

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0029 OF 2015

(Coram: Tumwesigye; Mwangusya; Opio-Aweri; Mwondha; Tibaternwa-
10 Ekiriikubinza; JJ.S.C)

Between

BAITWABUSA FRANCISAPPELLANT

And

UGANDARESPONDENT

15

(Appeal from the decision of the Court of Appeal of Uganda at Kampala before the Justices Nshimye, Solome Balungi Bossa, Kenneth Kakuru JJA, on the 17th day of February 2015 in Criminal Appeal No.26 of 2011)

20

JUDGMENT OF COURT

This is a second appeal which arises from the judgment of the Court of Appeal which upheld the conviction of Baitwabusa Francis (the appellant) by the High Court on five counts of murder and a sentence of life imprisonment on each count. The sentences were to run concurrently.

25 The facts of the case as found by the trial Judge (Chigamoy Owinyi-Dollo, J as he then was) and upheld by the Court of Appeal are that the deceased persons, namely, Kaireta Geoffrey, aged 25 years, Kabajwiga Brenda, aged 20 years, Kisémbó Derrick aged 4 years, Disaya Kabajungu, aged 3 years and Amanyire Edward, aged 2 years lived at Kihande I Village, Masindi with
30 Mathew Karubanga (PW2), his wife, Tugume Maureen and his mother, Rose Kabatoro (PW3).

On the 8th day of July, 2008 they had all retired to bed when PW2 who was sleeping with his wife in a separate room from that of the deceased, heard

'a blast from the Television set. He noticed that the house had caught fire
35 and all attempts to open the door were futile because it had been locked
from outside. His mother who was sleeping in a separate house raised an
alarm which attracted neighbours who removed iron bars from a window
through which PW2 and his wife escaped. The deceased were not so lucky.
They were all burnt beyond recognition as the post mortem reports on all
40 the five dead bodies indicated. They all died of multiple organ damage due
to extensive burns.

The District Police Commander Masindi District, Alex Twebaze(PW5) on
receiving the report about this incident visited the scene that very night. On
reaching the scene he confirmed that five people had perished in the fire and
45 the name of the appellant was being mentioned in connection with the
burning of the house in which the deceased persons perished.

He, together with the Local Council Chairman, Masindi and PW2 headed for
the home of the appellant at Katama village where the wife of the appellant
opened for them. The appellant was called out of his house and informed of
50 the allegation that he had burnt PW2's house in which the deceased were
burnt. He was then arrested. He did not resist the arrest. His only
response to the arrest was that it was okay. He was taken to Masindi Police
Station from where he was later taken to the Chief Magistrate Court where
he was charged with murder. He was later indicted in the High Court sitting
55 at Masindi where the prosecution adduced evidence to link him with the
offences.

The appellant denied the alleged offences. He testified that on 8th July 2008
he had gone to bed at 10:00 p.m. and was sleeping when he was awakened
by his wife who told him that someone wanted him. The District Police
60 Commander called him out and placed him under arrest. He was taken to
Masindi Police Station where he denied having burnt the house in which the
deceased persons died.

Norah Kyakuhaire (DW2) in support of her husband's alibi testified that on 8th July, 2008 she returned home at 6:00 p.m. from school where she was a 65 teacher. She found her husband and children at home and they remained together till his arrest in the night.

The arrest of the appellant was prompted by information circulating at the scene that he was not on good terms with PW2 whom he suspected of having a love affair with his wife. The suspicion arose from the fact that
70 PW2 had left a phone with the appellant's wife for whom he was doing some casual work.

According to PW2 and DW2, the phone was a pledge for a sum of Shs 20,000/= which PW2 had borrowed from the appellant's wife. PW2 had also taken a sum of Shs.850,000/= from DW2 on the pretext that he had a
75 cure for her medical condition. These two incidents had soured the relationship between PW2 and the appellant who had allegedly warned PW2 that something was going to happen to him following which his house was burnt.

Both the High Court and the Court of Appeal found that the case depended
80 on circumstantial evidence and we agree. Both Courts rightly stated the principles which Courts apply in deciding cases based on circumstantial evidence as was re-stated in the case of **Akbar Hussein Godi Vs Uganda (Supreme Court) Criminal Appeal No 03 of 2013** as follows:-

**"There are many decided cases which set out the relevant
85 principles which Courts apply in deciding cases based on circumstantial evidence. In the case of Simon Musoke Vs R. (1958) E.A. 715 at page 718H, the Court of Appeal for East Africa held that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find
90 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 "see also Teper Vs R.**

(1952) 2 ALL ER 447. Also see Andrea Obonyo & Others Vs R. (1962) E.A. 542 where the principles governing the application by Courts of circumstantial evidence were considered".

95

The circumstantial evidence relied upon by the two Courts to convict the appellant consisted of the threat by appellant to do harm to PW2 and evidence that he was seen fleeing from the scene on his motorcycle. The appellant denied both incidents throughout his trial and in his appeal he

100 raises two grounds as follows:-

1. That the learned Justices of Appeal erred in law and fact when they failed to properly re-evaluate the circumstantial evidence on record to come up with their own conclusion.

2. That the learned Justices of Appeal erred in law and fact in upholding an illegal sentence of the Appellant spending the rest of his life in prison (Life imprisonment) which was a manifestly excessive sentence.

He prayed that

1. The appeal be allowed.

2. The harsh and excessive sentence of the appellant spending the rest of his life in Prison be set aside or substituted with a lessor (sic) prison term.

110

The second ground is badly drafted. It raises the issue of illegality of sentence related to imprisonment of the appellant for the rest of his life and mixes it with the issue of a manifestly excessive sentence.

115

The prayer seems to abandon the issue of illegality but it is raised again in the appellant's final submissions. Our observation is that Counsel should take more care in the drafting of the memoranda of Appeal so that there is no mix up of issues on Appeal. Both grounds will be resolved as matters of

120 Law.

'At the hearing of the appeal the appellant was represented by Mr. Emmanuel Muwonge, Counsel on State Brief while the Respondent was represented by Ms Caroline Nabasa, a Senior Principal State Attorney,
125 Directorate of Public Prosecutions. Both Counsel filed written submissions which they adopted at the hearing of the appeal.

On the first ground of Appeal, Counsel for the appellant submitted that both the trial Court and the Court of Appeal correctly observed that the case
130 against the appellant was based entirely on circumstantial evidence because there was no eyewitness who saw the appellant commit the crime. He also acknowledged that both Courts correctly set out the principles that govern the Courts before any reliance can be placed on circumstantial evidence to convict a person. However, he faulted both Courts for having
135 heavily relied on the testimony of PW9 which lacked credibility. According to Counsel, this witness only came to testify after the Court had detained his mother and maternal uncle and his evidence that he had been approached by PW2 with money to testify against the appellant makes his testimony unreliable and should not have been believed. He also could not have
140 identified the appellant in the conditions prevailing on the night he is alleged to have met the appellant riding his motor cycle following the incident.

In reply Counsel for the Respondent submitted that the Court of Appeal properly re-evaluated the evidence as required of a first appellate Court and
145 given the strong circumstantial evidence adduced by the prosecution, the appellant was placed at the scene of crime. She submitted that the circumstantial evidence rotated around the grudge between the appellant and PW2 and the evidence of PW9 who met the appellant fleeing from the scene. According to this witness, the appellant was carrying a yellow five
150 liter jerrycan which fell off the motor cycle and he assisted him to retrieve it. He identified him in the process.

This Court being a second appellate Court is not required to re-evaluate the whole evidence unless it is found that the first appellate Court did not sufficiently re-evaluate the evidence to draw its own conclusion. This is the position which was stated in the case of **Kifamunte Henry Vs Uganda SCCA 10 of 1997** as follows:-

160 **"It is the Court of Appeal as the first appellate Court which has duty to re-evaluate the evidence of the trial Court. This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we will assume the duty of the first appellate Court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as a first appellant Court, the Court of Appeal misapplied or failed to apply the principles set out in such decisions as Pandya (Supra) Ruwala (Supra) Kairu (Supra)"**

170

In view of the defence of alibi raised by the appellant, it was incumbent on the trial Court and the Court of Appeal to determine whether or not the appellant was put at the scene of crime. The guidelines as to what amounts to putting the accused at the scene of crime were set by the Supreme Court of Uganda in the case of **Bogere and Anor (Supreme Court Criminal Appeal No 1 of 1997)** where it was held as follows:

180 **"What then amounts to putting an accused at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.**

To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution evidence

185 **alone, but must base itself upon the evaluation of the evidence as**
a whole. Where the prosecution adduces evidence showing that
the accused was at the scene of crime, and the defence not only
denies it but also adduces that he was elsewhere at the material
190 **judicially and give reasons why one and not the other version is**
accepted. It is misdirection to accept one version and then hold
that because of that acceptance per se the other version is
unsustainable"

195 As already indicated the case against the appellant is dependent on
circumstantial evidence and the question is whether the Courts below
subjected it to close scrutiny as is required. The requirement to subject
circumstantial evidence to close scrutiny was emphasised in the case of
Katende Semakula vs. Uganda (Supreme Court Criminal Appeal No. 11/
200 **1994)** where it was stated as follows:-

"Another requirement concerning circumstantial evidence is that
it must be narrowly examined, because evidence of this kind may
be fabricated to cast suspicion on another. It is therefore
necessary before drawing the inference of the accused's guilt from
205 **circumstantial evidence to be sure that there are no other co-**
existing circumstances which would weaken or destroy the
inference ... "

The first piece of circumstantial evidence relied on by both Courts to
210 connect the appellant with the offence was a threat allegedly uttered by the
appellant to PW2 on phone. The value to be attached to evidence of a prior
threat was discussed in the case of **Waihi and Anor Vs Uganda (1968) E.A.**
278 at p. 280 where the East African Court of Appeal stated:-

215 **"Evidence of a prior threat or of an announced intention to kill is**
always admissible evidence against a person accused of murder,

but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or of
220 **impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think capable of corroborating a confession "**

225 (underlining provided)

In this case, the appellant denies having made the threats and there was no verification of any telephone contact between the appellant and PW2.

Secondly, from our reading of the case of **Waihi Vs Uganda** (Supra) evidence
230 of prior threat cannot stand on its own. It can only be used for corroboration of other evidence which in this case is that the appellant was not only seen at the scene but was also seen fleeing from the scene on his motor cycle.

According to the evidence of PW2 it was his mother, Rose Kabatoro (PW3)

235 who informed people at the scene that she knew the person who had set the house on fire and had seen him jump on his motor cycle and ride away. But the trial judge, rightly so in our view disregarded this evidence when he observed as follows:-

240 **"It is easily discernable that the 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 for her family; and given that indeed the tragic fire incident took**
245 **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 jerrycan on a motor cycle fleeing from the scene of the fire. This was, in any case hearsay evidence and**

inadmissible. PW3's claim that fateful night is therefore worthless.

250 **I must disregard it."**

After disregarding the evidence of PW3, the only other piece of circumstantial evidence relied on to connect the appellant was that he was seen fleeing from the scene on his motor cycle. According to No 25383

255 D/CPL Okatayot Simon, an investigating officer who testified as a Court witness two people namely Mukubwa Peter a motor cycle rider who did not testify at the trial and Byakagaba Israel (PW9) a bicycle rider claimed to have met a person riding a TVS motor cycle on which he was carrying a five litre jerrycan.

260

Mukubwa did not identify the person while Byakagaba who testified as PW9 claimed to have identified the appellant whom he assisted to retrieve the five litre jerry can which had fallen from the motorcycle.

But in his own testimony this is what he stated "**the complainant**

265 **approached me and asked me to go and give evidence on how I had met the accused. He asked me if I knew the person who had burnt his house I told him I did not know the person, and then he asked me go and give statement at police. I accepted but asked him for 5 million shillings. He refused up to now"**.

70 Earlier he had stated that he never mentioned to anyone that he had met Baitwabusa. He also denied having made any statement at the police. Later he admitted recording a statement at the police and although there was a suggestion that the appellant had approached him to influence him not to testify against him he denied ever meeting the complainant or the appellant

275 after he had made his statement at the police. He denied having discussed the case with his uncle George Magambo (PW8) and his mother Evasi Kaheru (PW7). He denied having told his mother that he had seen the accused on the night of the fire.

In our View, the two pieces of circumstantial evidence did not point
280 irresistibly to the guilt of the appellant. The evidence of the District police
commander who arrested the appellant from his home did not help in
linking the appellant with the offence. According to the witness he heard the
name of appellant being mentioned at the scene and he went to his home
where he found him sleeping. No search was conducted at the home of the
285 appellant especially if anybody mentioned that he had been seen fleeing on
his motorcycle whose registration number was not given but was described
as blue in colour. There was mention of a yellow small jerycan which was
never recovered. Moreover PW9 who testified that he had met the appellant,
on the night the crime was allegedly committed told court that he never told
290 any body so including the complainant whom he told that he did not know
the person who had set fire to his property. It was only after he was
promised Shs.5 million that he agreed to go and make a statement at the
police. The complainant reneged on his promise to pay him Shs.5 million
which may explain why he was reluctant to testify in Court till his relatives
295 were imprisoned. There was also evidence that he was approached by the
appellant to withdraw his statement at the police which may explain the
disappearance of his statement from the police file.

We do not see how the trial Court and Court of Appeal would find P.W.9
300 such a credible witness as to disprove the alibi raised by the appellant. On
the contrary his credibility would be in question whether he was approached
by the appellant to exonerate him of the crime or by the complainant to
fabricate a story that he had met the appellant fleeing from the scene. On
that basis we find that although both courts were alive to the principles
305 regarding circumstantial evidence, none of them subjected it to the scrutiny
required before basing a conviction on it. We are of the view that the
evidence on record left the appellant as a mere suspect. Suspicion, however
strong it may be does not lead to conviction. See **R v. Israel Epuku S/O
Achietu [1934] IEACA 166.**

310 In the result the appellant's appeal is allowed. His conviction on all counts of murder is quashed and is to be released from custody unless he is being held on other lawful charges.

Dat d at Kampala this14th day ofAugust **2017**

Tumwesigye
JUSTICE OF THE SUPREME COURT

Mwangusya
JUSTICE OF THE SUPREME COURT

Opio Aweri
JUSTICE OF THE SUPREME COURT

Mwondha
JUSTICE OF THE SUPREME COURT

Tibatemwa-Ekirukubinza
JUSTICE OF THE SUPREME COURT