THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: WAMBUZI, C.J., TSEKOOKO, J.S.C., KAROKORA. J.S.C..

MULENGA, J.S.C., KANYEIHAMBA., J.S.C.)

CRIMINAL APPEAL NO. 1 OF 1997

BETWEEN

1. BOGERE MOSES
2. KAMBA ROBERT:::APPELLANTS

AND

UGANDA:::RESPONDENT

(Appeal from decision of the Court of Appeal of Uganda. (Hon. Manyindo, D.C.J., Mukasa Kikonyogo, J.. and Lugayizi. J.) dated 20th December 1996 at Kampala dismissing Criminal Appeal No.1 of 1996 and confirming conviction and sentence of death in High Court Criminal Session Case No.302 of 1995 at Jinja).

JUDGMEN T OF THE COURT

Moses Bogerc and Robert Kamba, in this judgment referred to as "1st Appellant and 2nd Appellant" respectively (and together as "the appellants") were jointly charged (with another person not produced in court) under sections 272 and 273 of the penal Code, on three counts of aggravated robbery committed I the night of 5.10.90. They were tired nearly five and seconds counts, but acquitted on the third count. However, the court ordered that sentence be deferred instead of passing and suspending it. Both appellants first appealed to the Court of Appeal. Their appeals were dismissed and they appealed to this Court.

The offences for which the appellants were convicted were committed in the night of 5.10.90 when a gang of robbers attacked a village known as Walumbe landing site in

Imanyiro Sub County, Iganga District. The robbers, armed with guns. Forcefully broke into several homes of the fishermen who inhabit that village and stole diverse goods. During the attack, gun shots were tired several times and one of the victims was help at gun point when he did not promptly respond to an attacker's demand for money. Subsequently the appellants were arrested separately and were ultimately charged in court with the said offences.

At the trial, only four prosecution witnesses gave evidence. All were victims of the robbing spree. Each testified that during the attack at his own home he had recognised only three persons among the gang of attackers, namely the two appellants, and one Appollo Olukanga (also bearing the names of Sunday and Agweke) who was indicted as A1 but did not attend court for trial. One of the witnesses. Rukuman Kabanda, (PW2) testified that a week and half after the robbery, some of the items stolen from him during the attack, were found in the 1st Appellant's home when it was searched by the police.

Both appellants also gave evidence on oath. Each denied participating in the attack or being at the scene of robbery at the material time. The 1st Appellant testified that at the material time he was at his home in Lwino village Lusede Sub county. Jinja District the 2nd Appellant testified that on the day of the incident, after his regular work at Kakira Sugar Works, he spent the rest of the day working in his garden at his home in Bukoli village, Waina Sub county Iganga District, lie went to bed at 9 pm. and remained at home until the following day. No prosecution evidence was adduced on the arrests of the appellants or on any police investigation. However according to the defence evidence, the 2nd Appellant was arrested by soldiers on I8.10.90 and the 1st Appellant was arrested by RC officials on 18.10.90. Both were taken into army custody at Magamaga military barracks, The 2nd Appellant denied that any stolen property was found at his home. More of that later.

In his judgment, the learned trial judge, alter holding that he was satisfied that aggravated robbery had been committed against Charles Musoke (PW1) and Rukuman Kabanda (PW2) as alleged in counts I and 2 of the indictment, observed that the issue of whether the appellants or either of them took part hinged “on the question of identification of the people whom the 4 prosecution witnesses claim to have seen at the scene of robbery.” He reviewed the evidence o identification and concluded that, despite what he held to be minor discrepancies, the evidence of identification of the appellants was truthful and that it had

put the appellants "at the scene of crime at the time the crime was being committed," so that the appellants' defences of alibi could not be sustained. He also held that the appellants, being part of the group of attackers, it was to be inferred that they shared in "a common intention of robbing the residents of Walumbe". On the strength of the evidence of identification, coupled with the inference of common intention, the learned judge, in agreement with the opinion of the single assessor who sat through the ease, convicted both appellants on the two counts. He acquitted them on the third count because no witness gave evidence on that count and the particulars thereof.

On the first appeal, the Court of Appeal upheld the convictions on the ground that the learned Justices of Appeal were satisfied on the evidence, that the Appellants had been correctly identified by the 4 prosecution witnesses. In addition, their Lordships held that "the fact of recent possession of stolen property which property was allegedly recovered from the home of the 1st Appellant, "showed that (he) had participated in the robbery against PW2"

In this Court the appellants attacked the decision of the Court of Appeal on two grounds framed in (heir joint Memorandum of Appeal, thus:

> *"1. That (he learned Appellate Judges erred in holding that the appellants had been positively identified.*
>
> *2. That the learned Appellate Judges erred in holding that some of the stolen property was recovered from the home of the first appellant when there was insufficient evidence to support such finding. "*

Mr Omoding, learned counsel for both appellants in this Court, argued the two grounds together. We however find ii more appropriate lo consider them separately because, while the first ground applies to both appellants, the second applies to the 1st Appellant alone. We also think it is appropriate to dispose of the second ground before considering the first which involves issues applicable lo both appellants.

On the second ground, Mr. Omoding argued that the prosecution had not sufficiently proved that the property seized from the 1st Appellant s home was stolen. According to him, his client's evidence that the properly was his own, was unshaken. He submitted that therefore, the Court of Appeal erred in applying the doctrine of recent possession of stolen property. In response, Mr. Ogwal Olwa, learned Principal State Attorney was rather equivocal. First, he submitted that the 1st Appellant's evidence, claiming ownership of the property was an afterthought because that claim was not put to Kabanda (PW2) in cross-examination. He however conceded that Kabanda's evidence on the issue, standing alone, would not be sufficient proof that that property was part of what was stolen from him. Lastly he opined that that evidence was superfluous but later clarified that he meant that the conviction of the f Appellant could be sustained on identification evidence alone, without resort to the said recent possession of that property.

This issue is the most unsatisfactory feature of this case. First the prosecution did not produce in court the seized property in question, and no evidence was adduced to explain that omission or failure. Secondly, while the trial court appears to have opted to passively ignore all the evidence about that properly, the Court of Appeal, without assigning any reason, placed reliance on only the prosecution version of it in finding the 1st Appellant guilty.

At the trial only two persons testified on that property, namely Kabanda (PW2) for the prosecution and the 1st Appellant in his defence. The only fact that the two were agreed upon, was that the latter's home was searched and that as a result, the police who conducted the search seized and look away some property. The rest of their respective evidence was in sharp contrast one with the other. Each claimed the properly to be his. Kabanda testified that about one and half weeks after the robbery some items of his stolen property were, recovered in his presence by the police at the 1st Appellant's home and the police took them away. The 1st Appellant, on the oilier hand, testified that his home was searched, first by soldiers in his absence, and again by the police in his presence, and that, no stolen property was discovered. He contended, however, that during the latter search, some people falsely claimed some of his own properly which the police then seized and took away. Both described the items taken by police, but save perhaps a bag, there was no similarity whatsoever, between those enumerated by one with those enumerated by the other. Kabanda's list comprised mostly

shop goods, i.e. a travelling bag, children's underwears, men's under pants and his shoes. The 1st Appellant's list comprised personal goods, i.e. his shirt, blanket, handbag, watch, socks. 2pairs of trousers and 2 table clothes. That conflict was never resolved. The property was not produced in court and the police who seized it did not give evidence. Indeed in his judgment, the learned trial judge made no reference to that evidence at all. let alone any conclusion based on it. On appeal it was not subject of any issue canvassed by either party. The only reference to it, is in the notes of only one member of the court (i.e. Manyindo, D.C.J) to the effect that the Director of Public Prosecutions (DPP) who appeared in that court in person, said:

> *"(PW2's) travelling bag and others were recovered from Bogere's house but the police took them away and were not seen again. "*

We do not think that this single note signifies a serious argument on the part of the DPP that that was evidence showing that Bogere had taken part in the robbery. We think it was a reference made more in passing than in urging the court to make a finding on it. However, in their judgment, the learned Justices of Appeal after holding that the appellants had been correctly identified by the four eye witnesses went on to say:

> *"Apart from the above, there was the fact that some of PW2's properties were recovered from the 2nd appellant's home not long after the said robberies had taken place. That fact of recent possession of stolen property showed that the 2nd appellant had participated in the robbery against PW2. "*

At the conclusion of the judgment their Lordships added:

> ..... *PW2's property which according to the record was recovered from the 2nd appellant's home during the search was later handed over to the police, but it was neither produced in court nor returned to the owner. This matter ought to be followed up by the DPP."*

(* Reference in these two passages to 2nd appellant is reference to Bogere Moses who is 1st Appellant herein.)

We have two observations to make arising from these two passages. First although we endorse the directive to the DPP, in the second passage as necessary to ensure that the police account for the property, it is of no consequence to the case.

Needless to say that the directive would have more beneficially a fleeted the justice of the case, if it had come from the trial, court before conclusion of trial. If the seized property had been traced and produced in court, it would have resolved the conflict either by strengthening the prosecution case, if the items were as described by Kabanda or by putting Kabanda's credibility in very serious doubt, if the items had answered the 1st Appellant's description.

The second observation relates lo the first passage. As a first appellate court the Court of Appeal has power to take into consideration, evidence lawfully adduced at the trial but overlooked in the judgment of the trial court, and to base its own decision on it. In doing so however, the appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses, and should, where available on record, be guided by impressions of the trial judge on the manner and demeanor of witnesses. What is more, care must be taken not only to scrutinise and re evaluate that evidence as a whole, but also to be satisfied that the trial court had erred in failing to lake that evidence into consideration. With the greatest respect to the learned Justices of Appeal, we think that that care was not applied in the instant case. Their Lordships did not show, and upon scrutiny of the evidence we do not find, any reason why the conflict in the evidence on the missing properly should be resolved in favour of the prosecution. We do not accept Mr. Ogwal's argument that failure by counsel for the defence to question Kabanda on the issue in cross-examination, necessarily shows that the 1st Appellant's claim of the properly was an afterthought. The burden to prove beyond reasonable doubt that the 1st Appellant was found in recent possession of stolen property, was on the prosecution. In our view, the evidence of Kabanda (PW2) standing alone as it was, did not discharge that burden, and the learned Principal State Attorney quite properly conceded the point. At the very least the weakness of Kabanda s evidence considered together with the evidence of the 1st Appellant, raise reasonable doubt on whether what the police found at the 1st Appellant's home was stolen property.

In conclusion, having regard to the unresolved conflict in the evidence on the issue, to the unexplained failure by the prosecution lo produce in court the items seized

by the police from the 1st Appellant's home, and to the omission of the dial court to make any finding of fact on the issue, we hold with due respect, that the Court of Appeal erred in law in holding as a fact that Kabanda's stolen property was recovered from the 1st Appellant's home The second ground of appeal therefore succeeds.

Before leaving this issue, however, we are constrained to express our surprise at the apparent lack of appreciation, on the part of those concerned with investigation and prosecution of criminal cases, of the evidential value of the doctrine of recent possession of stolen property in cases of this kind. That lack of appreciation is conspicuous not only in this case but also in a number of other cases we considered in the same session. Thus in this Court the learned Principal State Attorney initially rated the evidence on the issue as superfluous. At the trial stage nothing appears to have been done to ensure proof of the requisite evidence on the issue. It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye-witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eyewitness.

We now turn to the first ground of appeal. The thrust of Mr. Omoding submission was that the Court of Appeal failed in its duly to re-evaluate the evidence, and that if it had done so it would have found that the evidence of identification did not rule out possibility of mistaken identity, or even of frame-up as suggested by the defence at the trial, and that the appellants' defences of alibi had not been sufficiently negatived. He argued that although there was evidence of moonlight, lamp and torch light, there were other circumstances which did not favour correct identification. He reiterated the argument made before the Court of Appeal that in essence there was only one eye witness to the robbery in each count, and that in the circumstances it was not safe to uphold a conviction on the uncorroborated evidence of one eye witness. He also maintained that the absence of any police evidence- on arrest and investigations, cast considerable doubt on the prosecution case. Mr. Ogwal Olwa on the other hand,

stressed that it had not been shown that the Court of Appeal had erred in any way. He also reiterated a submission made in the Court of Appeal by the DPP that the several robberies in the homes which were very near one another, constituted one transaction witnessed by the four prosecution witnesses. He further submitted that the points raised in this appeal were not new. They had been raised in, and were, considered by the Court of Appeal which rejected them. According to him in view of the prosecution evidence the lower court could not have come to any other conclusion and the defences of alibi had to fail.

In its judgment, the Court of Appeal identified its task in the case in the following sentence:

> *"At the time of hearing this appeal, it was not in issue that the offences of aggravated robbery were committed at Walumbe beach, in Iganga District, in the night of 5th October, 1990, only the question of identification of the robbers remained to be resolved by the court. " (emphasis added)*

The Court then reviewed the arguments presented by Counsel for the appellant-; and the reply by the DPP for the respondent, without comment. It then resolved the question before it in the following passage:

> *"On the evidence, we are satisfied that the appellants were correctly identified by PW1, PW2, PW3 and PW4 during the robberies. The witnesses knew the appellants before the incident, and in recognizing the appellants they were assisted by the bright moonlight, the wick lamp and torch light. "*

It is evident from this passage that the court accepted the identification of the appellants as correct, on the basis of the factors which the witnesses said assisted them in the identification, namely the facts (a) that the appellants were known to the witnesses prior to the incident, and (b) that although it was night there was light which enabled the witnesses to recognise the attackers. What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the court's due

consideration. While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court in its judgment, even if the adjudication be handed out in summary form, in the instant case we find that the following material issues which featured in the first appeal and have recurred in this, were not adjudicated upon; namely

1. whether there were factors or circumstances which at the material lime rendered identification of the attackers difficult, notwithstanding that there were those which could facilitate identification;
2. whether the absence of evidence of arrest and or police investigation had any or no adverse effect on the cogency of the prosecution case;
3. whether the appellants' defences of alibi were given due consideration.

In our recent decision in Kifamunte Henry Vs Uganda (Cr. App. No. 10 of 1997 (unreported), we reiterated that it was the duly of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court, and make up its own mind. We there pointed out that, except in the clearest of cases. We, as a second appellate court, are not required to re-evaluate the evidence like a first appellate court. In our view, the instant case is one of such clearest of cases which make it incumbent on this court to re-evaluate the evidence. This is so because it is apparent from its judgment that the Court of Appeal did not evaluate the evidence as a whole, and in particular in respect of the said material issues; with the result that it cannot be ruled out that a different result would have been arrived at, if that evidence had been duly considered and evaluated. Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law. {See. Pandya vs R (1957) EA 336; as explained in Ruwala Vs R (1957) 13A 570)

On the above first issue, the. factors which have been highlighted from the evidence, as having been obstacles to proper identification are: (a) that the principal eye witnesses were

very frightened during the robberies and/or that they went into hiding thereby putting themselves at distances not favourable to accurate identification; and (b) that the attackers were carrying bundles which must have obscured their identities. The principal eyewitnesses referred to are Muhamed Charles Musoke (PWI) and Rukumani Kabanda (PW2). The former was the sole eye witness to the robbery at his house which

was subject matter of the first count; and the latter was the only eye witness to the robbery at his shop, which was subject matter of the second count the other two witnesses, Ali Wankya (PW3) and Rashid Musa (PW4) each saw and testified on the robbery at his own house which was not subject of any charge. The relevance of their evidence was that the robberies at their homes appear to have been pari of one transaction extended to several homes in the same village. In this regard we would at the outset reject the argument for the appellants that there was only one witness for each charge in the indictment. If the identification evidence of Wankya and Musa is accepted it adds to that of the other two because it was evidently one transaction with common intention.

Musoke and Kabanda in addition to telling the trial court that they were able to identify the appellants because they had known them before and there was moonlight during that night, both testified that when the attackers struck, they went into hiding. Musoke said he was very frightened, and both admitted dial initially they did not recognise the attackers. For emphasis we reproduce what Musoke said in this connection:

> *" 1 heard gun shots outside. 1 went out and heard alarms being raised. I went into hiding under the verandah of my house. I heard people ordering me to open, they hanged the door-and it opened I saw 2 people enter the house where my wife was still sleeping. One of them had a club another had something which looked like a gun. When things became bad I moved and hid somewhere else. Things were stolen front my house..... At that time I did not recognise anybody, but when I was hiding by the road I recognised 3 people when they were going away. I was hiding about 20 metres from my house. I was hiding about 5 yards from the road. "*

In cross-examination Musoke further said:

> *" I woke up from-the sleep when 1 heard gun shots I was very much frightened. At first I was hiding about 5 metres from the door of my house. When those people were entering my house I did not recognise any of them. I recognised the accused when they were coming out of the camp not out of my house. When I saw them getting out of my house 1 only recognised Sunday.... I did not expect the robbers to pass where I was hiding as I expected them to go by boats. Where I was hiding nobody could see me because I was wearing black "*

Kabanda did not expressly confess to having been frightened. However, he said that he was outside his house guarding his shop when he saw about 15 men whom he thought were tax collectors. He went behind his house and raised alarm and they fired their guns three times. They went inside his house and he heard them asking his wife where he was. On hearing that,

he went to hide behind a big tree. He hid about 20 metres away from his shop and from that distance saw the robbers carrying goods from his shop to one man who was on guard and near him. He also said that he did not recognise the appellants during the robbery but only when they were going away. Both Musoke and Kabanda described differently the bundles which the appellants were carrying as they were going away.

The other two witnesses (PW3 and PW4) both admitted that they were very frightened during the attacks at their respective homes. However, because the attackers found them indoors, they did not go into hiding except PW3 who went to hide after the attackers had left his house. PW3 testified that he was assaulted and kicked about. He saw the attackers for 2 minutes before his candle was blown out. PW4 testified that he was put at gunpoint on the floor and was beaten, he identified the appellants in the light of torches of the attackers and his own torch before it was snatched from him.

By any standards, the conditions described in the evidence in this case were not quite conducive for easy identification of the attackers. We would not wish to give the impression that frightened victims of attack cannot identify their attackers; nor that if one, in the panic of the moment, fails to identify his attacker initially, he cannot rccognise him in the safety of hiding. What we wish to highlight, however, is that such are factors that must be taken into consideration in evaluating the evidence in order to determine if conditions were easy or difficult for identification.

This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were I not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. It is trite law that no niece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe Vs Uganda S.C.Cr. App. No.7of 1991 unreported).

The problem of cases dependent on evidence of identification only is highlighted in the following passage from the judgment of the former Court of Appeal for East Africa in Roria Vs Republic (1967) EA. 583 at p. 584 I) E

> *"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of a debate……..' There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in*

nine cases out of ten — if they are as many as ten - it is on a question of identity' - That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. "

In Geoige William Kalyesubula Vs Uganda Cr. A pp. No. 16 of 1997

(Unreported)

" The law with regard to identification has been stated on numerous occasions. The courts have been guided by Abdulla Bin Wendo & Another Vs R (1953) 20 *EACA* 166 and Roria Vs Republic (1967)

EA 583 to the effect that although a fact can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error. "

The need for care stressed in the above passage is not required in respect of a single eve witness only but is necessary even where there are more than one witness where the basic issue is that of identification. This point was stressed in Abdala Nabulere & Another Vs Uganda Cr. App.No. 9 of I978 (1979) in the following passage in the judgment:

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications, The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused.

AH these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced hut. the poorer the quality the greater the danger.....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution. " (emphasis added)

In Moses Kasana Vs Uganda Cr. App. No. 12 of 1981 (1992-93) HCB A7 this court which cited the two foregoing decisions with approval, underlined the need for supportive evidence where the conditions favouring correct identification are difficult. It said at p.48

"Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi. "

We have to point out that the supportive evidence required need not he that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences (See George William Kalyesubu/a Vs Uganda (supra). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose. We think, that in the instant case, having regard to the difficult conditions for identification, there was need to look for other evidence which was supportive of the identification evidence and at the very least, there was need for the court to warn itself of the danger of convicting on the basis of the unsupported identification evidence. Neither the trial court nor the first appellate court adverted to that need.

We now turn to the second issue being whether the failure to adduce police evidence of arrest and/or investigation had any adverse effect on the prosecution case. We have noted earlier in this judgment that the scanty evidence on arrest was given only by the appellants, each stating the date and venue of his arrest. The first arrest was of the 2nd Appellant by unnamed soldiers on 15.10.90. They took him to Magamaga army barracks where he was asked if he was "Zanke" which he denied. Three days later the 1st Appellant was arrested by unnamed R.C officials and taken to the same army barracks. In all according to the 1st Appellant, four persons were arrested and detained in the said army barrack for about four days. There is no indication in the evidence as to when, where, by

whom, the other two were arrested nor what happened to them. Also there is no indication as to who caused the soldiers from Magamaga army barracks and/or the R.C. officials to effect the arrests. Musoke (PW1) testified that when he reported to the nearby military detach (at Busui) no help was given, so the following morning he reported to Buchapa police post. Kabanda (PW2) testified that he was with Musoke when making the said reports. Ali Wankya (PW3) testified that he reported the incident to Ikulwe country headquarters. The fourth witness, Rashid Musa, does not appear to have made any report. Musoke even specifically pointed out that he was not by the police to identify the attackers but that he had identified them at Magamaga army barracks "three days after their arrest. He did not describe the circumstances of how he came to identify them in the army barracks. The appellants were subsequently transferred to Iganga police station and were first taken to court on 7.11.90. at the trial the 1st Appellant was cross-examined by prosecuting Counsel who asked him if he knew "Patrick of Magamaga" and if he sold to him a stove and radio cassette, the 1st Appellant said he did not know him and did not sell the said items to anyone, the questioning on this line was terminated without disclosing that further information.

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counsel had. In our view, a number of questions remained unanswered, particularly as to the basis on which the police decided lo re-arrest and charge the appellants.

We agree with Sir Udo Udoma, C.J. as he then was where in Rwaneka Vs Uganda (1967) EA 768, at p.771 he said:

> *"Generally speaking, criminal prosecutions are matters of great concern to the state; and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of prosecutors to make certain that police officers who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals. "*

In the Court of Appeal, the learned DPP conceded that the arresting and investigating officers ought to have been called to give evidence, He argued, however. that the omission to adduce that evidence was not fatal lo the conviction because then- was other evidence which proved the charges beyond reasonable doubt. In support of that argument he relied on the decision in Alfred Bumbo and Others V s Uganda Cr. App. No.28 of 1994 (unreported) in which this Court said:

> *"While it is desirable that the evidence of a police investigating officer and of arrest of an accused person by the police, should always be given where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of an accused. All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charges"*

We recognise that this is a correct statement of the legal position. We also agree that the evidence available in Alfred Bumbo's case was sufficient to prove and did prove the case beyond reasonable doubt. The question for consideration here however, is. whether in the circumstances of the instant case, such police evidence would have been essential to prove the charges, in addition to the identification evidence. We think that if, such evidence was available it would have assisted. We hasten to add. however, that such evidence need not in every case, be supportive of identification evidence. It may. in the interests of justice, be essential to point to reasonable doubt on the guilt of the

accused. In the case of Rex Vs Shaban Bin Donaldi (1940) 7 EACA 60. the Court of Appeal for Eastern Africa said:

> *"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness, evidence of details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognise of the time or an article which is not really his. "*

The case was from Tanganyika. Section 157 of the Evidence Act referred to is similar to section 155 of our Evidence Act which provides:

> *"155. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. "*

In the subsequent case of Kella Vs Republic (1967) EA 809 at p. 813 was held.

> *"The desirability for this practice would apply with special force to a case of this nature where the decision depends upon the identification of the accused person some two and half years after the incident happened. The police must in their investigation have taken statements from both the principal witnesses Hallima and Jereyasio. In her evidence Hallima states that she gave the statement the following day, naming—the two appellants. If this statement had been produced and she had in fact identified both appellants by name the day after the incident, this would have considerably strengthened her testimony but if this portion of her evidence was untrue then it would have the opposite effect and have made her testimony of little value. "*

We think that the same reasoning is applicable to the instant case. Three of the witnesses,

Musoke, Kabanda and Wankya testified that they made reports the day after the incident. Wankya expressly stated that he had named the appellants in his report. If therefore, the prosecution had produced the statement each eye witness made to the police, it would have helped, either to confirm that what a witness swore to in court live years after the event, was, under s. 155 of the Evidence Act. Corroborated by the statement he made to the police a day after the attack; or to show that what he swore to was inconsistent with the statement. Indeed, although the statement made to the police by Wankya (PW3) was not exhibited in court, there are admissions he made during cross-examination which show that he was not consistent on the identity of the attackers who came to his house. Like the other eye witnesses, he testified that he recognised only 3 people who broke into his house, namely Sunday Agweke and the two appellants. In cross-examination he first denied telling the police that he had recognised only Agweke who came with Kadogo and he insisted that his attackers did not include Kadogo. He also denied telling the police that Kadogo had forced him into the house and kicked him or that there was shooting in his house. As the cross-examination continued however he stated; I told the police that kadogo hail ordered me to lie down while inside the house. 1 did in fact tell the police that Kadogo fired u gun near my ear after I had refused to lie down." From this part of evidence, serious doubt is raised on the identification evidence from at least one of the eye witnesses. We are rather surprised that this did not attract attention and/or comment from either of the courts below.

In conclusion on this issue, we think that a court properly directing itself could draw adverse inference from the failure of the prosecution to adduce police evidence of arrest and investigation particularly in a case such as this, where arrests and investigations appear to have been initially by soldiers who are not legally competent investigate criminal cases.

The third issue to consider is whether each appellant's defence was duly considered . The learned trial judge, alter reviewing the evidence of identification, held:

> *"I consider the evidence of those eye witnesses to be truthful and I accept it as such. The defence of alibi put up by the 2 accused persons cannot be sustained since through the evidence of the 4 prosecution witnesses the accused have been put at the scene of crime at the time the crime was being committed. "*

In the Court of Appeal the third ground of appeal was:

"3. The learned trial judge erred in law and fact when he found that the evidence adduced by the four prosecution witnesses placed the appellants on the scene of crime."

At the hearing in the Court of Appeal, Counsel for the appellants reinforced this ground with the argument that the defence evidence of alibi had not been shaken. In the judgment of the court however, the issue was not considered apart from noting the argument. As already noted earlier in this judgment the court simply stated that was satisfied on the evidence that that appellants were correctly identified by the four prosecution witnesses. He is reasonable to deduce from this that the court decided lo follow the holding of the trial judge which, we hasten to add, it is entitled to do. However, it can do so only on condition dial the latter arrived at the holding in accordance with the law. It is trite law that the court, in arriving at any decision, must take into consideration all the evidence before it. In Suleiman Katushabe Vs Uganda (supra) this court said:

" The principle is that in criminal cases, apart from certain limited exceptions, the burden of proof is throughout on the prosecution. It is also the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. It is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed no single piece of evidence should be weighed except in relation to all the rest of the] evidence, ''(emphasis added)

(Sec also Okoth Okale & Another Vs Republic (1965) EA 555 and Sam Lutaya Vs Uganda Cr. App. No. 10 of 1986 (unreported). We note that in the instant case the learned trial judge was conscious of the law that places the burden on the prosecution to disprove the defence of alibi. However there is no indication that he was similarly conscious of the requirement to, consider the evidence as a whole. In his notes for summing up to the single assessor we find the following:

"6. Defence. of alibi

Accused has the duty of raising the defence but has no duty of proving it. Prosecution bears the duty of destroying the defence by putting the accused at the scene of crime at the time (it) was being committed. "

The passage cited earlier in this judgment shows that the learned trial judge held the defences of alibi to be unsustainable because, “through the evidence of the eye witnesses the accused had been put at the scene of crime. "What then amounts to putting an accused person at the scene of crime? We think that the expression must

mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. In the instance case, we have found it very difficult In avoid the conclusion that the learned trial judge considered and accepted the prosecution evidence alone, and then rejected the defence summarily simply because he had accepted the prosecution evidence. That was in our view a misdirection. Accordingly we hold, with due respect that the. Court of Appeal erred in law upholding the depth of the statement which had been arrived at pursuant to misdirection.

In conclusion, having regard to our findings on these issues namely that there was failure on the part of the courts below:

(a) to appreciate the danger of basing conviction solely on unsupported evidence of identification made under difficult conditions and to proceed on such evidence with due caution and care: and

(b) to duly consider the evidence as a whole and in particular to consider and evaluate the defence evidence:

we think it would be unsafe to hold that the appellants were proved beyond reasonable doubt, to have committed the offences. Therefore the first ground of appeal also succeeds. Accordingly the appeal must be allowed, the convictions of both appellants are quashed and the sentences are set aside. Both appellants are to be released forthwith, unless they are held on any other lawful ground.

Before taking leave of this case, we wish to comment on another oddity in the trial proceedings. Three persons were changed on the indictment namely; Apollo Olukanga as the 1st Accused (A I) and the two appellants as the 2nd and 3rd Accused (A/

and A3). When the case first came up for hearing on I0.8.95. and subsequently. It was recorded that A1 was absent. No explanation appears to have been given to the trial court about this absence up to the time of the judgment. In the judgment the learned trial judge was constrained to observe:

> *"Although the indictment speaks of 3 accused persons who included a man called Appollo Olukanga Agweke At as having been one of the robbers it is not known what happened to this accused person.*
> *Be that as it may, this judgment is in respect of A2 and A3 only it has nothing to do with A I. "*

This clarification by the learned trial judge would not have been necessary the collect procedure had been followed the law of this country does not permit criminal trial of any person in his or her absence. Upon the prosecution deciding to proceed with the trial in absence of A I. the charges against A I ought to have been dropped and the indictment ought to have been accordingly amended. This should have been done, at the date immediately prior to commencement of hearing evidence. The trial court could not permit to proceed with the trial of an indictment naming an accused person who is not produced before the court.

Dated at Mengo this 6th day July 1998

S.W.W. Wambuzi
Chief Justice

J.W.N Tsekooko
Justice of the Supreme Court

A.N. Karokora,

Justice of the Supreme Court.

J.N. Mulenga,

Justice of the Supreme Court.

G.W Kanyeihamba

Justice of the Supreme Court