kibuye Village in Mbita, Homa Bay County, jointly with others not before court willfully and unlawfully set fire to a building i.e. a dwelling house, valued at Kshs.96, 700/= belonging to **JOEL OTIENO MATAARA**.

[2] After a full trial, the appellants were convicted and sentenced to five (5) years imprisonment each. Being dissatisfied with the conviction and sentence, they preferred separate appeals on the basis of the grounds contained in their respective petitions of appeal which grounds are more or less similar. Their main complaint was that they were convicted on the basis of evidence which was fabricated, crafted and malicious and were handed a harsh sentence in the circumstances.

[3] Both appeals were consolidated and heard together with David Ooko Aroko being the first appellant and Joanes Omondi Okeyo, the second appellant. The two appeared in person and presented respective written submissions which they each relied on fully.

The Learned Prosecution Counsel, Senior Assistant Deputy Public Prosecutor (SADPP), **MR. OLUOCH**, appeared for the State/respondent and opposed the appeals.

In so doing, he submitted that the testimony of PW1 was clear and was corroborated by that of PW2, PW3, PW4 and PW5.

[4] Learned Prosecution Counsel, submitted further that the appellants raised their alibis during the defence hearing and in any event, the same were rightly dismissed by the trial court.

Learned prosecution counsel, contended that the appeals lacked merit and urged this court to dismiss them.

The two appellants made no responses to the oral submissions by the learned prosecution counsel.

[5] Basically, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly that on the material date at midnight, the complainant **JOEL OTIENO MATARA (PW1)**, received a call from one Ducan Omondi and was informed that his house was burning. He was at the time at his employer's homestead

together with his wife, **ALICE KIBILA OTIENO (PW2)**.

[6] The two rushed to the scene on a motor bike and found their house on fire. While the complainant jumped over the fence to enter the compound, his wife used the gate. They found therein the first and second appellants who acknowledged responsibility for setting the house on fire on ground that the land it was erected on did not belong to the complainant. They (appellants) threatened that they would also burn the next house. Apparently there existed an ownership dispute over the land between the complainant and the appellants.

[7] **ELIJAH OGUNDA MATARA (PW3)**, arrived at the scene and found the complainant quarreling with the appellants. This was after the house had been destroyed by the fire.

Others who arrived at the scene and found the house burnt included **GEORGE AUKO ADONGO (PW4)**, and **SILA OGOLLA (PW5)**. They also found the two appellants at the scene.

[8] **JOHN OKINYI YUAYA (PW8)**, a Motor Cycle Taxi Operator (boda boda) was coming from a place called Luanda at about 1.00 a.m. on the material date when he arrived near the scene and saw the house on fire but could not see anybody thereabout. He then called the complainant on phone but no answer was forthcoming. He knew that most villagers had attended church for Christmas service and rushed to a nearby church in search of the complainant. He did not find him there. He called other villagers such as Ogunda Omollo and Sila and told them what he had seen. He thereafter continued with his usual “**boda boda**” business.

[9] **IP JOHN KILONZO (PW6)**, investigated the case after it had been reported at Mbita police station. In the process, the complainant and the two accused were interrogated by him on the material date at 9.00 a.m. He gathered that the first accused (herein, second appellant) was at the scene during the incident and that the second accused (herein, first appellant) was seen running away from the scene. He (PW6) arranged for the scene to be photographed and **CPL. SHEM ONDIEKI MOGAKA (PW7)**, of the scenes of crime unit undertook the necessary assignment and later produced the photographs in court (**P. Exhibit 1 a-d**).

[10] On completion of the investigations, the two appellants were charged with the present offence. Both of them, in their defence, denied the offence and implied that they were implicated without good cause.

Appellant one, indicated that he was at his home on the material night when he was awakened by his wife over a commotion at the home of the second appellant. He rushed there and found that second appellant lying on the ground allegedly after being assaulted by brothers of the complainant for reason that he burnt the complainant's house. He (first appellant) assisted the second appellant by taking him to hospital.

[11] The second appellant indicated that he was at his parents' homestead when he heard screams at about 12.30 a.m. Thereafter, stones were thrown on the roof of his house. He heard a crowd of people talking and alerted his wife. He ventured out of the house and was hit with a rungu (club) on his shoulder by youths he recognized and who alleged that he had burnt their brother's house. He was rescued from the crowd and taken to hospital by the first appellant.

[12] **SIPRINA AKINYI (DW3)**, and **LINET AKELLO AROKO (DW4)**, mother and wife to second appellant and first appellant respectively confirmed more or less what the two appellants stated in defence. They both (DW3 and DW4) implied that the two appellants were framed and charged even though they were actually victims of assault.

[13] After having considered the evidence in its totality, the trial court concluded that the prosecution had proved beyond reasonable doubt that the complainant's house was deliberately set on fire and that the two appellants were responsible for the offence. In so doing, the trial court held that the appellants' alibis were discredited and disproved by evidence adduced by the prosecution.

[14] This court, having reconsidered the evidence, is of the opinion that there was no dispute with regard to the fact that the offence of arson was committed against the complainant.

Indeed, evidence adduced by the complainant and most of the prosecution witnesses credibly showed that the complainant's iron sheets house was deliberately set on fire by fellow villagers who may or may not have been known.

[15] Under **Section 332 (a)** of the **Penal Code**, any person who willfully and unlawfully sets fire to any building or structure whatever, whether completed or not is guilty of a felony and is liable to imprisonment for life.

Herein, the basic issue arising for determination was whether the two appellants or any one of them was positively identified as those who set the complainant's house on fire.

The photographs produced in evidence (**P. Exhibit 1 a-d**) show that the house was to a larger degree grounded by the fire. It appeared to have been a one or two roomed house whose value was given as Kshs.96, 700=.

[16] The appellants denied their alleged involvement in setting the house on fire. However, there was undisputed evidence from the prosecution that the possible motive for the offence was an existing land ownership dispute between the complainant and the appellant.

The complainant indicated that the appellants alleged that he had erected his ill-fated house on land which did not belong to him but them.

[17] Although the incident happened in the night, it was the complainant's evidence that he arrived at the scene when the house was burning and was in the company of his wife (PW2).

Both of them testified that they found the two appellants at the scene having set the house on fire and an altercation between the complainant and the appellants occurred with the appellants threatening to assault the complainant and also set his other house on fire.

[18] The altercation was witnessed by Elijah (PW3), George (PW4) and Sila (PW5) who arrived at the scene no sooner had the house been burnt. They all corroborated the complainant and his wife in placing the two appellants at the scene of the offence when it occurred.

According to the complainant and his wife, the illumination from the bonfire provided favourable conditions for them to see and recognize the two appellants who were very well known to them and the other witnesses as neighbours.

[19] The trial court did not doubt the credibility of the prosecution witnesses on the identification of the appellants as the culprits. This court also finds no reason to doubt the credibility of the key witnesses who testified against the appellants.

The evidence by these prosecution witnesses clearly disproved and discredited the appellants' defence as to render it worthless.

It is therefore this court's finding that the appellants' conviction by the trial court was proper and is hereby sustained.

[20] With regard to the sentence, it was lawful but rather excessive considering that the appellants were first offenders and the value of the affected house did not exceed Kshs.100,000/= Accordingly, the five years' imprisonment sentence is set aside and substituted for a suspended sentence of two (2) years imprisonment.

The appellants may forthwith be set at liberty to serve the sentence for an operational period of two (2) years.

Ordered accordingly.

J.R. KARANJAH

JUDGE

13.12.2018

[Delivered and signed this 13th day of **December, 2018**]