THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, JSC; TSEKOOKO, JSC; KAROKORA, A.N. JSC;

MULENGA, JSC; AND KIKONYOGO, JSC.)

CRIMINAL APPEAL NO.3 OF 1998

BETWEEN

MAGIDU MUDASI ……APPELLANT

AND

UGANDA…… RESPONDENT

(Appeal from decision of the Court of Appeal of Uganda at Kampala

Manyindo, DCJ; Kato, JA; and Berko, JA

dated 30.4.1998

in Criminal Appeal No.7 of 1996)

JUDGEMENT OF THE COURT

This is a second appeal from a decision of the Court of Appeal of Uganda. The appellant, Magidu Mudasi, had been tried and convicted by the High Court on an indictment consisting of two counts. The first count was robbery, Contrary to Sections 272 and 273(2) of the Penal Code Act, the particulars of which were that the appellant with others still at large on or about the 3rd February, 1990 at Busamaga Village in Mbale District robbed one Jackson Waniala of a Motor Car Registration No. UXK 276, and at or immediately after the said robbery used a deadly weapon, namely a club on the said Jackson Waniala. The second count was murder, Contrary to Section 183 of the Penal Code Act, the particulars of which were that the appellant and others still at large on the 3rd, February 1990 at Bwase Village in Tororo District murdered the said Jackson Waniala.

On conviction after his trial, the appellant was sentenced to death on the first count. The sentence on the second count of murder was suspended. He then appealed to the Court of Appeal against

the convictions and sentence, but his appeals were dismissed. The conviction and sentence were upheld. The appellant has now appealed against the decision of the Court of Appeal.

The facts of the case established by the trial court and accepted by the Court of Appeal are briefly as follows. The deceased, 28 years old man, was a special-hire taxi operator in Mbale. He and the appellants were friends. On the morning of 3.2.1990 at about 4.00 a.m. the deceased collected his taxi car from the home of his mother, Foronika Wanyenze (PW5), where the deceased normally parked his taxi car at night. When he went to collect the car on this occasion, the deceased was in the company of the appellant and another person. The deceased woke up his mother and informed her that the appellant and others wanted the deceased to assist them to collect the appellant's wife from Budaka. Foronika (PW5) saw and recognised the appellant. She knew him before as they all lived in the same village in Mbale. Foronika (PW5) saw the appellant enter the garage with the deceased to collect the car. There was bright electric light, which enabled her to see and recognise the appellant, but she did not recognise the other person who was in the appellant's company. That person stood outside near the lamp post. The deceased, the appellant and the third person drove away in the deceased's car. That was the last time Foronika (PW5) saw her son (the deceased) alive.

When two days passed and the deceased had not returned home, Foronika (PW5) reported the matter to the Police at Mbale. The Police gave her a letter, with which to go to Budaka Police Post in search of her son. When she arrived there, Budaka Police showed to PW5 a shirt and trousers which the police at Budaka had removed from the dead body of an unknown person who had been discovered killed half a mile from Budaka Police Post. PW5 instantly recognised the clothes as those of her son.

The police at Budaka had on 3.2.1990 at about 8.00 a.m. discovered the body of the deceased already lying in a bush half a mile from Budaka Police Post. The deceased appeared to have been killed. The police officer who first saw the body, Gastaphino Lwanga I.P. (PW4), noticed some marks around the neck. The marks appeared to have been caused by a rope or a rubber band. When two days had passed without any person claiming the body of the deceased, the Budaka

Police had it buried, but preserved the clothes in which the body was dressed when it was discovered.

It was on 6.2.1990 that the mother of the deceased Foronika (PW5) and other relatives travelled to Budaka, where she identified to the police the body of the deceased after it had been exhumed. The matter was then reported to Mbale police where the body of the deceased was taken. On the same day, Dr. Wanziguya carried out a post mortem on the body of the deceased at Mbale Hospital, and made a post mortem report (exhibit P1).

In his testimony, the doctor said that he identified a dark mark around on the neck, and a depressed skull at the frontal bone. Internally, he observed brain damage. The cause of instant death was brain damage. Instrument used was possibly a hammer or an iron bar. The dark mark around the neck could have been a result of strangulation, caused by a rope or a wire. Strangulation was applied first but due to some resistance, a hammer was then used. The doctor ruled out that the injury was likely to have been caused by the steering wheel or dashboard.

On 13.2.1990 the appellant and a companion, one Wambede Issa, were found in Mukono with the car of the deceased, trying to sell the car in that area. They were arrested on 17.2.1990. The appellant and his companion informed Haji Hamudani Lubega (PW3) and the Police at Mukono that the car was theirs.

On 17.2.1990 persons who knew the motor car as belonging to the deceased went to Mukono for it. The motor car was later taken to Mbale where Foronika (PW5) identified it as her deceased son’s car. The appellant and his companion, Wambede Issa, were subsequently charged with the offences in the present case, but the latter died in prison before he was tried. At his trial the appellant put up an alibi, and explained how he came to be found with the deceased’s motor car at Mukono.

His defence was to the effect that on 3.2.1990, he was in Moroto Town, which he left at 2.00 p.m. for Mbale. He reached his home in Mbale at 8.30 p.m. On the following day, he met one Eddy Nyanganya. The latter asked the appellant to drive car No. UXK 276, a Toyota Corolla to Mukono, and proposed to pay him shs.30,000/ for the assignment. The appellant drove the car to

Mukono as agreed. He was accompanied by one Issa Wambede. Nyanganya did not accompany them.

When the appellant and his companion arrived in the car at Mukono, Issa Wambede directed him to go to the home of Haji Hamudani Lubega (PW3). The appellant and Issa Wambede stayed at PW3's for nine days. During that time, Issa Wambede was dealing in cattle until 14.2.1990, when he and the appellant were arrested by the police.

The appellant maintained that he was only hired to drive the car to Mukono and that he did not know the deceased. He also denied that he and Issa Wambede killed the deceased: or that he informed PW3 that the car belonged to him and Issa Wambede.

At the conclusion of the trial both the assessors believed the prosecution evidence, rejected the appellant's defence of alibi and advised for a conviction. The learned trial judge accepted the prosecution version of events and disbelieved the appellant's defence, convicting him and sentencing him to death as we have already mentioned. The appellant's appeal to the Court of Appeal against convictions and sentence failed. Hence this appeal.

Two grounds of appeal were set out in the Memorandum of Appeal. Firstly that the learned appellate Judges erred in convicting the appellant without evaluating the evidence; and secondly that the appellate Judges erred in holding that the circumstantial evidence warranted a conviction without scrutinizing the appellant's defence. The Memorandum of Appeal, as amended with the leave of the court, also prayed that the appeal be allowed, the convictions be quashed the sentence be set aside and the appellant be set free unless held on other lawful ground.

Mr. Leonard Musika, learned counsel for the appellant, argued the two grounds of appeal together. He submitted first that the Court of Appeal ought to have subjected to scrutiny the prosecution evidence of identification of the appellant in relation to the contradictory evidence from Foronika (PW5) and Caleb Muhore, D/IP (PW7) with regard to whether an identification parade was held; and in relation to the appellant's evidence that Foronika (PW5) was not known to him before the incident. In her evidence that Foronika (PW5) was not known to him before the incident. In her evidence Foronika (PW5) said that she knew the appellant before the deceased died, because she lived in the same village as the appellant in Mbale. However, this was

contradicted by the appellant in his evidence that PW5 was unknown to him before. Foronika also said in cross—examination that she identified the appellant at an identification parade. That was inconsistent with that evidence. D/IP Caleb Muhore (PW7) testified that he did not put the appellant and his companion on an identification parade. The learned counsel contended that if an identification parade was held for Foronika (PW5) to identify the appellant it meant that Foronika (PW5) did not know the appellant before, which would be consistent with the appellant's evidence that he did not know PW5 before. It the Court of Appeal had re-evaluated the evidence in the manner suggested, the learned counsel contended, the Court of Appeal would have come to a different conclusion, namely that Foronika (PW5) did not know the appellant before.

Secondly, the appellant's learned counsel submitted that the Court of Appeal ought to have invoked its powers under rule 29 of the Court of Appeal Rules and called additional evidence as the learned counsel put it:

On the part of the defence to ascertain the allegations of the defence whether the circumstances he came to the vehicle was right."

As authorities for his submissions the learned counsel cited the cases of *Amisi Dhatemwa, alias Waibi v Uganda , Criminal Appeal No.23 1997 (CAU) (1978) HCB 217 and Bogere and V Uganda, Criminal Appeal No.11 of 1997 (SCU) (Unreported).*

Ms. Khisa learned Principal State Attorney (PSA) for the responded, in her reply, supported the Court of Appeal's decision. She observed that only one ground of appeal was argued in the lower court. That ground of appeal was to the effect that the learned trial judge had erred in law and fact in convicting the appellant on insufficient prosecution evidence. Certain alleged unsatisfactory aspects of the prosecution evidence were pointed out by the appellant to the Court of Appeal. The first of these were that PW5's evidence of identification of the appellant should not have been accepted by the learned trial judge because she had lied when she said that she knew the appellant before. In the learned Principle State Attorney's view, PW5 did not lie in that regard because she and the appellant lived in the same village of Busamaga, which was a good reason for the two knowing each other. Secondly, the presence of bright electric light had

enabled PW5 to clearly see the appellant when he and the deceased went for the deceased's motor car; and that the evidence of identification of the appellant was properly reevaluated and rightly accepted by the Court of Appeal.

The learned Principal State Attorney also referred to the second issue, which had been raised by the appellant before the Court of Appeal. This related to how the appellant came to be in possession of the deceased's car at Mukono. It had been argued by the appellant before the Court of Appeal that the learned trial judge wrongly accepted the evidence of No.14293, P/C Karenget (PW1), Grace Turyagumanawe, SP (PW2) and Haji Hamadani Lubega (PW3) in this regard. Here, again, the learned Principal State Attorney submitted that the Court of Appeal properly evaluated the evidence and accepted the prosecution evidence as truthful and as cogent circumstantial evidence which clearly connected the appellant with the offence charged. The appellant's evidence that he was hired by Nyanganya to drive the car to Mukono was rightly rejected by both the trial court and the Court of Appeal, it was contended. It was an afterthought, as such an explanation had not been given on the first opportunity.

Regarding the appellant's criticism that the Court of Appeal ought to have invoked its powers under rule 29 and called additional evidence, but it did not, to verify the appellant's version of how he came to possess the deceased's car, the learned Principal State Attorney contended that the criticism was misconceived for the following reasons. Firstly as the appellant did not give his explanation to the police officers who arrested him and his companion at Mukono, it was apparent that the explanation he gave at his trial regarding how Nyanganya allegedly hired him to drive the car was an afterthought. Secondly, in the light of the clear evidence from Foronika (PW5) that she recognized the appellant when he and the deceased went away in the car, there was no need for the Court of Appeal to have called additional evidence under rule 29 of the Rules of the Court of Appeal.

The grounds of appeal, and the submissions made before us by both learned counsel, in our view, raised three main issues. The first is the criticism that the Court of Appeal convicted the appellant without evaluating the evidence. The second which, in essence, is a part of the first one, is that the Court of Appeal erred in holding that the circumstantial evidence warranted a conviction without scrutinising the appellant's defence. And the third is whether the Court of Appeal ought

to have called additional evidence to verify the appellant's explanation of how he came to be found in possession of the deceased's car. The three issues overlap, but we shall consider them separately and in the same order.

The legal duty of a first Court of Appeal to re-evaluate the evidence on which a trial court has founded a conviction is now well settled. In the case of any appeal from a decision of our High Court acting in its original jurisdiction, it is provided in rule 290 (a) of the Court of Appeal Rules as follows:

> "the Court may-
> (a) re-appraise the evidence and draw inferences of fact:"

This means that where an appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the trial court with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgement is wrong. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the trial judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the trial judge, even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. *See Dinkerri Ramkrishna Pandya v R (1957) E.A.336.* In Pandya's case (Supra) the appeal to the Court of Appeal turned entirely on a scrutiny of a watchman's evidence when considered in the light of other testimony and on evaluation of the evidence as a whole by the trial and the appellate court. The Court of Appeal said this on page 337:

"But the Parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions,

though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

These principles have been echoed and applied in many cases by our court and it predecessors. See the cases of *Shantilal Maneklal Ruwala v R (1957) E.A 570; Selle v Associated Motor Boat Co. (1968) E.A 570 Okeno v Republic (1972) E.A 32, Bogere and Another v Uganda, Criminal Appeal No.1/97 (SCU) orted2 and Kifamunte Henry v Uganda, Criminal Appeal No.10/97 (SCU,) (unreported).*

In *Shantilal M Ruwala (Supra).* The Court of Appeal said, at page 573:

"We do not take this to mean the appellate court should write a judgement in a form appropriate to a court of first instance. it is sufficient on question of fact if the appellate court, having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from demeanour of witnesses against the whole of their evidence, is satisfied that there was evidence upon which the court of first instance could properly and reasonable find as it did. If the conclusions of the appellate court are merely expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to make a critical evaluation of the evidence."

In the instant case the substance of the appellant's criticism of the learned trial judge in the Court of Appeal was that the learned judge was wrong to come to the conclusion that the appellant had robbed and murdered the deceased when the evidence of PW5 upon which that conclusion was based had not been properly evaluated in the light of the other prosecution evidence adduced to the court. It was contended that Foronika (PW5), the mother of the deceased told lies to the trial court when she said that she knew the appellant well. It was also argued that the appellant had offered sufficient explanation regarding how he came to be in possession of the deceased's motor car, and that his explanation ought to have been believed by the learned trial judge.

As can be seen from what we have said earlier in this judgement, criticisms labeled at the Court of Appeal were similar to those made against the leaned trial judge before the Court of Appeal. The Court of Appeal dealt with the evidence of recognition of the appellant and the circumstantial evidence of possession of the deceased's motor car in the following terms:

“Apart from the evidence of PW5 (Foronika Wanyenze) who saw the appellant leaving with the deceased in the same vehicle on the fateful morning, the prosecution case was based on circumstantial evidence. The learned trial judge quite ably dealt with this issue in his judgement and came to the conclusion that the deceased must have been killed and robbed by the appellant. We have no reason to disagree with the Judge’s finding on this point. There was sufficient circumstantial evidence to support his finding. The last person to be seen in the company of the deceased was the appellant who was later found in possession of the very vehicle in which he left with the deceased. The appellant’s explanation that the vehicle had been given to him by one Nyaganya cannot be true in view of what he told the police at the time of his arrest that the vehicle belonged to him and one Issa. He did not say he had been hired by Nyanganya to drive it. There was evidence that Issa was looking for buyers while the appellant was looking after the vehicle at the home of PW3. Clearly the mission to the home of PW3 was to dispose of the stolen vehicle. It is remarkable that the appellant said that he went to the home of PW3 on 4/2/90 when according to PW3 he went there on 12/2/90. We do not agree with Mr. Muhwezi’s contention that PW5, the mother of the deceased, did not recognize the appellant at the time she saw him leaving with her son. There was enough light from an electric lamp at the garage, the appellant was well known to PW5 who used to see him at the deceased’s house and on the night in question she took some time talking to the deceased and the appellant before they left for Budaka, PW5 certainly recognized the appellant as the very person whom she saw going away with her son in her motor vehicle.”

The passage we have just referred to from the Court of Appeal judgement clearly indicates that, the Court of Appeal evaluated both the prosecution and defence evidence in the case, like the learned trial judge, and rejected the appellant’s defence and accepted the prosecution evidence. After re—evaluation of the evidence the Court of Appeal found that the appellant was properly identified by the mother of the deceased, Foronika (PW5) as the person who went to her home and went away with the deceased in the car. The Court of Appeal also found that the appellant’s version of how he came to be in possession of the car as being a lie. It found this to be sufficient circumstantial evidence to support the appellant’s conviction by the trial court. We shall shortly say more about the circumstantial evidence.

In our view the Court of Appeal considered the evidence, evaluated it itself and drew its own conclusion and decided that on the facts there was ample evidence to support the appellant's conviction. There can be no standard form of judgement of a Court of Appeal. A First appellate court does not have to write a judgement in a form appropriate to a court of first instance. In the instant case we have no doubt that the Court of Appeal did all that it was expected to do in discharging its duty as a first appellate court. The first ground of appeal must therefore fail.

The evidence which the Court of Appeal considered and accepted against the appellant included that of his possession of the deceased's car so soon after it had been stolen. It was exactly nine days from 3.2.1990, when the appellant and the deceased drove away in the car from PW5's house in Mbale to 12.2.1990, when Haji Hamudani Lubega (PW3) first saw the appellant and his companion Issa with the car at PW3's home in Mukono.

It is now well established law 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 be 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, in particular, the fact that the accused has in his possession property which it is proved has 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 inculpating facts against accused person must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis 'than that of guilt. According to the particular circumstances, it is open to a court to hold that an unexplained possession of recently stolen articles is incompatible with innocence. On finding of possession of property recently stolen, in the absence of any reasonable explanation by the appellant to account for his possession, a presumption does arise that the appellant was either the thief or a receiver. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen, whether it is of a kind that readily passes from hand to hand; and the trade to which the accused person belongs can all be taken into account. See *Andrea Obonyo V R (1962) E.A. 542.*

Although very often circumstantial evidence is the best evidence it must always be narrowly examined because evidence of this kind may be fabricated to cause suspicion on another.

Consequently before inferring the guilt of an accused person from circumstantial evidence, it is necessary to ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

In the instant case the trial court and the Court of Appeal accepted the evidence that the appellant and the deceased were seen driving in the deceased's car away from the latter's mother's house. He was the last person seen with the deceased alive. Nine days later (a short time) the appellant and his companion were found in Mukono in possession of the car, trying to sell it. Both the appellant and his companion told Grace Turyagumanawe, S/P (PW2) and Haji Hamudani Lubega (PW5) that the car belonged to them, yet they did not produce any document pertaining to the car. The appellant, apparently, did not tell PW2 and PW3 that he had been hired to drive the car from Mbale to Mukono by one Nyanganya, which is what he said in his defence. His explanation when he was found with the car was that it belonged to him and Issa. This as other evidence showed was a lie. In the circumstances, the trial court and the Court of Appeal were justified in accepting the prosecution evidence and rejecting that of the appellant. As we have said before in this judgement, the Court of Appeal made a reevaluation of the relevant evidence. The criticism that the Court of Appeal accepted the circumstantial evidence against the appellant without scrutinizing his defence is, with respect, unjustified. The second ground of appeal should, therefore, fail.

Rule 29(1) (b) of the Court of Appeal Rules, l996, provides:

"On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction the court may

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."

The principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal were set out clearly in *Lord Parker, C.J.* in R *vs Parks, (1969) All ER at page 364* as follows:

“Those principles can be summarized in this way: First the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence, which is credible evidence in the sense that it is capable of belief.

Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.”

These principles were adopted by the Court of Appeal for East Africa in the case of ***Elgood v Regina (1968) E.A. 274***, in which the court said at page 276:

“We wish to stress that it is only in very exceptional cases that this court will permit additional evidence to be called.”

In our view these principles do apply with equal force to the exercise of its discretion to call additional evidence in a criminal case by the Court of Appeal under rule 29(1) (b).

Applying these principles to the instant case our view is that the criticism against the Court of Appeal that it ought to have called additional evidence to verify the appellant’s evidence as to how he came to be in possession of the deceased’s car has no merit for the following reasons:

Firstly, no application was made to the Court of Appeal for calling additional evidence on behalf of the appellant. It is usually the practice that such applications are made by one party or the other requesting the Court of Appeal to exercise its discretion under rule 29(1) (b). In the case of *(Supra)* the application to call additional evidence was made by the appellant.

Secondly, the learned counsel for the appellant did not indicate the nature of additional evidence which the Court of Appeal should have called and who was to give the additional evidence. Thirdly, some of the principles laid down in the ***R v Parks (Supra)*** were not complied with. For instance it was not shown that the evidence which could have been called on appeal was not available when the appellant was tried. If the additional evidence was to be adduced by Nyanganya, which it is reasonable to presume would have been the case, it was not shown that

Nyanganya was not available at the time of the appellant's trial. Fourthly the circumstances favouring positive identification of the appellant by Foronika (PW5) were so good that there could have been no mistake on her part. Hence the identification was so clear that there was no need to verify the appellant's evidence by additional evidence. The trial court and the Court of Appeal were entitled to accept PW5's evidence, as they did, rather than the appellant's evidence, which was rejected. Fifthly, it was not shown that this was a very exceptional case warranting calling of additional evidence.

For the reasons given, this appeal must fail. It is accordingly dismissed.

Dated at Mengo this 2nd day of October 1998.

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

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

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT.

J.N. MULENGA
JUSTICE OF THE SUPREME COURT.

L. M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT.