THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 325 OF 2015

(ARISING OUT OF HIGH COURT CRIMINAL CASE NO 129 OF 2014)

KAYAGA EDITH} .....APPELLANT

VERSUS

UGANDA} .....RESPONDENT

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE FREDERICK EGONDA NTENDE, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF COURT

The appellant was charged with three counts of murder contrary to sections 188 and 189 of the Penal Code Act and one count of arson contrary to section 327 of the Penal Code Act.

The brief facts as accepted by the learned trial judge were that on the night of 2nd and 3rd June, 2013 three residents of Buwate, Najera Village, and Kira Town Council in Wakiso district died in a fire at their residence. The deceased were Ismael Kawooya, husband of the appellant, Namale Saidah and Nakubulwa Shakira daughters of the deceased.

The appellant pleaded not guilty and was tried, convicted and sentenced by Musene J to life imprisonment in respect of count 1 of murder and 18 years imprisonment in respect of counts 2 and 3 also of murder. The appellant was sentenced to 15 years imprisonment on count 4 for arson and all the sentences are to run concurrently.

Being aggrieved by the judgment and orders of the High Court, the appellant appealed to this court on three grounds namely:

1. That the learned trial judge erred in law and in fact in his interpretation and application of the well-established law regarding circumstantial evidence.

2. That the learned trial judge erred in law and in fact in relying on the uncorroborated evidence of PW2 in convicting the appellant.

3. That the learned trial judge erred in law and in fact when he sentenced the appellant to harsh and excessive sentences.

The appellant prays that the convictions be quashed and sentences set aside. In the alternative the appellant prays that if the convictions are upheld, the court reduces the sentence to a sentence to be judiciously determined by this court.

At the hearing of the appeal learned Counsel Mr. Henry Kunya represented the appellant and learned Counsel Assistant Director of Public Prosecutions Ms Gladys Nyanzi Macrina represented the respondent.

Mr. Kunya after giving the brief facts addressed the court on grounds 1 and 2 together and proposed to address the 3rd ground relating to sentence last:

Whether the learned trial judge erred in law and in fact in his interpretation and application of the well-established law regarding circumstantial evidence?

Whether the learned trial judge erred in law and in fact in relying on the uncorroborated evidence of PW2 in convicting the appellant?

Mr. Kunya submitted that the gist of grounds 1 and 2 relate to the evidence on record which hinged on circumstantial evidence and uncorroborated evidence of PW2 a survivor of the fire. PW2 is the son of the appellant.

In arguments however counsel addressed the grounds separately. On the first ground of appeal, Mr. Kunya submitted that the record shows that the unfortunate incident happened deep in the night and the learned trial judge brought out the pieces of circumstantial evidence which formed his decision to convict the appellant. He submitted that though the learned tried judge seemed alive to the principles governing reliance on circumstantial evidence, the learned trial judge erred in the interpretation and application of the principles. The circumstantial evidence could not point to only the inference of guilt of the appellant and could be explained away on other hypotheses.

There was no credible evidence on who started the fire and the learned trial judge found that the appellant had disappeared from the home after she had reported the incident to PW3. The other fact used to infer guilt on the appellant was the fact that she was not burnt or hurt in any way by the fire. Further the adverse inferences were that when an alarm was made about the fire, the appellant did not join other concerned parties in the rescue effort. Secondly, the appellant left the scene of crime and was able to jump on to a motor cycle taxi known as "boda boda" which took her to Mulago hospital and beyond unaccompanied and without any support. Thirdly, after the fire she conducted herself in the home of PW3 majestically (as if no tragedy had befallen her family). The appellant also did not attend the funeral of the victims of the fire inclusive of her husband who died in the inferno.

Counsel contended that he did not know where the perception of majestic walking comes from and in any case there was no visual representation such as a video evidence to support the contention.

Mr. Kunya submitted that the circumstances were that the appellant had just escaped from the house with a blanket. However, an adverse inference was made that even the blanket did not have any traces of burning. However, the appellant explained this evidence through her testimony that she managed to leave the house soon after the deceased had raised the alarm. It is only because her deceased husband ran back to rescue other children that he was caught up in the inferno with the falling debris and he died there in.

On the adverse inference that the appellant locked the victims in the house while the fire was ranging, Mr. Kunya submitted that there was no clear evidence on the moving in and out. The husband had moved out initially with the appellant. Other adverse inference was that the appellant is reported to have said that Kawooya and 2 children "are finished". The learned trial judge emphasised this words to conclude that the appellant was responsible for the fire (with malice aforethought).

It was adversely inferred that the appellant was in a triumphant mood and instead of crying and sobbing for the loss of family members she was indifferent and did not even attend the burial. She moved around in a "gomesi" as if she was going for an introduction ceremony in the neighbourhood. Mr. Kunya submitted that the circumstantial evidence referred to when pieced together do not irresistibly point to the guilt of the appellant.

Mr. Kunya further submitted that there was a likelihood that the brother of the deceased who had a dispute on land had something to do with the arson and murder. The brother had the title deeds for the property which was jointly owned with the deceased husband of the appellant. There was no way the appellant could have set the house on fire because she had nothing to benefit from it. The house property was registered jointly in the

names of the brothers. It was therefore possible that the survivor brother probably is the one who would benefit from the fire and not the appellant.

Mr. Kunya submitted that while the learned trial judge correctly advised himself on the principles relating to circumstantial evidence, he did not apply them appropriately. Had the learned trial judge applied the principles to the facts he would have found that the appellant could not be held liable for the offense. The total effect of the circumstantial evidence and the net effect thereof did not with certainty point to the participation or alleged participation of the appellant. Counsel prayed that the first ground is answered in the affirmative.

On the 2nd ground of appeal, Mr. Kunya submitted that evidence proves that PW2 was a child of about 7 years age at the time of the incident and at the time of the trial he was 9 years old. He was a child of tender years and the learned trial judge held that he was satisfied that the child could give sworn testimony. The defence tendered the police testimony of PW2 and nowhere did he inform the police in his first statement that he saw the appellant light the fire that gutted their home. He later on made an additional statement trying to implicate the appellant. There is evidence that the learned trial judge extensively relied on the evidence of PW2.

Mr. Kunya submitted that the evidence of PW2 was difficult to comprehend. He claimed that he was awake and tip toed following his mother doing all the many things including going to the fridge to get fuel. There was a generator which is disclosed in evidence on record that was not functional. The police came to the scene on the fateful night and did not carry out any lab examination of whatever they could lay their hands on to establish the cause of the fire. Counsel in sum total prayed that the court disregards the evidence of PW2 and allows ground 2 of the appeal.

In reply Ms. Gladys Nyanzi Assistant DPP opposed the appeal and supported the conviction and sentence of the trial judge.

Ms Nyanzi argued grounds 1 and 2 together and submitted that she could state clearly from the evidence of PW2, the child of tender years, and PW4 that nowhere in their evidence do they testify that the deceased, their father, came out of the house with the accused and then rushed back in. The movement that was being done by the deceased Kawooya Ismael was in the house in the different rooms from the master bedroom to the sitting room because the doors were locked. He did not try to run out of the house as submitted by the appellant's counsel.

On the circumstantial evidence Ms Nyanzi invited the court to consider the evidence of PW2 Akram which was clear that the deceased was in the house when they went to sleep. PW4 corroborates the evidence that they were in the house with the appellant who organised their sleeping arrangement before the incident occurred. Further she was in the same room with Rashida and their father. The question is how the appellant left the house when all the other witness namely PW2 and PW4 testified that they tried to get out of the house but the doors were locked.

On the question of whether the door was locked from outside or inside, whether by padlock or other kinds of lock Ms Nyanzi submitted that she is not certain from the evidence on record whether the doors were locked from inside or outside; whether with a padlock or a key. However, Ms Nyanzi submitted that there was evidence of witnesses who went to the scene such as PW1 who testified that the house was locked from outside.

PW8 testified that he tried to open the door which connects the garage to the main house but it was locked. He tried the behind main door but it was also locked as the fire was too much.

On the issue of inconsistent evidence between police statement of PW2 and his testimony Ms Nyanzi agreed that the evidence was at variance. However, the evidence of the PW2 on the record was clear about what exactly happened and it stood up to cross examination.

With regard to any contradictions between the statement made to police and testimony in court by PW2, Ms Nyanzi submitted that PW2, the child called clearly testified in his cross examination testimony that he had been told to save mummy and told to lie but in court he told the truth.

The testimony of PW2 shows that he was the first person to see what happened. When an alarm was made other people arrived at the scene, at the time they arrived at the scene the appellant had ran away using a motorcycle. PW3 testified that the appellant came to his home and requested for cloths. They went to the scene but she remained behind and as they were running to the scene to rescue the situation. PW 7, the officer who carried out investigations into allegations of a land wrangle testified that the appellant suspected Sebunya because of land wrangles. However, they investigated the allegation and found that the certificate of title for the land was in the names of Sebunya and the deceased and that Sebunya stated that it was the deceased who gave it to him for safe custody.

Ms Nyanzi invited the court to look at the evidence of PW2 Master Akram as it was the strongest evidence prosecution adduced together with the circumstantial evidence that show that the appellant she had slept in that house, but left the house unhurt with no injuries on her. She invited the court to uphold the conviction and sentence imposed on the appellant.

Consideration of Appeal

We have carefully considered the submissions of counsel, the judicial precedents cited as well as the applicable law. As a first appellate court, our duty on material questions of fact in controversy is to retry them by

subjecting the evidence on record to fresh and exhaustive scrutiny and to reach our own conclusions on all questions of fact and law (See Rule 30 (1) (a) of the Rules of this Court).

In the exercise of this duty we have warned ourselves that we have neither seen nor heard the witnesses testify and made due allowance for that shortcoming as held in **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123**), **Kifamunte Henry v Uganda; SCCA No. 10 of 1997** and **Bogere Moses and Another v Uganda** and **Supreme Court Criminal Appeal No. 1 of 1997**.

The learned trial judge convicted the appellant on the basis of the testimony of PW2 a child of tender years who was 7 years old at the time of the incident and 9 years old at the time of his testimony. Secondly, he relied on circumstantial evidence which he found irresistibly pointed to the guilt of the appellant.

The first ground of the appeal attacks the finding of guilt of the appellant on the basis of circumstantial evidence.

Ground 1

> **That the learned trial judge erred in law and in fact in his interpretation and application of the well-established law regarding circumstantial evidence**

The learned trial judge considered the circumstantial evidence together with the testimony of PW2 which he considered was corroborated by the circumstantial evidence. On the question of whether the fire was caused with malice aforethought, he found that PW1 Mr. Ssebunya heard an alarm and when he went to the house he found that it had been locked from outside, both at the front door and the behind the door. Secondly, the learned trial judge found that PW2 Ssenfuka Akramu, son of the appellant and the deceased told the court that he saw the appellant set the house on

fire. He saw her as she had a torch and had followed her movements from two meters away in the corner. The appellant ran out of the house and locked the outer door as she left. This was confirmed by PW3 Hajj Munge Kibirige. The learned trial judge also considered the evidence of PW 8 who testified that the garage door was open and when he tried to open the door which connects it to the main house, it was locked. PW8 testified that he tried the behind door but it was also locked. The learned trial judge held that under the circumstances of heavy fire on the house and the locked doors it was impossible for the deceased persons to be rescued and this was evidence of malice aforethought. Secondly, the learned trial judge considered the act of disappearance of the appellant and how she surfaced at the home of PW3 at the time of the fire. The appellant was unhurt despite the raging fire in house. Further, that the evidence of PW3 brought out clearly circumstances of malice aforethought. This was the fact that the appellant moved majestically and asked for a "Gomesi" (a traditional long dress), a bra, a belt, as if the situation was normal. She did not rush back to the scene after she got the item she wanted and when they went back they found that she had disappeared. The learned trial judge emphasised the remarks of the appellant when she was at the home of PW3 that: *Kawooya and his two children are finished*. He found that the circumstantial evidence left nothing in doubt about the guilt of the appellant.

Next the learned trial judge considered the participation of the appellant and used these same findings on malice aforethought. On the participation of the appellant he relied on the testimony of PW2 which he held to be very revealing of the participation. He found that PW2 although a boy of tender age was steadfast while giving his testimony which stood up to cross examination and was satisfied in the circumstances with the testimony of PW2 which is the effect that he saw his mother setting the house on fire. The other circumstantial evidence was in the testimony of PW7 Detective Sgt Ochom Dennis who visited the scene and testified that he smelt petrol

at the scene of crime. He also found a generator and a mowing machine. The other circumstantial evidence was the escape of the appellant unhurt from the fire that gutted the house. The learned trial judge held that PW2 was emphatic in his testimony that after setting the house on fire, the appellant ran away from the house and locked the doors. The appellant's late husband was heard calling for help for the people outside to break the windows to rescue them as the door was locked. Further, that it was not surprising that when Namale Saidah shouted for help as she was helpless and could not come out. He found that the evidence of PW2 was corroborated by PW 5 Mr. Bugembe Stephen alias Mugisha who testified that he saw fire burning in the sitting room of the appellant's home.

The learned trial judge held that the act of disappearance by the appellant from the scene of the crime and not participating in the rescue efforts was conduct inconsistent with innocence and further that there was impunity displayed by the appellant. Among other things he held as follows:

> It was a further surprise when PW5 testified that the accused sat on the motorcycle to Mulago hospital, a distance of 8 km unsupported and unbothered. That points to the irresistible conclusion that the accused had no shame and was trying to escape from the scene of crime to cover her guilt....
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> It is the finding and holding of this court that in the present case, besides the identification of accused by PW2 setting fire behind the house, locking doors and running out of the house, the circumstantial evidence was so overwhelming that it pointed to the accused as one who was responsible for the heinous crimes. First of all, it is not disputed that the accused was in the house by the time everybody went to sleep. However, she was the only one who disappeared from the raging fire that engulfed the whole house apart from the 3 girls who slept in the garage that night.

We have carefully considered ground one of the appeal and in the process also dealt with the testimony of PW2 thereby also handling ground two of the appeal which is:

That the learned trial judge erred in law and fact in relying on the uncorroborated evidence of PW2 in convicting the appellant

The principles for use where the sole evidence on which to base conviction is circumstantial evidence were set out in **Simoni Musoke v R [1958] 1 EA 715** by the then East African Court of Appeal sitting at Kampala per Sir Kenneth O'Connor P, Forbes V-P and Gould JA. They held *inter alia* at pages 718 - 719 that:

> The learned judge did not expressly direct himself that, in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As it is put in Taylor on Evidence (11th Edn.), p. 74–
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> > "The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."
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> There is also the further principle, which in view of the doubt as to how long the appellant remained at the funeral ceremony on the night of January 18, 1958, is particularly relevant to the first count, and which was stated in the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 as follows:
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> > "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

The decision demonstrates that the circumstantial evidence should be such as would produce moral certainty about the guilt of the accused. There should be no other reasonable hypothesis other that the evidence points to the guilt of the accused.

We noted that the learned trial judge did not rely solely on the circumstantial evidence to convict the appellant but relied on the testimony of PW2 which he found to be corroborated by circumstantial evidence. At

the same time the learned trial judge found that the circumstantial evidence was overwhelming and pointed to the guilt of the appellant.

In the circumstances, we have deemed it necessary to first consider the testimony of PW2 Mr. Akram Ssenfuka. If the court finds that the testimony of PW2 can stand, the question of corroboration of the testimony can be considered only to support the testimony. It follows that ground two of the appeal would be considered on the basis of whether the learned trial judge erred because the testimony of PW2 was uncorroborated. It is the finding of the learned trial judge that the testimony of PW2 was corroborated by circumstantial evidence. We have carefully considered the testimony of PW2.

PW2 Master Ssenfuka Akramu was nine years old at the time of his testimony but 7 years old at the time of the incident and therefore a child of tender years. He testified that he saw the appellant doing it. He saw her getting paraffin from the generator. The generator was in the store. She put the paraffin behind the fridge in the sitting-room. This was at night.

Some questions immediately arise from the conclusion of the learned trial judge in relation to the kind of fuel that was used to burn the house. The learned trial judge found that according to the testimony of PW 7, a police investigator, there was a smell of petrol when he visited the scene of crime. Further evidence could have been adduced to establish whether the generator used petrol or diesel. Perhaps this could be inferred from the circumstances.

PW2 further testified that his father was in the house and so were other siblings. He saw his mother packing her clothes. There are two bedrooms in the house. His father was sleeping and other siblings were also sleeping. He further testified that the appellant used to sleep in his daddy's bedroom. Everyone was in his/her own bed. He testified that he was forced to wake

up because of so much smoke. This was when he saw the appellant pouring paraffin behind the fridge. Everyone else was asleep. He woke up and saw the accused his mother waking up. She parked her clothes and money in the bedroom and she had a torch.

Some remarks can be made about the testimony of PW2 that he was woken up by smoke. It can be presumed that the smoke came from a fire and that the fire commenced before he woke up. A further scrutiny of the testimony shows that his testimony is that he saw the appellant pouring paraffin behind the fridge. He saw her light the fire. Everyone else was asleep. It was quite improbable that he saw his mother waking up and at the same time saw her pouring paraffin behind the fridge when he was woken up by smoke. Was petrol poured and fire lit so casually?

PW2 further testified that the appellant brought a vehicle, packed all her things in the vehicle and left. He testified that she first put the paraffin behind the fridge, lit the fire and run out. He was in a corner of the house watching as she set the house on fire. Further, that the accused locked the outside door as she left. He immediately alerted his dad who asked him who lit the fire.

This testimony also shows that the bedroom door which connected to the sitting-room where the fridge was located was open. He slept in the same bedroom where his father (the deceased Kawooya) also slept. In this testimony, the accused locked the outside door as she left and he immediately alerted his dad.

We have further compared this testimony to police statements PW2 recorded. PW2 testified that he made a statement at the police but did not tell the police all the things he testified about because he feared policemen. PW2 *inter alia* testified that he did not like his mother because she used to beat him.

If the testimony of PW2 is to be believed, he gave direct evidence and not circumstantial evidence. We are cognisant of the fact that PW2 was only seven years old at the time of the incident.

In the first statement to the police, he stated that he was sleeping with his daddy and mummy plus Shakira, Rashida in the same room. Then his Daddy woke him up and told him that there was a fire burning in the house. The police statement contradicts his testimony in court that he woke up because of smoke. Was it his father who woke him up or did he wake up because of much smoke?

In relation to the participation of the appellant this is what PW2 stated:

> Mummy was standing outside then I saw her counting money. She had two notes of 50,000/= and one of 1000/=. Thereafter she called the man and he came and took her to the hospital. So I, mummy, Beatrice, Esther, Latifa survived but the daddy, Saida and Shakira died.

The statement is fundamentally different from the testimony in chief of PW2. It is also different from an additional police statement made a few days later. In the additional statement to the police this is what PW2 stated:

> While we were asleep, we heard our late sister called Saida Namale shouting and crying that fire had been set to her bedroom. My father woke up and then tried to open the bedroom door but it was locked. When daddy woke up, my mother Kayaga Edith was not in the bedroom. As fire was too much, my father was crying while saying that "pour water on the floor, it's too hot". Further he said that: "please open the window or break the wall and rescue me with the children....
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> Equally my sister died because there was no one to rescue her since our bedroom door was locked and that of Saida Namale. Father was telling her to open but she kept saying that the door was locked from outside. That is all I can state at the moment ....

The learned trial judge had to make up his mind as to what to believe. Was PW2 woken up by his sister screaming that there was a fire? How come his

testimony is that he saw his mother light the fire? Was he woken up by the smoke or his father? Was it petrol which is volatile that was used as the fuel for the fire? In the statement also the fire was set in the bedroom of the sister who woke them up with her cries. Further, in the statement both the bedroom door where PW2 slept and that of the deceased sister were locked.

Looking at the evidence of physical facts, it was crucial to establish which door was locked and by who? The evidence shows another door leading to the garage where some members of the family slept. Evidence also discloses that there was fire in the sitting-room.

We have compared the testimony of PW2 to that of PW4 and PW5 for consistency. PW4 Nansukusa Latifa testified when she was 16 years old and was 14 at the time of the incident. She testified that most of the times they would sleep in the garage namely with Namale Saida, Nampima Esther and Nabikolo Agnes. The appellant requested Namale Saida to go and sleep in the bedroom. She had also been requested her to go and sleep in the bedroom and leave the garage. She however declined. Subsequently, on Sunday, 3rd June 2013 Namale Saidah called them that the house was on fire. She was calling from the main house and requested them to open the door as the house was on fire. They opened the garage door and came out but could not rescue the victim's as the fire was too much. Fire was coming from the sitting room to the bedroom of their father. She stated that their father called and said that the doors were locked and requested people to break the doors. He was in the bedroom window. Then she was informed by Nabikolo Agnes that the appellant had gone on a motorcycle. She testified that her daddy had said that the doors were locked and confirmed that the behind door was locked from outside with bolts.

Several threads can be gleaned from this testimony. The first is that it was the Namale Saidah who cried that there was fire in the house. She was

calling on her siblings to open the door. The reason she gave for not opening the door was that the fire was too much. Secondly, there was fire from the sitting-room to the bedroom of her father. So there is a possible second reason as to why their father could not come out because the fire was in the sitting-room but was it because the bedroom door was locked? She further indicated that the door was locked from outside with bolts. Why was the bolt not simply opened? This can be compared to the testimony of PW8, Dr. James Eyul, who also testified that the doors were locked. He testified that he went through the garage which was the only place without fire. He tried to open the door connecting the garage to the main house but it was locked. PW8 further tried to open the behind door but it was also locked. If it was merely bolted from the outside, why could it not be forced open?

PW5 Bugembe Stephen alias Mugisha testified that he was a Boda Boda rider and remembered that at around 3 AM in the morning he heard an alarm from behind the house. The house belonged to the appellant when he went outside he saw fire burning behind in the sitting room of the appellant's house. He saw the deceased Kawooya in the bedroom of the burning house calling for help. He got a hoe and started knocking the window of the room where the deceased was. Another person started knocking the house from behind. He saw the appellant with her two daughters crying and she was standing near the toilet which was next to the house. She was wrapped in a blanket. When they broke the wall, they managed to pull out a young boy. Subsequently, the appellant requested him for some money so that she goes for treatment. By that time she was wearing a Gomesi. He gave the appellant Uganda shillings 20,000/= and rode with her to Mulago Hospital. Before arriving, the appellant went to talk to one of the concerned people called Tata Seki (brother of the deceased) and came back to the motorcycle whereupon she said that she was being accused of having killed the deceased. On the way to the hospital, the

appellant kept on, muttering about the accusation that she had killed her husband. The prosecution witness testimony shows that the appellant was around and went to the home of PW3 while covered with a blanket. She got a dress from there which she put on and came back to the scene of the fire from where she was taken away on a motor cycle.

PW5 clearly indicated that the appellant was at the scene. When she was at the scene, she was crying and wore a "Gomesi" and also apparently was in the company of two daughters. Where was PW4? The testimony of PW5 is consistent with that of PW3 in some material aspects. But it clearly indicates that the testimony of PW2 could not be truthful because the appellant was at the scene and had not driven away. The testimony of PW2 could only have come after the event when he was told that the appellant had been taken by a motorcycle to the hospital. These facts were not within the knowledge of PW2. In any case the physical distance between the burnt house and the house of PW3 is about 70 meters. Further it is more probable that PW2 was couched after making his first statement to the police. All in all his testimony in court is not believable at all and should never form the basis of any conviction. It was incapable of corroboration because it was inherently contradictory and highly suspicious when compared to 2 police statements and the testimony of other witnesses. We would allow ground two of the appeal and hold that the learned trial judge erred in law to rely on the testimony of PW2 and to further hold that it was corroborated by circumstantial evidence.

In relation to the first ground of the appeal, the circumstantial evidence relied on by the trial judge is based on a theory the basis of which is the testimony of PW2 that the appellant set the house on fire and escaped. It was her conduct after the fire that received a serious censorship from the learned trial judge. The fact that she was walking majestically, she was

asking for a dress when the fire was still raging, the blanket which covered her initially was not burnt. She was also unhurt by the fire.

We have carefully considered the circumstantial evidence. The first observation is that the circumstantial evidence is clearly hinged on the testimony of PW2. Once this testimony of PW2 is unreliable, then the entire circumstantial evidence crumbles.

The above notwithstanding, we have carefully considered the testimonies of the prosecution witnesses on the footing that the burden is on the prosecution to prove the case and does not shift to the defence. The innocence or guilt of the appellant has to be established from the prosecution evidence (see Woolmington versus DPP [1935] A.C. 462)

Apart from the physical evidence, the circumstantial evidence heavily relied on by the learned trial judge *inter alia* is in the testimony of PW1 and PW3.

We have accordingly considered the evidence on record. PW1 Mr Ssebunya, testified that he was woken up at around 4 AM in the morning hours. He opened the door and saw his brother's house burning in a distance and in the neighbourhood. He went to the house and found that it was burnt and the house had been locked from outside both in the front door and behind door. He forced the window open from the bedroom of the deceased (his late brother Kawooya Ismael) whereupon they picked a young boy called Senfuka Akramu (PW2) through the window. He testified that the accused and children had slept in the house but by the time he reached the scene, the appellant was not there. He further testified by way of background that the appellant did not like relatives of the deceased near their home. She did not like him though he had no grudge against her. PW1 introduced information about having no problem with his deceased brother over two acres of land. He admitted having made a statement to the police on 4th June 2013 and an additional statement on 9th June, 2013.

For the most part PW1 did not have any evidence implicating the appellant other than his observation that she had disappeared from the scene.

We have examined the two police statements PW1 made. In the first statement he wrote that he was woken up when the house was on fire. He rushed to the scene but found that the whole house was on fire. He and other neighbours tried to break the windows such as to rescue the people who were locked up in the house by the fire. They broke the window of the bedroom where the late Kawooya Ismail was sleeping. They rescued some people. He noted in a statement that he was surprised that the wife of his deceased brother was nowhere to be seen. She escaped to her own place. Later they got information that she went to Mulago hospital. They therefore suspected her to be the person who lit the fire. This is what he stated about the alleged sale of a piece of property:

> The issue of the sale of the piece of land by my late brother ... and that he was paid 250,000,000/= (Two hundred and fifty Million shillings) is false.

The only circumstantial evidence is the fact that the appellant was not present after the incident and did not attend the funeral of the deceased husband.

The third witness PW3 Hajj Minge Kibirige Mahmood testified that he heard somebody banging at his gate and woke up abruptly with his wife. His wife opened the window and saw that the house in question was on fire burning terribly. The house was about 70 meters away. When they rushed out of the house, they found the appellant lying on the veranda of their house whereupon he reported her as having said *Kawooya and his two children are finished*. The appellant was covered in a blanket and asked his wife to give her something to cover herself. He noted that her body was not burnt and she moved majestically. They rushed to the scene leaving her lying down on the veranda. To his further surprise two young girls, relatives of the accused were in the compound and were unaffected by the fire. He

heard that they had slept in the garage and it was the appellant who told the young girls to sleep in the garage and not the main house. When his wife went back after 10 to 20 minutes to check on the condition of the appellant, they found that she was not there and were told that a boda boda man took her. He was further surprised that the appellant had not run for help to the house of Mr Sebunya which was about 15 meters away and instead came to his house, about 70 meters away. The other surprise included the disappearance of the appellant when her husband and child were burnt in the house. He later learned that the appellant had gone to Mulago hospital. He contended that the appellant was pretending to suffer from high blood pressure.

Our first observation is that the testimony of PW3 corroborates that of PW5 that the appellant was subsequently putting on a Gomesi. It can safely be concluded that it is true that the appellant left the scene of the crime and went to the home of a PW3 who is her father-in-law. It is from there that she got herself dressed. Before that she was naked and covered herself with a blanket. The testimony of PW3 is however contradicted by PW5 with regard to the disappearance of the appellant. PW5 testified that he saw the appellant standing near the toilet crying with two of her children (before she went to the home of PW3). PW5 further testified that afterwards the appellant informed him that she was being accused of having killed husband (she was wearing a gomesi at this time). Thereafter, he took her to the hospital. In our view it was improper to impute malice aforethought on the appellant on the ground that she left the scene of the alleged crime. What comes out is that the appellant was covered by a blanket and rushed to her father-in-law's home whereupon she got dressed. She was also frightened apparently by one Tata Seki (a brother of the appellant's deceased husband) who told her something and PW5 reported that she was murmuring to herself that she was being accused of the death of her husband.

The learned trial judge echoed the sentiments of PW3 about the appellant walking majestically as if the situation was normal.

With regard to motive, PW4 testified that there was no problem between the appellant and her father but the appellant did not get well with PW1 Mr Sebunya. She testified that she also made a statement to the police the next day. In that statement she had stated that her daddy had come out of the house and this was because Nampima requested her to defend the appellant. She stated that in the second statement to the police, she told the truth.

We further note that the appellant apparently had nothing to gain from the crime and her children were also involved and in danger from the fire.

The other witnesses are policemen and we need not refer to their testimonies.

PW8 Dr. James Eyul was one of the neighbours. He went through the garage when the place was on fire. He testified that the garage was the only place without fire. He tried to open the door connecting the garage to the main house but it was locked. He tried the behind door but it was locked. He could not tell from which side (inside or outside) the doors were locked.

In the premises, it is our conclusion that the learned trial judge erroneously relied on the testimony of PW2 and heavily leaned on it. He found that PW2 was a steadfast witness. Had the learned trial judge found as we did that the testimony of PW2, a child of tender years, was unreliable, he would not have used the circumstantial evidence as corroboration to it.

In any case the circumstantial evidence could not on its own lead to the conclusion that the appellant was the person who committed the heinous crime. For circumstantial evidence to stand on its own and as held in **Simoni Musoke v R [1958] 1 EA 715** it must be established as held that:

The inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In other words there has to be moral certainty to the exclusion of every reasonable doubt. There are too many other possible theories about what or who could have caused the fire, and who could have locked the house, if locked at all coupled with the fact that the appellant had no conceivable motive that could be pinpointed. It was therefore very unsafe to have the only hypothesis that the circumstantial evidence of leaving the scene of the crime, and the others facts relied on in the judgment led to the only conclusion of guilt of the appellant. This is not so.

The appellant could have been frightened, traumatised and indeed she went to the hospital. She was also at the scene of the crime after the event with her children. She even talked to other persons. Even the fact of running to the home of PW3 can be explained by the fact that she did not have a good relationship with PW1 whose home was nearer. The prosecution witnesses contradicted one another. It was not clear how the doors were locked. Was it locked from outside according to the testimony of PW4? Was it locked from the inside? Cannot it be explained that the fire from the living room was so intense that the deceased (Kawooya) was unable to escape from the bedroom? There was no clear evidence about the outline of the house so as to consider which room is accessible from which point. For instance PW1's additional police statements stated that the door was locked from inside. In his first statement to the police he stated that he and other neighbours tried to break the window such that they could rescue the people who were locked up in the house by fire. It was therefore erroneous to conclude that the appellant had locked her own children in the house with malice aforethought. The evidence was inconclusive and there was no overwhelming circumstantial evidence to implicate the appellant.

In the premises, we allow ground one of the appeal and hold that the learned trial judge erred in law and fact in applying well established principles regarding circumstantial evidence to the facts of the case and coming to the erroneous conclusion that the evidence could only lead to the conclusion that the appellant was guilty of the offences she was convicted of.

We accordingly quash the conviction of the appellant on the three counts of murder and one count of arson.

Having quashed the conviction, it is unnecessary to consider ground three of the appeal which ground is against sentence.

We accordingly set aside the sentences imposed on the appellant and order that the appellant be set free forthwith unless she is held on other lawful charges.

Dated at Kampala the 3rd day of March 2020

Kenneth Kakuru

Justice of Appeal

Frederick Egonda Ntende

Justice of Appeal

Christopher Madrama Izama

Justice of Appeal