



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 35 OF 2015

NOOR MUHUMED HUSSEIN APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

(From original conviction and sentence in criminal case No. 17 of 2015 of the Principal Magistrate's court at Wajir – L. Kassan – PM)

JUDGMENT

The appellant was charged with arson contrary to Section 332(a) of the Penal Code. The particulars of the offence were that on 9th January 2015 at around 20.00 hours at Argane Location in Wajir East District within Wajir County, willfully and unlawfully set fire to a building valued at Kshs 200,000/- the property of Mohamed Hussein. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has now appealed to this court. He filed initial grounds of appeal on 5th May 2015. However, with the permission of this court the appellant filed an amended petition of appeal together with written submissions. The amended petition of appeal has four grounds which are as follows:-

1. *The trial magistrate erred in law and facts to convict him without considering that his fundamental rights were violated.*
2. *The trial magistrate failed to consider that the adduced evidence was contradictory and inconsistent.*
3. *The trial magistrate erred in law and fact to convict him without considering that the charge was defective.*
4. *The trial magistrate erred in law and fact to convict him without considering that the identification was not certain.*

The appellant filed written submissions to amplify the grounds of appeal. I have perused the written submissions.

During the hearing of the appeal, the appellant added orally that some people assaulted him and had not been arrested. He said that those people took his Kshs 200,000/- and a mobile phone. He said that those people were in the company of police officers. He also complained that the police who came to produce exhibits were not the people who arrested him.

Mr. Orwa for the state opposed the appeal. He stated that the charges were read to the appellant in a language he understood. Counsel submitted that the reasons why PWI was initially stood down were

recorded and his initial evidence was revoked by the prosecutor.

On defective charge, counsel submitted that there was no defects on the charge sheet and in case any defect was found it was curable under Section 382 of the Criminal Procedure Code.

With regard to the identity of the appellant counsel submitted that witnesses were not related to the prosecutor and that PW1 was present during the torching of the house. Counsel emphasized that there was also verbal communication between witnesses and the appellant and as such there was no possibility of mistaken identity.

Counsel also submitted that there was no evidence of a complaint of assault made by the appellant before the trial magistrate. In addition, the record did not show any indication of an attempt to withdraw the case, and that no law was violated on the production of exhibits.

In response to the prosecuting counsel's submissions, the appellant stated that he did not rape or kill anybody. He asked that the court acquits him or reduces the sentence.

During the trial the prosecution called four witnesses. Initially PW1 Muhumed Hussein testified and was stood down because, according to the prosecutor, he was changing his version of the statement he gave to the police. This witness was later called and testified as PW2.

PW1 was Hadija Shukri a sister in law of the appellant. She stated that she saw the appellant take a stick and burn the grass thatched house. She stated that during the incident, the appellant was armed with a panga and a knife. She identified photographs as those of the burnt house. She stated that Muhumed Hussein was present during the incident. She said also that Muhumed Hussein was her uncle.

In cross examination, she stated that her husband and uncle saw the appellant burn the house. She denied that the appellant was mad. She maintained that he burnt the house.

PW2 was Muhumed Hussein. It was his evidence that on 10th January 2015, the appellant who was his first born son, told him that the complainant (PW1) and his son had to leave the homestead and that he wanted to sell the livestock. The appellant also said that he would burn the complainant's house. He reported the matter and called elders who failed to settle the issue. The OCS then gave him police officers who arrested the appellant but, by then, the house had already been burnt. He stated that the house which was burnt belonged to the complainant (PW1) and her husband who was his son.

In cross examination he maintained that the complainant and her husband saw the appellant burn the house. He stated that they lived in the bush and, as such, there were no neighbours around. He denied hating any of his children including the appellant. He stated that the appellant had sworn that if released he would kill him.

PW3 was Ahmed Osman a Kenya Police Reserve officer. He testified that on 11th January 2015 during the night, PW2 went to see the OCS who instructed him with three other officers, to accompany PW2 to Argane where they met the appellant. It was around 5.00 am and he was sleeping with another person. They saw the burnt house and arrested him, took him to Wajir Police Station. According to this witness the appellant said that once freed he would kill PW1 and PW2.

In cross examination, he stated he did not see the appellant burn the house.

PW4 was PC Joseph Ojode. It was his evidence that on 11th January 2015 at 9.30 in the morning, he checked the OB at Wajir Police Station and found a case minuted to him. He recorded a statement from the complainant (PW2) who said that his son the appellant went to his home on 10th January 2015 and threatened to kill him. This was after the appellant had wanted his father to give him a camel to sell and the father refused. It was his evidence that Kenya Police Reserve officers arrested the appellant in the morning and found that the appellant had burnt his sister in law's house. He went to Argane and saw the traditional house which had been burnt. He identified photos of the burnt house.

In cross examination, he stated that he did not see the appellant burning the house but relied on information from witnesses.

When put on his defence the appellant gave sworn testimony. He stated that though his brother had said that he burnt his house, he was in the bush that day. According to him, no house was burnt. He said that he had differences with his brother who had made his parents quarrel him. He said that his father wanted him to be jailed and that the photographs relied upon by the prosecution were taken while he was in custody.

This is a first appeal. As a first appellate court, I am duty bound to reevaluate all the evidence on record and come to my own conclusion and inferences see the case of ***Okeno -vs- Republic (1972) EA 32***.

I have reevaluated the evidence on record. I have perused the judgment of the trial court. The appellant has raised a number of issues on appeal.

I note that in his written submissions, the appellant was referring to the case in question herein. However in his oral submissions, he appeared to be talking about rape and killing, instead of the burning of a house which was the complaint against him.

I am not sure whether that variance was deliberate or was perhaps confusion in the mind of the appellant. During the trial, he put a question to PW1 on whether he was a mad man. In my view the appellant might possibly be a person of high anger and confusion.

The prosecution relied on photographs of the burnt house. It is not clear how those photographs were taken, when and by whom. They were not even produced in court as exhibits. In my view those photographs should not have been relied upon by the trial court in determining the case.

The appellant has raised the issue of a defective charge. Having perused the charge sheet I find no defect on the same. The charge was clear. He was charged with setting a house on fire, which was arson. He understood the charge and defended himself. There was thus no defect on the charge.

In criminal cases, the burden is always on the prosecution to prove an accused guilty beyond reasonable doubt - see the case of ***WOOLIMINGTON -vs- DPP (1932)AC 462***. This position has been reemphasized by courts in this country again and again.

The accused does not have a burden to prove his innocence. In the Judgment the magistrate stated as follows ***“accused did not call any witness to support his defence”***.

In my view, that statement by the learned magistrate was an attempt to shift the burden of proof to the appellant. The appellant gave sworn testimony in his defence, which was not challenged through cross examination. His side of the story therefore remained unchallenged. He could not be convicted merely because he did not call additional witnesses.

In my view the prosecution evidence was so shaky that it did not prove that indeed the appellant burnt a house belonging to the complainants. The photographs were worthless because their source was unknown and they were not produced in court as exhibits. The evidence of the prosecution witnesses was also deficient in that the husband of PW1 was not called to testify, while he was said to be at the scene of the incident. PW2 on the other hand was not a credible witness because he was initially stood down for contradicting the statement he had recorded to the police. He could thus not be a credible or trustworthy witness.

In my view, the evidence of the prosecution did not meet the required standards for proof of guilt in a criminal case. I thus find merits in the appeal. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 4th day of March 2016.

GEORGE DULU

JUDGE