REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 2 OF 2016

SAUL MWAKINA MWADOE……..……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 364of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga(RM) on 22nd May 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Saul Mwakina Mwadoe,had been jointly charged with one Benson Mwaluma Mwadime (hereinafter referred to as "DW 1") for the offence of arson contrary to Section 332 (a) of the Penal Code Cap 63 (Laws of Kenya).

2. The Learned Trial Magistrate, Hon G.M. Gitonga, Resident Magistrate acquitted the said Beson Mwaluma Mwadime of the charges under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya). However, he convicted the Appellant herein of the said charge. He fined him a sum of Kshs 200,000/= and in default, to serve five (5) years imprisonment.

3. The particulars of the chargesof the said offence were as follows :-

> **"On the 7th day of August 2014 at around 8.00 pm at Mwakilemba Village in Kishushe Location within Taita Taveta County, jointly willfully and unlawfully set fire pm a dwelling house with house hold goods namely fifty kilogrammes of maize valued at Kshs 1750/=, ten kilogrammes of green grams valued at Kshs 800** (sic) **five kilogrammes of cow peas valued at Kshs 600/=, Bed, Blankets and sheets valued at Kshs 5000/= and a house valued at Kshs 50,000/= All valued at Kshs 58150/= the property of Defline Wughanga."**

4. Being dissatisfied with the said judgment, on 8th January 2016, the Appellant lodged a Petition of Appeal. The Grounds of Appeal were as follows:-

> **1. THAT the Learned Trial Magistrate erred in law and fact by failing to consider that both the conviction and sentence were founded on a defective charge sheet.**
>
> **2. THAT the Learned Trial Magistrate erred in law and fact by failing to consider the sharp contradictions in evidence of the prosecution.**

3. THAT the Learned Trial Magistrateerred in law and fact by failing to consider that no identification parade was conducted to link the offence to the accused (sic)**.**

4. THATthe Learned Trial Magistrate erred in law and fact by failing to consider the variance and discrepancies on core areas of the evidence by the prosecution.

5. THAT the Learned Trial Magistrate erred in law and fact by failing to consider his alibi evidence not challenged by the prosecution.

5. On 8th June 2016, the court directed the Appellant to file his Written Submissions. However, on 22nd June 2016, he filed the said Written Submissions and Amended Grounds of Appeal. The said Grounds of Appeal were **THAT**:-

1. The Learned Magistrate erred in law and fact by failing to consider that no identification parade was conducted or parade forms adduced as evidence by the Prosecution.

2. The Learned Trial Magistrate erred in law and fact by failing to consider both conviction and sentence were founded on a single witness which was insufficient to sustain the conviction.

3. The Learned Trial Magistrate erred in law and fact by failing to consider that the conviction depended on the mistaken identity as adduced in DW 1 (sic) **statement.**

4. The Learned Trial Magistrate erred in law and fact by failing to consider that the Prosecution had failed to produce evidence putting him at the scene of the crime.

6. The State's Written Submissions were dated 28th June 2016 and filed on 29th June 2016. The Appellant'sReply to the State's Written Submissions was dated 10th July 2016 and filed on 11th July 2016.

7. When the matter came up in court on 11thJuly 2016, both the Appellantand the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. The only issue this court identified for determination was whether or not the Prosecution proved its case against the Appellant herein against reasonable doubt.

10. This court addressed Amended Grounds of Appeal Nos (2) to (5) under one (1) head as they all related to the issue of the Appellant's identification by Defline Wughanga (hereinafter referred to as "PW 1"). He appeared to have abandoned his Ground of Appeal relating to defectiveness of the Charge as he did not submit on the same.

I. PROOF OF PROSECUTION'S CASE

11. The Appellant submitted that PW 1 had testified that the alleged offence occurred at night when there was no moonlight or any source of lighting. He argued that the identification of the attacker by PW 1 was not free from any possibility of error as such identification was impaired by the darkness.

12. He submitted that since his conviction was based on the evidence of a single witness of PW 1 and the omission the Prosecution failed to bring other witnesses to corroborate her evidence, it was not sufficient to have sustained his conviction.

13. He pointed out that PW 1 did not give out the particulars of the attacker when she lodged her complaint and that the failure to record the name or physical description of her attacker in the Occurrence Book (OB) and lack of an identification parade to test the veracity of her evidence, rendered his conviction unsafe.

14. He referred this court to the case of **Roria vs Republic (1967) EA 583 at page 584** where Sir Clement De Lestang V.P. was said to have rendered himself as follows:-

> **"…A conviction resting entirely in identity invariably causes a degree of uneasiness and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on Section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designated to widen the power of the court to interfere with verdicts. There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases outs of ten- if there are as many as then it is in question of identity…That danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction resting or based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification."**

15. He also placed reliance on the cases of **Abdalla Bin Wendo vs Republic (1953) EACA 166** and **Chemagong vs Republic (1984) KLR 611** which dealt with the issue of identification of an accused person and reliance of evidence of a single witness respectively.

16. On its part, the State relied with the case of **Andrea Nahashon Mwarisha vs Republic [2016] eKLR** where the Court of Appeal held as follows:-

> **"Identification parades are necessary though not absolutely where the witness purports to identify a suspect in extremely difficult conditions, which say, where the offence was conducted at night and when visibility was a challenge having regard to the availability or lack of light and when the circumstances under which the offence was committed were so harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time…"**

17. It was the State's contention that PW 1 testified that the Appellant came to her grass thatched house at about 8.00 pm and that she saw him placing fire next to her house but she put it off. It pointed out that she further stated that the Appellant went round her house, picked some dried leaves and started another fire and that he pulled her out of her house and started slapping her. It said that this gave PW 1 sufficient time to recognise the Appellant herein and consequently, her sole evidence was sufficient to have sustained the conviction against him.

18. A perusal of the proceedings showed that the Appellant herein went to PW 1's house at about 8.00pm and urged her to come out of her house. She refused to do so because the woman who was screaming had accused her of bewitching her children, accusations that were reiterated by DW 1. She said that she later learnt that that woman's son had hanged himself. She was subsequently pulled out of her house which was engulfed by fire and razed to the ground destroying foodstuffs and household goods.

19. During her cross-examination, she stated that DW 1 is the one who saved her from being beaten by the Appellant. It emerged from her evidence during Cross-examination by the Appellant herein that the

woman who had slapped her was the Appellant's mother. She stated as follows:-

> **"I saw you setting my house on fire…You were slapping me… The 1st Accused is the one who stood between me and you while you were slapping me. When your mother slapped me, she was warned by the 1st accused…You entered my house. I could see you…"**

20. On being Cross-examined by the Trial Court, PW 1 stated as follows:-

> **"…When the 1st accused called me, I was able to identify him by his voice. He also identified himself by the name "Ben". I identified the 2nd accused by his voice. He also said he was Saul."**

21. It was evident from his Judgment that the Learned Trial Magistrate cautioned himself of the risk of convicting the Appellant while relying on the evidence of PW 1 only. In this respect, it had due regard to the case of **Ogeto vs Republic [2004] eKLR** in which the Court of Appeal held that a fact can be proved by the evidence of a single witness if care and caution was exercised while placing reliance on such evidence.

22. This court was aware of the likelihood of PW 1's visibility at the scene of crime having being impaired as it was dark and there was no source of lighting or moonlight at the material time. It also cautioned itself against the risk of placing reliance on the evidence of PW 1 who was a single witnessas regards the lighting of the fire.

23. Appreciably, evidence of such a single witness ought not to be rejected at the outset. Rather it must be treated with care and caution. Indeed, in Section 143 of the Evidence Act Cap 80 (Laws Kenya), it is provided that *in the absence of any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact.*

24. The importance of testing evidence of a single witness was also addressed in the case of **Simon Kipkorir Changorik v Republic [2011] eKLR**where the Court of Appeal cited with approvalthe holding of Sir. Clement De Lestang V.P's holding in the case of **Roria vs. Republic** (Supra). He had statedthus:-

> **"subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness".**

25. According to DW 1 who testified under oath, PW 1 who was his aunt. He said that she had had a long standing feud with the Appellant's mother relating to land. The Appellant, his mother and PW 1 were therefore known to each other prior to the incident.

26. PW 1 was emphatic that the Appellant was her attacker and that he is the one who told her to come out of her house. Her evidence was corroborated by DW I who said that the Appellant came with a mob of people and pulled PW 1 out of her house. When she was cross-examined by the Appellant, she stated that it was DW 1 who tried to save her from the said mob, a fact that DW I confirmed when he said that PW 1 pleaded with him to save her from being lynched by members of the public for being a witch.

27. This court found that there was very little likelihood of there having been any mistaken identity of the Appellant by PW 1 as he had contended.Her evidence that the Appellant and his mother slapped her meant that she was in very close proximity to him and was therefore able to recognise him.The time PW 1 spent in her altercation with the Appellant herein was sufficient for her to have been certain that the person who came to her house was the Appellant herein.

28. If there was any doubt in the mind of this court that PW 1 could have been mistaken was quickly erased as the Appellant was placed at the scene of the crime by DW 1. Failure to have the name or physical description of PW 1's attacker recorded in the Occurrence Book (OB) did not therefore render

the Appellant's conviction unsafe.

29. Appreciably, entry of such information in the OB is not mandatory. It need not be recorded if a witness is so well familiar with the person who is being accused of committing a particular offence. It isnecessary and/or critical where a witness is not familiar with a person who is alleged to have committed an offence as its intention is to immortalise in writing what a witness has seen or observed as loss of memory of any account is ordinarily erased over a period of time.

30. This court thus found itself in agreement with the State's submissions that there was no need for an Identification Parade as the Appellant was well known to PW 1 and she ably recognised him as her attacker.

31. Turning to the issue of fire, PW 1 testified that she saw the Appellant lighting fire outside her house and that after she put off the first fire, he lit another fire which he fueled by adding dried leaves. DW 1 testified that he saw fire at PW 1's house which was about fifty (50) metres from the Appellant's mother's house where he was attending a "burial." He also stated that the Appellant was the first person to go to PW 1's compound but he did not see who lit the fire.

32. On her part, PW 1 was categorical that the Appellant lit fire twice. This was sufficient time for her to have interacted with him so as to have been certain that it was indeed him who lit the said fires. As has been seen hereinabove, despite the darkness, she had not been mistaken about the Appellant being at the scene of the crime.

33. The Appellant did not offer any defence for alibi to demonstrate that he was not present at the time the fire was being lit. Indeed, DW 1 was emphatic that the Appellant and others had gone to PW 1's house with the intention of lynching her for having bewitched the Appellant's brother.

34. Although the burden of proof did not shift to the Appellant herein, it was not lost to this court that when the Appellant was put on his defence after being found to have had a case to answer, he opted to remain silent and await the judgment of the Trial Court. The Prosecution's case that PW 1 saw him lighting the fires thus remained uncontroverted.

35. This court took into consideration that the Learned Trial Magistrate had had the advantage of observing the demeanour of witnesses. He observed that PW 1, though aged about seventy (70) years, was alert, candid and honest. This court also found her evidence to have been cogent and believable and was to a large extent corroborated by DW 1.

36. Accordingly, in the absence of any evidence to the contrary, this court was satisfied that the Prosecution proved its case to the required standard, which was proof beyond reasonable doubt. For that reason, Grounds Nos 1, 2, 3 and 4 of the Appellant's Amended Grounds of Appeal were not meritorious and are hereby dismissed.

II. SENTENCE

37. Section 332(a) of the Penal Code under which the Appellant was charged provides that:-

> **"Any person who willfully and unlawfully sets fire to-**
>
> > **a. Any building or structure whatever, whether completed or not: or…is guilty of a felony and is liable to imprisonment for life."**

38. The Learned Trial Magistrate fined the Appellant a sum of Kshs 200,000/= or in default, to serve five (5) years imprisonment. Although the State did not challenge this sentence and the said Learned Trial Magistrate exercised his discretion in meting out to him the said sentence, this court found the same to have been extremely lenient bearing in mind the consequences of what would have ensued had PW 1 not been saved from the lynching mob for being suspected to have been a witch.

39. Against that backdrop, this court was very tempted to enhance the sentence that was meted upon the Appellant. However, considering that the Sentencing Policy of the Judiciary obligates courts to mete out sentences that are proportionate to the circumstances of a case, it opted not to interfere with the discretion that was exercised by the Learned Trial Magistrate in respect of the length of the sentence. This is because the value of the property that was destroyed was Kshs 58,150/=.

40. The above notwithstanding, arson is a very serious offences that attracts a maximum life imprisonment and for that reason, this court found it fit and just to vary the sentence that was imposed upon the Appellant by setting aside the option of a fine and replacing it with a custodial sentence of five (5) years' imprisonment without the option of a fine.

DISPOSITION

41. For the foregoing reasons, this court found that the Prosecution had proved its case beyond reasonable doubt and consequently, the Appellant's Amended Grounds of appeal were not merited and/or successful. The Petition of Appeal that was lodged on 8th January 2016 is thus hereby dismissed.

42. Accordingly, this court hereby affirms the conviction hereinbut replaces the sentence of the fine of Kshs 200,000/= and in default to serving of five (5) years imprisonment with a sentence of five (5) years imprisonment without the option of a fine.

43. It is so ordered.

DATED and **DELIVERED** at **VOI** this **6th** day of **September** 2016

J. KAMAU

JUDGE

In the presence of:-

Thomas Tigina Wanjala…….. Appellant

Miss Anyumba…..……..State

Ruth Kituva……..Court Clerk