THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 019 OF 2021

(ARISING FROM CRIMINAL CASE NO. 052 OF 2017 MASAKA)

1. KIMENYI MOSES
2. KALYANGO DENIS :: APPELLANTS

VERSUS

UGANDA :: RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The 1st Appellant was charged with the offence of arson C/S 237 and the second Appellant was charged with the offence of Malicious Damage C/S 335 of the Penal Code Act, in the Chief Magistrates Court of Masaka at Masaka. Both Appellants pleaded not guilty to the charges. Prosecution led evidence of four witnesses and the Appellant gave evidence on oath but did not call any witnesses. The Court evaluated the evidence and the Chief Magistrate entered judgment on the 26th day of November 2020 at the Chief Magistrate's Court of Masaka at Masaka. The Appellants were found guilty and convicted for the offences of arson C/S 237 and Malicious Damage C/S 335 of the Penal Code Act. The Appellants were each sentenced to three years of imprisonment on Count I and one year of imprisonment on Count II which sentences are to be served concurrently.

BACKGROUND OF THE CASE;

The Prosecution case was that the Appellants were being charged on particulars that Kimenyi Moses, Kalyango Denis and others still at large, during the night of 21st day of October, 2016 at Nsanga Village in the Masaka District, willfully and unlawfully set fire to

the dwelling house, property of Twizeyimana Kaboyo Fabiano and unlawfully damaged/destroyed his plantation of growing coffee and bananas.

Prosecution evidence by the victim Twizeyimana Kaboyo Fabiano PW1, was that sometime in October 2016, he was informed of his impeding murder and burning of his house. He hid 50metres away from his house and saw the accused persons in company of other people destroying his property including pigs, coffee, windows of his house. He reported the matter to police and the police found the accused persons at the scene. He stated that he had a grudge with A1.

PW2 Amwesigye Yafetti stated that his father, PW1, informed him of an imminent attack and while he was hiding under the coffee tree, he saw the accused persons with several other people attack and destroy their house, cut down coffee trees, banana plants and passion fruit racks. He identified them because the car had lights on and they had torches. He was eight meters away from the scene.

PW3 Ishimwe Elijah stated that his father PW1 called him at about 9:00pm and informed him to vacate the house and 30 minutes later, assailants including the accused persons came and burnt their house. He was able to identify the assailants because he knew them and there were motor vehicle head lights.

PW4 D/Sgt Mbabazi Julius Badge No. 28863 Police Officer attached to Lwengo Police stated that he conducted the investigations into the case and recorded statements from the accused persons. He drew a sketch map of the scene admitted in evidence as Exh. P1, was present when photographs showing the damage and destruction to the property admitted as Exh P2. He did not see any coffee plants outside the victim's house and the bush where PW2 and PW3 were hiding is about 70 meters away from the scene.

That was the Prosecution case.

The Appellants denied the allegations and DW1 Kimenyi Moses testified that he was away to cultivate in Kyesiiga where he had been for about three days and when he returned, he was arrested.

DW2 Kalyango Denis stated that does not know of the offence.

That was the Accused/Appellants case.

In his judgment, the trial Magistrate found that the victim's property was unlawfully destroyed and regarding participation of the Appellants, the trial Magistrate stated that since the Appellants had put up a defence of alibi, the Prosecution had to prove their participation. In consideration of the evidence of PW2 & PW3 as eye witnesses corroborated by the land dispute where the persons on the side of A1 was detained as a civil debtor, the source of light and familiarity of the witnesses with the Appellants, the trial Magistrate concluded that the Appellants had participated in the crime. The Appellants were found guilty and convicted on both counts. The trial Magistrate sentenced them to three years and one year respectively for both counts to be served concurrently.

The Appellants being aggrieved and dissatisfied with the conviction and sentence brought this appeal on the following grounds;

1. The trial Magistrate erred in law and fact when he sentenced the Appellants to imprisonment without giving them an option of a fine which showed that he was biased against the Appellants which error caused a miscarriage of justice;
2. The trial Magistrate erred in law and fact when he relied on evidence of PW2 and PW3 who claimed to be eye witnesses at night without warning himself about the danger of relying on such evidence and subjecting it to close scrutiny which occasioned a miscarriage of justice;
3. The trial Magistrate erred in law and fact when he ignored the evidence of grave inconsistencies and contradictions in the prosecution case which error occasioned a miscarriage of justice;

4. The trial Magistrate erred in law and fact when he failed to consider the Appellants defence which occasioned a miscarriage of justice;
5. The trial Magistrate erred in law and fact when he sentenced the Appellants to a hard and excessive sentence in total disregard of mitigating factors which error occasioned a miscarriage to the Appellants;
6. The trial Magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole and reached the wrong decision which occasioned a miscarriage of justice;

The Appellants pray for the court to allow the appeal and set aside the conviction and sentence of the trial Court.

Both Parties filed written submissions.

The Appellants submitted that PW1 falsely testified that he was at his home yet his sons testified that he was not at home. Further that PW1 stated that his children were at school when he was warned of the assailants and yet the children testified that they were at home. It was also the Appellant's submission that there was a contradiction when PW2 and 3 testified that they hid under a coffee tree yet PW testified that there was no coffee tree in front of the house. It is also Counsel's submission that the Appellants' rights were contravened when court allowed the lawyer on state brief to proceed with the case yet she had an interest in the same.

The Appellants further argued that the trial Magistrate failed to exercise his jurisdiction to order a fine which conduct amount to bias. Further that the Appellants` defence of alibi was not destroyed by the Prosecution and the Appellants' evidence was never rebutted hence it was erroneous for the trial Magistrate to ignore such evidence. Counsel argued that the factors of identification were difficult as it was dark during night hours. Counsel further argued that the trial Magistrate did not take into consideration the time spent on remand by the Appellants thus making the sentence illegal.

In response, the Prosecution submissions are that the conditions of identification were favorable as there was light from the motor vehicle and some of the assailants had torches. The Prosecution further argued that the evidence was consistent and not shaken during cross examination. The Appellants were properly identified and placed at the scene of the crime and the sentence of three (03) years below the maximum was proper and appropriate in the circumstances.

Determination of the Appeal;

This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. ***(see Bogere Moses v. Uganda S. C. Crim. Appeal No.1 of 1997 and Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997,*** where it was held that: "***the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it***").

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, ***(see Pandya v. Republic [1957] EA. 336)*** and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion ***(see Shantilal M. Ruwala v. R. [1957] EA. 570)***. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses***, (see Peters v. Sunday Post [1958] E.A 424)***.

I will consider grounds 2, 3, 4 and six concurrently as they relate to the conviction and then Grounds 1 and 5 concurrently as they relate to the sentence.

Appeal against the Conviction;

Grounds two, three, four and six;

Ground two; The trial Magistrate erred in law and fact when he relied on evidence of PW2 and PW3 who claimed to be eye witnesses at night without warning himself about the danger of relying on such evidence and subjecting it to close scrutiny which occasioned a miscarriage of justice;

Ground three; The trial Magistrate erred in law and fact when he ignored the evidence of grave inconsistencies and contradictions in the prosecution case which error occasioned a miscarriage of justice;

Ground Four; The trial Magistrate erred in law and fact when he failed to consider the Appellants defence which occasioned a miscarriage of justice;

Ground six; The trial Magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole and reached the wrong decision which occasioned a miscarriage of justice;

Section 327 of the Penal Code Act Cap 120 provides that; "*Any person who willfully and unlawfully sets fire to—(a) any building or structure, whether completed or not;(b) any vessel, whether completed or not;(c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or (d) a mine, or the workings, fittings or appliances of a mine, commits a felony and is liable to imprisonment for life*."

For an Accused to be convicted of the offence of Arson C/s 327 of The Penal Code Act, the Prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. That a building or structure was destroyed or damaged by fire.
2. The fire was set willfully and unlawfully.
3. The Accused set or participated in setting the fire.

For the first ingredient, the Prosecution had to prove beyond reasonable doubt that a building or structure whether completed or not was destroyed by fire. The Prosecution adduced evidence of PW1, 2, and 3 who all testified that their house was set on fire. The Prosecution also adduced evidence of photographs in Exh P2 showing that the victim`s house was burnt and destroyed.

The Prosecution is also required to prove some change to the building's physical integrity. This can be a permanent or temporary change. To "destroy" means an act rendering the building or structure useless for the purpose for which it exists. To "damage" means the permanent or temporary reduction of functionality, utility or value of the building or structure. The damage or destruction must have occurred by fire.

I find that the Prosecution proved beyond reasonable doubt that Twizeyimana Kaboyo Fabiano's house was destroyed or damaged by fire.

The second ingredient requires the prosecution to prove that the fire was set willfully and unlawfully. Arson is an offence involving a specific intention to cause a specific result having regard to the interpretation of "*willfully*" in ***R v. Lockwood, ex parte A-G [1981] Qd R 209.*** "*Willfully*" requires proof that the accused either:

(a) had an actual intention to do the particular kind of harm that was in fact done; or

(b) deliberately did an act aware at the time he or she did it that the result charged in the charge sheet was a likely consequence of his or her act and that he or she recklessly did the act regardless of the risk. The word "likely" in the direction concerning recklessness conveys a substantial, a real and not remote chance.

There must be proof that the accused either had an actual intention to set fire to the building or structure or deliberately did an act aware at the time he or she did it, that the building or structure's catching fire was a likely consequence of his or her actions and that he or she did the act regardless of the risk. It is not enough to find that the person simply thought about the possibility of damage or destruction. This element will not be met if the accused

thought his or her actions might damage the property, but probably would not. It will only be satisfied if the prosecution can prove that he or she knew or believed that his/her actions were more likely than not to result in the property being damaged or destroyed by fire, or that at least one of his purposes in setting the fire was to damage or destroy the property by fire. ***(see Opira Willy Vs Uganda Criminal Appeal No. 0008 of 2019)***

The Prosecution adduced evidence of PW2 and 3 who testified that they saw the accused persons and others on the night of the alleged offence destroying the victim`s house and that one of them had a jerrycan. PW2 stated that when the assailants entered the house, a fire started.

There is no evidence to prove that the victim's house was destroyed legally. The Petition adduced documentary evidence of photographs as in Exh P2 showing the Victim's house destroyed and some of the pictures show the inside of the house walls covered in black...which could have been a result of soot arising from a fire. I therefore find that this ingredient was also been proved beyond reasonable doubt by the Prosecution.

Ingredient three relates to participation and the Prosecution was required to prove that the Appellants participated in the offence.

The Appellants' fault the trial Magistrate for failing to consider the inconsistencies and contradictions in the Prosecution evidence as well as relying on evidence of witnesses without warning himself of the danger of relying on such evidence without scrutiny.

Where prosecution is based on the evidence of an identifying witness under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity ***(see Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166; Roria v. Republic [1967] E.A 583; Abdalla Nabulere and two others v. Uganda [1975] HCB 77; and Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)***.

In doing so, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness

to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

In the instant case, the Prosecution evidence is that the offence took place about/between 9:00pm to 10:00pm about thirty minutes. It was at night and therefore it was important for the factors surrounding the identification to be clearly considered by the trial Magistrate.

PW2 and PW3 testified that they were able to identify the assailants because there was light from the motor vehicle, some assailants had torches and they were able to recognize them because they knew them as members and leaders of the area. PW4 testified that the motor vehicle was parked at about 8 meters from the house and the witnesses were hiding at about 70 meters from the scene.

The Prosecution witness testified that they recognized the assailants because they knew them as community members and leaders which prove that they are familiar with the Appellants. They also testified that they were able to identify the assailants/Appellants because there was light from the motor vehicle and some of them had torches. PW4 testified that the witnesses were hiding about 70 meters from the scene and the car was parked about 8 meters from the house. This court has to evaluate whether this distance and light were favorable for the proper identification of the Appellants.

The Prosecution witnesses testified that the assailants had a truck but the exact car was not described. The offence took place at night, this was arson and in addition to the fire, there was light from the motor vehicle. I therefore find that the witnesses were familiar with the Appellants, there was sufficient light for proper identification and the distance between the witnesses and the Appellants was also favorable for identifications. Therefore, these conditions were favorable for the proper identification of the Appellants and as such, they were properly identified.

Counsel for the Appellants seeks to challenge proper identification by submitting that the evidence was full of inconsistencies and contradictions.

I therefore have to consider the evidence of identification and weigh it against the inconsistences and contradictions in the Prosecution witnesses evidence as were raised by the Appellants.

It is trite law that where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. ***(See Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969 and Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989).***

In their evidence PW1, 2 and 3 testified that PW1 warned PW2 and 3 of the assailants. PW1 stated that he warned PW2 and 3 who were at School and told them to not come home. In their evidence PW2 and 3 stated that they were at home at the time of the warning. This was contradictory. Further PW2 and 3 stated that they hid under a coffee tree outside the house. PW4 testified that there were no coffee trees outside the house and this is further corroborated by the evidence in Exh. P2. This evidence was also contradictory.

It was important for the trial Magistrate to carefully consider this evidence as it related to identification and establishing the Appellants participation in the commission of the offence, bearing in mind their defence of alibi. I have considered the evidence and established that the evidence in Exh. P2 shows a tree near the house although it is hard to tell what type of tree it is. I also have to note that the pictures taken do not show the entire surroundings simply because they were taken with the purpose of showing the destruction to the house. The contradiction as whether there is indeed a coffee tree outside the house is therefore minor as there is no evidence to the contrary.

The Appellants had put up a defence of alibi and the Prosecution had the burden of proof to place them at the scene of the crime.

Where an accused raises the defence of alibi he has no duty to prove it as the duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime.

(see Festo Androa Asenua and another v. Uganda, S. C. Criminal Appeal No.1 of 1998 and Cpl. Wasswa and another v. Uganda, S.C. Criminal Appeal No. 49 of 1999).

To disprove the defence of alibi raised by the accused, the prosecution relies on the testimony of P.W.2 and P.W.3 who stated that they saw the accused persons committing the offence and destroying the victim`s house and property. Where prosecution is based on the evidence of an identifying witness under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity ***(see Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166; Roria v. Republic [1967] E.A 583; and Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997).***

I have already considered the factors of identification and found that there were favorable conditions and factors to enable the proper identification of the Appellants.

Evidence of a grudge. PW1 stated that he had a grudge with A1. Evidence of an existing grudge is circumstantial in proving the Prosecution's case. According to the decision in ***Teper Vrs R (1952) AC 489 and Simon Musoke 20 Vrs R (1958) EA 715*** circumstantial evidence is *"…..evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It would be no derogation of evidence to say it is circumstantial".*

The decision by the Supreme Court of Nigeria sitting at Abuja in ***Tajudeen Iliyasu Vrs the State SC 241/2013 (cited in Uganda versus Nankwanga Fauza Alias Maama Janat & others Criminal Session Case NO. 243/2015)*** considered that evidence in great detail. It was held that:-

"…..it is evidence of surrounding circumstances which by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics….this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence However the court cautioned that

"....such circumstantial evidence must point to only one conclusion, that the offence had been committed and that it was the accused person who committed it. For the purpose of drawing an inference of an accused's person's guilt from circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy that inference.....Thus, all other factors and surrounding circumstances must be carefully considered for they may be enough to adversely affect the inference of guilt....Each case depends on its own facts. However, one test which such evidence must satisfy, is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence."

It is my further observation that the evidence of a grudge was circumstantial and cogent in supporting the Prosecution's case and evidence. This evidence points to the intention of the Appellants and raises no other inference than that of the guilt of the appellants.

I therefore find that the trial Magistrate properly evaluated the evidence and reached his decision of convicting the Appellants upon proper consideration of the evidence.

Appeal against the Sentence;

Grounds one, four and five

One; The trial Magistrate erred in law and fact when he sentenced the Appellants to imprisonment without giving them an option of a fine which showed that he was biased against the Appellants which error caused a miscarriage of justice;

Five; The trial Magistrate erred in law and fact when he sentenced the Appellants to a hard and excessive sentence in total disregard of mitigating factors which error occasioned a miscarriage to the Appellants;

It is now settled, that an appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, or Court has failed to consider a material factor, or is harsh and manifestly excessive in the circumstance ***(see James v. R. (1950) 18 E.A.C.A. 147; Ogalo s/o Owoura v. R. (1954) 24***

E.A.C.A. 270; Kizito Senkula v. Uganda, S.C. Criminal Appeal No. 24 of 2001; Bashir Ssali v. Uganda, S.C. Criminal Appeal No. 40 of 2003, and Ninsiima Gilbert v. Uganda, C.A. Criminal Appeal No. 180 of 2010).

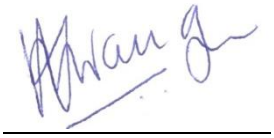
Under ***Section 327 of The Penal Code Act***, the maximum punishment for the offence of arson is ***imprisonment for life***. Under ***Section 162 (1) (a) of The Magistrates Courts Act***, a Chief Magistrate may pass any sentence authorized by law. The Appellants were sentenced to three years' imprisonment for the first count and one-year imprisonment for the second count to be served concurrently. I find this sentence to be appropriate in the circumstances of the case.

In the final result, I find that the trial Magistrate properly evaluated the evidence on record to reach his decision and the sentence of three years' imprisonment is appropriate in the circumstances.

This appeal bears no merits and is hereby dismissed.

I so order.

Dated at Masaka this 5th day of November, 2021

Signed; 

Victoria Nakintu Nkwanga Katamba

Judge