

DJP

IN THE COURT OF APPEAL FOR ZAMBIA  
HOLDEN AT LUSAKA AND NDOLA  
(Criminal Jurisdiction)

CAZ.006/2017

Between

LEWIS MATAMBO

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Mchenga, DJP, Chashi and Chishimba,JJA

On 7<sup>th</sup> March 2017, 9<sup>th</sup> March 2017 and 9<sup>th</sup> August 2017

For the Appellant: P. Mudenda, Legal Aid Counsel, Legal Aid Board

For the Respondent: P. Nyangu, State Advocate, National Prosecution Authority

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## J U D G M E N T

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Mchenga, DJP, delivered the Judgement of the Court

Cases referred to:

1. Charles Lukolongo and Others v The People [1986] Z.R. 115
2. Peter Yotamu Haamenda v The People [1997] Z.R. 184
3. Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People [1988-1989] Z.R. 163
4. Lupupa v The People [1977] Z.R. 38
5. Ali And Another v The People [1973] Z.R. 311 (Rep.)
6. Ilunga Kabala and John Masefu v The People [1981] Z.R. 102

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia
3. The Court of Appeal Act, Act No. 7 of 2016

Lewis Matambo, the appellant, appeared before the High Court sitting at Livingstone charged with 3 counts of Aggravated Robbery contrary to **Section 294 (2) of the Penal Code**. He was also charged with a count of Attempted Murder contrary to **section 215 of the Penal Code**.

In the 1<sup>st</sup> count of aggravated robbery, it was alleged that on 14<sup>th</sup> March 2010, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, being armed with offensive weapons, namely a pistol and an AK 47 rifle, and jointly and whilst acting together with other person's unknown, robbed **Jethro Simapili** of K9,000,000.00 cash, US\$100 and 20 Euros all valued at K9,600,000.00 the property of Stero Bureau de Change and at or immediately before or immediately after the robbery threatened to use actual or personal violence to **Jethro Simapili** in order to prevent or overcome resistance to the property being stolen.

The allegation in the 2<sup>nd</sup> count was that on 14<sup>th</sup> March 2010, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, being armed with offensive weapons namely 1 pistol and 1 AK 47 rifle, and

jointly and whilst acting together with other persons unknown, robbed **Timothy Mbewe** of 1 AK 47 rifle property of Zambia Police Service and at or immediately before or immediately after the robbery used or threaten to use actual violence to **Timothy Mbewe** in order to overcome resistance to the property being stolen.

In the 3<sup>rd</sup> count, it was alleged that on 14<sup>th</sup> March 2010, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, being armed with offensive weapon namely 1 pistol and 1 AK 47 rifle, jointly and whilst acting together with other persons unknown robbed **Jethro Simapili** of a bag, a black rain suit, a Barclays Bank card and a cell phone Nokia 5140 altogether valued at K844,000.00 the property of **Jethro Simapili** and at or immediately before or immediately after such robbery did threaten to use actual or personal violence to the said **Jethro Simapili** in order to overcome resistance to the property being stolen.

The allegation in the 4<sup>th</sup> count was that on 14<sup>th</sup> March, 2010 at Livingstone in the Livingstone District of the Republic of Zambia, jointly and whilst acting together with other persons unknown they attempted to unlawfully cause the death of **Timothy Mbewe**.

The appellant denied all the charges and the matter proceeded to trial.

Constable Tembo's evidence was that on 14<sup>th</sup> March 2010, around 09:00 hours, he reported for work at Stero Bureau de Change which is at Livingstone's Falls Park around 09:00. He was armed with an AK 47 rifle. Soon after the bureau opened, a customer came in and asked for his name. When that customer left, three robbers, who included the appellant, came in. The appellant, who was carrying a pistol, ordered him to drop his firearm and when he hesitated, he shot him. Soon after he was shot, he closed his eyes and pretended to be dead.

According to **Jethro Simapili**, the manager of Stero Bureau de Change, after the appellant shot Constable Mbewe, he pointed a firearm at him and demanded for money. He said he opened the drawers and handed over the money. The robbers also got his personal effects and Constable Mbewe's firearm, before getting away. After they left, he took Constable Mbewe to the hospital and reported the incident to the police.

On the same day, around 11:00 hours, Detective Inspector Nzhibwe, who was in Kalomo, received information of the robbery and mobilized police officers who included Inspector Lufwendo. They set up a road block at Kalomo Bridge and started inspecting every motor vehicle that was coming from Livingstone. After about two hours, the appellant turned up in a Toyota Chaser. He was stopped by Inspector Lufwendo who spoke to him and instructed him to park.

the motor vehicle. Instead of parking, the appellant drove off and they gave chase but could not catch him.

Detective inspector Nzhibwe returned to Kalomo Police Station and around 15:00 hours, he received information from members the public of an abandoned motor vehicle in the Simakaka area. He made a follow up and recovered the motor vehicle, which the appellant had driven through the road block, earlier on that day. In it, he found articles that included a magazine that was identified as having been on Constable Mbewe's firearm at the time he was shot at the bureau de change. The police also received information of the presence of the appellant at Macrons, which is close to the Simakaka area. They went there and apprehended him. He then led them to where they had recovered the motor vehicle and they found a small bag and number plate fixing riveter.

Following his apprehension, the appellant was placed on an identification parade where he was identified by **Jethro Simapili**. Constable Mbewe did not attend the parade because he was still recovering from the injuries he suffered during the robbery. However, he identified him in court.

In his defence the appellant said on 15<sup>th</sup> March 2010, he was apprehended in Kalomo by the police after disembarking from a bus. He had travelled there on

a business trip. They took him to Livingstone where they accused him of robbing **Jethro Simapili** and shooting Constable Mbewe. He denied both allegations.

The trial Judge found that the robbery took a short period of time and that both **Jethro Simapili** and Constable Mbewe were probably scared at the time. Even if that was the case, he found that they had the opportunity to identify the appellant. He found that prior to the shooting, the appellant had entered the bureau and this enabled the two witnesses to identify him. He also found that their evidence was corroborated by the recovery of Constable Mbewe's magazine from the motor vehicle that the appellant drove after the robbery. He rejected the appellant's defence, which he found to be a mere denial.

Consequently, he found that the prosecution had proved, beyond all reasonable doubt, that the property mentioned in the three charges in the information was stolen by the appellant and his colleagues. He also found that they shot Constable Mbewe with a firearm. He convicted him of all 4 counts. The trial Judge imposed the death penalty for each one of the 3 aggravated robbery counts. He also sentenced him to 25 years imprisonment for the attempt to murder Constable Mbewe.

Dissatisfied with the verdict of the High Court, the appellant has appealed against the conviction only. He has advanced one ground of appeal and it is couched as follows:

"The learned trial Judge erred in law and in fact when he convicted the appellant on the identification evidence by the prosecution witnesses when all the conditions favouring correct identification were difficult."

At the hearing, both parties relied on the written submissions that they had earlier on filed into court.

Mr. Mudenda submitted that both **Jethro Simapili** and Constable Mbewe did not have a good look at the robbers who came into the bureau. In addition, they were scared because a firearm was pointed at them and they were seeing the robbers for the first time. He also submitted that the trial Judge's finding that the witnesses saw the appellant before the robbery that morning, is not supported by evidence.

He also submitted that both Inspector Lufwendo and Detective inspector Nzhibwe did not have a good look at the driver at the road block to be able to identify him as being the appellant. This is because driver of that motor vehicle spent a very short period of time with them before driving off. He referred to the cases of **Charles Lukolongo and Others v The People (1)** and **Peter Yotamu Haamenda v The People (2)** and submitted that the identification evidence against the appellant was of poor quality and the appellant should not have been convicted on it because it was not corroborated.



Mr. Mudenda also referred to the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (3)** and submitted that the fact that the appellant led the police to the place where the motor vehicle was recovered, was of no probative value because nothing new was discovered. He referred to the case of **Yotamu Haamenda v The People (2)** and submitted that there was dereliction of duty when the police failed to lift finger prints from the recovered items. Further, he submitted that the appellant gave a plausible explanation of how he was found in Kalomo but it was rejected without explanation.

Finally, Mr. Mudenda submitted that there was misdirection when the appellant was convicted on uncorroborated poor quality evidence. He urged the court to uphold the appeal and set aside the convictions.

In response, Ms. Nyangu submitted that the principle set out in the case of **Charles Lukolongo and Others v The People (1)**, on corroboration of poor quality identification evidence, was satisfied by the prosecution evidence. Despite the quality of **Jethro Simapili** and Constable Mbewe's identification evidence not being good, it was supported by the evidence of both Detective Inspector Nzhibwe and Inspector Lufwendo. They identified the appellant as being the driver of a motor vehicle from which a magazine belonging to



Constable Mbewe was recovered. The appellant also led the police officers to the recovery of a small bag and number plate fixing riveter.

Ms. Nyangu also referred to the case of **Peter Yotamu Haamenda v The People (2)** and submitted that the failure to lift fingerprints could not amount to dereliction of duty because the evidence against the appellant was overwhelming and he was in no way prejudiced. He was identified by the witnesses and was linked to the robbery by the recovery of the magazine from a motor vehicle he had driven.

As regards Mr. Mudenda's reference to the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (3)**, Ms. Nyangu submitted the evidence of the appellant leading the police to where the motor vehicle was recovered, had probative value because it led to the recovery of a small bag and a number plate fixing riveter.

Finally, she urged the court to uphold the conviction and dismiss the appeal.

We have considered the evidence on record, the Judgment of the trial court and the submissions of counsel. The first issue we will deal with is Mr. Mudenda's submission on the trial Judge's finding that **Jethro Simapili** and Constable Mbewe's ability to identify the appellant were enhanced because they saw

him earlier that morning. He submitted that the finding was not supported by evidence.

In the case of **Lupupa v The People (4)** it was held, *inter alia*, that an appellate court can only set aside a finding of fact, by a trial court, if it is one that cannot reasonably be entertained on the evidence that was before the court. We accept Mr. Mudenda's submission that the finding that **Jethro Simapili** and Constable Mbewe saw the appellant moments before the robbery is not supported by evidence. They both testified to seeing him for the first time during the robbery. This being the case, we set it aside because it is not supported by evidence.

Reverting to the identification evidence at the bureau, we will first deal with Constable Mbewe's identification evidence. He did not attend the identification parade and only identified the appellant in court. In the case of **Ali and Another v The People (5)**, BARON, JP, at page 313, delivering the judgment of the court, observed as follows:

"The courts have frequently said that identification in these circumstances is of little or no value, and although (as the learned judge on appeal pointed out) there is some authority which suggests that it is within the judge's discretion to allow it in appropriate circumstances, we cannot agree that the circumstances in the present case were appropriate. In that case, *R v Caird* [1], the witness, a police constable, had been knocked unconscious at the time of the offence and was off duty for a considerable time thereafter; more importantly, it appears from the report that there was other evidence incriminating the accused. In the present case there was no

reason whatever not to hold an identification parade. The magistrate in his judgment makes no mention of the failure to conduct such a parade and he simply accepted the court room identification; nor did he consider whether there was any other evidence tending to support that identification"

Though the trial Judge did not give reasons for accepting Constable Mbewe's court room identification evidence, we find no misdirection in its acceptance. Constable Mbewe was sick at the time the parade was assembled, having been shot in the robbery, and there was therefore a good reason for him not going to the parade at which **Jethro Simapili** identified the appellant.

Both **Jethro Simapili** and Constable Mbewe told the court that their assailant talked to them during the robbery, which was in broad day light. Constable Mbewe said he was ordered to drop the firearm and when he hesitated, he was shot. In the case of **Jethro Simapili**, he was ordered to surrender the money by the appellant who was pointing a firearm at him. We find that the trial Judge cannot, in the circumstances, be faulted for finding that they had the opportunity to observe the appellant.

We also find that the trial Judge rightly found that the evidence of these two witnesses, was corroborated by the evidence of Detective Inspector Nzhibwe and Inspector Lufwendo; though the evidence of these two police officers was attacked by Mr. Mudenda who submitted that they did not have the opportunity to see and identify the appellant. We find that it was not the case. Inspector Lufwendo stopped and talked to him before he drove off. Not long

thereafter, police officers recovered Constable Mbewe's magazine from that motor vehicle. The trial Judge was on firm ground when he found that the two police officers were able to identify the appellant because they talked to him.

In the case of **Ilunga Kabala and John Masefu v The People (6)** it was held, *inter alia*, that odd coincidences, if unexplained, can provide supporting evidence and that an explanation, which cannot reasonably be true, is in that connection, no explanation. In this case, it would be an odd coincidence that the appellant was seen driving a motor vehicle in which a magazine "stolen" from Constable Mbewe's was found a few hours after the robbery, if he was not one of the robbers.

Coming to Mr. Mudenda's reference to the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (3)**, and his submission that the appellant's leading the police to the place where they had recovered the motor vehicle was of no probative value, because nothing was recovered, we agree with him. Contrary to Ms. Nyangu's submission that it was, because it led to the recovery of a small bag and number plate fixing riveter, we find that these two items did not incriminate the appellant in anyway. The bag is not linked to any one nor is the riveting gun linked to the number plates on the motor vehicle. However, we find that the trial Judge did not place any reliance on that evidence.

We find that the identification evidence of **Jethro Simapili** and Constable Mbewe was corroborated by the recovery of Constable Mbewe's firearm magazine from a motor vehicle that the appellant was driving soon after the robbery. We find no merit in the appeal and we dismiss it. But the matter does not end here.

As was indicated earlier on, the appellant was convicted of 3 counts of aggravated robbery and a count of attempted murder. All these offences arose from one incident. **Section 135 of the Criminal Procedure Code**, deals with the joinder of counts in a charge sheet or in an information and it provides as follows:

- (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character.
- (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.
- (3) .....

From this provision, it is clear that there are instances where more than one offence is committed during a criminal expedition and when that happens, the offences are set out in separate counts in the information or charge sheet. The question that arises in this case is whether, the appellant and his accomplices committed 3 robberies and the offence of attempted murder when they attacked Stero Bureau De Change on 14<sup>th</sup> March 2010.

The offence of aggravated robbery is set out in **Section 294 of the Penal Code** and it provides that:

- (1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years.
- (2) .....

In the case of attempted murder, it is set out in **Section 215 (a) of the Penal Code** and it provides that:

Any person who-

- (a) attempts unlawfully to cause the death of another; or
  - (b) .....
- is guilty of a felony and is liable to imprisonment for life.

Put simply, an aggravated robbery is committed when a thief, who is armed with an offensive weapon, or is in the company of another thief, uses or threatens to use violence, before, during or after stealing. On the other hand, there is an attempt to murder, under **sub section (a) of Section 215 of the Penal Code**, when injury is inflicted with sole purpose of killing.

From the evidence that was before the trial court, it is apparent that the appellant and his accomplices set out to rob the bureau de change armed

with a firearm. They shot and disarmed a police officer who was guarding it and thereafter, they threatened the manager into surrendering both the bureau's money and his personal property. They also took away the firearm for the police officer they had disarmed when they started committing the offence. It is our view, that had the prosecutor correctly assessed the evidence, the appellant would have only been charged with one count of aggravated robbery and nothing more.

The shooting of Constable Mbewe did not amount to a separate offence of attempted murder because it is actually an ingredient of the aggravated robbery; the use of violence to overcome resistance during a theft. Neither did the taking of his firearm amount to a separate robbery because it was clearly intended to prevent him from using it to resist the robbery.

Further, the fact that what was stolen from **Jethro Simapili** belonged to two different owners, cannot lead to a conclusion that there were two robberies. In theft related offences, aggravated robbery being one of them, a person who has in his possession property belonging to another person, can, depending on the circumstances of a case, be treated as a "special owner".

In this case, it can be said that **Jethro Simapili** had the authority to be in possession of property belonging to the bureau in circumstances that qualify him to be treated as the special owner of that property. A single count of



aggravated robbery should have therefore been preferred against the appellant and it should have referred to **Jethro Simapili** as the owner of property stolen from him and the bureau de change.

Consequently, we find that the information in this case was defective for having a multiplicity of charges that were actually one aggravated robbery. This is because, unlike what is envisaged under **Section 135 of the Criminal Procedure Code**, the count of attempted murder and two of the three counts of aggravated robbery, were not separate offences. They were all "components" of the robbery at the bureau.

**Section 16(4) of the Court of Appeal Act** provides that:

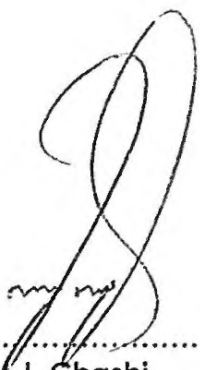
The Court may, on an appeal, whether against conviction or sentence, substitute a judgement of guilty for such other offence as the trial court could have entered and, in the case of an appeal from the Judgement of the High Court in the High Court's exercise of appellate jurisdiction, the Court shall, in addition, have power to restore the conviction of the trial court.

Having found that there was a multiplicity of charges, that were essentially one offence, we set aside the appellant's conviction for the 3 counts of aggravated robbery and a count of attempted murder. The sentences associated with them, are equally set aside.

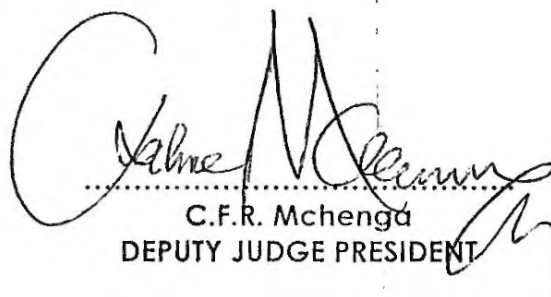
In their place, we convict him of a single count of armed aggravated robbery; on 14<sup>th</sup> March 2010, at Livingstone in the Livingstone District of the South

Province of the Republic of Zambia, the appellant, while in the company of others, and while armed with a firearm, robbed **Jethro Simapili** of K9,000,000.00, US\$100, Euros 20, 1 bag, 1 black rain suit, 1 Barclays Bank card and 1 Nokia 5140 cell phone all valued at K10,444,000.00, the property of **Jethro Simapili** and at or immediately before the robbery used actual violence in order to overcome resistance to the property being stolen.

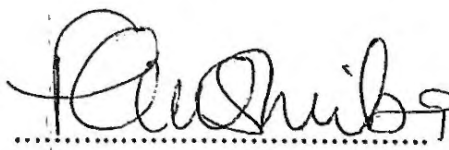
Since there is incontrovertible evidence, in the form of gunshot wounds suffered by Constable Mbewe, of the use of a firearm, our hands are tied into imposing the mandatory death penalty; and we so do.



.....  
J. Chashi  
COURT OF APPEAL JUDGE



.....  
C.F.R. Mchenga  
DEPUTY JUDGE PRESIDENT



.....  
F.M. Chishimba  
COURT OF APPEAL JUDGE