

**IN THE COURT OF APPEAL FOR ZAMBIA  
HOLDEN AT LUSAKA**

Appeal No. 7,8,9,10,11/2020

*(Criminal Jurisdiction)*

**BETWEEN:**

**HENRY CHITUNDU (Alias Alibaba)**

**1<sup>ST</sup> APPELLANT**

**FRANCIS CHANDA**

**2<sup>ND</sup> APPELLANT**

**JOHN NSAPO KAMWENA**

**3<sup>RD</sup> APPELLANT**

**DAVY MUMBA**

**4<sup>TH</sup> APPELLANT**

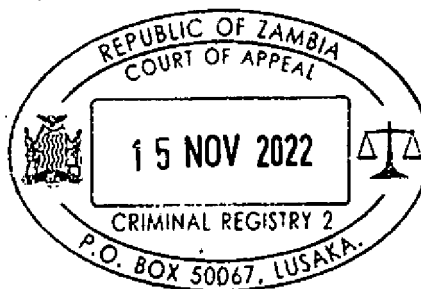
**CATHERINE M. KABUSWE**

**5<sup>TH</sup> APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**



***Mchenga DJP, Majula, and Siavwapa, JJA***  
***On 25<sup>th</sup> August 2020 and 15<sup>th</sup> November, 2022***

*For the 1<sup>st</sup> and 4<sup>th</sup> Appellant* : *Mrs. M.K. Liswaniso - Legal Aid Counsel,  
Legal Aid Board.*

*For the 2<sup>nd</sup> Appellant* : *Mr. L Saboi of Sikamba Legal Practitioners*

*For the 3<sup>rd</sup> and 5<sup>th</sup> Appellant* : *Mr. K Tembo on a brief from Apton and  
Partners*

*For the Respondent* : *Ms. N.T Mumba - Chief State Advocate,  
National Prosecutions Authority.*

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

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MAJULA JA, delivered the Judgment of the Court.

**Cases referred to:**

1. *Manongo vs The People* (SCZ No 26 of 1990)
2. *Dorothy Mutale & Another vs The People* (1977) SJ 54(SC)
3. *Miller vs Minister of Pensions* (High Court of England 1947)
4. *Shamwana & others vs The People* (1985) ZR 47
5. *R vs Coney* (1882) 8 QBD 534
6. *Chimbini vs The People* (1973) ZR 191
7. *John Mkandawire vs The People* (1978) Z.R. 46 (S.C.)
8. *Webster Kayi Lumbwe vs The People* (1986) ZR 93 SC
9. *Nikutisha And Another vs The People* (1978) Z.R. 300
- 10 *Sammy Kambilima Ngati & 2 Others vs The People* (SCZ Judgement No. 14 of 2003)
- 11 *Webster Kayi Lumbwe vs The People* (1986) ZR 93 SC
- 12 *Kampafwile vs The People* (1972) Z.R. 242
- 13 *Chipango And Others vs The People* (1978) ZR 304
- 14 *Machipisa vs The People* (2009) ZR 282
- 15 *Ilunga Kabala vs John Masefu vs The People* (1981) ZR 102.
- 16 *Kalunga vs The People* (1988-89) ZR 90
- 17 *Jonas Nkumbwa vs The People* (1983) ZR 103
- 18 *Raymond Kosamu Zulu and Another vs The People* – CAZ Appeal No. 158, 159 of 2020

**Legislation referred to:**

*The Penal Code, Chapter 87 of the Laws of Zambia*

*Electronic Communication and Transactions Act No. 21 of 2009*

**1.0 Introduction**

- 1.1 The appellants were charged in the High Court (before Yangailo J.) at Lusaka with 4 counts of the offence of

aggravated robbery contrary to section 294(1) of the Penal Code. It was alleged that during the robbery, they stole assorted items which include title deeds, White Books, cell phones, and various sums of money belonging to New Future Financial Limited Company.

- 1.2 They were subsequently tried and convicted by the learned trial Judge and thereafter sentenced to suffer death.

## **2.0 Evidence in the Court below**

- 2.1 Given the anxiety this appeal has caused us, it is appropriate that we set out, in summary, how the appellants became a target of law enforcement agencies. To prove its case, the prosecution called a total of thirteen witnesses in the court below. Their collective evidence was that on 2<sup>nd</sup> March 2018 employees of New Future Financial Limited Company (located in Woodlands area of Lusaka) were ambushed by a contingent of about nine armed robbers who raided the premises.
- 2.2 The company was a financial lending institution which was involved in the business of issuing loans to members of the public. As security for a loan, a client was required to surrender either a certificate of title or a white book. The gist of the prosecution's case was that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants in the company of other unknown people (with the aid of the 3<sup>rd</sup> and 5<sup>th</sup> appellants who were company employees)

set upon the premises and stole several properties listed above.

- 2.3 This evidence was confirmed by Gilbert Chileshe, who was employed as a security guard at the time of the incident. He narrated that on the day in issue at about 09.00 hours the robbers went to the premises in a grey Toyota Noah bearing registration number ATB 1842. When the assailants entered the premises which were also monitored by closed-circuit television (CCTV) cameras, they beat him up with an iron bar and eventually bundled him in a toilet together with Chinese employees.
- 2.4 The assailants proceeded to order people in the main building to lie down while they searched the place and took away assorted valuables. It was his evidence that he was able to identify the 1<sup>st</sup> appellant during the ordeal.
- 2.5 Tina Simukonda a friend to the 3<sup>rd</sup> appellant who was employed at a company opposite New Future Financial Limited Company alluded to the fact that in February 2018, the 3<sup>rd</sup> appellant gave her a bag which contained documents for a client which he said that he would collect later. After the robbery, it was discovered that the bag contained a certificate of title and an identification card bearing the names John Nsapi Kamwena (the 3<sup>rd</sup> appellant).

- 2.6 Ownership of the Toyota Noah was confirmed by Pastor Francis Nkhoma, the father to the 4<sup>th</sup> appellant as being the registered owner of the said vehicle. He had left the vehicle in the care of his son Davy Mumba (the 4<sup>th</sup> appellant) whilst he travelled away on a business trip at the time of the robbery.
- 2.7 Gilbert Chileshe's evidence was supported by the evidence of Feng Shengyue the General Manager who downloaded video footage from the CCTV. The footage was later submitted to the police for their investigations. Feng Shenghu attested to the fact that from the surveillance footage, he observed that a Toyota Noah registration number ATB 1842 went to the premises from which nine people disembarked. One of the assailants conversed with the 3<sup>rd</sup> appellant while the driver of the vehicle went to the guard house and struck the guard down.
- 2.8 The video footage further showed that the assailants progressed to the main office with the security guard's firearm where they forced Chinese employees to lie on the floor. Some of the robbers went to the bedroom and eventually one of them broke the CCTV cameras. He was able to identify the driver of the Noah vehicle to be the 4<sup>th</sup> appellant.
- 2.9 Joseph Simuchembu was the police officer who carried out investigations for the robbery after the incident. During a search conducted at the premises immediately after the

incident, he found the security guard's firearm underneath one of the vehicles that was parked as collateral.

2.10 In the course of his investigation, he also managed to apprehend the 1<sup>st</sup> appellant who led the police to the 2<sup>nd</sup> appellant. On his apprehension the 2<sup>nd</sup> appellant was found with a bag which contained six title deeds, two white books, and a laptop for clients of New Future Financial Limited Company that went missing during the robbery. After thorough interrogations, the two suspects revealed that they had inside dealing with the 3<sup>rd</sup> appellant who upon his apprehension led the police to Tina Simukonda where they recovered a bag which contained a certificate of title and his identity card. The 3<sup>rd</sup> appellant led to the apprehension of the 4<sup>th</sup> appellant who led the police to the recovery of the Toyota Noah that was used in the robbery.

2.11 When put on their defence, all the appellants denied being involved in the commission of the offence. According to the 1<sup>st</sup> appellant, on the material day he was at home feeding his chickens. He later went to Mtendere market to sell some of his chickens and only returned home around 14.00 hours.

2.12 The 2<sup>nd</sup> appellant claimed that on 27<sup>th</sup> February 2018, he travelled to Nakonde from Lusaka to purchase rice using Real Nakonde Bus services. He remained there until 21<sup>st</sup> March 2018 when he came through intercity bus terminus and proceeded home to reunite with his family in Makeni villa. He

denied being at the crime scene during the robbery. The 3<sup>rd</sup> appellant expressed ignorance at the assertion that he connived with the robbers who attacked the premises. His version was that he was equally accosted by the assailants as he was carrying out his routine work as a sales and marketing officer. He admitted that he gave a bag to Tina Simukonda but forgot to collect it.

2.13 The 4<sup>th</sup> appellant denied driving the bus at the time of the robbery but that it was in the garage being repaired by a man called Daniel. He claimed that the Toyota Noah in the video footage appeared new while his vehicle had dents on it.

2.14 For her part, the 5<sup>th</sup> appellant rebuffed the assertion of knowing any of the assailants prior the incident. With regard to her suspicious movements during the initial stages of the robbery, her response was that she was trying to see a branch that had fallen from the tree on one of the cars that was being kept as collateral.

### **3.0 Findings of fact in the Court below.**

3.1 The learned trial Judge analysed the evidence and the authorities that were before her in relation to the offence the appellants were charged with. She found that the evidence had established that on 2<sup>nd</sup> March 2018, there was an aggravated robbery that took place at the company with thieves who were armed with iron bars and a firearm. There

was violence exerted on the members of staff, and certain properties belonging to the company's clients and members of staff were stolen although they were eventually recovered.

- 3.2 She further found that the events highlighted were detailed in a surveillance video footage recorded on the CCTV cameras installed on the premises. The learned Judge was able to safely find that the vehicle driven by the assailants was retrieved by police officers from the 4<sup>th</sup> appellant shortly after the incident. The lower court relied on the evidence of Gilbert Chileshe and stated that although he was a single identifying witness, his identification of the 1<sup>st</sup> appellant was credible.
- 3.3 She was also satisfied that the 1<sup>st</sup> and 4<sup>th</sup> appellant were present at the scene during the robbery as they were clearly identified on the CCTV video footage. Finally her Ladyship was able to find that from the conduct of the 3<sup>rd</sup> and 5<sup>th</sup> appellants during the robbery, they had active knowledge of the robbery and were therefore parties to the crime despite being employees of the company. With regard to the 2<sup>nd</sup> appellant she found it odd that he was in possession of stolen title deeds upon his apprehension.
- 3.4 As a consequence, the trial Judge was satisfied that the state had proved its allegation of aggravated robbery beyond reasonable doubt and proceeded to convict them.



#### **4.0 Grounds of Appeal**

4.1 It is this conviction and sentence that the appellants have appealed to this court fronting the following grounds of appeal:

- “1. The trial court erred in law and fact in convicting the appellants of the subject offence in the absence of proof beyond reasonable doubt given the nature and quality of the evidence adduced.*
- 2. The trial judge erred in law and fact when she found that there was sufficient evidence connecting the appellants to the offences when the only evidence connecting them to the offence was the identification parade and that some of the appellants were actually employees of the complainant.”*

#### **5.0 Appellant’s arguments**

##### **5.1 1<sup>st</sup> and 4<sup>th</sup> appellants’ submissions**

5.2 On behalf of the 1<sup>st</sup> and 4<sup>th</sup> appellants, Mrs Liswaniso submitted that the 1<sup>st</sup> appellant was only identified by Gilbert Chileshe as being one of the assailants. Our attention was drawn to the case of ***Manongo vs The People***<sup>1</sup> where it was held that the concept of honest mistake is normally associated with single identifying witnesses. She contended that it was therefore a dereliction of duty for the police to fail to conduct

an identification parade in order to rule out the possibility of an honest mistaken identity.

- 5.3 It was further argued that the lower court erred when it based the conviction on a video footage that was unclear and retrieved by a non-expert witness.
- 5.4 With regard to ground two Mrs. Liswaniso criticized the lower court for failing to ascertain the real person who was in control and possession of the motor vehicle that was allegedly used in the aggravated robbery. She pointed out that A4 in his evidence testified that the vehicle was in the custody of a mechanic by the name of Daniel from 26<sup>th</sup> February until the day of his apprehension. It was therefore argued that the prosecution failed to prove its case beyond reasonable doubt by failing to bring the said Daniel as a witness.
- 5.5 We were accordingly urged to upset the conviction and sentence.

## **2<sup>nd</sup> appellant's arguments**

- 5.6 It was submitted with respect to the first ground of appeal that the trial court failed to address the fact of the non-availability of key witnesses or complainants particularly with respect to count 2 and 4.
- 5.7 Counsel pointed out that a perusal of the two counts shows that personal items belonging to He Shenghyue and Wan Song

were stolen but they were never called as witnesses. It was contended since the items listed in the two counts were never identified by the owners, the appellant ought to have been acquitted by the trial Judge.

5.8 Turning to the CCTV video footage relied on by the court below, counsel argued that the footage was unreliable in view of the fact that it was compiled by a non-expert witness. He submitted that the footage was unclear. The possibility of it being tampered with was not ruled out by an independent expert witness.

5.9 Learned Counsel specifically denounced the trial court for conducting a scene visit on its own motion. It was contended that this prejudiced the defendant case since the burden to prove the case is on the prosecution.

5.10 It was further submitted that the conviction cannot also stand on the basis of circumstantial evidence since there were discrepancies in the prosecution evidence. In order to drive his point home, counsel adverted to the case of ***Dorothy Mutale & Another vs The People***<sup>2</sup> for the principle that where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference.

5.11 The learned counsel went on to submit that the trial Judge failed to address issues of dereliction of duty on the basis that the arresting officer failed to record the items alleged to have been found during a search at 2<sup>nd</sup> appellant's premises. It was further alleged that the arresting officer did not obtain a cell phone call print out from any service provider or ZICTA to show that the appellants 1 and 2 were in contact with each other despite the police having confiscated their cell phones.

5.12 The 2<sup>nd</sup> appellant's counsel concluded his brief arguments around the 2<sup>nd</sup> ground of appeal by contending that the trial court misdirected itself when it failed to consider the alibi raised by the 2<sup>nd</sup> appellant to the effect that he was in Nakonde on 2<sup>nd</sup> March 2018 when the robbery took place.

5.13 On the basis of the foregoing arguments, the 2<sup>nd</sup> appellant's counsel urged us to allow the appeal and acquit him.

### **3<sup>rd</sup> and 5<sup>th</sup> appellants' arguments**

5.14 The thrust of the submissions on behalf of the 3<sup>rd</sup> and 5<sup>th</sup> appellants was that the basis of the conviction for the 3<sup>rd</sup> and 5<sup>th</sup> appellants was the clip on the video footage. That there is no independent evidence which proves the offence against the two beyond reasonable doubt. To support the principle of the standard of proof in criminal cases we were referred to the case of *Miller vs Minister of Pensions*<sup>3</sup> where Denning J (as he then was) held as follows:

*“The degree of cogency required in a criminal matter before an accused is found guilty is well settled. It need not reach certainty, but it must carry a high degree of probability.”*

5.15 Learned counsel went on to argue that the lower court relied on an out of court statement made to the police by the 2<sup>nd</sup> appellant to the effect that *“the plan was hatched with the help of A3 and A5.”* It was argued that this statement was neither said in court nor adopted by the accused person. To persuade us on this point we were referred to the holding in the case of ***Shamwana & others vs The People***<sup>4</sup> where it was held as follows:

*“...although an out of court statement made in the absence of the defendant by one of his co-defendants cannot be evidence against the former, unless he expressly or by implication adopts the statement as his own, if a co-defendant goes into the witness box and gives evidence in the course of a joint trial, then, what he says becomes evidence for all purposes of the case, including the purpose of being evidence against his co-defendants.”*

5.16 With regard to ground two, counsel submitted that the trial court erred when it made a finding that A3 and A5 had active knowledge of the robbery because they were in a position where they were able to see what was happening outside through the window. Counsel argued that there was no basis

for the court to make such a finding as the presence of the two appellants at the scene was not accidental. He sought refuge in the case of **R vs Coney**<sup>5</sup> where it was held that non-accidental presence at the scene of crime is not conclusive of aiding and abetting.

5.17 Finally it was submitted that the trial court drew wrong inferences from the circumstantial evidence which did not connect the 3<sup>rd</sup> and 5<sup>th</sup> appellants to the offence.

**5.18 Respondent's arguments**

On behalf the respondent, Ms. Chitundu, the learned Chief State Advocate, relied on the written heads of argument filed herein. She indicated that she supported the conviction for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants. However in relation to the 5<sup>th</sup> appellant it was asserted that other than her suspicious behavior on the material day there was no other evidence connecting her to the commission of the offence or actively participating in its planning as an aider or an abeter. Given these circumstances the conviction was not supported.

5.19 In response to ground one it was argued that the trial court was on firm ground when it relied on the evidence of Gilbert Chileshe who identified the 1<sup>st</sup> appellant. It was contended that Gilbert Chileshe was reliable in his observation of the events as the attack took place in broad day light. Gilbert Chileshe also had sufficient time to observe the 1<sup>st</sup> appellant because he was the person who showed him a card. At this

point the situation was calm and the witness had ample opportunity to observe the person he spoke to, who he identified as the 1<sup>st</sup> appellant. The case of ***Chimbini vs The People***<sup>6</sup> was called in aid to support the argument.

5.20 It was therefore contended that the identification of the 1<sup>st</sup> appellant was reliable as he observed the 1<sup>st</sup> appellant in conditions that were favourable for observation. This excluded the possibility of an honest mistake.

5.21 It was further submitted that there is a connecting link between the 1<sup>st</sup> appellant and the offence which would render a mistaken identity too much of a coincidence. This was the leading of the police to the 2<sup>nd</sup> appellant where property stolen from New Future Financial Limited Company was found. The case of ***John Mkandawire vs The People***<sup>7</sup> was cited where it was held that:

*“The possibility of an honest mistake cannot be ruled out unless there is some ‘connecting link’ between the accused and the offence which would render a mistaken identification too much of a coincidence.”*

We were accordingly urged not to disturb the trial court’s finding of fact on the reliability of Gilbert Chileshe’s observations.

5.22 Additionally there is electronic evidence from the CCTV footage which was produced as exhibit P11 and P12. These exhibits

were properly produced into evidence by Feng Shenghu who was the author and generator of the video footage. That this was in line with section 8 of the **Electronic Communication and Transactions Act**. The fact that Webster Sangalube, Feng Shenghu and Joseph Simuchembu were able to identify the 1<sup>st</sup> appellant corroborates Gilbert Chileshe's identification evidence of the 1<sup>st</sup> appellant and goes to show that the latter was reliable in his observation.

5.23 In relation to the 4<sup>th</sup> appellant, it was submitted that the trial court was satisfied that A1 and A4 were present during the robbery as shown in the video footage. That this position of the lower court was supported by the evidence of Webster Sangalube, Feng Shenghu and Joseph Simuchembu. She did not accept as credible the denial by the 1<sup>st</sup> and 4<sup>th</sup> appellants. The case of **Webster Kayi Lumbwe vs The People<sup>8</sup>** was adverted to the proposition that an appellate court will not readily interfere with a trial court's findings of fact on issues of credibility unless it is clearly shown that the finding was erroneous.

5.24 It was further argued that in addition to the 1<sup>st</sup> appellant being identified in the video footage, there is evidence from Joseph Simuchembu that the police were led to the apprehension of the 4<sup>th</sup> appellant who was found to be in possession of the Toyota Noah (exhibit 8) that was used in the robbery. This is an odd coincidence that gives rise to the inference that he was



involved in the commission of the offence. It is also an odd coincidence that on being found where it was parked, the vehicle was stripped of its number plates, fitness and road tax disks. Further it was the 4<sup>th</sup> appellant who showed Joseph Simuchembu where the number plates were hidden in a pocket behind the driver's seat.

5.25 In relation to the 2<sup>nd</sup> appellant, it was argued that there is evidence on record adduced by Joseph Simuchembu to the effect that the 2<sup>nd</sup> appellant led the police to his house where he produced a bag found to contain six title deeds and two motor vehicle white books. This raised the doctrine of recent possession which connects the 2<sup>nd</sup> appellant to the offence.

5.26 As regards the 3<sup>rd</sup> appellant, Ms. Mumba submitted that there was circumstantial evidence that connects him to the commission of the offence. This was from the suspicious behavior that he displayed before and during the attack at New Future Financial Limited company. We were accordingly urged not to disturb the findings of fact by the lower court.

## **6.0 Our Decision**

6.1 We have considered the grounds of appeal carefully. We have also considered the submissions made by counsel as well as the evidence on the record and the judgment of the lower court. Looking at the fact that the grounds of appeal are intertwined we shall deal with them globally.

- 6.2 The issue of the commission of the offence at New Financial Limited Company is not in dispute. In our considered view the central issue for determination is whether or not the appellants were connected in some way to the commission of the offence that occurred at the company.

**1<sup>st</sup> appellant - identification**

- 6.3 Starting with the 1<sup>st</sup> appellant, the thrust of Mrs. Liswaniso's argument is that there was a possibility of an honest mistake in his identification given the fact that he was singly identified by Gilbert Chileshe, hence the need for an identification parade to have been conducted by the Police. We have considered this argument in light of the evidence on record as well as the law on the subject. It is settled law that the issue of identification must be approached with caution in order to obviate the possibility of an honest mistake. This position was ably highlighted by the apex court in the case of **Nikutisha and Another vs The People**<sup>9</sup> where it was held that:-

*"There is need for caution in identification cases, and where the quality of evidence is not good, there is need for supporting evidence to rule out the possibility of an honest mistake."*

- 6.4 In resolving the issue of identification of the 1<sup>st</sup> appellant, the lower court started by evaluating the evidence on record and made a finding of fact that Gilbert Chileshe was reliable in his observation. It is trite that evidence of a single identifying witness can properly warrant any competent court to convict

upon it provided it is reliable. On this point we recall what was said in the case of **Sammy Kambilima Ngati, Mumba Chishimba Edward and Davy Musonda Chanda vs The People**<sup>10</sup> where it was held as follows:

*"It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated."*

- 6.5 In ruling out the possibility of an honest mistake, the lower court took into account the fact that the 1<sup>st</sup> appellant first encountered Gilbert Chileshe at the entrance to the company premises without a mask. This was in broad day light and the atmosphere was calm. The 1<sup>st</sup> appellant then engaged Gilbert Chileshe in a brief conversation before he produced his ID card. This goes to show that Gilbert Chileshe had ample time to observe the 1<sup>st</sup> appellant before he was assaulted by the later.
- 6.6 In addition to the testimony of the star identifying witness, the learned trial Judge also spotted the 1<sup>st</sup> appellant in the CCTV video footage that was admitted in evidence as exhibit P8. In our considered view, this provided 'something more' to support the evidence of identification tendered by Gilbert Chileshe.
- 6.7 Regarding the criticism that a Police identification parade should have been conducted, we do not see much value in this argument when the evidence of identification of the 1<sup>st</sup> appellant is considered in totality. Needless to restate that,

the Supreme Court has pronounced itself multifariously on appeals premised on findings of fact. One such case is ***Webster Kayi Lumbwe vs The People***<sup>11</sup> where it was held as follows:

*“An appellate court will not readily interfere with a trial court’s findings of fact... unless it is clear that the finding was erroneous.”*

6.8 We therefore find no basis to fault the trial Court for finding that the 1<sup>st</sup> appellant was properly identified. His conviction and sentence is accordingly upheld.

6.9 **2<sup>nd</sup> appellant- recent possession**

As regards the 2<sup>nd</sup> appellant, the evidence linking him to the commission of the offence was that upon his apprehension he was found in possession of a bag that contained six title deeds, two white books, and a laptop for clients of New Future Financial Company Limited that went missing during the robbery. And as pointedly submitted by the learned Chief State Advocate, this brings out the doctrine of recent possession. Under this doctrine, a trial court is entitled to draw an inference, if the facts warrant, that the person who is found to be in possession of recently stolen property is the thief, and therefore, guilty. It is crucial that the court should be satisfied beyond reasonable doubt that the property so found is the property identified by the complainant as that which was stolen. This proposition is in line with the holding

in **Kampafwile vs The People**<sup>12</sup>, where it was observed as follows:

*“The Court is entitled to draw the inference, if the facts proved so warrant, that the person in whose possession recently stolen property is found is the thief or the guilty one thereof. It is therefore vital that the Court should be satisfied beyond reasonable doubt that the property identified by the complainant is that which was stolen.”*

6.10 The recent possession of stolen property without a reasonable explanation 3 weeks after the incident therefore provided a connecting link between the 2<sup>nd</sup> appellant and the offences he was convicted for. For that reason, we find no basis upon which we can assail his conviction and sentence.

### **3<sup>rd</sup> appellant - odd coincidence**

6.11 Turning to the 3<sup>rd</sup> appellant, the evidence implicating him was from Detective Joseph Simuchembu who upon interrogating the 1<sup>st</sup> and 2<sup>nd</sup> appellant disclosed that they had inside information from the 3<sup>rd</sup> appellant. We are alive to the guidance of the Supreme Court on the guidelines for treating evidence of an accomplice as stated in the case of **Chipango And Others vs The People**<sup>13</sup> where it was observed that:-

*“Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an*

*accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded.”*

6.12 Although the 1<sup>st</sup> and 2<sup>nd</sup> appellants are accomplices whose evidence required corroboration there was ‘something more’ which linked him to the offence. There was evidence from Detective Joseph Simuchembu that the 3<sup>rd</sup> appellant led the police to the apprehension of the 4<sup>th</sup> appellant who was found in possession of the Toyota Noah that was used during the robbery. The evidence of ‘leading’ was never objected to in the court below. (See pages 220 to 222 of the record).

6.13 But the matter does not end there. It is an odd coincidence that he was equally found in possession of a bag which he had given Tina Simukonda for safe keeping. This bag contained incriminating evidence of a certificate of title belonging to one of the clients for New Future Financial Limited.

6.14 As the Supreme Court pointed out in the case of ***Machipisa vs The People***<sup>14</sup>:

*“odd coincidences constitute evidence of something more. They represent additional evidence which the court is entitled to take into account.”*

6.15 The view we take is that it is the odd coincidences highlighted above which connect the 3<sup>rd</sup> appellant to the commission of the offence.

6.16 Counsel for the 3<sup>rd</sup> appellant vehemently argued that the lower court erred when it relied on the out of court statements from the co-accused to the effect that they had inside dealing with the 3<sup>rd</sup> and 5<sup>th</sup> appellants. On the evidence that was before her, even if the out of court statements were to be wholly discounted, we are of the view there was still sufficient evidence to support the decision that the lower court arrived at.

6.16 The 3<sup>rd</sup> appellant's appeal against conviction cannot therefore be sustained.

**4<sup>th</sup> appellant – dereliction of duty**

6.17 Pertaining to the 4<sup>th</sup> appellant, the trial court is being faulted for allegedly convicting him without ascertaining the real person who was in control and possession of the vehicle used in the robbery. It has been spiritedly argued that he had not been in possession of the vehicle in question at the time of the offence as it was in the custody of the mechanic by the name of Daniel from 26<sup>th</sup> February until the date of his apprehension. That despite the police being told about Daniel, no efforts were made by them to bring him in for questioning at the police station or bring him to court. It has further been alleged that when Davy Mumba (the 4<sup>th</sup> appellant) attempted to make arrangements for Daniel to come to court to testify, the later declined alleging that he had been threatened.

6.19 In relation to the 4<sup>th</sup> appellant, he was firstly identified in the video footage. The 3<sup>rd</sup> appellant led the police to his whereabouts and subsequent apprehension. After he was nabbed, the 4<sup>th</sup> appellant led the police to the exact spot where the number plates for the vehicle were hidden. It is strange that a person who has a clear conscience can go to an extent of plucking out the road tax and fitness disks as well as removing and hiding the number plates for the vehicle that was identified in the CCTV video footage as the one used in the robbery. It is rather odd that the owner of the vehicle was never informed that his vehicle had had a break down. The said vehicle belonged to the 4<sup>th</sup> appellant's father who was the registered owner and who confirmed having left the vehicle in the 4<sup>th</sup> appellant's care during the time of the robbery. The later identified the vehicle at the police station and stated that it was in the "*condition in which it was left*".

6.20 Therefore the argument that the court below convicted without ascertaining the real person who was in control and possession of the vehicle flies in the teeth of the evidence on record. This is on account of the damning evidence adduced by the father of the 4<sup>th</sup> appellant that he had given control and possession of the vehicle to the son during the period in issue. Further, the alibi of the vehicle having been in the custody of a one mysterious Daniel cannot hold water.



6.21 We align ourselves to the holding in the case of ***Ilunga Kabala & John Masefu vs The People***<sup>15</sup> where it was stated as follows:

*“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”*

6.22 The odd coincidences alluded to in the preceding paragraphs lead us to the conclusion that the 4<sup>th</sup> appellant was connected to the commission of the offences. The explanations given do not hold water for reasons articulated in the preceding paragraph.

6.23 In view of the foregoing evidence, the lower court was perfectly entitled to find that the 4<sup>th</sup> appellant was one of the assailants who committed the offence at New Financial Limited company. He was placed at the scene with direct evidence which made his purported *alibi* to be disfavoured by the trial Judge. We are satisfied that there was no dereliction of duty on the part of the police in not locating the whereabouts of Daniel. The alibi that the vehicle had been in Daniel’s possession was rightly dismissed as an afterthought. We accordingly find no merit in his appeal.

#### 6.24 **5<sup>th</sup> appellant – suspicious conduct**

As regards the 5<sup>th</sup> appellant, she was convicted on the basis of her suspicious conduct during the course of the robbery. There was no other credible evidence on record linking her to

the commission of the offence. This is the basis upon which the respondent had difficulty in supporting her conviction by the court below.

6.25 We are inclined to agree with the position taken on account of the fact that indeed, apart from her suspicious conduct before and during the robbery, there is no credible evidence which connects her to the commission of the offence. She was at the scene by virtue of her employment. We therefore see no basis upon which the conviction can be sustained. In light of the foregoing, we quash the conviction and sentence for the 5<sup>th</sup> appellant and set her at liberty forthwith.

#### 6.26 **Lifting of finger prints**

Counsel for the appellants have raised an issue relating to the gun allegedly used in the robbery not having been subjected to finger print scanning. It has been argued that finger prints were not lifted from the gun that was found under the motor vehicle parked at the crime scene to ascertain if the appellants had touched the gun as alleged by the prosecution. We have been implored to make a presumption that the finger prints were lifted and did not match the appellants and therefore there was a failure to prove the offence of aggravated robbery.

6.27 In relation to this argument, the case of ***Kalunga vs The People***<sup>16</sup> where it was held by the Supreme Court that:

*“Failure to lift finger prints is a dereliction of duty by the police which raises a presumption that such finger prints as they were, did not belong to the accused. The presumption is rebuttable by overwhelming evidence against the accused.”*

6.28 The question that arises in this case is therefore whether or not there was overwhelming evidence against the appellants. We are satisfied for reasons outlined earlier in this judgment that there is overwhelming evidence that the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> appellants participated in the commission of the offence and thereby rebutting the presumption.

6.29 Before we conclude, we note that the appellants were charged with 4 counts of aggravated robbery contrary to section 294(1) of the Penal Code. The trial Judge found all the five accused persons guilty as charged and convicted them accordingly. It is imperative in our view to look at the provisions of section 294(1) which states as follows:

*294. (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) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death-*

*(a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and-*

*(i) that he was not aware that any of the other persons involved in committing the offence was so armed; or*

*(ii) that he dissociated himself from the offence immediately on becoming so aware;*

6.30 After considering the mitigation, the court below before inflicting the death penalty on all the convicts observed as follows:

*"The offence of aggravated robbery under section 294(1) PC CAP 87 provides for the imprisonment for life. Further, where the offensive weapon or instrument used in the robbery was a firearm, the penalty shall be death.*

*The offences committed by the convicts are very serious which are very prevalent in our society. There was*

*evidence of the use of a firearm. Accordingly, I hereby sentence Henry Chitundu Alias Alibaba (A1), Francis Chanda (A2), John Nsapo Kwamwena (A3), Davy Mumba (A4) and Catherine M. Kabuswe (A5) to death on all four counts. You shall be hanged by the neck until pronounced dead."*

6.40 The basis of inflicting the death penalty on all the convicts was that there was evidence of the use of a firearm. Having thoroughly examined the evidence on record, it is clear to us that the said firearm was never fired

6.41 In relation to the firearm the evidence that was adduced in court was from PW1 Gilbert Chileshe who testified when the assailants approached him at the gate and after a brief discussion he was beaten up by them and they used his firearm and they subsequently locked him up in the toilet.

6.42 Later when he was retrieved from the toilet, he went and checked in the guard room where he had put the gun and discovered it was missing. It was only when the police came to conduct a search that they found the rifle under one of the vehicles parked at the premises. The rifle was the gun he was using to carry out his duties.

6.43 Under cross examination he did indicate that when he was being dragged and kicked, his gun was in the guard room but he did see one of the attacker with a gun which he was

brandishing against the Chinese. He clarified that he saw the gun on CCTV footage.

6.44 There is no evidence as earlier indicated that the gun was fired and it is unclear which gun the assailants were using as this witness had said that his gun was in the guard room but was subsequently found under a car. The gun was neither examined and nor was it presented before the trial court. There being no direct evidence of use of a firearm, a conviction of armed aggravated robbery cannot stand. We are fortified in so holding by the case of **Jonas Nkumbwa vs The People**<sup>17</sup>, where 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."*

6.45 In the same case at page 105, it was further held 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."*

6.46 We also recall the case of **Raymond Kosamu Zulu and Another vs The People**<sup>18</sup> at J19 to 20 wherein we guided as follows:

*“.....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 is 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.....”*

6.47 It is significant to note that there is a distinction between armed aggravated robbery where a firearm is used then the penalty is that of the death sentence and ordinary aggravated robbery which carries a sentence of minimum 15 year to life imprisonment.


6.48 In light of the foregoing, we are of the considered view that the conviction for armed aggravated robbery was unsound, as there is no evidence on record to support it. We accordingly

set it aside. We instead find the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> appellants guilty of ordinary aggravated robbery.


#### 6.49 **Conclusion**

In conclusion, the two grounds of appeal having failed for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, their appeal is hereby dismissed. Considering the circumstances of this particular case wherein there was some degree of force used as well as the trauma inflicted, we are compelled to go beyond the minimum mandatory sentence. In our perspective, a sentence of 25 years imprisonment with respect to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants will meet the justice of the case.

6.50 The sentences shall run with effect from the date of convictions by the High Court.

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

  
 .....  
 B.M. Majula  
**COURT OF APPEAL JUDGE**

  
 .....  
 M.J. Siavwapa  
**COURT OF APPEAL JUDGE**