**Kibuuka v Uganda**

[2006] 2 EA 140 (SCU)

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 4 November 2006

**Case Number:** 3/04

**Before:** Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJSC

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Appellate procedure – Duty of first appellate court – Re-evaluation of the evidence on record –*

*Whether the court had adequately discharged its duty.*

*[2] Criminal law – Kidnapping with intent to murder – Elements of the offence – Taking by force or*

*fraud – Intent to commit offence of murder – Whether necessary intent proved – Section 235(1)(*a*) and*

*(2) – Penal Code.*

*[3] Evidence – Alibi – Onus of proof – Burden always on the prosecution to disprove alibi – Whether*

*prosecution had discharged burden.*

*[4] Evidence – Identification – Corroboration – Former statement made by a witness relating to a fact –*

*Whether identification of the appellant as the kidnapper was proper – Whether evidence of complainant*

*was corroborated – Section 155 – Evidence Act.*

**Editor’s Summary**

The appellant was convicted of the offence of kidnapping with intent to murder by the High Court and

sentenced to 20 years’ imprisonment. At his trial, it was alleged that the appellant had had an affair with

his niece, AN, which had

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resulted in the birth of a boy. Evidence was adduced to the effect that on 24 October 1998 at about 8pm.

The appellant had sent for AN to come from her brother’s house and meet him. Following their meeting,

she returned to her brother’s house. Later that night, the appellant again sent for her. Because her child

was crying, her brother requested her to take the baby with her. Some time later, AN returned to her

brother’s house crying that the appellant had taken her child away from her. The following day she

reported the matter to her mother as well as to the authorities. The appellant was later arrested but the

child was never seen again.

In his defence, the appellant put forward an alibi to the effect that on the night in question he had been

at the mosque, after which he had visited a friend then gone home. He called his friend as a witness to

support his alibi. He also denied having indulged in an incestuous relationship with AN. The trial judge

believed the prosecution case, rejected the defence evidence and convicted the appellant. His first appeal

to the Court of Appeal was rejected.

He now appealed to the Supreme Court on the grounds that the Court of Appeal erred in finding that it

was he who had kidnapped the child, that it had failed to scrutinise and re-evaluate the evidence and that

it erred in regard to the alibi. Counsel for the appellant also argued that the prosecution had failed to

prove that the appellant had the intention to murder. Counsel for the respondent supported the Court of

Appeal’s decision and argued, *inter alia*, that the Justices of Appeal had correctly directed their minds to

the law and evidence regarding the offence of kidnapping with intent to murder and had properly

evaluated the evidence and arrived at the right conclusion. She also argued that it was not necessary to

include section 235(2) in the indictment and that what had been included in the particulars of the offence

had been sufficient to explain to the appellant what he was charged with.

**Held** – It was the duty of a first appellate court to properly scrutinise and re-evaluate the evidence of both

the prosecution and the defence; *Abasi v Uganda* and *Bogere Charles v Uganda* followed. In this

instance, the Court of Appeal had properly discharged this duty and had not faulted the trial judge’s

findings on the complainant’s credibility as a single identifying witness.

Section 155 of the Evidence Act provided that any former statement of a witness relating to the same

fact made at or about the same time the fact took place could be proved to corroborate the testimony of

that witness. Such a statement must have been made either (*a*) at or about the same time when the fact

took place or (*b*) before any authority legally competent to investigate the fact; *Ndaula John v Uganda*

applied. In this instance, the statement made by AN to her brother that her child had been taken away

satisfied the provisions of section 155 and was provable against the appellant.

The Court of Appeal rightly upheld the findings of the trial judge that a love affair had existed

between the appellant and AN.

Counsel for the respondent’s submission that it was unnecessary to include section 235(2) in the

statement of the offence was erroneous. The inclusion of the subsection was necessary to inform the

accused of the relevant ingredient that the prosecution must prove in order to secure a conviction. The

omission by the prosecution of section 235(2) in the statement of the offence did not occasion a

miscarriage of justice nor did it prejudice the appellant. The prosecution

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evidence brought out the fact that the child had not been seen since the kidnapping and intention to

murder was thus rightly presumed and proved.

It was well settled law that an accused person who raised an alibi did not have the burden of proving

it; *Sekitoleko v Uganda, R v Johnson* and *Leonard Aniseth v R* followed. In this instance, the Court of

Appeal had reviewed all the evidence for both sides and agreed with the trial judge in rejecting the

appellant’s alibi and there were no grounds for interfering with this finding.

The sentence imposed on the appellant was lawful and hence the appeal against its severity was

barred by section 5 of the Judicature Act.

Appeal dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Abbasi and another v Uganda* criminal appeal number 10 of 1995 (SC) – **F**

*Bogere Charles v Uganda* criminal appeal number 10 of 1997 (SC) (UR) – **F**

*Bogere Moses and Kamba v Uganda* criminal appeal number 1 of 1997 (SC) (UR)

*Godfrey Tinkamarirwe and another v Uganda* criminal appeal number 5 of 1986 (SC)

*Ibrahim Bilal v Uganda* criminal appeal number 5 of 1995 (SC) (UR)

*Kifamunte Henry v Uganda* [1997] LLR 72 (SCU)

*Leonard Aniseth v Republic* [1963] EA 206 – **F**

*Mukoome Moses Bulo v Uganda* criminal appeal number 12 of 1995 (SC)

*Ndaula John v Uganda* [2000] LLR 130 (SCU) – **AP**

*Sekitoleko v Uganda* [1967] EA 531 – **F**

***United Kingdom***

*R v Johnson* [1961] All ER 1967 – **F**