IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 158, 159/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

RAYMOND KOSAMU ZULU	**1ST APPELLANT**
JOEL MWEEMBA SHAKWELE	**2ND APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

CORAM: **Mchenga DJP, Majula and Muzenga JJA**
On 18th May, 2021 and 26th May, 2021.

For the Appellant: Ms. Z. Ponde. Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. Kabwela, Principal State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Dorothy Mutale and Richard Phiri v the People (1997) SJ 51**
2. **Nyambe v The People (1973) ZR 228**
3. **Chimbini v The People (1973) ZR 191**
4. **John Mkandawire and Others v The People (1978) ZR 46**
5. **Sammy Kambilima Ngati and Others v The People**

6. **Lipepo and Others v The People – SCZ Judgment No. 20 of 2014.**
7. **Roberson Kalonga v The People (1988 – 1989) ZR 90**
8. **John Timothy and Feston Mwamba v The People (1977) ZR 394**
9. **Jonas Nkumbwa v The People (1983) ZR 103**
10. **Alex Njamba v The People – Reportable Judgment No. 1 of 2020**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **Firearms Act, Chapter 110 of the Laws of Zambia.**

The appellants were severally and /or jointly charged with four counts of the offence of aggravated robbery contrary to **Section 294(1) of the Penal Code[1].** At the end of the trial the 1st appellant was convicted on count 1 and both appellants were convicted on count 4. The 1st appellant was acquitted in counts 2 and 3. The particulars of the offence in count one allege that on 11th November 2016, at Kabwe District of the Central Province of the Republic of Zambia, Joel Mweemba Shakwele jointly, and whilst acting together with other persons unknown did steal from Mark Kasaili a motor vehicle namely Toyota Corolla Registration Number AHB 3468 valued at K35,000.00, the property of Albert Kapambwa Sinyangwe at and or immediately before or immediately after the time of such stealing, did use or

threaten to use actual violence to Mark Kasaili in order to obtain or retain, prevent or overcome resistance to the said property from being stolen.

In count four, the particulars of the offence allege that, on 11th January, 2017, at Kabwe District of the Central Province of the Republic of Zambia, Raymond Kosamu Zulu and Joel Mweemba Shakwele, jointly and whilst acting together with other unknown persons did steal from Rex Chirwa a motor vehicle namely Toyota Vitz registration number ALF 2012 valued at K30,000.00 the property of Evaristo Chisenga and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to Rex Chirwa, in order to obtain or retain, prevent or overcome resistance to the said property from being stolen. The two were subsequently convicted and sentenced as follows;

In count one, the second appellant was sentenced to 30 years imprisonment with hard labour, and in count four both appellants were sentenced to death by hanging until pronounced dead by the High Court (before Mr. Justice C. Zulu).

The appellants' convictions were based on the evidence of 8 prosecution witnesses namely, Mark Kasaila, Russel Musonda, Rex Chirwa, Albert Kapembwa Sinyangwe, Evaristo Chisenga, Inspector Damascus James Kumwenda, Inspector Layford Kunda and Sergeant Nakaona.

The summary of evidence adduced on behalf of the prosecution particularly from Mark Kasaila (PW1) the victim in count one was that in the evening of 11th November, 2016 around 18:00 hours, while at Kabwe Drivers' Station he was approached by the 2nd appellant who hired him to take him to a place called Chowa Mpangwa. On their way the second appellant called his friend who he believed to be at the destination to alert him that he had started off. When they reached a place with power lines, they found a man with a bicycle and the second appellant asked him to stop the vehicle. They both descended that car and had a conversation with the cyclist. PW1 helped the cyclist put the said bicycle in the boot of the car and as he bended to place the bicycle in the boot, the second appellant manhandled him by tying and convoluting a rope around his neck, and stabbed him on the shoulder with a screw driver. As he struggled to free himself, the cyclist hit him with an angle bar on the head and he held onto the rope to avoid being strangled to death.

The cyclist then grabbed his cell phone, the car keys, and together with the second appellant they drove off leaving him at the crime scene. His assailants also left behind the red mountain bicycle, a rope and an angle bar. Further, PW1 told the court that when he regained strength, he cycled to Chowa Police Station where he reported his ordeal. He was later admitted to

Kabwe General Hospital. Days passed and he was called to participate in an identification parade where he positively identified the second appellant.

Criminal Investigation Officer, Damascus James Kumwenda, of Chowa Police Station testified that on 11th November, 2016, around 19:35 hours, he received a report of aggravated robbery from Mark Kasaila as already narrated above. He told the court that during the course of his investigation, he learnt that the second appellant who had hired Mark Kasaila, had earlier made an arranged with another taxi driver and exchanged numbers. He got the said number and conducted a search with the service provider where a printout was obtained. He picked up one number from the printout, which turned out to be the number for the second appellant's wife, who later confirmed to him that the number left at the taxi rank was indeed that of her husband. The second appellant was later apprehended. His phone and SIM card were tendered as evidence in court.

In count four, the summary of the evidence is that on 11th January, 2017 Rex Chirwa a taxi driver, while at Sigma Kabwe around 13:00 hours, he was approached by the second appellant who told him that he was working for FRA and needed to hire a taxi to collect fertilizer. He told the court that the second appellant left him with his phone number and promised to return.

At 15:30 hours he received a call from the second appellant and they agreed to meet at a place called **"wire area."** He found the second appellant there and they started off for Kamakuti where the second appellant alleged to have left some people. When they reached at Kamakuti, the second appellant asked him to drive off the road for about 5 meters where they found the first appellant. The first and second appellant conversed for a short time and as he reached to open the passenger's door which was locked, the first appellant pointed a gun at him and ordered him to get out of the car and hand over whatever he had. He obliged and his hands and legs were later tied. He was then dragged to the nearby bush. The first and second appellant then left with the car. He told the court that the first appellant got his wallet, cell phone and National Registration Card. He managed to untie himself and later reported the matter to Kabwe Central Police Station.

He also told the court that, on 14th January, 2017, at around 13:00 hours while in Kabwe Town, he spotted the first appellant and when the first appellant saw him, he beckoned to his friend and attempted to run away. After a chase he was apprehended and was taken to the police station. Sergeant Ketty Nakaona informed the court that on 13thJanuary, 2027, she was assigned to investigate a case of aggravated robbery in which Rex Chirwa, had reported that a Toyota Vitz, registration No ALF 2012 pink in

colour was stolen. She told the court that during the course of her investigations, she came to learn that the second appellant's co-suspect, the first appellant herein was already in custody on other charges of aggravated robbery. When she warned and cautioned the duo, they denied the charge.

Layford Kunda, a scene of crime officer based at Chowa Police Station, told the trial court that he photographically recorded an identification parade on 10th February, 2017 at Chowa police station where Rex Chirwa identified the first and second appellant.

After considering the evidence of the prosecution witnesses, the trial court found the appellants with a *prima facie* case and they were placed on their defence.

In his defence, the first appellant stated that on the day of his arrest while at I Connect café with his friend, he opened his cellphone, which had a screen saver of him posing in front of a Toyota Vitz. He said that his friend then expressed interest in the said Toyota Vitz and he explained to him that the car was not his. He left his friend and when he returned, he found his friend with a lot of people who ascended on him for having a photo of a missing car. He was later taken to the police. In cross examination he told the court that he cannot remember where he was on 16th and 26th December as he was a very busy person.

In his defence, the second appellant stated that, on 1st February, 2017 while at his shop in Kawama Township, Kabwe, he was surprised to see a Chowa Police Station motor vehicle at his premises. He was told that he was required at the police station. While on the way, he was asked about a cellphone number which he positively identified to be his airtel cell number.

The police then informed him that the said number was connected to a report of theft of motor vehicle. He denied the allegation and stated that he was surprised that he was jointly charged with a person he did not know.

The trial court considered the evidence and written submissions presented before it by both parties. The trial court found that there was overwhelming evidence implicating the second appellant in count one and four. The trial court also found that there was no evidence to prove the charges against the first appellant in count two and count three, and accordingly acquitted him of the said charges. He was however found guilty in count 4 where he was jointly charged with the second appellant and were both sentenced to death.

Dissatisfied with the judgment of the lower court, the appellants appealed to this court. They filed one ground of appeal couched as follows:

1. **The trial court erred in law and in fact when he convicted the appellants based on the evidence of a single identifying witness.**

On behalf of the appellant, learned Counsel Ms. Ponde filed written heads of argument. In relation to ground one of the appeal, it is contended that the two witnesses who saw the second appellant book the tax and one of which exchanged numbers with the 2nd appellant failed to identify the second appellant during the identification parade. It is contended that this raises doubt which ought to be resolved in favour of the appellant. We were referred to the case of **Dorothy Mutale and Richard Phiri v the People**[1] where the Supreme Court of Zambia upheld the cardinal principle of Criminal Law that **"where two or more inferences are possible the court will adopt the one that is more favorable to the accused if there is nothing to exclude that inference."** The Supreme Court held that **"where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused."**

It is the appellant's contention that if PW1 had truly observed his assailant as he said he did, he could have clearly described his features to the court to eliminate the element of an honest mistake. To this end the court was referred to the case of **Nyambe v the People**[2] where it has held that:

> **"The witness should specify by what features or unusual marks if any, he alleges to recognize the accused and the circumstances in which the accused was observed the state of light, the opportunity for observation, the stress of the moment should be carefully canvassed."**

It is contended that PW1 did not give any description of the features of the 2nd appellant and the trial court did not test the evidence of PW1 to the required standard when it concluded that PW1 had accurately identified the 2nd appellant. Thus, the conviction based on the evidence of PW1 was not safe as his evidence ought to have been discounted.

With regards to ground 4 of the appeal in which both appellants were convicted, it is contended that the conviction based on the evidence of PW3 is not safe. It is contended that PW3 said he apprehended the 1st appellant with the help of his friend. He stated that his assailants was wearing a cap covering his forehead. According to the appellants' Counsel, that description is problematic as the entire face was not seen even if the witness emphasized that he saw. It is further contended that the 1st appellant gave a reasonable explanation that he was doing his business when he was apprehended and denied that it was PW3 that had alerted people about him. Furthermore, it is contended that PW3 was able to identify the first appellant during the identification parade as the person who was apprehended in town and not one of his assailants. That the 2nd appellant was connected to the case by the police on mere suspicion that he was part of it and after he was identified by PW3 on the identification parade. During his defence, the 2nd appellant

contended that PW3 had seen him in a C.I.D office before the identification parade. It is further contended that there is need for something more to connect the two appellants to the cases to corroborate the identification of PW1 and PW2 who are single identifying witnesses.

Counsel for the appellant submitted that although it is competent to convict on the evidence of a single identifying witness, there is always a risk of an honest mistake on the part of the witness. The court was referred to the case of **Chimbini v The People**[3] where it was held that:

> **"It is always competent to convict on the evidence of a single identifying witness if that evidence is clear and satisfactory in every respect. Where the evidence in question relates to identification, there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient the court must be satisfied that he is reliable in his observation."**

The court was further referred to the case of **John Mkandawire and Others v The People**[4] where it was 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 usually this possibility cannot be ruled out unless there is some connecting link between accused and the offence which would render a mistaken identification too much of a coincidence."**

It is contended that the ordeal that PW3 went through coupled with the fear makes it difficult to rely on his observations and identification of the appellants as something more ought to have assisted the trial judge arrive at the guilty verdict and not only through the evidence of PW3 as there is room for a possibility of honest mistake.

The Counsel for respondent Mrs. Kabwela filed her heads of argument and contended the trial judge was on firm ground in convicting the appellants on the evidence of a single identifying. The Court was referred to the case of **Sammy Kambilima Ngati and Others v The People**[5] where the Supreme Court held **"that it is settled law that a court is competent to convict on a single identification witness provided the possibility of an honest mistaken identity is eliminated."**

Further, the court was referred to the case of **Lipepo and Others v The People**[6] where it was held that:

> **"For the evidence of a single identifying witness to be reliable, the witness in question must have had the opportunity to positively and reliably identify the suspects. It is only then that the possibility for an honest mistaken identity will be ruled out. A poor opportunity of identification affects the reliability of such evidence and consequently entails high possibility of an honest mistaken identity."**

It was contended that the trial court was on firm ground in relying on the identification evidence provided by PW1 and PW3 in convicting the appellants. In relation to the conviction in count four, the evidence of PW3 was safe and the court properly relied on it. It is the respondent's contention that, in his evidence, PW3 indicated that he was with his assailants for about 40 minutes prior to them attacking him which was sufficient time for him to look at how they looked. Further, that this was a period of time which was not charged with emotional tension as they were discussing the taxi fare. That the opportunity for identification was good thereby ruling out the possibility of mistaken identity. At the hearing of this appeal, both counsels relied on the written heads of argument.

We have carefully scrutinized the evidence on the record, the judgment of the court below and the arguments by both parties. We shall first consider count one, in which the 2nd appellant is the only convict.

It is common cause that the evidence against the 2nd appellant hinges on a single identifying witness PW1. This is because PW2, who, according to what he told the court below, interacted with the 2nd appellant before he booked PW1, but failed to identify him on the identification parade. He only identified him in court. It is trite that court room identification is of little or no value and in the circumstances of this case, relying on it is untenable. The

question for our determination is whether PW1's identification evidence is reliable?

It was PW1's evidence that he was with the 2nd appellant for 30minutes when they moved from town to a place where they met the 2nd appellant's confederate. He said he had ample time to observe his assailants. The entire period he spent with the 2ndappellant is about one hour. It would appear that the last 30 minutes was the time PW1 was subjected to physical attack and threats.

The learned trial court analysed the identification evidence and came to a firm conclusion that it was reliable. We are of the considered view that the trial court cannot be faulted. We find force in the argument by Mrs. Kabwela that PW1 was with the 2nd appellant for about 30 minutes prior to the attack. This was in a calm environment without any stress of the moment. In fact PW1 one had a normal conversation with the 2nd appellant and they even turned back to town to put fuel.

It is trite law that a court can convict on the basis of a single identifying witness as long it is reliable. In such a situation, the dangers of an honest but yet mistaken identification are ruled out. In the case before us, PW1 was with the 2nd appellant for about 30 minutes in a calm environment. He was booked around 18:00 hours and was with the appellant until around 19:00

hours when they abandoned him. He identified the 2nd appellant at identification parade and in court.

The 2nd appellant in his evidence alleged that PW1 had seen him at the police station prior to the parade. The learned trial court considered this assertion and discounted it for not being true. We have found no reason to interfere with the trial court's conclusion in this regard especially that it was a credibility issue which the trial court was entitled to make on the totality of the evidence before it.

We find that the conviction by the lower court was safe. The appeal in respect of count one is bound to fail. We thus dismiss it for want of merit.

We now turn to count four. We must note that even in respect of this count, the evidence rests on a single identifying witness, PW3. PW3 told the trial court that the 2nd appellant came to book his taxi. They negotiated over the fare while sitting in the taxi for about 40 minutes. He left his phone number which he would use to call later. This was between 12 and 13 hours. Around 15:30 hours, PW3 received a phone call and was given directions to a place where he met the 2nd appellant. They then went to another place where they met the 1st appellant. He observed the 1st appellant when he was shouting at the 2nd appellant for having delayed. PW3 told the trial court that the 1st appellant was putting on cap covering the forehead and was wearing a grey

suede shirt and something white inside. This observation was before the onset of the attack. He stated that he spent quite a long time with his assailants. He told the trial court during cross examination that the attack took about 40 minutes.

Ms. Ponde argued on behalf of the 1st appellant that the identification evidence is not safe because of the traumatic circumstances of the attack especially that the assailant had partially covered his face. It was submitted that there should be a connecting link in order for a conviction to be safe.

We are satisfied that PW3 had ample opportunity to observe his assailants. This is buttressed by the fact that PW1 was able to recognize the 1st appellant 3 days later in the iconnect shop. We find that the 1st appellant's attempt to run away upon their eyes meeting provided a sufficient connecting link. In respect of the 2nd appellant, he was the one who went to book the taxi for PW3. They discussed in the vehicle for about 40 minutes in calm environment while negotiating the fare. He left his phone number and he also called PW3 on that same number. Then they met and moved together to a location where the attack took place. The duration of the attack was placed at about 40 minutes.

In these circumstances, we are satisfied that PW3 had ample opportunity to observe the 2nd appellant and the danger of an honest but

mistaken identification has been ruled out. Further, there is evidence that a search was conducted on the number which one of the assailants left with PW3 at the rank, which number was ultimately traced to the 2nd appellant. Further, at the time of apprehension, the 2nd appellant removed his sim card and broke it, in an apparent attempt to destroy evidence. All these circumstances provide an irresistible connecting link. We agree with findings of the lower court. The convictions of the appellants were safe and we accordingly dismiss the 1st and 2nd appellant's appeals. The convictions of the appellants in counts one and four are safe.

We note that the appellants in count 4 were charged under **Section 294(1)**. The conviction was however for armed aggravated robbery under Section **294(2)(a)**. The learned trial court relied on the fact that PW3 said the assailants had a gun. No firearm was recovered and none was fired in the course of the robbery.

The Supreme Court has guided in a plethora of authorities that in order for a conviction for armed aggravated robbery to stand, they must be direct evidence of use a fire arm and the accused must be put on notice that he is at peril of a death penalty under **Section 294(2)**. In the case of **Roberson Kalonga v The People**[7], the appellant was convicted of aggravated robbery

and sentenced to death. He was not charged with armed robbery. The Supreme Court had this to say:

> **"The learned Director of Legal Aid on behalf of the appellant has drawn the attention of this Court to the fact that the appellant was not charged with the offence of armed robbery in accordance with section 294(2) of the Penal Code. Neither did the particulars of the charge allege the use of a gun.**
>
> **We agree with the learned Director that it is essential when there is an allegation of armed robbery that an accused must be notified that he stands charged with such an offence. In this particular case there was no notification to the appellant and therefore, as we will say later in this judgment, he will not be subjected to the death sentence."**

The Supreme Court went on to hold *inter alia* that:

> **"It is essential when there is an allegation of armed robbery that an accused be notified that he stands charged with such an offence."**

Further, the Supreme Court held *inter alia* in the case of **John Timothy and Feston Mwamba v The People**[8] that:

> **"(i)To establish an offence under section 294(2)(a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act, Cap. 111, i.e. that it was a lethal barrelled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.**
>
> **(ii)The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found."**

In later case of **Jonas Nkumbwa v The People[9]**, the Supreme Court held that **"It is unsafe to uphold a conviction on the charge of armed Aggravated Robbery where there is no direct evidence of use of firearms."**

This Supreme Court further observed at page 105 that:

> **"As we have already stated, there is an allegation that two of the robbers were armed with firearms. There was no direct evidence of the use of firearms as they had not been fired nor were they subsequently found and tested to be firearms within the meaning of the Firearms Act. As Mr. Mwanachongo properly observes, they may have been imitations. In the premises we find that it would be unsafe to uphold a conviction on charge of armed aggravated robbery."**

Finally, in a more recent case of **Alex Njamba v The People[10] Reportable Judgment No. 1 of 2020**, the Supreme Court in allowing the appeal had this to say:

> **".....we agree with him entirely that the learned trial judge lost track when he convicted the appellant of armed aggravated robbery when the particulars of the offence did not show that the offence was committed with a firearm. Granted that Richard Mbao was armed with a firearm, it is mandatory that the accused is notified in the particulars of offence of armed aggravated robbery. There is, therefore, merit in ground two and it succeeds."**

Therefore, to begin with, in order for an accused person to be convicted of armed aggravated robbery, he or she must be charged with the same or atleast the particulars must indicate that it is armed aggravated robbery. This

will effectively put an accused on notice. Secondly, there must be direct use of a firearm. It is not enough that the witnesses saw a gun. The firearm so seen must be a firearm under the **Firearms Act, Cap 110 of the Laws of Zambia**. In simple terms, if the firearm is recovered, it must be examined in order to establish whether it capable of loading and discharging a projectile.

In the event that the firearm is not recovered, it is sufficient that the witnesses heard and or saw it being discharged in the course of the robbery and a spent cartridge is picked. It has also being held previously that it is also sufficient if the witnesses see a firearm during the attack and live ammunition is picked (see the case of **Timothy and Mwamba** *supra*). There could be many other ways in which evidence of use of a firearm may be established. Each case must thus be considered on its facts.

In the circumstances of this case, a conviction for armed aggravated robbery was a serious misdirection. We therefore set aside the convictions of armed aggravated robbery in count 4 and the sentence of death imposed by the trial court. Taking into consideration the aggravating circumstances herein which take the case outside the realm of the minimum mandatory sentence of 15 years for ordinary aggravated robbery. This is because PW3 was assaulted, tied and threatened with what he perceived to be a firearm by two assailants. We thus sentence each of the appellants to 30 years

imprisonment with hard labour with effect from the date of arrest. In respect of the 2nd appellant, the sentence in count one will run consecutively to the one in count 4.

We wish to urge trial courts to take note of the guidance of the Supreme Court referred to herein and the guidance of this court.

In total, the appeals are dismissed, save as we have ordered in respect of count 4.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE