

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**(Criminal Jurisdiction)**

**HK/65/2011**

**BETWEEN:**

**THE PEOPLE**

**VS**

**FRIDAY MWAMBA**

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court on the 14<sup>th</sup> day of June, 2011

For the State: Mr. M.C. Hamachila – State Advocate

For the Accused: Mr. C. Chali – Nkana Chambers

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

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**Case referred to:**

1. *John Timothy and Feston Mwamba v The People (1977) Z.R. 40*

The accused is charged with three counts of aggravated robbery contrary to section 294(1) of the Penal Code, Cap. 87. The allegation on the first count is that the accused, on 3<sup>rd</sup> September 2010, at Chingola in the Chingola District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed with an offensive weapon, namely a firearm, did steal K5,851,200.00 cash the property of KSH Farms and that he threatened or used actual violence to Jenipher Mkandawire. The allegation on the second count is that at the same time he stole 1 cell phone, 1 scarf and a cap altogether valued at K100,000.00 the property of KSH Farms and that he used or threatened to use actual violence to Jenipher Mkandawire. The allegation on the third count is that he also stole 1 cell phone valued at K540,000.00 the property of Sidelah Ngulube and that he used or threatened actual violence to Sidelah Ngulube. He pleaded not guilty to the three counts.

The prosecution called eight witnesses. PW1 is Crispin Chisala, a wages supervisor at KSH Farms Limited. He testified that he is in charge of preparing wages for workers and that at the end of August 2010 he prepared and sent to Avondale Ranch in Chingola along Solwezi Road, wages totaling K3,351,200.00. He said that later he heard that the manager, Jenipher Makofi who had gone to pay the workers was attacked. On 19<sup>th</sup> October 2010 he went to Chingola police station and was interviewed.

PW2 is Felistus Ngandwe Mwansa a Grade 12 pupil at Mindolo Secondary School, Kitwe. At the material time she was doing some work at Zimba Farm which was under KSH Farms, and she accompanied Sidelah Ngulube (PW3) and Jenipher Makofi Mkandawire (PW4) to Avondale Ranch to pay workers. She testified that they started off in a vehicle around 09.00 hours. She sat at the back of the van and when they reached near the farm they found a log across the road. The vehicle stopped and she went out to remove the log. She said that she pulled the log three times when she heard a voice behind her and words spoken in a foreign language from Congo which she did not understand. She said that she turned to look where the voice came from, then she heard the voice again telling her to stop and to put her hands up and a gun was pointed at her. She said that she dropped the log and raised her hands and a man ordered her to move to one side and threatened to shoot her if she moved and then he went to threaten the two people in the vehicle.

She said that Sidelah got out of the vehicle and was told to raise her hands and that when Sidelah asked the man what they had done, she was told to shut up and to move to where she (PW2) was. She said that the man went back to the car and threatened to shoot Jenipher Makofi if she did not come out of the car. She said that Jenipher Makofi also got out of the car and joined them and wanted to run, but the man threatened to shoot them if she ran away. She said that the man asked them to give him what they had, but they told him that they had nothing. The man then asked for their phones. When they told him that they had no phones he pointed the gun at her back and ordered her out of the car. She said that she got two phones, a Blackberry and an MTN and gave them to him and they went back to the others.

She testified further that Sidelah again asked the man what they had done and that the man alleged that they had chased a worker from Congo who was working at the dip and that they had been sent to kill Makofi, Mwape and Chisenga and that they were two soldiers and one commando, but the man was alone, with a gun, a knife in a pocket and a bag on his back. She said that the man went back to the vehicle and damaged the medicine they carried for dipping cattle and sweet potatoes. She said that they told the man that the people he wanted were not with them, but he threatened to shoot them and went back to the car and picked a black bag which contained the money.

She said that the man went back to where they were and ordered them back into the vehicle and told them to go back and to tell Makofi, Chisenga and Mwape that they would return to bomb them. She said as they reversed and turned back the man was following behind with the gun and that she had a very good look at him. She said that when they reached Solwezi-Chingola road they alerted neighbourhood officers and phoned Chingola police station and that the police arrived shortly after. She said that they went back to the scene and found that the bush had been burnt. She said that the man was of medium height, elderly and was putting on glasses and that when he talked his mouth was bending. She identified the accused as the attacker, two phones, P4 a black/yellow MTN phone and a black ZTE phone. She said that she thought the other phone was a Blackberry because she used to see and handle it at the office.

In cross-examination she agreed that she confused the ZTE phone with the Blackberry, but denied that she confused the accused with another man. She said she saw the accused, spoke with him and later identified him at the police station. She said she did not know the amount of money in the bag or that the accused once worked at the farm.

Sidelah Ngulube an agriculturist and employee of KSH Farms is PW3. She confirmed that on 3<sup>rd</sup> September 2010, she left at 09.00 hours with PWs 2 and 4 for Avondale Farm to pay workers and that they carried wages in envelopes and another amount of K2,500,000.00. She confirmed that after turning at Ngosa turn off they found a log on the road and that PW2 got out to remove the log.

She too said that she heard a male voice and saw a man pointing a gun at them. She also confirmed that the man told them to get out of the vehicle and spoke to them in a language she did not understand and that he ordered them to go behind the vehicle while threatening them with the gun. She also confirmed that the man took PW2 to the vehicle so that she could give him their phones and that she had a black ZTE phone while PW4 had a yellow MTN phone. She further confirmed that after the man got the phones and money he ordered them to get back into the car and told them not to proceed while pointing the gun at them.

PW3 also confirmed that they phoned the police after alerting crime prevention officers at Ngosa and that they went back to the scene with police officers, but did not find anything. It is PW3's evidence that two or three weeks later she was going back to the farm to count cattle when she saw their attacker as she wanted to buy food at Ngosa. She said that when she reached the farm she phoned her boss who in turn informed the police and that around 18.00 hours she went to the shop with the police and she identified the man from many people who were drinking beer and that the man was apprehended. She said that a few days later she identified the phones at the police station. She too identified the accused as the person who robbed them. She also identified a black bag, exhibit P3 in which the stolen money was and the gun, exhibit P2 as the one the man carried. She also identified the two phones, exhibit P4.

In cross-examination she said that at the time of the robbery she was working at Zimba Farms as a supervisor and that she had worked there for seven (7) years. She admitted that the accused had once worked at Avondale, but said that she did not recognise him immediately he attacked them. She said that she only realised that, from his name and actual appearance, after he was apprehended. She said that at the scene he looked darker and a bit different and that she had last seen him in 2004. She denied that they could have stolen the money and used the accused as a scapegoat as it was not their first time to handle company money or pay workers. She said that the wages were prepared in Kitwe and that they were just given envelopes to pay out.

PW4 an administrative manager for KSH Farms too confirmed the robbery on 3<sup>rd</sup> September 2010. She said that she was the driver and that she asked PW2 to remove the log from the road when she heard a voice coming from the bush telling PW2 not to remove the log. She said when the man approached he looked dangerous; that he had a bag behind; that he wore a pair of shorts, slippers on his feet and dark sun glasses; and that he had a gun, a panga and knives in his pockets. She said that the man asked them to move away from the van and claimed that he had come from Congo to kill Jenipher Makofi, Josephine Chisala and Webster Mwape because they laid off an employee and that he spoke Congolese and Bemba and had his gun pointed at them.

She said that he searched the vehicle and took the bag containing the wages for workers at Avondale Ranch and K2,500,000.00 meant to pay contractors, a scarf and a cap. She confirmed that he also took a black phone belonging to PW3 and her yellow MTN phone and that he ordered them to go back and not to report to anyone because he was with a soldier and two commandos and that they were very bad people. She too confirmed that they phoned the police from Ngosa and went back to the scene and that a few weeks later she identified the suspect at the police station; the single barrel shot gun, the bag which had contained the money and the two phones, all which she identified in Court.

In cross-examination she said that she has worked for KSH Farms for thirteen (13) years and that she had seen the accused prior to the attack, but did not recognise him at the material time because he disguised himself and painted charcoal on his face and spoke Congolese mixed with Bemba. She said that she identified him at the parade because he was the person who attacked them; that it was possible to identify him from the mouth, ears and head and that he worked for them a long time ago. She refused that they stole the money or that they are using the accused as a scapegoat. She said that she used to pay the workers at Avondale Ranch, that she carried K2,500,000.00 from petty cash; and that the other money was prepared from the Kitwe office.

John Kita of Chinese Grathal farm in Chingola is PW5. His evidence is that in October 2010 he received a phone call from someone who turned out to be a police officer. He said that the police went to his home to inquire about a phone which his son Whiteson Chita (PW6) was using. He said his son got the MTN phone from his elder sister who was given by the husband. He identified the MTN phone as the phone in question.

PW6 a pupil and also of Grathal farm testified that his brother-in-law Luka Foloshi bought the phone in question and gave it to his sister. He said that the phone had no sim card, so he asked his sister if he could be using it. He said that he led the police to his brother-in-law who was apprehended.

Francis Kalonga a peasant farmer and retired teacher of Sekela Village in Chingola is PW7. He testified that in July 2010 he lent his shot gun, exhibit P2 twice to the accused who was very well known to him as the accused wanted to go hunting and that in August 2010 the accused borrowed the gun the third time and kept it for 5 days. He said that subsequently the accused went to his home with police officers who informed him that the accused had used the gun in an aggravated robbery. He said that he gave the police the blue book for the gun, exhibit P1 and the gun, exhibit P2 and that he was detained in police custody for three (3) days for unlawfully giving someone the gun.

Detective Inspector Chisompola of Chingola CID is PW8. He testified that on 3<sup>rd</sup> September 2010 around 11.00 hours he received a phone call concerning the robbery in question. He went to Ngosa with other officers and met PW4 who was in the company of the other two witnesses. He obtained information from the witness and visited the scene and saw the log or tree branch on the road. He went back to the police station and recorded statements from the witnesses. He said that on 12<sup>th</sup> October 2010 he received a phone call from PW3 to the effect that the robber was at Ngosa area. He followed up the matter and went to a bar at Ngosa with PW3 who identified the accused as the robber. He apprehended the accused and took him to Chingola Central police station and recorded a warned and cautioned statement.

He testified that on 13<sup>th</sup> October he received the search warrant for the phones which he had earlier taken to MTN. He then contacted one number and talked to PW5 and later met him and his son PW6 at a Chinese farm in Ngosa area. He said that PW6 revealed that he got the phone from his brother-in-law Luka Foloshi who in turn claimed that he bought the phone at a certain area in Ngosa. He said upon searching Luka Foloshi he found him with the ZTE phone which he alleged he bought in Mwaiseni second class in Chingola, but later at the police station said he bought the two phones from someone called John Chitembi in Ngosa.

He said that he interviewed John Chitembi who claimed that he picked the phones along the road to KSH farm and the next morning led him to where he claimed he picked the phones which place was in fact the scene of the robbery. He said that on 18<sup>th</sup> October an identification parade was conducted at which PWs 2 and 4 identified the accused. He testified that later the accused led him to his home where the black bag exhibit P3 which had contained the money was found, and that an amount of K5,300,000.00 was alleged to have been stolen. He said that when he interviewed the suspects they told him that they had shared the money. He said that the accused also led him to PW7's home where the gun, exhibit P2 was found and that he verified ownership through the blue book, exhibit P1. He said that subsequently he charged the three suspects for aggravated robbery which they all denied and that later Luka Foloshi and John Chitembi were discharged under nolle prosequi and have since disappeared.

In cross-examination he said that PW4 did not mention that she knew the accused prior to the robbery and that he was not aware that the accused had worked with PW4. He admitted that he did not link the two phones to the accused and that it never occurred to him that the women stole the money and used the accused as a scapegoat. He said that the bag was identified by the complainants at the police station.

After the close of the prosecution's case I overruled the defence submission of no case to answer and put the accused on his defence. He elected to give evidence on oath and to call no witnesses.

In brief he said that on 20<sup>th</sup> August 2010 he borrowed the gun from PW7 for the purpose of hunting river ducks where he used to fish and that it was the third time he was borrowing the gun. He said that he was fishing from 24<sup>th</sup> August to 30<sup>th</sup> August and had one bundle of fish and that on 31<sup>st</sup> August he went hunting in the bush, but did not kill anything. He said that on 2<sup>nd</sup> September his son followed and told him that his pregnant wife was seriously sick and had been rushed to Mucinshi hospital. He said that he advised his son to go back with the bicycle and bundle of fish and that he would follow the next day after removing his fishing baskets as the fish may rot. He said that the next day he removed the fish from the river and started off for Ngosa and arrived around 09.00 hours and sold some fish at Jackson Phiri School before he proceeded home.

He said that he walked for about three (3) kilometers when he found an open van parked to the left side of the road going where he was coming from. He said on the car door were written the letters CH, so he knew that it was for Jane Makofi and Estellah. He said that he knew that it was them because they were holding onto a log and he had known them for two years when he worked at Avondale farm, but he stopped in May 2004. He said that the women were by an anthill holding a log that had dropped on their lane; that he put his fish by the road side and told Jane that he was selling fresh fish; but when they saw the a bag containing a gun, they told him that they did not know him. He said that a young lady who was in the car ran to them were with a black bag; that they started running towards the Chinese; and that he asked them why they were running as he had once worked at the farm. He said that he picked the fish basket and started going to Ngosa where he sold all the fish and that when he reached home he found that his wife had died and that in the evening he returned the gun to PW7.

He said that on 10<sup>th</sup> October he was arrested on allegation that he had committed a robbery. He said that on that date Estellah entered Saba shop where he and his nephew were drinking and that he followed her outside and greeted her and asked if she recognised him since he had worked as a watchman and told her that he found them by the road lifting a log and that he wanted to sell them fish but they ran away, and that he asked why they ran away.



He said that she responded that they did not recognise him and that in turn he responded that he could have given them some nice breams, but they ran away because of their fear. He said that later around 17.50 hours he was arrested by the police; that he did not steal the money or attack anyone; that the two phones and bag were found with Foloshi and Chitendi; and that the girl and the police went to his house but they did not find anything.

In cross-examination he reiterated that he borrowed the gun from PW7 because he wanted to go hunting and that on 2<sup>nd</sup> September his son informed him of his wife's sickness, but he could not leave immediately because of the fish. He admitted that on 3<sup>rd</sup> September he had a firearm, but said that it was in a bag and not exposed. He admitted that he met the three women, but insisted that they ran away when they saw the gun and that the girl who was in the car followed them with a black bag. He insisted that the phones and bag were found with Folsohi and Chitendi and said that he found the bag on the table when the two were giving statements at Chingola police station.

He further admitted that he took the police to PW7's house to get the gun and that he went to his house with the police on 11<sup>th</sup> October, but denied that the bag was found in his house. He said that the women ran away with the bag to the Chinese where the other two suspects were and that on 3<sup>rd</sup> September he was at the scene with the three women. He said that he was passing and that what stopped them was the log. He insisted in re-examination that the police did not find the bag with him; that the bag was with the other two men; and that the two men were taken to the police station with the bag and the phones. This in total is the evidence I have received in these proceedings.

I have considered the evidence before me. There are no submissions by both sides. There is no dispute that on 3<sup>rd</sup> September 2010 at about 09.30 hours PWs 2, 3 and 4, who were all working under KSH farms, were on their way to Avondale Ranch in a motor vehicle, an open van driven by PW4, when they found a log across the road after Ngosa turn off. There is no dispute that the three witnesses were going to the said ranch to pay workers their monthly wages or that the wages were prepared by PW1.

I accept as a fact that the total wages prepared by PW1 and put in the envelopes sent to PW4 amounted to K3,351,200.00. It is also in evidence and not disputed that PW4 also carried an extra sum of K2,500,000.00 to pay a contractor. I accept that the total amount that was in the bag that was allegedly stolen by the accused was K5,851,200.00, the money which forms the basis of the first count. I accept that the said money was the property of KSH Farms and that it went missing on 3<sup>rd</sup> September 2010, in an alleged aggravated robbery.

It is also in evidence and not disputed that the bag which contained the money also contained a scarf and a cap which form part of the second count together with the MTN black/yellow cell phone which on the evidence belongs to PW4, but in the particulars of the offence belongs to KSH Farms together with the scarf and cap. Therefore I find as a fact that the MTN phone, the scarf and the cap are the property of KSH farms. It is also in evidence and not disputed that the second cell phone ZTE belongs to Sidelah Ngulube (PW3) and I find this as a fact.

Further there is no dispute that on 20<sup>th</sup> August 2010 the accused Friday Mwamba had borrowed the shot gun exhibit P2 from Francis Kalongo (PW7) for purposes of hunting. It is in evidence and not disputed that the accused was a fisherman and that he was well known to PW7; and that the accused was borrowing the gun for the third time since July 2010. I accept the accused's evidence that he used to hunt water birds when he went fishing as well as other game. I accept that the accused left for his fishing grounds on 24<sup>th</sup> August 2010 and that he was there up to 3<sup>rd</sup> September 2010 when he left for home following a message received from his son the previous day on 2<sup>nd</sup> September that his wife was very sick.

Furthermore, it is a fact that on 3<sup>rd</sup> September the accused met with PWs 2, 3, and 4 on the road leading to Avondale Ranch after Ngosa turn off. It is a fact that there was a log which blocked the road and that PW4 had stopped the vehicle and asked PW2 to remove the log. On the evidence I find as a fact that it is at that particular point that the aggravated robbery occurred.

As I see it the question is whether or not the accused robbed the three women or the women stole the company money and used the accused as a scape goat. There is evidence that the accused had once worked for KSH farms as a watchman and that he stopped in 2004. There is also evidence that on the material date the three women did not recognise the accused because he had disguised himself, and none of the women seemed to recognise the accused as Friday Mwamba who once worked at the farm.

I accept as a fact that when the accused saw the vehicle and the three women he recognised them from the writings on the vehicle and from their appearance. I accept that he knew PWs 3 and 4 by name and that he knew that the vehicle was going to the farm. Since the accused had worked at the farm he must have known that the women were going to the farm to pay wages as according to PW4 she used to pay wages every first Friday of the month, and 3<sup>rd</sup> September 2010 was a Friday. On the totality of the evidence I am convinced that the accused robbed the three women and that he threatened violence against all the three witnesses.

I believe the three women that they did not steal company money or use the accused as a scapegoat; just as I do not believe that they could have stolen their own cell phones and destroyed dipping drugs and sweet potatoes which they carried in their van. The three women were working for the same company, but there is no motive for them to concoct the story that they were robbed. In the accused's own words the three women ran away because they did not recognise him. It becomes difficult for me to believe that the three women fabricated a robbery and implicated a man they did not know who was innocently walking home and only wanted to sell them nice fresh breams.

I am convinced that the accused way laid the women well knowing that they would be going to Avondale Ranch that morning to pay wages; that the accused blocked the road with the log to ensure that the vehicle stopped at that particular point; and that when PW2 attempted to remove the log the accused who was armed with the shot gun, P2 came out of the bush and confronted her. I am satisfied that the accused threatened to shoot the women if they did not cooperate or if they attempted to run away.

Further still, on the evidence I am satisfied that after the accused ordered PWs 3 and 4 out of the vehicle he also ordered PW2 at gun point to give him their cell phones and took her to the vehicle and that PW2 got the two phones, exhibit P4 and gave them to the accused. I am satisfied that PW2 was genuinely mistaken over the second phone that she gave to the accused. She believed that it was a Blackberry when in fact it was a ZTE. In any case the ownership of the two phones is not in issue.

I am further satisfied that after the accused was given the phones he went back to the vehicle whilst still threatening the three women with the gun and that he collected the black bag, exhibit P3 which as I have already said contained the money, the scarf and the cap. I do not believe the accused's story that PW2 ran out of the vehicle with a black bag or that she followed PWs 3 and 4 or that the three women ran towards the Chinese where the other two men who were connected to the two cell phones were. If the accused was innocently walking home with his basket of fish on the head, he would not have known the whereabouts of the other two men.

There is clear evidence which I accept that the accused in fact spoke to the three women in a foreign language mixed with Bemba and that he told the three women that he was with two others who were commandos and that he was a soldier and that they had been sent to kill Jenipher Makofi, Mwape and Chisala because they had laid off a worker from Congo without paying his wages. There is also evidence which again was not controverted that after getting the phones and money the accused ordered the three women back into the vehicle again at gun point and told them to turn back and not to report to anyone as they were very bad people and to tell Jenipher Makofi, Mwape and Chisala that they would return to bomb them. One would have expected the defence to challenge such important pieces of evidence, but all that remained unchallenged.

It seems to me that the accused may have been with the other two men although the two did not show themselves. That may explain how Luka Foloshi got possession of the two cell phones. I would hesitate to believe that the accused threw away the phones when he stole the phones at gun.

On the whole of the matter I am satisfied beyond reasonable doubt that the offence of aggravated robbery was committed and that it was committed by the accused on the material date. My finding of fact that the accused is the robber is supported by the finding of the black bag; exhibit P3 in the accused's house. The accused has admitted that he led PW8 to his house, but has denied that the bag was found in his house. His evidence is that the bag was found with the other two men because he saw it at the police station when the other two men were giving statements.

However, there is also evidence that when PW8 asked the accused about the money the latter said that he shared the money with the other two. Between the prosecution and the defence evidence on this point, I am more inclined to believe the former. Again I see no motive for PW8 to tell a lie that the bag was found in the accused's house. Further PW8's evidence on the finding of the bag and the sharing of the money was never challenged by the defence in cross-examination. Therefore I find as a fact that the bag was found in the accused's house proving beyond reasonable doubt that the accused was the robber. There is also evidence which the accused has admitted that he led PW8 to PW7 where the gun was recovered. In my view this proves that PW8 is a more credible witness than the accused.

Having found that the robbery was committed by the accused, the next question is whether or not the offence qualifies under section 294 (2) (a) of the Penal Code as armed robbery. It is to be observed from the information aligning the accused, that while it is alleged in the particulars of the three counts that the accused was armed with an offensive weapon namely a firearm, the statement of offence is premised only under section 294 (1) of the Penal Code which provides 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."

However, sections 294 (2)(a) and 294 (3) of the Penal Code provide as follows:

“(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.”

(3) In this section “Firearm” has the meaning assigned to it in section two of the Firearm Act.”

Section 2 (a) of the Firearm Act, Cap. 110 defines firearm as follows:

“(a) Any lethal barreled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile.”

In *John Timothy and Feston Mwamba v The People* (1) the Supreme Court had occasion to consider section 294 (2)(a) of the Penal Code. In that case the appellants were convicted of aggravated robbery. It was alleged that whilst acting together and being armed with a firearm they stole a considerable quantity of property from a dwelling house and used and threatened violence against the occupants. A servant of the complainants summoned the police, but when the police arrived the robbers made their escape; shots were fired by the police and one of the robbers was killed. The 1<sup>st</sup> appellant was found hiding in the grounds of the complainants’ house and his appeal was dismissed on the facts; the 2<sup>nd</sup> appellant was found on the afternoon of the day following the robbery, some considerable distance from the scene, with an injury in his left buttock. His appeal was allowed on the ground that the evidence that the injury was caused by a bullet was insufficiently clear, that certain evidence given by prosecution witnesses as to the finding in his possession of some of the stolen property was unsatisfactory, and that the second appellant’s own evidence as to the circumstances under which he had sustained his injury might have been true. A firearm similar to that described by the prosecution witnesses was found five days after the robbery at a place one mile away from the complainants’ house. There was no evidence that the gun was the one used in the robbery and no effort was made to test it for fingerprints.

It was held as is relevant to this case as follows:

“(i) To establish an offence under section 294 (2)(a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearm Act, Cap. 111, i.e. that it was lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.

(ii) The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.”

In this particular case there is no dispute at all that exhibit P2 is the firearm that the accused carried on the material date and the gun which PWs 3 and 4 saw with the accused. This is the same gun that the accused had borrowed from PW7 on two previous occasions in July 2010 for purposes of hunting and the same gun with which the accused had killed a duiker which he shared with PW7. Clearly the gun had been capable of firing at the time the accused killed the duiker in July 2010. Further the accused told the Court that he went hunting with the same gun on 31<sup>st</sup> August 2010, three days before the robbery, except that this time round he did not kill anything.

Admittedly there is no evidence that the gun was examined by a ballistic expert and there is no evidence that the accused fired the gun at the time of the robbery. Nevertheless, I am convinced beyond reasonable doubt that the shot gun, P2 is a firearm within the meaning of the Firearms Act. I am satisfied that it is a lethal barreled weapon from which a shot could be discharged and that it is capable of being fired. In conclusion on this aspect of the matter I am satisfied that the prosecution has established an offence under section 294 (2)(a) of the Penal Code and further that the accused has had an opportunity to adequately defend himself on that offence.

The last issue for decision in my view relates to the framing of the first and second counts. I have already made the point that the money which is the subject of the first count and the scarf and cap under the second count were all in the same black, bag exhibit P3 and that according to the particulars in the two counts, the money, scarf, cap and cell phone all belong to KSH farms and I have found this as a fact.

The particulars of both counts also allege that violence was used against the same person, Jenipher Mkandawire. In my view the first and second counts ought to have been charged as one, instead of two separate counts. Accordingly the information shall be amended to infuse or consolidate the items listed as stolen in the particulars of the second count into the particulars of the first count to make two counts of aggravated robbery instead of three counts.

In conclusion and on the whole of the matter I am satisfied that the prosecution has established beyond reasonable doubt that the accused was the person who robbed PWs 2, 3 and 4 of the items referred to in the two counts as amended contrary to section 294 (1) (2)(a) of the Penal Code, Cap. 87 and I convict him on both counts.

Delivered in Open Court at Kitwe this 24<sup>th</sup> day of June, 2011

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**R.M.C. Kaoma**  
**JUDGE**