REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal 21 of 2011

PATRICK NGOKA CHACHA ……..…….……..…….. APPELLANT

AND

STATE …… RESPONDENT

(Being an appeal from conviction and sentence on 3rd February, 2011 by Hon. J. Ndururi, SRM in

Kehancha SRM CR. Case No. 5 of 2008- Republic –vs- Patrick Ngoka Chacha and Wilson Muhiri Mwita)

JUDGMENT

1. The appellant herein, Patrick Ngoka Chacha who was 1st accused in the court below was charged in the first count with the offence of arson contrary to **section 332 (a)** of the **Penal Code** and in the second count with the offence of grievous harm contrary to **section 234** of the **Penal Code**. The particulars of the offence are that on the night of 20th and 21st March, 2007 at Siabai Sub-location of Kuria District, the appellant together with one Wilson Muhiri Mwita (2nd accused in the lower court) and others not before court, willfully and unlawfully set fire to six dwelling houses, 6 sheep, 4 goats, a dog, a hen and a duck all belonging to JAMES MARWA MWISE by shooting the said James Marwa Mwise on the left hand.

2. The 2nd accused, who faced a separate charge of arson contrary to **section 332 (a)** of the **Penal Code** jumped bail during the pendency of the case. This forced the prosecution to withdraw the case against the said 2nd accused.

3. The appellant pleaded not guilty to the two counts, forcing the case to proceed to full trial. The prosecution called 6 witnesses.

4. PW1 was Julius Mwise Moherai (Julius). He testified that at about 1.00 a.m. (though the record reads 1.00 p.m.) he was asleep in his home together with his wife Agnes Muhoni Mwise (Agnes) who testified as PW3. He was woken up by the noise of the door to his son's house breaking down. The son is James Marwa Mwise (James) PW2. Julius heard the appellant whom he knew well asking James to show him where his father was sleeping. On hearing that question, Julius woke up armed himself with a spear and a panga and took his position near the front door. Then there was a gunshot, followed by another. Then the door to Julius' house was completely broken down. According to Julius, it was the appellant who cut the door down. The appellant then fired some shots into the house. The appellant was armed with a long gun and was swearing that he would kill Julius. The appellant also threatened to set Julius' house on fire. The appellant set the house on fire using a match box, as he ordered the other members of the gang to surround the house so that Julius and his family could not escape, All the 6 grass

thatched houses in Julius' compound were set ablaze.

5. Both Julius and his wife escaped through the rear door of their house. Julius went and hid in the cattle boma. The appellant was together with Paul Munyolo, Mwikwabe Chacha and others whom Julius could not identify. All the 6 houses were razed to the ground and along with them the household items that are set out in the charge sheet.

6. PW3, Agnes, supported the testimony of Julius and said that she was able to recognize the voices of the appellant and other members of the gang as they told Julius that he (Julius) had run out of luck. She also said she heard the appellant saying that they would set the house on fire and they made their threat come true when they set the house in which Julius and Agnes were on fire. When Agnes ran out of the burning house through the back door, she went and hid herself in the cattle boma from where she was able to recognize the appellant and his colleague Paul Munyolo (still at large). The appellant had a gun in his hand while Munyolo carried a sword. There were 2 other people whom she could not identify.

7. After the attackers had left, Agnes raised an alarm. Neighbours came to the home and witnessed the burnt homestead. They also saw that James Marwa Mwise was shot on the left hand near the wrist.

8. James Marwa Mwise testified as PW2. On the night in question, he was in the house with his 5 year old brother who was feeling unwell. When the young boy began to vomit and diarrhoea, James woke up and lit a lamp. Just then the door to the grass thatched house where the two were was brought down suddenly and 3 people entered. Two of them carried a gun each while the third one carried an axe. James identified all of them with the help of light from the burning lamp. The appellant asked James to let him know where his father Julius was sleeping. When James sought to know why the appellant was asking for his father, Paul Munyolo told the appellant to shoot James. James knelt down with his hands up as he pleaded for mercy. Then there was a gunshot wound and James fell down. He lay there for a long moment until he heard the smell of a burning house. James crawled out of the house. He then realized he had been shot on the left hand.

9. After the attackers had left, Julius reported the matter to Ntimaru Police station as James was taken to Ntimaru Health Centre and later transferred to Migori District Hospital. The case was later transferred from Ntimaru Police Station to Kehancha CID office where Number 54791 Police Constable Patrick Nyongesa, PW5, took over the investigations. PW5 stated that after receiving the investigation file from Ntimaru Police station on 11th March 2008 he recorded statements from witnesses. He made arrangements for the scene of crime to be photographed as the manhunt for the suspects also commenced. The suspects' names were given by Julius and James. The appellant was arrested with the help of the OCS Ntimaru Police station. PW5 issued a p3 form for James which was filed by Dr. James Ochieng. The P3 form was produced by Dr. Mosi Philip PW6. According to Dr. Mosi, James sustained a fracture of the radius ulna joint. By the time James was examined by Dr. Otieno the injury was about 5 months old. The doctor opined that the probable weapon used to inflict the injury was a gun. The assessed degree of injury was grievous harm. The p3 form which was duly filled and signed by Dr. Otieno was produced as P. Exhibit 8.

10. At the close of the prosecution case the appellant was put on his defence. He decided to give an unsworn statement. He called 2 witnesses.

11. The appellant testified that on the material night, he was not at home, having left home on Monday 19th March, 2007 to visit his friend, Pastor Musa Wambura who testified as DW2. The appellant said he made the visit together with his wife Berita Gosensere Ngoke, DW2. The appellant and his wife spent 2 nights at Pastor Musa's house before he went to see his advocate regarding a case that was coming up at Kilgoris court on 21st March 2007. He went to the court at Kilgoris on 21st March, 2007. Copy of proceedings at Kilgoris court on 21st March, 2007 were produced as D. exhibit 1. The appellant said that he had 2 criminal cases at Kilgoris, namely criminal case Nos. 629 of 2005 and 420 of 2005. He said criminal case number 420 of 2005 was in respect of a land dispute between himself and Julius. He also said there was another criminal case Number 589 of 2000 in which he had been acquitted. The appellant also talked of civil case number 234 of 2002 in which he was the successful litigant and criminal case

number 323 of 2009 concerning the same land. In the latter case, he was out on bond. The appellant denied having committed the offence.

12. DW2 was Berita Gosensere Ngoke, wife to the appellant. She reiterated the evidence given by the appellant and stated that when she and the appellant went to Kilgoris court for his case on 21st March, 2007 he was arrested. During cross examination, DW2 said she was left at Pastor Musa's house at Migori when the appellant went to court at Kilgoris on 21st March, 2021.

13. The next defence witness was Pastor Musa Wambura who testified as DW3 (though the typed proceedings show he was DW2). His testimony was that on 19th March, 2007 at about 7 pm the appellant, DW2 and their 2 children arrived at his home. The visitors stayed at his home for 2 nights before the appellant went to Kilgoris court on 21st March 2007. Pastor Musa stated that the appellant and his wife went to the court together, leaving their 2 children behind. At about 4.00 p.m Berita informed Pastor Musa by way of telephone that the appellant had been arrested.

14. When put under cross examination Pastor Musa testified that he had no documents to prove that he was a pastor of the Church of the Living God.

15. After careful analysis of the evidence that was placed before the court, the trial magistrate was satisfied that the appellant was properly recognized by the two complainants, Julius and James and also by Agnes, as being among the group of people who attacked their homestead during the material night. The trial court also found that it was the appellant who shot James on the left forearm before proceeding to set the homestead of the complainants on fire. The trial magistrate was satisfied that the attack by the appellant was motivated by the land dispute between himself and Julius. The court found the appellant guilty as charged on both counts, convicted him accordingly under section 215 of the CPC. After hearing submissions by the prosecution on the appellant's previous criminal antecedents and the appellant's own submission in mitigation of sentence, the trial magistrate sentenced the appellant to serve seven (7) years imprisonment on each count. The sentences were to run concurrently.

16. The appellant was aggrieved by both conviction and sentence. He has come before this court on appeal on grounds that:-

1. The learned Trial Magistrate erred in law and fact in convicting and sentencing the appellant without considering that there was no proper identification.

2. That learned trial Magistrate misdirected himself when evaluating the evidence on record before occasioning miscarriage of justice.

3. The learned trial magistrate erred in law and fact in finding the appellant guilty of the charges without considering that the complainants were likely to frame up issues because of land dispute.

4. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant on insufficient evidence on record and prove to the charges leveled against the appellant.(sic)

5. The learned trial magistrate erred in law and fact in holding that voice recognition has sufficient to warrant a conviction and sentence.(sic)

6. The learned trial magistrate erred in law and fact in dismissing the appellants defence.

7. The learned magistrate erred in law and fact in convicting the appellant where the evidence is not corroborative.

8. The sentence imposed upon the appellant was improper, unlawful and excessive in the circumstances and the same should be varied and/or set aside.

The appellant prays that the conviction be quashed and the sentence of 7 years' imprisonment be varied and/or set aside.

17. At the hearing of the appeal I heard submission from Mr. Anyona Mbunde for the appellant and Mr. Gitonga, learned state counsel for the respondent. I have also carefully reconsidered and evaluated the evidence afresh. I have also carefully considered and weighed the judgment of the trial court. This is a first appeal and on this appeal the duty of this court is to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. A first appeal is like rehearing the case, the only difference being that this court has no chance of seeing and hearing the witnesses who testified before the trial court. The duty of the first appellate court has been defined and redefined by the both Court of Appeal and the High court in many a decision such as **Okeno –vs- Republic [1972] EA 32**, **Pandya –vs- Republic [1957] EA 336** and **Roria –vs- Repubic [1967] EA 583**. In the **Pandya case**, (above) the court of Appeal for East Africa said the following concerning the duty of the first appellate court:

"Even where, as in this case, the appeal turns on a question of fact, the

Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong ----. When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanor, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanor, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

18. During submissions, counsel for the appellant compressed the 8 grounds into one ground and contended that because the alleged offence was committed at night the circumstances prevailing at the time did not support positive and error-free identification of the appellant. Counsel submitted that the purported voice recognition of the appellant by both Julius and Agnes fell short of establishing that the appellant was present during the alleged attack. Counsel also contended that both Julius and Agnes admitted to not having seen the appellant setting the houses ablaze, and further that neither of them saw the appellant shoot James. Counsel also questioned the witnesses' contention that they ran out of the burning houses and hid in the cowshed which was in the middle of the compound to be an unpractical contention since the houses had already been set ablaze. counsel urged the court to accept the defence of alibi since the same was not challenged by the prosecution, and to further find that the trial court gave no reasons for dismissing the alibi.

19. Finally, counsel for the appellant submitted that the trial magistrate took into account matters that were extraneous to the case in reaching the conclusions that the prosecution had proved its case beyond any reasonable doubt against the appellant,

20. In response, counsel for the respondent submitted that the appellant was properly identified/recognized with the aid of light from the lantern which the appellant and his companions had, and also with the help of light from the lantern which was burning in James' house. Secondly that Julius was able to clearly identify the appellant with the help of light from the burning houses as he (Julius) hid at the cowshed.

21. Regarding the existence of the land dispute between the appellant and Julius, counsel submitted that the dispute provided a proper motive for the appellant to attack Julius and his family. It was contended on behalf of the respondent that contrary to what the appellant alleges, the 3 key prosecution witnesses, namely Julius, James and Agnes corroborated each other in every material particular, such that there was no doubt that he appellant was present at the scene, that he shot James in the left arm and that Julius saw him set one of the houses on fire using a match box.

22. Further, it was contended on behalf of the respondent that the defence of alibi did not shake the prosecution's evidence that the appellant was clearly identified at the scene of crime both by his voice and physically, first by James and secondly by Julius and Agnes. On sentence, counsel submitted that the term of 7 years imprisonment was neither harsh nor excessive. Counsel urged the court to find that this appeal lacks merit and to dismiss the same accordingly.

23. In reply counsel for the appellant submitted that there is no corroboration of evidence as between the key witnesses, and in particular that the child who was said to be inside the same house with James was never called as a witness. Finally it was submitted that the burden of disproving the defence of alibi rested with the prosecution and not with the appellant.

24. After carefully considering all the above, I am satisfied that this appeal has no merit. I am alive to the fact that the attack took place in the night and that in considering evidence of identification and/or recognition of an assailant in the night and especially where the circumstances are difficult, the court has to be cautious in accepting such evidence.

25. I shall first deal with the defence of alibi. It is trite law that an accused person does not assume the burden of proving a defence of any alibi he may put forward. This burden always lies squarely on the prosecution save in cases where the section creating the offence specifically places such burden on the accused or in cases where the court justifies that the alibi cannot be sustained. See the case of **Njuki & 4 others –vs- Republic [2002] 1 KLR 771**.

26. In the instant case, this court has considered the defence of alibi raised by the appellant and finds that the same cannot be sustained. The attack took place on the night of 20th and 21st March, 2007. The prosecution evidence by James was clear that on that night, the appellant broke into the house where James was. The appellant was in the company of others and in particular he was accompanied by Paul Munyolo. James stated very clearly that when the appellant, Paul Maul Munyolo and the 3rd gangster broke into the house, a lamp which James had just lit was alight. James testified that the appellant spoke to him by asking him to say where Julius was. James spoke back to the appellant when he sought to know why the appellant, who was armed with a gun, would be asking for Julius. It was at that point that the appellant was ordered by Paul Munyolo to shoot James and he did. Later on when the appellant broke into the house where Julius was, Julius also recognized the appellant who he

said was armed with a long gun. According to Julius, the appellant also carried a lamp which emitted sufficient light to enable him recognize the appellant. Furthermore, both Julius and Agnes said they were able to recognize the appellant by his voice, for the appellant is someone who was well known to the family of Julius. I am satisfied that the evidence by the 3 key witnesses completely displaced the alibi defence put forward by the appellant.

27. On the question of identification, I have considered what the Court of Appeal said in the now famous case of **Wamunga –vs- Republic [1989] KLR 424** to the effect that courts should be cautious in treating evidence of recognition where circumstance may be difficult. Also see **Odhiambo –vs- Republic [2002] KLR 241**where the Court of Appeal said that the court should receive evidence of identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. In the instant case, I am persuaded that the circumstances were conducive to proper and positive identification. The facial identification coupled with voice recognition places the appellant squarely at the scene of crime on the night of 20th/21st March 2007. I believe the testimony of Julius that the attack on his house by the appellant was meant to intimidate Julius so that he could not attend court on 21st March to testify against the appellant in criminal case no. 420 of 2005.

28.The last issue is one of sentence. The appellant contends that the sentence of 7 years imprisonment was harsh and excessive. The question to ask is whether there are sufficient reasons to warrant an interference with the said sentence. An appellate court can only interfere with the sentence if it appears to it that the trial judge either applied the wrong principles in passing the sentence or that the trial judge took with account matters it ought not to have taken into account or failed to take into account factors which ought to have been taken into account or if the sentence is manifestly excessive. See generally **Wagude –vs- Republic [1983] KLR 569**; **Kimaru –vs- Republic [1983] KLR 388** and **Dismas –vs- Republic [1984] KLR 634.**

29. In the instant case, I am persuaded that a term of 7 years imprisonment was well founded considering that the maximum sentence under the Penal Code upon conviction for an offence of grievous harm is life imprisonment.

30. The upshot of what I have said above is that this appeal is devoid of any merit on both conviction and sentence. The same is accordingly dismissed. R/A within 14 days.

31. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI
JUDGE

In the presence of

Present in person for appellant

Mr. Mutai (present) for respondent

Mr. Bibu - Court clerk

RUTH NEKOYE SITATI

JUDGE