

This is an appeal from the decision of the Court of Appeal which dismissed an appeal to the court by Kaddu George William, the appellant, against the decision of the High Court

(An appeal from the judgement of the Court Appeal at Kampala) (KATO, MPAGI-BAHIGINE AND KITUMBA, J.J.A.) dated 19th February, 1999 in Court of Appeal Criminal Appeal No.23 of 1998).

UGANDA ::::::::::: RESPONDENT

AND

KADU GEORGE WILLIAM ::::::::::: APPELLANT

BETWEEN

CRIMINAL APPEAL NO.11 OF 1999

(CORAM: TSEKOOKO, KAROKORA, MULENGA
KANYEIHAMBA AND MUKASA – KIKONYOKO, J.J.S.C)

IN THE SUPREME COURT OF UGANDA AT MENGO

THE REPUBLIC OF UGANDA

Final 12/73

District. The appellant, a saved man, managed a church called Katale Miracle Centre near Mangali's home and members of Mangali's family including Mangali's wife attended that church. Mrs Mangali at one time got a job for the appellant in a project belonging to Uganda Women Finance Trust but his employment there was terminated before 26/6/1991. Because the appellant used to quarrel with Mr. Mangali's workers in the home, Mr. Mangali warned the appellant never to visit his (Mangali's) home during his absence. Mr. Mangali owned a bicycle which he kept in his home for use by himself and by his shop attendant called Mohamed Muwonge(PW7).

On 26/6/1991, Mangali and his wife left home early for work. The deceased was left at home to wash clothes and also look after Mangali's six year old son called Joshu Wepukhulu. According to Elna Namubiru (PW5) the wife of the appellant, the appellant left his own home at 9.00 a.m. and returned at 12.30 p.m. At about 10.30 a.m. Muwonge left Mangali's home while the deceased was preparing to wash clothes. Mangali's bicycle was at home in the main house. On his way to Mangali's shop, Muwonge met the appellant who was carrying a panga and an axe. The point where the two met is a mile from the house of the appellant and probably the same distance from Mangali's home.

At about the same time, a neighbour of Mangali called, Paul Mukasa, (PW6), also saw the appellant pass by his home carrying a panga and an axe. Mukasa saw the appellant walking along a footpath passing by his home and leading to the home of Mangali. The appellant did not greet this witness. Shortly after, Mukasa heard and answered an alarm coming from the home of Mangali where Mukasa found the deceased Annet Nagujja

dead. .

At 10.30 a.m. Kiiza Benedicto (PW8) met the appellant riding a bicycle on which he had tied an axe. The meeting place was $\frac{1}{4}$ a mile away from Mangali's home. The appellant told Kiiza that he was going to cut fire wood. At about mid-day Kiiza again met the appellant now walking on foot and carrying the axe. The appellant claimed that the bicycle had developed problems, so he had left it behind. However earlier at 11.30 a.m., the appellant took the bicycle and left it in the home of Maurice Nabakoza (PW2), a member of his church. When leaving the bicycle in the home of Nabakoza, the appellant informed Nabakoza that he was going to the forest to cut firewood. The appellant removed an axe from the bicycle and took the axe with him. The appellant appeared to be in a hurry. He turned down Nabakoza's offer to make tea for him. The appellant never returned to collect the bicycle.

Meantime at about 12.00 noon, Mr. Mangali learnt of the murder of the deceased. He reported this matter to Lule (PW3) and to Kanjasi Police Post. The appellants' wife, Elina Namubiru (PW5) saw the appellant returning to his home at 12.30 p.m. where he washed himself, changed clothes and went away.

In the course of investigating the death of the deceased, Lule (PW3) and RC 1 Chairman learnt that the appellant had taken and left the bicycle in Nabakoza's home. Later at 6.00 p.m, Lule (PW3) , Muwonge (PW7) together with other people collected the bicycle from Nabakoza's home.

The Police used police dogs to investigate the murder. It does not appear that these dogs made any impact on the investigations. At 3.00 p.m. the appellant appeared at the scene of the murder. The appellant was arrested by police who eventually carried him together with Mr. Mangali on a pick-up together with the body of the deceased. The body was taken to Mulago mortuary. On the way to Mulago, the appellant attempted to jump off the pick-up but he was restrained by the police.

At the trial the appellant made an unsworn statement denying the charges. He admitted that he worked in Mrs. Mangali's project. He admitted that he lived at Katale Busawula Village. He raised an alibi to the effect that at the time of the murder, he (appellant) was away from the scene of murder. He testified that at 7.00 a.m. he left his home and went to Kajansi and returned home at 9.30 a.m. where found his wife Elina Namubiru sleeping. That he went to a place where she was supposed to be digging. He claimed that at 12.30 p.m. he found people (strangers) looking for stones to buy. He took these people around looking for some stones. Those people failed to get the type of stones they needed. These people dropped the appellant at home at about 1.30 p.m. At about 3.00 p.m. he learnt of the death of the deceased and went to Mangali's home. Later he joined other people to put the dead body on a vehicle but was prevented by Mangali's wife from doing so. Police then asked the appellant to explain his movements. The Police took the appellant to his home, searched it and took one of his pangas, before returning him to the scene where they bound him foot and hands and put him with the dead body on a pick-up. He was later charged with and tried for murder. The two assessors who assisted the trial judge believed the evidence of the prosecution that the bicycle incriminated the appellant and advised the trial judge to convict him.

The trial judge believed the prosecution case, disbelieved the appellant's defence and convicted him and sentenced him to death. The appellant's appeal to the Court of Appeal was dismissed. Hence this appeal.

As can be seen from the summary of the facts given above, the case against the appellant was based on circumstantial evidence which included recent possession of the bicycle stolen from Mr. Mangali's home.

Two grounds of appeal formulated in support of this appeal were:

1. The learned appellate Judges erred in law in upholding sentence and conviction of the appellant on the basis of circumstantial evidence which was fraught with inconsistencies contradictions and discrepancies.
2. The learned appellate Judges erred in law in upholding the trial judge's finding in respect of the appellant's alibi.

At the hearing of the appeal Mr. Kigundu, counsel for the appellant, abandoned the second ground of appeal. Mr. Kigundu criticised the findings of the two courts below on the inadequacy of medical evidence as to the cause of death and the circumstantial evidence which the two courts relied on to convict the appellant. He attacked reliance by the two courts on the doctrine of recent possession. Ms. Khisa, Principal State Attorney, supported the judgments of the two courts on the basis that the circumstantial evidence relied upon by the two courts was sufficient to justify the conviction of the appellant.

The only ground of appeal argued before us is really a combination of grounds 1 and 3 in the Court of Appeal. The Court of Appeal considered these complaints. The findings of the learned trial judge which were upheld by the Court of Appeal are reflected at pages 6 and 7 of the judgment of the Court of Appeal in the following passage:

"In his judgment the learned trial judge was alive to the fact that all the evidence on which he based the conviction of the Appellant was circumstantial evidence and relied on seven pieces of such evidence as follows:

- (a) *that on 26th June, 1991, the accused left his home at 9.00 a.m.*
- (b) *that between 10.00 a.m. and 10.30 a.m. on that day the accused was seen carrying a panga and an axe and taking a path which led directly to the scene of crime,*

- (c) *that sometime later the deceased was found dead at the scene of crime. She had cut wounds on the head which were consistent with the fact that they were inflicted upon her by means of a panga or an axe. At the same time PW1's bicycle which had been at the scene of crime before the deceased's death was missing;*

- (d) *that between 10.30 a.m. and 11.30 a.m. the accused was seen riding PW1's bicycle and had an axe tied on it. He left that bicycle at PW2's home after locking it and did no fetch it as he had promised;*

- (e) *that eventually the keys of PW1's bicycle was or were recovered from the accused's home between two mattresses on his bed. That key or keys opened the lock of the said bicycle after it was retrieved from PW2's home;*

In my opinion the above evidence is inconsistent with the accused's innocence and points only to his guilt. I also see no other co-existing circumstances in this case, weakening or destroying the above inference., the fact that the accused at one point wanted to jump off from the pick-up after his arrest also strengthens the fact that he committed the offence in issue."

The Court of Appeal then concluded that:

"We are unable to fault the learned trial judge on this finding. However, we would like to add that there was ample evidence of recent possession of a stolen bicycle by the appellant, receipt of which could not be explained on any other ground other than that appellant stole it and is the one who murdered the deceased."

Mr. Kigundu did not criticize the above findings. From the evidence which we have set out in this judgement, we are satisfied that on the facts both the learned trial judge and the Court of Appeal arrived at proper conclusions. Mr. Kigundu referred to contradictions in the prosecution case, especially on medical evidence and on whether there was one key or there were two keys because the evidence of Nabakozza(PW2), Muwonge (PW7) and Namubiru (PW5) conflicted on the number of keys and was therefore unreliable. The learned Justices of Appeal accepted the assessment and evaluation of evidence on the conflict by the learned trial judge in the following passage of his judgement.

".....there were contradictions here and there in the above evidence. Those contradictions particularly related to such things like the exact number of bicycle keys which were retrieved from the accused's home after the offence in issue; the exact time accused was seen by various witnesses; and whether the

Mr. Kigundu submitted that because Dr. Mukasa did not disclose on his postmortem report at the time of making it on 27/6/1991, the weapon that could have inflicted the injuries on the skull of the deceased, the doctors' opinion during trial on 18/6/1998 to the effect that the deceased died as a direct result of injuries was therefore not credible. This criticism raises practical points. The doctor omitted to describe in the postmortem report the weapon that could have caused the injuries. This is clear from his own

71 concerning the application of the doctrine of recent possession.

Obonyo vs. R(1962) E.A 542, and Ssemwogere and Another vs. Uganda (1979) HCB

Mr. Kigundu raised two points we ought to clear. The first was the criticism of Dr. Mukasa's opinion about the cause of death. The second is the import of the decisions of

Appeal erred.

On the facts of this case, we have no reason to disagree with the two courts. We have not been persuaded by Mr. Kigundu's arguments that either the trial judge or the Court of

accused was seen at various points on 26th June 1991, carrying just a panga or an axe or both? In my view those contradictions were of no significant consequences and could be over looked. (See Uganda vs. Dusmani Sebuni (1981) HCB 1. Indeed they can also be explained away on the basis of passage of time. The offence in issue was committed seven years ago. It is most unlikely that the witnesses would remember every fine detail in respect of what took place after such a long time. On my part therefore, I am satisfied that the said evidence was given by truthful witnesses; and that what they told court correctly represents what happened on 26th June, 1991."

This evidence was given by an experienced pathologist. He qualified as a medical doctor in 1980 and got the Degree of Masters in Medicine in 1987. Evidence shows that he has been involved in performing postmortem examinations. From his evidence which was not challenged by any other credible evidence we have no doubt that on the facts, Dr. Mukasa was capable of forming his opinion as to the type of weapons used in inflicting the injuries he saw and described.

"the body was of a female aged 18 years.....she had multiple cut wounds on scalp namely left temporal facial scalp. She had injuries extending to front and over the top. I opened the skull to find other injuries. There was a depressed fracture of the left tempo and facial bone. In my opinion deceased had died as a direct result of injuries stated above.....I did not indicate what caused the injuries; but in my view those injuries were caused by a big panga or axe."

However, the doctor's evidence is clear. In examination-in-chief he testified that-

the keeping of court records by whoever is concerned .

evidence at the trial along with other exhibits disappeared. This is a sad commentary on weapons. Unfortunately in this case the postmortem report which was produced in that the appellant is the person who killed the deceased by cutting her with those testified that they saw the appellant carrying an axe and a panga therefore the inference is it depends on guessing. It is arguable that because Mukasa (PW6) and Muwonge (PW7) about the type of weapon used; whether a panga or an axe should not be accepted because Kigundu appears to suggest that the doctor's oral testimony, given seven years later, not indicate the measurements of the cuts or the wounds he saw on the body. Mr. evidence both in examination-in-chief and during cross-examination. Apparently, he did

In Ssemwogerere's Case (supra), the facts were that that on 2/2/1977, three men entered a house occupied by the deceased and a 7 year old girl. The intruders forced the little girl into one of the rooms wherein they locked her. While there, she heard the three men attacking the deceased whose body was found behind the house, in the following morning

which was possession of property recently stolen at the time of the murder of the victim. offence of murder. The evidence in each case was based on circumstantial evidence each of the above two cases, the appellant was in fact tried for, and convicted of only the stolen property, the accused must first have been charged with, and convicted of theft. In for an accused to be convicted of murder on the basis of evidence of recent possession of Ssemwogerere and of Obonyo are not authority for his mistaken view that in order misunderstanding of the application of the doctrine of recent possession. The two cases unable to accept Mr. Kigundu's contention, which appears to be an example of itemised in his judgement as (d) and (e), already quoted above. With respect, we are whole evidence as circumstantial evidence. This is evident from the pieces of evidence possession of a stolen bicycle, the trial judge in fact, properly in our view, referred to the incriminating the appellant into that of circumstantial evidence and that of recent We would observe that although the Court of Appeal appears to divide the evidence relied on Ssemwogerere's case (supra) and Obonyo's case (supra).

Next Mr. Kigundu criticized the Court of Appeal for its reliance on the doctrine of recent possession to uphold the conviction of the appellant by the trial judge. We understood Mr. Kigundu's view to be that for a suspect to be convicted on the basis of recent possession, he must first have been charged with and convicted of theft. Learned counsel

of 3/2/1977. On that day at 4.00 p.m, the two appellants were found with the property of the deceased, namely, a Sanyo Radio and three gomesis which were identified by two witnesses as belonging to the deceased. The appellants were charged with and convicted of the murder of the deceased on the basis of extra-judicial statement and possession of stolen property. On appeal to the Court of Appeal for Uganda, the court excluded the evidence of the extra judicial statement but relied exclusively on the evidence of recent possession of property of the deceased in upholding the conviction and in accordance with the principle set out in the Obonyo Case (supra)

Mr. Kigundu's contentions are hinged on the 5th holding in Ssemwogere's case. We think that to appreciate the decision better, the 6th and 7th holdings in that case as summarised in the monthly Bulletin should be read together, with the 5th holding. When these three holdings are read together it is clear that the Court of Appeal explained that in certain circumstances possession by an accused person of property proved to have been recently stolen may support a presumption of murder if all the other circumstances of the case point to no other reasonable conclusion. These three holdings (5, 6 and 7) read as follows:

“(5) To justify an inference that a person has committed another offence from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt, and if a finding that he stole the articles depends on the presumption arising from his possession of the stolen articles, that inference would not be justified unless the possibility that he was merely a receiver of the stolen property was excluded.
Andrea Obonyo V.R.(1962) E.A. 542.

(6) In certain circumstances, possession by an accused of property proved to have been recently stolen may support a presumption of murder if all the circumstances of the case point to no other reasonable conclusion. R.V. Bakari s/o Abdulla (1949) 16 E.A. 84

(7) Since in the instant case, the theft was proved beyond reasonable doubt, and there was no doubt on the evidence adduced that the accused (sic) was killed by the thieves, and

since the appellants were under a duty to explain how they came into possession of the property, a duty which they failed to discharge, the inference that the appellants stole the deceased's property was irresistible and therefore, the possibility that they were receivers could safely be excluded. The learned trial judge was therefore justified in convicting the appellants as charged".

In Obonyo's case evidence showed that on the night of March 22nd-23rd, 1961, an armed gang of about eight or ten men carried out a raid on a small Trading Centre of Mugango in East Lake Province of Tanganyika. None of the witnesses could identify any of the appellants as having participated in the robbery and murder committed in the raid. The appellants were convicted of the murder of a man found dead in the street soon after the raid by the gang. It was alleged that the appellants were in the gang. At the trial, evidence was given that the gang, armed with pangas and clubs, terrorized the residents of the street and broke into and stole from the two buildings. The appellants were not directly identified and their convictions were based on evidence of their possession at the time of their arrest, some six days later, of some of the property stolen during the raid. The appellants denied taking part in the raid or being in possession of the stolen property which they said had been planted on them by the police. On appeal, it was submitted on their behalf, inter alia, that the evidence did not establish conclusively that the deceased was killed by a member of the raiding party, that even if he was killed by the raiders, it was not proved that he was killed in the prosecution of the common unlawful purpose of the gang, or that each appellant was a member of the gang. It was also submitted that in order to establish that the appellants were in the gang it was necessary to eliminate beyond reasonable doubt the possibility that they were mere receivers and not thieves, which was not done. In dismissing the appeal in respect of the second appellant, the Court of Appeal for East Africa held:

(i) In all the circumstances, the inference was irresistible that the deceased:-

(a) was killed by a member of the gang during the course of the raid and to infer that he met his death in some other way was not a reasonable possibility and could be excluded;

(b) was murdered in prosecution of the common unlawful purpose of the gang and, as murder was a probable consequence of that common purpose, each member of the gang was guilty of murder.

(ii) Where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt, and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles had been excluded.

In our view the two cases support the conclusions by the trial judge and the Court of Appeal in this case. The position illustrated by these two cases is that as a piece of circumstantial evidence, possession of property recently stolen at the time of murder, can, in appropriate cases, lead to irresistible inference of theft so as to support murder. This position is supported by a number of other decided cases.

R.vs. Yego s/o Kitum (1937) 4 EACA 25 supports the view that possession by an accused, soon after a murder, of property of the deceased, may be strong evidence that he

stole such property and with other circumstances of the case lead to irresistible conclusion that he also murdered the deceased. A similar view was also taken by the same Court of Appeal for Eastern Africa in R vs Bakari s/o Abdulla (1949) 16 EACA 84 to the effect that possession by an accused person of property proved to have been very recently stolen may not only support a presumption of burglary.....but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however criminal. These cases really reflect the principle contained in the provisions of S.112 of the Evidence Act which reads as follows:

"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"

We desire to point out that the application of the doctrine of recent possession with similar reasoning is found in a decision of Court of Appeal for Tanzania in Mamanzoo Mandundu & Another vs. Republic (1992) TLR 92, whose facts we need not set out here. We may also point out that during our last session, we considered the doctrine of recent possession in Izongosa William vs. Uganda - Supreme Court Criminal Appeal No.6 of 1998 (unreported) and explained its application.

Naturally, each case depends on its own facts. In the present case Mr. Mangali left his bicycle and the deceased at home. Muwonge (PW7) did the same at 9.00 a.m. Paul Mukasa (PW6) saw the appellant moving on foot in the direction of Mangali's nearby home at about 10.00 a.m. Soon he heard and answered an alarm at Mangali's home

where he found the deceased dead. About 10.30 a.m., Kiiza (PW8) met the appellant riding Mangali's bicycle. At about 11.30 a.m, appellant deposited the bicycle, locked, at the home of Nabakoza, claiming he was proceeding to cut firewood and that he would collect the bicycle later. He never returned to collect the bicycle until 6.00 p.m. when Lule (PW3), Muwonge and Mangali collected the still locked bicycle. Lule discovered the keys to the bicycle from the appellant's home, hidden under his bed according to his wife Namubiru (PW5). The key or the keys opened the lock of the bicycle. The act of the removal of the bicycle by the appellant is clearly theft in law as it was taken without the consent of the owner. He was seen riding it hardly an hour after the murder. He deposited it at Nabakoza's home within less than two hours after the murder. Although there is no direct evidence, on these facts the only reasonable and irresistible inference is that the appellant removed the bicycle at the time the deceased was murdered. The possibility that some other person murdered the deceased either before or after the appellant had taken the bicycle is so remote that it hardly deserves any consideration whatsoever. We agree with the learned trial judge and with the Justices of Appeal that it was the appellant who murdered the deceased.

The only ground of appeal must fail. Accordingly the appeal must be dismissed.

We wish to reiterate our abhorrence of the bad and common habits of the uncaring attitude with which the prosecution handles exhibits. The knickers found at the scene of murder and the axe collected from the appellant's home plus the piece of cotton wool should have all been subjected to chemical analysis by the government chemist and results brought to court at the trial. Results could have been valuable evidence for either side.

By saying this, we do not in any way mean that the prosecution would depend entirely on

success

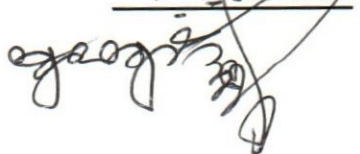
such report for success.

Delivered at Mengo this.....day of January, 2000

Appl

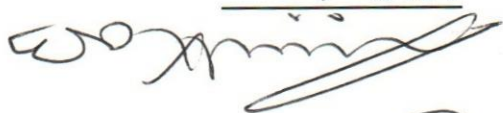
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JUSTICE OF THE SUPREME COURT

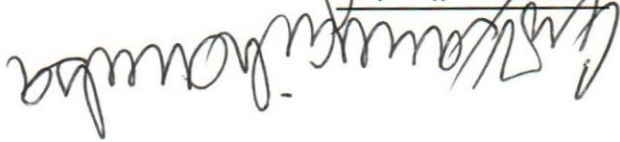
A.N. Karokora



J.N. Mulenga

JUSTICE OF THE SUPREME COURT

G.W. Kanyehamba



JUSTICE OF THE SUPREME COURT

E.L.M. Mukasa - Kikonyoko

JUSTICE OF THE SUPREME COURT



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