REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 222 of 2011

1. MARK LUVEMBE

2. WYCLIFF LUVEMBE SHIKOTO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kakamega (Lenaola, J.) dated 13th April, 2011

in

H.C.CR.A. NO. 236 OF 2010)

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JUDGMENT OF THE COURT

1. This is a second appeal. The two Appellants were, with five others, jointly charged before the Chief Magistrate's Court at Kakamega with the offence of arson contrary to**Section 332 (a)** of the Penal Code. After hearing the case, the Principal Magistrate acquitted three of the accused persons for lack of evidence but convicted the Appellants and two others and sentenced each of them to five years imprisonment. Their appeals to the High Court were dismissed by LenaolaJ thus provoking this second appeal.

2. At the hearing of the appeal before us,on his application, we allowed the withdrawal under **Rule 68 (4)** of the Court of Appeal Rules of the first Appellant's appeal. This judgment is therefore on the second Appellant **Wycliffe LuvembeShikoto's**appeal. We shall hereinafter refer to him as the Appellant.

3. Arguing his appeal himself before us, the Appellant started by attacking the substance of the charge against him. He submitted that as his full name,***Wycliffe LuvembeShikoto,*** was not stated and his physical address was given on the charge sheet as Kakamega South instead of KakamegaCentral,that rendered the charge against him fatally defective. He also faulted the trial court for convicting him on a charge that was amended without leave of court and the High Court for upholding that conviction.

4. The other grounds the Appellant argued were that there was no proof of the crime having been reported as the Police Occurrence Book was not produced; that as the complainant did not witness the commission of the crime, both the trial court and the first appellate court erred in accepting his hearsay testimony; that without the description of his appearance and/or apparel having been given to the police at the time of reporting the offence and in the absence of anycorroboration of the evidence of PW2, PW3 and PW4 all of whom were relatives of the complainant, the Appellant was not properly identified as one of the arsonists; that failure by the prosecution to call evidence on the value of the burnt house and the

Scenes of Crime personnel to produce the pictures he took of the burnt house as exhibits was fatal to the prosecution case; that both the trial court and the first appellate court erred in rejecting the Appellant's alibi and contention that the charge against the Appellant was a frame-up orchestrated against him because he tried to assist the family of the late ***William Napali*** to uncover the truth about his murder in respect of which the complainant in the arson case was the prime suspect; and that if the Appellant indeed committed the offence of arson, it could not have taken the police three weeks to arrest him when he was at his home all through. The Appellant also faulted the first appellate court for failure to read and re-evaluate the evidence on record against him as it was bound to.

5. Mr. Kiprop, learned State Counsel dismissed these submissions as untenable arguing that the Appellant was convicted on sound evidence. He also submitted that there is no defect in the charge. Referringus to **Section 134** of the **Criminal Procedure Code** he submitted that the charge against the Appellant together with its particulars contained all the ingredients of the offence of arson. He disputed the Appellant's contention that the charge was amended without leave of court. He said initially there were two cases. **Criminal Case No. 95** was withdrawn and Appellant with six others weresubsequently charged in one consolidated charge. As such the charge was not amended at all.

6. As regards the evidence against the Appellant, Mr. Kiprop argued that the offence having been committed in broad day light, PW2 and PW4 who knew the Appellant well could not have been mistaken as to his identity and their evidence did not require any corroboration. He also submitted that failure to produce the photographs of the burnt house did not cause any prejudice to the Appellant and was not fatal to the prosecution case. Finally, Mr. Kiprop submitted that given the evidence on record, both the courts below were right to reject the Appellant's alibi defence. He therefore urged us to dismiss this appeal in its entirety.

7. We have considered these rival submissions and carefully read the record of appeal. On the first ground of appeal we find no merit in the Appellant's contention that the charge against him was defective. **Section 134** of the Criminal Procedure Code requires:

"Every charge or information….[to] contain, and [it] shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The charge in this case was arson contrary to **Section 332 (a*)*** of the **Penal Code**. The relevant part of that section provides that "*Any person whowillfully and unlawfully sets fire to – (a) any building or structure whatever, whether complete or not… is guilty of a felony and is liable to imprisonmentfor life*."

8. The particulars of the offence in this case were that on the 7th day of December, 2007 at Irumbi Village, Shirere Sub-location in Kakamega South District within Western Province, the Appellant and his confederates jointly, willfully and unlawfully set fire to Timothy Imbenzi's dwelling house valued at Ksh. 2.6 million.

9. Pursuant to **Section 332 (a)** the charge in this case stated that the Appellant and his confederates "*willfully and unlawfully*" set on fire the dwelling house of Timothy Imbenzi. As stated above, the particulars identified that house as the one situate in Irumbi Village, Shirere Sub-location in Kakamega South District within Western Province. In the circumstances we find that the charge sheet contained all the ingredients of the offence and identified with particularity the burnt house and even gave its value. The Appellant's contention that his physical address was not stated on the charge sheet does not avail him as it is not "*necessary for giving reasonable information as to the nature of the offence charged*." Also not necessary is the Appellant's contention that his name was stated on the charge sheet as "***Wycliffe Luvembe***" instead of giving his full name of ***Wycliffe LuvembeShikoto***. Without appearing to be shifting the burden of proof onto the appellant, and for the purposes of explanation only, the Appellant did not contend that there is another person known simply as Wycliffe Luvembe who was or could have been at the scene at the material time. For these reasons we dismiss ground 1 of the appeal.

10. The Appellant's contention that the crime was not reported has also no basis. How did the police know of it if it was not reported to them? **Chief Inspector DanielKinyua**, PW5, testified that some people reported the crime to the police and the same was booked in the Occurrence Book. As the complainant was not at home when his house was torched, he did not have to report the crime himself. There is no legal requirement that it is only the complainant who should report the crime committed against him. Anybody else can. At any rate the primary duty of the police is to deter commission of crimes. On knowing of a crime, the police can always investigate it and take appropriate action. They do not need to wait until a report is made. In this case whether or not the offence was reported to police is immaterial. As we have said on getting to know of it, they could take appropriate action. That ground also fails.

11. With regard to the other grounds of appeal which in a nutshell are that there was no credible evidence to support the Appellant's conviction, having carefully perused the record, we agree with the learned State Counsel that there was overwhelming evidence against the Appellant. The offence was committed in broad daylight and PW2, PW3 and PW4 who implicated the Appellant are people who knew him well as they come from the same village. They therefore did not need to give his description and/or his attire. Such description is important when a witness is identifying a stranger.

12. The three witnesses in this case even described the role played by each accused person. They said the Appellant spread the fire. We therefore find that the Appellant was positively identified as one of the arsonists. With that clear and categorical evidence both the trial court and the first appellate court were right in rejecting the Appellant's alibi. He could not have been at his place of work at Eldoret when the evidence against him is clear that he was at the scene of crime and that took an active part in the commission of the offence. We are satisfied that the Appellant was properly convicted and we accordingly dismiss his appeal against conviction.

13. As stated above the offence of arsoncarries a maximum sentence of life imprisonment. The term of five years imprisonment meted against the Appellant in this case, given the circumstances in which the offence was committed, cannot by any stretch of imagination be said to be harsh. The appeal against sentence has also no merit and is accordingly also dismissed.

14. In the upshot, this appeal is hereby dismissed in its entirety

Dated and delivered at Kisumu this 10th day of OCTOBER, 2012.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR