

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

CASE NO: HCT-05-CR-SC-0228 OF 2003

UGANDA :::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

**A1. KAGYENDA MOSES
A2. TUGUME HERBERT
A3. MUHUMUZA JOHNSON** } :::::::::::::: **ACCUSED**

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

JUDGMENT:-

A1 Kagyenda Moses, A2 Tugume Herbert and A3 Muhumuza Johnson are jointly charged with aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act. Six witnesses testified for the prosecution. D/C Gumisiriza Nathan was PW1, Twesigye Onesmus was PW2, D/C Mugisha Gordon was PW3, Nuwamanya Dinah was PW4, D/C Eliphaz Turyahikayo was PW5 while Tuhaise

Dick ASP testified as PW6. The exhibit slip was received as exhibit P1, the two photographs of the motorcycle are P2, the extra judicial statement of A3 together with its English translation was exhibit P3 while the extra judicial statement of A2 in Runyankole together with its English translation is exhibit P4.

All the accused persons gave sworn statement in their respective defences. They called no witnesses.

It is the prosecution that on 17th November 2002, at Kamukuzi, Mbarara Municipality, all the three accused persons robbed a motorcycle Yamaha Mate Registration Number UDC 924M from Onesmus Twesigye, using a panga and a stick. With the assistance of A2 the motorcycle was recovered in Kyamuhunga two days after it was stolen. A2 and A3 made extra judicial statements

in which they admitted they participated in the offence. Both A1 and A3 were seen with the motorcycle the day after the robbery. In consequence the accused persons were arrested and charged with the offence.

It is the duty of the prosecution to prove the charge against the accused persons beyond reasonable doubt. See ***Ssekitoleko Vs Uganda [1967] EA 531*** where the charge is aggravated robbery the following ingredients ought to be proved:

- That there was theft.
- That there was the use or threatened violence;
- That there was use or the threat to use a deadly weapon; and
- That accused participated in the offence.

It was the evidence of PW2 that motorcycle number UDC 924M was stolen from him on the night of 17th November 202. Evidence of theft is also corroborated by PW1, PW3, PW4 and PW5. It is nowhere contested that such theft occurred. I find this ingredient has been proved beyond reasonable doubt.

PW2 testified that three men empowered him and took away the motorcycle he was riding away from him. It was his evidence the men told him to choose between handing over the motorcycle to them or losing his life. He said he offered no resistance after that. This piece of evidence which was nowhere disputed shows there a threat to use violence. This ingredient been proved beyond reasonable doubt.

There is no evidence PW2 was assaulted on the occasion of the theft of the motorcycle. It was conceded by the prosecution even that it had not proved that there was use of a deadly weapon on the occasion. PW2 himself stated that his assailants had a panga and a stick. However, PW2 stated that he was able to see the alleged weapons. This ingredient has not been proved.

PW2 testified that he never recognized the men who stole the motorcycle. The motorcycle was not exhibited in court. According to PW2, PW1, PW3 and PW5 the motorcycle recovered at Kyamuhunga answered to the description of motorcycle registration number UDC 924M. It was on that score the machine was handed back to PW2. Motorcycle number UDC 924M was recovered at the home of PW4 on 19th November 2002 – two days after it was stolen. It was the evidence of PW4 that the

motorcycle had been taken to her house by A1 and A3 together with her brother-in-law yet to be arrested. PW4 stated that the motorcycle was taken to her home on the night of 18th November 2002 and left there ostensibly because it lacked fuel. Pw2 in his part testified that he was attacked and robbed of the motorcycle at Kamukuzi. The evidence of PW1 that is while he was interrogating A2 concerning another case of robbery A2 had admitted to him that he (A2) had participated in the theft of the motorcycle in issue and had proceeded to lead PW1 and PW3 to Kyamuhunga to the house where the motorcycle was recovered. The evidence of PW1 is corroborated by that of PW3. Indeed PW4 admits the motorcycle was recovered at her house where A1 and A3 had taken it. The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. Where a person is in possession of goods soon

after they are stolen, there is a presumption that that person was the thief or that that person received the goods knowing them to be stolen, unless there is credible explanation of innocent possession. See **Andrea Obonyo & Others Vs R [1962] EA 452**, a decision by the East African Court of Appeal. Consequently the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, are incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. Court must also be certain there are no other co-existing circumstances that weaken or destroy the inference of guilt. See **Simon Musoke Vs R [1958] EA 715, 718; Teper Vs R (2) [1952] AC 480.**

PW6 testified that he recorded extra judicial statements from A2 and A3. Remarkably the statements have be

repudiated by the defence of A2 and A3. There is need for the statements to be corroborated by some other evidence if they are to be relied upon.

In the extra judicial statement of A2 which is exhibit P4 he states that on 17th November 2002 he left Kampala at about 3.00p.m in the company of A3. He adds that they arrived in Mbarara at about 8.00p.m. and found A1 at the Masaka Road Roundabout. He states that he hired motorcycles on two occasions and that on each of these occasions the motorcycle hired was being stolen by him and his colleagues A1 and A3. He says one robbery was at Kiyanja while the other was at Ruharo; adding that during the robbery at Ruharo the victim raised an alarm as a result of which he (A2) was arrested after his colleagues had escaped. He states also that after his

arrest he took police to Kyamuhunga where one of the motorcycles was recovered at the home of PW4.

The extra judicial statement of A3 that he left Kampala in the company of A1 and A2 at about 2.00p.m on 17th November 2002 and that the group arrived in Mbarara at about 7.00p.m. in the evening. While A3 and A1 walked from Rwebikoona, where the bus dropped them, to Kiyanja, A2 returned to Mbarara from where he hired a motorcycle, the statement adds. As soon as A2 and the three accused had got hold of the motorcycle rider and ridden away on the motorcycle and hidden it in Ruharo where he awaited A2. Later A3 had ridden to Itendero where A2 did not up. In Itendero A3 had hidden the motorcycle in a bush. Next day A3 had gone to Kyamuhunga but while there he was arrested and charged with aggravated robbery.

All three accused persons stated in their respective defences which were sworn averments that they were not known one to another before. Indeed their defences were alibis. A1 told court that he was arrested at Rwizi bridge in Mbarara following the breakdown of a vehicle he transported construction materials in. The arrest was on 10th July 2003, he stated, and was initially due to the fact that A1 was not in possession of receipts for his construction items on the vehicle. A2 on the other hand stated in his defence that he was a trader who dealt in beans. On 14th November 2002 he loaded beans at Rwahi for sale in Kampala. At about 10.00p.m. the vehicle in which he traveled with his said commodities nearly overturned, causing him to fall off it and getting injured in the process he became unconscious. He added that the day he was arrested he found himself in Mbarara

Hospital. Later he was arrested at the hospital at 2.00p.m. On 15th November 2002 owing to the fact that he lacked identity papers, his having gone missing following the accident. Further A2 stated that on 20th November 2002 he was forced to put his signature on a piece of paper, which had already been prepared in order that he might secure his release. It was after that he was charged with this offence. On defence of A3 was that he had left his home in Buremba on 22nd November 2002 in order to visit his brother who was a doctor at Comboni Hospital, Kyamuhunga. Before he could reach the hospital he visited a shop to get some refreshing drink. While at the shop he was asked about his identity and where he came from. All he had on him was a graduated tax ticket for the year 2001 which he was told was not satisfactory. Later he was arrested by LDU personnel and

others and taken to Mbarara Police Station. Afterwards he was charged with the present offence.

When an accused person sets up a defence of alibi he does not assume the duty to prove it. It is the responsibility of the prosecution to disprove the alibi by adducing evidence, which destroys it and places the accused person squarely at the scene of crime. See ***Ssentale Vs Uganda [1968] EA 365.***

I have considered the respective defences alongside prosecution evidence. I have stated earlier that A2 and A3 made confession implicating themselves as well as their co-accused but that the statements were repudiated. In order for a confession to be admissible it must expose the maker himself to the same or even greater risk than the person or persons implicated. The

East African Court of Appeal in ***Anyanga Vs R [1968]***
EA 239, 240 per Sir Clement de Lestang V- P stated:

“If it is a confession and implicates a co-accused it may, in a first trial, be “taken into consideration” against that co-accused. It is, however, not only accomplice evidence but evidence of the “weakest kind” ... and can only be used as leading assurance to other evidence against the co-accused.

It is also instructive to note that when the confession has been retracted or repudiated it then requires more corroboration before it can be relied on against the maker. Needless to say need for corroboration has more account where the confession implicating a co-accused.
See ***Israel Kamukolse Vs R [1956] EACA 521.***

The confession of A3 implicates A2 himself, A1 as well as A3. The confession of A3 implicates A3 himself, A2 as well as A1. It is the evidence of PW4 that both A1 and A3 took the motorcycle in issue to her house on the night of 18th November 2002, a day after it was stolen. This evidence of recent possession of the stolen motorcycle without satisfactory explanation is corroborated by the confessions of A2 and A3 showing that A1 and A3 participated in the robbery of the motorcycle. PW1 and PW3 testified that A2 led them to the home of PW4 in Kyamuhunga where they recovered the motorcycle in issue. The evidence of PW1 corroborates that of PW3 on this matter and vice versa. To buttress this evidence are the confessions of A2 and A3 showing A2 participated in the robbery of the motorcycle.

I have considered also the alibis of accused persons. They stated they did not know each other before and that

they did not participate in the offence. I find their alibis have been disproved by the strong prosecution evidence above. I find also that they had a common intention hence the appearing together at the home of PW4 by A1 and A3 as well as the knowledge of A2 of where the motorcycle was to be found.

Consequently I am satisfied the prosecution has proved beyond reasonable doubt that the accused persons had a common intention in prosecuting the offence they committed and that they did prosecute that purpose.

The gentlemen assessors in their opinion advised me to find the accused persons guilty as charged. For the reasons I have given in the course of this judgment I respectfully differ with that opinion. I instead find all the three accused persons guilty of a lesser offence of simple

robbery, contrary to sections 285 and 286 (1)(b) of the Penal Code Act and convict them accordingly.

PAUL K. MUGAMBA

JUDGE

23rd May 2007.