



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 134 OF 2012**

**SIMON KIMUTAI KIPROTICH.....  
APPELLANT**

**VS**

**REPUBLIC.....RESPON  
DENT**

**(Appeal from the Judgment of the Chief Magistrate, Kitale dated 17<sup>th</sup> December 2013 in Criminal Case No 2773 of 2010)**

**JUDGMENT**

**Introduction**

The Appellant, SIMON KIMUTAI KIPROTICH was charged jointly with eight (8) others with the offence of arson contrary to Section 332 (a) of the Penal Code, the particulars of the charge being that on the 4<sup>th</sup> Day of October 2010 at Kumot Village in Trans Nzoia County, jointly with others not before court, he willfully and unlawfully set fire to buildings namely dwelling houses valued at Kshs. 300,000 belonging to Kimaiyo Rutto. The Appellant and his co-accused faced similar charges on account of dwelling houses belonging to Thomas Tirop, Joseph Maiyo, Michael Murei, Jonathan Kiptisyo and Joseph Sitienei.

The Prosecution case was that one Stephen Sitienei, a son of Kimaiyo Rutto, the 1<sup>st</sup> Complainant differed with one Gladys at an illicit liquor den. Thereafter, Gladys became ill and died upon which the entire family of Kimaiyo Rutto was blamed for causing Gladys’ death through witchcraft. The villagers threatened to kill the family of Kimaiyo Rutto prompting evacuation of the family members to Tuigon Police Post. PW 4, PW 5 and PW 9 however stayed behind and hid in the darkness within the village. By close of day on 4th October 2010, all the houses belonging to Kimaiyo Rutto’s family had been burnt down.

The Appellant and his co-accused were tried at the Chief Magistrate’s Court at Kitale. The trial court acquitted the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> accused but the Appellant who was the 1<sup>st</sup> accused alongside the 2<sup>nd</sup> and 3<sup>rd</sup> accused were each convicted and sentenced to concurrent prison terms of ten (10) years on each of the five (5) counts.

**The Appellant’s Appeal**

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 21<sup>st</sup> December 2012, raising the following Ground of Appeal:

- a. That the learned trial Magistrate erred in convicting the Appellant on weak and contradictory evidence;
- b. That the learned trial Magistrate erred in law and fact by failing to evaluate the Appellant's defence ;
- c. That the learned Magistrate erred in law and fact by failing to apply the appropriate standard of proof;
- d. That in convicting the Appellant, the learned trial Magistrate was motivated by extraneous factors.

The Appeal was heard on 17<sup>th</sup> October 2013 with Mr. Kimani appearing for the Appellant and Mr. Konga for the State. Counsel for the Appellant submitted that the offence was not proved beyond reasonable doubt. The trial Magistrate relied on the evidence of PW 5 and PW 9 yet he doubted that PW 5 was able to identify the Appellant since the witness was hiding in the home of a neighbour while PW 9 could not have identified the Appellant since she fled from the scene to her parents' home. PW 9 told the Court that she saw the Appellant the day after the first round of arson. She did not testify as to which particular house the Appellant had set on fire.

### **Opposition by the State**

In opposing the appeal, Mr. Konga learned State Counsel submitted that the trial court properly relied on the testimony of PW 9 to the effect that she saw the Appellant moving around the scene of crime. The Appellant was therefore culpable for aiding and abetting the crime.

### **Finding and Determination**

The single issue for determination in this appeal is whether the Appellant was positively identified at the scene of crime either committing or abetting and aiding the crime. PW 5, Jackline Cheronu testified that while hiding at the home of a neighbor, she saw the Appellant moving round the compound. PW 9, Mary Tirop who had taken refuge at her parent's home on 3<sup>rd</sup> October 2013 came back to her home on 4<sup>th</sup> October 2013 and saw the Appellant going round the place and then back to the group. The question then is whether this was adequate evidence to convict the Appellant.

In his judgment, the learned trial Magistrate concluded that:

***“It does not therefore matter that the first accused (read Appellant) merely patrolled the area for others...All this amounts to aiding and abetting.”***

From the evidence on record, there was a large crowd of people numbering between 200 and 300, at the scene of crime. To my mind, the scene was chaotic and it is possible that villagers driven by fear, fury or mere curiosity were milling around the scene. Apart from the evidence by the Prosecution that the Appellant was seen at the scene of crime, there was nothing more to link him with the crime of arson either through active torching of the houses or by aiding and abetting. In the circumstances I find that the Prosecution did not prove its case against the Appellant beyond reasonable doubt and his conviction was therefore unsafe. Consequently, the Appellant's appeal is allowed, his conviction is quashed and the sentence set aside. I direct that the Appellant be set at liberty forthwith unless otherwise lawfully held.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT KITALE THIS 7<sup>TH</sup> DAY OF NOVEMBER 2013**

**J.R KARANJA**

**JUDGE**

**In the Presence of:**

.....**Appellant**

.....**Respondent**