



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 176 OF 2012**

**EDWARD GITONGA NGWERE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Cr. Case No. 853 of 2012 at the Principal Magistrate's Court Runyenjes by HON.J.P. NANDI – SRM on 28<sup>TH</sup> NOVEMBER 2012**

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

1. **EDWARD GITONGA NGWERE** the Appellant herein was charged with the offence of Arson contrary to section 322(a) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

***“On the 24<sup>th</sup> day of September 2012 at Kanja village, Kagaari North location, Embu County, willfully and unlawfully set fire to a building namely a dwelling house valued at kshs.200,000/= the property of one DANIEL MURIUKI NGWERE.*”**

2. The case proceeded to full hearing and he was convicted and sentenced to serve ten (10) years imprisonment. And being dissatisfied with the Judgment he filed this appeal against conviction and sentence on the following grounds;
  1. The trial Magistrate failed to consider that the prosecution side did not prove their case beyond reasonable doubts.
  2. The trial Magistrate misled himself when he convicted and sentenced the Appellant relying on a single eye witness.
  3. The trial Magistrate failed to consider that there was no corroboration in evidence adduced by the Prosecution witnesses.
  4. The trial Magistrate failed to consider that NO exhibit was recovered from one to link the Appellant with the said offence.
3. The Prosecution case is premised on the evidence of four (4) witnesses. PW1 (Daniel Muriuki) who is the complainant was at the neighbour's when he saw smoke being emitted from his house. He had left his house for the neighbour's a few minutes prior to the incident.

4. PW2 (Jedidah Ngwere) who is the mother to PW1 said she was outside her compound when she saw the Appellant enter PW1's house with a jerrican. She entered her own house to get water and on coming out she saw PW1's house on fire.
  5. PW3 (Njeru Getambu) the village sub-area says he was at the village market when he heard Appellant telling others he was going to burn a house at his home. He went to his home and later heard screams and went to the scene and found the house on fire. The Appellant ran away on seeing people.
  6. PW4 (IP Francis Njomo) re-arrested the Appellant and produced photographs of the scene taken by another officer. He also produced the certificate by the said officer (JACKSON K. KIPROP).
  7. The Appellant in his unsworn defence explained how he spent the day in question. He was going home after 4pm when he was arrested by Administration Police and was later taken to Runyenjes Police Station. He said he was framed because of family wrangles. And that PW1 had been jailed and threatened that one of them would be jailed. He denied the charges.
  8. When the appeal came for hearing the Appellant relied on his written submissions. He submitted that the Prosecution did not prove its case as even the cause of the fire was never established. And that his defence of a dispute between them was not considered.
  9. Mr. Wanyonyi for the State submitted that the evidence by the Prosecution was overwhelming. And that as per PW3's evidence the Appellant had uttered words to the effect that he was going to burn a house at their home to support his position. He cited two Court of Appeal decisions viz;
    - i. **WYCLIFF LUVEMBE SHIKOTO –V- REPUBLIC CRIMINAL APPEAL NO.222/11 – COURT OF APPEAL KISUMU**
    - ii. **KEINO CHURES & KIBET MUNGICH –V- REPUBLIC ELDORET HCRA NO.99/98**
10. This being a first appeal this Court is enjoined to re-evaluate the evidence and the grounds of appeal and arrive at its own conclusion. An allowance should also be given for the fact that this Court did not see or hear the witnesses. Ref:
- i. **OKENO –V- REPUBLIC [1972] EA 32**
  - ii. **PATRICK & ANOTHER –V- REPUBLIC [2005]2 KLR 162**
11. I have considered the submissions of both the Appellant and State together with the grounds of appeal. I have equally considered the evidence on record.
  12. The grounds of appeal herein all challenge the evidence adduced by the Prosecution witnesses. I will therefore address them jointly.
  13. The factual background is that PW2 (Jedidah Ngerwe) is the mother of PW1 (Daniel Muriuki) and a stepmother to the Appellant. This means PW1 and the Appellant are stepbrothers. Their father is deceased. It's not clear how the set up of the home is.
  14. There was no police officer who investigated this case as PW4 was only an arresting officer. Had there been an investigating officer he would have visited the scene and answered the issues arising herein. No such officer testified. All that PW4 did was re-arrest, receive exhibits and charge the Appellant.
  15. A scene of crime officer allegedly went to the scene and took photos which were again produced by PW4. Had this officer testified he would have enlightened the Court on how the home set up looked like.
  16. PW1 said he was at his neighbour's when he saw smoke being emitted from his house. PW2 was outside her compound when she saw the Appellant carrying a jerrican and entering into PW1's house. She entered her house and on coming out PW1's house was on fire.
  17. From the above narrative the following questions arise;
    - i. How far was PW1's house to PW2's house or compound?
    - ii. How far was PW1's house to the neighbour where he had gone to pick animal feeds?
    - iii. How far was PW2 from the Appellant when she saw him carry a jerrican to PW1's house?.
    - iv. Where was the Appellant when PW1 and PW2 saw the fire burning?
    - v. Did the investigating officer ever attempt to establish the cause of fire?
    - vi. Was the house of the Appellant searched for recovery of anything connected with the fire?

18. All the above questions would have been answered by an investigating officer had there been one in this case.
19. This offence is alleged to have occurred on 24/9/2012 at 6pm. PW1 said on the morning of this day the Appellant had threatened to burn his house for his refusal to give him the town key. He did nothing about this threat. Secondly PW3 (Njeru Gatambu) the sub-area of the Kanja village heard the Appellant telling others at Kanja market that he was going to burn a house at their home. He also did nothing.
20. PW3 is an administrator by virtue of his being a sub-area. He said he heard these words at 6pm. It's not clear if he left the Appellant at the market or the Appellant left him there. Whatever the case, how long did it take from the time he allegedly heard those utterances and the time he heard screams? He too elected to do nothing about what he had allegedly heard the Appellant say. As an administrator he heard such words but decided to go home.
21. This inaction is strange. Secondly the Appellant never addressed PW3. He addressed others. To confirm that indeed he heard what he was telling the Court, why were some of those addressed by the Appellant not called to confirm PW3's evidence?
22. The facts in the two cases cited by the State Counsel can be distinguished from this one. In the two Court of Appeal cases (supra) the Appellant had been clearly seen by the witnesses setting the houses on fire. It was clearly stated what role each of them played. But in this case no one saw the Appellant setting the house on fire. All there is, is the evidence of PW2 that she saw him enter PW1's house with a jerrican, and nothing more.
23. PW2 appears not to have seen the Appellant leave PW1's house with or without the jerrican. How long did it therefore take between the time the Appellant entered the house and the time fire was seen emanating from the said house?
24. PW1 had gone to a neighbour's. Did he leave his house locked? If not whom did he leave at his home? He had said one of the rooms therein was used by the Appellant's brother. Where was that brother? PW2 said there was no one else on the compound besides her and the Appellant. Was this the correct position? Were there no children in the home?
25. Again the questions I am raising in paragraphs 23 and 24 are things which ought to have been sorted out by the investigating officer which was not done.
26. The evidence of PW2 is the only evidence which tends to link the Appellant with this offence. Considering that PW2 is a step mother to the Appellant and there are allegations of grudges because of family properties, it was important for the Court to carefully scrutinize her evidence.
27. It is for this reason that I raised the many questions in paragraph 16 above. PW2's evidence was clearly circumstantial evidence.
28. In the case of *MWANGI –V- REPUBLIC [2004]2 KLR 32* the Court of Appeal held thus;

***“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypotheses except the hypothesis that the accused is guilty of the charge”***

This was also followed in *MWITA –V- REPUBLIC [2004]2 KLR 60*.

29. The Prosecution had a duty to link all these pieces of evidence to make the Appellant culpable. The offence is said to have occurred at 6pm. PW3 said he was at Kanja market with the Appellant at 6pm. It's not clear at what time they left the market.
30. Secondly no investigations were carried out to establish the cause of the fire. PW2's mentioning of the jerrican was to give the impression that an inflammable substance was used to set the house on fire. Nothing was done to establish the cause of the fire or even recover the said jerricans.
31. PW2 did not say she saw the Appellant leave PW1's house after setting the said house, on fire.
32. I have already dismissed the evidence of PW3 where he said that he heard the Appellant saying he was going to burn a house as a stretch of his imagination a bit too far. How could he as an administrator hear something like that and just keep quiet? The answer is that he never heard it.
33. Neither PW3 nor PW4 arrested the Appellant. So who is it that arrested the Appellant and from where did they arrest him?

34. In his defence the Appellant told the Court that he had been framed because of family wrangles. And this is based on a dispute over their deceased father's land. This considered alongside the loopholes I have pointed out in the case of the Prosecution leaves me in no doubt that PW2's evidence without corroboration could not found a conviction.
35. Before I make my final orders I will point out that PW4 could not produce photos plus a certificate on behalf of the scenes of crimes officer who took them without a basis being laid. That was an error by the learned trial Magistrate.
36. For the above reasons I do find that the appeal has merit and I allow it. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9<sup>TH</sup> DAY OF  
MAY 2014**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**M/s Mbae for State**

**Appellant**

**Njue – C/c**