REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 171 of 2010

WILLY KIMUTAI RUTO.....APPELLANT

AND

REPUBIC.....RESPONDENT

[Being an appeal from the judgment of Hon. A. Alego, Senior Resident Magistrate dated 12th November, 2010

at Eldoret Chief Magistrate's Court in Criminal Case No. 6304 of 2009]

JUDGMENT

The appellant, **Willy Kimutai Ruto**, was charged, tried and convicted of setting fire to crops contrary to section 334 (a) of the Penal Code in Eldoret Chief Magistrate's Court Criminal Case Number, 6304 of 2009. It was alleged, in the particulars of the charge, that the appellant, on the 11th day of October, 2009, at Ngenyilel Village in Uasin Gishu District within the Rift Valley Province, willfully and unlawfully set fire to crops namely three stacks of maize valued at Kshs 20,000/=, the property of **Margaret Wambui** (hereinafter "**the Complainant**"). The appellant pleaded not guilty to the offence and after a trial, he was convicted and sentenced to five (5) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant has appealed on nine (9) grounds which were argued by Learned Counsel **Keter**. In a nutshell, Learned Counsel argued that the evidence adduced did not support the charge and further that the evidence of identification was not positive the offence having ben committed at night.

On sentence, counsel submitted that the same was manifestly excessive in the circumstances given that the appellant was said to be a first offender and is asthmatic.

The appeal was opposed by **Mr. Chirchir** , the Learned Senior State Counsel who represented the respondent State. He submitted that the evidence adduced by the prosecution supported the charge and that the appellant was identified by recognition. With regard to sentence, learned Counsel submitted that in view of the value of the property razed down by the fire, the sentence of five (5) years was harsh.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence which was adduced before the Learned Magistrate and arrive at its own independent determination as to whether or not the conviction should be upheld. Of course, I bear in mind that the learned trial magistrate saw and heard the witnesses which advantage, I do not have. In **Gabriel Njoroge –vrs- Republic [1982-1988] 1 KAR 1134,** the Court of Appeal observed as follows:-

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the case are entitled as well on the questions of fact as on the questions of Law to demand a decision of the court of the first appeal, and as such the court cannot excuse itself from the task of weighing evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect."

The prosecution in this case mainly relied upon the testimony of **Samuel Lihanda Muibondi** (P.W.2) and **David Kirwa** (P.W.3). P.W.2 stated that at the material time, he was employed as a watchman by the complainant. His duty was to watch over the complainant's maize then grown on a five (5) acre piece of land. While on duty on 11th October, 2009 at 10.00 p.m., he saw the appellant shout that he would kill and behead somebody that day. As he shouted, he called out the names of the complainant and his wife (P.W.2's wife). P.W.2 then saw the appellant enter into his brother's house and exit therefrom with fire which he used to put the complainant's maize ablaze. P.W.2 told the Lower Court that he was only five (5) metres from the appellant and he saw him using light from his torch. P.W2 then went to report the incident to the village elder, (P.W.3). The latter confirmed that on receiving the report, he visited the scene where he found the appellant and interrogated him. According to P.W.3, the appellant admitted setting the complainant's maize ablaze but blamed the action on drunkenness. The complainant (P.W.1) confirmed that her maize worth Kshs 20,000/= was set ablaze and that the appellant was identified by P.W.2.

P.C **Charles Atee** (P.W.4) testified that he re-arrested the appellant and charged him as already stated.

Put on his defence the appellant, in a sworn statement, denied committing the offence and alleged that on the material night, he attended a circumcision ceremony and went to sleep only to be awakened by the village elder and taken to the police station. The appellant called two witnesses, **Leonard Kibet** (D.W.2) and **Benjamin Magut** (D.W.3). The two gave similar testimony that on the material night, they were with the appellant at a circumcision ceremony until the next morning.

The appellant has raised the issue of the evidence adduced not having supported the charge. He does so, because in the charge sheet, the stacks of maize are alleged to have been set on fire as opposed to a maize crop being set ablaze as per the testimony of the witnessed. The discrepancy in my view was not fatal to the charge as the appellant was not prejudiced in any way. In any event, the charge particulars clearly stated that what had been set ablaze were cultivated crops and the mention of stacks of maize was, in my view, a mere mis-description. The officer who prepared the charge sheet may have intended to estimate the value of the maize if they had been placed in stacks. I have no difficulty in finding that the description did not occasion a failure of justice.

On the complaint that the evidence of identification was not positive, no foundation for the same was given. The incident indeed took place at night. But P.W.2 was in no doubt as to whom he saw that night setting the complainant's maize ablaze. He said he used the light of his torch to identify the appellant who was a mere five (5) metres away from him. Besides, the torch light P.W.2 knew the appellant well. In his own words:-

"Accused has been my neighbor. I bought land from them. So I have known him todate".

P.W.2 also heard the appellant shout the names of the complainant and his wife and then saw him enter into his brother's house where he got the fire with which he set the complainant's maize ablaze. Then there was the testimony of the village elder (P.W.3). When he visited the scene he found the appellant there and he confirmed setting the maize ablaze due drunkenness.

In the premises, I have come to the conclusion that, there was no mistake in the identification of the appellant. The same evidence also clearly rebutted the alibi defence put forward by the appellant. The Learned trial magistrate in my judgment properly rejected that defence.

In view of my above analysis, I am satisfied that the learned trial Magistrate's conviction of the appellant

was safe. The appeal against conviction is accordingly without merit and is dismissed.

On sentence, I can only interfere if the trial Magistrate's exercise of discretion in that regard was based on a wrong principle or if she overlooked material factors or if the sentence is manifestly excessive in view of all the circumstances. (See **Ogah S/O Owuor =vrs= republic [1954] EACA 270**). The appellant was a first offender and suffers from ulcers and asthma. The appellant further admitted to P.W.3 that he committed the offence due to drunkenness. The value of the maize set ablaze does not appear to have been considered by the Learned trial Magistrate. In the premises, I am entitled to interfere. But before doing so, I call for a Probation Officer's Report. This case will therefore be mentioned on 19th September, 2012 for the same.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Keter for the appellant and **Mr. Chirchir** for the Republic.

F. AZANGALALA
JUDGE.
5/09/2012.