

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO.

CRIMINAL SESSION CASE NO. 84 OF 2004

UGANDA..... PROSECUTION

Versus

A1. OFONO MATIAS

A2. ALECHO JULIUS..... ACCUSED

**BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI-KAGABA.**

**J U D G M E N T**

Ofono Matias and Alecho Julius, who I shall refer to as accused No. 1 (A1) and accused No.2 (A2) in the rest of my judgment are jointly indicted for robbery contrary to sections 285 and 286 (2) of the Penal Code Act. It is stated in the indictment that Ofono Matias and Alecho Julius, in the night of 16<sup>th</sup> August 2001 at Kasimizi village, in Mukono District. In Count 1, robbed Nalongo Resty of a weighing scale and Shs. 200,000/= and at or immediately before or immediately after the said robbery threatened to use a deadly weapon, to wit a gun on the said Nalongo Resty.

In Count 11 robbed, one Shaban Mukalazi one weighing scale, six pairs of sleepers, six boxes of cigarettes and other unidentified shop items, and at, or

immediately before or immediately after the said robbery, threatened to use a deadly weapon, to wit, a gun on one Birungi Sylvia, wife to Mukalazi Shaban, and in Count 111 robbed one Mafabi Zimula of one weighing scale, two boxes of Cigarettes and cash Shs. 45,000/=, and at, or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun on the said Mafabi Zimula.

Both accused pleaded not guilty to all the three counts. They were represented at their trial by Kafuko-Ntuyo while the prosecution was led by Ndamurani, a Senior State Attorney. The prosecution called eleven witnesses to prove its case.

The three victims lived and operated shop businesses in a placed called Kasimizi in Buvuma Islands. Nalongo Reste (PW6) knew both Ofono (A1) and A2 who she knew as Soweoyo, as people of the same village at Kidama. They (accused) had been going to her shop to drink alchol. In the night of 16/8/2001, two people kicked the door of her shop. Ofono had a torch. They demanded for money. Ofono got Shs. 75,000/= from Night Nantongo who was in the bedroom and another Shs. 125,000/= which the witness (Nalongo) had hidden under the pillow on her bed. All this while, Saweyo (A2) was guarding her at gun point and threatening to shoot her if she raised an alarm. The two accused made off with Shs. 200,000/= and her weighing scale.

Birungi Sylvia (PW11) is the wife of Shaban Mukalazi was in her shop in the night of 16/8/2000, while her husband Mukalazi Shaban was in the bedroom.

As a neighbour, Mbigo came running to her shop, she heard gunshots fired in the compound of her house. Two men first went to Mafabi's shop which was opposite and near to hers. The same two men, who included Ofono (A1) who she had known for five years, came to her shop. The short man, with a gun, remained at the entrance to her shop while the tall one (Ofono) entered the shop with a torch.

There was then a burning tadoba (locally-made lamp) which Ofono later blew off. The

witness stated, she recognised Ofono by the tadoba light, his familiar voice and light from the torch which he was flashing around as he collected the shop items.

That the same Ofono got the gun from the short man and threatened to shoot her if she did not give them money.

She gave Ofono Shs. 50,000/= from her brasier and Ofono got another Shs. 60,000/= from the box which was under the counter. The robbers made off with (a) Shs. 110,000/=, (b) a weighing scale, (c) three dozens of cigarettes, (d) six pairs of sleepers and (e) three torches.

Next day Nalongo Resty reported to Katende Salongo - the LC Vice Chairman that she recognised Ofono among the robbers and what they took: Birungi also reported the robbery to Jane, the LC1 Chairperson.

Katende Salongo - the Vice Chairman with Kalyango Erifazi (LC1 Secretary for Information),(PW4) collected three cartridges from the compound of Birungi (PW11), arrested Ofono (A1) and reported the robbery to the Police. A1 admitted to Kalyango, Nalongo Resty (PW6), Birungi Sylvia (PW11) that he and Saweyo had earned out the robberies and led them and the police to where A2 was hiding in the bush. A2 was smoked out of the bush, by a group of people who included PW4 and PW5 (AIP Kirya). A2 led PW4 and PW5 to where he had hidden the gun. The gun with a magazine carrying thirteen (13) live ammunitions was recovered by the Police who included P.C. Wafula (PW3) and AIP Kirya (PW5).

After A1 and A2 were arrested, they disclosed where they had hidden the weighing scales. They led the team which included Kalyango (PW4) , P.C. Wafula (Pw3), the two victims, (PW6 and PW11) to the lake shore. Ofono collected two scales from underneath the water and they (scales) were identified as the property of Mukalazi and Nalongo Resty (PW6) respectively.

The two suspects, the two weighing scales, rifle, thirteen rounds of live ammunition, four empty cartridges were handed over to D/C Ojuku (PW7) by D/IP Kirya (PW5). D.C. Ojuku, handed the said recovered items and the suspects to ASP Apamalco (PW8) who in turn, handed the exhibits to D/C Walco Stephen, who exhibited them in court. The two suspects were delivered to Lugazi Police Station by ASP Apamako.

The rifle, live ammunitions and empty cartridges were submitted to D/SP Gakyaro (PW1) as a ballistic expert. The said officer made his report on them, which was admitted as exhibit PI. The accused were examined by a doctor, who unfortunately, the court could not get his particulars. The doctor found, on Police Form 24 (Exhibit P.2), that A1 was aged 23 years old had no injuries and was mentally normal. A2 was found to be 30 years old, had no injuries and was mentally normal.

Lastly, IP Muzei Shahim (PW10) recorded charge and caution statements of each A1 and A2 separately on the 22/8/2001 and 23/8/2001 respectively. These statements were admitted after a trial within a trial.

In all criminal cases, except in a few statutory exceptions, the burden of proving every ingredient of the offence with which an accused person is charged, rests with the prosecution. The prosecution must prove the ingredients of the offence and the guilt of the accused beyond reasonable doubt.

The accused has no burden to prove his innocence or disprove the prosecution evidence. Any reasonable doubt created by the evidence as a whole, such doubt must be resolved in favour of the accused person.

The prosecution must succeed on the strength of its evidence and not on the weakness of the defence or lies told by the accused. I did explain to the assessors what the burden of proof means, the test to be applied and the meaning of a reasonable doubt. In the same

way, I direct and warn myself those legal principles.

***See: (1) Wamongo and others vs. Uganda (1976) HCB 74***

***(2) Woolmington vs. DPP (1935) A.C. 462***

***(3) Leonard Anisetlii vs. Republic (1963) E.A. 206***

***(4) R. vs. Johnson (1961) 3 All E.R. 969***

Two other features arise in this case. They are the doctrine of common intention and the identification of a witness. I guided the assessors as I also address myself to sections 19 and 20 of the Penal Code Act. Section 20 in particular reads:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”**

***See: (1) Solomon Mungai and others vs. Republic (1965) E.A. 123***

***(2) Dracaku vs. R. (1963) E.A. 363***

***(3) Lamambutu vs. R. (1958) E.A. 124***

***(4) Yusiifu Sebuguzi vs. Uganda - Criminal Appeal 6/1989***

***(5) Gereson Bihingangwa vs. Uganda - Criminal Appeal 22/1985(C.A)***

This offence was committed at night and the court must examine the conditions which enabled the witnesses to identify the assailant. The court may consider, such conditions, enabling proper identification, as

(a) the means and intensity of light available to the witness.

(b) the familiarity of the witness and the attacker and their interaction or association

(c) the duration of the commission of the crime

- (d) the proximity between the attacker and the victim
- (e) other peculiar features relevant to the assailant, such as, his body/physical features, tribal marks, his/her voice, mode of dress, style of walking and any other mannerism

It is the judge's duty and he must warn the assessors the need to examine those circumstances with caution before convicting the accused relying on the evidence of identification. The reason for such caution is that there is a possibility that a mistaken witness can be a convincing one. If the quality is good, the danger of mistaken identity is reduced, but the poor identification, the greater is the danger. However, the true test is not whether the evidence of the witness is reliable but whether that evidence can be accepted as free from any possibility of error.

**See: (1) *Abudala Nabulere & 2 ors vs.***

***Court of Appeal Criminal Appeal 9/1978 — (1979) HCB 77***

**(2) *George Wilson Simbwa vs. Uganda - Criminal Appeal 37/95 (S.C.)***

**(3) *Uganda vs. Kaweke Musoke (1976) HCB 12***

The two accused are charged on three counts of aggravated robbery and the prosecution must prove beyond reasonable doubt that:-

- (a) There was theft of some property capable of being stolen.
- (b) There was use or threats to use a deadly weapon, at, or immediately before or immediately after the said robbery.
- (c) It is the accused, individually or collectively with other persons sharing a common
- (d) Intention, that carried out the theft.

**See: (1) *Uganda vs. Mawa alias Matua. (1992-3) HCB 65 19***

The evidence of theft on the first count came from Nalongo Resty (PW6) how two assailants kicked the door to her shop open and after it was opened Ofono (A1) demanded and obtained from her Shs. 125,000/= and another Shs. 75,000/= from her sister, Night Nantongo. The two assailants took the total of Shs. 200,000/= and the weighing scale which was later recovered from under the lake and exhibited as exhibit exhibit P7.

On the second count Birungi Sylvia (PW11) the wife of Shaban Mukalazi told court how two assailants went to her shop: The short assailant had a gun at the entrance to the shop, while Ofono, who had a torch, entered the shop and started to demand for money with threats that Birungi would have lost her life if she did not give the money.

Birungi testified that she gave Ofono Shs. 60,000/= from her brasiers and Ofono picked up another Shs. 50,000/= from the box below the shop counter. The thieves took away with them-Shs. 110,000/=, a weighing scale (exhibit P.6) which was marked with her husband's name, three dozens of cigarettes, six pairs of sleepers and three torches. All the stolen items, except the weighing scale have never been recovered.

In addition to the evidence of Nalongo Resty (PW6) and Birugni Sylvia (PW1 1), Ofono, on being arrested, admitted to Nalongo, Resty, Birungi Sylvia, and Kalyango (PW4) that he and another person who had gone with the gun had robbed the two victims. As a result of this disclosure, the second accused was arrested and the gun (rifle) exhibit P3 recovered from the bush where A2 was hiding. Secondly as a result of A2's admission in the participation of the robberies the rifle, exhibit P3 was recovered with his (A2) direction, from the bush where he had been hiding.

Further admissions made by A1 (Ofono) to the two victims - (PW6 and PW1 1), Kalyango (PW4) and the police led to the recovery of the two weighing scales from underneath the lake by the search party who included PW6 and PW11, DIP Kirya (PW5) and PC Wafula (PW3) the three empty cartridges.

Under section 29 of the Evidence Act, it is provided that notwithstanding sections 23 and 24, when any fact is deposed to and anything is discovered in consequence of information received from a person accused of any offence, so much, of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

**See: Andrew Walusimbi and 4 others vs. Uganda - Criminal Appeal 82/92.**

If what Ofono disclosed to PW4, PW6 and PW11 is not confession because he disclosed the whereabouts of his co-accused and the weighing scales after the angry mob poured on him melted burning liquid from jerry cans, the information that he gave, and which information led to the arrest of A2 and the recovery of the weighing scales is relevant and admissible under the above-quoted section. (S.29).

See. Andrew Walusimbi Vs. Uganda –supra

Lastly, both Ofono (A1) and Aleco (A2) admitted robbing from Nalongo and Birungi in their charge and caution statements which were admitted as exhibits P9 and 11 after a trial-with-in-a trial.

I there find that in the night of 16/8/2001 Nalongo and Birungi (PW6-11) were victims of theft during which their property stated in counts 1 and 11 of the indictment were stolen.

A deadly weapon is defined in section 286(3) of the Penal Code Act as including any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes is likely to cause death.

**See: (1) Geresomu Bihinganwa vs. Uganda - Criminal Appeal 22/95 (1986) HCB1**

**(2) Uganda vs. Charles Komwiswa**

Was there the use or threats to use a deadly weapon on either Nalongo Reste (PW6) or Sylvia Birungi (PW11) or both?



According to Nalongo, she was ordered to open followed by the kicking of her door open at 11.00 p.m. Saweyo (A2) had a gun to which she was put at gun point as Ofono demanded for money. Before the thieves entered, the muzzle of the gun was pushed through the door into her face. She was ordered to sit down by A2.

The two accused persons, no doubt had a gun which they used to threaten Nalongo in order to instill fear in her. Once put in that frightful state, Nalongo gave them money to save her life. The gun was not fired.

On the other hand, the two accused went to Sylvia Birungi's shop at 9.30 p.m. before going to Nalongo's shop. Birungi heard gunshots outside simultaneously as Mbigo came to her shop and the thieves were attacking the shop of Mafabi who was a very close neighbour. The two assailants entered his shop as the short man (A2) was holding a gun while Ofono was holding a torch. The tall man threatened to kill her if she did not give them money. Indeed, Ofono got the gun from A2 pointed it at Birungi (PW11) and threatened to blow her up if she did not give them money. It was under such fearful circumstances, that the assailants took her money and other shop items which included a weighing scale.

**The three questions which the court has to answer are:**

- a) Whether there was use or threats to use a deadly weapon at, immediately before or immediately after the robbery on Nalongo Reste and Sylvia Birungi.
- b) Whether it is the same gun that was recovered from the bush with the aid of Ofono who led to A2 and A2 who led the prosecution witnesses P.C., Wafula (PW3) and DIP Kirya (PW5 to where he had hidden it?
- c) Whether that gun was a deadly weapon?

- a) On the first question, there is abundant evidence that the attackers pointed the gun at both Nalongo Resty and Birungi (each at her shop) and threatened to kill them if they did not give them money.

~~(2) Vasija vs. Uganda (1975) EA 181~~  
The gun was used to instill fear in their victim's right from the start to the end of the robbery when the robbers left with the stolen goods. This use of the gun was to enable the thieves to obtain or retain the stolen goods from Nalongo and Birungi at their respective places. There was therefore use or threats to use a deadly weapon within section 286(2) of the P.C.A.

- b) On the second issue, there is evidence by both Nalongo (PW6) and Birungi (PW1) that the two men went to their respective places with a gun, which was carried by the short man - they knew as Saweyo (A2) On the arrest of Ofono, he offered to take P.C. Wafula (PW3) Kalyango (PW4) and D.P. Kirya (PW5 - to where the man with a gun they had used to steal from both victims was hiding. Ofono led the above-mentioned witnesses to the bush from where A2 was smoked out.

Alecho (A2) then led the two police officers (Pw3 and PW5) to a spot in the bush where a rifle with thirteen rounds of ammunition were found and recovered. The rifle and ammunition were exhibited as Exhibits P3 and P4 respectively.

In his charge and caution statement Ofono stated (English translation),

**“ Alecho was the one handling the gun”**

**“Alecho first fired shots in the air in order to threaten the villagers”**

**“ When I got him (A2) on the way, I saw him carrying a gun”.**

**“We started with two shops at Kabafu”**

**“When we left Mukabafu, we went to the house of Nalongo”.**

Alecho (A2) in his charge and caution statement (English translation) states:-

**“It is true that I together with Ofono Matias robbed people at Kome Island by use of a gun”.**

**“The said gun belonged to Okwoba Peter”.**

**“As I wanted people to get scared, I released off bullets in the air and these were the bullets”.**

**“I hid my gun in the forest”.**

**“ I took them where I had kept the gun”.**

There is therefore no doubt that the gun (rifle) which Alecho surrendered to P.C. Wafula (PW3) and DIP Kirya (PW5) was the weapon which Alecho fired to frighten the villagers and used to rob Birungi and Nalongo respectively,

- c) The rifle - exhibit P3, is a deadly weapon on the basis of the ballistic, expert - D/SP Gakyaro who testified in his report - exhibit PI that:-
- (i) The rifle - “A” - exhibit P3 is capable of discharging an ammunition.
  - (ii) The thirteen rounds of ammunition are live and capable of being used in exhibit P3.
  - (iii) The cartridges - exhibit P.5 were capable of being discharged from the rifle - exhibit P3.

In addition to the report of the ballistic expert, Sylvia Birungi (PW11) testified the attackers fired gunshots outside her house before they physically entered her shop. Evidence of this shooting is supported by the LC1 Secretary Erifazi Kalyango (PW4) who picked up four empty cartridges (exhibit P5) outside Birungi’s shop on the morning of 17/8/2001. The firing of the gun is admitted by Alecho in his charge and caution statement where he says he fired the shots in the air to frighten the villagers.

Once a gun is fired during the robbery it is deemed to be a deadly weapon. This has been the holding of many courts in such cases as:-

- (i) **Birumba vs. Uganda - Criminal Appeal No. 32/1989 (S.C.)**
- (ii) **P.C. Ben Muhwani & another - Criminal Appeal 3/1993 (S.C.)**
- (iii) **Wasaja vs. Uganda (1975) E.A. 181.**

It is therefore proved that exhibit P3 is a deadly weapon within the meaning of section 286 of the Penal Code Act.

**Participation of the accused:**

I have already alluded to the doctrine of common intention which is relevant to this case. Alecho and Ofono hatched a plan to steal/rob the residents of Kasimizi area which consisted of smaller locations known as Kabafu, Kidama, Kembo villages. Ofono as a resident of the area played the leading role because he knew who had what in the area. Alecho (A2) the retired soldier in UPDF provided the fire cover to enable the robberies to take place without resistance. Each of the two is equally responsible for the act or acts of the co-thief during these robberies.

The two accused first went to the shop of Mukalazi Shaban - where his wife Birungi (PW11) was in the shop. There was a burning tadoba in her shop. She says she recognised Ofono (A1) by the tadoba light and the torch light. Ofono had a torch which he was swinging around the shop in search of what to steal. Ofono had lived with Birungi in the same locality for five years and he was a frequent visitor to her shop. Ofono used to come to her shop to play Ludo. She had recognised Ofono before he blew off the tadoba light. She also recognised him (A1) by his voice, which was very familiar to her. Birungi reported the name of Ofono to the Chairperson - Jane, who directed Salongo the Vice-Chairman and Kalyango (PW4) to arrest Ofono. Ofono disclosed A2 and both of them were arrested.

In the same night, Birungi identified the short man who had a gun in the doorway. This short man was pointing a gun at Birungi as Ofono went about collecting the shop goods.

I am therefore satisfied that there were factors which enabled Birungi to identify Ofono (A1), and the short man who had a gun during the robbery. Moreover, Birungi confirmed to the team which arrested A2 in the bush that he was the short man who came with Ofono when the two robbed her.

Nalongo Reste (PW6) stated she knew A1 as Ofono and A2 as Saweyo, a visitor to Ofono. Both were in the same camp. She had known Saweyo (A2) for a week prior to the robbery. Both A1 and 2 came from Kidama a neighbouring village. The short man Saweyo had a gun which he pointed at her after she opened the door. Both A1 and 2 had been at her shop drinking the whole day and Ofono was wearing the same clothes he had been wearing during the day.

Nalongo recognised the two by means of the tadoba light. The tadoba was never blown off during the whole episode the robbers were inside her shop. Next day she gave the name of Ofono to the camp settlers and Katende Salongo - the Vice Chairman. As a result of that revelation, Ofono was arrested. Ofono disclosed the identity and whereabouts of Alecho (A2) and the weighing scales which he had hidden underneath the water.

Besides the identification made by Birungi and Nalongo, both Ofono implicated, themselves in the robbery of Birungi and Nalongo.

A1 Ofono gave information which led to the arrest of A2 as a co-accused and the recovery of the weighing scales exhibits P6 and 7 which were part of the property Ofono and Alecho stole from the shops of Birungi and Nalongo.

Even before making their charge and caution statements, Ofono had admitted to the Vice-Chairman, Birungi and Nalongo that he had participated in the robberies of Birungi and Nalongo with a co-thief who had the gun, and who, he was willing to take them to. Indeed, Ofono led, the police the victims and PW4 to the bush where A2 was arrested and the rifle - exhibit 3 found.

The two accused, each made a confession statement which were admitted having been voluntarily made after a trial within a trial. Section 27 of the Evidence Act provides

**“ when more persons than one are being tried jointly for the**

~~(2) *Musija vs. Uganda* (1975) EA 181~~ **same offence, and a confession made by one of those persons affecting himself or herself and some other of those persons is proved, the court may take into consideration such confession as against that other person as well as against the person who makes the confession.**

Thus, court may take into consideration the confession made by an accused person provided that confession implicates the maker fully in the commission of the offence as well as his co-accused. The test to be applied to a statement of one prisoner proposed to be used in evidence as against another is whether it is sufficient by itself to justify the conviction of the person making it, of the offence for which he is being tried with the other person or persons against whom it is tendered.

***See: Mulingwa s/o Mwanje and another vs. R. (1953) 20 EACA 255.***

But it must be remembered that evidence of a confession by one accused, implicating himself and the co-accused, cannot be the basis for convicting the co-accused unless it is supported by other evidence implicating him (co accused) in the commission of that crime.

***See: (1) R vs. Surumbu s/o Singana and others (1940) 7 EACA 55.***

***(2) Muthige s/o Mwigai and others vs. R. (1954) 21 EACA 318.***

Both accused repudiated their confessions in which each implicated himself and the co-accused in the commission of the robberies. However, the court found after a trial-within a trial that the confessions were made, made voluntarily, and hence, admissible in evidence under sections 23, 24 and 25 of the Evidence Act.

A confession connotes an unequivocal admission of having committed an act which in law amounts to a crime and must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence.

***See: (1) Anyungu vs. Republic (1968) EA 239***

***(2) Uganda vs. Yosamu Mutahanzo (1988-90) HCB 44***

***(3) Kanyomozi vs. Uganda (1967) EA 537.***

It is generally a matter of caution and prudence that the court should look for corroboration of a confession which has been repudiated or retracted before it (court) convicts on the basis of that confession. This is, however not a legal requirement.

***See: (1) Apnlunari Butafo vs. Uganda - Criminal Appeal No. 928/1967***

***(2) Bakaye vs. Uganda (1965) EA 621.***

***(3) Fabiano Obeli vs. Uganda (1965) EA 622.***

***(4) Tiwamoi vs. Uganda (1967) 84.***

But It was observed by the Court for Eastern African at page 89 in the Tuwamoi case (supra) that in case of a retracted confession, and as a matter of practice or prudence, the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so (convict) if it is satisfied in the circumstances of the case that the confession must be true.”

**In the same case (Tuwamoi) their Lordships stated:**

**“If the court is satisfied that the statement is properly admissible and so admits it, then, when the court is arriving at its judgment, it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider their weight to be placed on any confession that has been**

~~(2) *Vasija vs. Uganda* (1975) EA 181~~  
**admitted. In assessing a confession, the main consideration, at this stage will be Is it true?”**

**“And if the confession is the only evidence against the accused, then the**

**court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a Criminal Case”.**

Regarding the corroboration of the accused statements, I find ample corroboration in the eye witness account of Birungi (PW11) and Nalongo (PW6). I find corroboration in the admissions of Ofono to Kalyango, Birungi and Nalongo that he and his colleague, who had taken the gun, committed the robberies. More corroborative evidence is to be found in the conduct of Alecho who was found hiding in the bush by PW3, PW5, PW6 and PW11.

The conduct of an accused person may be very relevant circumstantial evidence tending to implicate an accused person in the commission of a crime. In this regard, Alecho’s hiding of himself and the gun in the bush is such evidence which tends implicates Alecho in the robberies on PW6 and PW1 1 respectively.

***See: Uganda vs. Simbwa - Criminal Appeal 37/1995 (S.C.)***

After the arrest of Ofono, he admitted the robberies and led Kalyango (PW4) to Nalongo’s house where some four cartridges (exhibit P5) were recovered and later handed to AIP Kirya (PW5).

Whereas Ofono led the prosecution witnesses (PW3 5, 6 and 11) to the lake where the



weighing scales (exhibits P6 and 7) were recovered by him, Alecho guided the same witnesses to the bush from where he recovered the gun they had used in the robberies and handed it to PW3 and 5. The weighing scales and the rifle (exhibit P3) in constructive possession of Ofono and Alecho respectively. All this evidence leading to the recovery the above-mentioned exhibits corroborates the confession statements of both accused as well as implicating both of them in the robberies of Birungi and Nalongo.

**For constructive possession - See the cases of**

***(1) Kamau s/o Njoroge and another vs. R. (1954) 21 EACA 257***

***(2) Said Kigozi vs. R. (1958) EA 1***

***(3) Juma vs. Republic — (1967) EA 432 and sections 2(v) 254(2)(e) and 314 of the Penal Code.***

Lastly and relevant to the application of this case is the doctrine of recent possession. The doctrine of recent possession is circumstantial evidence which tends to implicate the accused in the commission of the offence. Where a person is found in his possession of property which is stolen or suspected to have been stolen, the presumption is that is he either the thief or receiver of that stolen property

***See: (1) Lubinga vs. Uganda - Criminal Appeal No. 3/81 (S.C.)***

***(2) Eryeza Kasango vs. Uganda - Criminal Appeal No. 12/91 (S.C.)***

The finding of the two weighing scales - exhibits P.6 and 7, the property of Mukalazi and Nalongo respectively shortly after they were stolen from Pw6 and PW11 in the constructive possession of Ofono, not only implicates him as the thief of those scales but confirms that his charge and caution statement where the scales also mentioned, is true.

After assembling all the evidence that relates to identity of A1 and A2 by PW6 and PW11, during the attack, the admission of A1 to Kalyango (PW4) and the victims to the robberies,

the recovery of the rifle, cartridges and the weighing scales, guided by either A1 or A2, by PW3, PW5 PW6, and P W11, the finding of the rifle and the weighing scales in possession of A2 and A1 respectively. I am left in no doubt that both A1 and A2

participated in the robberies to the prejudice of PW6 and PW11 (Nalongo and Birungi).

The sum total of all this evidence direct and circumstantial, is that the confession statements of both accused have been found to be true and corroborated. The same evidence has implicated both accused in the robberies of Nalongo and Birungi respectively. I therefore, hold the element of the participation of both accused in the two robberies has been proved by the prosecution.

Their confession statements, their conduct after the robberies and the circumstances leading to the recovery of exhibits P3, 4, 5, 6 and 7 negative their alibi. I therefore reject their alibi as lacking any truth.

In order to tarnish the prosecution's evidence, particularly that of Nalongo who Ofono said she was telling against him because her husband had been ordered to pay compensation to Owino, Ofono's brother. Secondly, Ofono said Birungi had been his wife before Mukalazi took her over when he was away at home.

The legal position is that where the prosecution witness is found to be telling lies against an accused person for a motive, that motive must be investigated. If it is found to exist, the evidence of that witness must be approached with caution and or be corroborated before it is acted on.

***See: (1) Chan Wai-Keung (1952) 2 Criminal Appeal Reports 194 P.C.***

***(2) R v.s. Witts and Witts (1991) Crim. L. R. 562 C.A.***

**(3) Archbold 1997 Edition. Paragraphs 4-4049, 16-17**

Nalongo testified as PW6, she said she had no grudge with Ofono. She denied ever having married Owino alias Storechi, the brother of Ofono. She explained how Owino got drunk in their house and behaved in a disorderly manner. She explained how Owino was beaten in order to evict him from their house. Owino complained to the LCs for being beaten by Nalongo's husband. He was fined in the LC Court and the matter ended there and Owino and Nalongo family lived happily thereafter.

I see no merit in the allegations raised by Ofono against Nalongo Resty. The allegations have either been denied or explained. Ofono was never a party to the brawl between Owino and Nalongo's family.

As for Birungi (PW1), there was no suggestion of being a former wife to Ofono when she was testifying in court. In any case, if it is true that she loved him, she would be the last person to tell such lies against him as to land him in such a serious crime of robbery.

I therefore find the allegations of Ofono against both Nalongo and Birungi as lacking any truth. I reject them.

**See: (I) Lt. Mike Ochiti vs. Uganda - Criminal Appl. 7/88 (C.A.)**

**(ii) Kabenge vs. Mpalanyi — Civil Appeal B 56/62 (M.B.84/64)**

I have addressed myself to a few contradictions that arose in the prosecution evidence and found them minor and negligible. They do not affect the value of their evidence or their truthfulness. The test to apply when considering the inconsistencies in the prosecution evidence is whether those inconsistencies are minor or substantial. If minor, they can be ignored. If major, the court should ask itself whether they are intended to

*(2) fVasqja vs. Uganda - (1975) EA 181*

hide the truth from court, whether they can be explained in the context of the case and the witness(s) or whether they render the evidence of a witness valueless and the witness untruthful.

***See: (1) Constantino Okwel alias Magendo vs. Uganda - Criminal Appeal No. 12/1990 (S.C.)***

***(2) Rauben Bagamuhunda vs. Uganda — Criminal Appeal NO. 2/1987 (S.C.)***

After considering all the evidence on record, I find the prosecution has proved all the ingredients of robbery on counts 1 and 11 of the Indictment. **The prosecution has not proved the offence of robbery on count 111 against both accused.** I therefore acquit both A1 and A2 on count 111.

However, I find both **A1 and A2 guilty of the offence of robbery on both counts 1 and 11 of the Indictment.** Both assessors advised me to convict both accused on counts 1 and 11 as indicted.

In agreement with the opinions of both assessors, I convict **both A1 - Ofono Matias and A2 - Alecho Julius** of robbery contrary to sections 285 and 286(2) of the Penal Code Act on count 1 and count 11 respectively.

V.A.R.Rwamisazi-Kagaba

JUDGE

07/01/2005