



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO.50 OF 2013**

**DANIEL OLUOCH ODWAYA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(An Appeal arising out of the sentence and conviction of J.N Maragia R.M. in CM.Cr. case No.179 of 2013 delivered on the 30/5/2013)**

**J U D G M E N T**

1. It was alleged that Daniel Oluoch Odwaya (**the Appellant**) unlawfully attempted to set fire to the dwelling house of Mary Oloo Odhiambo (the complainant). This was said to have happened on 5<sup>th</sup> February 2013 at about 6.00p.m at Boro Nango village, Bujumba location of the Busia County.
2. Following trial the Appellant was convicted for the offence of attempted Arson contrary to Section 333(a) of The Penal Code. The Trial Court imposed a prison term of 3 years. Although the filed Petition of Appeal was a challenge only to his sentence, this Court allowed the Appellant to also question his conviction. This was after the Appellant requested to do so at the hearing of the Appeal. The State through Mr Kelwon did not object to the expansion of the Appeal.
3. On 5<sup>th</sup> day of February 2013 (although this date raised a controversy to which I shall return) the complainant was at her home at Bor Nanga with her grand-daughter Cynthia Atieno (PW 2). The Appellant, who is a cousin of PW1 came to their home and asked for food. The complainant offered him “githeri” but with a request that he leaves some for her. He became violent and abusive. He then rushed out and returned with a matchbox in hand. He lit the matchbox and attempted to torch down the house.
4. Although the hut caught fire, it did not spread at all as it was quickly put off. Members of the public heeded to the distress calls made by the complainant and rushed to her house. Among them was Erick Adala (PW 3) who found the Appellant still at the scene. PW3 and other members of the public arrested the Appellant and took him to Bumula Police Station where he was re-arrested by P.C. Kivuva (PW 4). Although this witness put the date of arrest at 6<sup>th</sup> February 2013.
5. PW4 visited the scene, took photographs of two grass thatched houses, one of which was said to have been the target of the Appellants attempt. He submitted the unexposed film to Joshua Macharia who processed one photographic print. The certificate of processing and printing which was prepared by Joshua Macharia was produced in Court by Corporal Benjamin Wechule (PW 5).
6. When invited to his defence, the Appellant gave an unsworn statement in which he denied the offence. He says that his grandmother gave him some food to eat but he declined to eat it. Shortly a motor bike drove into the compound. Two men then approached him, arrested him and took him

- to Bumala Police Post. He only came to learn of the reason for his arrest after 2 days of incarceration.
7. The above is the abridged version of the evidence which this Court is duty bound to re-evaluate afresh and draw its own conclusion. I must nevertheless keep in mind that unlike the Trial Court never saw and heard the witnesses testify and due allowance must be made for this. (see **Okeno -vs- Republic** [1972]E.A.32).
  8. But before I do so, what are the grounds of Appeal? From his Petition of Appeal and supplementary grounds, the grounds can be collapsed into the following:-
    1. That the sentence imposed on him was harsh and excessive.
    2. The conviction was based on contradictory, inconsistent and unreliable evidence.
    3. That his Constitutional right guaranteed by Article 49 (I) (f) was violated as he was brought to Court after 24 hours of his arrest.
  9. I propose to start with the last and this should not detain the Court at all as the law on this aspect is well settled. An arrested person alleging that he has been brought before Court after twenty-four hours after being arrested is entitled to petition a Constitutional Court for violation of his rights guaranteed by Article 49 (I) (f) of The Constitution 2010. But that violation cannot be a ground of vitiating his subsequent trial. That does it for ground 3.
  10. Turning to the evidence tendered before the Trial Court, it was the evidence of PW1 and PW2 that the Appellant visited their home on a day he asked for githeri and later attempted to torch the house. The charge sheet puts this day as 5<sup>th</sup> February 2013. That is repeated by PW2 and PW3. However PW1, from both the typed and handwritten proceedings, says it was on 5/2/2012. A third date is introduced by the Investigating officer P.C. Kivuva who says that he re-arrested the accused on 6/2/2013 which was the very day of the incident.
  11. The view I take is that the mix up of dates can be ignored if the other aspects of the Prosecution evidence is strong. Quite clearly, at least for PW1, the date given by the witness was erroneous or the recording of the proceedings by Learned Magistrate had a mistake. I say this because two witnesses were clear that the incident happened in the year 2013 and not 2012. And the accused first Court appearance was 7/02/2013. The charge sheet that he had to plead to shows that he was arrested on 5/2/2013. There is no evidence that the accused had stayed in custody for over 1 year. As to the date of 6/2/2013 given by the investigating officer it may have been a lapse on his part as the date of arrest given in the charge sheet was 5/2/2013.
  12. And those proceedings were dogged with yet another mix up of dates. PW5 testified that P.C. Macharia received the unexposed films from P.C. Kivuva on 20/02/2012. But in the report prepared by PC Macharia he states that he received the unexposed film on 20/02/2013. So was there a lapse in the testimony of PW5 or an error in the recording of proceedings by the Learned Magistrate?
  13. These may be far too many mix ups of dates in one trial. Yet they all seem explainable. It bears repetition that the Court will overlook them if the other aspects of the evidence are foolproof. It is to those other aspects that I now turn to evaluate.
  14. PW1 and PW2 all knew the Appellant before the date of the incident. PW1 was his grandmother and in fact welcomed him for a meal. While PW2 was his cousin. Both of them say how the Appellant visited the home of PW1 on 5/2/2013. Their story as to how the Appellant asked for food and later turned abusive was consistent. Consistent as well is how he lit a matchbox and attempted to torch the house. That although the house caught fire, that fire was quickly put off.
  15. The story of how the Appellant was arrested was told by three witnesses. PW1 says she started to scream for help and some neighbours responded to her distress call. Amongst them was Erick Adala (PW3). When they reached the scene, the Appellant was there. It was the evidence of all the three that the Appellant was arrested by some of these neighbours whilst at the scene (PW 3 being one of them) and taken to Bumala Police Station.
  16. When the investigating officer P.C. Kivuva visited the scene he found ashes there. He however said that the house never caught fire. The presence of ashes would be consistent with the evidence of PW1 and PW2 that the Appellant set off a fire but which did not successfully burn the houses. Although this officer, in cross-examination said that the house belonged to Daniel Okoch, his evidence in Chief was that the house he visited and photographed was that of PW1. That the

house that was the target of the Appellant belonged to PW1 was supported by the evidence of PW2, PW3 and PW1 herself.

- 17.P.C. Kivuva submitted unexposed films of the photographs he took to P.C. Joshua Macharia. P.C. Macharia processed one photographic print from the film. Both the print and the certificate of P.C Macharia made under the provisions of Section 106B of the Evidence Act were produced in Court.
- 18.From the Subordinate Court proceedings, the point which the Appellant lit the fire was pointed out to the Trial magistrate by PW1.
- 19.On my own evaluation of the evidence, I have reached a conclusion that the evidence adduced by the Prosecution was overwhelming. PW1 and PW2 knew and recognized the Appellant. They saw him attempt to torch PW1 house. PW3 arrested the Appellant while at the scene. PW3 and PW4 saw ashes at the scene which supported the complaint of PW1. The photographs produced in Court gave further credence to this. On a balance, that evidence far outweighs the unsworn statement of the Defence that although at the scene he did not commit the offence. The Prosecution discharged its burden as required by the Law.
- 20.Just like the Learned Trial Magistrate, this Court finds that the Prosecution proved beyond any reasonable doubt that the accused had committed an offence of unlawfully attempting to set fire to a Building. Although charged under Section 332 (a) which creates the offence of Arson itself not an attempt, the Learned Magistrate explained why she was willing to find the defect curable. She reasoned

**“The accused was however charged under section 332(a) which provides for arson. The correct section ought to have been section 333(a) of the penal code. However, I note that the mistake on charge sheet is not grave because the accused understood from the evidence tendered in court that he was charged with attempted arson and not arson. The mistake is curable.”**

That holding cannot be faulted.

- 21.On sentence, an offender under Section 333 (a) is liable to imprisonment for 14 years. The sentence imposed of 3 years cannot therefore be said to be unlawful or harsh.
- 22.The Appeal is dismissed in its entirety.

**F. TUIYOTT**

**J U D G E**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 15<sup>TH</sup> DAY OF MAY 2014.**

**IN THE PRESENCE OF:-**

**KADENYI .....COURT CLERK**

**.....FOR APPELLANT**

**.....FOR RESPONDENT**