THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 06 OF 2012

NIMUNGU CHARLES::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Arua before his Lordship Hon. Justice Lameck N. Mukasa dated 17/01/2012)

CORAM: Hon. Justice Remmy Kasule, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Justice Simon Byabakama Mugenyi, JA

JUDGEMENT OF THE COURT

Introduction

The appellant, Nimungu Charles was indicted, tried and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and he was sentenced to 30 years imprisonment. He has appealed to this Court against the conviction.

Background of the appeal

The facts as found by the trial Judge were that the appellant and Jamono Francis, the owner of the burnt house, were brothers. The appellant also had a house neighboring the burnt house. On 31st December, 2009 the house of Jamono Francis where the

deceased persons, Onencan alias Odele and Pacutho Paska, lived as husband and wife was set on fire in the middle of the night, at around 1.00 am when both deceased were sleeping. Ocwala Peter, PW1, whose house is 15-16 metres away from the scene of crime, heard an alarm from people who were crying for help as they were burning in the house, and he responded by coming out of his house. He saw the house burning and as he went towards it he saw the appellant running away from the burning house. He called out to the appellant and asked him whether he was the one who made the alarm but he (appellant) just continued running without answering PW1.

Eliya Okuaw, PW2, whose house is about 50 metres away from the house that was burning, also responded to the alarm at the same time that PW1 came out of his house and saw the appellant running away from the scene of crime at a distance of about 15 metres. Jakwonga Alex, PW3 who resided at Atyenda trading centre, a distance of about 100 metres from the scene of crime also heard an alarm coming from the house of Jamono Francis and he responded by using a shortcut to get there. On his way, he met the appellant running away from the scene of crime to the opposite direction. The point where they met was about 70 metres away from the scene of crime. He asked the appellant where he was going when his brother's house was on fire. The appellant said that was not his problem and he was going to check on his charcoal in the bush. He continued towards Atyenda trading centre as PW3 proceeded to the scene of crime.

The appellant did not appear at the scene of crime that night and subsequently. He even stayed away from his alternative place at Atyenda trading centre.

The appellant was later arrested and subsequently indicted of the offence of murder, which he denied. During the trial, the appellant raised a defence of alibi. The trial Judge found the appellant guilty, convicted him of the offence of murder and

sentenced him to 30 years imprisonment. Being dissatisfied with the decision of the trial Judge, he appealed to this Court against the conviction on the ground that the learned trial Judge erred in law and fact in failing to properly evaluate the evidence before him particularly on identification thereby arriving at a wrong decision.

At the hearing of this appeal, Mr. Paul Manzi appeared for the appellant on State brief while Mr. Sam Oola, Senior Principal State Attorney appeared for the respondent.

Counsel for the appellant with leave of court filed an amended memorandum of appeal containing two grounds of appeal. However, for reasons that counsel did not disclose to this Court, he again proceeded to argue the appellant's case based on the only ground stated in the original memorandum of appeal and by implication abandoned the amended memorandum of appeal. Unfortunately, both counsel for the respondent and the Court did not realise this anomaly and so counsel for the appellant proceeded without explaining to Court why he did so. The anomaly only came to our attention in the course of preparing this judgment.

We take exception at such conduct which leaves uncertainty on the Court record and we strongly discourage it. If counsel wanted to abandon the amended memorandum of appeal and proceed with the original one, he should have sought the leave of this Court to do so, just as he had obtained leave to file it. We find however, that the main complaint of the appellant is about evaluation of evidence by the trial Judge in both memoranda.

Appellant's Case

Counsel for the appellant submitted that the evidence of PW1, PW2 and PW3 did not prove that the appellant was the one who burnt the house, rather it creates mere suspicion. He contended that the testimonies of PW1 and PW2 on identification of

the appellant on that fateful night could not stand because the conditions were not favorable for correct identification since it was at night and the distance was about 15-16 metres between them and the appellant. Furthermore, that the evidence of PW1, PW2 and PW3 fell short of the required standard of identification. He contended that the evidence of PW3 could have been fabricated because he said that he identified the appellant using the moonlight but did not see the appellant burning the house.

Counsel submitted that the appellant raised the defence of alibi and it was not his duty to prove it but rather the respondent's duty to destroy it. He quipped that it was not the duty of the appellant to put off the fire. Counsel argued that if the trial Judge had properly evaluated the evidence of PW1, PW2 and PW3, he would not have convicted the appellant. He also submitted that the trial Judge in his judgment misdirected himself by putting heavy reliance on the weaknesses in the defence case thereby convicting the appellant. He prayed that this Court allows the appeal and quashes the conviction and sentence.

Respondent's Case

Counsel for the respondent opposed the appeal. He supported both the conviction and sentence. He submitted that the trial Judge was alive to the fact that none of the witnesses saw the appellant burn the house but nonetheless proceeded to analyze the evidence of PW1, PW2 and PW3 on identification of the appellant and found it reliable. PW1, PW2 and PW3 testified that there was moon light but PW1 and PW2 added that there was also bright light from the burning house. They also testified that they were related to the appellant and lived together although the appellant operated a drug shop at the trading center.

Counsel further submitted that the trial Judge considered the appellant's alibi and rejected it since the appellant contradicted himself during cross examination when he stated in his police statement that he went to the scene of crime some few minutes past midnight when he had gone to check on his charcoal. Counsel therefore contended that the conduct of the appellant of running away from the scene as others were going towards it, was that of a guilty person and his statement to PW3 that the burning house was not his problem also confirmed this.

He prayed that the appeal be dismissed, the conviction be upheld and sentence confirmed.

Decision of the Court

We have carefully studied the court record and considered the submissions of both counsel and the issues they raised. We are alive to the duty of this Court as the first appellate court to review the evidence on record and to reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10*** and ***Kifamunte Henry vs Uganda; SCCA No 10 of 1997.***

The burden to prove a charge of murder against the appellant laid squarely on the prosecution and the guilt of the appellant had to be proved beyond reasonable doubt. The ingredients of the offence of murder that had to be proved at the trial were that the deceased is dead, that the death was unlawful, that there was malice aforethought and finally that the appellant participated in the offence.

The first three ingredients were conceded to by the appellant as having been proved by the respondent beyond reasonable doubt and as such they are not being contested by this appeal.

However, the appellant contends that the last ingredient on participation in the offence was not proved. He specifically challenges the evidence of his identification and faults the trial Judge for failing to properly evaluate the evidence before him on identification, thereby arriving at a wrong decision.

It is trite law that in arriving at its decision a court is under a duty to take into consideration the evidence as a whole on issues that have to be determined. A court must not selectively consider evidence favouring one side without any regard for that which is unfavorable.

In the instant case, the trial Judge in his judgment at page 16 held thus;

> ***"The accused thereby put himself at the scene when the house was burning. It must have been while he was leaving that he was identified by PW1 and PW2. Just as PW1, PW2 and PW3 wondered, it is strong (sic) that he just left rather than doing something to save his brother's house from burning. Such circumstances point to nothing other than the guilt of the accused.....I accordingly find that the prosecution has proved beyond reasonable doubt that he participated in causing the death of Onenchan alias Odele and Pacutho Paska."***

The evidence of PW1, PW2 and PW3 which the trial Judge relied upon to come to the above conclusion was that they saw the appellant running away from the crime scene on that fateful night. It was their evidence that they managed to identify the appellant using the bright light which was coming from the moon and for PW1 and

PW2 the burning house also provided additional light. PW3 further testified that he stood close to the appellant and even talked to him.

In his defence, the appellant raised the defence of alibi to the effect that he spent the night at his home in Atyenda trading centre. The following morning he left for Paidha to collect drugs for his drug shop but along the way he learnt that the vehicle that was bringing the drugs had a mechanical problem. He then proceeded to Nebbi where the drugs were being off-loaded from. He spent the night there at the said place as it became late due to the time spent on sorting the drugs. On 1st January 2010 he left Nebbi at about 8.00 pm and reached his home at Atyenda trading centre past midnight only to be informed by his wife that the house of his brother Jamono had been set on fire.

It was the evidence of the appellant that the following day 2nd January 2010 he left for the village to inquire about what had happened from his brother Womala, whom his wife had told him was the suspect. Upon reaching the village, he heard alarms and whistles. He saw PW1 beating Womala in the company of other people including his brother Jamono Francis. The appellant said PW1 and the other people strangled Womala to death and he overheard them, from where he was hiding, saying he, the appellant would be next because he would follow up the case of Womala's death.

The trial Judge did not believe the alibi of the appellant since he (appellant) had stated earlier in his police statement that on the fateful night he had gone to check on his charcoal near the scene of crime. The trial Judge found that the appellant had placed himself at the scene of crime by his police statement which was corroborated by the evidence of PW3 who testified that when he met the appellant and asked him where he was going, he told him that he was going to check on his charcoal in the bush.

The law with regard to identification has been stated on numerous occasions. In the case of ***Abdulla Bin Wendo & Another vs R (1953) 20 EACA 166*** the Court held;

> ***"Although a fact can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."***

The need for greatest care as emphasized in the above case is not required in respect of a single eye witness only, but is necessary even where there is more than one witness where the basic issue is that of identification. This point was stressed in ***Abudala Nabulere & Anor vs Uganda Court of Appeal Criminal Appeal No. 9 of 1978 (1979)*** in the following passage in the judgment:

> ***"....Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the***

identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution...."

Bearing the above caution in mind, we have reappraised the evidence on record with a view of determining whether the trial Judge indeed failed to properly evaluate the same and came to a wrong conclusion in convicting the appellant. PW1, PW2 and PW3 all testified that they saw the appellant running away from the scene of crime the night the deceased were burnt to death in the house. PW1 and PW2 testified that there was sufficient light from the moon and the burning house which helped them to identify the appellant. They further testified that they are village mates with the appellant and they knew him well. This proved that they were familiar with him. PW3 said that he met the appellant running away and he even stopped and talked to him. He used the moon light to identify the appellant.

With regard to proximity between the witnesses and the appellant, PW1 testified that he was 15 to 16 metres away from the appellant. PW2 also testified that the appellant was about 15 metres away from him. PW3 testified that he met the appellant, stood near him and even talked to him and that is how he identified him. The appellant raised the defence of alibi but during cross examination, he identified a statement he made to the police in which he stated that he was near the scene of crime when the house of the deceased persons was burning.

Having subjected both the prosecution and the defence evidence to our own scrutiny in relation to the factors set out in ***Abudala Nabulele and anor vs Uganda (supra),*** we are satisfied that conditions favoring correct identification were present. There was adequate light coming from the moon and the burning house and the distance was close enough for all the three identifying witnesses to properly see the appellant and identify him.

In the circumstances, PW1, PW2 and PW3 could not have been mistaken in stating that it was the appellant they respectively saw running away from the scene of crime. Therefore, it is our considered opinion that the trial Judge was correct to hold that the appellant's alibi was disproved by the evidence of PW1, PW2 and PW3 which placed him (appellant) at the crime scene on that fateful night.

We now turn to the issue of participation of the appellant. None of the prosecution witnesses saw the appellant setting the house on fire. In effect there is no direct evidence pointing to the participation of the appellant. However, the fact that the appellant was properly identified while running away from the crime scene as the house was burning created circumstances upon which the trial Judge inferred guilt of the appellant and accordingly convicted him.

Although the trial Judge appeared not to have given much weight to the evidence of the appellant's disappearance from the area after the incident as additional circumstantial evidence, and did not specifically rely on it to corroborate the evidence of PW1, PW2 and PW3, we have reappraised this evidence and are satisfied that it was not conduct of an innocent person.

The law on circumstantial evidence was well stated by ***Ssekandi J.A*** (as he then was) in his lead judgment in ***Amisi Dhatemwa Alias Waibi vs Uganda; Court of Appeal Criminal Appeal No. 23 of 1977*** as below:

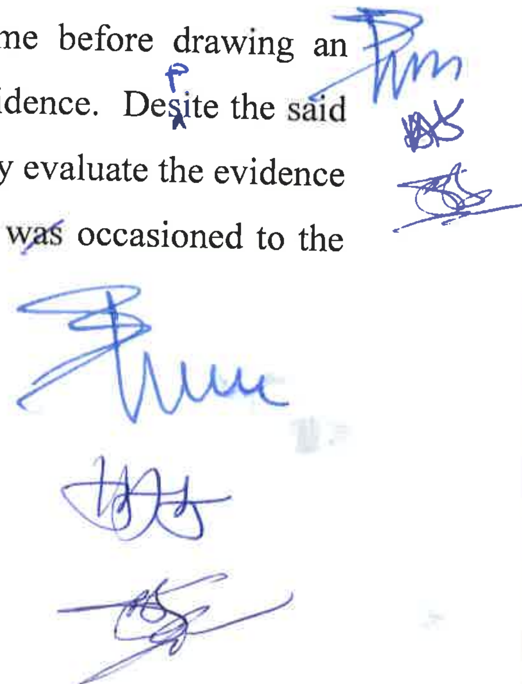
"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial, <u>See: R vs—Tailor, Wever and Donovan. 21 Cr, App. R. 20.</u> However, it in trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another…."

In ***Simon Musoke vs R [1958] EA 775*** it was held that;

"In a case depending exclusively upon 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 reasonable hypothesis than that of guilt."

The court is required to exercise caution when dealing with circumstantial evidence. In ***Teper vs R (2) [1952] AC 480*** the court held that before drawing an inference of the accused's guilt from circumstantial evidence, the court has to make certain that there are no other co-existing circumstances which would weaken or destroy that inference.

We note that although the trial Judge in his judgment cited a number of authorities on the need to exercise caution when dealing with circumstantial evidence, he did not expressly warn himself and the assessors on the same before drawing an inference on the accused's guilt based on circumstantial evidence. Desite the said omission, the trial Judge, proceeded to carefully and properly evaluate the evidence on record, and we therefore find no miscarriage of justice was occasioned to the appellant as a result of that omission.



On our part, we are alive to the need for caution as we proceed to reevaluate the circumstantial evidence on record adduced to prove the appellant's participation in the offence.

To begin with, it is not in contention that the appellant and Jamono Francis, the owner of the burnt house, are brothers. PW1, PW2 and PW3 testified that they saw the appellant running in the opposite direction from his brother's house that was on fire, with two people inside who were desperately crying for help. It is our considered opinion that in such circumstances, the appellant ought to have been running towards the direction of the burning house while calling for help to save the lives of the occupants of the house. It was the testimony of PW3 that when he met the appellant running from the direction of the burning house, he asked him where he was going when his brother's house was burning. The appellant answered that it was not his problem; he was going to check on his charcoal in the bush. The appellant himself stated the same thing in his police statement that was exhibited in court during his cross-examination. It is very strange that the appellant would be running to check on charcoal as opposed to running to save precious lives of fellow human beings who were not even strangers to him.

We find that the appellant's police statement corroborates the testimony of PW3 on what the appellant told him and it is consistent with the circumstantial evidence on record pointing to the guilt of the appellant.

The court in the case of ***The King vs Baskerville KB (1916) P.658*** held that corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime

Secondly, PW1, PW2 and PW3 all testified that the appellant disappeared from the village after the incident and also kept away from his alternative place at Atyenda

trading centre. As already stated earlier in this judgment, in our opinion, this was not conduct of an innocent person because, as a brother to the owner of the house who happened to be a brother in law of one of the deceased, the appellant was expected in such circumstances of tragedy to be present as people in the neighbourhood, including residents of Atyenda trading centre (PW3) responded to the alarm and news of the fire spread. In any event, the appellant's own house was also just a few metres away from the burnt house and that should have caused some concern to him and given him reason to go there and check on it. Instead, the appellant chose to disappear from the village and the trading centre for some days and came back in a stealthy manner he described in his alibi.

In ***Remegious Kiwanuka vs Uganda; Criminal Appeal 41 of 1995***, the Supreme Court held that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence. This is because such sudden disappearance from the area is incompatible with the innocence of such a person.

We therefore find that the appellant's conduct of disappearing from the area corroborated the evidence that he was seen running away from the scene of crime on the fateful night. This was incompatible with his innocence and is incapable of explanation upon any other reasonable hypothesis than that of guilt. Therefore, we cannot fault the trial court for drawing an inference of guilt of the appellant based on the evidence of PW1, PW2 and PW3, which, in our view, was properly evaluated and led to the right decision to convict the appellant.

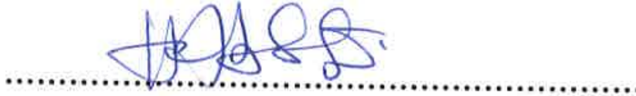
Accordingly, the only ground of this appeal fails and it is dismissed. We uphold the conviction and sentence by the trial court.

We so order.

Dated at **Arua** this....6th....day of..JUNE..2016

HON. MR. JUSTICE REMMY KASULE, JA

JUSTICE OF APPEAL



HON. LADY. JUSTICE HELLEN OBURA, JA

JUSTICE OF APPEAL

HON. MR. JUSTICE BYABAKAMA MUGENYI SIMON, JA

JUSTICE OF APPEAL