REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA, AND KANYEIHAMBA, JJ.S.C.)

CRIMINAL APPEAL No.33 of 2002

BETWEEN

1. MWERU ALI ……]

2. ABAS KALEMA
…… **APPELLANTS**
……..]

3. SULAIMAN SENKUMBA ……]

AND

UGANDA
……
…… **RESPONDENT**
……
……
……

[Appeal from a judgment of the Court of Appeal at Kampala (Kato, Engwau and Kitumba, JJ.A.) dated 8th September, 2000 in Criminal Appeal No. 89 of 1999]

JUDGMENT OF THE COURT:

This is a second appeal. It is from the judgment of the Court of Appeal dismissing an appeal against conviction, by the High Court, of the appellants for capital robbery.

On 30/11/1995, at 10.00 a.m., Mugisha Abas Ali, *[PW1],an* accountant with Energo Company Ltd., of George Street, Kampala, drew shs 25m/= from Barclays Bank, Kampala Road, and carried it in a brief case in a company car. He was accompanied by Mr. Zairia Matoric, a senior officer of the company. On their way back to office and upon reaching the gate of the company offices on George Street, they were confronted by armed robbers who robbed the money from Mugisha and sped off in a waiting car. Mugisha reported the robbery to the Central Police Station [CPS] Kampala, who started investigations. A man called John Mayanja was arrested on the same day in connection with the robbery. The appellants and a number of other suspects were subsequently arrested either by the Police or by personnel from military intelligence. In the course of investigations, a gun was seized by D/Sgt Ogwal [PW4] and other policemen from Katwe, in a home of a man called Sula. Because of information given by the appellant Ali Mweru about a gun, a policeman called Kisale was traced in Kiboga and arrested in connection with the robbery. On 21/12/1995, an identification parade was held at the CPS by D/AIP Otim [PW2] where Mugisha purport to identify the first appellant Mweru and John Mayanja. (The latter was acquitted after trial). Confession statements were obtained from Mweru and the second appellant, Abas Kalema. Six suspects including the three appellants were charged with the robbery.

During the trial, the charge and caution statement (Exh. P. 1) of Ali Mweru, was admitted in evidence without challenge. The confession statement (Exh.P2) of Abas Kalema was also admitted in evidence but after a trial-within-a-trial. In their respective defences at the trial, each of the appellants and the other co-accused raised the defence of alibi and appellants retracted their respective confession statements, each claiming that his statement was not made voluntarily. At the close of the trial, the only

assessor advised the judge to convict only Mweru for capital robbery and Kisale for giving away the gun. The learned trial judge found that the prosecution had proved its case against the three appellants whom he convicted; he acquitted Kisale. By then two other suspects had died.

The appellants appealed to the Court of Appeal. In that court, the appellants complained about reliability of evidence on identification at the scene by Mugisha, as well as about the voluntariness of confession statements of the appellants Mweru and Abas Kalema. The trial judge was also criticised on his conclusions regarding the fairness of the conduct of the identification parade in respect of Mweru. He was again criticised in respect of evaluation of evidence generally. The Court of Appeal found that the identification parade had been conducted improperly and so the court disregarded that evidence. The Court upheld the findings of the trial judge on the rest of the grounds of appeal. Consequently, the court dismissed the appeal. The appellants have now brought this appeal. Each appellant lodged a separate memorandum of appeal.

There is some confusion about numbering of the appellants. In this judgment we shall refer to Mweru Ali, Abasi Kalema and Sulaiman Senkumba as A1, A2 and A3, respectively and we shall consider the appeal of each appellant separately.

APPEAL OF MWERU ALI (A1)

The Memorandum of Appeal, contained three grounds. At the hearing ground three was abandoned. Grounds one and two were formulated as follows: -

1. ***That the learned Justices of Appeal erred in law and fact in finding that the second appellant had been identified at the scene of crime.***

2. ***That the learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence on record relating to: -***

   (a). arrest of the appellant.

   (b). the gun (exhibit P3).

   (c). the conduct of the second appellant.

(d). the charge and caution statement of the second appellant (exhibit P7) and subsequently reached erroneous decisions.

Reference to "second appellant" in 2 (c) and 2 (d) above is to Mweru Ali. Mr. Kunya, counsel for the appellant, argued the two grounds together. The thrust of his arguments was that re-evaluation of evidence was not adequate. First, counsel submitted that Mugisha, [PW1], was a single identifying witness and that the prevailing circumstances were not conducive to positive identification of the appellant. Counsel contended that Mugisha was scared; that the robbery by strangers took a short time and that on the facts Mugisha had poor memory. Secondly Mr. Kunya contended that there was insufficient evidence to link the appellant to the gun used in the robbery. Thirdly, counsel relied on a decision of this Court [Kawoya Joseph Vs Uganda, Criminal Appeal No. 50 of 1998 (SC) (unreported)] for his contention that the trial judge "ought to have ascertained whether it was proper to admit" in evidence the confession statement of his client. Mr. Kunya pointed out that the date of A1's arrest is unknown. In reply, Mr. Elem Ogwal, Assistant DPP, submitted that the prevailing conditions at the time of the robbery favoured correct identification of the appellant by Mugisha. He pointed out that the Court of Appeal upheld the conviction of the first appellant on the basis of his confession which had been admitted without objection. The learned Assistant DPP argued that absence of evidence of arrest is not fatal in this case and that the gun was linked to A1. There are aspects of the evidence of Mugisha which must be treated with caution. Although the robbery took place during broad day light, at 10.00 am, and Mugisha claims to have seen the robbers' faces very well, it is indisputable that the robbers whom he saw for about five minutes were strangers to him. The robbers surrounded the car. One of them held a gun menacingly and he admitted he was scared. The car in which Mugisha travelled to the Bank and back was a car he was using regularly. He could not remember its registration number when he testified in court on 10/5/1999, four years after the robbery. In these circumstances his dock identification of A1, 4 years latter must be treated with caution. As against that there is A1's confession statement in which he fully admits participation in the offence. We revert to the confession a little later. There is the question of whether the number of the gun used in the robbery is 5710 or 6710. PW4 gives the number of the gun as 6710 as does Mr. F. Bachara, the ballistics expert. Their evidence appears

reliable and conclusive on the gun's number. With regard to the recovery of the gun, PW4's evidence is somewhat unclear regarding when the gun was recovered. Mr. Kunya argued that his client has not been linked to the gun which was used in the commission of the robbery. Perusal of the evidence of PW.4 and that of P/C. Wasswa (PW6) shows that Mweru's arrest and the recovery of the gun were made more than a week after robbery. The information given by Mweru to PW4 led to the recovery of the gun. The trial judge held that Mweru got the gun from P.C. Kibale of Kiboga. The Court of Appeal correctly applied the provisions of S. 29A of the Evidence Act to connect the appellant to the gun and to the robbery.

True there is no clear police evidence about when Mweru was arrested. But in his own evidence Mweru testified that he was arrested by DMI officers from his residence at Old Kampala Police Barracks at 7.30 p.m, on 8/12/1995, which is just over a week after the robbery. D/ASP. Obwona (PW7) confirmed that A1 was arrested by DMI. There should have been evidence by the arresting officer, but since the appellant admits his arrest which was ultimately connected to this case, the absence of the arresting officer's evidence is not on the facts prejudicial to his conviction. The most damning evidence against A1 is his confession statement (Exhibit P.6) Mr. Kunya contended that the trial judge "Ought to have ascertained whether it was proper to admit the confession". This statement was admitted in evidence without contest. From the trial court record, the learned trial judge took trouble to ascertain from A1 and his other co-accused [P/C. Kisale] whether they had agreed that their statements be admitted. The answer was in chorus in the words: -

"That is true. We have no objection".

In his testimony about recording the charge and caution statement from Mweru, this is what D/ASP Obwona stated: -

> ***"I told him the nature of the charge being robbery committed along George Street to the prejudice Energo Project. I explained to him the substance of charge. He understood it. I put it in writing and I invited him to countersign it, as he understood. He signed. After signing I read the caution statement to him. I said that you need not say anything unless you so wish but I shall record it and it may be used against you. He***

understood the caution. He said he was willing to make statement. He also signed the caution, which he acknowledged he understood. He told me his story. I recorded it. After I had recorded it I gave it to him read through. I asked him if he wanted to add or subtract any thing. After reading through he said it was okay. I invited him to countersign. He signed."

The witness was not cross-examined about this part of his evidence which is important in so far as assessment by Court of admissibility of the statement was concerned. The witness was only asked whether he ever interacted with DMI officers who had arrested Mweru. He denied any such interaction. He did not know when and where DMI arrested Mweru. It was when Mweru gave his defence on oath that he implicated Obwona in the torture before the charge and caution statement was recorded. It is a little strange that Mweru, an ex-policeman, allowed D/ASP Obwona to say what he said, about the confession, in court without causing his counsel to challenge Obwona by way of cross-examination. Moreover, Mweru admitted making the confession even though apparently due to fear. He claimed he had been tortured, mostly by Ogwal, but on 12/12/1995, Obwona also participated. All these claims were not put to Ogwal nor to Obwona during cross-examination of these witnesses. .

The learned trial judge found that the confession was true and voluntary and that it fully implicated the appellant in the robbery. The Court of Appeal agreed with the conclusions of the learned trial judge regarding the confession statement as follows: -

"In the confession the first appellant gave a detailed account of the preparation and the execution of the robbery. He stated that he attended the preparatory meeting with several other people at Owino market. He obtained the gun, which was used in robbery from P/C. Kisale of Kiboga Police Station. After the robbery he received his share of the proceeds. As the first appellant had in his defence denied making the confession, the learned trial fudge treated it as retracted confession and rightly so, in our view, and looked for corroboration. The confession was true. See <u>Tuwamoi Vs Uganda</u> [1967] EA 84. He found corroboration of the

confession in the discovery of the gun, exhibit P3, the conduct of the appellant which led to the arrest of the other suspects and the fact that he had been identified by PW1 at the time of robbery. The learned judge also relied on the confession of the second appellant. We cannot fault the learned fudge on these findings"

The criticism of the trial judge for admitting the confession statement has no basis whatsoever because the appellant and his counsel each consented to the admission of the statement after the trial judge had taken trouble to ascertain first from counsel and then the appellant Mweru himself whether the statement should be admitted in evidence. There was no objection. With respect, Mr. Kunya's criticism of the judge has no basis.

It is quite clear that the case of **Kawoya Joseph Vs. Uganda** (supra) relied on by appellant's counsel is distinguishable and does not apply to the circumstances of A1's case. There the appellant Kawoya was in total disagreement with his lawyer about the conduct of Kawoya's defence. We agree with the conclusions of the Court of Appeal. Accordingly both grounds 1 and 2 must fail. It follows that Mweru's appeal must fail. It is dismissed.

APPEAL OF ABAS KALEMA (A2).

Abasi Kalema's memorandum of appeal contained five grounds. At the hearing of the appeal, ground two was abandoned.

The first ground states: -

The learned Justices of Appeal erred in law and in fact to uphold the trial judge's decision to admit the extra-judicial statement of bas Kalema.

Mr. Ddamulira - Muguluma, counsel for this appellant, contended that the charge and caution statement attributed to the appellant is full of deficiencies, was irregularly obtained, for instance, for not recording it in Luganda, the vernacular language used

and spoken by A2. Counsel relied on the cases of Androa Asenua and Another Vs Uganda Criminal Appeal 10 of 1998 (SC) (unreported) (S.C) and CPL. Wasswa and Another Vs Uganda Criminal Appeals No.48 and 49 of 1995 (SC) (Unreported) for the view that the statement should have been written in Luganda.

Learned counsel complained that although his client surrendered himself to Masaka Police on 28/12/95, he was only brought to Kampala CPS on 29/12/95 where he was detained in custody until 4/1/96, before a charge and caution statement was recorded from him. Therefore, he argued, the prolonged detention affected the voluntariness and the admissibility of the statement which the Court of Appeal should have rejected.

For the respondent, Mr. Elem Ogwal pointed out that the Court of Appeal was alive to the necessity to, and failure by the police officer to, record the charge and caution confession statement in the Luganda language, which the appellant spoke. He argued that failure to so record does not render the statement inadmissible.

We have studied the two authorities cited to us by Mr. Ddamulira Muguluma. We note that in the Asenua Case (supra) this Court emphasized the need for persons (Magistrates and policemen) whose responsibilities are to record charge and caution statements to comply as nearly as possible with the procedure set out in the administrative instructions issued by the then Chief Justice on 2/3/1973. In the instructions, it is stated that the statement should be recorded in the language which the accused speaks. However, we have not been persuaded that the recording of the statement in English, rather than in Luganda language, caused injustice to the second appellant. We note that at the trial, the statement was admitted after a trial-within-a-trial. D/ASP Rwenduru (PW.3) who recorded the statement testified about the procedure he followed. Other than not recording the statement in Luganda, PW3 appears to have followed the correct procedure before and after he recorded the statement which he read back in Luganda to the appellant before the appellant signed it. The appellant signed it because he understood what was read to him. Rwenduru's

competence to speak Luganda and or to translate it into English, was not challenged in cross-examination. In his evidence during the trial-within-a-trial, Kalema claimed that he made three other statements, apparently voluntarily. The one now under question was the fourth. The appellant stated that PW3 did not assault him nor do anything harmful to him. Indeed the appellant complained to PW3 about alleged mistreatment meted to him by PW4 (Sgt Ogwal) which clearly suggests that the appellant had some faith in Rwenduru. It is to be noted that in this case the trial judge was not even impressed with the appellant in the trial - within a trial. The record of the judge implies that the appellant feigned illiteracy yet he appeared to know English.

The case of CPL. Wasswa (supra) is authority for the view that it is wrong for suspects to be detained in custody for long periods before confession statements are recorded from them. Clearly each case must be decided on its own facts. Here the appellant testified that he was arrested on 28/12/1995 in Masaka. That was near the end of the year. It took some days before he was transferred to Kampala CPS before 4/1/96 when he made his statement. Given that the appellant was arrested just before the end of the year followed by the new year public holiday on 1/1/96, and considering that he was arrested away from Kampala, in this particular case, these are circumstances which we have taken into account. Although the delay to record a statement from the appellant is deplorable, it does not in this case appear to us that that delay was deliberately designed to cause the appellant to make an involuntary and untrue statement. Although the Court of Appeal did not evaluate the evidence surrounding the delay before the statement was recorded, nevertheless the court held that the statement was voluntarily made and that the confession is true. We have not been persuaded that the conclusions of the Court of Appeal are wrong. Therefore ground one must fail. Ground 3 and 4 state as follows: -

3. ***The learned Justices of Appeal erred in law and in fact to concur with the trial judge to reject the second appellant's alibi.***

4. ***The learned Justices of Appeal did not properly evaluate the evidence (as a whole) on record in respect of A2.***

Mr. Ddamulira-Muguluma contended that the trial judge did not evaluate evidence properly and that the Court of Appeal did not appreciate the fact that Mugisha did not identify his client at the scene of crime. That there is inconsistency created by his client's statement in which he is recorded to have admitted taking from Mugisha the brief-case containing the money whereas Mugisha himself testified that it was John Mayanja who took the brief case. Counsel submitted that this inconsistency should be resolved in favour of his client. Counsel also contended that the Court of Appeal erred when it held that Mweru's charge and caution statement corroborated the charge and caution statement of Kalema, yet such evidence is of the weakest type. Learned counsel contended that it was wrong for the two courts below to hold that his client purchased a vehicle after the robbery because there was no evidence to support this. That the date of purchase and of resale of the vehicle before or after robbery was not given by prosecution. For the respondent, the Assistant DPP, Mr Elubu, submitted that the prosecution evidence put Kalema at the scene of crime and therefore his alibi was disproved.

We agree with learned counsel for the appellant that there is some inconsistency regarding whether it was him or John Mayanja who took the brief case from Mugisha. But we think that this inconsistency is immaterial; for in such a case, the robbery was a joint enterprise among the robbers and whoever seized the brief case, seized it on behalf of the group and in furtherance of the common enterprise. We have already held that Kalema's statement was properly recorded and that it is truthful. In the statement the appellant admits taking the brief case. That establishes his guilt.

The learned Assistant DPP quite properly conceded that Mweru's confession statement as corroborative evidence of the information in Kalemas statement is weak but he submitted that it is lawful for court to hold that the two statements corroborate each other. We note that both appellants retracted their statements. We also note that the two Courts below considered that fact and came to the conclusion that Kalema's statement was voluntary and that it is truthful. We have not been persuaded that these findings are erroneous. Since Mweru's statement was admitted without challenge and as we accept the finding by the two courts below that Kalema's statement was

voluntary and its contents are true, then if the two statements talk about the same transaction, they (statements) must surely be corroborative of each other on those aspects on which they (statements) are in agreement.

As regards incriminating evidence of the vehicle, the finding that Kalema's confession statement is truthful leads to the inference that its contents state what happened. Towards the end of the statement, it reads: -

> ***"During the distribution, I was given 1.7 million. After one week I bought Motor vehicle Reg. No. 683 UBK and went home to Masaka where J was arrested by police in Masaka."***

This must therefore mean that Kalema used the share of the money robbed to buy a vehicle. It was argued that shs 1.7/= was insufficient to buy a car. However the statement does not say that the car was purchased with only Shs 1.7m/=. Nor are we told whether the car was not paid for in instalments. Kalema in evidence during cross-examination agreed that the car was his. He was a car dealer. He had purchased the car for Shs 4.5m/ = five weeks before it was impounded. He had bought it in Kampala. There is evidence by PW4 (Ogwal) that after this car was impounded on 23/12/1995, third parties claimed it. Kalema in his evidence acknowledged that car 683 UBK was his and was impounded by police when it was in possession of people to whom he had sold it. Three weeks previously, the police impounded the vehicle on suspicion that robbery proceeds were used to purchase it. His claim that he was a car dealer does not remove the possibility that he used robbed money to buy a vehicle and then sell it in Masaka. The date of robbery, i.e., 30/11/1995 is very close to the first week when Kalema claims to have purchased the vehicle in question. Regarding the alibi we note that both the trial judge and the Court of Appeal evaluated evidence generally including the evidence of alibi before rejecting the alibi. We have not been persuaded that either court erred. Therefore Grounds 3 and 4 must fail. The last ground states: -

> ***The learned Justices of Appeal erred in law and in fact to uphold the conviction of A2 where there was no summing up to the assessors.***

This ground concerns summing up to the assessors. The complaint arises from the absence of the judge's summing up note from the court record. Mr. Ddamulira - Muguluma criticised the trial judge for not accepting the only assessor's opinion that the accused persons be acquitted.

Learned counsel contended that there is nothing to show how the trial judge addressed the assessor on the law and on the evidence. Mr. Elem Ogwal pointed out that there is evidence on the court record showing that the judge summed up to the assessor and that, in any case, the absence of the note is not fatal to the case against the appellant. The record of the trial court shows that after the closing addresses by counsel for both sides on 14/7/1999, the judge adjourned court to 22/7/1999. He does not state the purpose for the adjournment. However the record for 22/7/1999 shows that the one remaining assessor gave his opinion covering two pages. The opinion is lengthy and unambiguous. The assessor specifically referred to the ingredients of the offence of robbery. The assessor advised conviction only of Mweru (A1) for the robbery and not the others. He advised conviction of P/C. Kisale of the offence of theft of the gun but not of robbery. This leads to the presumption that the assessor must have been guided along those lines by the trial judge during the summing up. We are supported in this by what the judge stated in his judgment in which the learned trial judge refers to his directions to the assessor as follows: -

> ***" I shall deal with the issue of admissibility of statement presently including the directions given to the assessors regarding these statements."***

Later the learned judge again stated: -

> ***"I have carefully considered the circumstances of this case and warned myself and assessor on the necessary caution to be taken when relying on the confessions....."***

From these passages we infer that, though the summing up note is not on the court record, the trial judge must have addressed the assessor. In any case Mr. Ddamulira-Muguluma has not pointed out any vital aspect of the case where specific mention should have been made to assessor by the judge.

While disagreeing with the assessor's opinion to acquit some of the accused persons (including A2 and A3), the learned judge stated:

> ***"The gentleman assessor advised this court to convict P/C. Mweru [A1] of the offence of aggravated robbery. He then advised me to acquit all the rest of other accused persons, for reasons given earlier J accept his advise in respect of A1, P/C. Mweru and A3 P/C Kisale. I also accept his advise regarding A2 John Mayanja. I do not with respect accept his advice regarding Abasi Kalema and Sulaiman Senkumba who actively committed the robbery with P/C Mweru and others."***

It is our opinion that, and with respect to learned counsel, this passage shows that the learned judge gave reasons for not accepting the assessor's advice before he convicted the appellants.

Ground 5 has no merit and it must fail and so must the appeal of Kalema which is dismissed.

APPEAL OF SULAIMAN SENKUMBA (A3)

Ms. Diana Harriet Musoke who replaced Messrs Tusasirwe & Co. Advocates filed a fresh memorandum containing three grounds in respect of the third appellant. In the first ground, the complaint is that the Justices of Appeal erred in law and fact when they confirmed that the 3rd appellant was the same person as Sula Bulega whereas there was no evidence to prove this. Ms. Musoke criticised the trial judge for not finding whether Sulaiman Nsubuga is the same as Sula Bulega. She also criticised the

Court of Appeal for upholding the finding of the trial judge that Sula was Sulaiman. In counsel's view, a wrong man was before the trial judge. The learned Assistant DPP supported the judge's finding. He agreed with the trial judge that the case of Ombeka Vs. Republic (1968) EA 132, relied on by appellant's counsel, is distinguishable from the present case because in the former, the name of Ombeka was not cited in the charge sheet, instead a different name was cited. Yet despite that anomaly, Ombeka in fact pleaded guilty and was convicted. The learned Assistant DPP contended that there was overwhelming evidence against A3. First the gun connected to the robbery was found in his residence at Katwe. Then he was identified during the trial by Mugisha, the person who saw him at the scene of crime. Third Mweru and Kalema, who are co-accused, implicated him in their respective confessions. The Assistant DPP argued that Sula is short form for Sulaiman.

We note that in their confession statements appellant Mweru (A1) and appellant Semakula (A2) mention the name Sula. Mweru's statement covers 8 pages. He mentions the name Sula in five of the pages. In that statement, Mweru indicates that a gun was got from Sula's residence in Katwe. In his statement, Kalema mentions the name Sula at least once in relation to the events which occurred after the robbery. In the statement Mweru says that Sula and Emmanuel waited for Kalema and another person at Makerere and these two joined Mweru in the car which took them to Nsambya from where they shared the robbery money with 18 other persons.

In his judgment, the trial judge was clearly alive to the question of the identification not only of the third appellant but also of the other co-accused persons. The judge stated: -

> ***" What made the issue of identification of this accused crucial was therefore the fact that he was identified at the scene of crime by a single witness. Secondly he denied his name "Sula" while answering to the name Sulaiman Senkumba by which he had been indicted."***

Thereafter the learned judge referred to the now famous tests which the predecessor to this Court set out in Nabulele and another Vs. Uganda (1979) HCB 72. The judge considered Mugisha's evidence and concluded this way: -

"I believe the testimony of Mugisha (PW1)..... **This** ***particular accused bore the gun and came very close to the vehicle in which the complainant sat. He also spoke ordering them to surrender the brief case. The events occurred in clear day time at a time (10.00 a.m.) when the complainant was still fresh and alert. The identification parade which should have been organised in respect of A5 would have highlighted the consistency of this witness. But its absence though a disturbing error of police ineptitude, was not destructive to his positive recognition of his assailant. Though the assailant was not known to him before, he presented in a favourable atmosphere enabling his being identified by the witness."***

In their judgment, the learned Justices of Appeal agreed that the circumstances were favourable for correct identification of A3 who was A5 during the trial. They then stated: -

"We agree with the learned trial fudge that the third appellant is the same man who was identified by PW1 at the scene of crime and in court as being one of the robbers. He is also the same man referred to by the first and second appellants in their confessional statements as Sula. The mere fact that the prosecution did not call local council officials who arrested him, in our view does weaken (Sic) the prosecution case. Whether the third appellant was arrested at Namasuba or at Najjankumbi, in our view is immaterial."

In view of the contents of the confessions of Mweru and Kalema we agree with the above conclusions of the Court of Appeal. Ground one must fail.

The complaint in ground two is that the Justice of Appeal erred in law and fact in their evaluation of identification evidence because conditions were not favourable for correct identification of A3. In away we have considered the substance of this ground.

On the issue of identification, the judge considered the conditions under which the appellant was identified and came to the conclusion that the conditions were ideal to correct identification. These conditions were that the robbery was committed in broad day light, the witness saw the appellant while the witness was in a car with clear glasses, the appellant pounced on him wielding a gun, the witness saw the appellant point a gun at Motorich's head, the witness saw the faces of three robbers including the appellant very well; he heard the appellant speak Luganda, and ordered him and his party in the car to surrender the brief case in which there was money, and the incident lasted about 5 minutes. The main attack on the identification by Mugisha that he may have been mistaken because his description of the colour of the vehicle he was using did not tally with that of other witnesses was rejected by both the trial court and the Court of Appeal. In our opinion the two lower Courts came to the right conclusion on this inconsistency. In the first place, it was not material inconsistency because the colour of the vehicle was not an issue. Further it is immaterial that he could not remember the Registration number of the vehicle. The fact that he was scared by the robbers, does not mean that he could not identify the robbers whom he watched for 5 minutes while they were carrying out the robbery of the money from the vehicle in which he was passenger. There is no evidence that he was injured or that his vision was blocked or interfered with.

The other weakness raised by Ms. Musoke in his identification evidence is that no identification parade was conducted in respect of this appellant. This was a serious omission but it is not so serious as to undermine his visual identification at the time of the robbery. Identification parade evidence if it had been held would merely confirm or support the visual identification.

PW.1's dock identification of the appellant was also attacked as of no evidentially value. Because of the incrimination of this appellant in the confessions of Mweru and Kalema, we think that the identification in court tends to strengthen the witness's evidence that the person whom he identified at the scene of crime as one of the robbers is the same as the appellant. We therefore agree with the conclusions of the

two lower courts that the conditions were favourable to correct identification and that PW.1 correctly identified the third appellant

There is some circumstantial evidence tending to support the identification of the appellant by Mugisha as a single witness. As pointed out under ground 1, in the confession of Mweru, he implicates A.3 as the man who kept the machine gun, and who carried it to the scene of robbery and put the victims at gunpoint. The gun was subsequently recovered in a house believed to be his. Kalema also seems to implicate this appellant as the man who rushed to the targeted vehicle holding a gun. There is also evidence that this appellant disappeared from his home in Katwe and even changed the place of residence, apparently to avoid arrest. This circumstantial evidence, though weak in some respects, tends to implicate the appellant, and renders strong credence to the evidence of identification by a single witness. This evidence was sufficient to support the conviction as the two lower courts found. Ground two must therefore fail.

Ground 3 is a complaint that the Justices of Appeal erred when they rejected appellant's alibi without credible evidence adduced putting him at the scene of crime. In our opinion there was credible evidence placing the appellant at the scene by PW.1 and the confessions of the co-accused. It is true the police did not check out the truth of the appellants alibi that he had gone to see his wife in Kagando Hospital. The wife he said he had gone to visit at Kagando Hospital to nurse died while the appellant was in prison. She could have been a useful witness for either side. But even if he had gone to Kagando, he could have done so after the robbery as evidence of his absence from Katwe at the time of search of his house shows. Whatever the case was, he was hiding from the long arm of the law which eventually caught up with him at Namasuba. Therefore this ground must also fail. In consequence his appeal must fail.

The result is that the appeals of the three appellants are dismissed.

Delivered at Mengo this 21st day of August 2003.

B.J. ODOKI

CHIEF JUSTICE

A.H. ODER

JUSTICE OF SUPREME COURT

J.W.N.TSEKOOKO

JUSTICE OF SUPREME COURT

A.N. KAROKORA

JUSTICE OF SUPREME COURT

***G.W.* KANYEIHAMBA**

JUSTICE OF SUPREME COURT