THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CRIMINAL SESSION CASE No. 0131 OF 2009

UGANDA …… PROSECUTOR

VERSUS

BAITWABUSA FRANCIS …… ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Baitwabusa Francis, herein referred to as the Accused, was indicted on five counts; all for the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence in each count alleged that on the 8th day of July 2008 at Kihande I Village in the Masindi District, the Accused murdered the person named in the count; and these were, respectively: Kaireta Geoffrey, Kabajwiga Brenda, Dizaya Kabajungu, Kisembo Derick, and Amanyire Edward. The Accused denied the allegations in each count; and the Court entered corresponding pleas of "Not Guilty", then this trial followed.

Murder is an offence constituted by three ingredients. These are:-

(i) Death of a human being.

(ii) The cause of death was homicide.

(iii) The homicide was perpetrated with malice aforethought.

It is incumbent on the prosecution to prove, beyond reasonable doubt, that the person so charged unlawfully perpetrated the said death, and with malice aforethought; after which the charge of murder can result in conviction of the person accused.

The law, as was stated in ***Kimweri vs. Republic [1968] E.A. 452***, is that proof of death may be done by presentation of a report of medical examination on such body; or, inter alia, by a person who physically saw the dead body. In the present case before me, the post–mortem examination reports by Dr Abiriga (PW1) of Masindi Hospital, on the victims named in the respective counts, were admitted in the preliminary proceedings, under section 66 of the Trial on Indictments Act, as agreed facts; and exhibited, respectively, as: *PE1, PE2, PE3, PE4, PE5*. He certified in each report that the body, which was identified to him by Karubanga Mathew (PW2), had been burnt beyond recognition.

PW2 –owner of the house in which the victims perished, who was himself in it that fateful night – and his mother Kabatoro Rose (PW3), adduced direct evidence of these deaths; as the deceased were their family members. Zubairi Byesigwa (PW4) the LC1 Chairperson of the ill–fated village, and SP Twebaze Alex (PW5) the DPC, who both immediately visited the scene of the incident and saw the dead bodies, corroborated the evidence regarding the deaths. Hence, as was rightly conceded by the defence, the prosecution has proved the death of the person named in each count, beyond reasonable doubt.

With regard to the ingredient of homicide, it is a presumption of law always; and this has been restated in such cases as ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65****;* ***Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68;*** and ***Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16,*** that any incident of homicide is felonious. This presumption of unlawfulness may however, as was stated in ***Festo Shirabu s/o Musungu vs. R. (22) E.A.C.A. 454***, be rebutted by the person charged by establishing, on a mere balance of probabilities, that the homicide falls under either some justifiable or excusable circumstance.

Justifiable homicide may, in fact, be intended. However, because it is not owing to any evil design; but rather committed under circumstances dictated by duty, such as in the administration of justice, instances of which are the execution of a lawful sentence of death, or fatality resulting from an attempt to arrest an escaping felon carried out in a manner devoid of criminally careless or reckless conduct, it is an absolute defence to any charge. Excusable homicide, on the other hand, results from such instances as self defence, or of a family member, or proportionate response to some offending provocation. It is dictated either by necessity, or is accidental. This

reduces such homicide from murder to a lesser offence such as manslaughter; which, while still punishable, is only so to a lesser degree.

In the instant matter, no one was seen setting the house on fire that fateful night. However, the prosecution evidence was that the inferno burnt down a permanent building which had been strangely locked from the outside that night; and rescue efforts to break down the door proved futile. Further evidence was that the family dog staggered and collapsed to death at the same time; and the necropsy carried out on it established that it had been poisoned. The inculpatory facts of poisoning the dog, locking the house from the outside, and the ferocity of the fire that burnt down a permanent building – strongly pointing to the use of petrol as was asserted by PW3 – were all circumstantial evidence; but from which foul play is so manifest.

There is however no other fact, whether inculpatory or exculpatory, that could offer any reasonable alternative hypothesis as to the source of that fire; or other circumstance co–existing with these several inculpatory facts listed above, and which could either weaken or altogether negate the compelling and irresistible inference that the multiple homicides resulted from nothing else but the vile felony of arson. Accordingly, in the absence of any evidence in rebuttal – and this was rightly conceded by the defence – the presumption that the multiple deaths were, all, unlawful homicides remains well founded.

As for the ingredient of malice aforethought, unless the person causing the death has expressly declared his or her intention to cause death, malice aforethought would remain an element of the mind; and can only be established by inference, derived from the conduct of the perpetrator, or the circumstances surrounding the causation of such death. This position of the law is well encapsulated in section 191 of the Penal Code Act; which provides as follows:

"191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although

such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

The factors from which malice may be inferred, were authoritatively laid down in the case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63****;* and re–affirmed in such cases as ***Uganda vs. Fabian Senzah [1975]H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989.*** The factors are, but not exclusive to, whether the weapon that caused the injury occasioning the death, was lethal or not; whether the parts of the body of the victim targeted were vulnerable or not; whether the nature of injury pointed to an intention to cause grave damage, as for instance where the injuries are inflicted repeatedly, or not; whether the conduct of the assailant, before, during, and after the attack, points to guilt or not.

In the instant case, as pointed out above, there was no direct evidence as to the source of the fire that caused the grisly deaths. Nonetheless, the fire burnt down a permanent building, thus giving much credence to PW3's assertion that petrol had been used. The locking of the house from the outside by some unknown person that night while the occupants slept inside, and the poisoning of the family dog that very night, all, in the absence of any alternative hypothesis, or co–existing circumstance, are very compelling circumstantial evidence irresistibly pointing to evil design having been behind the tragic fire. As was also conceded by the defence, and on the authority of ***Uganda vs. Turwomwe [1978] H.C.B. 16,*** whoever caused the fire did so with malicious intent.

There was no direct evidence of identification of the perpetrator of the arson. However, it was common ground that there existed bad blood between the Accused and PW2. PW4 the Chairman LC1 of the area testified that the Accused had lodged a case with the LC committee alleging that PW2 had conned his wife of some money claiming he would bring someone to solve her problems, and further that his wife had given PW2 a phone with which they used to communicate; and that all this had brought confusion in his home. He stated that the Accused had demanded that PW2 should never again set foot in his home; but that PW2 however denied all these allegations

Both PW2 and PW3 testified that the Accused was terribly mad at PW2; and that at the meeting with the LCs, when the LCs had heard from both sides, and had taken time off and gone to confer on the course of action to take in the matter, the Accused threatened to undress and bare his nakedness in front of PW2; and this very grave and abominable suggestion drove PW2 to walk

away from the place of the meeting before the LCs could return and deliver their decision. The departure of PW2 was corroborated by PW4 who however did not know the reason for that turn of events, and who stated that efforts to call PW2 back were futile; with the consequence that the LCs failed to resolve the matter.

PW2 and PW3 further testified that the evening after the meeting, the Accused brought his wife to their home; and introduced her to PW3 as her daughter in law whom he had delivered to her lover PW2; and that while there, he pointed out PW2's house to his wife as hers. They testified further that the Accused then demanded for the phone and money he contended his wife had given PW2 as her paramour; and issued a three day ultimatum, threatening that otherwise either he or PW2 would die. The Accused followed up this with threatening calls to PW2; and indeed upon the expiry of three days PW2's house, which the Accused had pointed to his wife, was tragically burnt down.

PW5 the DPC testified that at the scene of the fire that night, he heard an LC official state that the Accused had been seen fleeing from the scene. He accordingly went to the home of the Accused and confronted him with the information that there was a case of arson at Kihande in which he was a suspect and therefore under arrest; but the Accused who was calm and never resisted arrest, only said it was okay. He testified that the Accused denied that he had any conflict with PW2. His further testimony was that the LC1 Chairperson and PW2 told him that a boda–boda rider had claimed to have identified the Accused who was fleeing from the scene. The DPC could not recall the name of the boda–boda rider he claimed to have been told.

PW3 testified in Court that she had, that fateful night, identified the Accused as he fled from the scene of the fire. This, if found to be true, would provide strong circumstantial evidence pointing to the participation of the Accused in the arson. Defence counsel however confronted PW3 with her police statement – recorded soon after the incident; and admitted in evidence as *exhibit DE1* – in which she had stated that when she responded to the alarm made by PW2, she saw somebody riding away from the scene of the fire towards the main road on a motorcycle; and that the following morning she heard some people she did not identify, claim that they had seen the Accused, with a jerry can, riding a motorcycle away from the scene of the fire.

PW3's Court testimony is evidently at material variance with what she had stated to the police two years earlier. It is not possible either to ignore, or treat lightly, or explain away the

inconsistency regarding whether or not, that night, she actually identified the person she claimed to have seen riding away from the scene of the fire. In a passage from ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60,*** the Court of Appeal for Eastern Africa advised on the need to adduce, at the trial, evidence of any statement a witness made to police around the time the incident took place; because often, such evidence proves quite valuable, either as corroboration of the Court testimony, or as proof that the Court testimony is just an afterthought.

In ***Kella vs Republic [1967] E. A. 809,*** at p. 813, Court restated that this practice was crucial either by bolstering the testimony in Court if indeed the accused was named in the statement made to police soon after the event; or, if the converse was the case, it would instead render such testimony unworthy of placing reliance on. The Supreme Court of Uganda cited the ***Shaban bin Donaldi*** case, (supra), with approval in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997;*** noting therein that the provision of the Tanganyika Evidence Act referred to in the ***Shaban bin Donaldi*** case (supra), was similar to section 155 of our Evidence Act, regarding proof of a former statement made to a competent authority. I should add that section 154(c) of our Evidence Act also provides for the impeachment of a witness' creditworthiness in similar circumstance as the instant one.

It is easily discernible that PW3's Court version alleging that she had identified the Accused fleeing from the scene that night was ill contrived. She was evidently influenced to state so, by the ultimatum and threat she and PW2 claim the Accused uttered to her family; and given that indeed the tragic fire incident took place within this time. In addition was her claim that she heard some people allege the morning after the fire that the Accused had been seen with a jerry can on a motorcycle fleeing from the scene of the fire. This was, in any case, hearsay evidence and inadmissible. PW3's claim that she identified the Accused that fateful night is therefore worthless. I must disregard it.

At this stage, things took a strange turn as State Counsel informed Court that one Israel Byakagaba, a boda–boda rider, who the State desired to summon as a witness, was reported missing under suspicious circumstances; and his mother had informed the police that this was after the Accused had threatened to harm him if he did not pull out of the case. I took very serious concern of this turn of events, and made it clear that owing to the gravity of this claim, in the event that the State did not call the mother of the missing witness to throw more light on this

allegation, I would myself summon her to testify as Court witness. The State called Evasi Kaheru, mother of Israel Byakagaba, as PW7.

Her testimony was that her son had gone missing from home for the two days previous to her appearance in Court; and this was after a motorcycle she only heard but didn't see had come to her home very early at dawn. She testified further that earlier in the year, her brother Magambo had asked her to send Byakagaba to him so as to accompany him and a son of Wayara a brother to the Accused to the police and rectify some mistakes there. Her son however contended that he had no problem with the police. The following day, the Accused, who had never talked to her before, met her and told her that some people had been burnt at Kihande; and her son had been made to sign something which he wanted her to advise her son to go and rectify at the police.

She stated further that her son's response was that it was Satan which had entered him; and later, her son told her that he had gone with her brother Asaba and the Accused to the police, and that matters had been put right. She stated that her son had earlier indicated that he was unaware of the matter of the people burnt in a house. Magambo George PW8 testified that the Accused had been a friend of his father, as well as schoolmate of his wife; and that he had heard the day after the fire incident that the Accused was the suspect; and further that later, when the Accused was on bail, he got rumours at the bus park in town that Byakagaba was a witness, but when he asked PW7 about it she denied knowledge of such a thing, so she sent Byakagaba to him.

He further testified that Byakagaba had told him that PW2 had requested him to give evidence about the burning of the house, telling him what to say, with the promise that he would pay him shs. 100,000/=; whereupon he warned Byakagaba of the dangers of giving false testimony, and Byakagaba assured him that he would not involve himself in those matters anymore, as he had not been paid the money promised. He denied that Byakagaba told him about having made a statement to police, or that he told his sister to tell Byakagaba to go to police and rectify anything; and that his brother Asaba had denied that Byakagaba had told him about being a witness.

Detective Constable Kimera testified as Court Witness CW1, and stated that he had gone with PW2 the complainant to PW7's home on the directive of Court that the police should locate the missing witness; (these were the two persons PW7 testified had gone to her home the day before a motorcycle visited her home at dawn after which her son disappeared) but PW7 told them that

she had heard about the case, and that her son feared to appear as witness. She told them that her brother Magambo had expressed his concern about her son Byakagaba having involved himself in the case; and wanted to meet Byakagaba.

He testified further that the PW7 told them that after this, the Accused met her as she was going to some place and demanded to know why her son had involved himself in a matter that would bring him problems; after which the Accused demanded to meet her son. She further told them that a week after this, her son told her that he had met Magambo, the Accused, and others; and that following this, everything had been put right; and that she asked her son about these issues, but he just blamed Satan but without explaining what for.

Detective Corporal Oketayot Simon Luciima Court witness (CW2) stated that as investigating officer he had, a year after the incident, recorded the statements of one Mukwabwa and one Byakagaba who were both brought to him by PW2; and one Mwangi, a brother of PW2, had helped in translating between him and the two witnesses. He testified that Mukwabwa had stated that on the night of the fire incident he had seen someone riding away from the direction of the burning house, at high speed on a TVS motorcycle with a five litre jerry can on it; but he was unable to identify the person.

He testified that Byakagaba had stated that when he responded to the alarm he met the Accused, whom he knew well, riding a motorcycle at high speed with a five litre jerry can tied at the back of the motorcycle. The witness was surprised that the statement of Byakagaba was missing from the police file which was forwarded to the Resident State Attorney with the two statements in it; and indeed under Minute 40 in the file, it was still indicated that on 5th June 2009 he recorded statements from two eye witnesses. This, he stated, was the first time in his 17 years in the Police Force to experience a case of a statement disappearing from a police file.

Mwangi Eriya, Court witness (CW3) and younger brother of PW2, testified that one day when a boda–boda cyclist taking him back to school, who introduced himself as Byakagaba, learnt from him that he was from Kihande village where some people had been burnt in a house, the boda–boda cyclist told him that he had on the night of the fire incident met someone riding away from the scene on a motor cycle with a jerry can behind it; and that he was able to identify the rider as the Accused when the jerry can on the motor cycle fell down, and the rider came back to pick it.

CW3 testified further that when he met the boda–boda cyclist, PW2 was in Kampala, so he informed him on phone; and also reported the matter to police, and one Oketayot a police officer came to their home before PW2 had come back from Kampala. When PW2 returned from Kampala, he and PW2 took Byakagaba and one Peter, who Byakagaba had named as also knowledgeable about the matter, to police; wherefrom police officer Oketayot recorded the statements of the two eye witnesses, and he (CW3) also assisted in translating between the two eye witnesses and police officer Oketayot as he recorded the statements. After the close of the defence case, Byakagaba who had reportedly disappeared without any trace was produced by the prosecution as PW9.

He testified that he had on the night of the fire met the Accused whom he knew by name, coming from the direction of the fire on a motorcycle with a five litre jerry can on it. He testified further that the jerry can fell off the motorcycle and he picked it up and handed it over to the Accused, and because there was bright moonlight he was able to identify the Accused whom he greeted but did not respond. He stated that the next morning he went to the scene of the fire and found the police and other people; but did not divulge his information to anyone until a year later when he decided to, and informed PW2.

Further, he testified that when PW2 asked him to make a statement at the police, he demanded for a reward of shs 200,000/= from PW2 who however raised it to shs 5,000,000/=. He then went to police with PW2 and he recorded a statement stating that he had seen the Accused that night of the fateful fire. However, PW2 did not honour his pledge to reward him at all; and for which he has a grudge against PW2. Although he stated that he did not fear to come and testify in Court, he revealed that Satan which looked like PW2 had told him in a dream that he would be arrested from Court; so he went away to Nakasongola. He admitted that his uncle Asaba Fred had asked him about this case; and his mother PW3 had told him that the Accused had confronted her about his involvement in the case. He however denied ever going with his uncles Magambo and Asaba to police.

In his defence, the Accused made a sworn testimony; in which he denied the offence. He stated that his problem with PW2 arose when PW2 took money from his wife; and that PW2 was playing a game of cards with his children from his home, and teaching them tricks of how to set fire in the anus of a human being. He stated that in the meeting before the LCs, PW2 first denied his allegations, but later admitted them, including the issue of the phone; whereupon he

demanded a written undertaking by PW2 not to set foot at his (Accused's) home again; but PW2 declined, and went away when the LC officials had gone out to see how to resolve the matter.

He testified further that the LC officials wanted to give him a letter to take to police; but he advised that PW2's mother and aunt, who were present, should be given two days to talk to PW2 and then report on the third day. The next day, the LC Chairman summoned him and gave him a letter, regarding trespass by PW2, to take to police; which he did. Upon Court examination, he admitted that he made a number of phone calls to PW2. He admitted that on 8th June, 2008 the DPC arrested him from his home where he found him sleeping, but that he never gave him the reason for his arrest; and it was until the 12th June, 2008 that he was given that reason, and then on the 15th June, 2008 he made his statement (exhibited as *DE2*).

His wife testified in his defence as DW2, and denied that there was ever any affair between her and PW2. She stated that she had met PW2 and sympathised with him and given him money for the security of his phone although he was a stranger; and even when PW2 manifested that he was undependable she still transacted with him. She stated that she never told anyone apart from her husband that PW2 had taken money from her. She also denied that anyone from her home knew PW2's telephone contact. DW3 Asaba Fred testified that he had been close to the Accused, but denied any participation in the matter regarding the burning of the children in a house for which the Accused had been arrested. He denied ever discussing with PW9 anything about the case.

The entire evidence the prosecution has adduced, with a view to pin the Accused as the villain who set PW2's house ablaze, is entirely circumstantial. It seeks to establish that the Accused had the motive, which he openly expressed, to harm PW2; and indeed PW2's house was set on fire as he slept inside, within the time threatened by the Accused. I have closely examined the evidence adduced by the prosecution witnesses alongside that for the defence. In the web of circumstantial evidence adduced in Court, the activities attributed to the Accused before the fateful incident, demand serious consideration. I have to determine however whether to reject the whole of PW3's evidence in the light of her having lied on oath; or to sever and admit what is worthy of acceptance from that which was clear deliberate falsehood and which I have roundly rejected.

How Courts should treat contradictions, inconsistencies, or falsities by witnesses are well laid down. In ***Khatijabai Jiwa Hasham v. Zenab d/o Chandu Nansi [1957] E.A. 38,*** at p. 49, Court emphasised the need to appreciate and attach due importance to a deliberate untruth made by a

witness regarding a material point; otherwise it would affect any favourable view the Court might have of such a witness. At p. 54, the Court stated thus:

> *"A useful test in the assessment of this type of evidence is laid down in* ***FIELD'S INTRODUCTION TO THE LAW OF EVIDENCE,*** *p. 37, quoting* ***NORTON on Evidence****:*
>
> > *'The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But if there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of want of veracity on perhaps some very minor point.' "*

In ***Siduwa Were v. Uganda [1964] E.A. 596;*** where the Court was dealing with a confession which was partly false, it said at p. 601 as follows:

> *"While it is clear law that a confession must be taken as a whole, it is also clear law that it need not be believed or disbelieved as a whole. It is open to a trial judge to accept a part of a statement and to reject another part. Where however the part which is rejected is so inextricably interwoven with another part that such other part would become something quite different if it were divorced from the rejected part, then we consider that it is not open to a judge to accept such other part save in the most exceptional circumstances... which, require*[s] *the exercise of the greatest caution before any part of the confession* [is] *accepted."*

In ***Alfred Tajar v. Uganda, E.A.C.A. Crim. Appeal No. 167 of 1969*** (unreported), the Court stated as follows:

> *"In assessing the evidence of a witness … it is open to a trial Judge to find that a witness has been substantially truthful, even though he lied in some particular respect."*

In ***Gabula Bright Africa vs. Uganda, S.C. Crim. Appeal No. 19 of 1993,*** the Court echoed the principle laid down above, that the trial judge could properly rely on any portion of the evidence he believed to be true, even when other aspects of the witness' evidence was untrue and unbelievable. It cited with approval, a passage from the decision in ***Mattaka and Others vs.***

Republic, [1971] E.A. 495 at p. 504; in which the Court of Appeal for East Africa dealt with deliberate untruthfulness presented in Court, and stated as follows:

> *"… the Chief justice was satisfied that the main portion of Labello's evidence was true … but the Chief Justice found that he would not accept any portion of his evidence as involving any of the appellants except where that evidence was shown by other evidence or by sequence of events, to be true."*

Accordingly then, although I have roundly rejected PW3's testimony before me, with regard to the identity of the person she claimed to have seen speeding away from the scene of crime that fateful night, as having been deliberate falsehood, I find her testimony and that of PW2 to be in agreement regarding the events that took place between them vis-a-avis the Accused before the fateful night. I also find that the testimony of PW4 the LC Chairperson largely corroborates that of PW2 and PW3 regarding the events that took place in the meeting before the LCs; and departs from that of the Accused. I am therefore able to sever PW3's deliberate untruthfulness from the rest of her other evidence in the matter.

I am convinced that indeed the Accused fully believed that his wife had an affair with PW2; and this weighed heavily at his heart. His version of events, including the account of the proceedings before the LCs, sought to lessen the gravity of this matter. It varies from that of PW2, PW3, and PW4 the LC Chairman. He believed that the phone which exchanged hands between his wife and PW2 was so done in appreciation of their illicit relationship; and for this he was extremely mad at PW2. I am also convinced that the Accused took his wife to the home of PW2 and issued the three day ultimatum. Nevertheless, this was all circumstantial evidence surrounding the burning of PW2's house, albeit it establishing that the Accused had the motive to commit the vile act.

The principle regarding treatment of circumstantial evidence is now well settled. Leading authorities on the matter include ***Simon Musoke vs. R. [1975] E.A. 715;*** and ***Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.*** In ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14, the Court spelt out the position as follows:-

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on 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 must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

In the instant case before me, which is grounded exclusively on circumstantial evidence, I duly warned the assessors, in accordance with the authority in the ***Tindigwihura Mbahe*** case above, that there is need to approach the evidence on record with caution and narrowly examine it, as it is susceptible to fabrication; and that conviction can only be justified when the inculpatory facts have been found to be incompatible with the innocence of the Accused, and incapable of explanation upon any other hypothesis than that of guilt; and further still that an inference of guilt from such evidence should only be drawn upon satisfaction that there are no co–existing circumstances which would either weaken, or altogether destroy that inference.

The initial disappearance of PW9, as well as his police statement, has been a matter of grave concern to me; and for which I caused the prosecution to call PW7 and PW8 who initially were not State witnesses. I also had to call CW1, CW2, and CW3 as Court witnesses as their names featured in the trial. I have found PW7's quite credible in her testimony regarding the events surrounding her interaction with her brother PW8, and the Accused, and leading to the initial disappearance of her son. She had no reason to concoct any evidence against either her brother PW8 or the Accused. Further, while the Accused denied ever confronting her about her son's involvement in this case, PW8 admitted expressing concern to her about her son's involvement, and actually adversely advised him regarding the case.

When PW9 eventually appeared in Court, he evidently looked scared. Nonetheless, in the main and in material particular, he was firm in his testimony that he had identified the Accused that fateful night. The inconsistencies in his testimony were all minor and not aimed at crucifying the Accused; and can all be explained away as resulting from lapse of time. PW9 had no grudge against the Accused. On the contrary, it was with PW2 that he claimed to have had a grudge even before the tragic fire; and also due to PW2's alleged failure to honour his pledge to reward him for divulging such vital evidence. His disclosure, though belated, was of his volition; and not from any desire to obtain any benefit, though he later brought the element of benefit as a condition to repeat this to the police.

PW8 and DW3 admitted that the Accused is their family friend. It is not difficult to see that they had the inclination to save the Accused; or at least not have their nephew serve as the witness whose evidence could nail the Accused as the perpetrator of the tragic fire. Police officer Oketayot CW2 and CW3 Eriya Mwangi have corroborated PW9 Israel Byakagaba's testimony that he recorded a statement with the police; in which he stated that he had positively identified the accused riding away from the burning home on a motorcycle. CW2 testified that to his shock the police statement is nowhere on the file although there is reference to it.

The DPC PW5 testified that at the scene that fateful night he learnt that a boda–boda rider had claimed to have identified the Accused fleeing from the scene that very night; and this caused him to proceed to the home of the Accused and effect his arrest. Therefore, the naming of the Accused by a boda–boda rider was not an afterthought conjured up after his arrest but an immediate occurrence that very night. The chance meeting between CW3 and Byakagaba was, as fate would design it, merely the long arm of the law having its day. It is true PW9 was manifestly sickly while testifying before me; and had to visit the washroom a couple of times.

PW9 Byakagaba's evidence regarding his identification of the Accused that night is evidence which I have to subject to the rules governing the treatment of such evidence. I must, as I did warn the assessors, be satisfied that the conditions at the time of the alleged identification favoured correct identification before I can place reliance on it. PW9 has testified that the Accused was no stranger to him; and there was bright moonlight when he picked a jerry can which had fallen off a motor cycle that was speeding away; and when the rider turned back to collect it, he was able to identify him as the Accused whom he greeted as he handed the jerry can to him, but never responded to his salutation. The conditions therefore favoured correct identification.

Even then this offered nothing more than circumstantial evidence; and since the prosecution case is grounded exclusively on circumstantial evidence, before conviction can be justified, there is need to narrowly examine the evidence and establish whether the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of guilt. Further, there must be no co–existing circumstances that would weaken or altogether destroy the inference of guilt. To this, I will advert in this judgment. The testimonies of CW2 and CW3 are however vital because they

corroborated PW9's testimony that he indeed recorded with the police, the now inexplicably missing statement.

This offers strong corroboration of the testimony by PW7 and PW9 that there was indeed some sinister design by the Accused, and others close to him, in the period after the Accused had been admitted to bail, to interfere with the key State witness Byakagaba. I do believe PW7 that both PW8 and the Accused confronted her under the circumstances she has testified to. This links irresistibly to the disappearance of the police file, and apart from it being conduct pointing to the guilt of the Accused, is a blatant affront to justice; which if not checked would set a terrible precedent in greatly hampering the maintenance of law and order.

The inculpatory interference with a State witness by the Accused and his family friends who were relatives of the key witness was an abuse of the due process; and was conduct which cannot be explained under any other reasonable hypothesis apart from guilt. There is also no co–existing circumstance that would weaken or altogether negate the inference that, in so interfering with the witness, the Accused was acting out of guilt. I am compelled to make the adverse inference that he was intent on destroying adverse evidence; instead of confronting such evidence in Court to expose it as lacking in worth. This was utterly incompatible with the innocence he pleaded; but instead provided corroboration of the circumstantial evidence linking him with the deadly fire.

I am clear in my mind that the circumstantial evidence in the instant case, including the assertion by PW9 that he met the Accused fleeing from the direction of the fire with a jerry can on his motorcycle, was the best evidence establishing that the Accused set the house ablaze; and with the malicious intent that PW2 should perish in the inferno that would surely ensue. I therefore reject his alibi. It does not matter that the Accused might not have known that there were other persons in the house, or intended that any other person but PW2 should be harmed. The act of locking the door from the outside was clearly intended to ensure that anyone and anything in the house would be destroyed; or he ought to have known that his action would result in such eventuality.

I am therefore in full agreement with the lady and gentleman assessors in their joint opinion advising me that the evidence adduced by the prosecution has proved, beyond reasonable doubt, all the elements of the offence of murder in each of the counts for which the Accused has been indicted. Accordingly, I find him guilty as charged; and convict him on each of these counts.

Alfonse Chigamoy Owiny – Dollo

JUDGE

14– 01 – 2011