REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Appeal 18 A of 2005

JACOB KIPCHIRCHIR TOROITICH …… APPELLANT

=VERSUS=

REPUBLIC …… RESPONDENT

(Being an Appeal against the Decision of the Senior Resident Magistrate at Iten –

D.M. Ochenja in ITEN SRM NO. 792 of 2004 Dated 9Th March,2005)

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate at Iten D.M. Ochenja which was delivered on 9th March,2005 . The appellant was initially charged with two counts. Both counts were for the offence of arson contrary to section 332(a) of the Penal Code.

After a full tria, the learned magistrate acquitted the appellant of the second count but convicted him on the first count and sentenced him to serve three (3) years imprisonment. The appellant having been aggrieved by the decision of the learned trial magistrate has appealed to this court on the following grounds:-

1. He did not plead guilty to the charge.

2. The learned magistrate erred in law and in fact by basing his judgment and subsequent conviction on the fact that the voice of the appellant was known to the complaint notwithstanding the fact that the complainant did not explain as to how or as to what made him recognize his voice.

3. The learned trial magistrate erred in facts and in law when he relied on the evidence of P.W.1 and P.W.2 to convict him yet the same was never substantial (sic) with any independent witness to prove his allegations.

4. The learned trial magistrate erred both in law and in fact when he failed to appreciate the fact that on that material night he spent in somewhere else and this was proved by his defence witness who stated very clearly that he arrived at his house at 11.50 p.m. and yet the incident took place at about 4.00 a.m. to 7.00 a.m.

5. The learned trial magistrate erred both in law and facts when he disregarded his unsworn defence with apparently no substantive reason.

6. The learned trial magistrate grossly misdirected himself on basing his conviction upon the basis of circumstantial evidence notwithstanding that the same ought to have been corroborated by any independent witnessed who witnessed the incident.

7. The learned trial magistrate misdirected himself in convicting him for the offence charged in that he shifted the burden of proof from the prosecution to him.

At the hearing of the appeal the appellant tendered written submission. The learned Principal State Counsel, Mr. Omutelema supported the conviction of the appellant. He submitted that the prosecution adduced overwhelming circumstantial evidence that the appellant set the complainant's house a blaze. The complainant who was P.W.1 and another witness P.W.2 told the magistrate that the appellant had a quarrel with them and threatened to kill them. They also heard the voice of the appellant when the appellant issued threats from outside the house. In his view, the quarrel and the verbal threats of the appellant from outside the house irresistibly pointed to the appellant as the offender. He submitted further that the defence of the appellant was considered by the learned trial magistrate and rejected as an afterthought. He also urged this court to uphold the sentence of three years imprisonment, as it was not excessive. This is a first appeal and as a first appellate court, I am bound to evaluate all the evidence on record and come to my own conclusions.

In brief the facts of the case are that on the 24th July,2004 at about 10.00 p.m., the complainant P.W.1 was drinking in a bar at Chebiemit trading centre in Marakwet District. The appellant was also drinking in the same bar. There was also a woman called Caroline in the same bar. At around 11.00 p.m. the appellant and Caroline who was P.W.2 left the bar. Then P.W.1 later took Caroline (P.W.2) to his house and they slept together in that house. At about 4.00 a.m. the house of P.W. 1 was burnt, but both P.W.1 and P.W.2 managed to come out of the house unharmed. The house was burnt to ashes.

It is the evidence of P.W.1 and P.W.2 that the one who burnt the house was the appellant, as they heard his voice, when he threatened to kill them from outside the house before the house was burnt.

The appellant on the other hand maintained in his defence that though he was in the same bar and later disagreed with Caroline – (P.W.2), and slapped her, he did not go to burn the house of P.W.1. He instead proceeded to the house of Jane W. Njenga and slept there. He also called that Jane W. Njenga as a witness who testified as D.W.2. Though the appellant was initially charged with two counts of arson, he was acquitted of the second count as the complainant or owner of the house in the second charge did not come to testify in court. Though the appellant has appealed on several grounds, I am of the view that the said grounds can be compressed into four grounds. Firstly that the magistrate convicted the appellant on the basis of voice recognition by P.W.1 and P.W.2 who did not state how they recognized the voice. Secondly, that the learned magistrate erred in convicting the appellant when he disregarded the defence of the appellant and his witness. Thirdly, that the learned magistrate erred in basing his conviction on circumstantial evidence which was not corroborated by any independent evidence. Lastly, that the learned magistrate erred in shifting the burden of proof from the prosecution to the appellant.

The first issue for consideration in this appeal is whether the learned trial magistrate erred in convicting the appellant on the voice identification. On the issue of identification, the learned magistrate

had this to say in the judgment :-

> " **The accused followed them and warned them that they would be killed. Moments later P.W.1"s house was on fire. It is very likely that it was the accused who set P.W.1's house on fire".**

I have perused the evidence on record. It is not in dispute that the appellant, P.W.2 and the complainant were in the same bar at Chebiemit on 27/7/2004 up to around 11.00 p.m. The appellant left the bar at 11.00 p.m. followed by P.W.2. P.W.1 left shortly afterwards and went to his house with Caroline (P.W.2) who had joined him. From the evidence of P.W.1, he initially locked P.W.2 in his house and tried to walk to his rural house. At that time he left the appellant standing outside the house. When P.W. 1 came back to the house shortly thereafter, the appellant was not present. Regarding the time the incident of fire took place, P.W.1 stated :-

> **"At night the accused came back and summoned Caroline. I told Caroline to just keep quiet. Thereafter the accused told us that even if we keep quiet, we were going to be killed. Later we were woken up by fire. The house was on fire. It was around 4.00 p.m.(sic)".**

The evidence of P.W.2 Caroline Cherotich who was sleeping in the same house with the P.W.1, when the house caught fire, was that while she was sleeping in the house the appellant came and shouted her name severally. At that time, P.W.1 was asleep. At 4.00 a.m., she was merely woken up by P.W.1 who told her that the house was on fire. She testified in cross-examination that she knew the voice of the appellant.

On the basis of the above evidence, the learned magistrate found that the appellant committed the arson as charged and convicted him.

The evidence of identification of the appellant as to the burning of the house of P.W.1 was clearly based on the voice of a person who shouted from outside. Even though P.W.1 stated that when the appellant shouted he told P.W.2 to keep quiet, P.W.2 stated in evidence that when the appellant shouted from outside the house, P.W.1 was sleeping. This is a contradiction. Both stories cannot be true. Assuming that the appellant shouted from outside, how can his shout be associated with the fire" It is apparent from the evidence of P.W.2 that the appellant shouted and went away. The house got burnt later. At that time of the burning of the house, though P.W.1 stated that when the appellant shouted he told P.W.2 to keep quiet, P.W.2 categorically stated that when the appellant shouted, P.W.1 was asleep. I find this to be a material contradiction, leaving me in doubt as to whether indeed the appellant went and shouted outside the house of the complainant at the time when the house was set ablaze, and whether his voice was recognized by P.W.1 and P.W.2. Though there was strong suspicion because of the quarrel between the appellant and P.W.2, the evidence on record falls short of proof that the appellant shouted at the time the house of P.W.1 was set ablaze.

The second issue is whether the learned magistrate convicted the appellant by disregarding the defence of the appellant and his witness. I have perused the judgment. The learned trial magistrate, in

my view, considered the defence of the appellant. He gave a narrative of the defence case. However, he did not make any specific finding as to whether he believed or disbelieved the defence case and give the reasons why. This, in my view, contravenes the provision of **section 169(1) of the Criminal Procedure Code (Cap 75**) which requires a trial court to consider and make findings on the prosecution case as well as the defence case. In my view, the learned magistrate erred in not making a specific finding on whether he believed or disbelieved the defence case. The learned magistrate merely stated that it was clear from the accused's own admission that he differed with P.W.2 and slapped her. That fell short of the legal requirements.

The third issue is whether the circumstantial evidence proved the guilt of the appellant. Obviously the case was based on circumstantial evidence as no one saw the appellant burn the house.

For circumstantial evidence to sustain a conviction, the circumstantial evidence must point to the guilt of the accused and there should be no other reasonable hypothesis. There are several case authorities on this position. I only need to cite the case of **Ibrahim Mwita –vs- Republic - Kisumu Criminal appeal No. 86 of 2004** where the Court of Appeal in reiterating what was stated in the case of Simon Musoke –vs- Republic {1958} EA 715 stated :-

> " **It is trite that in a case depending on circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt".**

In our present case the circumstantial evidence was that the appellant had a disagreement with P.W.2 after drinking in a bar that night. The disagreement was at about 11.0 p.m. to 11.30 p.m. . Thereafter the complainant –(P.W.1) took P.W.2 to his house and apparently the appellant followed them. It was the evidence of P.W.1 that when he took P.W.2 to his house, the appellant came to that house and stood outside. P.W. 1 went away and then came back to find that the appellant was not there. He went in the house to sleep. Then the house caught fire at about 4.00 a.m.. P.W. 1 stated that this was after the appellant went to the house and made verbal threats from outside the house to kill both P.W.1 and P.W.2. The appellant and D.W.2 maintain that the appellant went to sleep and did sleep in the house of D.W.2 . That at 4.00 a.m., the appellant was sleeping in the house of D.W.2.

Does the evidence on record lead irresistibly to the conclusion that the appellant committed the arson" In my view, the answer is no. Firstly there is the contradiction of the evidence of P.W.1 and P.W.2. P.W.2 stated that the appellant went and shouted threats when P.W.1 was asleep. P.W.1, on his part, stated that just before the burning incident, the appellant made verbal threats from outside the house and he (P.W. 1) talked to P.W.2 to keep quiet. On her part , P.W.2 stated that she was merely woken up by P.W.1 when the house was already on fire. In effect, according to her, it was not true that P.W.1 told her to keep quiet when the appellant was shouting from outside. In addition to this the defence of the appellant and D.W.2 was that the appellant was sleeping in the house of D.W.2 at the time of the fire.

The burden is always on the prosecution to establish an offence against an accused person beyond reasonable doubt. The circumstantial evidence in this case does not lead to the irresistible conclusion that the appellant is the one who burned the complainant's house. There is evidence of strong suspicion. However, suspicion alone is not enough to sustain a conviction. It is quite possible that

someone else would have caused the fire. The case having been based on circumstantial evidence, it is my view that it was unsafe to found a conviction on the evidence on record, as there is a possibility that the fire was caused by someone else. The learned magistrate's finding that " it is very likely that it was the accused who set P.W.1's house on fire" falls far short of the proof required in a criminal case. It shows that the magistrate was not in fact fully convinced beyond any reasonable doubt that the appellant burnt the house.

The last issue is whether the learned magistrate shifted the burden of proof to the appellant. I have perused the judgment of the trial magistrate . I find no evidence that the learned magistrate shifted the burden of proof to the appellant. All that happened is that the learned magistrate convicted the appellant without considering the defence and making specific findings on whether he believed or disbelieved the appellant's defence. For the above reasons, I allow this appeal, quash the conviction and set aside the sentence. I order that the appellant be released forthwith unless he is otherwise lawfully held.

Dated at Eldoret this 20th day of December, 2005.

GEORGE DULU,

Ag. Judge.

In the presence of: