

Final Draft

11/04/2000
CWD

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA AND
MUKASA-KIKONYOGO- J.J.S.C.)

CRIMINAL APPEAL NO. 34/1999

B E T W E E N

KATUMBA JOHN BOSCO AND
SENKUNGU JOHN

.....APPELLANTS

A N D

U G A N D A

.....RESPONDENT

*(Appeal arising from the judgment and orders of the
Court of Appeal (Manyindo, D.C.J., Mpagi-Bahigeine and Engwau,
J.J.A.) dated the 14th day of May, 1999 in Criminal Appeal No. 26 of 1998)*

JUDGMENT OF THE COURT

This is an appeal from the judgment and orders of the Court of Appeal dismissing the appellants' appeal against the convictions and sentences imposed upon them by the High Court (Kagaba, Ag. J.) on 6th July, 1998.

delivered on 17/04/2000

The brief facts of the case may be summarised as follows : In the night of 17.3.92, robbers attacked several homes in Balinda village in the District of Rakai and stole a number of property from the homes of several residents. None of the robbers could be identified by witnesses that night. The link between the robbery and the appellants came to be established by the events which occurred in another village, namely, Kimanya, in the Masaka Municipality. Presumably on information received, the Local Council officials of Kimanya, accompanied by police sergeant Daniel Chemonges (PW6) arrested two suspects who had been hiding in a trench in a banana plantation. The suspects who turned out to be the appellants led the team of the Local Council officials and sergeant Chemonges to their respective homes where some of the stolen property from Balinda village was found. From under his bed, the 1st appellant, John Bosco Katumba, pulled out a gunny bag which contained a head of a Singer sewing machine, 5 table cloths, 9 cassette compacts, 2 packets of tea leaves, some children's dresses, an assortment of clothes and a glass. In the house of the 2nd appellant, John Senkungu, which was some 100 metres from that of Katumba, the team's search discovered two radio cassettes and a pair of bed sheets. Sergeant Chemonges and the Local council officials made further searches in the neighbourhood and managed to recover more stolen property from other people including the 2nd appellant's brother, Semwanga, in whose house the search team recovered a stolen television set and one bicycle. Two days later, the victims of the robbery in Balinda village were able to identify all the recovered property as theirs which had been taken from them during the night of the robbery.

The appellants were charged on four counts of robbery with aggravation contrary to sections 272 and 273 (2) of the Penal Code Act. The High Court convicted them of simple robbery in respect of counts 1 and 2 of the charge, contrary to sections 272 and 273 (1) (b) of the Penal Code Act, but acquitted them on counts 3 and 4 of the charge. The convictions were based on the doctrine of recent possession of stolen property.

Each appellant was sentenced to 6 year's imprisonment, 24 strokes of the cane and ordered to pay compensation of Ug. shs. 100,000/=. They appealed to the Court of Appeal against the convictions and sentences. The Court of Appeal dismissed the appeal against the convictions but reduced corporal punishment to 10 strokes and the amount of compensation to shs. 50,000 and made an order of Police supervision for 3 years as by statutory requirement. The appeal before us is against the convictions.

There are two grounds in the Memorandum of Appeal framed as follows:

- 1- *That the Hon. Justices of the Court of Appeal erred in law when they wrongly applied the standard of proof in rejecting the convicts' defence of alibi that had been raised at the trial.*
- 2- *The Hon. Justices of the Court of Appeal did not reevaluate the evidence that led to the trial judge to convict the appellants basing on the principle of recent possession.*

Mr. Rwarinda, counsel for the appellants argued the two grounds of Appeal together. He made submissions on two issues, namely, that the High Court and the Court of Appeal failed properly to evaluate and reevaluate the evidence relating to the appellants' defence of alibi and, secondly, that the

two courts failed to resolve major contradictions which occurred in the prosecution's evidence. If these contradictions had been resolved, it was counsel's contention, that the two courts would have given the benefit of the doubt to the appellants. Counsel submitted that in his testimony, the 1st appellant had stated clearly that at the time the robbery was allegedly taking place in Balinda village, he was in the Falkland Club in the Masaka Municipality. Yet, the two courts failed to take this fact into account before convicting or confirming his conviction and this was erroneous on the part of the two courts. It was counsel's contention that the trial judge having stated in his judgment that there was no direct evidence of identification of any of the robbers as well as all the victims involved in counts 1 and 2, he should have accepted the 1st appellant's alibi.

With regard to the contradictions in the evidence of the prosecution, counsel for the appellants, submitted the following:
Firstly, that there were major contradictions in the evidence relating to the place or places where the appellants had been apprehended and arrested. In his evidence, Sergeant Chemonges (PW6) had stated that he had found the appellants hiding and lying in a dug out trench in a banana plantation, chewing sugar canes and it is there that he arrested them. On the other hand, during cross-examination by Mr. Mugambi, learned counsel for the appellants, the same witness said that the two appellants had been arrested from the house of Semwanga. Another place was given by the defence witness, Iga (DW3) who testified that the appellants were arrested by Sergeant Chemonges in the company of Bukenya in a place where foodstuffs are sold.

Counsel further submitted that there were contradictions regarding the items of property and the places from where they had been recovered. The 1st appellant testified that the property which was recovered from his house had been brought there by one Sekitoleko. Some of the property allegedly recovered as stolen property had disappeared and was never produced as exhibits in the trial court. It was therefore counsel's contention that the courts below erred in failing to evaluate and reevaluate the evidence relating to these contradictions. He submitted that had these contradictions been resolved, the courts would have given the benefit of the doubt to the appellants and acquitted them.

Finally, learned counsel for the appellants submitted that, given the explanation of the 1st appellant that he was not in possession of the stolen property and was not searched and, the explanation by 2nd appellant that the goods found in his house were given to him by Sekitoleko, the appellants should have been believed. Counsel cited the cases of **Emmanuel Nsubuga vs. Uganda**, Crim. Appeal No. 16 of 1988, (S.C.), (unreported), and, **Patrick Isimbwa, Mohamed Kassim Oyeka, Alias Okello vs. Uganda**, Crim. Appeal No. 13/1991(S.C), (unreported), in support of his submissions. He asked this court to allow the appeal, quash the convictions and set aside the sentences.

Mr. Wagona, Senior State Attorney and counsel for the respondent, opposed the appeal and supported the convictions and sentences. He too argued both grounds of appeal together. In his opinion, the major ground in this appeal is the alleged contradictions in the evidence of Sergeant Chemonges and in particular that part of it relating to the place where the

appellants were arrested. Mr. Wagona submitted that these contradictions were minor according to the finding of the learned trial judge. Counsel supported the decision of the trial judge. Firstly, it was not disputed that it was Sergeant Chemonges who arrested the appellants. Moreover, the banana plantation in which the arrest took place was near the home of Semwanga. Consequently, whether the witness calls the place where the appellants were arrested the banana plantation or the home of Semwanga is of little or no consequence. With regard to the conflicting evidence given by Iga (DW3) on the same matter, counsel submitted that the trial judge considered and rejected it on the ground that Iga was not a truthful witness.

The learned judge gave reasons why he did not believe Iga's evidence and the Court of Appeal considered this aspect of the appeal and agreed with the findings of the trial court. Counsel for the respondent further submitted that the contradictions did not go to the root of the prosecution's case which was founded entirely on the doctrine of recent possession of stolen property. He contended that the doctrine applied by reason of the fact that it was only the day following the robbery that each of the appellants was found in possession of items of property and goods which had been removed from the houses and possession of the victims during the commission of the robbery. These goods and property were clearly and positively identified by the victims of the robbery. Counsel submitted that it was significant to note that it is only on counts 1 and 2 that the appellants had been convicted and these counts, save for the use of a deadly weapon, were proved by means of circumstantial evidence of recent possession of stolen property.

Counsel further submitted that under the doctrine of recent possession, once an accused person has been shown to be in possession of property recently stolen it is upon that accused person to give a reasonable explanation as to how he or she came to be in possession of that property. It was counsel's submission that in this particular case, the learned trial judge properly applied the doctrine of recent possession and gave sound reasons for his findings.

Counsel contended that in light of the reasons given by the learned trial judge, the explanation by 1st appellant that it was Sekitoleko who had brought the stolen property to his house was quite unreasonable and the judge was correct to reject it. Counsel submitted that had the 1st appellant been an innocent receiver of the stolen property, he would not have hidden them under his bed. Mr. Wagona submitted further that the 2nd appellant did not offer any explanation. His was a mere denial. Counsel cited **Izongoza William v. Uganda**, Crim. Appeal No. 6 of 1998, (S.C.), (unreported), in support of his submissions.

The conviction of the appellant under sections 272 and 273 (1) (b) of the Penal Code Act was based solely on circumstantial evidence, namely, on the doctrine of recent possession of stolen property. In considering whether or not the circumstances of this case justified the application of the doctrine of recent possession, the learned trial judge said,

"The prosecution relied on the evidence of PW6 (Chemonges) which brought into play the doctrine of recent possession. The evidence of Chemonges is that he was led to the houses of the accused on 18/3/92 when the robbery had been committed on the night of 17/3/92. It was recent possession. In the case of

Semwogerere and Another v. Uganda, Crim. Appeal No. 14. of 97 (1979) HCB, it was held in that case that where persons are found in possession of property recently stolen, they have a duty to explain such possession otherwise the inferences of guilt arising from the doctrine of recent possession are not displaced."

The testimony of Sergeant Chemonges was corroborated by other witnesses namely, Haruna Muwalya, (PW1), Lucia Nankya (PW2), and Michael Nsamba (PW5). The recently stolen property was claimed by the victims who gave evidence in court. These included George William Muwonge (PW1), Lucia Nankya (PW2), Scola Nakyanzi (PW3), Mpuga Kizito (PW4) and Michael Nsamba Muwonge (PW5). The trial judge acted on the evidence of George William Muwanga, (PW1), and Michael Nsamba, (PW5), in convicting the appellants. In their judgment, the learned justices of appeal, carefully considered the submissions of counsel on the doctrine of recent possession and while confirming the findings of the trial court, observed,

"We are unable to agree that the explanation given by the first appellant is sufficient, especially when he offered no explanation why he was found hiding some of the property under his bed. This conduct, in our view, is not consistent with his innocence. We are not satisfied that mere denial by the second appellant that he did not participate in the commission of the alleged robbery is sufficient explanation. The defence of alibi raised by the appellants was rightly, in our view, rejected by the 'learned trial judge'"

We think that both the High Court and the Court of Appeal correctly applied the doctrine of recent possession to the facts and circumstances of this case. Both the learned trial judge and the learned justices of the Court of Appeal considered the contradictions in the prosecution's case and correctly described them as minor. In any event, they did not affect the

facts which justified the application of the doctrine of recent possession.

In **Izongoza William v. Uganda**, (supra), this court had occasion to reiterate its opinion on the doctrine of recent possession and refer to some of the leading authorities on it, including **Kigoye and Another v. Uganda** (1970) E.A. 402, **Andrea Obonyo and Another v. R.**, (1962) E.A. 542, **Kantillal Jivaraj And Another v. R.** (1961) E.A. 6., **Erieza Kasaija v Uganda**, Crim. App. No. 21/91 (S.C), (unreported), **R. v. Bukai s/o Abdallah (4)** (1949) 16 E.A. C.A. 84 and **Simon Musoke v. R.**, (1958) E.A. 715.

In **Izongoza William v. Uganda** (supra), while one James Wakholi was riding his bicycle from market in the evening of the 20th December, 1993, on Wampewo Avenue in Kampala, he was attacked and grievously wounded by an unknown assailant or assailants who robbed him of his bicycle. He was left lying on the road and unconscious. Later, a witness found him lying on the road and bleeding profusely from the head. He was rushed to hospital. The following day in the hours of 8 – 9 a.m., Wakholi's stolen bicycle was found in Kisenyi, one of the suburbs of Kampala and Izongoza who claimed that the bicycle was his and was offering it for sale, was apprehended and later charged with robbery contrary to sections 272 and 273 (2) of the Penal Code Act. He was tried and convicted by the High Court and sentenced to death on circumstantial evidence in the form of recent possession of stolen property. His conviction and sentence were, on appeals, confirmed by the Court of Appeal and finally by this court. In that case we held that,

“In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that the

accused was found in possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation of how he or she came to possess the goods, otherwise the evidence of recent possession would justify his or her conviction. On this aspect of circumstantial evidence, S. 112 of the Evidence Act. (cap.43) provides,

'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.' ”

In this appeal, both the trial court and the Court of Appeal, having found that all the ingredients of the doctrine of recent possession were present, looked for reasonable explanations from the appellants and these were not forthcoming. It is therefore our view that the trial court correctly convicted the appellants and the Court of Appeal rightly confirmed those convictions. In consequence, the two grounds of appeal ought to fail. The appeals are dismissed.

We observe that the Court of Appeal properly corrected the error of the trial judge relating to imposition of an omnibus sentence of six years imprisonment. However, the same court glossed over the fact that in fact the trial judge should have specified that he had convicted the appellants on each of counts one and two. In that way, the judgment would have been clearer.

Before leaving this appeal we are constrained to state once again that we are concerned at the unprofessional manner in which the authorities responsible for investigation and prosecution conducted the case.

Important items of property and goods referred to by some of the witnesses

in this case seem to have mysteriously disappeared. These included the bicycle which was stolen during the robbery and had been recovered and listed as found by Sergeant Chemonges and mentioned by other witnesses in their testimony. Yet, at the trial the bicycle was not produced as an exhibit nor did counsel for the state offer any explanation as to why it was missing. On a number of similar failings by the investigation and prosecution officers in the past, we have advised counsel who represent the state to inform the Director of Public Prosecutions to take steps intended to improve the conduct of these officers without much response. We would once again, urge that the D.P.P take steps to ensure that criminal cases are properly investigated and properly prosecuted.

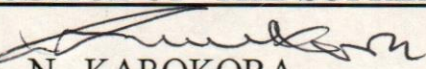
Dated at Mengo this...^{17th}.....Day of ^{April}.....2000


A.H. ODER

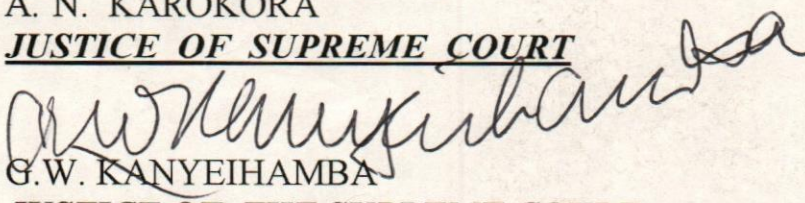
JUSTICE OF THE SUPREME COURT


J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT


A. N. KAROKORA

JUSTICE OF SUPREME COURT


G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT


L.E.M. MUKASA-KIKONYOGO

JUSTICE OF THE SUPREME COURT