IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 6 OF 2016

(FORMERLY MIGORI HCCRA NO. 74 OF 2015)

BETWEEN

RICHARD CHACHA CHAMPION.....1ST APPELLANT

ZEPHANIA CHACHA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case

No. 357 of 2014 at Senior Resident Magistrate's Court at Kehancha,

Hon.C.M. Kamau, RM dated on 24th September 2015)

JUDGMENT

1. The appellants, **RICHARD CHACHA CHAMPION** and **ZEPHANIA CHACHA,** were jointly charged with the offence of arson contrary to **section 332(b)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 28th February 2014, at Ikerege trading centre in Kuria West District of Migori County, they wilfully and unlawfully set fire to a motor vehicle make Toyota registration number KBL 292A valued at Kshs. 650,000.00 the property of Johnes Getangita Chacha.

2. They were convicted after trial and sentenced to life imprisonment. They have now appealed against conviction and sentence. The thrust of the appeal as posited by their counsel, Mr Marwa, is that the evidence of identification or recognition was unreliable and insufficient to warrant a conviction.

3. At the hearing of this appeal, Mr Oluoch, learned counsel for the respondent, conceded that the appeal on four grounds. First, that the conditions favourable for positive identification were lacking as only evidence connecting the appellants to the offence was the testimony of a police officer (PW 2). Second, that the appellants were arrested two months after the incident at the behest of the PW 2's superiors undermined the evidence of identification. Third, that the appellants' alibi defence was not considered in accordance with established principles concerning burden of proof. Finally, that the learned trial magistrate manifested bias as evidenced by the life sentence imposed on the appellants which was excessive in the circumstances.

4. Notwithstanding the concession by the respondent, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

5. On 28th February 2014 at about 8.00pm, an accident occurred between a motor vehicle Toyota Corolla registration number KBL 292A and a Bajaj Boxer motorcycle KMCH 596T at Ikerege trading centre. The motor vehicle was owned by Jones Getangita Chacha (PW 4) and was being driven by Paul Rioba Mwita (PW 7). PW 4 recalled that that he received a call from PW 7 informing him that he was involved in an accident at Ikerege. PW 7 confirmed that he was involved in an accident at Ikerege and that he was assaulted by an irate crowd whereupon he was rescued by APC Charles Malela (PW 1). PW 7 was taken to hospital where he was treated and examined by Moses Ginono (PW 5), a clinical officer at Kehancha District Hospital.

6. PW 1 went to the scene and found the motorcyclist's body lying on the road. There was also a large group of about 100 people gathered and were lynching PW 7. PW 1 intervened, rescued him and took him to the nearby AP Camp. PW 1 did not see the vehicle being burnt. PC Elias Tanui (PW 6), a police officer from Kehancha Police Station, arrived at the scene and found the motor vehicle on fire. He stated that it was dark. He and other officers on the scene took the deceased's body to the mortuary and the motor cycle to the police station. He did not see the appellants at the scene. Daniel Machengera Sagomo (PW 3) testified that he was at the trading centre on the material night and that he saw the appellants but denied that he saw the appellants set the motor vehicle ablaze.

7. AP Corporal Stanley Kisicho (PW 2), who was at the nearby AP Camp, responded to a call and proceeded to the scene of the accident where he found a crowd of about 100 people. He testified that he recognised the appellants. According to his testimony, the 2nd appellant opened the car boot and took away bundles of tobacco. He returned with the 1st appellant who had a can of petrol. The 1st appellant poured the petrol around the vehicle and set it ablaze while everyone watched. PW 1 further testified that after 3 months he received an order from Kehancha Police Station to arrest the appellants whom he arrested. In cross-examination PW 2 stated that there was sufficient light from motorcycles which had stopped at the scene and had their headlights on.

8. When put on their defence, the appellants elected to give sworn testimony. The 1st appellant stated that he had travelled to Tanzania on 22nd February 2014 and returned on 4th April 2014. He produced receipts showing he had travelled. The 2nd appellant testified that he was unwell and was admitted to Isebania Sub-district Hospital on 27th February 2014 and discharged on 3rd March 2014. Chacha Mwita (DW 4) confirmed he went to visit the 2nd appellant in hospital while Michael Chacha Mwita (DW 5) testified that he is the one who took the 2nd appellant to hospital after finding him unconscious.

9. The prosecution case was based on the identification of the appellants by one witness in difficult circumstances. Such evidence must be watertight before a court can return a conviction (see ***Abdalla Bin Wendo & Another v R*** **[1953] 20 EACA 166**, ***Wamunga v Republic*** **[1989] KLR 42** and ***Maitanyi v Republic*** **[1986] KLR 198**). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***R v Turnbull*** **[1967] 3 ALL ER 549)**. The court also has to make an inquiry whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police.

10. This case was not a case of identification of strangers but rather one of recognition as PW 2 stated seemed to know the appellants and the 2nd appellant's brother. But even in such cases the court ought

to exercise caution as mistakes can still be made in such circumstances (see ***Anjononi & Others v Republic*** **[1980] KLR 59**).

11. I have reviewed the evidence and I am constrained to agree with the learned counsel for the respondent, that the circumstances of the incident were less than favourable for positive identification. First, the PW 2 did not given any evidence of the nature and presence of light vis-à-vis the actions of the appellants. It must be recalled that PW 6 stated that it was dark and all the prosecution witnesses are clear that there was a very large crowd involved in riotous activity. Thus, the trial court had to exercise grave caution in accepting PW 2's testimony. Even where recognition is relied upon, the prosecution must establish the relationship between the witness and the accused to establish the basis for such recognition. The testimony of PW 2 is lacking in this respect. He did not testify how he knew the appellants to enable him pick them out of a large crowd.

12. If indeed PW 2 knew the appellants, why did it take three months to arrest them for such a grave offence. The investigating officer, as the person who would have shed light on when the incident was reported, by whom and whether the appellants were named in the first report, was not called leaving the court to draw an adverse inference particularly in light of the testimony by PW 2 that he was ordered to arrest the appellants three months after the incident. I find and hold that the testimony of PW 2 was not free from error and could not support the conviction of the appellants.

13. In dealing with the appellants' defence the learned magistrate stated that;

The alibi defences are false when considered against the testimony of PW 2. The receipts produced do no confirm that he was not Ikerege on the material date. All that they prove is that he travelled on the dates on them. They were also not verified. The discharge summary produced by the second accused person also has not been verified. The maker was not called as witness. I am convinced that they were at the scene of the crime on that day.

14. In approaching the issue of the defence of alibi, it must always be recalled that the burden remains on the prosecution to prove the allegations made against the accused person beyond reasonable doubt. In ***Kiarie v Republic*** **[1984] KLR 739**, the Court of Appeal held that:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

15. In the case of ***Wangombe v Republic*** **[1976-80] 1 KLR 1683**, the Court of Appeal addressed the treatment of defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused. The trial court, in taking the approach it did, failed to consider the veracity of the defence and determine, in light of the entire evidence and whether the prosecution had met its obligation to the required standard. This not a case where the appellants merely asserted an alibi; they gave sworn testimony, produced supporting evidence and called witnesses.

16. The standard required for consideration of the defence was outlined in ***Uganda v Sebyala & Others*** **[1969] EA 204**, where the learned Judge quoted a statement by Georges CJ., in Tanzania Criminal Appeal No. 12D 68 of 1969 who observed that:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

17. The appellants' alibis were plausible and although they were raised for the first time during the defence, the duty of displacing or rebutting that defence lay on the prosecution. Indeed, the law affords the prosecution such an opportunity in **section 212** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

18. Having analysed the evidence, I find that the prosecution failed to prove its case beyond reasonable doubt. The respondent properly conceded the appeal and I allow it.

19. I would also like to comment on the life sentence imposed on the appellants. Under **section 332** of the ***Penal Code*** a person convicted of the offence of arson liable to imprisonment for life. This means that life imprisonment in this case is not a mandatory sentence but the maximum sentence (see ***Opoya v Republic*** **[1967]EA 752)**. While there may be rare circumstances where the maximum penalty may be imposed, it is clear from the record that the learned magistrate failed to bear in mind the facts, principles of proportionality, aggravating and mitigating factors in assessing the appropriate sentence.

20. The appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 9th day of March 2016.

D.S. MAJANJA

JUDGE

Mr Marwa instructed by Kerario Marwa and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.