

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/51/2013

BETWEEN:

THE PEOPLE

Versus

MUZAMAI NYAMBE
SITALI SITALI

Before the Hon. Mr. Justice Justin Chashi in Open Court on the 24th day of March, 2014.

For the State:

P. Mukuka, State Advocate

For the Accused:

L. M Chikuta, Messrs Milner Katolo & Associates

J U D G M E N T

Cases referred to:

1. Mwewa Murolo v The People (2004) ZR 207
2. The People v Hamainda (1972) ZR 310
3. Molley Zulu, Abraham Masenga and Smiling Banda v The People (1978) ZR 277
4. Ali and Another v The People (1923) 232
5. Charles Lukolongo and Others v The People (1986) ZR 115
6. Kalebu Banda v The People (1977) ZR 169
7. Forbes (2001) 1 All ER 686
8. Yotam Manda v The People (1988-89) ZR 129
9. George Nswana v The People (1988-89) ZR 174

Legislation referred to:

10.The Penal Code, Chapter 87 of The Laws of Zambia

11.The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

The 1st and 2nd Accused persons namely **Muzamai Nyambe** and **Sitali Sitali** respectively are charged with the **Offence of Aggravated Robbery Contrary to Section 294 (2) of the Penal Code¹⁰.**

The particulars of the Offence being that the 1st and 2nd Accused on the 28th day of October 2011 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons unknown and whilst armed with two AK 47 rifles and a pistol did steal from **Patel Usman Gani K76,000,000.00** cash and 5 cell phones altogether valued at **K76,650,000.00** the property of Patel Usman Gani and at or immediately before or immediately after the time of such stealing, did use or threatened to use actual violence to the said Patel Usman Gani in order to obtain or retain the said property or prevent or overcome resistance to its being stolen.

At the hearing of the matter the State called five (5) Prosecution witnesses.

PW1, Hassan Mukelabai, a Machine Operator at West Pro Plastics and Chemicals testified that whilst at work on the 27th day of October 2011 around 01:00 hours, he was taken by surprise when about seven people entered the company premises. That at the time he was with other workmates.

According to PW1, these men ordered him to leave the machine and go to the toilet. When he refused, one of the men hit him in the chest with an AK 47 rifle twice. That's when he left and on the way to the toilet he found another man who had a pistol who asked for his phone but he did not have it. He asked him to lie down with others and said if anyone stands, he will be shot.

It was PW1's testimony that he became unruly and stood up. That's when the third person hit him with an iron bar and he fell into the toilet where he was then locked in with the other employees.

That, after twenty minutes, when it became quite, they all came out of the toilet after the other employees from the other departments who had hidden behind the sacks came and opened for them. They were then told by their supervisor Zacharia Patel to go outside the Plant whilst he phoned the Police on Mumbwa road. That the Police came and got statements from the employees who had been beaten. Thereafter, they were taken to the clinic where they were given medical reports by the Police. They were also given medicine and prescriptions. PW1 further testified that after two weeks bed rest, he reported for work and was given some more rest.

Further, according to PW1, it was his first time to see the people who attacked them. That he was with the assailants for about thirty minutes and there were lights. That the first assailant was tall and had long boots, and a long dust coat like the ones Police Officers wear.

The second one was short and was wearing camouflaged trousers and long boots and had a pistol in his hands. It was PW1's testimony that he first saw the 2nd Accused and then the 1st Accused. PW1 identified the medical report in Court. PW1 also identified the two Accused persons in Court.

In cross examination, PW1 reiterated that he saw about seven people but not all of them went to the machine. He asserted that the 2nd Accused is the one who went to the machine and hit him with an AK 47. That although everything was hurriedly done, he looked at the 2nd Accused before he hit him. PW1 further asserted that he met the 1st Accused when he was on his way to the toilet. Further that he was in fear as the 2nd Accused had frightened him. That when he met the 1st Accused, he was still frightened.

In further cross examination, PW1 asserted that when he came back from the Police, he did discuss the ordeal with his fellow employees who equally said that they were afraid. Further that he was never called by the Police for an identification parade.

In re examination, PW1 stated that although he was afraid, he still managed to see the assailants faces and he was able to recognize them.

PW2, Raymond Nsemiwe an extruder operator at the same company recalled that on the 27th day of October 2011 around 01:00 hours whilst checking on the machines he was taken by surprise when someone kicked him from behind. When he turned, he saw a short person wearing a Police coat. He tried to defend himself and argued with the assailants as they looked like Police Officers. That another person came and hit him with an AK 47 rifle on the hand, insulted him and kicked him. That of the two assailants, the short one was very aggressive.

According to PW2, he was then taken to the other side of the machine with the other employees and they were made to lie down and searched. That the assailants got his bible and two cell phones, **a Samsung C212**, and **a Nokia C1**. That the Nokia phone was grey in colour.

It was PW2's further testimony that afterwards, he heard a gun shot, although he did not know where it was coming from and after that they were all taken and put in the toilet compartments. After about thirty minutes, they were rescued and taken outside the plant and the Police Officers from Trishul Police Post came and took him with PW1, PW3 and another employee to the Police Post where they gave statements.

According to PW2, there were spot lights inside the plant and he was close to the assailants for about five minutes, about a metre away. That although he had never seen these people before the incident, he could still be able to identify them in Court. PW2 identified both the 1st and 2nd Accused in Court.

It was PW2's further evidence that only the Nokia phone was recovered although the back cover and the battery had been changed. PW2 identified the phone in Court.

In cross examination, PW2 asserted that the 1st Accused did not want him to see his face and that's why he showed aggression and continued attacking him until the 2nd Accused came.

PW2 further asserted that PW1 works in a different department. That he could identify the assailants but could not identify the people he was with in the toilet because at the time he had already been beaten by the assailants.

As regards the phone that was recovered, PW2 asserted that the brand name is C1 and there are many of them.

PW2 further reiterated that he was able to identify the assailants as when he was kicked, he turned and started arguing with them. According to PW2, he gave the Police a statement but was never called for any identification parade.

PW3, Mohammed Elyyas Patel, a Director at the same company gave his testimony that on the 28th day of October 2011, around 02:30 hours, he received a phone call from Mr. J Singh one of his employees that there was a robbery at the Company. As it was late, he informed him that he would go there in the morning, which he did around 06:30 hours. He found night shift employees seated outside the Plant. PW3 was then led by Mr. Usman Patel (PW4) to the place where he was staying and he noticed that the grill and the bedroom doors were broken and the room was ransacked.

Thereafter, PW3 was led to the Accountants Office where he found the door broken and the room was also ransacked and later to his Office.

According to PW3, the company had K75,600,000 from the previous day sales which had been kept in the drawers in his office and all the money was

missing. That he was also taken into the manufacturing plant which also had been ransacked.

After that PW3 went to Trishul Police Post to report, where together with PW4 they gave statements. Further, according to PW3, no monies were recovered.

PW4 was Usman Ibrahim Patel, a Manager at the same Company. His testimony was that on the 28th day of October 2011 at around 01:00 hours whilst asleep with the family his wife and two daughters, he heard noise coming from the ground floor near the entrance as they occupy the top floor. That the sound was over shadowed by the noise from the machines at the plant.

After a brief moment, he heard someone touching the locks to the grill door. He got out of bed and realized that the bed room door had been broken and that about ten people had entered the room. That when the assailants entered the room they switched on the lights and one of them picked up his three year old daughter and held her in his hands, whilst another assailant pointed a pistol at her. One of the other assailants pointed an AK 47 rifle at PW4 whilst another rifle was pointed at PW4's wife. The rest of the assailants kept demanding for money.

After searching the room, the assailants found the office keys. It was then that they ordered PW4 to lead them to PW3's Office on the ground floor, which he did, leaving his family with one of the assailants who had an AK 47 rifle. Whilst on the way to the ground floor, the assailants took PW4's two cell phones.

PW4 further testified that after opening PW4's Office he opened the drawers and took out **K75,600,000:00** which he handed over to the assailants. That despite, one of the assailants demanded for more money and upon saying he

did not have more money, the assailants flung a machete which missed him and hit the office table.

From there, they then broke into the Accountant's Office which was directly opposite PW4's Office. They also broke the doors to the store rooms.

Further according to PW4, they made him sit in one place whilst one of the assailants kept pressing a pistol against him and then entered the factory and demanded that all the workers gather in one place. They forced the workers in the changing room and locked it.

PW4 was later led back upstairs by the assailants whilst they kept demanding for more money and threatening his life. Upstairs, he was ordered to sit with his family and they left. PW4 further gave evidence that after about fifteen minutes, he heard the watchman calling from downstairs. The watchman told PW4 that the assailants had left. That is when PW4 went to the ground floor and after seeing that the watchman had been untied, he then proceeded to the factory floor and found it was empty though the machines were still running. The Workers were later found in the changing room after it was opened.

PW4 also testified that, he later went to Trishul Police Post with G3 Security personnel to report the robbery after he had phoned PW3. They were then escorted back to the factory by the Police, who then carried out further investigations.

It was PW4's evidence that he did not know the assailants from before and that it was difficult for him to describe them as all the time they were asking him to look down, as such he would not be able to recognize them. That none of the stolen items were recovered.

PW5, Detective Sergeant Victor Mwangala based at Los Angeles Police Post in Kanyama testified that on the 15th day of November 2012, he was allocated a docket of Aggravated Robbery in which PW3 was the

Complainant on behalf of West Pro Plastics and Chemicals. That he started investigating the matter and the investigations led him to Kabanana Site and Service where he apprehended the 1st Accused, who after being questioned and an oral warn and caution being administered led him to Kanyama Compound where the 2nd Accused was apprehended.

According to PW5, after searching the 2nd Accused's house, he found a Nokia C1 grey in colour which was later identified by PW2 as his phone. PW5 identified the phone in Court as well as the Police Medical Report which was issued to PW2.

In cross examination, PW5 asserted that when he went to the 1st Accused's house he asked him where a person called Sojar is found and the 1st Accused said although he knew a person called by that name, he would not know where he is found, but that he could lead him to the 2nd Accused who would know.

PW5 further asserted that he came across the name Sojar during his investigations. That the inquiries led him to the two Accused persons.

According to PW5, out of all the witnesses, he did not come across any witness who said they knew the attackers.

Further that he did not get anything from the 1st Accused's house. As regards the Nokia phone which was recovered from the 2nd Accused, PW5 asserted that the 2nd Accused told him that he had bought the phone from Mweemba on Katondo Street, although he never led him to Katondo Street and neither was he willing to show him Mweemba.

Further, according to PW5, he did make inquiries and concluded that Mweemba did not exist.

In conclusion in **volta face**, PW5 asserted that the witnesses said they were able to identify the attackers, although an identification parade was never conducted.

At the close of the Prosecution's case, the 1st and 2nd Accused persons were found with a case to answer and were put on their defence in accordance with **Section 207 (1) of The Criminal Procedure Code**¹¹.

Both Accused persons elected to give evidence on Oath and did not call any witnesses.

The 1st Accused testified that he is a fisherman. That on the 17th day of February 2012 around 07:00 hours, he heard a knock on the door and when he opened, he found four people who started asking him about Sojar who he said he did not know where he stays. That they then started taking items from his house. They took a television set, three LG CD loaders, a sony CD loader and two Nokia Phones. That one of the numbers he was using was 0963-022976 whilst he could not remember the second one.

As regards the four people whom he later discovered were Police Officers, he told them that the only person who would know where Sojar lives was his uncle in Kanyama, the 2nd Accused. They then went to the 2nd Accused's place and searched the house and thereafter took the 1st Accused to Los Angeles Police Post.

According to the 1st Accused, he took the Police Officers to the 2nd Accused because Sojar drinks beer at the 2nd Accused's bar called Mandala in Kanyama. The 1st Accused denied that he was involved in the robbery.

In cross examination, the 1st Accused asserted that he used to stay in Kabanana Compound with his wife and children. That he was beaten and that's how he led the Police to the 2nd Accused who was staying with his wife, where they found the Nokia phone. According to the 1st Accused, he used to

see the 2nd Accused with the phone and that he had it for about a year and some months.

The 1st Accused further asserted that he does not remember where he was on the 28th day of October 2011.

The 2nd Accused testified that, he is a businessman and that on the 17th day of February 2012 in the morning, he was taken by surprise when the curtain was pulled off in the bedroom and when he looked around, he saw gun barrels pointing at him. He was then grabbed by the legs whilst being asked where Sojar was. That he told them that he does not know where he stays, he only comes to the bar. That after searching the house, they took three phones. One of the phones was his and was using the number 0966-918068.

The 2nd Accused further testified that he was further questioned about the Nokia C1 phone and he told them that he bought it from a friend by the name of Mweemba on Katondo Street. That he went to Katondo Street with a Police Officer but did not find Mweemba. They only found his friend.

According to the 2nd Accused, he bought the phone sometime in July/August 2011.

The 2nd Accused identified the phone in Court and stated that it was his phone and that he does not know anything about the phone being stolen because even during the time of elections in September 2011 he was using the same phone. The Accused denied being at the scene of the crime.

In cross examination, the 2nd Accused asserted that on the 28th day of October 2011, he was in Mumbwa attending a funeral with his uncle Gregory Namakando. The 2nd Accused denied robbing anyone.

At the end of the 2nd Accused's evidence, the Court exercising its powers recalled PW2 to come and clarify some issues regarding the Nokia C1 which

in his testimony he claimed was stolen from him during the robbery and was allegedly found with the 2nd Accused.

When asked by the Court as to what number PW2 was using in the Nokia phone, he stated that it was an MTN number but he does not recall the number as it was new. That he however had the number from March 2011 up to the time of the robbery.

When asked by Counsel for the Accused persons, he asserted that he does not remember any of the people he called using the same number.

Arising from the evidence of PW2 and the 2nd Accused, I did make an interlocutory Order for the arresting Officer (PW5) to obtain a print out from MTN Zambia Limited using the Nokia phone serial number covering the period January 2011 to the 30th day of October 2011.

However, despite several adjournments and for reasons not disclosed to the Court, PW5 failed and/or neglected to obtain the print out.

Both Counsel for the State and the accused persons indicated that they would file written submissions by the 3rd day of March 2014. However, at the time of writing this Judgment, only Counsel for the Accused persons had done so.

It was Counsel's submission that the Prosecution in criminal matters bears the burden of proof beyond reasonable doubt as a requirement of the law and in that respect relied on the cases of **Mwewa Murono v The People**¹ and the case of **The People v Hamainda**² and then went on further to state that the State has failed to discharge that obligation for the following reasons:

- 1. That Courtroom identification is not sufficient to Convict an accused upon.*

2. *That there is doubt that has been raised as to ownership of the phone which was the main evidence to link the accused to the crime and,*
3. *That the failure by the Police Officer to bring before Court the print out raises doubt as the same could have had evidence beneficial to the Accused.*

Counsel expounded on the issue of identification by submitting that Courts do not take a casual approach and always warn themselves of the present danger associated with identification of persons. In that respect, Counsel relied on the case of **Molley Zulu, Abraham Masenga and Smiling Banda v The People**³ where the Supreme Court held inter alia that:

“Although recognition of a person one knows is less likely to be mistaken than identification of a stranger, even in cases of recognition the danger of mistake is present and it must be considered”.

Reliance was also placed on the case of **Ali and Another v The People**⁴ where it was held inter alia as follows:

“Although it is within the Court’s discretion to allow it in appropriate circumstances, a Court room identification has little or no value particularly where there is no satisfactory explanation for the failure to hold an identification parade and there is no other evidence incriminating the accused”.

Counsel for the Accused persons further submitted that there was dereliction of duty on the part of the arresting Officer when he failed to investigate the issue of ownership of the cell phone and also when he failed to bring before the Court a printout from the service provider regarding the said phone. That as such the Accused are entitled to the presumption that had the printout been brought, it would have exonerated the Accused.

It was Counsel's contention that if the State had any evidence in their possession, they ought to have led such evidence before the Court, as any failure to do so creates doubt in favour of the Accused.

Counsel cited the case of **Charles Lukolongo and Others v The People**⁵ where **Chomba J** has this to say:

“Decided cases on the question of dereliction of duty show inter alia that....where evidence available only to the Police is not placed before the Court, the Court must presume that had the evidence been produced it would have been favourable to the Accused”.

Counsel also relied on the case of **Kalebu Banda v The People**⁶ amongst other cases on this subject matter.

In conclusion, Counsel urged the Court to acquit the Accused persons.

As earlier alluded to, the 1st and 2nd Accused persons have been Charged with **Aggravated Robbery Contrary to Section 294 (2) of The Penal Code**¹⁰. The ingredients of the offence which need to be proved by the State beyond all reasonable doubt are contained in **Section 294, Subsection (1) and (2) of The Penal Code**¹⁰.

From the evidence adduced by the Prosecution witnesses, there is no doubt that an Aggravated Robbery occurred at West Pro Plastics and Chemicals at Lusaka in the early morning of the 27th day of October 2011. It is in respect of that Robbery that the two Accused persons are before this Court.

What remains for this Court's determination is whether from the Prosecution's evidence the 1st and 2nd Accused persons can be placed at the scene of the crime. In other words, can the Accused persons be said to have

been involved in the commission of the offence, given the available evidence.

Let me start with the 1st Accused person. The crucial evidence which relates to the 1st Accused is that of PW1 and PW2 and to a lesser extent PW5. That evidence touches on the issue of identification in that both PW1 and PW2 identified the 1st Accused in Court.

PW1 in his evidence in chief which touches on both the 1st and 2nd Accused persons testified that it was his first time to see the assailants.

In other words he had never seen them before. He however went on to state that there was lighting inside the plant and he spent about thirty minutes with the Accused persons and he went on to describe what they were wearing and who had what firearm. PW1 also described the height of the Accused persons and on that basis went on to identify both Accused persons in Court.

However, in cross examinations, PW1 asserted that, the assailant who attacked him kept hitting him with a butt of the gun, so as to avoid seeing his face. That he was afraid and had so much fear but he was still able to identify the assailants. PW2 further asserted that he was never called for an identification parade in order to identify the Accused persons.

Equally PW2's evidence was that he was able to give the height of the Accused persons and who had what firearm but he was not able to say which of his workmates he was with. PW2 further testified that it was the 2nd Accused who grabbed the phones from him amongst which was the contentious Nokia C1, grey in colour.

According to PW2, there was lighting in the plant and that, he was with the assailants for a good five minutes at close range.

It was PW2's evidence that he was seeing the Appellants for the first time, although he went ahead and identified the 1st and 2nd Accused persons in Court.

In cross examination, PW2 admitted that the assailant who attacked him did not give him an adequate opportunity to look at him and that at the same time he was confused because of the attack. PW2 also conceded that he was never called for an identification parade in order to identify the assailants nor the Accused persons.

As regards the evidence of PW5, PW5 in cross examination first stated that he did not come across any of the witnesses who said they knew the attackers, only to change later and said the witnesses were able to identify the attackers although an identification parade was never conducted.

It is indeed trite law that the Court must acquit the Accused persons if it considers that the identification was of poor quality. There is no doubt that an Aggravated Robbery orchestrated by so many assailants numbering in excess of seven as was the case in **Casu**, can be such a confusing and frightening ordeal to any member of the public who has never experienced such an attack before. Although PW1 and PW2 were of the view that there was enough light and were able to an extent to describe the height of the persons and what they were wearing and which one had what firearm they were not in a position to give any features of the Accused persons which would make them positively describe the Accused persons without creating any doubts or danger of mistaken identity.

If indeed as was put by PW5 in his evidence, the witnesses were able to identify the assailants that is the more reason why an identification parade ought to and must have been conducted in order to remove any doubt and danger of a mistaken identification.

Given the nature and magnitude of the attack and the fear it induced into the victims, something more needed to be done in the form of an identification parade than merely bringing the witnesses to Court and making them identify the Accused persons in the dock in Court.

At first sight it might seem that there could not be better evidence of the identification of the Accused than the direct statement of a witness in Court that the Accused is the "the man" but the witness is all too apt to think that the Police must have got the right man who is actually in the dock, with the result that he may be prepared to swear positively to a fact of which he is by no means certain.

It has therefore been held that it is undesirable for the Police to do nothing about the question of identification until the Accused is brought before the Court.

Where the identity of a person is known or there is an allegation by the witnesses that they are able to identify the Accused, it is common to hold an identification parade. The witness will be asked if the person he previously saw is one of the people on the line up or parade. Alternative procedures include asking the witness if he can identify the person he previously saw from within a group or from a collection of video clips or photographs. Before any of those procedures are used the Police must make a record of the witnesses description of the person he saw.

In the case of **Forbes⁷ The House of Lords** was of the view that an identification procedure is mandatory where there is a witness who has identified a suspect or who identified a suspect or who feels that they are able to identify a suspect. That there is a mandatory duty on the Police to hold a parade wherever the suspect disputed the identification.

That this was the case even were there has been unequivocal identification or where there was difficult in arranging a parade. The Police could not circumvent the requirements.

Therefore, dock identification, that is identification at the trial itself without any preceding method of identification is normally in admissible, although there are exceptions.

Back at home, this issue was aptly dealt with by the Court of Appeal in the case of **Ali and Another v The People**⁴ which had been cited by Counsel for the Accused persons. In that case, the Appellants were convicted of the theft of a Motor Vehicle. The evidence against the first Appellant was overwhelming. The evidence against the second Appellant rested on an identification made in Court at the preliminary inquiry supported by his silence in the face of a statement implicating him alleged to have been made in his presence by the first Appellant.

The Court of Appeal held that:

“Although it is within the Court’s discretion to allow it in appropriate circumstances, a Courtroom identification has little or no value, particularly where there is no satisfactory explanation for the failure to hold an identification parade and there is no other evidence incriminating the Accused”.

In view of the aforesaid authorities and the facts of the case, the identification evidence is in my view weakened and in fact of no value in view of there being no explanation at all from PW5, the arresting Officer as to why an identification parade was not conducted.

The question which then needs to be posed at this instance is this - is there any other evidence incriminating the Accused persons? As regards the 1st Accused, I cannot find any.

According to the 1st Accused, his house was searched and certain items were taken but nothing incriminating was found. The evidence of PW5 also does not bring out any incriminating evidence. PW5 does not clearly in his evidence bring out what led him to the 1st Accused. It would seem from the evidence of PW5 in cross examination that when he went to the 1st Accused's house, he went there with the view that the 1st Accused would know the whereabouts of a person called Sojar and it was for that reason and in that quest that the 1st Accused led PW5 to the house of the 2nd Accused where a Nokia C1 cell phone was recovered.

Could this Nokia C1 then be the link and incriminating evidence as regards the 2nd Accused. As earlier alluded to, PW5 was led to the 2nd Accused by the 1st Accused and after searching the house, only the Nokia C1 phone was recovered and nothing more.

It was the evidence of PW2 that this phone was grabbed from him by the assailants. In identifying the phone, PW2 asserted that the back cover and the battery had been changed. It will be noted that in view of the alleged changes to the phone, PW2 did not give any feature of the phone which made him believe that was the phone which was grabbed from him. As was conceded by PW2, when he was recalled, he could neither remember the number the phone was using nor the people he had called using that phone.

The identification of that phone was later brought into issue and complicated the matter when the 1st Accused testified that he had seen the 2nd Accused use that phone for more than a year prior to his apprehension. Further, the 2nd Accused, claimed that was his phone having bought it from Mweemba, his friend on Katondo Street sometime in July/August 2011 and that he even had the phone during elections in September 2011.

Indeed, if PW5 had put his mind to this case, he would have appropriately invested in investigating the ownership of this phone and as to the likelihood of it having been stolen from the Aggravated Robbery also bearing in mind that in view of the explanation by the 2nd Accused, the Court cannot restrict itself to only one inference that the 2nd Accused was involved in the commission of the offence based on having found him in possession of the phone.

As was held in the case of **Yotam Manda v The People**⁸ inter alia:

“The trial Court is under a duty to consider various alternative inferences which can be drawn when the only evidence against an accused person is that he was in possession of the stolen property. Unless there is something in the evidence which positively excludes the less severe inferences against the accused person (such as that of receiving stolen property rather than guilty of a major case such as aggravated robbery or murder) the Court’s bound to retain a verdict on the less severe case”.

In the case of **George Nswana v The People**⁹ the Court in **Obiter dictum** confirmed the principle that where a finding of guilty is dependant upon the drawing of an inference from the possession of recently stolen property, the inference will not be drawn unless it is the only reasonably open on the facts of a particular case.

The Court went on further to say as follows:

“In this regard any explanation offered by the Accused must be considered and where one is offered or that which is offered turns out to be a lie or one which could not reasonably be true, the Court is still obliged to consider what other inference, if any can reasonably be drawn taking care that the Court does not in the process indulge in insupportable speculation. If the facts would justify the drawing of two

or more equally reasonable inferences, it is customary in a criminal case to adopt that which is more favourable or less disadvantageous to the Accused”.

What adds a damning complexion to this case and moves us away from the making of inferences is the lack of evidence that this is the same phone which was taken from the Aggravated Robbery.

Furthermore, the failure by the Prosecution in particular PW5 to properly and thoroughly investigate the case. In the beginning, PW5 should have obtained a print out from the relevant service provider which would have gone a long way in assisting the Court as to who had use of this phone at the time the offence was committed. That was not done. Even when the Court made attempts to prompt and implore the Prosecution to do so, the Prosecution failed and/or willfully neglected to do so.

I am in agreement on this point that there was in that respect dereliction of duty on the part of the Police and in particular PW5. I have also taken note of the authorities cited by Counsel for the Accused persons and given that failure by the Police, I am left in no doubt and can safely presume that had the Police obtained the relevant printout, it would have been favourable to the 2nd Accused.

In view of the aforesaid, a lot of doubt has been created in this case as to the guilty of both the 1st and 2nd Accused as such I cannot safely place them at the scene of the crime and the said doubts must be credited to the Accused persons advantage.

The Prosecution has failed to discharge the burden of proof beyond all reasonable doubt.

The 1st and 2nd Accused persons are therefore both acquitted and set free.

Delivered at Lusaka this 24th day of March 2014.

**JUSTIN CHASHI
HIGH COURT JUDGE**