THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA

CRIMINAL APPEAL NUMBER 0026 OF 2011

BAITWABUSA FRANCIS ::APPELLANT

VS

UGANDA::RESPONDENT

(Appeal against judgment of Hon. Justice Chigamoy Owiny Dollo given on 14th January 2011 in criminal session case No. 131 of 2009)

CORAM: HON. MR JUSTICE A.S NSHIMYE, JA

HON. LADY. JUSTICE SOLOMY BOSSA BALUNGI, JA

HON. MR JUSTICE KENNETH KAKURU, JA

JUDGMENT OF COURT

The appellant was charged with two counts of murder and was convicted on both counts. He was sentenced to life imprisonment. He appealed to this court against both convictions.

The brief facts of the case as found by the trial court are that; on the 8th day of July 2008 at Kihande 1 village in Masindi District, the appellant murdered Kaireta Geoffrey, Kabajwiga Brenda, Desire Kabajungu, Kisembo Derick and Amanyire Edward.

The complainant, Mathew Karubanga (PW2), was an employee of the wife of the appellant at the material time. A misunderstanding developed between PW2 and the appellant, relating to a phone. PW2 stated that he allegedly left with the wife of the appellant for a loan, while the appellant believed that PW2 had given the phone to his wife so that they could communicate. The appellant believed that PW2 was having an affair with his wife. He reported the matter to the LC 1

Chairman of Kihande 1 village, Central Division, Masindi Municipality. Before the fateful day, the LC 1 Chairman, Zubairi Byesigwa (PW4), summoned PW2 and PW3 (PW2's mother) regarding a complaint lodged by the appellant against PW2 that he had caused misunderstanding between the appellant and his wife. The meeting was attended by the Secretary for Defence, one Kugonza, the Secretary for Information and Mobiliser, Barongo Deogratius, one Kevina, the aunt of PW2, PW2, PW3 and the appellant. The LC1 failed to resolve the misunderstanding and forwarded the matter to the Police.

Subsequently, the appellant went to the home of PW2 and his mother PW3 twice in the same evening, looking for PW2. The first time, he went there alone. He later returned with his wife, and told PW3 that he had brought for her, her daughter in law (wife of the appellant). After they left, the appellant called PW2 and also threatened the complainant with harm.

On the fateful day, while the complainant was sleeping, he was awakened with heat that filled the house. He tried to run out with his wife through the door but it was locked from outside so they escaped through the window. They tried to save five family members in the next room but the fire was too much for them to be rescued. They all died in the fire.

The appellant appealed against his conviction on the following grounds;

1. The Learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record.
2. The learned trial Judge erred in law and in fact when he based the conviction on circumstantial evidence without due regard to other co-existing contrary evidence.
3. The learned trial Judge erred in law and in fact then he procured his own court witnesses during the trial

The appellant prayed that the judgment and sentence be set aside.

During the hearing of this appeal Mr. John Paul Baingana represented the appellant while Ms. Nabaasa Caroline, Principal State Attorney appeared for the respondent.

Arguments on grounds one and two of appeal

Counsel for the appellant

Counsel for the appellant argued grounds 1 and 2 together. The two concern the evaluation of evidence and the learned trial Judge's reliance on circumstantial evidence.

Counsel for the appellant argued that; the entire evidence of the prosecution against the appellant was entirely circumstantial. The learned judge was convinced that indeed the appellant fully believed that his wife had an affair with PW2 and this weighed heavily at his heart, that the phone which exchanged hands between the appellant's wife and PW2 was done in appreciation of their relationship, and that the appellant was extremely mad at PW2 and as a result, he issued the 3 days ultimatum. Counsel further submitted that the appellant denied that he suspected his wife of having an affair with PW2, and that there was no other evidence that showed that the appellant suspected his wife other than the evidence of PW2 and PW3.

He also argued that the evidence of PW1 referred to the day when the LC1 court sat, while PW3 testified about the day of the incident which is 8th July 2008. The trial Judge however considered this evidence as having taken place on the same day.

On the evidence of the arresting officer, SP Twebaze Alex, the DPC who testified as PW5, Counsel submitted that the learned trial Judge relied heavily on what PW5 had discovered at the scene. The DPC testified that at the scene that fateful night, he learnt that a boda boda rider had claimed to have identified the accused person fleeing the scene that very night. All this evidence was insufficient to amount to circumstantial evidence.

Arguments of Counsel for the respondent

Counsel for the respondent submitted that the trial Judge properly evaluated the evidence and came to a right decision. She referred to the statement of the learned trial Judge on page 5 of the judgment that there was no direct evidence. The Judge heavily relied on the evidence of PW2 and PW3 relating to the prior threats to this incident. She submitted that there was proper evaluation of evidence and that the evidence was corroborated.

On the issue of the appellant going to the home of PW2 and PW3, she submitted that from the record, this evidence was not challenged in cross examination and the legal position on unchallenged evidence is well settled. She referred to the case of ***Otti Sebastine vs Uganda Supreme Court Criminal Appeal No. 17 of 1998 (unreported)***, as authority for the proposition that failure to cross examine on the evidence would mean that the unchallenged evidence is accepted in its entirety.

Resolution of grounds 1 and 2 of the appeal

This is a first appeal and this court takes cognisance of the established principles regarding the role of a first appellate court. The cases of ***Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997*** and ***Pandya v. R [1957] EA 336,*** and ***Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997*** in essence have established that a first appellate court must review/rehear the evidence and consider all the materials which were before the trial Court, and come to its own conclusion regarding the facts, taking into account that it has neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

Rule 30 of the ***Judicature (Court of Appeal Rules) Directions SI 13-10*** is also relevant. It provides that;

30. Power to reappraise evidence and to take additional evidence

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) Reappraise the evidence and draw inferences of fact; and

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

We have borne the above principles in mind in resolving this appeal. We consider that the logical way to proceed is to determine issues 1 and 2 together first, i.e. is whether the learned trial judge erred to convict the appellant on circumstantial evidence and if he was right, whether he properly evaluated it.

The learned trial Judge dealt with the issue of circumstantial evidence on page 17 of his judgment. He had this to say;

The principle regarding treatment of circumstantial evidence is now well settled. Leading authorities on the matter include *Simon Musoke v. R [1975] EA 715*; and *Sharma and Kumar v. Uganda, SC Criminal Appeal No. 44 of 2000*. In *Byaruhanga Fodori v. Uganda, SC Criminal Appeal No. 18 of 2002 [2005] 1 ULSR 12* at page 14, the Court spelt out the position as follows:-

It is trite 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 v. R [1958] EA 715*; *Teper v. R [1952] AC 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 learned trial judge was alive to the law applicable and to the fact that circumstantial evidence must point irresistibly to the guilt of the accused person. He was also alive to the defence of the appellant which was an *alibi*.

We consider that the learned trial Judge properly directed himself and the assessors on the principles regarding circumstantial evidence.

We now move to consider whether his assessment and reliance on it, was proper. The evidence implicating the appellant in the commission of the offence of murder was circumstantial. There was no eye witness who saw the appellant commit the crime.

The learned trial Judge relied on the totality of the evidence to convict the appellant, and not only on the evidence of PW2 Karubanga Mathew, (the complainant) and PW3 (Rose Kabatooro, the mother of PW2). He considered the entire prosecution evidence *vis-à-vis* that of the defence.

First of all, he relied on the evidence of PW9 Israel Byakagaba. This witness was initially on the prosecution list of witnesses. He however disappeared, and it was not until the learned trial Judge threatened to lock up PW7 Evasi Kaheru, his mother, and PW8 Magambo George, his maternal Uncle that the PW9 was found and came to testify. In essence, he testified that he was a bodaboda taxi rider. He met the appellant on July 7, 2008 at around 11 pm at Wairindi junction in Kihande area riding a motorcycle coming from the direction of Kihande. The appellant had a jerrycan on his motorcycle which fell down about 30 metres after he had passed PW9. PW9 stopped and assisted him to pick it up. The appellant got the jerrycan and went away. PW9 also proceeded on his way. He then noticed some confusion ahead. He saw fire at the palace of Omukama of Kihande. He took his customer to his destination at Kihande mile 3 and went back home. The next morning, he learnt that some children had been burnt at the scene. Initially, he denied knowledge about the person who had burnt the house of PW2. He also denied that he mentioned to anyone that he met the appellant. He also denied making a statement at the police. However, he subsequently admitted that he went to the Police and made a

statement. He accepted telling his mother, Evasi Kaheru (PW7) that he wanted money from the complainant but he did not tell her the reason he wanted it. He subsequently admitted that he told PW2 the name of the person who had set fire to his house. He confirmed that it is true that he saw the appellant, at 11 pm on the night of the incident, but he had wanted payment for his evidence before he could testify. No body forced him to tell PW2 that he had seen the appellant on the night of the fire. His mother told him that she had met the appellant who had stated that he wanted to see him (the appellant) about the case. The witness obviously told some falsehoods but as the learned trial Judge observed regarding PW3, the case of ***Alfred Tajar v. Uganda EACA Crim. Appeal No. 167 of 1969 (unreported)*** is authority for the principle that 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. The testimony that was true could be severed from the false one, and the falsehood that he did not make a statement at the police does not detract from the fact that he saw and identified the appellant coming from the direction of the scene of crime shortly after the fire started at the home of PW2 and PW3. We consider that the learned trial Judge who observed his demeanor found him to be truthful regarding this important evidence.

We note that 11pm is the approximate time that PW2 and PW3 say they woke up to see a fire coming from the house of PW2. Although it was during the night, we consider that PW9 had ample opportunity to recognize the appellant. That is why he was able to mention his name.

The learned trial Judge further took into account the activities attributed to the appellant before the fateful incident, namely that the appellant and PW2 had a dispute concerning a phone PW2 pledged to his wife; that the appellant accused PW2 before the LC 1 Court of Kihande 1 Village of having bought a phone for his wife and disorganized his family, and suspected PW2 of having an affair with his wife.

Furthermore, the learned trial Judge rightly took into account the evidence that appellant went to the home of PW2 and PW3 with his wife, on the evening of the very day of the meeting of the LC1 Kihande

1 village, on a motor cycle. PW2 and PW3's houses were five metres apart. At their home, he told PW3 that he had brought her, her daughter in law (appellant's wife) for her to see. Thereafter, he called PW2 on phone and stated that he had given him three days. On the third day is when the house was burnt.

The accused denied going to the home of PW2 and PW3. He also denied the accusations he made at the LC1. He further denied leaving his home on the night of the incident. The learned trial Judge noted that his testimony differed from that of PW4, Zubairi Byesigwa, the LC1 Chairman and that of PW2 and PW3, which confirmed that the appellant had a problem with a phone that he alleged PW2 bought for his wife. We particularly note the evidence of PW4, the LC chairman that the appellant told him that he was looking for PW2 Karubanga a resident of his village because he (PW2) had caused misunderstanding between him and his wife. This is independent evidence corroborating that of PW2 and PW3 on this aspect.

It is curious that the appellant sought to deny the nature of the accusations he made before the LC1 Court as well as the visit he paid to the home of PW2 and PW3. His relatives also showed concern that PW9 might testify in the case. There were also attempts by the appellant to ensure that PW9 did not testify. Evasi Kaheru (PW7), the mother of PW9 was accosted by her brother one Magambo George (PW8), who told her that she should inform her son, PW9 to go to him with one son of Wamara and rectify mistakes at the Police. According to PW7, Wamara is a brother to the appellant. The appellant himself accosted PW7 and told her to tell her son (PW9) to go to police as there were some matters to settle there relating to what he had signed on the incident at Kihande where some people were burnt. This does not point to an innocent coincidence.

In conclusion, we consider that the learned trial Judge did not only correctly apply the principles relating to circumstantial evidence but correctly weighed the evidence on record, and correctly found the accused guilty beyond reasonable doubt, based on the circumstantial

evidence. The circumstantial evidence pointed irresistibly to the guilt of the appellant and excluded any reasonable doubt.

Arguments of Counsel on the third ground of appeal

Counsel for the appellant's arguments

Counsel for the appellant faulted the learned trial Judge for procuring his own Court witnesses during the trial. He argued that the only instance where a court has discretion to adduce evidence on its own concerns evidence regarding a custom and way of life of any community. He further submitted that ***section 80 (1) of the Trial on Indictments Act*** provided for the only instance where a court has got discretion to adduce evidence on its own , that is evidence regarding any custom was not applicable in this instance and that it was an error for the learned trial judge to bring in his witnesses.

Counsel for the Respondent's arguments

Counsel for the Respondent relied on ***section 39 of the Trial on Indictments Act***, which provides for power to summon witnesses. She submitted that the learned trial Judge was entitled to call witnesses, as long as their evidence was essential to meet the ends of justice. She also submitted that the inconsistencies in the prosecution case were minor and did not go to the root of the case. She prayed for dismissal of the appeal.

Resolution of ground three of appeal

We note that ***section 39*** of ***the Trial on Indictments Act*** provides for exercise of power of a court to summon witnesses. It provides:

The High Court may, at any stage of any trial under this Act, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his or her evidence appears to it essential to the just decision of the case.

We note further that the learned trial judge summoned 3 witnesses who talked about the arrest of the appellant and the statement that PW9

made at the Police. The learned trial judge considered that the witnesses he summoned were necessary for the just determination of the case. We observe that the appellant's Counsel was given an opportunity to cross-examine them. Moreover, the appellant gave sworn evidence and had opportunity to rebut the evidence called. In the premises, we consider that no prejudice was occasioned to the appellant.

We also agree with both Counsels that ***Section 80(1) of the Trial on Indictments Act*** is not relevant.

The result is that we find no merit in the three grounds of appeal. This appeal is accordingly dismissed. As there was no appeal against sentence, we have found no legal basis to disturb it. The conviction of the appellant on two counts of murder and his sentence to life imprisonment are accordingly upheld. Order accordingly.

Dated this 17th day of February 2015

Signed by

Honorable Justice A S Nshimye JA _____

Honorable Justice Solomy Balungi Bossa JA _____

Honorable Justice Kenneth Kakuru JA _____

17.2.15

Edward Ahimuza holding brief for Baingana Paul for Appellant
Kataike Florence, State Attorney for Respondent
Applicant in court
Charity court clerk
Ct Judgment delivered in chambers

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