

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY

HK/56/2012

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE
AND
DAVIES CHANDA LUBAU

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 28th day of
September, 2012

For the State: Mr. K.I. Waluzimba – Acting Assistant Senior State Advocate

For the Accused: Mr. H. Mweemba – Senior Legal Aid Counsel

JUDGMENT

Cases referred to:

1. *Simutenda v The People* (1975) Z.R. 294
2. *Saluwema v. The People* (1965) Z.R. 4

The Accused was charged with six counts of aggravated robbery contrary to section 294 of the Penal Code Chapter 87 of the Laws of Zambia, as well as with one count of aggravated assault with intent to steal contrary to section 295 of the said code.

The particulars of the said offences are as follows:

That the Accused, on the 1st day of October, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm and a long baton, did steal 2 cell phones and K200,000=00 cash altogether valued at

K610,000=00 the property of SHARON BANDA and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said SHARON BANDA in order to retain, prevent or overcome resistance from it being stolen.

That the Accused, on the 30th day of September, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm did steal 1 cell phone and K944,000=00 cash altogether valued at K1,194,000=00 the property of PENWELL SINKALA and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said PENWELL SINKALA in order to retain, prevent or overcome resistance from it being stolen.

That the Accused, on the 13th day of April, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm did steal 2 cell phones and K50,000=00 cash altogether valued at K420,000=00 the property of KONDWANI MUZUMARA and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said KONDWANI MUZUMARA in order to retain, prevent or overcome resistance from it being stolen.

That the Accused, on the 13th day of April, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm did steal 1 cell phone and K50,000=00 cash altogether valued at K350,000=00 the property of SHERA NKANDU and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said SHERA NKANDU in order to retain, prevent or overcome resistance from it being stolen.

That the Accused, on the 21st day of August, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm did steal 1 cell phone valued at K60,000=00 the property of CHRISTOPHER CHILESHE and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said CHRISTOPHER CHILESHE in order to retain, prevent or overcome resistance from it being stolen.

That the Accused, on the 21st day of August, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm and long baton, did assault CHALWE KATEBE with intent to steal.

That the Accused, on the 21st day of August, 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with unknown type of a firearm did steal 1 cell phone valued at K80,000=00 the property of BERNARD MUKUKA and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said BERNARD MUKUKA in order to retain, prevent or overcome resistance from it being stolen.

He pleaded not guilty to all the said charges.

I warn myself that in criminal cases the burden of proving the guilt of an accused lies from beginning to end on the prosecution; they must prove each element of the offence charged beyond reasonable doubt. If at the end of the day I harbor any doubt as to the guilt of the accused person, I must grant him the benefit of that doubt and acquit him. The Accused has no obligation to prove his innocence.

Section 294(1) of the Penal Code under which the Accused was charged reads;

“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.....”.

With regard to the offence of **“aggravated assault with intent to steal”** section 295 of the Penal Code provides;

“Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, assaults any person with intent to steal anything, is guilty of a felony.....”

In respect of count 1 the prosecution called SHARON BANDA (PW5) who testified that on 30th September, 2011 she was with her boyfriend PENWELL SINKALA (PW6). They had just finished collecting some debts in Ndeke Township of Kitwe and were walking from G section to H section around 19:00 hours when they were accosted by two men who were coming from the opposite direction. PW5 thought the two men were police men because of the attire they were wearing, which she described as police uniform. One of the said police men had a gun and the other a long baton. PW5 said she was able to see the men clearly because there was enough light which was shining at the scene from the houses which were about 15m from them. She described the light as coming from spot or security lights from the said houses. She said in addition there was moonlight.

The two police men told PW5 and her companion that **“You are under arrest”**. She protested that they could not arrest them because it was only 19:00 hours. To which the policemen said **“You are too argumentative, we have apprehended you, come with us to the Police Station”**.

The two policemen then started pushing PW5 and PW6 in the direction of the bush where the policemen claimed they had left their vehicle with their colleagues. In the bush the policemen ordered PW5 and PW6 to kneel down, which they both did. The policemen asked the two witnesses how many children each had before ordering them to stand up. The policemen then started searching the witnesses while asking them how much money each had. She said the policemen took K200,000=00 cash from her as well as two cell phones, namely a SAMSUNG E 250 and an MTN Bustelle. From PW6 the policemen took a cell phone and some cash. After the search the policemen ordered the witnesses to go with them towards the main road so that they could hire a vehicle to take them to the police station. On the way they stopped them and ordered PW5 to go and call her aunt so that the aunt could come and witness them being taken into custody. When PW5 tried to resist they threatened to shoot her if she did not leave at once. She then decided to move away and went to stand at some distance leaving PW6 with the policemen.

After some time she saw PW6 come running claiming that the policemen had sprayed chili in his eyes. That is how the two witnesses left the bush and went to a nearby house where they got some water to wash the chilli out of PW6's eyes.

PW5 said they did not go to report the incident to the police that night because it was getting to 22:30 hours by the time they got home. It was only the following morning that PW5 and PW6 went to Wusakile Police Station where they reported the incident. She said they told the police that they were able to identify their attackers if they saw them again. She said apart from the lights from the nearby houses at the scene where they had been accosted as well as the moon, at the bush where the two had been taken she had lit the torch on her MTN phone to assist the policemen count the money they had taken. In the process of counting she used to aim the torch light at the faces of the policemen and was thus able to observe their features.

PW5 said it had taken about 2 hours and 30 minutes from the time the policemen had stopped them to the end of their ordeal in the bush. As such she said she had the opportunity in that time to observe the features of their attackers. She described one of their attackers as of medium height and dark in complexion. She particularly observed the shorter of the two policemen whom she said was wearing a dark coat and brown beret with a shiny badge on it. It was this shorter man who took her cash and cell phones; he was the one who had ordered her to light the torch on her MTN phone when they were counting the money; it was on him that she was directing the torch in the process. He was the one who had the short black baton which was about a metre long. He was also the one who had ordered PW5 to go and call her aunt to come and witness them being taken into custody.

PW5 said that on 7th October, 2011 she and PW6 were called to Wusakile Police Station where an identification parade was being conducted comprising of nine men. She said she found other witnesses in the CID office where she went. They were each asked if they were able to identify their attackers if they saw them on the parade, to which they said yes. They were taken one by one to the parade outside and after each had identified their attackers they were taken to another office to wait. When her turn came she went and identified one man at the parade whom she said was among those that had attacked her and PW6 on 30th September, 2011. She also gave a statement, she said that when she went to the police station on 7th October, 2011 she was informed by the police that they had recovered a small phone and was asked if she could identify it. She said it was an MTN phone which she was able to identify by the scratches it had on the back with a broken piece at the back, as well as by the stains of red nail polish. She had had it for six months before it was taken from her. At the time it was recovered it did not have its sim card. She said the number of the phone was 0963/410445. She identified the said phone in Court which had the features the witness had described. She said the SAMSUNG phone and cash were never recovered.

At the trial PW5 identified the Accused as one of the policemen who had stolen the items from her and PW6 on 30th September, 2011. She said he was the one she

identified at the parade on 7th October, 2011. She also identified the “**gun**”, long baton, dark coat and brown beret she claimed the Accused had been wearing at the time of the incident.

Under cross examination PW5 said that at the time she and PW6 had been stopped there was enough light for her to recognize people she saw. She said people were moving about around that time that is why she was surprised that the policemen had decided to arrest them for loitering. It was at a built up area where they were arrested. She said she was scared when all this was happening. She said the toy gun she saw in court had looked real at the time. She could not see it clearly then because it was being hidden in the coat. She said the policemen were using the long baton to push them around and that the Accused used to get upset whenever she diverted the torch light to his face when he was counting the money they had taken from PW5 and PW6.

She said that when she went for the identification parade, there were many other witnesses who had been called. She said she was in the CID Office before her turn came for identification and she did not see the other witnesses identifying the Accused. She said the Accused was not known to her before the incident.

Court 2 relates to the robbery in which the victim was PENWELL SINKALA who came as PW6. His testimony was in most material respects very similar to that of PW5 and I don't propose to relate it in much detail. PW6 confirmed that he had been with PW5 when the policemen accosted them and told them they were under arrest. He said when he started questioning the policemen where they were taking him and PW5, the policemen got upset and threatened him with the gun they had. He said at the bush where the two witnesses were taken the policemen took away K944,000=00 cash which he had as well as a DOLADO cell phone valued at K250,000=00. These, he said, have not been recovered to date. PW6 said the policemen also took away two cell phones, a SANSUNG and MTN, as well as some cash. He said the police men threatened to shoot PW5 when she tried to resist their orders to go and cal her aunt to come and witness their arrest. When PW5 left, the police men took PW6 a little further where they

slapped PW6 in the face and pushed him to the ground. That is when they sprayed chili in his eyes and left him. PW6 started shouting for help and went staggering towards the main road until he linked up with PW5. Together they went to a nearby house where they got some water which he used to wash the chili out of his eyes. He said before the date of the incident he had not known his attackers. However, he said, he was with them for about 45 minutes to an hour and was able to observe one of them very well. That was the shorter of the two attackers who was dark in complexion and a scar on the side of his face. That was the man who had slapped PW6 in the face. PW6 described man as having been in police uniform and was wearing a black coat and brown beret which had a badge on it. That was the man PW6 went and identified at the parade on 7th October, 2011, now the Accused. Among the items PW6 identified in court were the black coat and beret which PW6 said the Accused had been wearing at the time of the incident.

In cross examination PW6 said he was able to identify the Accused because he had been face to face with him for a long time that night. However, he was not able to see the gun and baton clearly because the policemen were hiding them on the sides. Regarding count 3, I received evidence from KONDWANI MUZUMARA (PW8). His evidence was that on 13th April, 2011 he was with his girlfriend SHIRA NKANDU (PW10). As they were proceeding home in Ndeke Township between 19:00 and 20:00 hours they were stopped by two policemen in uniform who claimed to be on patrol. This was between G and H section of Ndeke. The policemen who were speaking a mix of Nyanja, Bemba and English told the duo that they were being arrested for being in that area at that time of the night. They started searching the two witnesses. From PW8's trousers pocket one of the policemen removed an envelope containing PW8's identity documents including the National Registration Card, Passport, Voter's Card, ZICCA ID Card, and ZIBSIP ID Card. When PW8 protested at the search, they threatened to use force against him. The policemen also took K50,000=00 cash which PW8 had on him and an MTN cell phone which he valued at K70,000=00. From PW10, PW8 said the policemen took K50,000=00 cash and a Chinese made DORADO cell phone valued at K300,000=00. They said they were going to take the couple to Changala Police Post

near Arthur Davison Stadium in Ndeke unless they paid K250,000=00 fine for both witnesses. PW8 protested that they did not have that kind of money at which the police men reduced the amount to K150,000=00 and said they would not release the items that had been seized until the fine was paid. They also said meanwhile PW10 would also remain in their custody. PW8 pleaded for PW10 to be released so that they go and fetch the money from home. At last the policemen agreed to release the two witnesses and told PW8 to take the money to them at the place they had arrested the witnesses. PW8 then went home and got the K150,000=00 cash. However, when he returned to the scene he did not find the two policemen. He then decided to just go back home.

The following morning around 06:00 hours PW8 went to Changala Police Post and asked for the officers who had been on patrol the previous night. He was however told that they were not aware about such patrols. He was then advised to go and find out from at Wusakile Police Station. At Wusakile he narrated and was told there had been no such patrols in the area. There upon a docket was opened.

In April, 2011 PW8 managed to get another cell phone which was activated with the number he had been using on his stolen phone, 0965/758410.

He said that in September, 2011 someone phoned him at night on that number and asked PW8 if the witness had ever lost a cell phone. At first PW8 told the caller that he had not. However, on second thoughts, PW8 returned the call to find out how the caller had gotten PW8's number. He was told that his number was found on a sim card they had recovered on which PW8's name had been saved as "**ONE AND ONLY**". PW8 then asked for the phone number on that sim card, which he was told was 0968/153411. PW8 recognized the number as that of his girlfriend which she had had in the cell phone that was taken from her on 13th April, 2011. PW8 then told the caller of what had happened on that day where upon he was asked to go to Wusakile Police Station the next day. This PW8 did and made his explanation again to an officer, Mr. TONKOLA, who managed to located the docket that had been opened in April, 2011. He was advised to go back to the Police Station the next day with PW10. When both

reported, they were told of how PW10's sim card had been recovered in some the police had searched police said investigations were continuing and that the two would be contacted later.

In the first week of October, 2011 PW8 and PW10 were again called to the Police Station where they asked if they were able to identify any of the men who had stolen their property in April, 2011, to which both witnesses said they could. PW8 said they had been accosted near a house which had a spot light which threw its light where they had been stopped. He said the spotlight was about 7m from where they had been standing and that he was very close to them such that the policemen were able to touch both witnesses. He said they had been at that place for about 5 to 10 minutes. He described the attire the two policemen were wearing as black police coats and black police boots. He said one had a rifle which was protruding from under his coat while the other had a short baton. Both men were wearing berets. One wore a brown beret with a police badge on it.

When it was PW8's turn to go to the identification parade he identified the Accused as one of the men who took their property in April, 2011. PW8 said this was the man who wore the brown beret with the police badge on it and was the one who had the short baton. He said it was the Accused who had taken the envelope with the identity documents. At the trial PW8 identified the boots, short baton and toy gun as the things the two policemen had. He said none of the property that was taken from him had been recovered.

Under cross examination PW8 said he concluded that the two men who accosted them were police men because they looked and conducted themselves as such. He said he feared that they would beat him and PW10 if he resisted. He said they used to grab him and push him to the ground. He described the Accused as having been more difficult than his colleague.

SHIRAH NKANDU (PW10) gave evidence in respect of count 4, which in most material respects was like that of KONDWANI MUZUMARA (PW8). I do not propose to recite that evidence in full but to only highlight some aspects thereof. She said of the two policemen who stopped them one had a short baton while the other had a gun under his coat. One of them grabbed a purse from her which had K50,000=00 cash which he took together with a DORADO E 21 cell phone. She said the police men also grabbed a cell phone from PW8 as well as identity documents. The two witnesses were then fined K150,000=00 which PW8 went to get from home while PW10 went her own way.

PW10 said that she and PW8 had been with the two policemen for about 5 to 10 minutes and that she was able to observe their features. She identified the Accused in court as the one who had grabbed the purse from her and as the one who had a short baton. She said on that day he was wearing a dark blue coat and a beret like the ones police officers wear. That how she was able to later identify the Accused at the identification parade.

PW10 said the number for the cell phone which was taken from her was 0968/153411 and that some of the number she had saved to the phone book included those for BABY J for JOY whose number was 096490558, BABY P for PRISCA, whose number was 0964/716265, MUM, DAD, ONE AND ONLY or her boy friend, PW8 whose number was 0965758410. All these number appeared when the sim card which was later recovered by the police during the investigations was inserted in a cell phone at the trial and activated.

In cross examination, PW10 reiterated that she was assisted to observe the features of the two policemen by the light from the spot light at the nearby house. She said the two men threatened them such that she was scared.

Concerning counts 5, 6 and 7 the prosecution led evidence from CHRISTOPHER CHILESHE (PW1) and CHALWE KATEBE (PW2)

B.

PW1 testified that on 21st August, 2011 he and his two colleagues, PW2 and one BERNARD MUKUKA who passed away before the trial, who were all residents of Ndeke Township at the time, had gone fishing at Kafue River. On their way back from the river, they met three police men in uniform who said they were on patrol and who stopped them and demanded to know why they were in a prohibited area. The police men then ordered the PW1's team to sit on the ground, accusing them of being thieves. PW1 said they explained to the policemen that they were coming from fishing by the river and showed the policemen the catch and the fishing lines. However, the police men started beating PW1 and his friends they slapped and kicked PW1 and his colleagues and even used iron bars to beat them. PW1 started bleeding from the nose and mouth. They knocked out a tooth from his mouth and his cheek got swollen. PW1 said BERNARD MUKUKA had his nose broken and had his face badly swollen from the assault and that he bled profusely from the nose. The policemen then started searching the men and took away an MTN cellphone from PW1 which he valued at K60,000=00. PW1 said that when the policemen realized that the three men were looking at them very closely they threw chili into the men's eyes and left, saying if the three men wanted to get back the cellphones that had been taken from them they should go to the Police Station, without specifying which police station. PW1 and his friends finally reported the incident to Wusakile Police Station where they were issued with medical report forms which the three took to Kitwe Central Hospital where they were examined and attended to. The medical report forms were duly completed and returned to the police station. At the trial PW1 identified his medical report which stated the injuries he had sustained.

PW1 said that in October 2011 he was contacted by the Police who asked him and his two friends to go Wusakile Police Station. On arrival at the Police Station the Police Officers asked them if they could identify the items that had been taken from them when they were assaulted in August, 2011. PW1 said he was able to. They were shown some items Police said they had recovered but PW1 did not find his MTN cellphone amongst those items.

PW1 and his friends were then asked if they could identify the men who had assaulted them. PW1 said he was able to. He said they had been with those policemen very close where they could even touch and kick PW1 and his friend. He said the incident had lasted some 20 to 30 minutes before chili was thrown in their eyes.

PW1 and his friends were each taken in turn to an identification parade at which he identified the Accused person now, from and 17 men who were on that parade, as one of the three policemen who had attacked them in August, 2011. He said on the day of the incident the Accused appeared to be the ring leader of the group as he was the one that was giving instructions to his two other colleagues.

PW1 said the Accused had kicked him and beaten him with the iron bar. PW1 said Accused also carried a firearm which looked like an AK 47 assault rifle. Accused was the shortest among the policemen and was wearing boots, a brown beret which had a badge, and black coat. He said the other two were similarly attired. PW1 said that he had known the Accused or his two colleagues prior to 21st August, 2011.

Under cross examination, PW1 said that it was not yet 19:00 hours when they were attacked. He was able to observe what each of the policemen was wearing, which he described as police uniform. He described the attack as having been violent. He admitted to having been scared especially that the policemen were pointing the AK 47 rifle at them. He said at the time they reported the incident to the Police they had described the police men's features and the attire they were wearing.

As for PW2, CHALWE KATEBE, his testimony was in most material respects like that of PW1. He also described how they were stopped by three men he believed at the time to be policemen in police uniform one of whom had a firearm which looked like an AK 47 assault rifle while another had a short baton. Those policemen ordered them to sit on the ground and started beating them. PW2 said they beat them severely in the process of which he sustained an injury to his right eye and a swollen right cheek. The

policemen then searched PW2 and his colleague and took away a catapult and small panga that he had, while they took away the cellphones his two friends had.

PW2 said the short policeman who had the firearm wanted to shoot them, but his colleagues restrained him. He said the attack lasted about 20 to 30 minutes during which time PW2 said he was able to observe the policemen's features and their attire. He said they were very close and that when they said that they were being observed they threw chilli in the eyes of PW2 and his colleagues and left.

After finally reporting the incident to Wusakile police station, the three men were given Medical Report Form to take to the Hospital. PW2 was treated and had his medical report form completed at Wusakile Mine Hospital while PW1 and BERNARD MUKUKA had theirs at Kitwe Central Hospital. At the trial PW2 identified the medical report in respect of his injuries.

PW2 said in October, 2011 he attended at Wusakile Police Station where he identified the catapult that was taken from him by the policemen in the incident which he said he had personally made. He also identified it at the trial. PW2 said he and his colleagues were taken in turns to an identification parade where, when it came to his turn, he went and identified the Accused as having been among the policemen who had beaten them and taken their items. He said he was able to identify the Accused because there was sufficient light at the time of the incident. He said Accused had beaten him so much that he almost killed him for no reason at all. He said it was the Accused who was bearing the firearm.

In cross examination PW2 admitted that 21st August, 2011 was the first time he had seen those policemen. He also admitted that they scared because of the beatings.

Regarding the identification parade at which the Accused was identified by the witness, the evidence was led by the prosecution from Inspector CHRISPIN CHILALA (PW7) and Detective Inspector SIMON CHUSHI (PW9). PW7 said he was assigned to conduct

the parade on 7th October, 2011 in the afternoon. Nine men were paraded including the Accused person who was then a suspect. PW7 said the witnesses who went and identified the Accused were SHARON BANDA (PW5), SHERA NKANDU (PW10), KONDWANI MZUMARA (PW8), CHRISTOPHER CHILESHE (PW1) PENWELL SINKALA (PW6), and BERNARD MUKUKA (now Deceased), PW7 said D/I CHUSHI (PW9) took photographs of the identification. He said when asked if he had any complaints about how the identification parade had been conducted, the Accused said it was fairly done.

PW9 was the scenes of crime officer who attended the identification parade and took photographs of the parade as well as of the identification of the Accused by the witnesses. He later printed the photographs he took and compiled an album which he produced at the trial as part of the evidence. He said at the parade the Accused had remained at position 6 throughout and did not request to change that position.

The evidence the apprehension

Delivered at Kitwe in Open Court this 27th day of July, 2012

I.C.T. Chali
JUDGE