

UGANDA / JUDGMENT

Uganda v Bagaga & 2 Others (Criminal Session 129 of 2018) [2024] UGHC 107 (30 January 2024) [2024] UGHC 107

COURT

High Court of Uganda

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Criminal Session 129 of 2018

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT UGANDA AT JINJA****CRIMINAL SESSION NO. 129 OF 2018**

UGANDA:.....

VERSUS**A1 BAGAGA JAMES****A2 MUWANGUZI PRAISE****A3 KYAZIKE MONICA :.....****BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI****RULING ON A PRIMA FACIE CASE**

Bagaga James (A1), Muwanguzi Praise (A2) (a minor at time the offence was allegedly committed) and Kyazike Monica(A3) herein referred to as the accused persons and others still at large were indicted with the offence of murder contrary to Sections 188 and 189 of the Penal Code Act. For the first count, it is alleged that the accused persons and others still at large, on the 5th day of May 2022 at 5:00am at Mpumudde in Jinja City, with malice aforethought, unlawfully caused the death of

For the second count, it is alleged that accused persons and others still at large, on the 5th day of May 2022 at 5:00 am at Mpumudde in Jinja City, with malice aforethought, unlawfully caused the death of an unknown person.

For the third count, it is alleged that accused persons and others still at large, on the 5th day of May 2022 at 5:00 am at Mpumudde in Jinja City, willfully and unlawfully set fire on Holy Healing Ministries International Church, the property of Apostle Joseph Muwanguzi.

For the fourth count, it is alleged that the accused persons and others still at large, on the 5th day of May 2022 at 5:00am at Mpumudde in Jinja City, conspired to commit a felony.

At plea taking, all the accused persons pleaded not guilty to the indictment.

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Representation

The prosecution was represented by Shallote Kamusiime and Moses Atoe, Senior State Attorneys in the Office of the Director of Public Prosecutions. The accused was represented by Counsel Mudde John Bosco, Jason Njeru Kiggundu and Gloria Abaruhanga on private brief while Counsel Daniel Mudhumbisi represented the accused persons on State brief.

At the closure of the prosecution's case, neither the prosecution nor the defence made submissions on a no case to answer and the matter was left to court for a decision.

Court's analysis

Burden and Standard of proof

The burden of proof in criminal matters rests squarely on the prosecution and does not shift to the accused unless it is exempted by statute. The standard of proof is high; the prosecution must prove all the essential ingredients of the offences beyond reasonable doubt.

The prosecution led the evidence of eight witnesses; Kato George Rwakatata (PW1), Kwagala Juliet Kisakye (PW2), Kawanguzi Ngobi Laston (PW3), Dr. Onyai Pitua Patrick (PW5), ASP Nyanzi Rashid (PW6), AIP Okello Michael Jackson (PW7). Det. AIP Namanya Alex (PW8) and AIP Mugabi Apollo (PW9). Kanabiro Robert who conducted the medical examination on the accused persons and the evidence on Police Form 24 was agreed upon by both the prosecution and defence.

The Law

At the close of the prosecution's case, Section 73 of the Trial on Indictments Act (TIA) Cap 23 as amended, requires this court to determine whether or not the evidence adduced has established a prima facie case against the accused person. It is only when a prima facie case has been made out against the accused that he/she should be put to his or her defence.

Section 73(1) of the TIA provides that;

"When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall,

after hearing the advocates for the prosecution and for the defence, record a finding of not guilty".

Prima facie case.

By law, it is expected of the prosecution that, at the close of its case, if it has made out a *prima facie* case, on the face of it should be convincing enough to require that the accused person be put on his defence. Justice Stephen Mubiru in the case of Uganda Vs Obur Ronald & 3ors Criminal Appeal No. 0007 of 2019 (HC) stated that:

"A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R.* [1957] EA 332). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proven the case beyond reasonable doubt since such a determination can only be made after *hearing both the prosecution and the defence.*"

According to A Guide to Criminal Procedure in Uganda" B. J. Odoki 3rd Edition at page 120, it was stated that in order for the court to dismiss the charge at the close of the prosecution's case, court must be satisfied that: -

- a. There has been no evidence to prove an essential element of the alleged offence or:
- b. The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

The Evidence**First and Second Counts of Murder**

Section 188 of the Penal Code Act Cap 120 (PCA) as amended provides that: -

"Any person who of malice aforethought causes the death of another person by an *unlawful act or omission commits murder.*"

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Section 189 of PCA provides for the death sentence as the punishment for any person convicted of the offence of murder.

For the case of murder, the prosecution must prove each of the following essential ingredients;

- 1. Death of human being.
- 2. That the death was unlawful.
- 3. That the death was as a result of malice aforethought.
- 4. That the accused is the person who caused the death of the deceased.

Court analyzed the evidence adduced by the prosecution in proving whether the two counts of murder brought against the accused persons had been proven to the extent that the accused persons should be put on their defence.

I have analysed the prosecution's evidence in respect of this count below.

(1) That there was death

It is trite law that death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. (See Uganda versus Anyao Milton Criminal Session No. 5 of \$2017\$)

The prosecution adduced two post mortem reports for the two deceased persons both dated 5th May 2022 prepared by PW5, Dr. Onyai Pitua Patrick, a Medical Doctor at Jinja Regional Referral Hospital. The post mortem reports were admitted as evidence for the prosecution and were marked as PEX3 and PEX4. Dr. Onyai testified that on the 5th of May 2022, he received two bodies, one of Kalichera Jonathan while the other was unidentified. That the body of Kalichera Jonathan was identified by Mukisa Fred who was the care taker of the deceased. It was his testimony that the bodies were severally burnt and as such, there was no need for an internal examination. That after examination of the bodies, he authored post-mortem reports which he stamped and submitted to the police. That he handed over the body of Kalikyera Jonathan to the deceased's relatives for burial while the other unidentified body was handed over to Jinja City Council for burial in the cemetery.

This testimony was corroborated by the testimonies of PW1, PW2 and PW3 who all testified that the body of Kalichera Jonathan and that of an unidentified person were found at the scene following an inferno at Holy Healing Ministries Church at Mpumudde at about 5.00 a.m. on 5th of May 2022.

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Based on the above evidence adduced by the prosecution, I therefore find that the prosecution adduced sufficient evidence to prove this ingredient.

(2) The death was caused by some unlawful act.

It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law (See *R v. Gusambizi s/o Wesonga* (1948) 15 EACA 65).

However, the prosecution must prove first that the death was a homicide before this presumption can be applied. This is done by adducing evidence which proves that it was not suicidal, accidental, in execution of a lawful sentence of death or otherwise legally justified or excused. The prosecution contended that the deaths of Kalichera Jonathan and the unidentified person were a homicide which contention was rebutted by the defence.

This ingredient requires that the death was caused by an unlawful act. Therefore, to prove that the death of Kalichera Jonathan and that of the unidentified body was unlawful, the prosecution relied on the evidence of PW5 who in PEX3 and PEX 4 conducted a post mortem on the two bodies after which he indicated in the post mortem reports that both bodies were charred and that the cause of death was due to severe burns in the 4th degree. In his testimony in Court, PW5 explained that the bodies had been severely burnt to the extent that there was no flesh available to open them up and as a result, he could only examine the bodies by external observation.

Kwagala Juliet Kisakye (PW2), testified that she knew that one of the bodies belonged to Kalichera Jonathan reason being that he could not be found following the inferno. She testified that the body was unrecognizable and that only the upper part of his body had remained, the rest of the body having been burnt in the fire and that she had no knowledge as to where the other body parts were taken although it seemed as though they had been burnt in the fire.

Having considered all the available evidence, I am satisfied that the death of Kalichera Jonathan and another unidentified body was caused by fire.

I shall now determine whether the prosecution adduced credible evidence to prove that the said fire was unlawful and hence a homicide in nature that culminated in the death of the two deceased persons.

PW1 testified that he saw A1 with an iron rod which he used to hit the Church and that he saw A2 with a jerry can which seemed to have petrol in it. He further testified that A3 was seen with a brown polythene bag at the time the Church was attacked. However, in cross-examination, PW1 testified that he did not see the accused

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persons set the church on fire nor kill Kalichera Jonathan or the other unidentified person. It was PW1's testimony that neither did he see the accused persons participate in the looting of the Church nor did he see the accused persons prevent Kalichera from leaving the Church at the time of the attack. He further testified that inside the Church, was a generator which had petrol in it and that four other generators had reserve petrol in them. In cross examination, PW1 testified

that there was a possibility that mentally unstable people who were brought to the Church for prayers and healing could subconsciously start a fire.

Detective ASP Nyanzi Rashid, PW6, testified that he was instructed by the Director of Forensics in his department to constitute a team and revisit the crime scene at Mpumudde. He explained that the constitution of an Emergency Response Team to revisit the crime scene was based on a complaint by a whistleblower, Anakooli Ndyabagera, to the Director of Forensics, the complaint being that the complainant was not satisfied with the way the Scene of Crime Officer had previously handled the matter.

In the course of his testimony, he tendered to court an investigation report dated 5th September 2022, which was marked as PEX6. His findings in that report were that there had been a prior attack on the Church by unknown people who made off with Church items, which included televisions and projectors among others. That after the looting, there was a fire outbreak at about 4:00am. It was his finding that at the time of the alleged fire outbreak; the weather was reportedly good with no rain nor thunderstorms. He testified that the Church had not been connected to the newly installed power line and that the generators were not running at that time. He further testified that he did not find any fragments nor craters at the scene and that no blasts were heard and as such he ruled out the possibility that there had been an explosion at the scene. He clarified that he visited the scene with the Emergency Response Team three weeks after the fire incident at the Church. He further testified that the Team thoroughly searched the scene and did not find any charcoal stoves, gas cylinders, gasoline stoves or cooking stones. In his professional opinion, he concluded that the fire could have been caused by a deliberate act of an arsonist.

Defence Counsel contested this report in cross examination. On being cross examined about how he found out about the attack on the Church, PW6 testified that he was informed about the fire attack on the Church from the Division Police Commander and Pastor Kato (PW1). He admitted that the findings in the report were based on his perception and that at the time he visited the scene, it had not been cordoned off and therefore the scene could have been tampered with and compromised. He explained that he had omitted to indicate the source of lighting

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that was being used by the Church in his report. He also testified that the Church had a kitchen which was located behind the Church and that he did not take any samples from the scene e.g. soil samples or burnt objects which would have assisted him to determine the source of the fire.

In the case of *Uganda v Kavuma* (Criminal Session Case No 0819 of 2016) 2018 UGHCCRD 145 (4 July 2018) Justice Stephen Mubiru observed that;

"An expert opinion relevant to a material issue in a trial but based entirely on unproven hearsay is admissible but will carry no weight whereas an opinion based on matters within the scope of his or her expertise, as in personal observation, consultation with colleagues, and information that an expert obtains from a party to litigation touching a matter directly in issue. Where the

information upon which an expert forms his or her opinion comes from a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will have a direct effect on the weight to be given to the opinion. However, where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight."

In the instant case, PW6 relied on what was narrated to him by PW1 and other people. From the above information, it is clear that the PW6 had already formed a prejudiced mind on the investigations before he conducted the same. He failed to explain to this court in his testimony and in his report that his investigations had been conducted independently and instead informed this court that his findings were based on what had been narrated to him. I find it extremely unprofessional of a forensic investigator with 15 years of work experience to have failed to conduct a conclusive and independent forensic investigation of the scene of crime and yet his visit to the scene of crime was to rectify what could have gone wrong during the first visit by the Scene of Crime Officer. PW6 instead chose to rely on what was narrated to him which formed the basis of his findings as opposed to his own independent and professional findings.

Further in his testimony, apart from stating that in his opinion, the fire could have been caused by an arsonist, he did not clarify what the cause of fire was in his report marked as PEX6.

I find that the testimony and report of PW6 were not definite and conclusive as to the cause of the fire which burnt the Church and as such, this leaves room for doubt that there could have been other causes of fire that burnt the Church. The fact that he did not examine any of the burnt objects at the scene of crime brings the question as to why a forensics investigator was deployed in this case.

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Although the testimonies of PW1, PW2 and PW3 disclose that Church was burnt as a result of petrol-soaked sponges that were ignited with fire that eventually burnt down the Church, this evidence is not indicated anywhere in PW6's report nor did he carry out a forensic examination to prove these assertions.

PW9, AIP Mugabi Apollo testified that as the Scene of Crime Officer, he managed to retrieve some of the exhibits from the scene of crime and that those exhibits included a small bottle with liquid suspected to be fuel, ash samples from the location of the scene which had burnt debris and from where the unidentified body had been found and a sample of burnt debris from the location at the scene where the body of Jonathan Kalichera was found. It was the testimony that he submitted a request to the Government Analyst to ascertain what the liquid in the bottle was, its effect on fire and examine if ash and burnt debris can cause fire and any other analysis.

The report of the Government Analyst was not received in evidence since the Defence raised an objection that PW8 was not the author of the report nor did the prosecution bother to bring the Government Analyst to tender in this crucial report which objection the Court upheld.

Having considered all the available evidence, I am not in the least satisfied that the prosecution has adduced sufficient evidence to prove that the death of Kalichera Jonathan and another unidentified person was caused by an unlawful act.

(3) That the death was as a result of malice aforethought.

The prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined under Section 191 of the Penal Code Act as:-

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 such person is the *person actually killed or not;*
- b. or 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

In the case of R v. Tubere s/o Ochen (1945) 12 EACA 63, Court set out the circumstances which the trial Court should consider in deciding whether there was

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malice aforethought in the killing of a person. These are: the type of weapon used, the nature of injury or injuries inflicted, the part of the body affected and the conduct of the attacker before and after the attack. Malice aforethought being a mental element is difficult to prove by direct evidence.

Courts have found that in situations where no weapon is used, for a court to infer that an accused killed with malice aforethought, it must consider if death was a natural consequence of the act that caused the death and whether the accused foresaw death as a natural consequence of the act. That court should consider;

- whether the relevant consequence which must be proved (death), was a \$(i)\$ natural consequence of the voluntary act of another and
- whether the perpetrator foresaw that it would be a natural consequence of his \$(ii)\$ or her act, and if so, then it is proper for court to draw the inference that the perpetrator intended that consequence.

(See *R v. Moloney* [1985] 1 All ER 1025; *Nanyonjo Harriet and Another v. Uganda S. C.* Cr. Appeal No.24 of 2002).

In this instant case, the post-mortem reports exhibited by the prosecution as PEX3 and PEX4 indicated that the external injuries on both bodies of the deceased persons exhibited as charred bodies and that since both bodies had been severely burnt, they could not be dissected to ascertain if there had been any internal injuries. It was the testimony of PW5 that the cause of death for the two deceased persons was 4th degree burns. He further testified that although these injuries were consistent with fire, no evidence was adduced to prove that the accused persons intentionally caused the death of the deceased persons.

Further in cross examination, PW1 testified that any responsible neighbour would come to the rescue of his neighbour in the event of fire occasioned on the neighbour's house. In this regard, the Defence demonstrated to this Court that the presence of the accused persons at the Church on the day the Church went ablaze was to help put out the fire as responsible neighbours.

Having analysed the evidence above, I find that no sufficient evidence has been adduced by the prosecution to prove the ingredient of malice aforethought against the accused persons.

(4) That it was the accused who caused the unlawful death.

There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. Section 19 (1) (b) and (c) of the Penal Code Act lists persons who are deemed to have taken

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part in committing an offence and to be guilty of the offence and who may as a consequence, be charged with actually committing it. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence.

The prosecution relies entirely on identification evidence. The established principles with regard to identification evidence were laid down in the case of *Abdallah Nabulere & Anor Vs Uganda Criminal Appeal No. 9 of 1978*, the court observed that "the judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence"

Prosecution relied on the testimony of PW1 who testified that on 5th May 2022 between 4:00am- 5am, he had knocks on the Church and got out of a room (apartment) within which he resided and went to the main Church Hall. He traced for the sounds of the knocks on the Church and discovered that some wooden parts of the Church building had been broken off. He testified that he recognized the three accused persons among the people who were outside the Church and another girl called Patience. That A1 had an iron rod and was hitting the Church, A2

had a jerry can that he was lifting and A3 had a polythene bag, brown in colour, with sponges in it. He explained to Court that he was able to see the accused persons with the aid of solar powered lighting. He described the Church as not being completely enclosed since it had wooden enclosures on the sides and flaps at the entrance.

It was his further testimony that he observed about forty people who started looting the Church including the accused persons. He also testified that he saw A1 knocking the walls of the Church with an iron bar and that A2 had a jerry can with a liquid in it which he later found out to be petrol as he was able to smell it inside the Church. That in the morning, jerry cans were discovered with petrol by the Police in A1's room which was near the Church.

However, in cross examination, PW1 stated that he did not see the accused persons kill the deceased persons or even set the church on fire. He stated that he saw the accused persons before the Church went ablaze and described A1 to have been wearing a striped black and white short sleeved shirt, a black trouser and black gumboots while A3 wore a brown dress and that he was able to identify the two accused persons with the aid of a solar light at the scene. He also told Court that the fire started from the side of A1's residence, although at some point in his testimony, he refuted the same.

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PW2 in her testimony told Court that on 5th May 2022 at about 4.00 a.m., while asleep she heard bangs which woke her up. That someone banged on one of the windows in the room in which she had spent the night and as a result of the banging, the window broke and fell into the room. She testified that she did not suffer any injuries from the broken window and that she heard A3 speak through the space of the broken window that no one should leave the church lest she or he be killed. PW2 further testified that she used a torch to see what was going on outside on the side of A1's residence where the attackers were. She further testified that she went back to the window and with the help of the torch, she was able to see what was outside. She informed Court that she saw A1 burn a cloth which he used to burn the boys' wing of the church. That A1 was in the company of a group of men including A2. That the men got cloths, dipped them in a pail which had a liquid in it after which they threw them towards the Church. PW2, in her testimony told court that the fire did not start from the kitchen. She explained that the fire started from the boys' wing at the bottom end where A1's residence is located. She also told Court that the attackers had had iron bars, axes, hammers, knives, pangas and two petrol jerrycans one yellow in colour while the other was grey in colour. It was her further testimony that all these items were found in A1's home by the Police although she did not see the jerry cans being removed from A1's home. In cross examination, PW2 stated that the distance between her room and the boys' wing was about 20 metres. That the rooms were made of wooden material and it was the wooden walls that separated the Church from A1's home. That from her sketch, A1's home was at the top and was 15metres from her room. That there was a room for training of upcoming pastors and that it was from inside this room in which she stood that she was able to see A1 at the boys' wing. That no fire was started from A1's side of home which Court observed as

a contradiction from her earlier testimony. She also testified that she did not see the accused persons loot anything from the Church, kill or cut anyone in the Church but that it was the fire that burnt the deceased persons to death.

She described A1 to have been wearing a short-sleeved checked shirt and a black trouser with pockets and that A3 was wearing a multi coloured dress at the scene. She explained that she was able to see the accused persons with the aid of a torch.

In cross examination, PW 2 testified that it is true that fire can amputate a body. This Court observed that although it was PW2's testimony that fire can amputate a body, the prosecution failed to adduce evidence to prove why the second body was not amputated by the fire yet both bodies were burnt by the same fire. This would beg the question as to whether the amputation of the body was caused by something else.

PW3 testified and told this Court that as it approached the morning on the 5th of May 2022, which happened to be on a Thursday, while he was asleep at Church and was

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woken up by smoke which had surrounded the Church. That there were loud knocks on the walls of the Church which he heard from the boys' wing where he had slept. That he went to the side of the building where the knocks were coming from and that when he reached the office from which the Pastor would counsel people, he realized that the office had been broken by the knocking. That he checked the hole in the wall of the office and saw A1 starting the fire and that he was able to see him with the assistance of the solar lighting from A1's home.

PW3 further testified that he saw A3 with a basin which had fuel in it and that sponges would be soaked in the fuel which she handed over to several boys. That A2 was holding a long metallic pole which he would use to pluck out the timber from the Church walls. That he saw the accused persons throw the sponges into the Church.

He further testified that it was A1 who started the fire outside the Church which spread very fast into the Church due to the clothes inside the Church. That he heard loud noises inside the Church and that when got inside the Church he realized that the noise had broken out due to a fight between Pastor John and three people, one of whom he identified as Brian with the aid of the solar lighting inside the Church. It was the testimony of PW3 that due to fear of being attacked by the boys and the fire that was spreading fast, he ran to the back of the Church for safety. In cross examination, PW3 testified that he did not reside inside the Church but later admitted that he resided in the church.

In the case of Uganda v Kavuma (Supra) Justice Stephen Mubiru observed that;

"It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see Alfred Tajar v. Uganda, EACA Cr.

Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S. C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered

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minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case."

I have observed conspicuous contradictions and inconsistencies in the prosecution's case. Whereas PW1 testified that he saw the accused persons on 5th May 2022 and that the fire started from the side of A1's residence, in cross examination he denied having seen the accused persons start the fire or kill the deceased persons. His testimony seems to contradict that of PW2 who testified and stated that she saw the accused persons and that the fire started from the boy's wing and not from the side of A1's residence. Further still, PW3's testimony contradicts the testimonies of PW1 and PW2 since he testified that he was sleeping in the boys' wing which was outside the church and that the fire started from outside the church and that he saw the accused persons who started the fire outside the pastor's counselling room through a hole. It is mind boggling that all the three witnesses seem to allegedly put the three witnesses at the scene of crime in three different locations from which they claim the fire was allegedly started by the accused persons at the same time.

PW3's testimony cast doubt in the prosecution's case since he failed to clarify on how the sponges were thrown into the Church by the accused persons which would then catch fire yet he had testified that A1 started the fire from outside the Church and the sponges were not lit from outside the Church. PW 3's testimony that he saw the accused persons break the wall of the Church is unconvincing since he testified that he only saw the broken wall after it had been broken.

Further PW3's omission of A3 as one of the people who was present at the scene on 5th May 2022 in his police statements marked as DEX1 and DEX2 yet he testified in Court that A3 was at the scene of crime cast a huge doubt in the mind of this Court as to the truthfulness of this witness. Further contradiction in PW3's testimony is that in Court he testified that there was liquid in the jerry can held by A2 which liquid is not mentioned anywhere in the statements he recorded at the Police.

The testimony of PW9 disclosed to this Court that he had no search certificate as prescribed under the Standing Orders of Police and as such there was no proof that the items he collected were collected from A1's home.

I have considered the range and character of the contradictions and inconsistencies so highlighted. I have found them to be grave in so far as they go to the root of the matter in issue. The prosecution failed to put the accused at the scene of the crime. Therefore, there is no sufficient evidence adduced by the prosecution to connect the accused persons with the commission of the two offences offence of murder.

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Count Three: Arson

Section 327 of The Penal Code Act 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;**
- d. or a mine, or the workings, fittings or appliances of a mine,

commits a felony and is liable to imprisonment for life.

For the accused to be convicted of arson, the prosecution must prove each of the following essential ingredients as was laid by Justice Stephen Mubiru in the case of *Uganda v Asobasi* (Criminal Sessions Case No. 0025 of 2018) [2018] UGHCCRD 50 (27 February 2018)

- 1. Setting fire to a dwelling house.
- 2. The fire is set unlawfully and intentionally.
- 3. The accused set the fire.

a. Setting fire to a dwelling house.

To prove that fire was set to a dwelling house, there must be evidence establishing the fact that a dwelling house caught fire and that it was as a result of a deliberate act and not accidental. A dwelling house is defined under the Black's law dictionary, 8th edition at page 1539 as the house or other structure in which a person lives, that in connection with a crime of arson, a dwelling house is defined as any house intended to be occupied as a residence or an enclosed space permanent or temporary in which human beings usually stay. The structure in question is church which housed some of its members. PW1 and PW2 testified that 20 members stayed in the house including Jonathan Kalichera, the deceased, as per the testimony of PW1 who further stated that at the material time the church was burnt, there were 15 members who were residing

therein. PW3 stated that he had lived in the church for 5-6 years and PW2's testimony confirmed that there was a boy's and girl's wing in the church. As much as the church was not licensed to house people as per PW1's testimony, it was a dwelling house for some of its members. I find that the church falls within the definition of a dwelling house.

The prosecution relied on the testimonies of PW1, PW2, PW3, PW6, PW7, PW8 and PW9 to prove that fire was set on the church. PW3 stated that he was awakened by smoke in the church and he got out, on arrival at the scene, PW9 found the church

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burning with a lot of smoke and PW1, PW2, PW6, PW7 and PW8 testify of the same occurrence. Therefore, a dwelling house was set on fire.

b. The fire is set unlawfully and intentionally.

In the case of *Uganda v Asobasi* (supra) Justice Stephen Mubiru stated that;

"Proving that the fire was set unlawfully and intentionally requires evidence to show that the house was deliberately set alight, without justifiable cause. The word wilfully is defined in the Black's Law Dictionary as "voluntary" and intentional, but not necessarily malicious." The word unlawful is defined in the same dictionary as "violation of law, an illegality." Unlawful is also said to include moral turpitude. There must be evidence which establishes that the assailant either should have intended the house to take fire, or, at least, should have recognized the probability of its taking fire and was reckless as to whether or not it did so. It requires proof of a deliberate act of setting fire or in the alternative, conduct which consists of failing to take measures that lay within the power of the accused to counteract a danger that he himself or herself created of a fire breaking out or evidence establishing that the risk of fire is one which would have been obvious to a reasonably prudent person, even if the particular accused gave no thought to the *possibility of there being such a risk.*"

In the instant case, PW1 stated in his testimony that he was awakened by knocks and when he went to the church to find out what was happening, he saw many people and noticed that some wood on the church structure had been broken off. He testified that the church was attacked and looted by people who were armed with weapons such as iron rods, knives and iron bars. He testified that he saw about 40 people during the attack. PW1 further stated that he saw people throwing sponges into the church which caught fire that eventually led to the church burning down. PW2 and PW3 also confirmed that there was nothing accidental about the fire since there was no possibility that the fire started from the kitchen which was near the church and neither did it start from the church generator nor electricity since the source of lighting of the church was solar energy.

Considering the violence that preceded the burning of the church, I find that the act of setting the church on fire was deliberate and illegal.

- c. The accused set the fire.

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Lastly, the evidence implicating the accused persons in setting the fire must be of such a kind that places the accused persons at the scene of the crime. The prosecution relied on the evidence of PW1, PW2 and PW3 to place the accused persons at the scene of the crime as proof that they participated in the commission of the offence. In his testimony, PW1 clearly stated that from his room, he saw people throwing sponges in the fire after which they were thrown at the church and did not mention any specific person as the perpetrator in setting the church on fire. PW1 further stated that A1 was vandalizing the wooden walls of the church with an iron bar, that A2 was holding a jerry can and that A3 was in possession of a polythene bag which had sponges in it. However, during cross examination, he confirmed that he did not see any of the accused persons set the church on fire.

On explaining how he discovered that the liquid in the jerry can that A2 had was petrol, PW1 testified that he was present when the police recovered items such as jerry cans which had petrol in them from A1's home. However, PW9, the Scene Of Crime Officer in this case clearly confirmed that PW1 was not present when he went to A1's home.

In light of PW1's testimony, it is possible that any one of the several people that he saw at the church could have participated in burning down the church. PW1 further testified that A3 did not set the church on fire.

In addition to that, it was PW2's testimony that from her room she saw A1, A2 and other men light up clothes with fire which they threw towards the church and that she was able to see them with light from a small sized torch at a distance. Under such circumstances, it is possible that she saw people other than A1 and A2. In her testimony, she clearly stated that A1 would light the sponges, she was oblivious of what he used to light them with and she did not give his actions much thought. In cross examination, she stated that she saw him burn the wooden wall which separated the church from his home and not the church and also stated that no fire was started from the side of A1's home where the wall is situated. It is clear that PW2 was confused as to the origin of the fire and who started it.

It should be noted that PW1 saw something different from what PW2 states she saw concerning the role A1 played in burning down the church. PW1 stated that he saw A1 with an iron rod hitting the church and that he participated in its looting which he failed to confirm during cross examination when he testified that A1 did not participate. PW2, on the other hand stated that she saw A1 setting the church on fire and later said it is the wall that he burnt. Both witnesses allegedly saw A1 around the same time that is between 4:00am and 5:00am. It should also be noted that PW1 stated in his testimony that A1 was seen wearing a striped short sleeved shirt whereas PW2 saw him wearing a checked short sleeved shirt and that A3 was wearing a

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brown dress. PW1 testified that A3 she was wearing a multi coloured dress contrary to PW2's testimony. These contradictory testimonies indicate that the two witnesses were not able to identify the accused persons properly in the chaos at church at the time. Given the sharp contradictions discussed above, court cannot rely on such information to establish a case against the accused persons.

During cross examination, it was discovered that PW3's testimony was contradictory as well. He stated that he saw the people who started the fire yet by the time he woke up the church was already on fire and smoke had surrounded it. He provided varying information from what he had recorded in his statements at police marked DEX1 and DEX2 respectively. During his testimony in court, he maintained that he had seen A1 burning the church yet in his statement at police marked as DEX1, he stated he just saw A1 and A2 with a jerry can pouring something. In his statement marked as DEX2, he stated to have seen A1 with an axe and jerry can and A2 with an iron bar. He did not state anything concerning the accused persons starting a fire. Also to note is that PW1 did not mention A3 in his statements at police but in his testimony in court he stated that he saw A3 with a polythene bag and sponges. When asked about the contradictions during cross examination, it is shocking that PW1 accused police of recording their own information which information was clearly read back to him after which he appended his signature to the statement thereby owning it.

Given the circumstances, the said evidence has major contradictions which are grave in nature and go to the root of the ingredient of participation in the offence and hence court cannot rely on the same as was stated in the case of *Uganda v Kavuma* (Supra) by Justice Stephen Mubiru that;

"It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored..."

In the same circumstances it does not rule out the possibility that other persons actually set the church on fire because the witnesses stated that there were many people at church at that material time when the church caught fire.

The prosecution has failed to prove that the accused persons burnt down the church. I find that the prosecution has not proved the offence of arson contrary to Section 327 (a) of *The Penal Code Act* preferred in count three against the accused persons.

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Count Four: Conspiracy to commit a felony. Section 390 of the Penal Code Act provides that: -

"Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Uganda would be a felony and which is an offence under the laws in force in the place where it is proposed to be done, commits a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment."

In the case of *Angodua v Uganda* (Criminal Appeal No. 0013 OF 2016) High Court at Arua, Justice Stephen Mubiru observed that: -

"The offence is committed when there is an agreement between two or more persons to prosecute an unlawful purpose. In this case Arson is the offence.

On count three regarding conspiracy to commit a felony, under section 390 of the Penal Code Act, the offence of conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. The offence is complete the moment such an agreement is made. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. See: *Director of Public Prosecutions V. Nock*, [1978] 2 All E. R. 654). Not only is the prosecution required to prove the intention but also that there was an agreement to carry out the object of the intention, which is an offence. The offence of conspiracy has three elements:

\$(1)\$ an agreement.

- (2) which must be between two or more persons by whom the agreement is effected and
- (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished."

In this particular case, there was no evidence that was adduced by the prosecution to prove that the accused persons conspired to commit the felony of arson. The above ingredients were not met by the prosecution.

I have evaluated the evidence as required at great length and there is nothing to connect the accused persons to have conspired to commit the felony of arson except mere suspicion. Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. I find in this case that the prosecution has not

proved to this Court that this is a case where the accused persons conspired to commit the offence of arson.

On the whole, since no sufficient evidence has been adduced by the prosecution to connect the accused persons to the commission of the offence of murder in the first and second count, arson in the third count and conspiracy to commit a felony in the fourth count, I find that the prosecution has not established a prima facie case requiring the accused persons to be put on their defence and accordingly find the accused persons not guilty of all the four counts.

I hereby acquit them of these offences under Section 73(1) of the Trial on Indictments Act, Cap 23 as amended.

I so order.

HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI **JUDGE** Ruling delivered on 30th January, 2024.

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Prepared on 13 October 2026 · Esheria