REPUBLIC OF KENYA

IN THE COURT OF APPEAL

at KISUMU

Criminal Appeal No. 156 of 2011

BETWEEN

VALENCE MOMANYI OGARO ……..…..….... APPELLANT

AND

REPUBLIC …….……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga, J.) dated 22nd July, 2010

In

H.C.CR.A. NO. 109 OF 2009)
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JUDGMENT OF THE COURT

Following his arrest on *27th March, 2008* for the offence of arson contrary to ***section 332(a)*** of the Penal Code and grievous harm contrary to ***section 234*** of the same Code, ***Valence Momanyi Ogaro***, the appellant was kept in police custody until *4th April, 2008*, when he was presented before Mrs. Oganyo, Senior Resident Magistrate, at Kilgoris charged with the aforesaid two offences. He pleaded not guilty. He was remanded in custody, but when the case came for the second mention on *5th May, 2008*, the appellant raised a complaint relating to his long incarceration in police custody before he was taken to Court. The prosecution was asked to respond to the complaint, which it did on *6th May, 2008*. The prosecutor explained that the delay occurred because the appellant was facing two cases, one which was being handled by Keroka Police Station and the one before Kilgoris court. That court accepted that explanation and in effect dismissed the appellant's complaint which we think was made pursuant to the provisions of ***section 72*** of the Old Constitution of Kenya.

The decision of the trial magistrate was in writing and the appellant was given ***14 days*** to appeal against it if he felt aggrieved. He did not appeal, nor did he raise the issue on his first appeal against his

subsequent conviction on both the arson and grievous harm charges he faced before that court. In this second, and probably his last appeal, the appellant has revisited the issue. It is our view; however, it is not open to him to raise the matter again having failed to appeal against the decision given by the trial Magistrate on the issue. An explanation was given by the prosecution as was envisaged by ***section 72 (3)*** of the old Constitution, since repealed.

The case against the appellant before the trial Magistrate was that the appellant had been engaged to split wood into timber using a power saw, by the husband of one ***Sofia Lobi Peter*** (PW1), but on *14th February, 2007*, he was assigned the duty of making floor of PW1's house at Olomismis in Transmara District. The house had a grass thatched roof and earth walls.

It had more than one room. Inside one of the rooms, there was a baby sleeping while in another room one Manekete was smearing the walls with mud. In the room where the appellant was working there was a power generator and the power saw the appellant had been using. There was also petrol in a jerrican.

At about 2 pm a fire broke out from the room in which the petrol was. PW1 did not know how the fire started. She saw the fire on the roof while outside the house. Only the appellant and the baby, who was then about four months old, were inside the house, as Manekete had finished the smearing and was washing her hands outside the house.

It was PW1's evidence that when she saw the fire she rushed indoors, caught hold of her baby, and as she was rushing outside, she met the appellant coming out from another room. Earlier, she had seen the appellant trying to splash something on to the fire. She believed the appellant was splashing petrol over the fire and shouted saying *"the Kisii guy"* had burnt her house. As PW1 rushed out cuddling her baby, she slipped and fell over the jerrican of petrol and the petrol spilled over her skirt. The skirt caught fire and when she reached the outer door she threw forward the baby, she removed her blouse to obviate the fire spreading to the upper part of the body, but before she could remove her skirt she was badly burnt on her lower body and hands. She was later rushed to Tenwek Hospital. Happily, the baby was not affected.

The appellant allegedly escaped and was not seen until on or about *27th March, 2008*, when he was spotted at Keroka and arrested. The person who arrested him did not testify, but the appellant did not deny he was arrested at Keroka as alleged.

In his defence the appellant gave evidence on oath. He admitted he was in the burnt house on the material day; was working on the floor removing excess soil and trying to compact the floor. In the course of doing so a fire broke out from an adjacent room. He did not know what caused it. PW1 was inside that room and he heard her calling him to go and rescue her, but he could not because the fire was much. He later saw her struggling to get out while carrying a jerrican of petrol.

Her clothes had caught fire. Despite entreaties to her to drop the jerrican, she did not listen. Eventually she managed to get out but not before she had been badly burnt, mainly on the lower part of her body. She blamed him for failing to assist her. She was taken to hospital. He remained around until evening. Nobody came to the house and not knowing what to do next, he decided to return to his home at Keroka, Kisii. When he later met PW1, it was at Keroka. They engaged in a friendly talk in the course of which she admitted it was her carelessness with petrol which caused the fire which eventually burnt her house and herself. Later, he was arrested in connection with the fire. He stated that PW1 was using him in her business of buying and selling narcotic drugs and his arrest was related to the trade.

Under cross-examination, the appellant admitted he had been hired by PW1's husband to split for him some timber. After he left to return to Keroka after the house burnt, he did not go back to check on PW1.

The trial magistrate, R.A. Oganyo, SRM, in her judgment found as fact that PW1 was seriously burnt by a fire which also razed down her house. She inferred from the appellant's conduct of disappearing from the scene after the house burnt and PW1 suffered severe burns from the fire, that he

was the one who set the house on fire. She rejected the appellant's insinuation that PW1 turned against him when her drugs which he and another person were peddling on her behalf were seized by the police while the two were on transit towards Sotik. She did not make any specific finding on how the appellant was responsible for PW1's burns other than it being as a result of PW1 rushing indoors to save her baby and in the process she was burnt.

In the end the trial magistrate found the appellant guilty as charged, convicted him and sentenced him after asking for and obtaining a probation officer's report which was said to be unfavourable to the appellant. That report is, however, not part of the record of appeal. A prison term of life imprisonment was meted out to the appellant.

In his first appeal, the appellant complained, among other things, that he was arraigned in court after the stipulated twenty four hours after arrest in violation of his constitutional right as enshrined under ***Section 72(3) (b)*** of the constitution, his conviction was not established to the standard required and the evidence relied upon was both contradictory and unreliable, and that his defence was not given due weight.

In his judgment, Musinga, J. like the trial magistrate, considered the circumstances under which the fire burnt PW1's house and herself; the conduct of the appellant of disappearing when the house was still burning and the fact that the appellant was seen splashing on the house with what was believed to be petrol, when the house was on fire. He rejected the appellant's defence and in the end he affirmed the trial court's decision. Like the trial magistrate, he took an adverse view of the appellant's antecedents as revealed in a probation officer's report and therefore found no basis for interfering with the sentence which had been imposed on him.

This is the appellant's second appeal, and as we stated earlier, it could be his last. In his memorandum and supplementary Memorandum of Appeal, several grounds of appeal have been raised, but when looked at minutely, they may be summarized into the following:-

(1) There was variance between the name of the complainant given on the charge sheet and the name of the one who testified.

(2) The High Court did not re-evaluate the evidence which was presented at the trial, and instead glossed over the evidence.

(3) The evidence against the appellant was purely circumstantial and did not meet the threshold required to sustain a conviction.

(4) The two courts below improperly relied on a probation report on the appellant's previous record instead of a proper record of previous convictions.

On the first ground, the names of the complainant on the charge sheet are indeed not the same as those of the person who testified as the complainant. It would appear to us that the name Sofia Otan'go was picked from the P3 form which was filled by ***Dr. Robert Mutula*** (PW2), who examined the complainant. The injuries he identified on the person he examined were the same as those the person who testified as complainant had. It has not been suggested that Sophia Robi Peter is different from Sofia Otan'go. Besides, PW1 was not questioned concerning her identity. Instead, it is quite clear from the record that the appellant when cross-examining the complainant confirmed that the person whose house was burnt and who also was burnt was the person who testified and he was therefore not misled on who the complainant was. The different names appear to be names of the same person.

The second and third grounds can be handled together. The evidence against the appellant was largely circumstantial. Musinga, J. considered those circumstances, as he was required to do, and came to the conclusion that the appellant and no other person was responsible for the burning of both PW1 and her house.

He also came to the conclusion that the appellant's conduct left no doubt about his involvement. In our view, the learned judge fully re-evaluated the evidence and reached his own independent conclusions on it.

True, the evidence was circumstantial. However when considered as a whole it leaves no doubt that the appellant committed the offences he now stands convicted of. We bear in mind the principles which guide the Court in cases dependent wholly on circumstantial evidence. First, that the evidence must be watertight and exclude any other reasonable hypothesis than that the appellant committed the offence charged. Second, that the circumstances must exclude any co-existing circumstances which would weaken or destroy the inference of guilt. (***Simoni Musoke v. R. [1958] EA 715***).

These were concurrent findings of fact by the trial and first appellate Courts, that before the house of the complainant caught fire, only the appellant, a lady who was smearing the house and a baby were inside the house. The baby was asleep, the appellant was working on the floor of one of the rooms in which there was petrol in a jerrican. The lady who was smearing the house walls inside came out before the house caught fire. She was washing herself outside when fire broke out. Both courts below believed PW1 when she testified that she saw the appellant splashing some liquid onto the burning roof, that he tripped her as she ran inside to rescue her baby and he escaped while the house was still burning and did not assist in putting off the fire. He did not return and his whereabouts were unknown until he was arrested about a year later when he was spotted at Keroka, a place near his home.

The two courts below also believed the evidence of ***Anna Kalunde Muse*** (PW3). PW3 was PW1's co-wife. She was nearby when PW1's house caught fire, and she knew that PW1's child was in that house when it caught fire. Like PW1, she testified that she saw the appellant splashing some liquid at the point where the fire was burning the roof. The liquid could have been water, but that was not the appellant's case. What he was splashing was a matter especially within his own knowledge. He did not however offer any explanation. Both *PW1* and *PW3* were entitled to conclude it was the petrol which was in the room where he was working.

The appellant disappeared from the area and did not return, and no one knew where he was until he was arrested at Keroka.

The evidence clearly shows that the appellant instead of assisting to try and put out the fire, escaped. He was the only man around. The others were three women and a baby. There is no clear evidence as to the motive for burning the house. The Investigating Officer, ***Pc. Stephen Onchari***, (PW4) implied that the appellant had found some money in the house, pocketed it and burnt the house to create a ruse that the money was burnt inside. In absence of evidence from either PW1 or PW3 in that regard, not much turns on that proposition.

It is, however, trite law that motive is not a factor in criminal liability. (See ***Section 9(3)*** of the Penal Code. The circumstances do show that the appellant with the requisite ***mens rea*** burnt the house of the complainant.

As regards the charge of grievous harm, the appellant knew there was a baby asleep in the house when, according to the evidence, the house caught fire. The appellant was the only other person inside. It can be inferred he set the house on fire. He must have known that the fire would burn at least the baby. The baby was however, rescued by its mother, who in the course of doing so was badly burnt by the fire. In our view, the appellant was properly convicted both of the arson and grievous harm counts.

As regards sentence, the appellant complains that a probation officer's report was improperly used to provide his antecedents. It is his case that the report is false and was not based on information supplied to the probation officer. The trial Magistrate in her notes on sentence remarked thus:-

"The accused's social background report is not suitable. The accused has previous anti-social tendencies and need complete exoneration from Society.

In the circumstances I find that the harm he caused the complainant herein is so grievous as seen in Court and also having burnt her house. I hereby commit the accused to a life sentence on both the counts."

The probation officer's report was not put to the appellant for comment. It is a damning report against him, penning among other things, that the appellant in the year 2000 stole household goods from his mother, set on fire a neighbour's house; in 2001 stole a cow from his mother and was imprisoned by a Keroka Court for four years for it; attempted to rape his mother; forced her to take some poison with the intention of creating aruse that it was a case of suicide, and that he is a bhang smoker. As we stated earlier, these are serious allegations and the appellant should have been asked to comment on the report before it was acted upon to determine what sentence to impose on him.

It must, however, be noted that the sentence which was imposed on the appellant is a lawful sentence. This Court by dint of the provisions of section 361(1) of the Criminal Procedure Code lacks jurisdiction to interfere with a lawful sentence. The failure to put the probation report to the appellant for his comment is a matter which goes to severity of sentence and not the legality of it. ***Section 361(1)*** of the Criminal Procedure Code, as material, provides:-

"361(1) A party to an appeal from a subordinate court may, subject to subsection (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this Section:-

(a) On a matter of fact and severity of sentence is a matter of fact; or

(b) Against sentence, except where a sentence has been enhanced by the High Court,
……
……

Unless the Subordinate Court had no power under Section 7 to pass that sentence."

In the above circumstances, we find no basis for interfering with the decision of the High Court, and accordingly dismiss the appellant's appeal. It is so ordered.

Dated and delivered at Kisumu this 22nd day of March, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR