THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE C.M.KATO, JA.

HON. JUSTICE G.M.OKELLO. JA.

HON. LADY JUSTICE A.E.N. MPAGI BAHIGEINE. JA.

CRIMINAL APPEAL NO.55 OF 1999.

AWALI MUSOKE ……………………………………………….......................APPELLANT

AND

UGANDA …………………………………………………………………RESPONDENT

(Appeal from conviction and sentence of the

High Court of Uganda at Jinja (Justice Onega J.)

dated 14/5/99 in criminal session case No. 194 of 1996)

REASONS FOR TIIF. DECISION OF THE COURT.

We heard this appeal on 25/11/99 and dismissed it reserving our reasons which we now proceed to give. The appellant was indicted and convicted for robbery contrary to sections 272 and 273(2) of the Penal Code Act He was sentenced to death. He appealed against conviction and sentence.

The gist of the evidence against the appellant at the trial was as follows. On 22/10/95 the appellant hired the complainant, Musa Mugoya, who operated a business of bicycle boda-boda to go and collect shs. 500/= from Kakaire (PW2). At first, Kakaire told him that he had no money but the appellant sent him back, this time Kakaire gave him shs. 300/= which he (complainant) took to the appellant. He used the money to purchase a knife, which he pocketed. He then told him to take him (appellant) to the slaughter place. When they reached the railway the appellant asked the complainant to surrender to him the bicycle which he resisted and a struggle ensued in the course of which the appellant stabbed him with the knife and went away with the bicycle. The matter was reported to the police and the appellant was arrested and charged with robbery.

After some 7 months the complainant died before he had testified, so prosecution case was only based on what he had told PWI and PW2 before his death. At the trial the appellant denied ever having robbed anybody of a bicycle. He pleaded alibi, which was rejected by the trial judge, hence this appeal.

Three grounds of appeal were framed, namely:

1. The Learned Trial Judge erred on the question of identification both in fact and law and came to an erroneous conclusion.
2. The Learned Trial Judge erred when he found that the victim knew the accused.
3. The Learned Trial Judge wrongly rejected the defence of Alibi.

Mr. Serwanga, learned counsel for the appellant, argued the first and second grounds together and the third ground separately. As counsel for the state did not Support the conviction and sentence, and we agree with him, it is not necessary for us to go into the details of Mr. Serwanga's submission.

The real substance of his submission was that the learned trial judge was wrong to apply the- provisions of section 30(a) of the Evidence Act to the present case. In his view the appellant should not have been convicted on the basis of what Mugoya told his mother and Kakaire about the robbery. Mr. Wagona for the state conceded that that section was not applicable to the facts of this case because that section deals with dying declarations when an accused has been indicted for murder of the maker of the statement, which is not the case here.

Section 30(a) of the Evidence Act upon which the trial judge relied in convicting the appellant reads as follows:

'30. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are, themselves relevant facts in the following cases:-

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the case if that person's death comes into question and such statements are relevant when the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the case of his death comes into question."

In his judgment the judge after quoting the same section said:

> "To be relevant under S.30 (a) the statement must be made a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In the case before us it is said the deceased was robbed of a bicycle in the process thereof he was stabbed with a knife. Eventually he succumbed to the injury and died and he is now dead and cannot be called to testify in court. In this way the statements he made to PWI and PW2 relating to his being robbed and stabbed with a knife would be relevant and can be proved in evidence. However when dealing with such statements first it must be proved that they were made and then it has to be proved that the statement made is true."

With due respect, we think that the learned judge misdirected himself in law when he held that the section applies to all situations where the maker of the statement is dead. We agree with the view held by the two counsels that the section is only applicable to cases where the cause of the death of the maker of the statement is in issue that is if the appellant was being tried for the murder of Mugoya. In the instant case the cause of Musa Mugoya's death was not in issue, what was in issue is the robbery of a bicycle from him (Mugoya). The section is not therefore applicable. Since the only evidence against the appellant was that admitted under section 30 of the Evidence Act the appellant's conviction cannot be sustained in the absence of some other evidence.

It was for this reason that we allowed the appeal, quashed conviction and set aside the sentence.

Dated at Kampala this 9th day of December 1999.

C.M. KATO

JUSTICE OF APPEAL

G.M. OKELLO

JUSTICE OF APPEAL

A.E.N. MPAGI BAHIGEINE

JUSTICE OF APPEAL