IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJSC)

CRIMINAL APPEAL NO. 15 OF 2001

BETWEEN

BUKENYA PATRICK)……..
MUNSURU RAJABU) ..... APPELLANTS

AND

UGANDA ..... RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala by the Hon. Justices Kato, Berko, Mpagi- Bahigeine, JJA dated 26th April 2001 in Criminal Appeal No. 15 of 1999)

JUDGMENT OF THE COURT

This is a second appeal. The appellants were tried and convicted by the High Court sitting at Fort Portal on 17"' March 1999 for aggravated robbery contrary to sections 272 and 273(2) of the Penal code and were sentenced to death. Their appeal to the Court of Appeal was dismissed on 26th April 2001. They appealed to this court.

The facts of the case were as follows: -

On 8th May, 1996 at about 3:00 am while the complainant, Hussein Sebbi (PW6), was sleeping together with members of his family at his home in Nzara Fort Portal Municipality, a group of robbers forced the rear door open and entered the house. The robbers had a panga and torches. They demanded money from him. One of the robbers placed a panga on the throat of Hussein Sebbi (PW6) and threatened to cut

him if he did not produce money. The robbers collected a number of household properties which included a brief case, a suit case, clothes such as one brown suit, a white and black Kaunda suit, one black pair of shoes and cash Shs. 300,000/= from his room. From another room the robbers took a small brief case labelled "President" and a hand bag containing ladies clothes. One of the young girls in the house called Fatuma Ismail (PW8) recognised the second appellant by voice. The rest of the robbers were not recognised.

On 17/6/96 when the complainant was driving in Fort Portal town he sighted the first appellant wearing his Kaunda suit which had been stolen on 6/5/96. He stopped and greeted him. The first appellant was scared and then started running away. The complainant raised an alarm and many people answered the alarm, chased him and arrested him. He was handed over to police. The police interrogated the lst appellant and as a result of the interrogations, the police recovered some property from appellant's home at Rugombe Fort Portal - Kampala road.

At the trial the first appellant made an unsworn statement denying participation in the robbery. He stated that on 9/5/96 his mother sent him to Fort Portal to buy drugs for her. He met one Nyakojo Rogers who borrowed Shs. 4,000/= from him and handed some clothes to him as security. However, on 17/4/97 while the lst appellant was wearing a shirt which was one of the clothes Rogers Nyakojo had given to him as security for the loan of Shs. 4,000/=, PW6 met him and caused his arrest. After the 1st appellant was arrested and handed over to police CPL Okello, PW7, stated that he decided to search 1st appellant's home from where he recovered more property stolen during the robbery at PW6's home. The evidence connecting the 2nd appellant with robbery was that during the night of the robbery Fatuma, an 11 years old girl (PW8) identified him by his voice which she knew before the robbery.

However, immediately after the robbery, the 2nd appellant disappeared from the area. When he re-appeared in the area in April 1997, he was arrested and charged for the robbery together with the 1st appellant. At the trial he denied involvement in the robbery.

The learned trial Judge accepted the prosecution evidence and rejected the defence of both appellants and convicted them. Their appeal to the Court of Appeal was dismissed hence this appeal.

The appeal to this court is based on four grounds; namely,

(1) The learned Justices of Appeal erred in law on relying on the uncorroborated evidence of a child of tender years, who was a single identifying witness, in upholding the conviction and sentence against the 2nd appellant.

(2) The learned Justices of Appeal erred in fact and law by upholding that the doctrine of recent possession applied to the 1st appellant.

(3) The learned Justices of Appeal erred in fact and law by relying on the circumstantial evidence that was improbable and insufficient in upholding the conviction and sentence against the two appellants.

(4) The learned Justices of Appeal erred in fact and law when they rejected the defence presented for the two appellants.

Mrs. Eva Luswata Kawuma argued grounds one and four together concerning the second appellant and then grounds 2, 3 and 4 for the 1st appellant Mr. Michael Wamasebu, Assistant Director of Public Prosecutions opposed the appeal.

Mrs. Eva Luswata Kawuma started with the second appellant whose defence was an outright denial of the charge and had set an alibi that he never went to Njara village on 8/5/96 where the robbery took place. The thrust of counsel's argument was that it was wrong for the trial Judge to rely on the evidence of identification by a single identifying witness Fatuma (PW8) who was a young girl aged 11 years

without corroboration. She contended that sudden disappearance by the second appellant from the area was not corroboration.

In our view, the Court of Appeal rightly accepted the finding of the trial Judge to the effect that PW8 had known the 2nd appellant for 3 years; and that the 2nd appellant used to go to her grandfather's shop at Njara trading centre at least three times a month where she would hear him talk. The Court of Appeal re-evaluated the evidence of Fatuma (PW8) before upholding the finding of the trial judge. This is how the court re- evaluated the evidence before rejecting the appeal.

> ***"We think, that the instances narrated by PW8 were sufficient to enable her to identify the voice of the 2nd appellant. She even told the police that she did recognise the voice of the 2nd appellant during the robbery. That led the police to look for him. We do not, however, agree with the learned counsel that the evidence of PW8 required corroboration as a matter of law. At the time of the incident she was 11 years, but she was 14 years at the time of trial. She was therefore not a child of tender years since the issue as to whether a child is of tender years arises only at the time of trial and not when the offence was committed. See John Muchami alias Kalule vs. Uganda Cr. Appeal No. 3 o f 1993 (SC) unreported.***
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> ***We therefore think that the evidence of PW8 alone was enough to connect the 2nd appellant with the offence. But it so happened that her evidence is, in actual fact, corroborated by the sudden disappearance of the 2nd appellant from the village soon after the robbery. We find no merit in the appeal of the 2nd appellant."***

We reiterate what we stated in ***John Muchani alias Kalule v Uganda (supra)*** that the issue as to whether a child is of tender years arises only at the trial but not when the offence was committed. We may add that corroboration in such a case is not a requirement by law. However, in the instant case there was an unchallenged evidence of PW7 (No. 23577 CPL Okello) that after the robbery, Fatuma (PW8) told them that she had identified A2 as one of the robbers from his voice which she knew very- well. D/CPL Okello testified that after the robbery A2 disappeared from the area and that when he (A2) surfaced in the area, police got information

and arrested him. We think that the conduct of A2 as described above provided sufficient corroboration to PW8's evidence of identification.

In the result, grounds one and four must fail.

We turn to grounds 2, 3 and 4 which attacked the conviction of the 1st appellant of robbery on the basis of the doctrine of possession of recently stolen property. Mrs. Eva Luswata Kawuma argued these grounds together and contended that the 1st appellant explained how he came into possession of the property. Mr. Michael Wamasebu for respondent opposed the appeal and urged us to dismiss it. He argued that the 1st appellant's explanation as to how he came into possession of stolen property was not credible.

The Court of Appeal reviewed the entire evidence and arguments of counsel from both sides. The Court then upheld the conclusions of the trial judge to the effect that the 1st appellant's possession of Kaunda shirt and other properties belonging to PW6 soon after the robbery, without any reasonable explanation and that the possession was incompatible with his innocence. It concluded that the learned trial judge was right to convict the 1st appellant of robbery on the doctrine of recent possession of stolen property.

We reiterate what we stated in ***Magidu Mudasi v Uganda Cr. Appeal No. 3 o f 1998 (SC) (unreported)*** that:-

> ***"It is now well established that a court may presume that a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to have been stolen unless he can account for his possession. This is an inference of fact which may be drawn as a matter of common sense from other facts including the particulars of the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found in possession. It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against the accused person must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt.***

We repeated the same principle in the case of ***Bogere Moses & Anor v Uganda Cr. Appeal No. 1 o f 1997 (SC) (unreported)*** where we stated that:-

> ***"It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable than the eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the later solely depends on the credibility of the eye witness."***

In this case the trial court considered whether the 1st appellant was a thief and not a receiver and concluded that:-

> ***"These were personal effects which could not readily pass from hand to hand and could not have done so over night, any way. The accused said he used to sell shoes and at times do masonry work. He was not trading in second hand items and was not even selling them at the time of the arrest. He had decided to wear them as his own. Before inferring the guilt of an accused person from circumstantial evidence, the law enjoins me to ensure that there are no other co-existing circumstances which would weaken or destroy the inference. I have seen none in this case.."***

The learned trial judge then further reviewed the evidence against A1 before convicting him.

We agree with the Court of Appeal that the 1st appellant's explanation was not consistent. At first he stated that he had bought Kaunda shirt from Kyomuhendo who in fact denied having sold it to him. In court the first appellant changed his story and stated that the Kaunda shirt was part of the properties one Rogers Nyakojo gave to him as security for a loan of Shs. 4000/= he (1st appellant) lent to him on 9/5/96. However, PW9, the mother of the 1st appellant testified that on 9/5/96 when she sent the 1st appellant to buy drugs for her, he returned with a bag containing properties and gave it to his wife and that the shirt he was found wearing on 17/6/96 was among the properties that were in the bag. The court of Appeal concluded that:-

> ***"The first appellant was therefore found in possession of some of the stolen property within 24 hours after they were stolen. He gave contradictory explanation as to how they came into his possession. That raises a very strong presumption of participation in the stealing. The trial judge was therefore right to rely on the doctrine of recent possession of stolen property to convict the 1st appellant."***

We have not been persuaded that either the trial judge or the Justices of Appeal erred in law or in fact in their conclusions. In the result, grounds 2,3 and 4 must fail.

Therefore this appeal has no merit. It is accordingly dismissed.

Dated at Mengo this 19th day of December 2002.

A.H.O ODER,
JUSTICE OF THE SUPREME COURT

J.W. TSEKOOKO,
JUSTICE OF THE SUPREME COURT

A.N. KAROKORA,
JUSTICE OF THE SUPREME COURT

J.N. MULENGA,
JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA,
JUSTICE OF THE SUPREME COURT.