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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT GULU**

**CRIMINAL APPEAL NO. 046 OF 2016**

**KOMAKECH ALFRED KIDEGA .....APPELLANT**

**VERSUS**

10 **UGANDA.....RESPONDENT**

*(Appeal from the decision of the High Court at Gulu before Hon. Lady Justice Mutonyi Margaret dated 23<sup>rd</sup> day of March 2016 in Gulu AA 041 of 2013 arising from Gulu High Court Criminal Case No. 0221 of 2013)*

15 **CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA**  
**HON. MR. JUSTICE F.M.S EGONDA -NTENDE, JA**  
**HON. LADY JUSTICE HELLEN OBURA, JA**

**JUDGMENT OF THE COURT**

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This appeal arises from the Judgment of Hon. Lady Justice Margret Mutonyi in *High Court Criminal Case No. 0221 of 2013* at Gulu dated 23<sup>rd</sup> day of 2016 in which the appellant was convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act (CAP 120) and sentenced to 20  
25 years imprisonment.

The appellant being dissatisfied with the decision of the High Court, now appeals to this Court on the following grounds;-

1. *The learned trial Judge erred in law and fact when she relied on uncorroborated evidence of a single identifying witness.*

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2. *The learned trial Judge erred in law and fact when she relied on circumstantial evidence to convict the accused.*

35 3. *The learned trial Judge erred in law and fact when she convicted the accused on evidence that had contradictions and inconsistencies, thereby causing a miscarriage of justice.*

4. *The learned trial Judge erred in law and fact when she convicted and sentenced the accused to 20 years imprisonment.*

40 At the hearing of this appeal, the appellant was represented by *Mr. Mooli Albert Sebuta* on private state brief appearing together with *Mr. Anyuru* on state brief while learned Senior State Attorney *Mr. Patrick Omia* appeared for the respondent.

#### **Brief facts**

45 The appellant was in love with one Acan Scovia PW2, the mother of Atima Sammy a 3 year old girl now deceased. On 2<sup>nd</sup> May, 2013 she left her child with Akello Irene the baby sitter and went to dance at *Amigos* dancing hall, where she met another man with whom she danced. While there, the appellant found her and was not happy that she was dancing with another man. He asked her to dance with him but she refused. Meanwhile Akello Irene developed labour pains, locked the child in the house and went to the hospital. 50 The appellant left *Amigos* Disco Hall at around 2:30 am, while PW2 was still at the dancing hall, her house caught fire. The deceased was burnt to death inside the house. The appellant was seen by one Akello Polly Faith, PW3 near the burning house and he requested her not to reveal to any one that she saw 55 him around. He was subsequently arrested and charged with murder.

#### **The Appellant's Case.**

Mr. Mooli submitted that, the learned trial Judge erred when she convicted the appellant, on insufficient evidence. He contended that, the appellant's

conviction was based entirely on circumstantial evidence, which was weak  
60 and contradictory.

Counsel argued that, no one had seen the appellant torch the house and no  
direct evidence was led to show that the fire that killed the deceased child was  
as result of the deliberate act of the appellant. Further that, although the  
appellant was in the vicinity of the burning house, and did not answer the  
65 alarm, that, on its own was insufficient to sustain a conviction against him on  
the offence of murder.

Counsel further submitted that, the appellant was not the prime suspect when  
the incident occurred but rather the mother of the deceased suspected  
another person also called Komakech who was arrested by the police and  
70 later released. This Counsel argued, raises a possibility of mistaken identity  
throwing further doubt on the prosecution case.

He asked Court to find that, the learned trial Judge erred when she convicted  
the appellant on weak and contradictory evidence that was entirely  
circumstantial and insufficient to sustain a conviction on the offence of  
75 murder.

In the alternative, he submitted that, a sentence of 20 years imprisonment in  
the circumstances of this case was manifestly harsh and excessive. He prayed  
for the same to be set aside and substituted with a lesser one.

#### **The Respondent's Case.**

80 Mr. Omia opposed the appeal and supported the sentence. He submitted that  
the prosecution presented strong and sufficient evidence at the trial to sustain  
the conviction and the trial Judge was justified when she convicted the  
appellant on the evidence.

He submitted that PW2's evidence, that the appellant was her boyfriend and  
85 had found her dancing with another man that evening and when the appellant  
requested to dance with her, she refused.

Following the incident, Counsel submitted, the appellant was so annoyed that  
he went to PW2's home and burnt it down killing the appellant's baby who  
was asleep in the house at the time. Further that, the appellant had been seen  
90 walking away from the scene of crime by PW3.

Counsel contended that, the conduct of the appellant walking away from a  
burning house of her lover and telling PW3 not to tell anyone that she has  
seen him that night was inconsistent with his innocence.

Counsel submitted further that, there were only minor inconsistencies in the  
95 prosecution witnesses, and the trial Judge was justified when she ignored  
them as they were not material to the resolution of the issue before her. He  
asked Court to uphold the conviction.

On the alternative ground of sentence, Counsel submitted that a sentence of  
20 years imprisonment for the offence of murder that carries a maximum  
100 penalty of death was neither manifestly harsh nor excessive in the  
circumstances of this case. He asked court to confirm it.

#### **Resolution of issues.**

It is now a well-established principle that, as a first appellate Court, we are  
required to re-evaluate all the evidence on record and come up with our  
105 inferences on all issues of law and fact. This principle has been set out in many  
authorities of the Supreme Court in particular in *Fr. Narsensio Begumisa and 3  
Others Vs Eric Tibebaga, Supreme Court Civil Appeal No. 17 Of 2002*, where the  
Supreme Court held that;-



110        *"It is a well-settled principle that on a first appeal, the parties are entitled*  
*to obtain from the appeal court its own decision on issues of fact as well as*  
*of law. Although in a case of conflicting evidence the appeal court has to*  
*make due allowance for the fact that it has neither seen nor heard the*  
*witnesses, it must weigh the conflicting evidence and draw its own*  
115        *inference and conclusions."*

See also *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997, and Rule 30 (1) of the Rules of this Court. We shall proceed to apply this principle in the determination of this appeal.*

120        The main question to be answered in this appeal is whether or not the prosecution at the trial adduced sufficient evidence to prove beyond reasonable doubt the appellant's participation in the offence he was convicted of.

There being no eye witness to the commission of the crime, the appellant's  
125        conviction was entirely based on circumstantial evidence adduced by the prosecution.

The law on circumstantial evidence is well settled having been clearly set out by the East African Court of Appeal the predecessor to the Supreme Court of Uganda in *Simon Musoke Vs R [1957] EA 715*, where it held that:-

130        *"In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon 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. Teper v. R., [1952] 2 All E.R. 447, followed."*

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At the trial, the prosecution called four witnesses, while the appellant gave a sworn statement but called no witnesses.

By consent of both the prosecution and the defence, the identity of the deceased and the cause of death not in contention. What was in contention  
140 was the participation of the appellant.

PW2 the mother the deceased testified that the appellant and her were lovers. On 3<sup>rd</sup> May 2013, she went out for leisure, at a local bar and dancing hall called *Amigos*. Apparently she stayed at the place for some time. Between 2:00am and 4:00am, while she was dancing with another man whose name she did not  
145 disclose, the appellant also came, to the same place and found her dancing with that man. He asked to dance with her, but she refused. In her own words, she stated as follows;-

*"On 3/5/2013, I went out for leisure. I was taking beer with some people at AMIGOS. It was at around 2 to 4 am. I was taking Beer with some other  
150 man. We were dancing with another man. The accused came to me asking me to dance with him and I refused.*

*He was annoyed. He said, he would come in the morning to bring Some oil for the baby. He said he was going back home. We were just friends loving  
155 each other."*

She stated further that she had left her baby home with a baby sitter who was pregnant. The baby sitter, Apiyo, called her while she was still at the bar and informed her that she had gone into labor and wanted to go to the hospital.  
160 She wanted PW2 to come back home apparently to stay with the baby. It appears she did not heed the call. Later while still at the bar, she received another call that her house was on fire. She rushed home only to find that her

house had been completely burnt down and her daughter had been burnt in the house. It appears from her evidence that her house had been locked from the outside. She narrated what followed as follows;-

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*"Atima my daughter was in the burning house. I saw the lock at the door, I tried to go in but people got hold of me. Apiyo Irene had delivered in the hospital. I started crying that it is Kidega who had killed my child. Kidega is a brother to the landlord. He is called Kidega Geoffrey not the accused I had quarreled with him the previous day. I started crying that it was Kidega.*

*I went to the police and fire brigade came to put off the fire.*

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*The police started asking the people. They removed the body of the child and placed it outside. Then the sister of the landlord said she saw the accused when the house was burning. She is called Polly Akello Faith. She said, she saw Kidega Alfred Komakech who told her not to tell anybody. Kidega Geoffrey was released by the police. Akello Polly Faith said it was Kidega Alfred Komakech. I went to Police and reported the case telling them, it is said it is the accused who killed my child.*

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*The Police did not allow people to get near the body. She was buried at Layibi. The Police released the other Kidega and detained this one. I said he was annoyed. I was with my sister Apio Kevin. She is a witness."*

185 In cross examination, she stated that she did not believe the appellant is the one who set her house on fire. She went on to state that in her heart, she felt that Kidega Geoffrey and not the appellant is the one who set her house on fire. She states further in cross examination as follows;-

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*"I went to the police when they released him and the police said, it was the accused who burnt the house because he got me with another man.*

*The police told me that they investigated and found out that it was the accused who burnt the house because he got me with another man and he was not with me.*

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*The witness who said she saw the accused when fire was burning saw him with folded trousers and the police saw him with folded trousers. They wondered if he had not set the house on fire, why did he not report but went to sleep on his bed."*

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From the testimony of the witness, she suspected that it was Kidega Geoffrey who had set her house on fire because, he was a brother to her landlord, one Luwum Michael. It was Luwum Michael together with the appellant's grandmother who had earlier gone to the witnesses' house and removed the appellant from there because they disapproved his relationship with PW2.

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However, when PW2 went to the police she found that, Kidega Geoffrey had been released and from the above excerpt of her evidence it is the police who told her that, the appellant must have been the one who burnt her house and not Kidege Geoffrey.

The police even provided the motive.

PW3 Akello Polly Faith testified that she is a sister to Luwum PW2's landlord. She testified as follows in examination in chief.

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*"I saw a certain man passing via the home in the compound. He turned back to go the direction he came from .He was moving slowly. After he turned back to go back to the direction he came from. It was away from the burning house. I then saw him and wanted to know who he was. What*



215 *helped me was the clothes he was wearing, it was a dark blue trouser with  
a white long sleeved shirt.*

*I suspected him to be Fred the accused. Then called him Fred three times.  
He stopped and turned to me and asked if I was Aci (another form of  
Akello). I said I was the one. He came close to me and asked me "What is  
220 happening?" I told him you are seeing. i.e. the burning house.*

*He asked me again that where is Scovia. I told him she was not around.  
He then asked me who were the people gathered there. I told him only our  
family members. He then said, don't say to anyone that you saw me. He  
225 cautioned me three times.*

*He hugged me and went away I did not keep quiet, I went to my brother  
Luwum Michael, and I told him all that Fred said to me.*

230 *After, my brother called the fire brigade to come and put out the fire."*

In cross examination, this witness stated that she knew Kidege Geoffrey, he was a son to her sister. That she did not know if it was the appellant who had set PW2's house ablaze. She was aware that PW2 and Kidege Geoffrey had a quarrel the day before the house was burnt.

235 PW4 Apio Kevin, a cousin to PW3 testified as follows;-

*"I went with Scovia to dance at Amigos.*

*While we were in dancing hall, Scovia danced with another man. Fred  
came inside and discussed with Scovia. I was at a distance so I did not get  
the words I saw them standing and talking. Fred was not happy. Later, I  
240 went to Scovia and asked her what was wrong with him.*

15 *They talked as if they were quarrelling. She told me that she was tired of Fred because the mother of Fred (Accused) disturbs her. She told me that he wants to buy smearing oil for Atim. I left then and went home. I also left Fred the accused in the dancing hall."*

We have endeavored to reproduce the relevant excerpt of the evidence upon which the appellant was convicted.

250 The learned trial Judge based the conviction largely on the conduct of the appellant at the time the house was burning, when she stated in her judgment as follows:-

255 *"He is seen by one prosecution witness PW3, walking slowly. Under such circumstances people rush to the scene of the fire if at all he was concerned like he wanted this court to believe. But unfortunately, he was recognized by PW3.*

260 *He sarcastically asks what was happening and yet he knew exactly what was going on according to her evidence, the accused turned back to go away from the burning house, when she identified and called him, he pleaded with her not to tell anyone that she saw him.*

265 *That conduct was not of an innocent, concerned person. He was person would not fear grandmother in such a situation where the house of a beloved one is on fire more so with a child inside burning to death. He also pretended not to know the whereabouts of Scovia, when he knew very well that he had left her at Amigos Disco Hall dancing with another man. Had his presence within the vicinity of the burning house been innocent, he would have told Akello Polly Faith, that he had just left Acan Scovia at Amigos and most probably she was not yet back."*

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With all due respect to the learned trial Judge her decision was based more on speculation than fact.

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We find that, the circumstances leading to the death of the deceased could be explained under a number of other hypothesis other than the guilt of the appellant. The cause of fire was never established. It could have been an accident or a faulty electrical installation.

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The nature of the house that was burnt was never explained and we do not know whether or not it was grass thatched. The baby sitter was not called to testify as to what kind of light was being used in the house when she left or whether she had left a lit fire, candle lamp or any other light burning. There is nothing in the evidence to prove that the house had been deliberately set on fire. Accident as a cause of the fire was never ruled out.

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We find that there were co-existing circumstances which very much weakened the inference of the appellant's guilt. We are unable to say that, the inculpatory factors were incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis than that of guilt of the appellant.

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The inference brought out by the learned trial Judge, with all due respect fell far short of what is required to establish the guilt of the appellant beyond reasonable doubt.

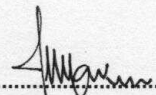
For these reasons we find merit in this appeal and we hereby allow it. The appellant's conviction is hereby quashed and the sentence set aside.

He is set free.

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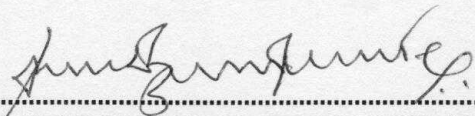
Dated at Gulu, this 7<sup>th</sup> day of November 2017.

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**HON. JUSTICE KENNETH KAKURU**  
**JUSTICE OF APPEAL**

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**HON. JUSTICE F.M.S EGONDA NTENDE**  
**JUSTICE OF APPEAL**

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**HON. LADY JUSTICE HELLEN OBURA**  
**JUSTICE OF APPEAL**