

IN THE HIGH COURT FOR ZAMBIA
HP/172/2009
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

VS

VICTOR MUKULI
FRANCIS TEMBO

Before the Hon. Madam Justice F. M. Lengalenga this 1st day of June, 2012 in open court at Lusaka.

For the people : Mr. P. Mutale - Deputy Chief State Advocate

For the accused : Mrs. C. K. Kabende - Assistant Senior
Legal Aid
Counsel

JUDGMENT

Cases cited:

- 1. ELIAS KUNDA v THE PEOPLE (1980) ZR 100**
- 2. CHAMPION MUKWAKWA v THE PEOPLE (1978) ZR 347**
- 3. TOKO v THE PEOPLE (1975) ZR 196**
- 4. MWAPE v THE PEOPLE (1976) ZR 160**

5. THE PEOPLE v ROBERT PHIRI & ANOTHER (1980) ZR 249

6. MANONGO v THE PEOPLE (1981) ZR 152

7. SITUNA v THE PEOPLE (1982) ZR 115

8. CHIMBO & OTHERS v THE PEOPLE (1982) ZR 20

9. CHIZU v THE PEOPLE (1979) ZR 225

The two accused persons, Victor Mukuli and Francis Tembo stand charged with one count of aggravated robbery contrary to section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of offence are that the two accused persons on 21st October, 2008 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons unknown did steal from Elase Ngulube one Philips television, three blankets, one sewing machine, one home theatre and a case of shoes, all valued at K1.7 million, the property of Elase Ngulube and at or immediately before the time of such stealing did use or threatened to use actual violence to the said Elase Ngulube in order to prevent or overcome resistance to its being stolen.

Both accused persons denied the charge and the matter proceeded to trial where the prosecution called five witnesses to testify on its behalf.

The prosecution case was to the effect that according to the evidence of PW1, Emma Kamanga a Secretary at the University of Zambia, on the night of 21st October 2008, she left her home at House Number 474. O.J Simpson Close in Avondale, Lusaka to go and attend a funeral in Chelston. Whilst she was at the funeral house, around 03-00 hours, her young sister, Rabecca Kamanga phoned her to report that there were thieves who were breaking into the house. Thereafter she phoned the police at Chelstone Police Station to inform them and she gave them details and directions to the house where the theft was taking place. Then she made a follow-up by driving to Chelston Police Station but there they referred her to Avondale Police Post and when she reached Avondale Police Post, the police told her that they had already received a message from Chelston Police Station and she was advised to call the police who were on duty at that time. When PW1 confirmed where they were, she went and picked them up and then they rushed to her house within Avondale. Upon arrival at the house, the police officers climbed over the wall fence and they jumped into the yard because the gate was locked. Emma Kamanga remained outside the gate and by then the thieves had already left and that is when the police opened the gate. When she went inside she found Elase and Rabecca crying and she was told that Elase had been raped. Thereafter she went inside the house where she discovered that the television, the sewing machine and other household goods were

not in the house. She named these are blankets, duvet, bedsheets, home-theatre and pairs of shoes. Thereafter the police officers started searching within the yard and they were able to find the sewing machine and television behind the wall fence. Then from there the police officers asked them to accompany them to the police post where a docket was opened and thereafter, Emma Kamanga was asked to take the girl who had been raped to the nearest clinic, which was Chelston Clinic but they were referred to the University Teaching Hospital (UTH). At the University Teaching Hospital, Elase was tested for HIV and she was put on ARVs and recommended to undergo counselling. Fortunately, afterwards, the HIV results were negative. Later some things were recovered and these were a suitcase where the thieves had packed the beddings and in there were three blankets, about six bedsheets and a duvet, the home theatre, television, suspect's shoes, trousers and his phone, some pairs of shoes and the shoe rack were not recovered. PW1, Emma Kamanga estimated the value of goods to be over K1.5 million and she said that she did not allow anyone to take her property.

In court, PW1, Emma Kamanga identified the recovered items after describing them and these are listed as follows:

- (1) A big size brown checked suitcase ("ID1")**
- (2) A brown king sized lion print blanket**

- (3) A plain pink double blanket (“ID3”)**
- (4) A green and brown print three-quarters blanket - (“ID 4”)**
- (5) A pair of white king size bedsheets - (“ID5”)**
- (6) A pair of blue brown and white stripped winter queen size bedsheets (“ID6”)**
- (7) A pair of polyester cream/white three quarter size bedsheets - (“ID 7”)**
- (8) Pinkish grey floral double size duvet - (“ID 8”)**
- (9) One grey LG Home theatre with five (5) speakers - (“ID 9”)**
- (10) One 21” Phillips TV with grayish screen and black behind - (“ID 10”)**
- (11) A pair of (olive) greenish trousers (left behind by suspects) - (“ID 11”)**
- (12) A pair of black shoes (left behind by suspects) - (“ID 12”)**
- (13) Black LG cellular phone (left behind) - (“ID 13”)**
- (14) One cream/white Empirisal sewing machine - (“ID 14”)**

Under cross-examination by Mrs. C. Kabende, Assistant Senior Legal Aid Counsel, PW1, Emma Kamanga confirmed that her house was in a wall fence and that some of the recovered goods were within the wall fence. She, however, stated that it

was not possible for her to remember which items were outside the wall fence. She also confirmed that a pair of shoes and a shoe rack were not recovered. PW1 said that unless she checked the statement then she would know whether she did not report them as having been stolen. She explained that what happened is that they left that house the very next day in the afternoon around 15-00 hours and because they had to pack some things, it was only afterwards that she noticed that the shoes and shoe rack were missing. She said that the fact that these items were missing, she assumed that the thieves went away with them. PW1 also informed the court that the other items she identified, such as the phone and trousers were not hers.

PW2, Rabbecca Kamanga's testimony was to the effect that on the night of 21st October 2008, she was just with her cousin Elase Ngulube at home as her sister, Emma Kamanga had gone to spend the night at a funeral in Chelston. After they slept that night and when it was past 02-00 hours, they heard people breaking the window in the bedroom where they were sleeping and then she saw a hand trying to pick up the phone from the bed but fortunately it fell down. Thereafter PW2 and the cousin ran away from the bedroom to the sitting room but as they were in the sitting room they heard people struggling with the kitchen door and so they decided to go back to the bedroom to go and pick up PW2's phone. After PW2 picked up her phone she phoned

her sister Emma Kamanga (PW1) and informed her that there were people around the house and minutes later her sister called her back to ask where the people were and PW2 told her that they were still struggling with the door. Thereafter, she switched off her phone and threw it under the chair and when the intruders managed to open the door, they entered and found the two standing in a corner in the sitting room. The two men who entered told them that they were serial killers and that they were going to kill them. It was dark as all the lights were switched off except for the bedroom light. The two men went to where PW2 and her cousin were and demanded money and Rabbecca Kamanga told them that the only money she had was K30 000=00 transport money for her to go to school and back. They ordered her to give them the same K30 000=00 and they all went to the bedroom and she got the money and gave them. After that they demanded the phone that they had heard ringing whilst they were outside and she told them to go and get it under the chair but they told her to go and get it for them and after giving them the phone the men asked them to go back to the bedroom and to cover themselves with a blanket and after doing so, the two men switched off the light and they went back to the sitting room where they spent quite a while. When they came back they asked PW2 where the owner of the house was and she told them that she was at a funeral in Chelston and then they asked them where the main bedroom was and they told them that it was

opposite their bedroom. They went into that bedroom and spent some time there before they went back to PW2 and her cousin and asked them whether it was true that there was no money in the house. They then asked PW2 what they should do to her if they found some money in the house and she told them to do whatever they wanted. They removed things from the bedroom and then they went out briefly and after returning to the bedroom one of them told PW2 that since they were unable to give them what they wanted, he was going to have sex with her and she told him that there was no problem with that but he would do it at his own risk because she was HIV positive as her husband had died a few months earlier and that is how they left her and left the room. However, a few minutes later one of them returned and picked up her cousin Elase and went outside the house with her. Thereafter, the police officers arrived with PW2's sister and then the police officers started chasing the two men who were still in the premises. After her sister Emma learnt that her cousin Elase had been raped, she took her to the hospital while PW2 and the neighbour and one police officer remained and started picking up whatever they could be found. She said that the police found a pair of trousers with a phone and a pair of shoes where her cousin was raped. She named a few items that she could remember being recovered and these were a big checked brown suitcase ("ID1"), a 21" Philips television ("ID 10"), a pair of trousers ("ID 11"), a pair of black shoes ("ID 12"), a black phone and a sewing

machine ("ID14"). It was also Rabecca Kamanga's further testimony that they were later called to Avondale Police Post to give statements about what happened but she could not remember if it was the same day. She stated that the thieves were at their house for about one hour as they kept going in and out of the bedroom and that there was lighting when they entered and so she was able to see them as they were not wearing anything on their faces and so she would be able to identify them if she saw them because one was taller than the other and a bit lighter than the other. She explained that the taller one was the one who was lighter and the shorter one was the darker one and she added that the taller and light one was the one who asked her what he should do with her if he found some money in the house. PW2 identified A1, Victor Mukuli as one of them and the light one but she was not sure about the other one (A2, Francis Tembo).

Under cross-examination, PW2, Rabecca Kamanga admitted that they were scared and that they were ordered to cover themselves with blanket but that it was before the men switched off the light. She also agreed that there are people who fitted the description but when they asked her to sleep with them, she took a look at the person who wanted to sleep with her. She also said that when she went to give them the K30 000=00, the light was on and that she remembered everything, the way they were and the way they entered and that otherwise the police just forgot to

put it in the statement but she remembered telling them. PW2 informed the court that the statement was recorded in English even though she did not remember it being read back to her or her signing it. She, however, recognised her signature and acknowledged that it meant that everything was correct. She insisted that what she was telling the court was the truth. When she was asked about the identification parade, she said that she was not around by then as she was in Cape Town and so she was not called to the identification parade. She also said that she had never attended an identification parade. With reference to the recovered item she said that they were found outside the wall fence according to the police. PW2 said that the trousers and shoes do not belong to her family members.

In re-examination, PW2, Rabbecca Kamanga explained that where their bedroom was, there was a light outside and that even outside the sitting room there was a light and that outside there were two electric bulbs altogether. She said that, therefore, when they were inside, there was a bit of light and they could see and so it was not dark as of dark. She also said that she went to Cape Town shortly after she finished writing her examination in December 2008 and she only came back in March 2009.

PW3, Elase Ngulube testified to the effect that on 21st October, 2008 her elder cousin, Emma Kamanga went to a funeral in Chelston and she remained at home at House Number 474, OJ Simpson Close, Avondale but she was not sure of the address. She said that it was between 02-00 and 03-00 hours when thieves broke the window in the bedroom where she and her cousin Rabecca slept. They shouted and ran away into the sitting room and then Rabecca decided to go back into the bedroom to phone Emma and they went back and picked up the phone. Later Emma phoned to ask where the thieves were and by then they were trying to open the grill door and Rabecca switched off her phone and hid it under the chair. PW3, Elase Ngulube saw two men coming with machetes in their hands from the kitchen into the sitting-room, one man was tall and the other short and then the tall man told them that they were serial killers and that if they did not give them what they wanted they would kill them. They demanded money and Rabecca told them that they did not have money and that the only money she had was her transport money for going to school and they told her to give them. They all went to the bedroom where Rabecca gave them the purse and they got the money and thereafter the tall man asked where the phone that was ringing was and they told them and they went back to the sitting room and they were given the phone. Thereafter, the two men ordered them to go and sleep in the bedroom and to cover themselves and not to shout. They went to collect things

and shortly after that they returned to the bedroom and they asked them where the main bedroom was and PW2 and PW3 showed them. After sometime they returned to the other bedroom and the tall one told them that since they did not find any money they would have sex with them and PW2 told them that her husband died of HIV/AIDS and that if they did not mind they could go ahead and after that they went out and came back and the tall man ordered PW3 to get up and he took her outside to the garden and raped her. Afterwards he ordered her to go back inside the house but before she could do so, the police arrived and fired a shot and that is how he ran away. PW3, Elase Ngulube was later taken to the University Teaching Hospital (UTH).

Then early in 2009, the police at Ng'ombe Police Station called her so that she could see whether she could identify anyone from the men the police had apprehended. From the eight men who were paraded outside the office at Ng'ombe Police Post, PW3, Elase Ngulube was able to identify the man who raped her. She explained that she was able to identify him because she saw him in her bedroom as the light was on and when he took her outside, there was also a security light so she was able to see him. She estimated the whole incident to have lasted about thirty-five minutes and she said that she was with him for about five minutes. She said that she was able to identify him and she

described him as being tall, huge and brown in complexion and of medium weight. PW3 pointed at A1, Victor Mukuli by way of identification.

Under cross-examination by Mrs. C. K. Kabende, Assistant Senior Legal Aid Counsel, PW3, Elase Ngulube agreed that she had been sleeping, was scared and confused. She also admitted giving a statement on 22nd October, 2008 and she said that she described her assailant and that the statement that was recorded in English was read back to her and she signed it. She said that there was no signature of hers on the statement. She confirmed that there was a light in their bedroom and when he was getting money from Rabecca she was able to see him clearly and even when he ordered her to wake up she had another chance to look at him clearly and even when he took her outside where there was a security light at the verandah and she added that they stood there as he asked her if Rabecca was really HIV positive and she looked at him and agreed. She said that even at the back of the house where he took her, there was a security light which faces the garden so she was able to see him clearly. She admitted that throughout that time she was scared. PW3 explained that they were ordered to cover themselves with blankets while the light was on and after the men left the room that is when they switched off the light. She admitted that she only had a brief look at those two men and she wanted them to

be captured and she was happy when they were caught. Elase Ngulube admitted that she was shown photographs but not before the parade. She later apologised and explained that the police took photographs at the house in Avondale and at the parade after she identified the man and they showed her the photographs they had taken. She said that her assailant ran away after raping her when he heard the gunshot and the other man also ran away. In re-examination, PW3 denied seeing any of the men before the parade.

PW4, Inspector Stanslous Luntanshe number 31212 of Ng'ombe Police Post testified that on Thursday 19th February, 2009 whilst he was on duty he conducted an identification parade consisting of eight male suspects and among those suspects were Victor Mukuli and Francis Tembo who were facing aggravated robbery and rape charges. There was only one witness, female Elase Ngulube of Avondale who was invited to the parade and she identified Victor Mukuli who was at position number five (5) and afterwards the suspects were asked if they were comfortable with parade and they all agreed. PW4 testified further that the second time PW3 identified male Victor Mukuli at the same position because he did not change his position. Inspector Luntanshe said that he later handed over the suspects to Detective Sergeant Simuchembu no. 32202 who was the dealing officer for further

investigations and he identified the 1st accused as Victor Mukuli by pointing at him in the dock.

Under cross-examination, PW4 confirmed that the parade comprised eight (8) male suspects of the same height and complexion. He confirmed that Francis Tembo was part of the parade and he pointed at the 2nd accused, Francis Tembo in court but conceded that Francis Tembo was slightly shorter and he said that they were of the same complexion and that at the time of the identification parade they were of the same complexion. He, however, informed the court that the photographs did not come out.

PW5, Detective Sergeant Joseph Simuchembu, No. 32202 of Ng'ombe Police Post, testified to the effect that on 10th February, 2009, he received some information from members of the public that there was a terrorising group of people who were terrorising the Ng'ombe, Chelston, Kaunda Square Stage 1 and Avondale areas. Acting on the report, he activated his fellow officers and he apprehended the first suspect and interviewed him and he later came to know him as Victor Mukuli who resided in Ng'ombe Compound and he also apprehended the second suspect, who he also came to know as Francis Tembo who resided in Mtendere East Compound and he separated the suspects by detaining them in two separate police stations. He detained Francis Tembo at Ngombe Police Post whilst Victor Mukuli was detained at Le Soleil

Police Post. Later he and his colleague interviewed the two suspects and as a result of those interviews with the two suspects, PW5 with his colleagues visited a house in Avondale in Thomson Road and at the same house he found Mrs. Emma Kamanga who confirmed that there had been a robbery at the same house. He also learnt that some of her household goods that were removed from her house were found heaped outside the house in front of the entrance while the thieves were trying to get away with them. Detective Sergeant Simuchembu named some items that he later identified in court as follows:

- (1) a brown suitcase (which has three blankets) (“ID 1”)**
- (2) a brown blanket - (“ID 2”)**
four small speakers - (“ID 9”)
- (3) a greenish blanket - (“ID 4”)**
- (4) a pair of white bedsheets - (“ID 5”)**
- (5) another pair of white bedsheets - (“ID 7”)**
- (6) a big speaker - (“ID 9”)**
- (7) a DVD player - (“ID 9”)**
- (8) a Philips TV - (“ID 10”)**
- (9) a sewing machine - (“ID 14”)**

(10) a pair of soft jeans trousers - ("ID 11")

(11) a pair of black shoes - ("ID 12")

(12) an LG phone (black) - ("Id 13")

PW5 testified further that he kept the items in his custody at the office as evidence before this court. He later cautioned the two accused persons for the offence of aggravated robbery and rape in English the language the two accused persons chose to use and they gave a free and voluntary reply admitting the charge according to PW5. Detective Sergeant Simuchembu made up his mind to charge them for the subject offence of aggravated robbery and he arrested and detained them in police cells for further dealings and the docket was sent to the Magistrate's court for disposal of the charge of rape. PW5 tendered "ID 1" to "ID 14" in evidence as there was no objection from the defence and the same were admitted in evidence as exhibits "P1" to "P14". However, when Detective Sergeant Joseph Simuchembu attempted to produce warn and caution statements, there was an objection from the defence on the ground firstly that the same were not given freely and voluntarily by the accused and secondly because the defence were not aware that the prosecution intended to rely on them since the warn and caution statements were not served on the defence. In its ruling the court disallowed the production of the warn and caution statements for reasons stated in its ruling and primarily because the prosecution had

failed and/or neglected to serve the court and defence with copies of the accused's warn and caution statements.

Reverting to PW5's evidence, he identified the two accused that he charged with aggravated robbery contrary to section 294 (1) of the Penal Code, Cap. 87 of the Laws of Zambia.

In cross-examination, PW5 admitted that he interviewed PW1 Emma Kamanga PW2 and PW3 and obtained statements from them in the English language and that they all signed. He said that PW2 and PW3 described their assailants at the office. With respect to Elase Ngulube's statement, he said that he is not the one who recorded but she signed and he added that he was not there when the statements were given. He conceded that there was nothing in terms of description of the assailants. PW5 said that he referred to the two statements that had been recorded in his absence that is, four months before he came in. He said that it was only four months after the attack that the victims had a chance to describe their assailants. He further stated that he went to the house in Avondale since he was aware of the address. He also confirmed that the items were recovered within the premises but he disagreed that the charge should have been attempted aggravated robbery because he said that the slightest movement of an item qualifies as theft and those items were removed from the house. He agreed that the LG phone did not belong to the complainant or any of the victims and he accepted

that it could have been one of the robber's properties as it was found at the scene and in the pockets of the trousers that was found there. He said that he would not be surprised to learn that both accused denied admitting the charge against them when they admitted the charge because they are bound to change as they are human beings.

In re-examination, PW5, stated that he started investigating the matter four months after the offence was committed because that is when he was allocated the file. He said that an officer from Avondale Police Post recorded the statements but he apprehended the two suspects and he was later led by the two suspects to the house in Avondale.

At the close of the prosecution case, the court found that the prosecution had established a *prima facie* case against the two accused persons and they were found with a case to answer and accordingly put on their defence. Later their rights were explained to them and Defence Counsel informed the court that 1st accused Victor Mukuli would give evidence on oath and not call any witnesses while in the 2nd accused, Francis Tembo had elected to remain silent.

DW1, Victor Siboli Mukuli and the 1st accused herein, in his defence admitted that he heard what the prosecution witnesses had said but that on 21st October 2008 which was a long time ago, nothing big or significant happened in his life. He testified that what he could recall that what he recorded in his diary was that he was at work as usual and that he used to work as a taxi driver, parking his vehicle at the University of Zambia (UNZA) bus stop along Great East Road, from 06-00 to 20-00 hours. He said that he was working and he was at the bus-stop and knocked off at 20-00 hours and he went to rest and sleep at home around 21-00 hours. He testified further that they were asleep until he woke up the following day around 06-00 hours and he went for work. DW1 further testified that on 9th February 2009, he knocked off and went home to rest around 06-00 hours and that later as he was seated at home around 10-00 hours I saw two police officers enter and one of them had a small fire-arm. He said that the officer with the big fire-arm pointed it at him and told him to follow his orders whilst the other one with a small fire-arm produced handcuffs and handcuffed him on his right hand and then cuffed him to the grill door at his house in Ng'ombe Compound. He said that the officer told him that people had told him that the 1st accused was an armed robber and that he wanted the fire-arm and he denied and thereafter they started beating him while he was still handcuffed to the grill door. He also testified to the effect that later they left him there and then they proceeded to

beat his wife and asked her where the fire-arm was and afterwards they searched the house but they did not find any stolen items in his house and eventually they told them that all the property inside the house was stolen and that they would take it and they took DW1's property and documents including photographs from his album. He said that at Ng'ombe Police Post they continued to beat him and they asked him where he steals and he denied that he steals. The 1st accused informed the court that at the police post he was not charged with any offence as the police were just beating him and he claimed that he first heard of the offence of aggravated robbery at the subordinate court. He testified that after five days had passed from the time he was taken from his house, Officer Simuchembu took him from the cells and at the time his legs were swollen and he took him outside to the police car park where he told him to look at some ladies who were at the side and he stood and looked at them for about two minutes. He said that there was one who he recognised from Mr. Simuchembu's office and at that time the 1st accused was not wearing shoes. He said that he was just alone while Mr. Simuchembu went to stand somewhere at a distance with his fire arm and where he was standing he saw a police vehicle where it was written Le Soleil Police Station with people inside and that when those people came out they went and stood near him on the parade and that is when Mr. Simuchembu went and called the woman he had found in the office. Victor Mukuli informed the

court that afterwards the lady went and touched him on the shoulder and she repeated her identification of him on the parade. He testified further that when Mr. Kamfwa went to the group he told those who came in the vehicle that he wanted them to assist them to assist them with the identification parade and they were paraded. He claimed that he was the only tall one and when he looked around there was a young man of the same complexion as his and he added that he was told that if he had a complaint he should complain and that he did complain to another parade officer that all his clothes were blood stained, he was the only one without shoes and that the person who identified him had been with him in the office. The 1st accused also informed the court that when Officer Simuchembu called him to the office there was a woman and he told Victor Mukuli that she had picked up his trousers and a phone and that they were his and that he should take them but he refused and he was taken back to the cells and beaten.

In cross-examination by Mr. Patrick Mutale, Deputy Chief State Advocate, the 1st accused, Victor Mukuli said that he was not alone in the house on 21st October, 2008 and he further stated that the police did not ask him about being with his wife on 21st October, 2008. He also admitted that he had earlier stated that before the parade he was shown some women and he said that he told them and his lawyer asked them in court.

In re-examination by his advocate the 1st accused maintained that he was not charged with the offence of aggravated robbery.

At the close of the defence case, written submissions were filed into court on behalf of the accused by learned Defence Counsel, Mrs. C. K. Kabende. She submitted that it is trite law that in all criminal matters, the burden of proof lies on the prosecution. With respect to PW1 and PW2's evidence that there was a robbery at PW1's house, she observed that by the time PW1 and the police arrived the robbers had fled the scene and left the property behind within her yard and others outside so that it was clear that the property that was recovered except for the shoe rack and a pair of shoes which Defence Counsel submitted could have gone missing in the confusion of moving. It was contended on behalf of the accused that since the robbers never left with the property it means that there was a mere attempt to steal and that the charge should have been attempted robbery. Mrs. Kabende referred to section 389 (1) of the Penal Code, Cap 87 of the Laws of Zambia which provided as follows:

“(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his

intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.”

She submitted, therefore, that the indictment was defective and that the proceedings against the accused persons were a nullity and in the alternative, she submitted that the identification evidence was insufficient to secure a conviction against the accused. She submitted further that although both PW2, Rabecca Ngulube and PW3, Elase Ngulube identified the 1st accused, Victor Mukuli as being one of the assailants, she found that there were contradictions in the evidence of the two witnesses as regards visibility. She pointed out that PW2 testified that the light in the bedroom was off and that she was able to see her assailant by the light that was coming from outside while PW3 testified that she was able to see the 1st accused because of the light in the bedroom. Defence Counsel relied on the case of **ELIAS KUNDA v THE PEOPLE**¹ where it was held that where witnesses give contradictory testimonies, that evidence must be rejected. Mrs. Kabende further referred to the case of **CHAMPION MUKWAKWA v THE PEOPLE**² where the Supreme Court observed that to simply rely on the description by the witnesses that one of the assailants was tall was insufficient as there are plenty of tall men around. She submitted that in this case, there

was not even a description given by PW2 and PW3 of the assailants in their statements. Defence Counsel submitted that PW3's testimony on identification is highly unreliable such that the danger of honest mistake cannot be ruled out.

Further in relation to PW3's identification of the 1st accused months after the attack at an identification parade after what Defence Counsel suspected was tip off by the police, she relied on the case of **TOKO v THE PEOPLE**³ where the impropriety of a witness who had identified a suspect at an identification parade being brought into contact with witnesses who were yet to visit the parade was discussed. Mrs. Kabende submitted that the 1st accused in his defence stated that he saw PW2 before the parade and she submitted that the identification parade be nullified as it was also unfair in terms of how the suspects were presented. She observed that from PW4's Stanslous Luntashe's evidence that the suspects were all of the same height and complexion, that looking at the two accused, it was clear that the two accused were of different heights and complexion. She emphasized that the court should disregard the identification parade in its entirety. She further submitted that there was nothing else to connect the accused to the offence and she submitted that the police should have investigated who could have been the owner of the phone left at the scene by the assailants by way of tracking down the phone. Learned Defence Counsel submitted that there was

insufficient evidence and she urged the court to acquit both accused persons.

I have carefully considered the evidence before this court in its entirety and the submission by learned Defence Counsel. It is not disputed that on the night of 21st October, 2008, PW1, Emma Kamanga's house in Avondale, Lusaka was broken into by two men and some goods were removed from the house. What is disputed however is that it is the two accused who had broken into the house and stole the goods after threatening violence to PW2, Rabecca Kamanga and PW3, Elase Ngulube and that the 1st accused raped PW3 as alleged. Defence Counsel vehemently argued that the prosecution case had not been established and the offence of aggravated robbery contrary to section 294 (1) of the Penal Code not proved against the two accused firstly on the basis that the ingredients of the offence had not been established and secondly that the identification of the assailants was not satisfactory based on the arguments advanced by Mrs. Kabende.

The two accused persons, Victor Mukuli and Francis Tembo stand charged with the offence of aggravated robbery contrary to section 294 (1) of the Penal Code, Cap. 87 of the Laws of Zambia. Section 294 (1) provides:

“294 (1) Any person who, being armed with an 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.”

Therefore, from the foregoing it is clear that for the prosecution to succeed, it must show that the person(s) in charge or responsible for the property concerned was or were put in fear by the attacks that injury would be cause to him or her or them or such property and conceded to demands made to him or her or them and that the attackers were armed with an offensive weapon or instrument or were in the company of one or more persons as was held in the case of **MWAPE v THE PEOPLE**⁴.

In the present case, there was evidence of a break-in at PW1, Emma Kamanga's house by two men according to PW2 and PW3 and there was evidence of threat of violence to the two young ladies when they could not produce enough money to give the two men and the lack of sufficient money resulted in the raping of PW3. There was also evidence of the removal of goods from the house but the said goods were left behind by PW2 and PW3's assailants when PW1 arrived in the company of the police officers. Defence Counsel's contention in view of the goods having been left behind is that there was no aggravated robbery as the culprits only attempted and that, therefore the charge was defective and that the proceedings against the two accused should be nullified. Whilst I accept that since the goods were left behind as the intruders fled, and that, therefore, there was no aggravated robbery established by the prosecution, I do not accept that the proceedings should be nullified as I am of the considered and firm view that if there is sufficient evidence of attempted aggravated robbery, the accused may be found guilty of a lesser offence of house-breaking and burglary contrary to section 301 of the Penal Code, Cap 87 which provides:

“301 Any person who-

(a) breaks and enters any dwelling house with intent to commit a felony therein; or

(b) having entered any dwelling house with intent to commit a felony therein, or having committed a felony in any such dwelling house, breaks out thereof; is guilty of the felony termed “house breaking” and is liable to imprisonment for seven years. If the offence is committed in the night, it is termed “burglary” and the offender is liable to imprisonment for ten years.”

I will revert to the issue of this lesser offence after dealing with the issue of identification of the accused by the victims, PW2 and PW3 and the basis upon which they, especially PW3, Elase Ngulube claims to have been able to identify the 1st accused, Victor Mukuli. However, before examining and evaluating their evidence of identification, I looked at some authorities on the law relating to evidence of personal identification. In the case of **THE PEOPLE v ROBERT PHIRI & ANOTHER**⁵, it was held that the adequacy of evidence of personal identification always depends on all the circumstances surrounding each case, which must be decided on its merits. Further in **MANONGO v THE PEOPLE**⁶, the Supreme Court held that when dealing with the issue of identification, the risk of honest mistake is one of the factors to be taken into account in testing the credibility of witnesses. With respect to PW2, Rabecca Kamanga’s identification of the accused,

learned Defence Counsel, Mrs. Kabende challenged her alleged identification of the accused on the basis that she could not have seen the accused since the lights in the house were switched off as they had been ordered to get into bed and to cover themselves with the blanket. However in cross-examination, PW2 explained that she looked at the men before they switched off the light in the bedroom and she had also stated that the intruders kept going in and out of the bedroom and that there was lighting when they entered and so she was able to see them as they were not wearing anything on their faces. Rabecca Kamanga had also stated that when they asked her to sleep with them, she took a look at the person who wanted to sleep with her and she added that even when she went to give them the K30,000=00 the light was on in the bedroom.

In re-examination, PW2's explanation was that there was a light outside their bedroom and outside the sittingroom and that, therefore, even when the lights inside were switched off, there was a bit of light and they could see as it was not dark as of dark.

In PW3, Elase Ngulube's case she had testified that she was able to identify the man who raped her because she saw him in her bedroom when the light was on and when he took her outside where there was a security light. She even described him as being tall, huge and brown in complexion and of medium weight

and in court she identified him by pointing at him in the dock and he was the 1st accused, Victor Mukuli. Furthermore, PW3's evidence of identification of the 1st accused Victor Mukuli as the tall, light man was corroborated by PW2 who had earlier testified that the taller and light man was the one who had asked PW2 what he would do to her since she was unable to give them sufficient money and who demanded to have sex with her until she told him that he could do so at his own risk as she was HIV positive and that her husband had died of HIV related causes some months before.

PW3's identification of the 1st accused, Victor Mukuli at the identification parade was challenged on the ground that she was shown photographs and that she was shown the 1st accused before she went out to the parade. However, she denied being shown the suspect before the identification or seeing photographs of him before the identification. PW3 Elase Ngulube firstly had explained or clarified that they were ordered to cover themselves with blankets while the light was on and that after the men left the room is when they switched off the light. Further, she had clarified that she was shown photographs that were taken as she was identifying the suspect at the parade and she said that she was shown the photographs after the parade. She also denied seeing any of the men before the identification parade.

From the evidence before the court I am satisfied that PW3, Elase Ngulube's evidence of identification of the 1st accused, Victor Mukuli is quite strong as she has established the basis upon which she claims to have been able to identify her assailant, the man who raped her outside her home while the security lights were on and she was able to see his face. Therefore, even if PW2's evidence may not be considered to be strong, which I disagree, I am of the considered view that PW3's evidence alone can suffice based on the position of the law on the evidence of a single identifying witness. In the case of **SITUNA v THE PEOPLE**⁷, the Supreme Court held that the evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the danger of an honest mistake being made by subjecting the witness to searching questions and carefully noting all the prevailing conditions and the basis upon which the witness claim to identify or recognise the accused. Further in **CHIMBO & OTHERS v THE PEOPLE**⁸, it was held by the Supreme Court that although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake.

I have considered PW3, Elase Ngulube's evidence of identification of the 1st accused, Victor Mukuli and the basis upon which she claims to have been able to identify him and from the

evidence, the answers in cross-examination and re-examination. I am satisfied that she clarified her evidence and left no doubt on how she was able to identify the 1st accused, Victor Mukuli. I had warned myself of the need to exclude the possibility of an honest mistake in identification of the accused by PW3 and I am satisfied that the same has been excluded because of the circumstances of the case.

What remains to be established is whether in the absence of corroboration of PW3's evidence by PW2, her evidence can stand. Even if PW2's evidence of identification of the 1st accused, Victor Mukuli was not accepted, PW3's evidence can stand on the strength of the authority of the Supreme Court's decision in the case of **CHIZU v THE PEOPLE**⁹, where it was held that there is no rule of practice or law for the corroboration of the evidence of a single witness and that there is nothing improper in allowing the conviction to stand on the evidence of one prosecution witness alone. I, therefore, accept that the 1st accused, Victor Mukuli was properly identified by PW3, Elase Ngulube as having been one of the intruders at their house in Avondale and also as being the man who sexually assaulted her by raping her.

After consideration of the evidence of identification, I revert to the issue of the charge of aggravated robbery. Since I had already considered that issue and found that there was sufficient

evidence of house-breaking and burglary contrary to section 301 of the Penal Code, Cap 87, I accordingly find that the 1st accused Victor Mukuli who was positively identified by PW3, Elase Ngulube and placed at the scene of crime, is guilty of the said offence of house-breaking and burglary contrary to section 301 of the Penal Code and I convict him accordingly.

However, with respect to the 2nd accused, Francis Tembo, even if he may have been the person who was with the 1st accused on the night in question, the fact that he was not positively identified but merely described by way of physical features such as height, stature, weight and complexion, I am not satisfied that the said identification is sufficient upon which to base a conviction as the danger of an honest mistake has not been excluded. I, therefore, find him not guilty of the lesser charge of house-breaking and burglary and I, therefore, accordingly acquit him of the subject charge of aggravated robbery.

DATED this.....day of June, 2012 at Lusaka.

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F. M. Lengalenga

JUDGE

