THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

(CORAM: TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJ.SC).

CRIMINAL APPEAL NO. 03 OF 2008

KAKOOZA GODFREY :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[An Appeal from the Judgment of the Court of Appeal at Kampala **arising from Court of Appeal Criminal Appeal No. 22 of 2005** ***(G.M. OKELLO, S.G. ENGWAU, S.B.K., KAVUMA, JJ.A); dated 19th May, 2008.***

Criminal procedure – simple robbery – Doctrine of recent possession – application of the doctrine of recent possession – arresting officer – effect of failure by prosecution to call evidence of arresting officer.

Evidence – Evaluation of evidence – when can a second appellate court interfere with findings of the lower court

Held: appeal dismissed

JUDGMENT OF THE COURT

This is a second appeal by the appellant, Kakooza Godfrey, against conviction for simple robbery.

The brief facts as given in the judgment of the Court of Appeal are that on 6th December, 2001, at Semawata Road, Ntinda, Kampala, a motor vehicle Reg. No. UAD 058 H was robbed from one Kababa Ronald, its lawful owner. The said Kababa together with Francis Muhamiriza and Loyd Tusiime were travelling together when at about 9.00 p.m. at the above mentioned place they were confronted by three thugs who emerged from the roadside and blocked the vehicle. The thugs ordered the occupants of the vehicle to get out of it. At the time of the robbery or immediately before or immediately after the said robbery, one of the thugs, later identified to be the appellant, threatened to use what appeared to be a deadly weapon, to wit, a gun on the said

Kababa. Thereafter, the thugs sped off in the robbed motor vehicle. Kababa reported the incident to Ntinda Police Post.

Three days later, Kababa was informed by the Police that his motor vehicle had been recovered in Kenya while in the possession of the appellant. Kababa then travelled to Kenya where he identified his vehicle. Subsequently, extradition proceedings were initiated in Kenya against the appellant as a result of which the appellant was returned to Uganda and charged with and tried for aggravated robbery contrary to Section 285 of the Penal Code Act. At the said extradition proceedings, both Kabaka and Francis Muhamiriza had identified the appellant as one of the thugs that had robbed the vehicle from them.

At the trial in this country before the High Court, however, prosecution failed to prove the deadly nature of the weapon used in the robbery. Consequently the appellant was acquitted on capital robbery but was instead convicted of simple robbery and sentenced to 18 years imprisonment.

The appellant then appealed to the Court of Appeal against both conviction and sentence. In that Court, it was argued for the appellant that there had not been proper identification as there had been no identification parade organised. He also argued that there was no direct evidence to show that the appellant was in possession of the vehicle at the time of his arrest. He therefore argued that his conviction based on the doctrine of recent possession was wrongful and should be quashed.

The Court of Appeal, while agreeing with the trial Judge that there was no reliable direct evidence of identification, nonetheless found that the appellant had been properly convicted under the doctrine of recent possession. The Court of Appeal also did not find the sentence of 18 years imprisonment illegal or excessive. Accordingly that court upheld the conviction for simple robbery and confirmed the sentence of 18 years imprisonment. The appellant lodge this appeal against conviction.

In this Court, the appellant, through his lawyer, Robert Tumwine of Kanyunyuzi & Co. Advocates, filed two grounds of appeal as follows:-

1. ***"The learned Justice of Appeal erred in law and in fact when they totally failed to properly re-evaluate the whole evidence on the file in its entirety thereby leading to a wrong decision.***

2. ***"The learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence in relation to correct identification leading to a wrong finding."***

Counsel for the appellant elected to argue both grounds together. In his arguments, counsel at first argued that the appellant had not been properly identified at the scene of crime and that no proper identification parade had been organised. However, he quickly abandoned this argument upon realising that the trial court had in fact addressed itself to that aspect of the case, evaluated the evidence and came to the correct conclusion that the evidence of direct identification was lacking and could not convict the appellant on that evidence. The court had convicted the appellant on the basis of the doctrine of recent possession as it was proved that he had been found in possession of the stolen vehicle in Kenya only three days after it was robbed in Uganda.

Counsel then concentrated his arguments on the matter of the doctrine of recent possession. He argued that even that doctrine had not been properly applied by both the trial court and the Court of Appeal. He contended that there was no evidence of the arresting officer to prove that in fact the appellant was found in possession of the vehicle at the time of his arrest. He pointed out that the appellant in his unsworn statement in court had claimed that he was arrested while travelling in a taxi. Counsel attacked the evidence of Benson Kasyoki, PW3, the Police Officer from Kenya who received the report of the interception of the stolen motor vehicle and the arrest of the appellant as hearsay. He therefore submitted that the doctrine of recent possession had been wrongly applied by the trial court and wrongly confirmed by the Court of Appeal. He prayed that this court allows the appeal quashes the conviction and sets aside the sentence.

In his reply, Mr Oditi, Principal State Attorney for the respondent, supported the decision of the Court of Appeal. He argued that the stolen vehicle had been intercepted in Kenya by Kenya

Police after they had been alerted by **INTERPOL**. The person who was arrested with the vehicle had his particulars taken on record. This information was then submitted to (PW3), a senior officer who was entitled to receive that information and act upon it, which he in fact did, leading to the extradition of the Appellant to Uganda. He submitted, therefore, that the evidence of the arresting officer was not necessary and its omission was not fatal to the conviction. The learned Principal State Attorney further pointed out that the appellant's alibi that he was arrested from a taxi was found both by the trial Court and the Court of Appeal to be a pack of lies. He submitted that the appellant was correctly convicted, and urged this court to uphold the conviction.

We think that the real issue to resolve in this appeal is whether the Court of Appeal as well as the trial court correctly evaluated the evidence, correctly applied the doctrine of recent possession, and correctly convicted the appellant.

As a second appellate court, we are aware that the two lower courts reached concurrent findings of fact as to whether the appellant was in fact found in possession of the stolen motor vehicle. We can only interfere in those concurrent findings if we are satisfied that the two courts were grossly wrong and or applied wrong principles of the law. We are mindful of the fact that we did not see the witnesses at the trial.

That said, we note that the Court of Appeal was aware of its duty as a first appellate court. In its judgment, at page 8, it stated thus:-

> ***"We are alive to duty of this court, being a first appellate court, to re-evaluate the entire evidence on record and come to its own conclusion bearing in mind that it did not see the witness testify. See KIFAMUNTE HENRY –Vs- UGANDA SCCA NO. 10 OF 1997 – See also PANDYA –Vs- R 1957 EA 336, and OKENO –Vs- REPUBLIC [1972] EA 32."***

Clearly, the Court of Appeal guided itself as to the law regarding its duty to re-evaluate the evidence. The court then set out, in great detail to consider the entire evidence on record before

coming to the same conclusion as the trial court had reached. The court cited with approval, a lengthy analysis of the evidence by the trial Judge and agreed with his conclusions.

In agreeing with the trial Judge the Court of Appeal also found that the conditions for identification at the scene of the crime were not favourable for a proper identification of the appellant, and that no identification parade had been conducted.

The court stated:-

> ***"No identification parade was conducted. These were not favourable conditions for proper identification of the appellant. No wonder, the learned trial judge opted, and rightly so in our view, to rely on the doctrine of recent possession as supported by the evidence on record as ably and elaborately set out in the above quotation of part of the learned trial judge's judgment. This approach adopted by the learned trial judge was proper. It did not occasion any miscarriage of justice to the appellant. The information about recent possession was given by the Kenya Police, Parkland Tracking Unit to PW3 who properly received it as police officer attached to Interpol Kenya. The evidence of PW3 based on this information is therefore, not hearsay as contended by counsel for the appellant. It was admissible evidence and it was properly admitted by the trial court. That evidence neatly connected the appellant with the robbery and fixed him as the one found in possession of the robbed motor vehicle."***

Counsel for the appellant raised the issue of the failure to call the police officer who arrested the appellant. Indeed, we are of the opinion that it would have been desirable to call the evidence of the arresting officer, especially in view of the unsworn evidence by the appellant that he was arrested from a taxi. However, we find that the trial Judge correctly addressed himself to this issue when he stated, at page 8 of the judgment, thus:-

> ***"True there is no evidence of the arresting officer from Kenya. But circumstantial evidence is receivable in criminal cases. But it is 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. After giving myself this warning I find that circumstantial evidence here pointed***

irresistibly to the accused as the person found in possession of motor vehicle Reg. No. UAD 058 H in the Republic of Kenya."

Having re-valuated the evidence ourselves, we find no reason to interfere with the findings of the Court of Appeal and of the High Court. The police in Kenya did intercept the vehicle stolen from Uganda. It was clearly proved stolen. The police took down the particulars of the person found in possession of the vehicle and he remained in police custody. His particulars were then communicated to PW3, a senior police officer, and who in turn communicated those particulars to Uganda police. As the Court of Appeal correctly observed, the explanation given by the appellant as to how he found himself in police custody was neither reasonable, innocent nor convincing. The court was right to reject it and accept the evidence of PW3.

We also find that the Court of Appeal correctly applied the law with regard to the doctrine of recent possession thus:-

"Considering the application of the doctrine of recent possession in criminal trials in BOGERE MOSES and ANOTHER –Vs- UGANDA, (SCCR APPEAL NO. 1 OF 1997), the Supreme Court had this to say:-

"It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable that eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the later solely depends on the credibility of the eye witness."

This position of the law was correctly applied to the facts of this case. We are satisfied that the prosecution proved its case beyond reasonable doubt.

In the result, we find no reason whatsoever to depart from the findings and decision of the Court of Appeal. This appeal is accordingly dismissed.

Delivered at Kampala this 18th day of October 2010.

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J. W. N. Tsekooko

Justice of the Supreme Court

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B. M. Katureebe

Justice of the Supreme Court

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C. Kitumba

Justice of the Supreme Court

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J. Tumwesigye

Justice of the Supreme Court

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E.M. Kisaakye

Justice of the Supreme Court