

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 189/2022
Appeal No. 190/2022

(Criminal Jurisdiction)

BETWEEN:

MARTIN KALYANGILE
BILLY LIKOMENO



1st Appellant
2nd Appellant

AND

THE PEOPLE

Respondent

Coram: Mchenga DJP, Banda-Bobo and Sharpe-Phiri, JJA
On 19 September 2023 and 10 October 2023

For the Appellants: Mr. O. Mudenda, Senior Legal Aid Counsel
Legal Aid Board
For the Respondent: Mr. C. Bako, Deputy Chief State Advocate
National Prosecution Authority

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

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

Cases referred to:

1. *Simon Miyoba v The People* (1977) Z.R. 218,
2. *Benwa and Another v The People* (1975) Z.R. 1

1.0 INTRODUCTION

1.1 This is an appeal against a judgment of the High Court Judge Chilombo Maka Phiri of 15 February 2022. By that decision, the trial Judge found the 1st and 2nd Appellants guilty of Aggravated Robbery contrary to **Section 294(1) of the Penal Code** and convicted them accordingly. They were each sentenced to serve 20 years imprisonment with hard labour.

2.0 THE EVIDENCE IN THE HIGH COURT

2.1 The prosecution's case was based on the evidence of 3 witnesses who testified that on 22 July 2021, PW1, *Paul Twambo Siachumbe*, the victim herein, was with his friends, Wisdom Mapanda and Mike on their way to purchase some goods from Dambwa Central Market.

2.2 Along the way, they met a group of men, who grabbed Wisdom and started beating him. Upon seeing what was happening, PW1 attempted to rescue his friend and in the process, one of the men named Martin, hit PW1 with an axe on his forehead. At that point, another one of the men reached into PW1's pocket and took K50 off him plus his cell phone, Infinix Hot 7 Pro, which PW1 had purchased at K1,200.

2.3 PW1 ran to Dambwa Central Police Station where he gave a statement to PW2, Collins Manda, a Zambia Police Detective Sergeant, of what had transpired. PW2 stated that he had observed that PW1 was bleeding heavily, and his clothes were torn. PW1 and

PW2 both testified that while at the station taking down the statement, Martin, the 1st Appellant appeared with Wisdom, the friend that PW1 had been with and other unruly boys from Zambezi Saw Mills. PW1 identified Martin (also referred to as Malike), who was the group leader to PW2 as the person who had axed him.

- 2.4 According to PW1 and PW2, while at the police station, the 1st Appellant beat PW1 and threatened to “finish him off”. It was the further testimony of PW1 and PW2 that Martin was apprehended by the police at Dambwa Central Police Station soon thereafter.
- 2.5 The further evidence was to the effect that the man who had taken PW1’s phone, named as Billy Likomeno, was apprehended, and identified. A 3rd person, named Joe Nthambwe, was also apprehended and identified.
- 2.6 PW1 was taken to the hospital, where he was sutured and thereafter a medical report was issued detailing the injuries PW1 had suffered. PW2 decided to arrest and charge the 3rd person they apprehended, because they acted together when they took the phone and K50 from PW1, axed him and he sustained a serious wound.
- 2.7 The evidence of PW2 was that his investigations revealed that Martin Kalyangile, the 1st Appellant had axed PW1, Billy Likomeno had grabbed a mobile phone and K50 from PW1 and Joe Nthambwe had participated in beating PW1. All 3 persons had been identified by PW1. It was also PW2’s testimony that the 1st Appellant and his group had been unruly on the material day and they had damaged

some windows of the police station, as well as motor vehicles parked at the police station.

- 2.8 It was the evidence of PW3, *Simon Mukupa*, a detective constable, that on 22 July 2021, while on duty at the Dambwa Police Post, he received a report from PW1 of unlawful wounding and aggravated robbery. Whilst PW1 was giving a statement to PW2, a group of men went to the police post holding a person named Wisdom. PW1 immediately identified Martin, the 1st Appellant as the person who had axed him. Acting on this identification, he apprehended the 1st Appellant and placed him in custody.
- 2.9 He further stated that upon placing the 1st Appellant into custody, the men that had accompanied him to the police post began chanting for the release of their “commander”. The unruly group threw stones at the police post and in the process 3 window panes and a rear windscreen of a motor vehicle were broken.
- 2.10 It was further submitted that Livingstone Central Police were called for reinforcement and the crowd ran away. A medical report was issued to PW1, and he was taken to the hospital. It was observed that Wisdom had sustained a swollen lower jaw. The further evidence of PW3 was that members of the public later brought in the other two gentlemen as suspects involved in assault, unlawful wounding, and aggravated robbery. PW3 later came to know them as Billy Likomeno the 2nd Appellant and Joe Nthambwe. He later proceeded to arrest them on a charge of assault occasioning actual bodily harm in which Wisdom Mapanda was the witness.

2.11 PW3 further confirmed that PW1 was bleeding on the left-hand side of his forehead when he arrived at the police post. He identified the Medical Report issued to PW1 and the people they had charged.

3.0 **THE DEFENCE**

3.1 Having been found with a case to answer and being put on their defence, the Appellants gave sworn evidence and called 4 witnesses in defence of the charges. The 1st Appellant, Martin Kalyangile was the first witness for the defence as DW1. It was his testimony that on 22 July 2021, between 9 to 10 hours, he was seated at a PF campaign shelter in the sawmills. Whilst there, about 20 UPND cadres came and tore down the chitenges they had put up for the shelter and they proceeded to beat up a man named Peter. At that point, he apprehended one of the guys named Wisdom Mapanda and took him to the police post. When they arrived there, they found other UPND cadres already at the station, who told the police to arrest him. The police proceeded to arrest him and chased Peter away.

3.2 He later saw Billy and Joe being brought into custody and heard that they were jointly charged with him. DW1 stated that he did not know Billy and Joe at that time.

3.3 DW1 denied robbing PW1 of his phone or axing him. He also denied beating PW1 on the road or at the police station. He alleged that PW2 was being untruthful when he told the Court that he had seen DW1

hit PW1 at the police post. DW1 confirmed that he had seen the injury PW1 had on his forehead in Court but could not confirm whether he had seen PW1's injury at the police post on the material day.

- 3.4 *Kingsley Namuchana Mubita* was the second defence witness, DW2. His testimony was that on 22 July 2021, whilst with his friends near Zambezi Sawmills, where they would gather with PF members, they saw 2 guys arrive and started beating Peter. He then saw other groups of people enter their place and he immediately ran away from the scene. While he was hiding in the neighbour's house, he came to learn that his friend Martin held onto one of the boys who were beating Peter and managed to take him to the police station. He had seen Martin and Peter carrying the person who had come earlier. He later heard Martin was placed into police custody.
- 3.5 Billy Likomeno, (2nd Appellant) was the third witness for the defence, DW3. He testified that on 22 July 2021, he was going to his workshop in Dambwa Central using the sawmills pathway. On the way, he encountered a fracas between PF and UPND supporters. He stated that some of the people dressed in UPND regalia began following him and started threatening and beating him because he was wearing a PF t-shirt. He stated that the same group of people grabbed a hold of him and took him to the police station. At the station, without hearing why he had been taken there, the police put him in the land cruiser and took him to Livingstone Central Police Station where he was taken into custody. He found Martin Kalyangile, Joe Nthambwe

and Damian in the cells, who he did not know at the time. He was later jointly charged for Aggravated Robbery.

3.6 In cross-examination, DW3 denied that he had stolen PW1's phone. He also denied that the people he had been charged with were his friends. He conceded that he did not report to the police that the group of UPND people had beaten him up but said he had tried to. He confirmed that he had been warned and cautioned for the offence of aggravated robbery and had been accused of beating PW1. He insisted that he just found himself in the fracas.

3.7 The fourth defence witness, Joe Nthambwe, DW4 testified that on 22 July 2021, he was on his way to work in Molight Compound when he met some UPND members on the road. He knew they were UPND members as they were wearing party regalia. At the time, he was wearing a PF cap, and these people followed him and started beating him. They took the money out of his pocket and proceeded to take him to the police station where they handed him over to the police. A bag of suspected marijuana was handed to the police. He was taken to Central Police Station where he found Martin Kalyangile and Damian Mushabati, whose names he came to know when they were taken to the Anti-Robbery Unit. He was initially charged with malicious damage and unlawful wounding. He was also later charged with aggravated robbery and trafficking in psychotropic substances. He was acquitted for the later offence. DW4 denied knowing PW1.

4.0 TRIAL JUDGE'S FINDINGS

- 4.1 Having considered the evidence adduced in the matter, the trial Judge made the following findings: that it was not in dispute that on 22 July 2021, around 9 hours, PW1 and his friends Wisdom and Mike had a confrontational encounter with a group of men, among whom was DW1 and DW2. A fight erupted and PW1 was axed on the forehead and a medical report confirmed that he had sustained a scalp laceration and abrasions on his back and left knee.
- 4.2 PW1's friend Wisdom was also injured in the fracas, and a medical report confirmed that Wisdom had sustained injuries consistent with the report he made to the police, which injuries included bruises on his left shoulder, swelling on his left eye, swollen and tenderness in the left mandibular region. The trial Judge found that the above evidence showed that PW1 and Wisdom Mapanda were assaulted and injured on 22 July 2021.
- 4.3 The trial Judge also found as a fact that PW1 had a phone on him at the time he was violently attacked at Zambezi sawmills area, which was stolen from him together with K50 cash.
- 4.4 In relation to the question of whether it was the Appellant who attacked PW1 and Wisdom Mapanda and stole PW1's phone and K50 cash, the trial Judge found that PW1 had identified the 1st Appellant as the person who had axed him on the forehead, and that since the incident had happened in the morning, PW1 was able to clearly see the people involved in the fracas.

- 4.5 The trial Judge was therefore satisfied that PW1 had rightly identified the 1st Appellant as the person who had axed him. The Judge also found that the 2nd Appellant was also clearly seen at the scene and the role he played clearly visible and described by PW1. The trial Judge found that the 1st and 2nd Appellants had gravely injured PW1 and robbed him of a phone and K50 cash.
- 4.6 In relation to the 3rd accused person, Joe Nthambwe, the trial Judge found that PW1 did not identify him as being one of the men who had attacked him. The Judge observed that PW1 had also conceded that he did not identify the 3rd accused person. The trial Judge went on to find that the 3rd accused person, Joe Nthambwe did not participate in the beating and the robbing of PW1. The trial Judge found the 3rd accused person not guilty of aggravated robbery and acquitted him accordingly.
- 4.7 With respect to the charge of assault occasioning actual bodily harm, the trial Judge observed that PW3 had testified on the charge of assault occasioning actual bodily harm that it was his investigations that revealed that it was the 3 accused who beat up Wisdom Mapanda. However, Wisdom Mapanda had not testified in Court and that there was no explanation from the prosecution as to why he did not appear. Therefore, there was no basis upon which PW3 premised his conclusion. This is considering that the arresting officer was not at the scene and did not see who beat up Wisdom Mapanda. The Judge therefore concluded that the prosecution had failed to proffer evidence as regards the identity of the persons who injured Wisdom Mapanda. The trial Judge found therefore that there was no evidence linking the three accused persons to the commission of the offence

of assault occasioning actual bodily harm and acquitted all three accused of this offence.

4.8 Turning to the charge of aggravated robbery, the trial Judge observed that the *“facts of the case revealed that the 1st Appellant was armed with an axe which he used to hit PW1 on the forehead. That the axing or actual violence on PW1 by the 1st Appellant was spontaneous and contemporaneous with the taking of the phone from PW1’s pocket by the 2nd Appellant. The Judge found that this was indicative of the fact that the two accused persons had common purpose and acted jointly when they threatened and used actual violence on PW1 in order to steal the phone and K50 cash from him”*.

4.9 Having made the above findings, the trial Judge found the two accused persons (the Appellants herein) guilty of the offence of Aggravated Robbery contrary to **Section 294(1) of the Penal Code** and convicted them accordingly. The 1st and 2nd Appellants were sentenced to 20 years imprisonment with hard labour.

5.0 **THE APPEAL**

5.1 Being dissatisfied with the decision of the lower Court of 15 February 2022, the Appellants brought an appeal to this Court advancing one ground of appeal, namely that the learned trial Court erred in law and fact by convicting the Appellants of the offence of aggravated robbery in the absence of proof beyond reasonable doubt.

6.0 APPELLANTS' ARGUMENTS

6.1 The 1st and 2nd Appellants filed their Heads of Argument on 30 August 2023. In the arguments, it was submitted firstly, that there was no evidence led by the prosecution that there was violence used to aid the taking of the properties of PW1. Secondly, it was argued that the prosecution also failed to prove that on the material day, PW1 was in possession of a phone and K50. We were referred to page 152 of the Record of Appeal (ROA), lines 11 to 15 where the trial Court confirmed that the only evidence of the existence of the phone is from PW1, the complainant, who was the only eyewitness for the prosecution.

7.0 RESPONDENT'S ARGUMENTS

7.1 The Respondent did not file written arguments but made oral submissions during the hearing of the appeal.

8.0 THE HEARING

8.1 The appeal came up for hearing on 19 September 2023. The Appellants were represented by Mr. O. Mudenda, Senior Legal Aid Counsel at Legal Aid Board. The Respondent was represented by Mr. C. Bako, Deputy Chief State Advocate at the National Prosecution Authority.

8.2 The Appellant relied on the written arguments filed on 30 August 2023. The Respondent orally countered the Appellants' submissions

by arguing that contrary to the Appellant's assertion, that PW1 had no phone, the evidence on record as shown at page 152 where PW1 told Court below that he had a K50.00 note and an Infinix phone. Counsel argued that the trial Court was on firm ground in finding that the fight was meant to help with the robbery.

- 8.3 On the question of inconsistencies in the statements given at the police station and during the trial, Counsel for the Respondent stated that the Court correctly treated the said inconsistencies generally and determined that the statements were written by different people and concluded that Wisdom was only brought to the police by the 1st Appellant.
- 8.4 Counsel for the Respondent further added that there is no dispute on the identification of the Appellants as the attack took place around 9 hours, PW1 had known his attackers since 2016 and had sufficient opportunity to identify the attackers at the time the robbery took place.
- 8.5 In reply, Counsel for the Appellants rebutted that it was the responsibility of the State to prove that PW1 had a phone and not the Appellants. Counsel concluded by submitting that the Court should take judicial notice that an axe is a very sharp tool such that if used to inflict injury, it would result in a deep cut. Further, that the medical report at page 160 of the Record of Appeal is not sufficient to prove that an axe was used.

9.0 **THE DECISION OF THIS COURT**

- 9.1 We have considered the sole ground of appeal which asserts that the learned trial Court erred in law and fact by convicting the Appellants of the offence of aggravated robbery in the absence of proof beyond reasonable doubt.
- 9.2 It is trite law that the legal burden of proof required to secure a conviction in a criminal case is beyond a reasonable doubt. The issue for consideration is whether the evidence adduced by the prosecution in the Court below was sufficient to secure a guilty verdict of the Appellants.
- 9.3 In considering this matter, our starting point will be to have recourse to the provisions of **Section 294(1) of the Penal Code** which provides that:

'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.'

- 9.4 The foregoing reveals several essential ingredients to prove the offence of aggravated robbery. In the present case, there is no contention of the presence of weapons and injury occasioned to the victim Paul Twambo Siachumbe, PW1, on the day of 22 July 2021 while, the victim, in the company of his 2 friends were enroute to Dambwa Central Market.
- 9.5 What is in issue is whether the prosecution proved its case to the requisite standard, being beyond reasonable doubt, that the 1st Appellant axed PW1 and that the 2nd Appellant immediately or thereafter stole or took the victim's phone and money.
- 9.6 While there is no doubt that the victim, PW1, was injured on the material day, *because even the appellants acknowledge that there was a fight between PF and UPND cadres, the credibility of his testimony could be questioned on the sequence of events as they may have unfolded on the day in contention. During examination in chief of the said victim, as shown in part at page 22 of the Record of Appeal, PW1 told the Court the following:*

'After seeing that the person who was being beaten was my friend, I went there to rescue him and in the process of rescuing that person, I was hit with an axe. And then one person went into my pocket and got a cell phone that I bought from Arakan barracks. Billy whose surname I do not know got onto my pocket and got my cell phone... I found police officers at the reception... after giving the statement, the person who hit me with an axe by the name of Martin came through as well. He had apprehended my friend Wisdom Mapanda, the one who was being beaten.'

9.7 However, in the statement the victim gave to the police officer, PW2, which was admitted into evidence, he said something different. In that statement, the following was his account of what happened on the material day:

'I do remember very well that on the 22nd July 2021, at about 09:00hrs I was with my friend M/Mike Mwendabai going to Dambwa Central Market from Dambwa Site Market, so we passed through Zambezi Saw Mills and as we walked in the area just at the Railway line, we passed a place where I saw a group of young men sitted (seated) and they were smoking unknown type of drugs. Suddenly a person I know as M/Billy other names not known came towards me straight and shortly his friend I also know as M/Martin Kalayangile coming towards me with an axe in company of M/Joe Ntembwe and others I don't know, and it was at that time when M/Billy started searching my pockets and I tried to resist and in the process I was hit by M/Martin Kalyangile with an axe on my forehead and M/Billy got my K50.00 and my cell phone Infinix Hot 7... my friend M/Mike then gained courage to come and rescue me from further beatings of which he managed to rescue me and he asked me to hold on his shoulders for I had lost strength...then as we were going towards Dambwa Central Police post just some few meters away M/Martin Kalyangile followed us and he started dragging while beating me up until we reached the police post where he continued to beat me in the presence the police officers, there and then the police had to detain him in police cells and I was issued with a medical report form...'

9.8 When asked in cross examination, PW1 conceded the inconsistency but did not give any explanation for it. The inconsistency was that

in court he said after being robbed at the sawmills he went to the police to report and while he was making the report, the appellants turned up and they were apprehended after he identified them. But in the statement PW1 told the police officers that after the robbery, the appellant and his associates dragged him to the police station.

9.9 In the case of **Simon Miyoba v The People** it was held that:

“The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.”

9.10 Since the case against the Appellants hinged on the credibility of PW1’s account of what happened, in the circumstances of this case, it was necessary for the trial Judge to have considered the significance of the inconsistency. Although Mr. Bako argued that the trial Judge considered it in “general terms,” this was not the case. It is our view that had the trial Judge considered the inconsistency, he would have found that the circumstances surrounding PW1’s injury was actually a fight between UPND and PF cadres and not a robbery.

9.11 While we note that there are inconsistencies in the statement PW1 gave to the police and his testimony at trial, our view is that the same do not go to the crux of the matter as far as the Appellant’s culpability is concerned. This is because, PW2, the police officer who

took the statement down from PW1 confirmed that the 1st Appellant attacked PW1 at the police station, a fact which confirms PW1's account that he had been attacked prior to his attendance at the police.

9.12 Further, the incident happened among a crowd of people at about 09:00hrs on the 22nd of July 2021, the identification of the 1st Appellant as being the one who injured PW1 by alleged axing is not shaken despite the inconsistencies of the sequence of events given by PW1 at the police station and during examination in chief in the Court below.

9.13 The injury sustained as a result of the fight on the material day cannot be doubted just as the identity of the 1st Appellant having been the one that inflicted the said injury on the person of PW1. It is also clear that while the fight ensued, the 1st and 2nd Appellants acted together against PW1 and his camp.

9.14 In the case of ***Benwa and Another v The People***, the Supreme Court held that:

'It is not a condition precedent to the substitution of a minor offence under section 181 (2) of the Criminal Procedure Code that it be cognate to the offence charged; the fact that the alternative is or is not cognate to the offence originally charged will be one of the factors to be taken into account by the court. The test to be applied by the court in considering the exercise of its discretion to

substitute a minor offence is whether the accused "can reasonably be said to have had a fair opportunity to meet the alternative charge.'

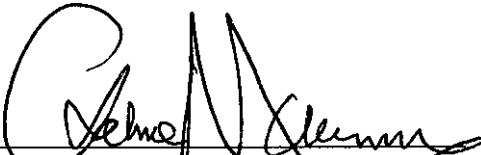
9.15 Having found that PW1 was injured during a fight, we set aside the appellants' conviction for aggravated robbery. In its place we convict them for the lesser offence of causing **Grievous Harm** contrary to **Section 229 of the Penal Code.**


9.16 We also hold the view that substitution of the offence under Section 294(1) of the Penal Code with one under Section 229 of the Code will not result in any prejudice to the Appellants as they have had sufficient opportunity to be heard on the ingredients of the substituted offence.

10. **CONCLUSION**

10.1 Having established as we have above, we accordingly set aside the conviction and sentence of the 1st and 2nd Appellants by the High Court of the offence of Aggravated Robbery. We convict the Appellants for the offence of *causing Grievous Harm* contrary to **Section 229 of the Penal Code.**

10.2 In order to deter supporters of political parties from engaging in violence during the period of elections, we will impose a deterrent sentence. The Appellants shall serve a sentence of 5 years imprisonment with hard labour from 15 June 2021, the date of their arrest.


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


A.M. Banda-Bobo
COURT OF APPEAL JUDGE


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE