

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 151/2018

HOLDEN AT LUSAKA

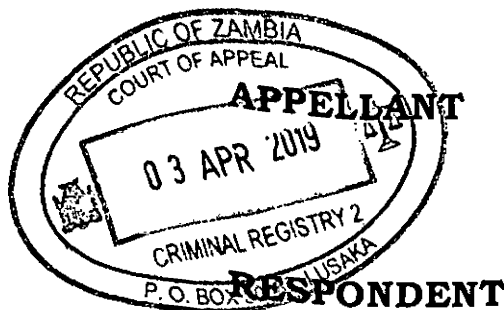
(Criminal Jurisdiction)

**BETWEEN:**

**DAVIES KABILA**

**AND**

**THE PEOPLE**



**CORAM: MAKUNGU, SICHINGA AND NGULUBE, JJA.**  
**On 26<sup>th</sup> March and 3<sup>rd</sup> April, 2019.**

**For the Appellant:** H. Mulunda, Messrs L.M. Chambers

**For the Respondent:** O. Siankanga, Acting Senior State Advocate -NPA

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

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Chali vs The People* (1975) ZR 232.
2. *Katebe vs The People* (1975) ZR 13.
3. *Chimbini vs The People* (1973) ZR 191.
4. *Kunda vs The People* (1980) ZR100.
5. *Nzala vs The People* (1976) ZR 221
6. *John Mkandawire and Others vs The People* (1978) ZR 46.
7. *R V Turnbull* (1976) 3 ALL ER 549.
8. *Bwalya vs The People* (1975) ZR 125.
9. *George Chileshe vs The People* (1977) ZR 176.

**Legislation referred to:**

1. Penal Code, Chapter 87 of the Laws of Zambia.

The appellant was tried and convicted by the Lusaka High Court on one count of aggravated robbery, contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence were that *Davies Kabila*, on 10<sup>th</sup> June, 2015, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, stole one unregistered motor vehicle, Toyota Corolla Sedan, valued at K60,040=00, the property of *Dominic Twinjika* and at or immediately before or immediately after the time of such stealing used or threatened to use actual violence to *Dominic Twinjika* to obtain, retain or overcome resistance to the vehicle being stolen.

The prosecution's case rested on the evidence adduced by five witnesses. The facts as they emerged from the evidence before the trial Court were that *Elvis Msimuko*, PW1, a businessman of Salama Park, Lusaka sold a motor vehicle, Toyota Corolla Sedan, beige in colour, to the complainant *Dominic Twinjika*, PW2, on 4<sup>th</sup> May, 2015 at the purchase price of K52,000=00 and handed over the relevant documentation to PW2 for change of ownership.

In cross-examination PW1 stated that the rear mirror of the vehicle was not broken at the time of the sale.

The second prosecution witness' testimony was that on 9<sup>th</sup> June, 2015, he retired to bed at 21:00hours. At about 02:30 hours, he woke up when he heard some noise and walked out of his bedroom to check. He met four men in the passage, who demanded for the car keys of his motor vehicle. PW2 stated that one of them wielded a gun which he used to hit him below his ribs. He fell down and two of the men tied his hands and legs with a cable. They took him outside and one of the men then broke the triangle mirror of the left rear door. They then managed to open the doors of the vehicle, started it without the key and drove off. Thereafter, PW2 was able to cut the cable that was used to tie him and freed himself. He called the Police who visited the scene later that morning.

On 12<sup>th</sup> June, 2015, PW2 left for Chililabombwe by car to attend a funeral in the company of four other people. When they reached the Police check point just before Ndola, he saw the motor vehicle that was stolen from him being driven ahead of them. He asked

his cousin to check if the vehicle had a broken triangle mirror, and she confirmed that it did. They trailed the motor vehicle until they got to a filling station where Shadreck, another of his cousins travelling with him almost confronted the driver of the vehicle but he was warned not to by another passenger because the men were armed.

PW2 and his relatives continued trailing the motor vehicle until they reached the roundabout after Jacaranda Mall, when Shadreck, the driver, hit the motor vehicle they were trailing from behind. They continued to give chase and he hit the motor vehicle again in Kansenshi, then it careered off the road into a furrow and got stuck. The men who were in the motor vehicle got out and ran away. However, PW2 and his relatives apprehended the driver. The incident occurred at about 01:00hours at night and they took the man that they apprehended to Kansenshi Police Station.

PW2 stated that he identified his motor vehicle because it had two small dents on the left passenger door and the front lights were tinted. When the motor vehicle was recovered, it bore the number

plate ALZ 9025. He saw his assailants during the robbery because the light in the passage of his house was on. He further stated that the man who was apprehended when the vehicle was recovered was the one who tied him with the cable during the aggravated robbery. When the motor vehicle was recovered, it had no ignition.

The third prosecution witness, *Shadreck Kapasa*'s testimony was that he left for Chililabombwe with his brother, PW2 on 11<sup>th</sup> July, 2015 to attend a funeral. He was the driver of the motor vehicle. As they approached Ndola, he saw a motor vehicle, Toyota Corolla, which bore the registration number ABL 9025. He noticed that the vehicle had two dents on the left side and one of its triangle windows was broken. He recognized the vehicle as the one that was stolen from PW2. They trailed the motor vehicle up to Mount Meru Filling Station and he wanted to confront the men in the vehicle, but his fiancé warned him that they were armed. The men realized they were being followed and sped off, but PW3 gave chase and hit the motor vehicle behind to try and stop it but the men drove on. He continued to pursue them until he hit the

vehicle again and it careered off the road and went into a ditch. The men in the vehicle got out and started running. PW3 stated that he noticed that one of them had a limp and he concentrated on chasing him. Eventually, the man, who was also the driver of the motor vehicle was apprehended and taken to Kansenshi Police Station.

The fourth prosecution witness, was *Ackson Phiri*, Inspector of Lusaka Division Headquarters. His testimony was that he inspected a Toyota Corolla, beige in colour, whose registration number was ALV 9025 and found that the vehicle had two discs, one bore the registration number ALV 6437 while the other bore the registration number ALH 2493. The engine number was IZZ 0802295 while the chassis number, was ZZE 1223013750. The witness stated that the motor vehicle had a damaged ignition and the boot could not close. The small window on the passenger door was also broken. He then prepared a report.

The fifth prosecution witness, *Mwiya Mutakatala*, Detective Inspector of Lusaka Division Anti Robbery Squad testified that the second prosecution witness reported a case of aggravated

robbery of his Toyota Corolla Sedan which took place at his house on the 10<sup>th</sup> June, 2015. On 12<sup>th</sup> June, 2015, the witness called him and told him that the stolen vehicle had been recovered in Ndola. He travelled to retrieve the motor vehicle and returned to Lusaka with the suspect whom he came to know as Davies Kabila.

The motor vehicle bore the number plate ALZ 9025 and was beige in colour. When a search was conducted at the Road Transport and Safety Agency (RTSA), it was found that the number plate ALZ 9025 was for a motor vehicle, Lexus by make, which belonged to one Guram Pandesh. The stolen motor vehicle also had a disc marked ALV 6437 and a search that was conducted at Road Transport and Safety Agency (RTSA) revealed that it was for a motor vehicle belonging to *Likando Maboshe*. He then arrested the appellant herein for the offence of aggravated robbery.

In his defence, the appellant testified that he went to Nakonde by bus on 8<sup>th</sup> June, 2015 to buy merchandise. While there, he was informed that his sister in Chingola was very ill. He left Nakonde by bus but disembarked at Kapiri Mposhi as he had received a

call from his former boss, Joseph Tibeti who asked him to give K1,500=00 to one Rabby Zulu. He did so and got a lift from Rabby at Kapiri Mposhi as he was driving to Chingola. While in Ndola, a vehicle hit the motor vehicle they were travelling in at the back. The driver suspected that they were under attack and sped off. However, they were pursued further and the other vehicle hit theirs a second time, leading to the vehicle going off the road and it fell into a ditch. Eventually, he got out of the vehicle and stood one metre away to see what was happening. The people from the other vehicle apprehended him and took him to Kansenshi Police Station where he explained that he was a mere passenger in the vehicle. He was remanded in custody and eventually taken to Lusaka where he appeared before the Subordinate Court. He denied ever having been the driver of the stolen motor vehicle.

The second witness for the Defence, *Jeff Kande's* testimony was that on 12<sup>th</sup> June, 2015, he received a call from the appellant who asked him to collect goods on this behalf from a CV bus. He managed to collect the goods but later learned that the appellant was apprehended and detained by the police in Ndola.



The third witness for the Defence, Alice Kabila stated that the appellant was her brother. She confirmed that they had a sister who had fallen ill in Chingola and that the appellant was on his way there when he was apprehended in Ndola.

The Court analysed the evidence before it and found that the appellant was recognized by the second prosecution witness as having been among the robbers who attacked him at his house and was also found driving the stolen vehicle in Ndola. The Court found that the witness had ample opportunity to observe his assailants in adequate lighting. It also found that the appellant was driving the motor vehicle when he was apprehended which meant that he was in possession of the motor vehicle and this gave credence to the second prosecution witness' evidence of identification.

The Court did not believe the appellant's testimony that he was in Nakonde when the aggravated robbery occurred in Lusaka and convicted the appellant of the offence as charged and sentenced him to fifteen years imprisonment with hard labour.

Dissatisfied with the Judgment, the appellant filed four grounds of appeal couched as follows-

1. The learned trial Judge erred in law and fact when she convicted the appellant on the uncorroborated evidence of PW1.
2. The Court below erred in law and fact when it convicted the appellant of aggravated robbery despite acknowledging that PW1 did not give the description of his assailants to the Police.
3. The Court below erred in law and fact when it discounted the appellant's defence of alibi.
4. The Court below erred in law and fact when it convicted the appellant of aggravated robbery despite the appellant rendering an explanation as to how he found himself in the motor vehicle suspected to have been stolen.

The appellant filed heads of argument and in arguing ground one, it was submitted that no other evidence other than the testimony of the second prosecution witness placed the appellant at the scene of crime. That the identification of the appellant by PW2

was suspect as it was done in traumatic circumstances and that he did not have enough time to observe his assailants. It was submitted that the lower Court erred when it relied on the evidence of the second prosecution witness, given the circumstances at the scene.

In arguing ground two, it was submitted that the failure by the second prosecution witness to give a description of his assailants to the Police at the time the matter was reported, leads to the assertion that the witness could not identify his assailants and did not have enough time to observe them. We were referred to the case of **Chali vs The People**<sup>1</sup> on witnesses giving the fullest possible description of their assailants at the time when the initial report is made. It was submitted that since the second prosecution witness did not give a full description of his assailants, this cast doubt on the reliability of his evidence of identification.

In arguing ground three, Counsel submitted that the Court shifted the burden of proof from the prosecution onto the appellant. We were referred to the case of **Katebe vs The People**<sup>2</sup>

where the Court stated that where a defence of alibi is set up, and there is evidence of such alibi it is for the prosecution to negative it. The onus is on an accused to establish his alibi. We were urged to allow ground three of the appeal.

In arguing ground four, it was submitted that the arresting officer confirmed that one Joseph Tibeti advised the appellant to get on the subject motor vehicle and that it was the duty of the Police to obtain the call records to verify the appellant's claims. It was contended that the appellant's explanation as to how he found himself on the vehicle is plausible and reasonable.

We were urged to uphold all the grounds of appeal and acquit the appellant.

The respondent's advocates filed heads of argument in reply and stated that they supported the conviction and sentence that was handed down to the appellant. They argued grounds one, two and four together because they were of the view that they were interrelated.

Responding to the said grounds, Mr. Siankanga, Acting Senior State Advocate submitted that there is no rule or law that requires more than one witness to prove the identity of an accused person. The second prosecution witness' testimony was that he met the assailants in the passage where there was adequate light. As such, he was able to see them clearly. He stated that the appellant was the person who tied him up during the aggravated robbery and that the ordeal lasted for about ten minutes. Counsel submitted that the witness had ample time to see and observe his assailants clearly.

We were referred to the case of **Chimbini vs The People**<sup>3</sup> where it was held that it is competent to convict on the evidence of a single identifying witness, as long as the Court is satisfied that the observations were reliable and the possibility of an honest mistaken identity was ruled out. Mr. Siankanga submitted that the Court ruled out the possibility of honest mistaken identity after analyzing the circumstances under which the appellant was identified. He further submitted that since the appellant was found in possession of the stolen motor vehicle, this corroborated

the evidence of identification as the appellant did not render any explanation about how he was found driving the stolen motor vehicle. We were referred to the case of **Kunda vs The People**<sup>4</sup> where the Supreme Court held that-

***“Recent possession may imply guilty knowledge if no explanation of possession is rendered or the Court does not believe the explanation.”***

Counsel submitted that the appellant gave no explanation as to how he came to be in possession of the vehicle and chose to give a bare denial that he was a mere passenger. It was contended that the circumstances lead to the conclusion that the appellant was not innocent but one of the assailants who attacked the second prosecution witness.

It was submitted that although the witness did not describe his attackers in full when he gave a statement to the Police, this did not discount the whole of his evidence of identification as he was able to identify his stolen motor vehicle when it was disguised with a fake number plate. Counsel argued that the evidence of identification cannot be argued in isolation to the evidence of

possession of the motor vehicle which was stolen in violent circumstances. It is further submitted that the evidence linking the appellant to the commission of the offence is overwhelming. Counsel urged the Court to dismiss grounds one and two of the appeal as they lack merit.

Responding to ground three, Counsel submitted that the appellant had the duty to furnish the Investigating officer with details of how his alibi could be confirmed, as a mere mention of having been in Nakonde was not substantiated and was therefore unhelpful.

We were referred to the case of **Nzala vs The People**<sup>5</sup> where the Supreme Court held that the police can only investigate an alibi when the accused has provided details of the witnesses who can support it. *In casu* the appellant did not provide verifiable details to the arresting officer that would help confirm his alibi. Counsel urged the Court to dismiss ground three of the appeal for lack of merit.

On the whole, Counsel submitted that the trial Court was on firm ground when it found the appellant guilty of aggravated robbery

contrary to Section 294(1) of the Penal Code, and urged the Court to dismiss the appeal for lack of merit.

At the hearing of the appeal, Counsel for the appellant, Mr. Mulunda submitted that he would rely on the heads of argument filed and emphasized that the appeal was against conviction and not sentence. He reiterated the contents of the heads of argument and prayed that should the Court be inclined to uphold the conviction, the appellant be convicted of the lesser offence of receiving stolen property as no evidence of him having been at the scene of crime was placed before Court.

Mr Siankanga, on behalf of The People submitted that he would rely on the respondent's heads of argument filed herein on 27<sup>th</sup> March, 2019.

We have considered the arguments by Counsel for both parties, the record of appeal appealed against. The four grounds of appeal raise the following underlying issues-

- (1) The issue raised in ground one is whether the learned trial Judge properly admitted the evidence of identification.



- (2) In ground two, the issue is whether the Court erred in convicting the appellant for the offence of aggravated robbery when the second prosecution witness did not give a description of his assailants to the Police.
- (3) In ground three, the issue is whether the court erred in discounting the appellant's defence of alibi.
- (4) In ground four, the issue is whether the explanation that the appellant rendered on how he found himself in the motor vehicle could be considered to be reasonable.

Starting with ground one, there is no dispute that the second prosecution witness was attacked at about 02:30hours on 10<sup>th</sup> June, 2015, by four robbers who got away with his motor vehicle, an unregistered Toyota Corolla Sedan beige in colour. He was tied up with a cable by one of the robbers and the witness stated that his assailants wore no masks. Two days later, he drove to Chingola for a funeral and on the way, he saw the motor vehicle that was stolen from him being driven ahead of him. He and his cousin gave chase until the motor vehicle careered off the road and the appellant, the person who happened to be the driver of

the stolen motor vehicle that night was then apprehended at the scene while his colleagues managed to flee. The second prosecution witness identified the appellant as having been among the robbers on the material night and that he was even the one who tied him with the cable. The witness stated that the incident lasted for about ten minutes.

The issue therefore is whether the evidence of identification was safe and sufficient to secure a conviction. In the case of **John Mkandawire and Others vs The People**<sup>6</sup>, the Supreme Court held that the evidence of a single identifying witness must be treated with the greatest caution because of the danger of an honest mistake being made and that the possibility cannot be ruled out unless there is some connecting link between the accused and the offence which would make mistaken identity too much of a coincidence. In this matter, the appellant was found driving the stolen motor vehicle two days after the aggravated robbery occurred. We find that this supports the second prosecution witness' evidence of identification and as was stated

by **Lord Widgery C.J.** in the case of *R V Turnbull*<sup>7</sup>, odd coincidences, if unexplained, may be supporting evidence.

We therefore find no merit in ground one of the appeal and it fails.

Regarding ground two, whether the failure by the witness to give a description of his assailants was fatal to the case, we note that although he did not give a description of his assailants to the Police when he gave his statement, the appellant was found driving the stolen motor vehicle two days later and from the evidence, even when the witness and his cousin gave chase, the appellant did not stop the vehicle. This confirms that he knew that the motor vehicle was stolen in an aggravated robbery two days earlier and supports the second prosecution witness' evidence of identification. We do not find merit in this ground of appeal as well and it fails.

Regarding ground three, the Court discounted the defence of alibi as an afterthought because there was no decisive evidence adduced on record to ascertain that when the robbery occurred on 10<sup>th</sup> June, 2015, the appellant was on a business venture in Nakonde. The Court rejected the evidence of the two defence

witnesses as it failed to corroborate the appellant's evidence of alibi.

We agree with the trial Court that the two defence witnesses' testimony did not help the appellant. The witnesses merely stated that they heard that the appellant was in Nakonde and were not with him when he allegedly was in Nakonde. Further, we are of the view that the appellant did not provide the Police with sufficient material to test the alibi, such as where he lodged in Nakonde and the people he interacted with while there. As was stated by the Supreme Court in the Case of **Bwalya vs The People**<sup>8</sup>, simply saying "***I was in Nakonde at the time***" does not place an onus on the Police to investigate an alibi. We find no merit in this ground of appeal also and it fails.

In ground four, whether the Court erred in not accepting the explanation that the appellant rendered on how he was found in the motor vehicle, we refer to the case of **George Chileshe vs The People**<sup>9</sup> where the Supreme Court stated that-


***"It is the duty of a trial Court, in cases where recent possession of stolen property may lead to a conviction of the accused, to consider whether such recent possession may be the result of the receiving of stolen property as opposed to guilt of the major crime during the commission of which the stolen property was obtained."***


A relevant question to determine is whether the appellant was in recent possession of the stolen motor vehicle. The evidence on record is that the appellant drove the stolen motor vehicle two days after the aggravated robbery and was apprehended at the scene when the vehicle careered off the road and landed into a ditch. In our view, he was in possession of the motor vehicle and did not give a reasonable explanation of how he, as a passenger, having gotten a lift from a person he did not know at Kapiri Mposhi, was found driving the stolen motor vehicle. There were suspicious features surrounding the case. When the appellant and his colleagues realized they were being pursued, they sped off and ended up landing in a ditch. We are of the view that the facts cannot support an alternative inference and that the explanation that was given by the appellant could not reasonably

be true. It is unlikely that the vehicle changed hands within two days. It was therefore reasonable for the learned trial Judge to make an inference of guilt, that the appellant was one of the robbers who attacked the second prosecution witness on the material night.

We do not find merit in this ground of appeal too and it fails. The net result is that the whole appeal fails. We accordingly dismiss it and uphold the lower Court's conviction and sentence.

  
C.K. MAKUNGU  
**COURT OF APPEAL JUDGE**

  
D.L.Y. SICHINGA  
**COURT OF APPEAL JUDGE**

  
P.C.M. NGULUBE  
**COURT OF APPEAL JUDGE**