THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: TSEKOOKO,J.S.C., KAROKORA J.S.C., MULENGA J.S.C, KANYEIHAMBA J.S.C., KIKONYOGO J.S.C.

CRIMINAL APPEAL NO: 6 OF 199 8

B E T W E E N

IZONGOZA WILLIAM ……APPELLANT

VS.

UGANDA……RESPONDENT

(Appeal from judgment of the Court of Appeal of Uganda at Kampala before C.M. Kato, J.A., J.P. Berko, J.A., and Twinomujuni, J.A.) (dated 24/7/98 in the Court of Appeal Criminal Appeal No: 5 of 1997)

JUDGMENT OF THE COURT:

This is an appeal from a decision of the Court of Appeal confirming the conviction and sentence against the appellant passed by the High Court.

The following are the facts of the case: While riding his bicycle from market on 2 0th December, 19 93, on Wampewo Avenue, in Kampala, James Wakholi (PWI) was attacked and grievously injured by an unknown assailant or assailants who robbed him of his bicycle. Wakholi was left lying on the road unconscious. Later, Sebastian Buchindika (PW2) found Wakholi lying on the road and bleeding profusely from the head. Buchundika recognised Wakholi as one of his neighbours in the Kololo residential area. Shortly afterwards, Patrick who was driving a car also arrived on the scene of the crime. He too was known to Wakholi

and Sebastian Buchundika. After consulting with Buchundika, Patrick drove to Wakholi's home to inform and summon Wakholi's wife(PW3). As chance would have it, on the way to Wakholi's home, Patrick found a police patrol vehicle and alerted the occupants about Wakholi's whereabouts and condition. With the assistance of the police, Wakholi's wife, Patrick and Buchindika, Wakholi, the victim was taken to hospital still unconscious. It took two weeks of careful treatment and nursing for Wakholi to regain consciousness and recover. The witnesses who discovered or saw Wakholi lying on Wampewo Avenue noticed that his bicycle was missing presumably, taken by his attackers. Amongst the first persons to be informed of the robbery was Emmanuel Wanjala (PW4), his younger brother. On discovering that his brother's bicycle had been taken by robbers, Wanjala decided to visit places where people say stolen things are taken and sold. On this mission, Wanjala visited Kisenyi which is allegedly one of such places.

He was in Kisenyi between 8 - 9 a.m., and, as luck would have it, he saw two young men in possession of two bicycles one of which he easily recognised as his brother's bicycle which was stolen the previous night at Wampewo Avenue during the robbery. He approached the two young men and enquired about the bicycles. They informed him that the bicycles were for sale and when he wished to know the price for his brother's own bicycle, he was told by the young men that they did not know the price as the bicycle was not theirs but if he waited, the owner would shortly return to the group. After some twenty minutes, William Izongoza, the appellant in this case, appeared at the scene and was introduced to Wanjala as the owner of the bicycle. Thereafter the two men, Wanjala and appellant negotiated for the purchase price of the bicycle. Initially, appellant asked for Ug. shs 60,000= but in the end accepted Wanjala's offer of shs 40,000 for the bicycle. Wanjala persuaded the appellant to accompany him on the bicycle to Nsambya barracks where Wanjala claimed he lived and would find the money to pay the appellant. At Nsambya, the pair met Mr. Mauka, a cousin of Buchundika and, between them Buchundika and Mauka managed to overpower the appellant, arrested him and took him to the police at Nsambya. The police rearrested and detained him.

The appellant was subsequently charged with robbery contrary to ss. 272 and 273 (2) of the Penal Code. He was tried by the High Court and sentenced to death. He appealed to the Court of Appeal which dismissed the appeal and confirmed both the conviction and sentence, hence this appeal.

In the Memorandum of Appeal, there is only one ground of appeal, namely, that the Justices of the Court of Appeal erred in law and in fact when they failed to take into consideration

circumstances that raised a reasonable probability that the appellant might have been only a receiver of a stolen bicycle. For the appellant, Mr. Mubiru argued that the learned Justices of the Court of Appeal erred in confirming a conviction for robbery when the only circumstantial evidence against him was one of recent possession. It was the appellants' case, that before a court can convict for robbery on the ground of the doctrine of recent possession, it must be satisfied that other probable reasons to explain the accused's possession of the bicycle or stolen property have been ruled out by the prosecution. Mr. Mubiru contended that in the application of the doctrine of recent possession as a basis for convicting for robbery, it is not enough for the prosecution merely to prove recent possession.

Nor is it incumbent upon the accused person to offer any plausible explanation for his or her acts. The onus of proof for robbery is not only always on the prosecution to prove their case beyond reasonable doubt, but they owe an additional duty of tendering evidence that recent possession of the goods obtained during a robbery cannot be explained on any ground other than that of robbery. In other words, the accused is not even under any obligation to explain away how he came into possession of the bicycle. In the case of Kigoye and Another v. Uganda (1970) E.A 402. It was held that before a court can rely on the doctrine of recent possession , the possibility of the accused being a receiver must be removed. The possibility of the bicycle having been taken away by some other person from the scene of the crime was not ruled out nor was the possibility of some other person having assaulted the complainant. Learned Counsel further contended that if the judge had addressed her mind to this issue she could possibly have found the appellant guilty of the lesser offence of receiving stolen property.

Mr. Mubiru invited this court to make a distinction between the evidential proof required to convict a person charged with robbery on the application of the doctrine of recent possession and that necessary to convict another charged with receiving stolen property also on the evidence of recent possession of that property. According to the arguments advanced by Mr. Mubiru to convict for robbery on the evidence of recent possession, the prosecution must not only prove the case beyond reasonable doubt but it is also incumbent upon them to produce further evidence that rules out

any other plausible explanation . On the other hand, if the charge is of receiving stolen property, once the prosecution has presented evidence of recent possession of that property, the accused is guilty unless he or she can offer some reasonable explanation. Counsel for the appellant cited the case of Andrea Obonyo and Another v.R. T9621 E. A. 542 . and in particular the passage that appears on page 549.

> "When the evidence is circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

From this observation, learned Counsel submitted that all evidence showing that the appellant may be an innocent receiver should be ruled out before conviction. It was his view that once the appellant denied having been in possession of the bicycle and instead claimed that he was framed, the police had to disapprove this evidence. Counsel further submitted that the record of proceedings do not show that the prosecution offered any evidence to rule out the possibility that the appellant might have been an innocent receiver of the bicycle. Thirdly, counsel argued that the fact that the appellant may have been an innocent receiver is strengthened by the knowledge that the bicycle was found in Kisenyi area which is notorious for the disposal of stolen goods. It was Mr. Mubiru's contention, therefore, that by failing to rule out all these hypothetical possibilities, the prosecution had failed to prove their case beyond reasonable doubt. In consequence, when the High Court convicted for robbery and the Court of Appeal confirmed that conviction, without either taking into consideration these possibilities, they erred in law and fact. Further counsel, submitted that the Court of Appeal failed to reevaluate the evidence as would have been expected of them. The appellant should have been cleared of robbery and convicted of being a receiver of stolen property.

Ms. Betty Khisa, Principal State Attorney, for the respondent, supported the conviction, the sentence and the judgments of both the High Court and the Court of Appeal. In her opinion, the doctrine of recent possession as a basis for convicting and sentencing the appellant for robbery was properly applied. Ms. Khisa contended that the court must be guided by the nature of the item which was stolen, a bicycle in this case. The robbery took place between 7 and 8 p.m. at night, yet by

early morning, the appellant was already in the business of selling the same bicycle as its true owner. Counsel for the respondent distinguished between the circumstances of the present case and those surrounding the Obonyo case (supra) cited by counsel for the appellant. In Khisa's submission the items in the Obonyo's case which were found on the appellants whose convictions were subsequently quashed were easily disposable and they included items which were damaged or of little value. These included a broken pen, a few cigarettes, a rupee and sun glasses.

On the other hand, in the same case, one appellant who had been found in possession of items such as burnt-out detonator and gelignite, which were not easily disposable, had his conviction upheld and sentence confirmed. In this case, the courts below looked at the circumstances surrounding the robbery of the bicycle, its possession and attempts to dispose of it in Kisenyi, and concluded that the appellant was the robber.

In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation of how he or she came to possess the goods otherwise the evidence of recent possession would justify his/her conviction. On this aspect of circumstantial evidence, S 112 of the Evidence Act (Cap. 43) provides:-

> "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural, events, human conduct and public and private business in their relation to the facts of the particular case".

In Kantillal Jivarai and Another V.R (1961) E.A. 6. the Court of Appeal for East Africa at Page 7 said:

> "It is of course, well established and the learned resident Magistrate properly directed himself, 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 in reference of fact which may be drawn as a matter of common sense from other facts including in particular, the facts that the accused has in his possession

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property which it is proved has been unlawfully obtained shortly before he was found to be in possession of it."

In DPP v Neiser (1958) 3 WLR 757, The doctrine of recent possession was said to be merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused person must be incompatible with the innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt according to particular circumstances. It is open to a court to hold that unexplained possession of recently stolen articles is incompatible with innocence. But guilt in this context may be guilt either of stealing or of receiving articles in question. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account. A shopkeeper dealing in secondhand goods would naturally suggest receiving rather than stealing.

In this case evidence that the bicycle was found in a notorious place where, stolen goods are normally sold, was given at the trial but was not taken into consideration by either the trial judge or the Court of Appeal. This is an omission, and may be its consideration could have led to the courts to hold that the appellant was a mere receiver and not a robber. However, was no evidence of admission or adduced by the appellant at all, that he was a receiver and not a robber.
This court, examined the doctrine at length in the case of Erieza Kasaijja v. Uganda, Crim. App.No. 21/91 (unreported)
In that case, the appellant Erieza Kasaija was convicted on a charge of simple robbery contrary to sections 272 and 273 (1) (b) of the Penal Code Act. This court analyzed that case in relation to the elements of the doctrine of recent possession as a basis for convicting for robbery. Except for the sentencing, the Court of Appeal agreed with the findings of the trial judge.

The facts of the Erieza Kasaiia case may be summarised as follows : The appellant had entrusted a stolen bicycle to one Stephen Agaba. The appellant's defence was that he was not in possession of the stolen bicycle, that it had been planted on him by the police. The trial judge rejected the evidence which tended to show that the appellant had been properly identified as one of the robbers at the scene of the robbery but accepted the prosecution's evidence that he had been found in recent possession of the complainants' property. The court stated In the Erieza Kasaiia case (supra) . that :

> "In the case before the learned judge, it would have been wiser to have abandoned the identification evidence and relied on that of recent possession....At length the case boils down to unreliable evidence of identification.... and secondly, firm evidence of recent possession, a species of circumstantial evidence, is that if the accused is in recent possession of stolen property, for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief, or the receiver of the stolen goods, according to the circumstances. Hence, once the appellant has been proved to have been found in recent possession of stolen property, it is for the accused to give a reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be true. If he does so then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence"

Later, in the judgment, the court makes a conclusion on the subject of the doctrine of recent possession thus:

> "In so far as the learned judge was dealing with the case of recent possession she was right to observe that in the absence of explanation of the accused to account for his possession that would give rise to the presumption that the accused is either a thief or receiver of such property.
> ....Altogether the learned judge came to a sound conclusion that the appellant was found in possession of the stolen bicycle and cloth on the morning after the robbery. On this finding the inference of theft was most reasonable. Accordingly, the conviction of robbery was sound".

Similarly, in R.v. Bukai s/o Abdallah (4) (1949) 16 E.A.C.A. 84 it was observed,

> "That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all circumstances of a case point to no other reason able conclusion, the presumption can extend to any charge however penal."

In the present case, It is quite clear from their judgment, that both the High Court and Court of Appeal properly applied the doctrine of recent possession. They reviewed the available authorities on the subject. For instance, the Court of Appeal distinguished the circumstances of this case from those which obtained in Kigoye and another v. Uganda (1970) E.A. 403, considered the circumstances to be taken into account before a court applies the doctrine of recent possession as was done in Simon Musoke v.R. (1958) E.A. 715. Referring to the gist of this latter case, the court observed, at p. 3 of its judgment, that :

> "In a case depending exclusively upon circumstantial evidence, the court must, before deciding on a conviction, find that inculpatory facts are incompatible with innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt".

Returning to this appellant, the Court of Appeal found that in the instant case, the learned trial judge believed the evidence adduced by the prosecution that on 20th December 1993 at 8 p.m. a violent robbery took place at Wampewo Avenue, Kololo in which the complainant was seriously assaulted and his bicycle stolen.

Barely twelve hours later, the bicycle was found in possession of two boys who were offering it for sale as agents of the owner.

The appellant as the owner was soon thereafter introduced and agreed to sell the bicycle as owner to Mr.Wanjala (PW4). Under the circumstances, the doctrine of recent possession required the appellant to give a reasonable explanation. The learned trial judge properly evaluated the evidence and correctly applied the law. Thus having reviewed the ingredients of the doctrine of recent possession and the leading authorities on it, she concluded at pages 11-12 of the judgment:

> "In the instant case, I have taken into account the fact that the complainant's bicycle was found in the Accused's possession 12 hours after it was stolen. Ordinarily such a lapse of time would be too short for the thief to have disposed of an item like a bicycle which by its nature does not easily change hands, being an item that is peculiarly identifiable by a serial number. The Accused himself in his statement never claimed to have received the bicycle from anybody. In the circumstances, the possibility that the Accused was merely a guilty receiver can safely be excluded and the inference that he was the thief that stole the complainant's bicycle, is irresistible. Also looking at the evidence as a whole, I find no other co-existing circumstances which would weaken or destroy the inference of guilt. . ." In conclusion, I find that the prosecution has proved beyond reasonable doubt that William Izongoza, on 2 0/12/93 at Wampewo Avenue, Kololo robbed James Wakholi on_ a Hero bicycle S/NO 17508 and at or immediately before the said robbery, caused grievous harm to the said James Wakholi"

It is also clear from her judgment that the trial judge considered and excluded the possibility that the appellant was a mere receiver. The Court of Appeal took all this into account.

We are not persuaded, by the arguments advanced by learned Counsel for the appellant. We agree with counsel for the respondent that both the trial judge and the Court of Appeal were correct in their respective judgments. The ground of appeal must fail. The appeal is dismissed.

Delivered at Mengo this 7th day of January 1998

J.W.N 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

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