REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 30 of 2012

LUCY GAKII MARANGU…….……..…..APPELLANT

V E R S U S

REPUBLIC ……..RESPONDENT

J U D G M E N T

The Appellant LUCY GAKII MARANGU was charged with attempted arson contrary to section 333(a) of the Penal Code. It is alleged that on 14th January 2011 at Kiorono village the Appellant attempted unlawfully to set fire to a building namely a dwelling house the property of LUCY KATHURE NKANATA. In count 2 the Appellant is charged with malicious damage to property contrary to section 33(1) of the Penal Code. it is alleged that on the same day and place the Appellant unlawfully destroyed one lantrn lamp, a record player, two stores, a bag of fertilizer and assorted goods valued at Ksh.20,000/- the property of LUCY KATHURE NKANATA The appellant was convicted in court and sentenced to 5 years imprisonment. Being aggrieved by the conviction and sentence she filed this appeal. There are eight grounds of appeal in the filed petition of appeal dated 13th March, 2012 which are as follows:

1. **That the learned Chief Magistrate erred in law and in fact in convicting the appellant on a charge of attempted arson contrary to section 333(a) of the Penal Code on the evidence before him.**

2. **That the learned Chief Magistrate erred in law and in fact in ignoring and/or not tking ito account the appellant's defence of alibi during the trial.**

3. **That the learned Chief Magistrate erred in law and in fact in failing to have any regard to the appellants witnesses evidence and consider the same in his judgment.**

4. **That the learned Chief Magistrate erred in law and in fact in failing to consider and/or taking into account the appellant's witness evidence.**

5. **That the conviction is against the weight of the evidence and the law.**

6. **That the learned chief magistrate erred in law and in fact in not finding that this was a civil dispute over a family house passed as a criminal case to settle the house claim.**

7. That the learned Chief Magistrate erred in law and in fact in shifting the burden of proof to the appellant.

8. That the Sentence of 3 years imprisonment without an option of a non custodial sentence is

manifestly excessive and/or wrong in law.

The chief facts of the prosecution case wee that the Appellant who is aware of PW1 and 2 according to both of them he went to here rural home for the funeral from Nairobi where she resides. The appellant arrived at her rural home home on 11th January, 2011. She spent the night with a friend PW3. On 14th January 2011 she went to PW1 at 12.30 am and asked for a key to her grand parents home wher she slept whenever at home. PW1 CALLED her daughter, PW4 to open the said house for hr which she did. The Appellant entered the house. At 1 am, PW2 Appellant's uncle went out of his house to rlief himself when he saw fire inside his late father's house. Outside the house was a person. When he flashed his torch at them he recognized his niece the Appellant 15 meteres from him. As PW2 approached her to take her, the Appellant ran away/ PW2 woke up PW1. He put out the fire when they entered the house they found an empty jerry can smelling of petrol, and burnt items including a stove, a record player, fertilizer and some books. The Appellant was traced in Nairobi.

The Appellant's defence was that her parents left the house in question for her. That on 13th January 2011 she went home to attend her cousin's burial and found the locks to the house had been changed. She said it was PW1 her sister in law who had changed them. That PW1 and herself were unable to deliberated and resolve the issue because PW1's husband was not at home. The Appellant said she returned to Nairobi. She said that later on, she was arrested by a strange group of people who were accompanied by PW1 and informed that she had torched a house.

The appellant called 4 witnesses. DW2 was M'Itere her niece since Appellant was her uncle's daughter and owner of the house was Appellants father according to DW2 his evidence was the house alleged to have been torched was still there and that it belonged to the Appellant.

DW3 was David a brother to the Appellant. He told the court that the house subject of the case belonged to the Appellant. He testified that the Appellant had gone home for burial and that she reported to him, their sisters DW4 and DW5 and other family members that she was unable to sleep in her house because the locks had been changed. DW4 Lucy confirmed that evidence. Both DW3, 4, and 5 all siblings stated that they advised the Appellant to leave for Nairobi same day so that the family could meet at a later stage to deliberate on that matter.

I have carefully considered the appellants appeal and have reevaluated and reanalyzed the evidence adduced before the trial court and have come to my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses and have given due allowance for same.

Mr. Gichunge represented the Appellant in this appeal while Mr. Moses Mungai, the learned state counsel represented the state.

Mr. Gichunge urged grounds 1 to 7 of the Petition together, and abandoned the eighth ground. Mr. Gichunge urged that the charge of attempted arson could not stand because what Appellant is alleged to have attempted to set on fire is not listed under section 332 of the Penal Code. He urged that since what caught fire were fertilizer, record player, lamp and a stove the charge could not stand.

Section 333 (a) of the Penal Code under which the appellant was convicted states:

333. Any person who -

(*a*) attempts unlawfully to set fire to any such thing as is mentioned in section 332;

That section must be read together with section 332 of the Penal Code which stipulates:

"332. Any person who wilfully and unlawfully sets fire to -

(*a*) any building or structure whatever, whether completed or not; or

(*b*) any vessel, whether completed or not; or

(*c*) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

(*d*) a mine, or the workings, fittings or appliances of a mine,

is guilty of a felony and is liable to imprisonment for life."

Mr. Gichunge's suggestion that one must have attempted to set fire to a building, as in the facts of this case for offence to establish is a very strict interpretation of section 332 of the Penal Code. It is enough if the thing sought to be set on fire may lead to the burning of a building or vessel or whatever structure near it. The facts for the prosecution case was that certain properties inside a room in the house in question were set on fire. Had the fire not been put out, the room even entire house may have burnt. Nothing turns on this point.

Mr. Gichunge raised issue with certain inconsistencies and contradictions in the prosecution case. Some of the alleged inconsistencies are really petty and do not go to the substance of the prosecution case.These include who reported the matter the police what is however clearly substantive is what the relationship between the Appellant, PW1, 2 and DW3 and 4 was. There was controversy regarding this all important fact. PW2 and 1 were a brother in law and sister in law respectively by virtue of fact PW2's brother was husband of PW2's brother was husband of PW1. Their evidence was that the Appellant was their niece. PW4 said the Appellant was her cousin. PW4 was daughter of PW1.

DW3, 4 and 5 are all siblings testified that the Appellant was their sister and a sister to PW2.There was controversy in the evidence before the trial court. The learned trial magistrate not only failed to resolve it; he did not even mention it in evidence. The learned trial magistrate clearly took the evidence of the prosecution witnesses as the truth, therefore failing to internalize the critical issues which arose in the case for the prosecution and the defence.

The bone of contention in this case was a house, the one alleged to have been set on fire by the Appellant, while the prosecution witnesses alleged that the Appellant slept in the house between 12.10 am and 1 am after PW1 and 4 opened it for her. The prosecution case was that she set the fire inside one of the rooms because PW2 saw her standing outside as the fire burnt. PW2 says she then ran away as he approached her. In his evidence PW2 was categorical that the house belonged to his elder brother not Appellant. He also said that the Appellant was not his sister but a niece PW1, the complainant made a bad situation once because not only did she deny that the Appellant was her sister in law or that she was the owner of the house. She suggested that the Appellant was an illegitimate child who just grew up in the home with her mother. PW1 also worsened the prosecution case by saying that all houses in that home belonged to her.

The burden lay with the prosecution to prove its case against doubt. There is no proof that the Appellant slept at the home in question on the night of the alleged time. PW3 who was the person who alleged to have seen her last said she left his house at 10 pm. PW1 and 4 said Appellant went to them home at 12.30 a.m. DW3,4 and 5 told court they advised the Appellant to return to Nairobi on 13th January, 2007 after the burial. The Appellant's own defense was that se indeed returned to Nairobi same night as agreed with her siblings.

The evidence of whether or not the Appellant left for Nairobi on 13th January 2007 soon after the burial of their cousin was not resolved. The reason the learned trial magistrate did not consider that issue is clear from the judgment. The learned trial magistrate did not analyze the defence case. In fact, he did not consider evidence adduced by the defence witnesses at all and neither has he summarized their evidence in the judgment.

It is trite law that a defence of an accused person must be considered first before a decision to accept or reject it is made. Failure to do so may affect the judgment.

The most important issue is this case is that there was controversial evidence about the ownership of the

house in which the fire was allegedly set up. It was important for the learned trial magistrate to determine whether or not the house was bequeathed to the appellant by her late father. The importance of resolving that controversy is because the ownership of the house was tied up with the proof of guilt. If the house belonged to the Appellant then she ought not to have been charged with the offence as the one named in the charge as the owner of the house would lack locus standi to complain. No one can be charged with maliciously damaging their own property or of unlawfully attempting to set fire to their own property.

I find that important issues which introduced controversy in the case were neither considered nor resolved. It is the duty of a trial court to try and resolve controversy in the case……..More importantly their was doubt as to the ownership of the property attempted to be destroyed in this case. I find that the doubt went to the very substance of the charge. The learned trial magistrate ought in all the circumstances of the case given doubt to the prosecution case. He failed to do so. The conviction entered against. The Appellant was unsafe and ought not to be allowed to stand.

I have come to the conclusion that the Appellants appeal must succeed. Consequently I allow the appeal, quash the conviction and set aside the sentence. The Appellant was on bond. The bond is cancelled and surety discharged. Any security deposited by the surety should be returned to him.

Those are my orders.

SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2013.

J. LESIIT
JUDGE