

KENYA / JUDGMENT

Peter Odoyo alias Oloo v Republic [2017] KEHC 237 (KLR)

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COURT

High Court

BEFORE

DO Ohungo

CASE / FILE NUMBER

Criminal Appeal 5 of 2017

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 5 OF 2017

BETWEEN

PETER ODOYO alias OLOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of P. GICHOI (MRS), CM, in Homa Bay CM's Court Criminal Case No.253 of 2015 dated 22/12/2016)

JUDGMENT

1. PETER ODOYO alias OLOO was convicted on a charge of arson contrary to Section 332 of the Penal Code and sentenced to serve 10 years imprisonment.

The charge against him stated that on 10th April 2015 at about 2. 00 a.m. at KAMASASIA village, KOMOLLO location in HOMA BAY County, he willfully and unlawfully set on fire a dwelling house valued at Kshs.1. 8 m and property which included furniture, kitchenware, electronics, beddings and clothes worth Kshs.1. 9 million. The appellant denied the charge.

2. ELIZABETH OKELLO(PW1) a business woman in KISUMU owned the house at KAMASASIA village which was under the care of UNITA OTIENO. On 10/04/2015 at about 2. 30 a.m., she received a call from UNITA (PW2) that her house was on fire, and she was being assisted by good Samaritans to put out the blaze.

3. PW1 travelled from KISUMU to KAMASASIA village that very night, and found the house and all her property had been razed down – nothing was salvaged. She inquired from the watchman OSUDO ADINA who informed her that her younger brother-in-law PETER ODOYO (brother to her husband) had told him he would see what he'd never seen before. PW1 explained that her relationship with the appellant was not good and he had called in early 2014 and warned her that he'd go home and do something to her property that she would never forget. However she did not report the threats to police because she was trying to convince the appellant to go home for mediation with the family.
4. On cross examination PW1 denied suggestions that she had approached the appellant requesting him to inherit her after her husband's death.
5. OSUDO ADINA (PW2) who worked as a guard at PW1's KAMASASIA home told the trial court that on 9/4/2015 at about 5.00 p.m. while on duty, the appellant (whom he had known since the year 2012) told him he was about to witness something he had never seen before. He explained that the appellant's home and the complainant's home were only separated by a fence. The appellant did not give any reasons for his remarks.
6. On 10/04/2015, at 2.00 a.m. PW2 was in the kitchen where he normally slept, when he was woken up by the sounds of people murmuring near the tank. He heard footsteps going towards the main house, followed by the breaking sound of a glass window. He peeped through his window and saw fire in the main house.
7. When PW2 came out he flashed his torch and saw three people – two of them were heading towards the main gate but he could not identify them. The third one walked towards the barbed wire fence – he flashed his torch and saw that it was the appellant. There was no electricity that night as the area had suffered a power outage for two consecutive nights. PW2 raised an alarm and members of the public responded in a bid to help put out the fire.

On cross examination PW1 stated:-

"I saw three people that night but I did not identify the other two. I identified you as you were the last. I saw you as you passed and tried to go to your home."

8. PW2 explained that he was using a chargeable torch and the appellant was just 20 metres away from him and was rushing to escape through the fence to his home. PW2 also explained that he could not run after the appellant and apprehend him because he had earlier on assaulted his sister-in-law using a panga and had also attempted to cut PW2.
9. PW1's sister-in-law UNITA OTIENO (PW3) used to keep the keys for PW1's house as she had been tasked to supervise the workers there. She received a call from MR. ONYANGO that PW1's house was on fire. By the time she got to the scene which was about ½ km away from her home, nothing could be salvaged. The watchman told her that the appellant was the culprit. She did not see who set the house on fire but stated on cross examination – "it is not electronic fault that burnt the house ... The people from Kenya Power came to the scene and

ruled it.”

10. BERNARD OCHIENG OGURE (PW4) a brother to the appellant was among those who rushed to the scene – all he learnt from PW2 was that three people had been sighted within the compound before the fire broke out but he did not mention any names to him.
11. The area chief ELISHA MALELA OGUTA (PW5) informed the court that when he spoke to the appellant’s brother one HEZRON OCHIENG the latter, suspected the appellant as the culprit.
12. CPL SHEM MOGAKA (PW7) visited the scene and took photographs which were produced in court as exhibit.
13. IP FRED BUNUSU (PW8) the investigating officer established that there were strained relations between the appellant and PW1 and PW1 informed him about the threats appellant had made. This was also repeated to him by PW2 and that the house was burnt just a day after the appellant made the remarks to PW2.

He also confirmed from PW3 and PW4 that the appellant had disappeared from the area but resurfaced a day before the fire. When PW1 went to the appellant’s house that very date shortly after the incident had taken place, he was nowhere to be found.

14. PC NICHOLAS ODHIAMBO (PW9) who visited the scene also established from members of the public that the appellant had been seen in the vicinity a day prior to the incident making inquiries on the whereabouts of the owner of the house; and spent the day mingling with neighbours and making inquiries.

He also got information that the appellant was seen riding away from the area at around 5. 30-6. 00 a.m. of the morning the house was burning. The information police got on the ground concerning the appellant’s conduct led to them pursuing and arresting him at Ndhiwa shopping centre. The appellant was pointed out to police by an informer.

15. Debris from the scene was collected and submitted to the government chemist for examination and analysis. DENNIS OWINO ONYANGO (PW6) who works for the Government Chemist produced a report which showed that petrol was used to burn the house as there was petrol acceleration in the ash from the rooms. He ruled out the possibility of an electronic fault as being the cause of the fire.
16. In his unsworn testimony, the appellant stated that on 10/04/2015 he was at his house in KANYAMWA within NDHIWA when his wife HELLEN AKINYI called at 2. 00 a.m. to say that PW1’s house was burning. This was confirmed to him by DOROTHY ATIENO OTIENO. At 6. 00 a.m., CID officers called asking whether he was in NDHIWA and upon so confirming, they asked him to proceed to NDHIWA police station and tell them how the house got burnt. He obliged but when he got there, he was placed in the cells.

17. The appellant's wife HELLEN AKINYI ODOYO told the trial court that she received a call on 9/4/2016 at 5. 45 a.m. that the appellant had set a house on fire yet as far as she knew; the appellant had never set foot in the area since the year 2013.

She accompanied the appellant to NDHIWA police station where he had been summoned to go and record a statement and was informed that the appellant would be handed over to Homa Bay police.

18. The trial magistrate noted that there was no evidence that petrol used to be stored in the house – which would therefore mean that someone came and used it to set the house on fire.
19. The trial magistrate considered the appellant's alibi defence and pointed out that the court had erroneously allowed DW1 to testify yet she had earlier on been disqualified on 21/10/2015. However even in considering her evidence it was found to be contradictory and untruthful as she referred to different dates, with regard to the incident.
20. The trial magistrate also noted that she was a dishonest person who having earlier admitted to being in court throughout, the testimony of PW1, months later gave different information to the court. She was described as follows:-

"She is untruthful. Her evidence is made up and that is why she openly contradicted herself in simple facts and was inconsistent. She was not with the accused on the material night."

The trial court thus disregarded her evidence.

21. The trial court was mindful of the fact that no one saw the appellant actually set the house on fire, but pointed out that the circumstantial evidence showed that the appellant had an opportunity to set the house on fire; as he was a neighbor to PW1, and the relationship between them was not good. Further he had warned her previously that he would do something she would never forget – an issue the appellant did not pursue during the hearing.
22. The trial court commented thus on the demeanour of the appellant and the complainant:-
"The court observed both the accused and the complainant during this line of cross examination by the accused. He could not even look up and face her. He looked down, as if in embarrassment just as the complainant appeared disgusted. He did not seem to believe in what he was saying and did not even revisit it in his defence."
23. The trial magistrate was satisfied that the allegation about PW1's desire to be inherited was only meant to "annoy and embarrass the complainant ... had not believed that she fabricated this case."
24. She pointed out that the appellant was with PW2 at the scene in the evening just before the house was burnt and he issued the same warning that PW2 would witness something he had never seen before. The trial magistrate noted that the appellant never rebutted this evidence in any way. That night he saw three people and identified the appellant with the aid of torch

light. The trial magistrate was persuaded that PW2 positively identified by recognition the appellant as he was someone he'd known for a long time and he saw her just 20 metres away as he ran towards his home and there was no possibility of error.

25. The trial court also found that there was evidence that appellant had disappeared from their KAMASASIA village after assaulting his other sister-in-law and only resurfaced at the scene on the evening the house was burnt; only to

leave again for Ndhiwa very early.

26. His entire conduct and utterances were termed by the trial court as "malicious, unlawful, intentional and unlawful." The prosecution's evidence was found to be properly corroborated and proved the case against the appellant beyond reasonable doubt.
27. The appellant challenged the trial court's findings on conviction only on grounds that the pictures produced in court as exhibits did not show a burnt structure to prove that the house was burnt. Further, that the trial court failed to find that the scenes of crime personnel did not give a proper explanation as to how the photographs were processed and the devices used to process them, thus violating Section 65 (8) of the Evidence Act. He faulted the trial magistrate for rejecting his defence which he considered to be strong and that the burden of proof was unfairly shifted on to the defence. He however did not challenge the sentence.
28. In the written submissions, the appellant argued that witnesses whose names were mentioned as HEZRON OCHIEN'Gand MOURICE OTUNGA did not testify, and it was unsafe to rely on the testimony of PW2 solely regarding identification.

It was his contention that even if he made threats to PW1 it did not prove that he set the house on fire; and in any event these threats were not reported to police or the community authorities.

He also faulted the trial magistrate for rejecting his alibi defence, saying that he was not at the scene.

29. In opposing the appeal MR. OLUOCH on behalf of the State submitted that PW2 positively identified the appellant at the scene as he was someone well known to him and that he was only 20 metres away. He urged the court to consider the appellant's conduct especially a day before the incident and after the incident which was consistent with a guilty mind.
30. With regard to provisions of Section 65 (8) of the Evidence Act, counsel submitted that the provision was not applicable to the case as the evidence PW4 gave had nothing to do with a computer print out.
31. Whereas PW2 was the sole identifying witness – it was clear that this was not identification of a stranger, but someone who was well known to him and whom he had even encountered in the evening before the incident. He was able to see him with the aid of his torch as he made his way away from the burning house back to his compound.

32. Indeed the trial magistrate did not solely rely on the evidence of identification to convict the appellant. She duly pointed out the circumstances surrounding the matter – the utterances the appellant made – an ominous promise that PW1 and PW2 would witness something they had never seen before. The appellant never denied making such utterances.
33. It was also common ground that the appellant had been away from the village for a very long time – but he resurfaced that evening and was seen by PW2, a fact he did not deny. He thereafter disappeared from the scene.
34. The appellant also complained that some witnesses were mentioned yet they never testified namely MOURICE OTUNGA and HEZRON OCHIENG. I don't know what MOURICE would have said since the only evidence is that he called the area chief to say PW1's house was on fire.
35. As for HEZRON, he was said to have told the chief he'd been in the appellant's company and they parted at about 6.00 p.m. I am keenly aware of the decision on *BUKENYA and OTHERS -VS- UGANDA 1972 EA page 509* which stated that:-
- "1) The prosecution must make available all witnesses to establish truth, even if their evidence may be inconsistent.*
- 2) When evidence called is inadequate the court may after that the evidence of uncalled witnesses would be adverse to prosecution."
36. However it has not been established where HEZRON and the appellant were, so that the failure to call him or MOURICE in my view was not fatal to the prosecution case.
37. The evidence was largely circumstantial, but as the trial magistrate pointed out, the general conduct of the appellant before and after the incident, his ominous utterances to PW1 and PW2, the absence of a rebuttal on this conduct, coupled with the identification by the guard (PW2) inculpably pointed to the appellant as the person behind the fire. He may have been assisted by the other two unidentified persons BUT he was part of the mischief.
38. The chain of events had strands interlocking each other to no one else other than the appellant as the author of the offence.
39. As regards the photographs produced I think the appellant is splitting hairs – PW1 was shown the photographs and photo No.1-15 showed different faces of the burnt structure. This was identified by PW1, PW3 and PW4. The appellant complained that the trial magistrate had violated Section 65 (8) of the Evidence Act which provides as follows:-
- "In any proceedings under this Act where it is desired to give a computer print out or statement in evidence by virtue of this section"*
40. I need not delve deeper than this – the provision is totally unrelated to the issue surrounding the photographs.

41. Consequently the conviction was safe and is upheld. The appellant did not contest the sentence – the appeal is thus dismissed.

Delivered and dated this 9th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE

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