THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA)

CRIMINAL APPEAL NO 52 OF 2019

RWAKASANA SIMON} ..... APPELLANT

VERSUS

UGANDA} .....RESPONDENT

(Appeal from the decision of the High Court at Kampala; the Hon. Lady Justice Jane Frances Abodo dated 25th October, 2018 Criminal Appeal No 107 of 2018 Chief Magistrates Court Nakasongola Criminal Case No. 395 of 2016)

JUDGMENT OF COURT

This is a second appeal from the decision of the High Court in its appellate jurisdiction in an appeal from the decision of the Chief Magistrate Court of Nakasongola. The brief facts are that the Appellant was charged with the offence of arson contrary to section 327 (a) of the Penal Code Act. It was alleged that on 24th of October 2016 at Nsanga Village, Kalungi Sub County, Nakasongola district, the accused wilfully and unlawfully set fire on the structure and property of Luzindana Stephen. The appellant was tried and convicted of arson contrary to section 327 of the Penal Code Act by her worship Agatonica Mbabazi Ahimbisibwe, the learned Chief Magistrate of Nakasongola Chief Magistrates Court on 9th August 2018. The appellant was sentenced to 8 years' imprisonment and appealed to the High Court against both conviction and sentence. The High Court dismissed the appeal and upheld the conviction and sentence. The appellant appealed to this court on the following grounds:

1. The learned appellate Judge erred in law when she confirmed the appellant's conviction based on the unreliable and uncorroborated evidence of a single identifying witness.

2. The learned appellate Judge erred in law when she confirmed the appellant's conviction without considering the defence of alibi raised by the appellant; in the alternative and without prejudice;

3. The learned trial Judge erred in law when she confirmed the sentence of the appellant which sentence was illegal, based on wrong legal principles and was harsh and manifestly excessive given the circumstances of the case.

At the hearing of the appeal, learned counsel Mr Andrew Sebugwawo represented the appellant. The appellant attended court from Masindi main prison via video link. The respondent was represented by learned counsel Nalwanga Sharifah, Chief State Attorney. The court was addressed by way of written submissions.

Ground 1

The learned appellate Judge erred in law when she confirmed the appellant's conviction based on the unreliable and uncorroborated evidence of a single identifying witness.

The appellant's counsel submitted that the learned first appellate Judge erred in law to confirm the appellant's conviction based on the unreliable and uncorroborated evidence of a single identifying witness. He submitted that the court is required to warn itself of the likely dangers of acting on such evidence and to only convict after being satisfied that correct identification was made which was free of error or mistake (See **Abdallah Bin Wendo v R [1953] 20 EACA; Abdallah Nabulere and 2 Others v Uganda [1975] HCB 77**). Further, he submitted that the evidence of a single identifying witness needs to be corroborated. The appellants counsel pointed out that PW1 testified that his house was burnt and there were children in the house.

The children were never called as witnesses to corroborate evidence of PW2 who is said to have identified the appellant.

PW2 was the single identifying witness who testified that he raised an alarm which was answered by several people. However, none of those people were called to testify in court and give an account of what transpired at the scene of the crime or to corroborate his evidence. Counsel submitted that the absence of the evidence created a big gap in the prosecution case which ought to be resolved in favour of the appellant. Further, the identification of the appellant at the scene of the crime is questionable because the evidence adduced at the trial was too weak, brief and unreliable. For instance, how was the appellant dressed or what was he putting on. What type of bicycle did the accused have at the scene of the crime? What type of matchbox was used to set the house ablaze? How long did it take for the house to burn in the presence and under the watch of PW2? This is a person who is alleged to have been 3 metres from the scene and it took the appellant one minute to light the fire. Counsel contended that if he was truly at the scene, he would have put out this fire in just seconds considering he was only 3 metres from the house. He submitted that the learned appellate Judge assumed too much and relied more on her own reasoning, understanding and conjecture other than the evidence on record. He prayed that this ground of appeal is allowed.

In reply, the respondent's counsel submitted that the learned first appellate court Judge applied the relevant principles as outlined in **Abdallah Nabulere v Uganda** (supra). This is because in the cited case, the proposition is that the court takes into consideration the familiarity of the witness with the accused, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused when under observation, the source of light aiding identification. Further, there is no statutory authority requiring more than one witness and section 132 of the Evidence Act is clear on that. She submitted that the appellate court Judge found in her evaluation of the evidence that all factors for correct identification were present. This is because the appellant was known to the

witness as a clansman, he was 3 metres from the appellant and the witness also clearly observed the appellant when he saw him and when the appellant jumped on the bicycle and rode away from the scene of crime. The time of the crime was 3 PM (in broad daylight). Further, the appellate court Judge found that so long as the court warned itself of the dangers of relying on a single identifying witness, it can go ahead to convict on the uncorroborated evidence. Lastly, the Judge found no possibility of a mistake in identification in the circumstances and dismissed the appellant's appeal on that ground.

Ground 2

The learned appellate Judge erred in law when she confirmed the appellant's conviction without considering the defence of alibi raised by the appellant.

The appellant's counsel submitted that the accused set up an alibi as a defence which was confirmed by 2 other witnesses. That this alibi was strong as against the uncorroborated evidence of PW2. He submitted that when the defence raised the defence of alibi, it was incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. That it is a misdirection to accept one version and hold that because of the acceptance per se, the other version is unsustainable (see **Moses Bogere vs Uganda; Supreme Court Criminal Appeal No 1 of 1997**).

As far as the facts are concerned, the appellant's counsel submitted that the learned appellate Judge dismissed the alibi on grounds that it came late in the appellant's statement instead of early at the point of arrest. That this was a misdirection on the part of the learned appellate Judge. Further it was sufficient for the police to investigate the alibi and make the necessary conclusions. The alibi was not investigated by the police and this created a big gap in the prosecution case which ought to be resolved in favour of the appellant.

In reply, the respondent's counsel submitted that the learned first appellate court Judge correctly confirmed the appellant's conviction after re-evaluation of the evidence of alibi. The learned appellate court Judge emphasised the principles of law that where a defence of alibi is raised, it is the duty of the prosecution to adduce evidence to destroy the alibi and that such a defence ought to be raised at the earliest opportunity.

The learned appellate court Judge found that the alibi came late in the day and not immediately after the arrest of the accused. Further upon re-evaluation of the prosecution evidence, the learned appellate court Judge found that the appellant had been placed at the scene of the crime and upheld the decision of the trial magistrate. The respondent's counsel relied on **Ssenyondo Umar v Uganda; Criminal Appeal No 267 of 2002** for the proposition that the accused ought to raise the defence of alibi as soon as possible for it to be considered a genuine defence. An alibi that is belated has reduced value as a defence. Further in **Jamada Nzabaikukize; Criminal Appeal No 01 of 2015**, it was held that the alibi was discredited, because the appellant was placed at the scene of the crime.

Alternative Ground 3 of appeal.

The learned appellate Judge erred in law when she confirmed the sentence of the appellant which sentence was based on the wrong legal principles and was harsh and manifestly excessive given the circumstances of the case.

The appellant's counsel submitted that the record shows that the appellant was remanded on 26th of October 2016 and granted bail on 14th of December 2016. He had spent a period of approximately 2 months on remand. This period was never considered and taken into account while sentencing the appellant contrary to article 23 (8) of the Constitution of the Republic of Uganda. He further submitted that the appellant's sentence was harsh and manifestly excessive given the circumstances of the case. There were no strong aggravating factors in the evidence. He prayed that the sentence of

8 years' imprisonment is set aside and replaced with another sentence of 2 years' imprisonment.

In reply the respondent's counsel conceded that the period of 2 months the appellant spent in pre-trial detention was not taken into account in passing sentence and the sentence was illegal. However, the learned appellate court Judge rightly confirmed the sentence which was not harsh and manifestly excessive in the circumstances. This is because arson carries a maximum sentence of life imprisonment. The learned the trial Chief Magistrate took into consideration the mitigating factors as found by the first appellate court Judge. The aggravating factor was of setting the house ablaze. She prayed that this court upholds the sentence of 8 years' imprisonment and only deducts the 2 months spent on remand and sentences the appellant to 7 years and 10 months' imprisonment.

Resolution of appeal

We have duly considered the appellant's appeal. The appeal is a second appeal originating from the decision of the High Court sitting as a first appellate court pursuant to the decision of the Chief Magistrate's court of Nakasongola in which the appellant was convicted of arson contrary to section 327 (a) of the Penal Code Act and sentenced to 8 years' imprisonment.

As a second appeal, the appellant is only entitled to appeal on a point of law and is barred from appealing on any mixed point of law and fact or a point of fact. Section 45 (1) of the Criminal Procedure Code Act cap 116 provides that:

> 45. Second appeals.
>
> (1) Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.

Ground 1 of the appeal is that:

The learned appellate Judge erred in law and fact when she confirmed the appellant's conviction based on the unreliable and uncorroborated evidence of a single identifying witness.

On the face of the pleadings, ground 1 of the appeal involves a mixed question of law and fact and is barred on that ground. We have however, carefully considered the submissions of the appellant's counsel and the law. The question of law is whether the first appellate court erroneously upheld the decision of the trial magistrate on the issue of whether it warned itself of the likely dangers of acting on the evidence of a single identifying witness. The evidence that is being attacked is the evidence of PW2 Mr. Kanyarwanda Sam who testified that he saw the appellant lighting a match and setting the house of the complainant on fire. The learned Chief Magistrate on the question of credibility of PW2 found that he was a truthful witness. Secondly, she found that the testimony of PW2 remained consistent and truthful in cross examination. She held that the house caught fire as a result of a deliberate act. It was PW2 who saw the accused lighting a match and setting fire to the house and this was when he was 3 meters away. The learned Chief Magistrate further considered and relied on the decision in **Abdullah Nabulere v Uganda; Criminal Appeal No 8 of 1978 [1979] HCB 77** and that of **Abdullah Bin Wendo & Another v R 20 EACA 166** for the proposition that before relying on the evidence of a single identifying witness, the following elements must be considered:

(a) Conditions of light enabling proper identification.
(b) Proximity of the accused to the witness at the scene of crime.
(c) The familiarity of the accused with the identifying witness.
(d) The duration of time.

The learned Chief Magistrate further quoted extensively from **Abdullah Nabulere v Uganda** (supra) for the proposition of law on reliance on the testimony of a single identifying witness to base a conviction and this is what she wrote:

"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 on 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 even a number of such witnesses can all be mistaken. The Judge should examine closely the circumstances in which the identification came to be made particularly the length of time, 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 mistaken identity is reduced by the poorer the quality the greater the danger..."

The learnod Chief Magistrate after considering the law held that the accused was properly identified. The offence was committed during broad daylight, and out in an open space, in close proximity of the identifying witness who had ample time and opportunity to see the accused. It was 3 PM when he saw the accused lighting fire with a matchbox. The accused started lighting the fire in the doorway. He had a bicycle. Upon the accused seeing the witness, he jumped on a bicycle and rode off. PW2 knew the accused before. Further PW2 testified that it took about a minute to light the matchbox and set the house on fire and ride off. The learned trial Judge further considered the submission that the testimony of the identifying witness lacked corroboration. This is what the learned trial magistrate held:

> I have already found that the identification was done in satisfactory conditions and cautioned myself so there is no need of other evidence to corroborate his evidence.

The learned Chief Magistrate further considered the alibi of the accused against the evidence of identification and found that the accused admitted during cross examination that he did not tell the police that he was sick and sleeping at the time after he was arrested. He brought out the defence of alibi 8 days after his arrest. She found that the prosecution evidence places the accused squarely at the scene of crime as the person who burned the house and disregarded the alibi.

On appeal to the High Court against the decision of the learned Chief Magistrate, ground 1 of the appeal is that:

> **The learned trial magistrate erred in law and fact when she relied on the uncorroborated evidence of a single identifying witness and wrongfully found that the appellant had committed the offence of arson contrary to section 327 of the Penal Code Act.**

The learned first appellate court Judge found that the issue to be determined was whether the identifying witness was able to recognise the accused and his actions. She considered the doctrine relied on by the learned Chief Magistrate, which procedural doctrine, we do not need to repeat as it is quoted above. She found that PW2 knew the accused as a clansman. Secondly, the duration of time taken to observe and identify the accused and the proximity of 3 metres. The accused saw the witness and the witness saw the accused. She found that the witness had ample time to recognise the accused. Moreover, the offence occurred at about 3 PM in the afternoon. She found no possibility of mistaken identification by the single identifying witness.

What then is the question of law? The only question of law is whether the first appellate court Judge erred to affirm the decision of the trial magistrate which relies on the evidence of a single identifying witness without corroboration. On a matter of procedure, clearly the learned Chief Magistrate considered the law on identification and cautioned herself. In the case of **Abdullah bin Wendo and another v R (1953), 20 EACA** page 166 as cited in **Roria v R (1967) EA 583** the East African Court of Appeal held that subject to well-known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone. Clearly, it is not a misdirection to convict on the evidence of a single identifying witness if the conditions are right for such an identification. There is no requirement for corroboration though it may be necessary where the conditions are not good enough. This is a question of fact. In the circumstances, there is no question of law involved and there was no misdirection on the part of the learned trial Chief

Magistrate or the learned first appellate court Judge. The question of whether the lower courts were right on the issue of whether the conditions were perfect for such identification is a question of fact. The trial court and the first appellate court agreed that the conditions were right and the identification was perfect. We cannot in the circumstances interfere with that. Ground 1 of the appeal fails on the ground that it involves a mixed question of fact and law and is barred by section 45 (1) of the Criminal Procedure Code Act.

Ground 2 of the appeal

The learned appellate Judge erred in law when she confirmed the appellant's conviction without considering the defence of alibi raised by the appellant.

We have carefully considered this ground which is on the issue of whether learned first appellate court Judge should have upheld the defence of alibi on the facts and circumstances. The learned appellate court Judge considered the ground 2 of the appeal in the High Court which was couched as follows:

The learned trial magistrate erred in law and fact when she completely disregarded the appellants alibi and therefore arrived at the wrong conclusion in convicting the appellant of the offence of arson contrary to section 327 of the Penal Code Act.

The learned Chief Magistrate considered the defence of alibi and the first appellate court Judge considered ground 2 of the appeal against that decision. The question of whether the evidence was sufficient to put the appellant at the scene of the crime and to disregard the evidence of alibi goes to the credibility and sufficiency of the evidence. While there was no misdirection on the part of the lower courts, the question of whether from the facts the defence of alibi was properly disregarded is a question of law.

The issue of the alibi of the appellant goes to the entire defence of the appellant which requires us to consider the two elements of the defence

together. The first element being that there was a grudge between the appellant and the complainant. The second element being that the appellant's defence was that he was at home on account of sickness at the material time (3.00 pm).

The learned Chief Magistrate stated as follows:

> On the issue of the grudges both prosecution and defence allege the issue of grudges. That they have a land matter in court. Whereas the complainant alleges that the intention of accused was to destroy the documentary evidence in respect of the land matter, accused thinks he was framed because of the same matter. I have cautioned myself about the danger of convicting accused in light of the presence of the grudges.
>
> However, I find that although these grudges were there, one cannot burn his own house and mostly do so when his children are sleeping inside. After all the complainant was not at home at the time of arson. A normal person cannot do that. I now turn to the accused alibi that he was sick on that day and that he first took the cows out, then went and brought food and that since he was not feeling well he took medication and went to sleep from 1.00 PM to around 7.00 PM when he was arrested.
>
> I do not agree with counsel for state that the accused admitted during cross examination that he did not tell police that he was sick and that is why he was at home. That he told a police officer about the sickness 8 days later, I agree on the position of law that a defence of alibi should be disclosed at the earliest opportunity as belated disclosures undermines its credibility - **R v Sukha Singh Wazir and Ors [1939] EACA**. It was held in **Uganda v George Kasya [1988] HCB 78** that when an accused person raises a defence of alibi, it's not his duty to prove it but it is the duty of the prosecution to dig out and destroy the defence.
>
> In the case before Court prosecution evidence places accused squarely at the scene of crime as the one who band the house. I hence have nothing better to do than to disregard the alibi.

On this issue the learned first appellate court Judge found that:

> I also found that the learned trial Magistrate evaluated both the prosecution and defence evidence and rightly came up with her conclusion based on the strength of the prosecution evidence. She disregarded the alibi of the defence after evaluating the evidence the prosecution had put forward to place the appellant at

the scene of crime, the learned trial magistrate was right in arriving at a conviction.

While the learned Chief Magistrate stated that she cautioned herself, caution is not only in the mind but must be demonstrated in the evaluation of evidence. It was not enough to state that she had considered the grudges based on the established fact that the parties had a land dispute and perhaps thought that it had no bearing on the testimony of PW2; the single identifying witness. The evidence of PW2 has to be treated with the greatest caution because of the evidence of a grudge and the presence of a land dispute between the complainant and the appellant which was in Court. Both parties used this grudge with the complainant suggesting that it was meant to destroy evidence as the motive of the appellant and the appellant saying that his arrest because he was framed due to the land wrangle.

When the evidence of PW 2 is considered against the evidence of the alibi, that caution should be apparent.

The complainant testified as PW1 and stated that he left 3 children sleeping in the house. He left between 11 AM and 12.00 noon when the children went to sleep. The children in the home were Sam Kananga 13 years old, Sarah Ngabali 8 years and Kaligiba Merab 5 years. Mr. Ruzindana, the complainant, made a statement at the police which was admitted in evidence. It shows that the house is a grass thatched house. In the statement he states that sometime back in 2007 he had a dispute over the same piece of land with the appellant. The matter was in court. In the police statement he states that he left home with his wife in the morning hours.

PW2 Sam Kanyarwanda was 18 years old at the time of his testimony. He testified on 13th of December 2016. On 24th of October 2016 he was alone when he saw the appellant. He saw the appellant lighting the fire on the house and ran into the house and got out 3 children from the house. The children were crying from inside the house. He raised an alarm and people responded. In cross examination he stated that he first got the children out of the house before raising an alarm and people responded to the alarm.

The appellants counsel took issue with this testimony on the ground that it took the appellant a full minute to light the fire with a match and the witness (PW2) was only three minutes away. Moreover, in his testimony he said that as soon as the appellant saw the witness, he jumped on a bicycle and rode away. The issue raised by the appellant's counsel is why the witness did not put out the fire immediately. No other person saw the appellant The time of the incident was around 3.00 PM in the afternoon. Apparently the house was not locked and PW2 was able to access it and remove three children out of it. It is presumed that these children were sleeping inside

We have also critically considered the evidence of PW4 Mr. Budama James who was told about the arson and came to the scene. He received a phone call that the house of the complainant had been burnt. He is a younger brother of Ruzindana (the complainant). He testified about the damage to the properties due to the burning of the house. Significantly he mentions documents in the house which included land titles for Block Number 142 Plot 11. Many things were burnt beyond recognition.

On the other hand, we have considered the testimony of the appellant who testified as DW1. It is *inter alia* that his people have a land wrangle with the family of Ruzindana (the complainant). He was cross examined about the loss of documents and testified that none of his relatives would benefit from the loss of the documents. Clearly the documents were important in the land dispute matter. Further, the alibi of the appellant that he was in his house sleeping is corroborated by the testimony of his wife Kobusingye Justine (DW2) who was around when the appellant was sleeping. Secondly, it is corroborated by the testimony of Mukanyena Penina (DW3) who testified when she was 16 years old. She came back from school at around 1 PM. Her father was at home when a visitor came that afternoon (around 5 pm) and she was there until when the police came to arrest her father.

Against the testimonies of the defence is that of PW2, the only witness who in the space of 1 minute was able to identify the appellant and no other person did as the appellant rode away and PW2 raised the alarm after rescuing children.

Further, the learned trial Magistrate relied on the fact that the alibi was given late about 8 days after the arrest and this was the ground she stated for not taking it seriously. On the other hand, we have considered the fact that the appellant testified in cross examination that he was arrested at 7 PM the same day and his statement was recorded by the police 8 days later. That was the only time he could have disclosed his alibi. It was therefore erroneous to use the late disclosure of alibi disclosed to the police 8 days after the arrest when in actual fact it is the state which took the statement of the appellant late (namely 8 days after his arrest). The reason given by the learned Chief Magistrate to disregard the appellant's alibi cannot stand. What is left is to test the testimony of the appellant, that of his wife DW2 and that of his daughter, DW3 against the testimony of the single identifying witness PW2.

While we are cautious that we cannot try matters of fact, we can consider the fact that the children are stated to have gone to sleep in the same house at around 11 AM in the morning and by 3 PM in the afternoon, they were still sleeping in the house and were rescued by the herdsman PW2 before raising an alarm about the fire or the person who lit the house. Moreover, the oldest child was 13 years old. Apparently the house was accessible from outside. We cannot tell whether outside was assessable from inside. To lock it from outside would have constituted the offence of attempted murder. The complainant left the home around 11 AM in the morning when the children had gone to sleep. We cannot speculate further speculate about the circumstances but note that several theories are possible. It is a case of the testimony of PW2 against the testimonies of DW1, DW2 and DW3 all given on oath and all which seemingly remained consistent even after cross examination.

We therefore find that the learned first appellate court Judge ought to have scrutinised this evidence before coming to the conclusion that the learned trial Chief Magistrate properly disregarded the appellant's alibi on the strength of the prosecution evidence. As noted above, we have seen sufficient grounds for caution and the appellant ought to get the benefit of

doubt. Failure to consider the evidence thoroughly by the first appellate court on the issue of the alibi vis a vis the testimony of the single identifying witness on the participation of the appellant was an error of law.

In the premises, we allow ground 2 of the appeal and find that it was unsafe to base conviction solely on the testimony of a single identifying witness in circumstances of a land wrangle between the complainant's family and the appellant's family coupled with conflicting testimonies all on oath, one asserting that the appellant was at the scene through a single identifying witness and 3 others asserting that he was somewhere else at the material time. In light of the finding in ground 2 of the appeal, we do not need to consider ground 3 of the appeal which is on sentence.

We accordingly quash the conviction of the appellant and acquit him. We further set aside the sentence. The appellant shall be set free unless held on other lawful grounds.

Dated at Kampala the 15th day of Oct 2021

Fredrick Egonda - Ntende

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal