

N THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(Criminal Jurisdiction)

HK/31/2011

BETWEEN:

THE PEOPLE
AND
WILLY CHELA

Before Honourable Madam Justice C. K. Makungu

For the State : Mr. G. Zimba – State Advocate from DPP's Chambers

For the Accused : Mr. T.M. Chabu of Ellis and Company

J U D G M E N T

Cases referred to:

1. **Mwewa Murono v The People (2004) ZR 207**
2. **The People v Chimbala (1973) ZR 188**
3. **The People v Ackim Manda and Malie Simbeye (1992) SCJ**

Legislation referred to:

1. **Fire Arms Act Cap 110 of the Laws of Zambia.**
2. **Penal Code Cap 87 of the Laws of Zambia**
3. **Criminal Procedure Code Cap 88 of the Laws of Zambia.**

The accused stands charged with the offence of aggravated robbery contrary to section 294(2) (a) of the Penal Code chapter 87 of the Laws of Zambia.

Particulars of the offence are that Willy Chella on 8th November, 2010 at Kitwe in the Kitwe District of the Republic of Zambia, jointly and whilst

acting together with others unknown, and being armed with offensive weapons, did steal 1DVD, 1 radio cassette , 2 cell phones and K34,000.00 cash altogether valued at K 2 634 000, the property of Jessy Muhango and at the time of such stealing did use or threatened to use actual violence to the said Jessy Muhango in order to obtain or retain or prevent the said property from being stolen.

A summary of the evidence adduced herein is as follows:

PW1 Martha Kabwe testified that on 8th November, 2010 between 19:40 and 20:00 hours she was at home in Changa Changa Township, Kitwe with her mother Jessy Muhango and her brother Ephraim Muhango in the sitting room watching T.V. They had left the door open. Her brother had gone to the bedroom when some robbers entered the house. One of the robbers said freeze, another one went to her mother to ask for money and phones. As she lay at the bedroom entrance she heard them dump her brother on the floor. She gave them her phone. Her mother told them to get her phone which was on the table. When her husband showed up, she got up and so did her mother who started struggling with one of the robbers who had a gun.

PW1 added that she saw two of the intruders struggling with her husband. As she got up the two intruders who had been struggling with him took away a radio and DVD player belonging to the family. The intruder with a gun remained in the house. They struggled with him and she later tried to close the door but felt somebody pushing it on the other side. Thereafter some of their neighbors came and the people who had been pushing the door left. The assailant who had been apprehended in the house was taken

to Justine Police Post in Ndeke Township by her husband and herself. That's the one who had carried a gun with a brown handle covered with a small cloth in front. The masks and some of the clothes the assailants were wearing remained in the house.

Under cross examination she said that she did not look at the people who entered the house carefully and could not describe the ones who ran away. She said before she bowed down she saw the person who had a gun go past her and ask her mother for some money. However she did not see anyone getting the money but had seen two of the assailants stealing a radio cassette and a DVD. She further stated that the clothes left in the house were a head sock, bomber jacket.

PW2 Ephraim Muhango testified that on 8th November, 2010 around 19:40 hours he was at home with his mother Jessy Muhango and sister Martha Kabwe. He was in the bedroom and his sister and mother were in the sitting room when he heard a voice saying "*freeze!*". He came out of the bedroom and found six intruders in the sitting room who were wearing black coats and masks. One of them was pointing a gun at his mother and telling her to give him some money. They made him and his mother lie down on the floor and started beating them with iron bars. Later his brother Lyson Kabwe showed up and was also beaten with an iron bar before some of them left with some cell phones, money, a television set, radio cassette and a DVD player. The robber who was held by his mother remained in the house. He was dark in complexion, of medium height with small ears. PW3 further stated that he was injured behind his ear and suffered body pains due to the beating. He was treated for that and a

medical report was issued. He identified the accused as the person who was apprehended in the house.

Under cross examination he said that he saw six intruders wearing masks. It was the accused who hit him with an iron bar and hurt him behind the ear. He had a gun and an iron bar of about 70cm long. When the accused was struggling with his mother, his mask got off. He further stated that the whole family took the accused to the police station.

PW3 Jessy Muhango testified that on 8th November, 2010 around 19:40 hours whilst she was seated in the sitting room with her daughter PW1 and son PW2 they were attacked by some armed robbers who were wearing masks and long jackets. One of them poked her with a gun and asked for some money and a phone as another kicked her. His colleagues cut the power lines for the electrical items such as radio, DVD player and took them outside. She said she showed them her phone which was on the table and they got it. She also gave them K34 000 which was in her hands. They kicked and beat up PW2 with an iron bar on the head. They also hit her with an iron bar on her back and she fell down then they covered her head with some cushions and continued hitting her with iron bars. Later, her son Kabwe came in and the one with a gun threatened to shoot him. His colleague hit Kabwe on the neck with an iron bar thereby making him stagger. That's when she got up and held the one with a gun. As they struggled the gun broke. By then Kabwe was fighting with two of the robbers in the kitchen who later ran away. She struggled with the accused person who had a gun. She held on to him as he took off his jacket, trousers, scarf and mask. His friends came and wanted to open the door

but were stopped by the family. Then the neighbors came and the accused's colleagues who were outside ran away. The accused was beaten and taken to Justine Police Post. They later went to Wusakile Police Station where PW2 was issued with a medical report. The police accompanied them home where they picked up the accused's clothing and gun. They also picked up a long green screw driver.

PW3 further stated that when the accused's mask got off she did not see him clearly, but later, the police took him to her home so that the family could have a good look at him and get to know him. She said she had kept in mind that the accused had small ears when she saw him in her house during the attack. She identified the accused in court.

Under cross examination she said that Kabwe and Martha took the accused to the police station whilst she remained home with PW2. All the six assailants wore masks. She did not see the accused clearly until he was taken home by police officer Sililo and his colleagues a few days after the incident. The police told her that he was the one who had entered her house. She further stated that when they took him home PW1, PW2 Jacob and Mabvuto were there.

PW4 Laison Kabwe testified that on 8th November, 2010 he arrived home from work between 19:30 and 20:00 hours. He lives at house No. 45 New Ndeke Township Kitwe. He knocked on the door but no one answered, then he heard someone in the house saying "woman, bring the money or you will die today." He entered the house through the kitchen door and went up to the entrance of the sitting room. He saw six strange men

wearing masks and coats. One of them had a big gun. One of them hit him on his back with an iron bar. He started struggling with two of them whilst PW3 his mother in law was struggling with one of them. One of them beat him on his right cheek and he let go of him. Two of them remained in the house and ran into the bathroom. PW3 went there and got hold of one of them. Some neighbors showed up to help. He told them that he would take the person he had apprehended to the police himself because they had taken long to come after hearing the shouts for help. He then took the intruder to Ndeke Police Post. The robbers had gotten away with a television set, radio cassette and some phones. They had left some head socks or masks, a big gun and an iron bar in the house. The gun looked fake with a wooden handle. It was about 70 cm long. The police collected all the things which the robbers had left in the house. PW4 further stated that he had seen the person he took to the police station whilst he was walking with him for about an hour. He described him as dark and of medium height and medium built. He identified the accused as the one he had handed over to the police on the material date.

Under cross examination he said that he found the six robbers standing in the sitting room. PW3 was kneeling down with a cushion on her head whilst they were hitting her with a metal object. The man who was struggling with PW3 overpowered her and went into the bathroom where he fell in a dish. The one he took to the police is the one his mother in law was holding. The others had left. He was with his wife when taking him to the police. He added that he was confused during the attack as it was his first experience. PW5 Siiho Kaika a police officer based at Kitwe District Headquarters Anti Robbery Squad said that on 8th November 2010, whilst he was on duty

around 20:40 hours he received a radio message that a criminal had been apprehended at plot 45 New Ndeke Township and taken to Ndeke Police Post. He then went to the police post where he found the accused person with PW3 who had apprehended him. He could not interview him at the police post because some people came there and wanted to burn him. So he took him to Wusakile police station. PW2 explained to him what had transpired at her house. PW5 said he learnt that the accused's friends ran away with the stolen property. PW5 further stated that after warning and cautioning the accused and interviewing him he made up his mind, to arrest and charge him with aggravated robbery and keep him in police custody pending trial. He got the toy gun, screw driver, masks grey sweatshirt and black and grey bomber jacket from the scene. All the said items were produced as part of his evidence. He also produced the medical reports for PW2 and PW3. He identified the accused in court.

In cross examination he said that the stolen items were not recovered. When he apprehended the accused, he was wearing the same mask.

DW1 William Chela (the Accused) testified that on 8th November 2010 around 20:00 hours he was coming from the market where he had been selling some items. He met four people in Ndeke Township on a public road. They accused him of having stolen something from their house and beat him up. He was not wearing a mask. Many people gathered around, then he was taken to the police station where he was charged with aggravated robbery.

In cross examination he said that on 8th November, 2009 after doing some business in town he was walking home between 19:30-20:00 hours on a

public road. PW1 and PW2 were amongst the people who apprehended him and took him to the police.

It is not in dispute that the accused was apprehended by some people including PW1 and PW2 in Ndeke Township on 8th November 2010 between 1930 and 20:00 hours and handed over to the police. On the material date PW1, PW2, PW3 and PW4 were attacked by six armed robbers in their home just before 20:00 hours. The robbers were all masked and wearing coats. One of them had a toy gun which has been produced herein and an iron bar which has not been produced. Others were armed with iron bars and screw drivers. During the attack they threatened to kill their victims if they did not give them some money and phones. They also beat up PW2, PW3 and PW4 with iron bars. PW3 and PW4 fought with some of the robbers and managed to apprehend the one who was armed with a gun. The one who was apprehended is the one who had asked for money and phones and taken away K34 000 and a phone from PW3. PW1's phone was also taken away from her by one of the robbers, a DVD player and a radio cassette player were also stolen. The stolen goods were valued at a total of K2 634 000.00.

I find that it was the accused person who was apprehended by PW3 in the house that night. He was the one who had the toy gun and an iron bar. I reject the accused's evidence that he was apprehended as he was walking along a public road in Ndeke Compound because PW1, PW2, PW3 and PW4 did not apprehend anyone outside their home that night.

The accused's evidence that only four people were present when he was apprehended is consistent with evidence from the prosecution witnesses

that only PW1 up to PW4 were present when he was apprehended. Other people gathered around as he was being taken to the police post.

The evidence of PW1 that the accused was taken to her house by the police the following day so that the family could take a good look at him does not raise a doubt on my mind that the accused is the one who was apprehended in the house on the material date, because there is ample evidence that he is the one who was taken to the police by the complainant. I accept PW3's evidence that the accused's mask had fallen off and he took some of his clothes off as she was struggling with him because that was likely to happen in a struggle and the accused himself admits that he had no mask on when he was apprehended.

Learned State Advocate Mr. Zimba submitted orally that there is no evidence why the prosecution witnesses could have concocted a story that the accused was apprehended in the house. The accused's bear denial in his defence is a failure to answer to the cogent evidence adduced by the prosecution. He further submitted that the prosecution has adduced ample evidence that the accused and his friends were carrying offensive weapons. He pointed out that under section 2(a) of the Firearms Act (1) a fire arm is defined as any lethal barreled weapon from which any bullet or missile etc can be discharged or which can be adopted for the discharge of any such shot. He argued that P1 i.e. the home made gun comes within that definition. If the court will not accept that then, the accused should be convicted of a lesser offence under section 294(1) of the Penal Code (2).

Learned defence counsel submitted in writing that there are reasonable doubts as to whether the accused was apprehended from PW3's house as

there was no proper identification of the accused at the material time. PW1, PW2, PW3 and PW4 who were witnesses with a possible interest to serve had no opportunity to observe their assailants. He further argued that assuming that the accused was apprehended from the house, there is no evidence on record to prove the essential ingredient of the offence of aggravated robbery, which is stealing something. He added that there was no direct evidence of use of the alleged firearm marked P1 therefore, the offence of armed robbery which attracts a death penalty cannot stand.

Mr. Chabu cited the case of **Mwewa Murono v The People** (1) where the Supreme Court said as follows at page 210 lines 5 – 9:

“In Criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused, lies from beginning to end, on the prosecution. The standard of proof is high. The case must be proved beyond all reasonable doubt”

He argued that the prosecution has in the present case failed to prove some essential elements of the offence. There is no proof that the accused stole anything and that he had a firearm as defined under the Firearms Act (2). He cited section 294 of the Penal Code (1) which reads:

(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; or
 - (b) where the offensive weapon or instrument is not a fire arm and grievous harm is done to any person in the course of the offence, unless the court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offence.
- (3) In this section “Firearm” has the meaning assigned to it in section *two* of the Firearms Act. “

Counsel further relied on the case of **The People v Chimbala** (2) were it was held, obiter, as follows:

“It is necessary, under a charge of robbery or aggravated robbery to prove that the taking and force used or threatened

contemporaneously with the taking was accompanied by intent to deprive the owner permanently of the thing taken”

He also pointed out that section 265(1) of the Penal Code (1) defines “steals anything” as follows:

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing”

Section 265(5) of the same code defines the word “take” as follows:

“A person shall not be deemed to take a thing unless he moves the thing or causes it to move”

He therefore argued that there is no proof that the accused is the one who took the goods from the house. The stolen items have not been recovered. The accused’s friends were not found and interrogated to justify a finding that the accused stole the goods.

On the issue of the alleged use of a firearm Mr. Chabu cited the case of **The People v Ackim Manda and Malie Simbeye** (1992) Supreme Court judgment where it was held that:

“It is unsafe to uphold a conviction on a charge of armed robbery where there is no direct evidence of the use of firearms”.

He argued that there is no evidence that any bullet was fired from the said gun. The gun was not tested to be a firearm within the meaning of the

Firearms Act (2). Evidence from PW5 is that it is a toy gun. Therefore it is not a firearm as defined under section 2(a) of the Firearms Act.

I have already resolved the issue of whether or not the accused was apprehended from PW3's house in favor of the prosecution. Although PW1 upto PW4 were members of the same family who might have had a motive to lie against the accused person and should be treated as suspect witnesses, I find that in the circumstances of this case it was not possible for them to fabricate a story against the accused person. Therefore the danger of false implication of the accused has been removed.

I am satisfied that the accused acted in concert with his colleagues who ran away with the stolen goods and money, therefore he is just as guilty as they may be of having stolen the said goods and money. In fact he is the one who took the money and a phone and beat up PW3. Mr. Chabu's submissions with regard to this are rejected.

I accept Mr. Chabu's submissions that exhibit P1 is not a firearm as defined under section 2(a) of the Firearms Act for all the reasons that he has given.

I am satisfied that the prosecution has proved beyond reasonable doubt that the accused committed the offence of aggravated robbery contrary to section 294(2) (b) of the Penal Code because grievous harm was done to the victims using the offensive weapons. The prosecution has also proved that the accused committed aggravated robbery contrary to section 294(1) of the Penal Code.

Section 181 of the Criminal procedure code (2) provides as follows:

“181(1) when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Section 294(1) provides for a minimum mandatory sentence of 15 years imprisonment and a maximum of life imprisonment unlike section 294(2)(b) which provides for a death sentence.

In the circumstances I cannot convict the accused of the offence under section 294(2) (b) of the Act as it is not a minor offence. I therefore find the accused guilty of aggravated robbery contrary to section 294(1) which is a minor offence and convict him accordingly.

Dated thisday of2011.

**C. K. MAKUNGU
JUDGE**