

IN THE COURT OF APPEAL OF ZAMBIA Appeal No.177,178/2022
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

CLINTON SINKALA

HOOLO MAMPI

AND

THE PEOPLE



1ST APPELLANT

2ND APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe JJA

ON: 22nd August 2023 and 31st August 2023

For the Appellant: S.F. Bwalya, Senior Legal Aid Counsel, Legal
Aid Board

For the Respondent: G. Zimba, Deputy Chief State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Legislation referred to:

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

Cases referred to:

1. Nyambe v. The People [1973] Z.R. 228
2. Champion Manex Mukwakwa v. The People [1978] Z.R.

3. Chabala v. The People [1976] Z.R. 14
4. Saluwema v. The People [1965] Z.R. 4
5. Kenneth Mtongo and Victor Kaonga v. The People SCZ
Judgement No. 5 of 2000
6. Molly Zulu and Others v. The People [1978] Z.R. 227
7. Peter Yotamu Hamende v. The people [1977] Z.R. 184
8. Ilunga and John Masefu v. The People [1981] Z.R.
102
9. John Nkumbwa v. The People [1983] Z.R. 103
10. John Timothy and Feston Mwamba v. The People [1977]
Z.R. 394

1. INTRODUCTION

1.1. The appellants appeared before the High Court (Sinyangwe, J.) jointly charged with three counts of offence of Aggravated Robbery, contrary to **Section 294(1) of The Penal Code.**

1.2. They denied the charges and the matter proceeded to trial.

1.3. At the end of the trial, they were each found guilty of committing all the three offences.

1.4. They were both condemned to suffer capital punishment.

1.5. They have appealed against both the convictions and the sentences imposed on them.

2. EVIDENCE BEFORE TRIAL JUDGE

2.1. The evidence before the trial Judge was that in the early hours of 22nd April 2021, Lineo Mphaka, a cashier at an abattoir in Gwembe, was attacked by four men in her house.

2.2 Some of the robbers were dressed in long coats and wearing military boots. Money and a cell phone was stolen from her. A phone belonging to her sister, Mirriam Mphaka, was also stolen.

2.3 The robbers then got Lineo Mphaka and went with her to the abattoir where they stole the guard's phone.

2.4 The robbers initially ordered the sisters to cover themselves, but later Lineo Mphaka uncovered because she conversed and negotiated with them in the house that was lit. Her conversation with the robbers continued at the abattoir where it was equally lit.

2.5 The whole ordeal lasted between 3 to 4 hours.

2.6 The 2nd appellant was apprehended after Lineo Mphaka identified him at a market.

2.7 In the case of the 1st appellant, he was apprehended after the police received intelligence information. From the 1st appellant's house, the police recovered a gun and some long coats.

2.8 The gun that was recovered was subjected to ballistics examination. The examiner found that it was an air pistol which was "a dummy of a real gun".

2.9 In court, Lineo Mphaka, Mirriam Mphaka and the guard identified the gun as being the one the robbers had been carrying.

2.10 Both appellants were later identified at an identification parade by the guard and Lineo Mphaka. The 1st appellant was also identified by Mirriam Mphaka.

2.11 In his defence, the 1st appellant raised an alibi. He said he was at home with his wife. He called his wife as a witness to support the alibi. He admitted that a gun and long coats were recovered from his house. He said they belonged to his deceased grandfather.

2.12 The 2nd appellant equally raised an alibi. He said he was in hospital at the time. He produced

medical records to support the claim. He also called his mother as a witness.

3 TRIAL JUDGE'S FINDINGS

3.1 The trial Judge made a finding that before the identification parade, the 1st appellant was beaten at the reception of the police station in the presence of witnesses.

3.2 He also found that a police officer told the guard and Mirriam Mphaka that the 2nd appellant, was one of the robbers just before the parade.

3.3 The trial Judge noted that the identification of the appellants during the robbery, took place under stressful conditions.

3.4 The trial Judge found that even if there were irregularities during the identification parade, the witness had the opportunity to observe their assailants and to identify them.

3.5 However, he ruled out the possibility of an honest but mistaken identification, noting that the robbery took between 3 to 4 hours and that there was sufficient lighting during that period.

3.6 Further, he found that the testimony of the identifying witnesses was corroborated by the recovery of the coats and gun.

4 GROUNDS OF APPEAL

4.1 Three grounds were advanced in support of the appeal. They were couched as follows:

- (1) The learned trial Court erred in law and fact when the Court found that the dangers of an honest mistake was not present in the circumstances of this case;
- (2) The learned trial Court erred in law and fact when the Court found that no explanation was given by the 1st appellant regarding the long jackets and pistol and that it was an odd coincidence which made it safe to rely on the evidence of PW1, PW2 and PW5 regarding the identification of the 1st appellant; and
- (3) The learned trial Court erred in law and fact when the Court found that there was a case of armed aggravated robbery as there was direct

evidence of the use of a firearm 'P1' and sentenced the appellant to death.

4.2 Since the 1st and 2nd ground of appeal are both concerned with the quality of the identification evidence, we will deal with them at the same time.

5 ARGUMENTS IN SUPPORT OF THE 1ST AND 2ND GROUNDS OF APPEAL

5.1 In support of the 1st ground of appeal, it was submitted that Lineo Mphaka conceded, in cross examination, that while the 1st appellant had a poke marked face and the 2nd appellant had a huge scar on the face, she did not identify him using those features.

5.2 It was also submitted that Lineo Mphaka also conceded that she did not tell the police that one of her assailants had catapults and a knife.

5.3 She submitted that the witnesses only described their attackers by what they wore and they only gave general description of their height and complexion.

5.4 The trial Judge having found that the attack was traumatic, she submitted that the opportunity of observation was poor. Ms Bwalya referred to the cases of **Nyambe v. The People**¹ and **Champion Manex Mukwakwa v. The People**² and submitted that given these concessions by the witnesses, the trial Judge should not have ruled out the possibility of an honest but mistaken identification by Lineo Mphaka, Mirriam Mphaka and the guard.

5.5 Coming to the 2nd ground of appeal, Ms. Bwalya referred to the cases of **Chabala v. The People**³ and **Saluwema v. The People**⁴ and submitted that all an accused person is required to do, is to give an explanation that can reasonably be true.

5.6 She pointed out that in his evidence, the 1st appellant explained that the two coats found in his house belonged to his grandfather. That explanation was sufficient because there was no onus on him to prove anything.

5.7 The trial Judge therefore fell into error when he found that the recovery of the coats and boots was

corroborative because the explanation that the 1st appellant gave could reasonably have been true.

6 RESPONSE TO THE 1ST AND 2ND GROUNDS OF APPEAL

6.1 In response, Mr. Zimba submitted that even the appellants were identified in circumstances that were traumatic, the witnesses spent a considerable amount of time with their assailants, which gave them sufficient time to observe them.

6.2 He went on to argue that the identification evidence was supported by the recovery of the gun and the coats from the 1st appellant.

6.3 Mr. Zimba referred to the case of **Kenneth Mtonga and Victor Kaonga v. The People**⁵ and submitted that the fact there was more than one witness, rendered the identification evidence credible.

6.4 Further, Mr. Zimba referred to the cases of **Molly Zulu and Others v. The People**⁶ and **Peter Yotamu Hamende v. The People**⁷ and submitted that the 1st appellant's possession of the gun and coats provided corroborative evidence.

6.5 Coming to the 2nd ground of appeal, Mr. Zimba submitted that the 1st appellant's explanation of how he was found with the gun and coats could not reasonably have been true and was therefore not an explanation at all.

6.6 He then referred to the case of **Ilunga and John Masefu v. The People**⁸, and submitted that the possession of the gun and the coats were an unexplained odd coincidence and therefore corroborative.

7 COURT'S CONSIDERATION AND DECISION ON THE 1ST AND 2ND GROUNDS OF APPEAL

7.1 We will first deal with the issue of whether the 1st appellant's explanation of how the gun and the coats were found on him, could reasonably have been true.

7.2 When considering the issue, it is important to appreciate the significance of those articles; the prosecution witnesses identified them as either being carried or worn by the robbers.

7.3 It follows that whether they belonged to the 1st appellant's grandfather or not is a non-issue. The question is, were they used and their significance should be considered in that context particularly that the 1st appellant did not dispute their being recovered from him.

7.4 The trial Judge made a finding that the appellants were exposed to the witnesses before the parade.

7.5 In the case of **Kenneth Mtonga and Victor Kaonga v. The People**⁵, it was held, that:

(i) The Police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

(ii) If, therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever on the identification, it would not be to nullify the identification given the ample opportunity available to the witnesses.

(iii) If the identification is weakened then, of course, all it would need is something more, some connecting link in order to

remove any possibility of a mistaken identity.

7.6 The evidence of Lineo Mphaka, which the trial Judge accepted, is that the robbery lasted for period of between 3 to 4 hours. During this period, she had the opportunity to look at the faces of the appellants.

7.7 Her sister Mirriam Mpaka also had an opportunity to see the 1st appellant, be it that it was just a glance. In the case of the guard, although the time he spent with the robbers was not determined, it is apparent that was not just a glance.

7.8 From the evidence on record, even if the experience was traumatic, it is clear that both Lineo Mphaka and the guard, had a sufficient opportunity to identify their attackers. There was sufficient lighting and the duration of the attack was long. In the case of Lineo Mphaka, she even had the opportunity to converse with them, time and again.

7.9 Ms. Bwalya also submitted that since the appellants had outstanding facial features, the

witnesses should have described them if they really had the opportunity to identify them.

7.10 We agree with Ms. Bwalya that the quality of identification evidence is enhanced where peculiar facial features are given to the police before the identification parade. This is the case particularly where the period of interaction is short.

7.11 It is our view that where the interaction is prolonged the failure of an identifying witnesses to mention peculiar features should not automatically lead to a conclusion that the identification evidence is of poor quality.

7.12 The effect on such deficiency must be considered on the circumstances of each case.

7.13 In this case, Mirriam Mphaka only had a glance at the 1st appellant and her identification evidence can be classified as being of poor quality and in need of corroboration, particularly that the appellants were exposed to her before the parade.

7.14 However, in the case of the guard, even if he was exposed to the appellants, he had sufficient opportunity to identify them during the robbery.

7.15 His identification evidence complimented that of Lineo Mphaka, who spent a long period of time with the appellants, in circumstances that gave her a sufficient opportunity to identify them.

7.16 Further, in the case of the 1st appellant, the recovery of the coat and the gun provided supporting evidence for his identification.

7.17 We are satisfied that the trial Judge was on firm ground when he ruled out the possibility of an honest but mistaken identification.

7.18 This being the case, we find no merit in both the 1st and 2nd grounds of appeal and we dismiss them.

8 ARGUMENTS IN SUPPORT OF THE 3RD GROUND OF APPEAL

8.1 In support of the 3rd ground of appeal, Ms. Bwalya pointed out that **Section 294(3) of The Penal Code** makes it clear that for a person to be convicted of the offence of "armed aggravated robbery" under **Section 294(2) of The Penal Code**, the gun must be a 'firearm' within the meaning of **The Firearms Act**.

8.2 She submitted that in view of the ballistics experts finding that the gun was not a firearm, the

trial Judge erred when he convicted the appellants of the offence of armed aggravated robbery. She referred to the cases of **John Nkumbwa v. The People**⁹ and **John Timothy and Feston Mwamba v. The People**¹⁰, in support of her submission.

9 RESPONDENT'S REACTION

9.1 Mr. Zimba, conceded that the gun produced in court was not a firearm and in the absence of evidence that a firearm was discharged during the robbery, a conviction for armed aggravated robbery was unsafe.

10 CONSIDERATION AND DECISION OF THE COURT ON THE 3RD GROUND OF APPEAL

10.1 For a charge of 'armed' aggravated robbery to be sustained under **Section 294(2) of The Penal Code**, there must be evidence that the robbers were armed with a firearm as it is defined by the **Firearms Act**.

10.2 In this case, there was no evidence before the trial Judge that a firearm was discharged during the robbery or that the gun recovered from the appellants was a firearm. The gun that the appellants were armed with during the robbery was not a firearm but a dummy.

10.3 That being the case, the appellants should not have been convicted of 'armed' aggravated robbery under **Section 294(2) of The Penal Code**. They should have, instead, been convicted of 'ordinary' aggravated robbery under **Section 294(1) of The Penal Code**.

10.4 Consequently, we allow the third ground of appeal and set aside the appellants' conviction for the offence of armed aggravated robbery under **Section 294(2) of The Penal Code**. we substitute it with a conviction for aggravated robbery under **Section 294(1) of The Penal Code**.

11 VERDICT

11.1 We allow this appeal to the extent that we set aside the appellants' conviction for armed aggravated robbery under **Section 294(2) of The Penal Code**. We instead convict them for aggravated robbery under **Section 294(1) of The Penal Code**. We also set aside the death penalties imposed on them.

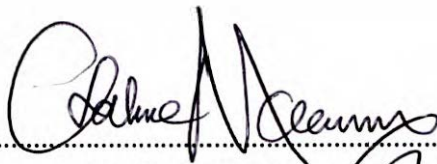
11.2 Coming to the sentence, we note that the appellants are first offenders and no serious physical injury was inflicted on their victims.

11.3 However, during the robbery they constantly threatened one of their victims with rape and ordered her workmate to rape her, failure to which they would shoot him. It is necessary that sentences that deter the use of sexual violence during robberies are imposed.


11.4 We are sentencing the appellants as follows:

- (1) Count 1, which relates to the attack on Lineo Mphaka, we sentence each of the appellants to 25 years imprisonment. This is on account of Lineo Mphaka being threatened with rape throughout the robbery;
- (2) For count 2, which relates to the attack on Mirriam Mphaka, the appellants are each sentenced to 15 years imprisonment with hard labour;

- (3) For count 3, which relates to the attack on the guard, we sentence each of the appellants to 25 years imprisonment. This is on account of them forcing the guard to undress and threatening him with death, if he did not rape Lineo Mphaka; and
- (4) The three sentence shall all run concurrently from the 12th of May 2021.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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K. Muzenga
COURT OF APPEAL JUDGE


.....
Y. Chembe
COURT OF APPEAL JUDGE