THE REPUBLIC OF UGANDA

JUSTICE OF THE SUPREME COURT

AT MENGO

(CORAM: WAMBUZI, C.J., ODER, J.S.C., & TSEKOOKO, J.S.C.) CRIMINAL APPEAL NO. 11/1994

BETWEEEN

KATENDE SEMAKULA ========== APPELLANT

AND

UGANDA ========== RESPONDENT

(Appeal against conviction of the High Court of Uganda at Masaka (Mpagi-Bahigeine, J) dated 17th April, 1994.

IN

(CRIMINAL SESSION CASE NO. MMA. 256 OF 1993)

REASONS FOR DECISION AND ORDERS

The appellant, Katende Semakula was indicted on two counts. The first one was murder, contrary to Section 183 of the Penal Code, the particulars of which were that on 10th February, 1991 at Mbirizi village in Masaka District he murdered Birisila Namutebi.

The second count was robbery, contrary to Sections 272 and 273 of the Penal Code. The particulars of this count were that on the same day and place he robbed the deceased of her sack, one hurricane lamp and a blanket, and at or immediately before or immediately after the time of the robbery caused the death of the deceased.

The appellant denied the charges on both counts and was tried and convicted as indicted and sentenced to death on the second count. Sentence on the first count was suspended.

The appellant was dissatisfied with the decisions and appealed against the convictions. We heard and allowed his appeal, quashed the convictions, set aside the sentence and ordered his release unless he was otherwise legally held. We reserved our reasons for doing so, which we

now proceed to give.

The facts of the case, briefly, were that during the night of 10th and 11th February, 1991 the deceased was attacked in her house by an unknown person or persons and seriously injured. On the morning of 11/2/1991, she was rushed to Masaka Hospital, where she died on 12/2/1991. On the same day, a postmortem examination of the body was carried out by Dr. Rukunda of Masaka Hospital, whose evidence was admitted under Section 64 of the Trial on Indictments Decree. Injuries found on the body of the deceased were deep cut wounds on the left temporal and right of the head. Cause of death was open head injury leading to heamatoma of the brain.

The villagers suspected the appellant to have killed the deceased. R.C. officials and villagers searched the house of the father of the appellant and found there some articles of property allegedly belonging to the deceased. They included a basket, an old lantern, a sack and blanket.

On 7/6/1991, about four months later, the appellant was taken to Mbirizi Police Post on a charge of being drunk and disorderly. He ended up being taken to Masaka Police Station and charged with the present offences, for which he was Cried and convicted.

The only evidence against the appellant and the basis on which he was convicted was circumstantial evidence to the effect that he was found in the deceased.

Grounds three to six of the eight grounds of appeal set out in the memorandum of appeal criticise the learned trial judge's acceptance of the prosecution evidence and conclusions regarding the circumstantial evidence in question. We considered these to be the main grounds of appeal and dealt with them together. The other two grounds (grounds one and two) complained against the learned trial Judge for sitting with assessors who had not been sworn; and for acting on the evidence of a witness who had not taken an oath or been

affirmed.

In the well-known case *of* ***Andrea Obonyo and Others versus R.*** (1962) E.A. 542 it was held by the East African Court of Appeal that 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 has been excluded. This decision has been consistently followed.

Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore, necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See ***Teper v. R.*** (1952) A.C. 480 at 489; ***Simon Musoke v. R. (1958)*** E.A. 715 cited with approval in ***Yowana Serwadda v. Uganda,*** Crim. Appl. No. 11 of 1977 (U.C.A.) (unreported) and in ***Amis Dhatemwa Alia Waibi v. Uganda,*** Criminal Appl. No. 23 of 1977 (C.A.U) (unreported).

In the instant case the circumstantial evidence adduced against the appellant was that the deceased was attacked by an unknown person or persons during the night of 10th and 11th February, 1991. She died two clays later of head cut wounds at Masaka Hospital where she had been rushed for treatment after she had been injured. She had lived alone in her house. There was, therefore, no eye witness to the attack.
Thereafter, rumours circulated in the village that the appellant was the culprit. According to Kerati Seruwe, the R.C.I Secretary for Defence in the village (P.W.5) the appellant was suspected because of numerous previous incidents with which he had been connected in the village and for which he had been reported to the police. Seruwe enumerated such incidents as including theft of a pig, theft of a cow, breaking into a house, and theft of iron-sheets. The appellant had been shot in the leg once when he was being apprehended.

We think that such evidence of the appellant's alleged antecedents should not have been admitted as, no doubt, it gave the impression that the appellant was the sort of person who was likely to have committed the offence in the instant case. It was prejudicial to him.

The appellant apparently reappeared in this village at about the time the deceased was killed. This, coupled with his being suspected due to previous incidents, led to a search of his father's house, where he usually stayed whenever he was in the village.

It is noteworthy that inspite of the suspicion against the appellant apparently no report was made to the police. It took four months before the appellant was arrested for the offence; even then, he was arrested because he happened to have been taken in by the police on a charge of being drunk and disorderly. If he was so strongly suspected for the instant offence 'why the absence of evidence of any report to the police?

According to Njaku Yusuf, R.C.I Secretary for Information (P.W.4), Kereti Seruwe (P.W.5) and George William Wasswa Kalyango (P.W.6), they and others conducted the search of the house in the presence of the appellant's father Maulisio Semakula (P.W.7), but the appellant was absent. Some members of the search party claimed that Maulisio (P.W.7) informed them that during the previous night he had heard his son, the appellant, digging in the rear room, which the appellant normally occupied when he was at home, and in which the stolen articles of the deceased property were recovered during the search. The search party found that the front room, normally occupied by Maulisio (P.W.7), did not contain anything. The second room, at the rear, was very dark. A hole had to be knocked into the wall to let in some light. In that room they found a covered empty hole. Another hole contained a sack full of second-hand clothes.

Another sack, lantern, basket and blanket were also found in the room.
On prompting by the search party, Maulisio led the party to a banana garden where banana fruits had been buried for brewing native beer. Underneath the bananas, a radio cassette was recovered. The lamp, sack, blanket, basket, gunny bags and second-hand clothes were claimed by the relatives of the deceased who were members of the search party as having

been hers. These items were subsequently handed over to the police and some of them were tendered in evidence as exhibits at the trial.

The evidence of the appellants father, Maulisio Semakula (P.W.7), however, was that though he was present during the search, he was not asked about his son, the appellant. He did not see the appellant bring the items of property into the house. The rear room in which the items were found had previously been occupied by one Alikiliza who had long since died before Maulisio moved into the house, his own having collapsed.

The appellant did not say anything in his defence. He opted to remain silent.

We were satisfied that the learned trial judge had properly directed herself and the assessors on the tests to be applied regarding the care that must be taken in acceptance of, and the weight to be attached, to, circumstantial evidence, and on the doctrine of recent possession of stolen property. It is the conclusions, which she reached in applying the law to the facts of the case before her that caused us concern. This is what she said in her conclusions.

> ***"In view of what I have endeavoured to explain above, I am satisfied that the accused had in his possession the deceased's properties unexplained (when called upon to do so) by an innocent origin. This was very recent, only hours after the incident and the possession was exclusive. I find all these inculpatory facts quite incompatible with innocence."***

With respect we were unable to agree with the learned trial judge in her conclusions. First the evidence of Semakula Maulisio (.P.W.7) in so far as is relevant was as follows,

> ***"Left Mbirizi a long time ago because my son Katende Semakula committed an offence. He killed Birizita. I just used to know her at our village. I was just told he is the one who killed her.***

There were some stolen property recovered from my house after Birizita 's death - a blanket, a lamp, old clothing, a blanket were all recovered from a room which used to belong to late Alikiiza. I was around when they were being recovered.

I was never asked about my son. They asked me if they could enter the house - I allowed them. They just took the property.

I did not know where he was - he had not been around that night but had been around some other day. It is the accused who had brought that property at night - that night. I used to sleep in the front room while he was sleeping the back room (sic).

Alikiliza had died a long time before. I did not see him bringing the things but they were recovered in the room belonging to Alikiliza.
I knew he was the one who had brought them. Alikiliza died long before - after that I moved into her house when mine collapsed. I had lived alone for a very long time. I did not receive visitors."

The witness first denied his son, the appellant, had been to the house that night. He did not see the appellant bring the stolen property although he knew the appellant had brought the property. Unfortunately he was not asked how he knew that the appellant had brought the property in view of his evidence that he did not see him bring the property and that he had not been to the house that night.

Secondly, Maulisio's evidence did not tally with that given by some of the other members of the search party to the effect that Maulisio (P.W.7) had informed them chat he had heard his son digging in that room.

Thirdly, the evidence did not prove exclusive possession of the property by the appellant. It would appear that anybody, including Maulisio himself, could have hidden the items where

they were found including the banana garden. It should be noted that some of the property like the radio cassette and old clothing which were obviously stolen property did not belong to the deceased according to Seruwe (P.W.5). Whose property was it and who brought it in Maulisio's home.

Fourthly, of the two relatives of the deceased who are said to have identified the property of the deceased only one of them, Kalyango (P.W.6), gave evidence. Unfortunately he did not identify the items which had in fact been exhibited. Accordingly all the evidence that some of the stolen articles found in the house of Maulisio belonged to the deceased is hearsay.

In the circumstances, we were not satisfied that the circumstantial evidence adduced against the appellant and accepted by the learned trial judge satisfied the tests laid down in ***Adrea Obonyo*** (supra), ***Yowana Serwadda*** (supra). ***Amis Dhatemwa*** (supra) and numerous other cases in which this court had followed the cases just referred to. First of all the stolen property was not proved to have belonged to the deceased. Secondly the evidence did not lead to the irresistible inference that the appellant stole the deceased's property and killed her in the process, because his possession of the recently stolen property was not proved beyond reasonable doubt. The possibility that the items of property could have been taken into the room by some other person could not be ruled out. This would mean that there were other explanations compatible with innocence of the appellant.

For these reasons, we decided that the grounds of appeal in question should succeed and that the appeal should be allowed. It was accordingly allowed.

The appeal having succeeded on the main grounds we thought that it was not necessary to consider the first two grounds.

Dated at Mengo this 17th day of January 1995

S.W.W. WAMBUZI
CHIEF JUSTICE

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

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL,

W. MASALU MUSENE,
REGISTRAR, THE SUPREME COURT.