

UGANDA / JUDGMENT

Uganda v No. RA 25721 cpl. Mukasa (Criminal Session Case 289 of 1992) [1993] UGHC 66 (17 August 1993) [1993] UGHC 66

COURT
High Court of Uganda

BEFORE
GM OKELLO, J

CASE / FILE NUMBER
Criminal Session Case 289 of 1992

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II' TIE Ej'. Gr. COURT OF UGANDA - AT KAMPALA - HOID7JN AT GULU HIGH COURT CRIMINAL SESSIONS CASE NO.289/92 (Original Criiainal Case No. MG. 31/91)

UGANDA PROSECUTOR.

- versus -

NO. RA ²⁵⁷²¹ CPL T.'iUICASA ERIC ACCUSED.

BEFORE: TIE HONOURABLE IIR. JUSTICE G. M. OKELLO.

I14M1 JUDGMENT >JR , • ^a ..

The accused in this case is a FRA soldier ITo. RA ²⁵⁷²¹ Cpl. Mukasa Eric. Ho was indicted for aggravated Robberycontrary to sections 272 end 273(2) of the Penal Code Act. The offence was alleged to have been committed by the accused and others who are still at largo on the night of 15-16/1/91 at Kabodo-opong village, Patiko Division of Gulu District. They were alleged to have robbed Vincent Oryem of his Roadmaster bicycle frame No. 166819 and cash of shs. 2,000/= and that in the course of the theft, they used a deadly weapon to wit a gun.

It was the case for the prosecution that in the night of 15-16/1/91 the complainant Vincent Oryem and his family had already retired to bed in their Residence at Kabodo opong village in Patiko Division when at about midnight, their house was attacked by throe gun mon in military uniform. Each of the gun non had a torch. They knocked at the door of the complainant¹ s house. When they failed to gain entrance into the house through the door, the assailants fired a gunshot and broke into the house through the window. Two of -them entered the house. In

the house, they held, the complainant at gun point and demanded money from him. He gave them two thousand shillings. Not satisfied with that amount, one of the assailants grabbed the complainant's Roadmaster bicycle frame No. 66819 and walked out with it. When the complainant protested the taking of his bicycle, one of the assailants again fired a gunshot in the air. This subdued the

On 11th March 1993, the complainant went to the cash of 2,000/=. The complainant did not identify any of the assailants.

On the following morning the complainant reported the matter to the authorities and the police giving them the particulars of the bicycle. A few days later, John Ocaya bought a bicycle from a seller in town. It was a Roadmaster bicycle. Its frame number was found to be the same with that of the bicycle which was robbed few days earlier from the complainant.

On realising that the seller had sold him a stolen bicycle, John Ocaya (F.75) laid a trap and the accused was arrested a few days later as the seller of the stolen bicycle. He was taken to Oulu Police Station and was eventually indicted for this offence.

The accused denied the offence and pleaded an alibi. That he was elsewhere when the Robbery was being committed. He also denied ever owning or soiling any bicycle to anybody.

It is trite law that to secure a conviction of an accused in any criminal offence, the prosecution must prove his guilt beyond reasonable doubt. This burden does not shift to the accused because an accused has no duty to prove his innocence. Even where an accused has set up an alibi as his defence to the charge against him, it is still the duty of the prosecution to disprove that alibi by leading evidence which places the accused squarely at the scene of crime.

See *SicMtolekc -vs- b* •

In order to secure a conviction of an accused of aggravated Robbery, all the essential elements in the offence must be proved beyond reasonable doubt. In this case, the prosecution must prove: -

- (a) that there was theft of the complainant's Roadmaster bicycle or cash of shs. 2,000/=;
- (b) that a deadly weapon was used or threatened to be used in the course of the theft;
- (c) that it was none else but the accused who committed the offence.

I shall consider (a) and (b) above together. To begin with, a deadly weapon has been defined in sub-section 2 of section 273 of the Penal Code Act to "include any instrument made or adapted for shooting or cutting or stabbing or any instrument which when used for offensive purposes is likely to cause death." Whether the deadly weapon is a gun, its deadly nature must be established either by expert evidence showing that the gun is capable of discharging bullets or by other evidence showing that the gun was fired in the course of the commission of the offence.

In the instant case, the evidence of the complainant (P»71) shows that his Roadmaster bicycle frame No. 16681⁹ and cash of shs. 2,000/= 'wore in the night of 15-16/1/91 stolen by three gun men each of whom had a torch and in military uniforms. That in the course of the theft, the assailants fired two gunshots. This evidence was admitted by the defence under section 64 of the TID. In his address to ??o, counsel for the accused further conceded that there was theft of the Roadmaster bicycle and cash of shs. 2,000/= all belonging to the complainant. He further conceded that there was use of a deadly weapon in the course of the theft since two gunshots were fired.

from the above evidence, I have no difficulty to find like the Assessors, that there was theft and use of a deadly weapon in the course of the theft. Those two elements in the offence have therefore been sufficiently established by the prosecution.

Tills now leads me to consider the question, who committed this offence? The prosecution contended that the offence was committed by the accused. That the accused was found in possession of the stolen Roadmaster bicycle within 48 hours of its theft

The principle of the law governing the doctrine of Recent Possession was correctly pointed out by the Senior Resident State Attorney. It is that when a person is found in possession of the goods recently stolen, there arises a presumption that he is either the thief or the Receiver of the goods with knowledge of its theft.

See TIWAJ & ANOR \$-vs- R\$ (1961) EA 6 at 7.

The duty to rebut the presumption is on the accused. The standard of proof required of the accused to rebut the presumption is however low. It is only on the balance of probabilities.

The prosecution relied on the evidence of PV5, PV6 and PV4 to show that the accused was found in possession of the stolen Roadmaster bicycle (Exh. F1) within 48 hours of its theft.

John Ocaya (P.75) testified that on 17/1/91\$ he bought a relatively new Roadmaster bicycle from the accused in Gulu town. That at the time of the sale, the accused was in company of three other men and sold the bicycle at shs. \$20,000/\$ =. That despite a one-hour-long bargain, the accused could not reduce the price as he said he needed the money to look after his wife who was sick in Hospital. That he paid to the accused \$19,000/=\$

having withheld \$1,000/\$ = to be paid later when the accused produced the document pertaining to the bicycle. That the accused had assured him that he had bartered the bicycle with salt in Arua. That he had forgotten the document relating to his ownership of the bicycle at home and promised to produce it the following day. RUS was emphatic that he properly observed the seller of the bicycle during the bargain which lasted for one hour and that he had thereby properly identified him as the accused.

P75 further testified that when he discovered that he had bought the bicycle which was stolen from Vincent Gryen, he at once alerted the owner of the bicycle and the RC officials of his purchase of the bicycle and later assisted in the arrest of the accused who sold him the bicycle.

The evidence of (Not Francis (PM6) corroborates the evidence of John Ocaya (PW5) in all material particulars relating to the purchase of the bicycle. He was together with John Ocaya when the latter bought the bicycle.

The evidence of Yovan Ojok (\$PW4\$) shows that in 1991 he was the chairman RC.111 of Gulu Bazaar. That in the afternoon of 17.1.91 the accused who was in company of three others came to his office and introduced themselves as soldiers who had recently been transferred from Arua. That they had a bicycle and wanted him to witness its sale. Me further testified that he declined the request before their ownership of the bicycle was first verified by their commander. That the accused who did the talking, promised to bring a document from his commander verifying his ownership of the bicycle. But that the accused never returned.

The Senior Resident State Attorney who appeared for the prosecution invited court to find the above witnesses for the That their evidence of identification prosecution credible. that should be believed and the accused be found to have been found in possession of the bicycle which was stolen from Vincent Oryem 48 hours earlier.

The accused denied that he was ever found in possession of the bicycle. He denied that he ever owned a bicycle nor sold any to any body.

Mr. Atare dismissed PV5 and PV6 as unreliable and invited court not to believe them. He invited court to believe the accused's unsworn statement. In his statement, the accused told court that at the time of the alleged Robbery he was at his Camp at Turongo. That he came to Gulu on 17.1.1991 to attend a meeting which was scheduled to be held in the Gulu Amay Barracks. That the meeting did not take place until 19.1.1991. That the meeting lasted until about 5.00 p.m. That after the meeting, he went to the Gulu main Market to purchase for himself some provisions before he proceeded to his station at Purongo. That it was at this time that he was arrested by unknown people. That he was eventually charged with this offence.

\$5\$

The question whether the accused was accurately identified as the version who sold the stolen bicycle to John Ocaya or not is a matter of credibility of the witnesses who testified on the fact. I did direct the Assessors as I now direct my mind to the law governing assessment of credibility of witnesses. It is that in assessing the credibility of witnesses, their consistencies or inconsistencies are relevant factors for consideration. Grave inconsistency unless satisfactorily explained, usually but not necessarily results in the evidence of the witness being rejected. Minor inconsistency however, unless it points to a deliberate falsehood, usually does not have the same effect. In any case a trial Judge may find a witness substantially truthful even though/had lied in some respect. This principle of the law was stated in Alfred Tajar -vs- Uganda (1969 (E. A. C. A Criminal Appeal No. 167/69.

In the instant case, Mr. Atare attacked the credibility of John Ocaya (PW5) on two grounds: -

\$(a)\$ that the conduct of John Ocaya in the alleged purchase of the stolen bicycle was suspicious. That after the purchase of the bicycle and when he was informed that the bicycle which he bought might be the one which was stolen from Vincent Oryem, PJ5 avoided to face Vincent Oryem. That instead he was sending his younger brother for any information he wanted concerning the bicycle from the owner.

(b) that PV5 later decided to report his purchase of the bicycle not to the RC of his area but to the RC of another area and could not explain in cross-examination why he did that.

The learned counsel submitted that the above conduct of John Ocaya was suspicious and showed that he was one of those who robbed the bicycle. He prayed that the evidence of this witness be treated with a caution.

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I directed the assessors as I now direct my mind, that where a witness for the prosecution was shown to have proved motive to tell lies against the accused, the evidence of that witness must not be acted on unless it is corroborated. This principle was stated in JA

In the case before me, the evidence on record do not show that the conduct of John Ocaya was blameworthy. He bought the bicycle from a seller in town. When he was informed of the theft in their village and of the fear that the bicycle which he bought might be a stolen one, he immediately sent his younger brother to alert the person whose bicycle was stolen and sought particulars of the stolen bicycle. On confirming that the bicycle which he bought was the one stolen from Oryem in their village, he at once sent his brother to alert the owner of the bicycle and the HC of the village having bought the stolen bicycle. Later he assisted in the arrest of the seller. I do not find anything blemish with the above conduct of John Ocaya. It was not necessary that he had to go in person to alert the owner of the bicycle and the RC of his purchase of the bicycle. There is in my view no fault to dent the credibility of PW5. There was no evidence of proved motive on the part of PW5 to tell lies against the accused. PJ5 denied that he had any grudge against the accused. This was confirmed by the accused himself. There is therefore no known reason why John Ocaya should pick on the accused and frame him with this serious offence.

Ocaya (P-75) told court that the sale transaction took time in a broad day time and lasted for one hour*. That during this time he had ample time to observe the seller whom he accurately identified as the accused.

The evidence of identification was corroborated by the evidence of PW6 - Okot Francis. He was present during the sale transaction and was able to identify the seller of the bicycle as the accused. Two days later he was the one who spotted the accused

y' In the instant case, the theft was committed in the night of 15-16/1/91 and three days later, the accused was found in possession of the bicycle. The possibility that he is a receiver with knowledge of its theft has not been ruled out and there is no compelling evidence to the inference that he was the thief. In those circumstances, I find that it was not sufficiently proved that the accused was the thief. I however find him guilty of being a receiver of the bicycle with knowledge of its theft and convict him as such - c/s 298 (1) of the Penal Code Act.

G. M. Okello

Judge 17/8/1993.

S. R. S. As

The accused has no known record of previous conviction. He may be treated as a first offender. However, I pray for a stiff sentence - a deference one. This offence carries a maximum of 14 years imprisonment. Had the bicycle been simply stolen and the accused received it he would still be liable to 14 years imprisonment. But this was not ordinary theft. Violence and deadly weapon was used in the theft. This violence was transmitted to the receiver. This therefore calls for a stiff sentence. If he had been found the thief he would have been sentenced to death.

I pray that you disregard any alleged hardship to him or to his family because he knew of the theft. His long stay on remand should be disregarded. This is a border line case of which the accused took advantage of a legal technicality. Had I the power I would ask for a maximum sentence in this case. I pray for a deference sentence.

£1 ' A •'

Accused is a first offender, Had been on remand for over 2½ years from 19/1/91- He is married with 2 children. The family had been sent home after his arrest. He does not know how his family are. The stolen bicycle has been recovered. Accused is very sorry for involving himself into receipt of this bicycle. I pray for leniency.

SELF TEST CJJ

The offence of which the accused stands convicted carries a maximum sentence of 14 years imprisonment. It is a serious one. The theft was committed with violence. A deadly weapon was used. The accused received the bicycle with knowledge of the theft, This makes the receiving quite serious too.

I note that he is a first offender and had been on remand in custody for 2½ years. This is a factor which this court takes into account in his favour. In the whole, the sentence must be commensurate with the offence. Considering all the above factors, I consider that 4½ years is commensurate to the offence. Accused is therefore sentenced to 4½ years imprisonment.

G. Okello

Judge 17/3/1993-

ORDER: -

The bicycle Exh. P.1 be returned to the complainant Vincent Oryom.

C-. M. Okello Judge 17/8/1993.

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