

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA

**HCT-05-CR-CN-044-2002**

(Arising from Cr. C. No. 658-2001 Bushenyi)

KACUNGUZI FRANK .....APPELLANT

-VS -

UGANDA .....RESPONDENT

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

Kacunguzi Frank appeals the judgment of the Grade 1 Magistrate at Bushenyi wherein he was convicted of stealing from a vehicle contrary to sections 252 and 256 (c) of the Penal Code and sentenced to 3 years imprisonment. He was also to pay Shs.760,000/ to the complainant as compensation.

The prosecution case was that on 9th October 2001 the complainant travelled as a passenger on an omnibus registration number 103 UBK. The journey was from Kasese and was to terminate in Mbarara. The complainant had luggage comprising some kitenge material he had bought in Kasese and which was contained in a polythene package. It was prosecution evidence there were 43 items of the said kitenge worth some Shs.752,500/. Appellant was the conductor on the vehicle. Between Kasese and Mbarara at Kitojo, Bushenyi District, the aforementioned vehicle on which the complainant, the conductor and other passengers travelled had an accident. It fell in a trench and the complainant was one of the passengers who sustained serious injury. Appellant escaped injury. The complainant took the earliest opportunity to travel by a Police vehicle that came by and took injured passengers to hospital. He entrusted his luggage with appellant for safe custody. PW2, a Police officer who came to the scene of the accident said in his testimony that he saw appellant had some kitenge material in polythene package to a boda boda rider to take to his home. Appellant in his defence admitted he knew the boda boda rider called Elikana. He also

admitted he knew the complainant because he had travelled as a passenger on the motor vehicle at the time of the accident. He however denied knowledge of the complainant before the fateful trip. He denied also that he had been entrusted by the complainant with his luggage as alleged.

The prosecution has the burden to prove beyond reasonable doubt the guilt of the accused and this burden does not shift except in a few exceptional cases.

See *Uganda - vs- Kahiritira [1988-1990] HCB 30.*

This case is not one of those where the burden would shift. It is common ground both the appellant and the complainant travelled in the same vehicle on the day alleged. It is very likely complainant's property was lost. The trial court relied on the evidence of the complainant that he had entrusted his property with the appellant and the evidence of PW2, the Policeman, who testified he had seen appellant hand over to the boda boda rider some kitenge material in polythene wrapping at the scene of the accident, whereupon appellant had told the witness the material was to be conveyed to his home.

From the above it is not clear whether that package seen by PW2 was the same as one claimed by the complainant. The evidence which the trial court went by was circumstantial. In order for circumstantial evidence to justify an inference of guilt the inculpatory facts must be incapable of explanation upon any other reasonable hypothesis than that of guilt.

See: *Simon Musoke - vs- R [1958] EA 715*

I do not find prosecution evidence showed beyond doubt that the package taken by the boda boda rider was that claimed by the complainant. It is not even clear that there was only one package of the type, to wit kitenge material, contained in polythene package.

In *Waibi - vs- U2anda [1978] HCB 218* the Court of Appeal observed:

‘Although very often circumstantial evidence is the best evidence, it is trite law that such evidence must be normally examined because evidence of this kind may be fabricated to cause suspicion on another. Consequently before inferring the guilt of an accused from

circumstantial evidence it is necessary to be sure that there are no other co-existing circumstances which would weaken that inference.’

There is no evidence appellant was at any stage seen with complainant’s luggage at the scene or elsewhere in the wake of the accident. A search of his home did not reveal such connection either. I find therefore that the prosecution failed to prove beyond reasonable doubt that the appellant committed the offence alleged against him.

In the result I allow this appeal, quash the conviction and set aside both the sentence and the order for compensation.

P. K. Mugamba  
Judge

20th March 2003

Appellant in court

State Attorney for respondent

Mr. Bezire for appellant

Ms Tushemereirwe court clerk

Court:

Judgment read in court.

P. K. Mugamba  
Judge