

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CR-SC-0029-2012**

**UGANDA.....PROSECUTOR  
VERSUS**

**A.1 BULOLO REUBEN alias GIZAMBA JULIUS  
A.2 MWONJE ISSA NAYIMA  
A.3 NAMONO BEATRICE  
A.4 BISIKWA SYLVIA  
A.5 KAMIDA NAMYEKA  
A.6 NAYIMU MUHAMMED  
A.7 SHIKANGA DAN  
A.8 MUGANDA BAKARI  
A.9 MAFABI LUKEMAN  
A.10 MUTONYI MARY.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

All the accused persons were indicted on three counts jointly and severally.

On count I, all accused were charged of aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act. It was alleged that all accused on 22<sup>nd</sup> July 2011 at Bujoloto Cell, Nkoma in Mbale district robbed **Wakholi Victor** of a mobile phone plus 300,000/= and immediately before or after the said robbery did threaten to use a deadly weapon to wit a gun and a panga on the said **Wakholi Victor**.

On count 2 of aggravated robbery c/s 285 and 286 (2) of the Penal Code Act, accused jointly are alleged to have robbed **Sabilla Goretti** of cash 30,000/= a

mobile phone, identity card, NSSF card, ATM and immediately before or after threatened to use a deadly weapon to wit a gun and a panga on the said **Goretti Sabila**. All this happened at Bujoloto Cell, Nkoma, Mbale.

On count 3 accused are charged of aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act. The accused are alleged to have robbed **Nambozo Rose** of cash 440,000/=, 2 LG DVD Players, airtime worth 60,000/= and a torch. This was on 22<sup>nd</sup> July 2011 at Bujoloto Cell, Nkoma, Mbale District. The accused used a gun and a panga to threaten the victim.

Accused all denied the above charges.

During the trial the prosecution relied on the evidence of PW.1- **Nambozo Rose**, who recounted that on 22<sup>nd</sup> July 2011 while at Nkoma at around 9:00p.m in her shop she got customers. These turned out to be robbers. One had a gun and pointed it to her. The other one jumped to the counter and picked money from there. Another one picked 2DVDs and a torch. They then switched off her light and used her torch. The one with the gun told her to close the door, and then they left. She said that while she was attacked she was with her children; including a one **Sankie**; and a younger one called **Shafiga**; and youngest called Gloria. She clarified that during the episode her children saw and **Sankei** was watching TV, and was seeing what was going on. She further testified that because the shop was lighted with light from electricity she was able to identify the assailants. She pointed at A.1 (**Bulolo**) as the one who had the gun. She also pointed at A.9 (**Mafabi Lukeman**) as the second man. She couldn't identify the third assailant because he remained behind and didn't enter. She identified her DVD by the inscriptions she had marked thereon as "NR" and the fact that the cover of the

DVD had broken off. She confirmed in her testimony that later on she was called by police to identify a recovered DVD if it was the one stolen from her. She was able to confirm that the recovered DVD was her stolen DVD as it bore the secret cord “NR” which she had inscribed on it, and it also had a broken off cover. The DVD was received in court as PEX.2.

**PW.2 Sankei Ojeka** testified to the effect that he was a pupil at Gangama primary school in primary six. **Nambozo Rose** in his landlady (PW.1). He stated that on 22. July 2011 while in the shop watching T.V in PW.1’s shop at around 9:00p.m, a customer came and asked for cigarettes of 500/= . When PW.1 sent her child **Shafika** to go and get the cigarettes, two other men came in. They pushed the other children watching TV inside and ordered them to sit down. The one who asked for cigarettes had a gun. The one with the gun ordered her to lay down. The other one who had a bag was ordered to go to the counter and pick money. When going to pick money, the first one splashed flour in his face and ordered him to look down so that he doesn’t look at them. He testified that there was electric light and he was able to identify these men. He said he used to see them around the “pool” place before the advent of theft. This was at Nkoma stage. He claimed that since December 2010, the men were common figures at Nkoma, where they usually went to play pool. The witness clarified that he could also go there on non-schooling days to pass time. He identified A.1 (**Buloolo** and A.9 (**Lukeman**).

**PW.3 Wakoli Victor** stated that on 22. July 2011, he was in Bujoloto at his shop. Two girls then went to his shop as customers. They told him that they wanted to buy handkerchiefs. He entered the shop and gave them the handkerchiefs. After a short time two men came in hurriedly with guns. They put him on gunpoint and told him to raise his hands. They asked for money and ordered the girls to search

him. They searched him and took the money he had in his pockets and in the counter. They took money, a phone, shs. 300,000/=. At that time, another customer called Sabira also came in. When she saw the thugs she wanted to run but was pushed back. Her phone, bag, and its contents were all grabbed from her. Later they pushed the door and closed them inside the shop. The witness further testified that as there was light in the shop from electricity he recognised the thugs and could readily identify them. He pointed at the two girls as being A.3 (**Namono**) and A.4 (**Bisikwa**). The two men were identified as **A.1 (Buloolo)** and **A.9 (Lukeman)**. He claimed all accused were common people he usually met along the way to Nkoma stage. Later his brother came and opened for them. He then heard noise from **Nambozo's** shop that she too had been robbed.

**PW.4 Bukaye Salaama** said she knew A.2 (**Mwonje Issa**), who was their tenant. She testified that in August 2011, on a day she couldn't recall she found the wife of A.2 (**Issa**) carrying something like a gun. She had put it behind a pot and was rushing out of the house belonging to PW.4. After two days police came and arrested PW.4 and her husband **Issa** was also arrested.

**PW.5 Sgt Onono Christopher**, testified that he was the arresting officer for A.1- **Bulolo Reuben**. He recounted how he acted on information from District CID Officer **Ereku Fred**, to proceed and arrest a murder suspect called **Buloolo**. The suspect first resisted arrest but upon arrest, he was found with an NSSF Card in names of **Sabira Gorret** SR No. 8768500060233 and other things. At police, it was revealed by a one **Gyabi** that the card related to a complainant of another robbery case.

**PW.6 Sabila Goretti** testified that on 22<sup>nd</sup> July 2011, she was from school. She branched to Victor's shop to buy soap. As she entered the shop, two men were standing in Victor's shop. They were putting on long jackets and had guns. One of them was pointing at Victor with his gun. Two ladies were searching Victor. She was ordered to put up her hands which she did. They took her bag and removed everything she had in the bag. Inside her bag was one phone, NSSF card, in names of **Sabila Gorretti** an ATM card from Post Bank, result slip and shs. 23,000/= . They later locked them inside the shop. Later Victor's brother opened for them and that is when they realised that **Nambozo's** shop had been robbed.

She testified that she was able to identify the thugs on account of the light available from electricity. She pointed at A.1 (**Buloolo**), A.9 (**Lukeman**), A.3 (**Namono Beatrice**) and A.4 (**Bisikwa Sylvia**). She couldn't identify the rest because she claimed they remained outside and she didn't have opportunity to see them. She further told court that later police called her to identify a recovered NSSF Card- which he did. The card was exhibited as (PE.3).

**PW.7 Namondo Solomon** stated that he knew A.7 (**Shikanga Dan**). He knew him as a street vendor frying chapatti opposite the clock tower in Mbale. He told court that the accused took to him a DVD and sold it to him at shs. 100,000/= . He paid him 60,000/= and received the DVD from him. The DVD was black and had a broken park at place of insertion of the disc. He was arrested after about two months on account of possessing a stolen DVD. At police he found there A.7- **Shikanga**, whom police interrogated, and the witness confirmed that he had bought the DVD from him. He identified the DVD in question as being Exh.2.

**PW.8 Gyabi Serulo**, was the investigating officer. He revealed in the course of investigations how he had recovered the NSSF Card belonging to **Sabila**. This led him to **Buloolo** (A.1) who later on went on to reveal to him his robbery escapades. In his investigations, the witness referred to revelations made by A.1 to him regarding his contacts with **Namono Sylvia** (A.3), A.2 (**Issa**), A.9 (**Mafabi**) **Nayimu** (A.6), **Kamida** (A.5) and others' including A.4 (**Bisikwa**), A.8 (**Muganda Mafabi**). He also recounted how he was able to recover the DVD linked to A.7 (**Shikanga**). He also explained how A.10 (**Mutonyi Mary**) was arrested when the exhibited gun was recovered near her bar in a garden.

**PW.9 Ochwo (DAIP)**, was the officer who recorded a charge and caution statement from A.2- **Mwonje Issa**; which was admitted in evidence as PE.5.

In defence A.1 (**Buloolo**) put up a defence of alibi- that at time of allegations he was at his home. He denied all allegations save that **Namono Beatrice** is his girlfriend.

**A.2 – Issa Mwonje** also put up an alibi stating he was at his home at alleged time with many people including his aunt **Kamida**.

**A.3 – Namono Beatrice-** said at 9:00p.m of the alleged dates she was at home with her children; and she has never gone to Bujoloto.

She called a witness **DW.1- Phiona Bisikwa** who said she was with her mother (A.3) the whole day.

**A.4- Bisikwa Sylvia** said she was at home the whole day and didn't go anywhere.

**A.5- Kamida Namyeka** said she spent the whole day at Bufumbo and never participated in the robbery.

**A.6- Nayimu Mohamed** claimed he had been at home reading books when police arrested him.

**A.7 – Shikanga Dan,** claimed that he was in prison on remand for another murder charge at time of offence in this case. He denied participation.

**A.8 – Muganda Bakari** said on that date he was at home by 9:00p.m. He spent the day in the market selling rice.

**A.9- Mafabi Lukeman,** claimed at the stated time he was at home with his wife **Kamida Nambozo.** He denied participation in the robbery.

**A.10- Mutonyi** claimed she spent her day till 11:00p.m at the bar doing her normal business. She denied having participated in any robbery; as alleged.

All the evidence above having been duly reviewed the prosecution has the burden to prove the following ingredients:

1. That there was theft.
2. That a deadly weapon was used.
3. Accused were the culprits.

I will consider each ingredient as an issue as here below.

**1. Whether there was theft.**

The prosecution led evidence through PW.1 and PW.6 who were victims detailing how their properties were stolen. Their evidence was collaborated by that of PW.2 and PW.3 who witnessed the act of theft. From the submissions of both counsel it was agreed that theft was not contested. The necessary ingredients of theft were therefore proved through evidence of witnesses above.

## **2. Whether a deadly weapon was used**

Evidence of PW.1, PW.2, PW.3 and PW.6 who were eye witnesses said that the robbers had guns at the scene of crime. A gun has long been held to be a deadly weapon. Evidence above sufficiently shows that a deadly weapon was used during the theft.

## **3. Whether accused participated in the theft.**

It was defence counsel's contention that the evidence on record did not implicate the accused persons. He noted that evidence of PW.1, PW.2, PW.3 and PW.6 should be disregarded as it was systematic and was of coached witnesses. He averred that conditions for identification were not favourable; the culprits were unknown to the victims, the incident lasted a very short time, and the alleged attackers had guns which created fear; yet it was late in the night. He faulted evidence of PW.2, PW.3, PW.4 and PW.6, for various shortcomings rendering the evidence to pass as discredited. Counsel then reviewed the defence offered by each accused, where each stated that they were in their homes at time of crime, hence putting up a defence of "alibi". He attacked the confession statement by A.2, though admitted. He cautioned that it couldn't be relied on without collaboration. He therefore prayed for the acquittal of the accused persons.

The learned State Attorney on the other hand averred that evidence from prosecution proved the participation of all accused.

He noted that a review of the evidence of PW.1, PW.2, PW.3, and PW.6, indicates in detail how they identified A.1, A.3, A.4 and A.9 during the criminal episode.



Their evidence is of eye witnesses who saw and who were tested by cross-examination.

According to the evidence, the conditions of identification were favourable. Witnesses testified that light was sufficient, and the accused were at close range with the victims and spent sufficient time at the scene. The victims looked at them and some of them had prior contact with the accused; e.g. PW.3 knew A.1 and A.9 before the event.

From the above evidence, I am constrained to find that the conditions for identification laid down in the case of *Abdulla Bin Wendo and Anor. V. R (1977) HCB 1* were properly satisfied. Prosecution further led evidence to show that PW.2 had prior contact and knowledge of A.1 and A.9, as he had seen them before playing pool at Nkoma stage. These pieces of evidence in my view sufficiently break the defence of alibi by these accused. The evidence effectively placed the accused at the scene of crime.

The credibility of PW.2's evidence of identification was challenged on grounds that he testified that accused threw flour in his eyes so he couldn't have been able to see. I however find that he testified that, "When he saw me looking at him... he threw flour"- the action of throwing flour happened after he had identified accused. This was therefore not fatal to his identification. The attack on PW.3 and PW.4's evidence by counsel is therefore not justifiable. The reasons advanced against it are not of any evidential relevancy- and I find no fault with their evidence. I therefore find all the accused persons were properly identified as per the evidence above.

Counsel attacked the confession statement admitted as exhibit for the prosecution; saying it had been retracted. This court has had occasion to interpret the law regarding the evidential value of retracted confessions in the case of Uganda v. Loduku Amado and 5 Others HCT-CR-SS-0125-2013 of Moroto, where Court held thus referring to Twamoi v. Uganda (1967) EA 84;

*“Once a confession is retracted court should accept it with caution before basing a conviction on it.”*

Also in John Serumaga and 3 Ors v. Uganda Cr. 31/96 CA,

*“The principle is that a statement which affects a co-accused accused can only be used to supplement an otherwise substantial case against them. There must be full admission of guilt in the statement before it is used as a basis of conviction.”*

The import of all this is that there must be admission of guilt in the confession; and it has to be supported by some other independent evidence before basing on it to convict.

An examination of PE.5, the confession by A.2 (**Mwonje Issa**) shows the following: He mentions a gang of robbers to which he belongs. He names the other members as **Buloolo Julius (A.1) Murefu, Muwonge, Biitu, David** brother to **Bittu**.

From the content of the confession, there is admission of gang robberies which were planned and conducted, similar to those described by the evidence of PW.1, PW.2, PW.3 and PW.6. The confession collaborates the elaborate evidence in chief of PW.8 (**Gyabi**). The statement therefore having been closely examined by this court is found to contain sufficient evidential value, capable of convincing this

court to base a conviction thereon. It implicates the maker A.2, and further collaborates evidence against A.1 and A.3.

I do not believe the alibi set up by **A.4- Bisikwa Sylvia**. This is because she was properly identified at the scene of crime by PW.3, as one of the ladies who were searching the victim for money and **PW.8 Gyabi's** testimony as how she led him to the suspect's hide out. Her alibi was destroyed by her own witness who contradicted her by stating that she was not at home at 9:00p.m as she claimed.

There is evidence of the participation of A.7, as led through PW.7. This was the one from whom the stolen DVD was recovered, and testified that he bought it from A.7. Further evidence against A.7 is contained in the evidence of PW.8, who interrogated A.7, and he revealed that his role in the episode was to sale the stolen items; and revealed having sold the DVD to **Namondo Solomon** (PW.7). The doctrine of recent possession of stolen property would come into play here and A.7 is accordingly found a participant. His defence of alibi was effectively destroyed and his attempt to lie that he was in custody at time of offence was bursted and he owned up to the truth openly during cross-examination. He was untruthful and attempted to lie in open court. It has been long held that deliberate untruthfulness is inconsistent with innocence. His defence was therefore merely a cover up of his involvement.

Other pieces of evidence which helped this court were the exhibited NSSF Card, the recovered DVD, the elaborate collaboration between the evidence of the gun in the confession statement, PW.8 (**Gyabi's**) evidence on the gun, and PW.4 (**Bukaye Salam's**) evidence together with evidence of all witnesses PW.1 to PW.9, the

prosecution has proved beyond doubt that the defences put up by A.1, A.2, A.3, A.4, A.7 and A.9 of alibi are not sustainable.

Prosecution however has not destroyed the defence of alibi put across by A.5, A.6, A.8 and A.10.

The assessors reached the same opinion and found that participation of A.1, A.2, A.3, A.4, A.7 and A.9 had been proved. I hold a similar view, and hold that participation has only been proved against:

**A.1- Buloolo.**

**A.2- Mwonje Issa**

**A.3- Namono**

**A.4- Bisikwa sylvia**

**A.7- Shikanga Dan**

**A.9- Mafabi Lukeman.**

Participation is not proved in respect of:

**A.5- Kamda Namyeka.**

**A.6- Nasim Mohamed**

**A.8- Muganda Bakari**

**A.10- Mutonyi Mary.**

I therefore in conclusion hold that the prosecution has proved the charge against A.1, A.2, A.3, A.4, A.7 and A.9 and are each accordingly convicted on all three counts of aggravated robbery c/s 285 and 286(2) of the Penal Code Act.

A.5, A.6, A.8 and A.10, are not found liable and are set free immediately unless held on another charge.

I so order.

**Henry I. Kawesa**

**JUDGE**

**17.02.2015**