

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HP/200/2014



BETWEEN:

THE PEOPLE

VS

CELESTINO MUMBA

**BEFORE Honourable Mrs. Justice J. Z. Mulongoti
on the 25th day of July, 2014.**

For the People : Mr. B. Mpalo, Senior State Advocate

For the Accused : Ms. M. Marabesa, Legal Aid Counsel

JUDGMENT

Cases Referred to:

1. WOOLMINGTON V. DPP (1935) A.C. 462
2. DOROTHY MUTALE & RICHARD PHIRI V. THE PEOPLE (1997 S.J. 51 (51))
3. GEORGE NSWANA V. THE PEOPLE (1988-89) ZR 174 (SC)
4. YOANI MANONGO V. THE PEOPLE (1981) ZR 15 Z
5. ZONDE AND OTHERS V. THE PEOPLE (1981) ZR 337 (SC)

Legislation Referred to:

1. *Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.*

The accused, **Celestino Mumba**, 24, is indicted on one count of *Aggravated Robbery contrary to section 294(1) of the Penal Code.*

The particulars allege that on 15th day of March 2014, at Lusaka in the Lusaka Province of Zambia, the accused jointly and whilst acting together with others unknown and whilst armed with a knife stole 1 brown wallet valued at K150, 1 Samsung duo phone valued at K1,200 and 1 Blackberry cell phone valued at K800, all items together valued K2,150, the property of **Carlton Macmillan** and that at or immediately before or immediately after the time of such stealing did use actual violence on the said Carlton Macmillan, in order to obtain or retain or prevent or overcome resistance to the said properties being stolen.

At trial, the accused pleaded not guilty. To prove its case, the prosecution led evidence from three prosecution witnesses (*PW*). *PW1, Carlton Macmillan, 24*, testified that on 14th March 2014, at about 19:00hours, he was at Texaco Nightclub

situated in Northmead. After taking some beers, he decided to leave around 21:00hours. He decided to walk to Manda Hill to catch a taxi from there to take him to Kalundu, where he stayed.

After walking for about 20 minutes, he felt unsafe and decided to turn back. As he headed back he met two guys who stopped him and asked for a match stick. He told them he had none and suddenly two other guys appeared. One hit him on the left side of the face with a brick and he fell to the ground. Then he started arguing with the guys. A car drove by and stopped. The driver attempted to rescue him but the guys threatened to break his windows and he drove off.

The guys assaulted him and dragged him to the next road. He tried to fight back but two more guys appeared and one was armed with a knife.

The Court heard that five of the guys continued assaulting him as one was on the lookout. They robbed him of his pants, shoes, K200, a Samsung SGT 75 phone, and a Blackberry 1300 phone. After that they all ran away. *PWI* decided to walk back to the club where he had left his friends. The he met the taxi driver

who had attempted to rescue him. He stopped and with him were two Police officers. They carried him and headed to Northmead Police. On the way they met two of his assailants and he alerted the Police. The car stopped and the two guys started running away. Fortunately one was caught.

When they got to Northmead Police Post, the guy was searched and found with his (PW1's) Samsung SGT 75 phone. *PW1* identified the phone 'P1' in court.

He further testified that the Police issued him with a medical report 'P2'. He also identified the accused as one of the people who attacked him, though, that it was dark at the scene and he could not see the faces of his assailants but their clothes which helped him to identify them.

In cross examination, *PW1* confirmed that he was initially attacked by four people and that it was dark and he was unable to see their faces.

PW2, Constable Henry Masauso Nyirenda, 25, testified that on 14th March 2014 around 23 to 24 hours, he was on duty at Northmead Police when a taxi driver came in to report that as he drove along Benakale road he saw four gentlemen attacking one gentleman. The taxi driver then drove **PW2** and one neighbourhood officer to the scene. When they got to the junction of Subweni and Benakale roads, they saw two gentlemen heading towards Northmead shopping area. When they neared the scene, they met a gentleman, who was only wearing boxer shorts and a T-shirt. They stopped and asked if he was the victim of the attack and he confirmed, saying the attackers had headed towards Northmead.

They picked the victim and drove back to Northmead Police and on the way, the victim saw two gentlemen and identified them as his attackers. They stopped in front of them and apprehended one while the other one ran away. At the Police, the suspect was searched and found with a Samsung phone which the victim identified as his. After that **PW2** issued **PW1** with a medical report as he complained of pain.

- In cross examination, *PW2* reiterated that the taxi driver reported that four people had attacked the victim.

PW3, Detective Sergeant Fandika Tembo, 35, testified that on 15th March 2014, he reported on duty in day shift. He was handed a docket of Aggravated Robbery and the suspect was already in custody. He interviewed the suspect in relation with the charge but he denied. *PW3* identified the accused as the suspect referred to. *PW3* also tendered in evidence the phone 'P1' and the medical report 'P2'.

That was the evidence on behalf of the prosecution. I found the accused (**DW**) with a case to answer and when called upon to defend himself, he opted to give evidence on oath and not to call any witness. He testified that on an unknown date he was at a bar in Northmead. When he decided to leave, he met someone outside who was going in the same direction and they decided to walk together, although they never spoke.

As they walked, they saw four men beating a person who was lying on the ground. Then he said to the person he was with that they should return but his companion decided to reach the scene. He (accused) remained standing at a distance. Then he saw the four men run away when they saw his companion approach. The one on the ground also got up and ran.

The court heard that it was then that the accused also decided to reach the scene and when he got there he found a phone. He picked it and they decided to go to the Police and make a report. As they walked they saw a vehicle which stopped and some Police officers disembarked and fired some shots. His companion ran away but he was apprehended and bundled in the vehicle and taken to the Police where he was beaten and searched. A phone was found in his pocket, he tried to explain but the officers said he would do so the following day. The following morning he was accused of stealing the phone but he denied and explained how he found the phone as he stated in court.

During cross examination, when he was shown the phone 'P1', he confirmed that it was the one he found at the scene. He said he was picked by the Police around 22 hours, though he did not check the time. He said he stays in Makeni and on that day he had gone to Northmead to sell trousers. Under further cross examination, he said he was alone at the club. And that when they saw the four men assaulting one person, he was on his way to Manda Hill bridge to get a taxi. When further cross examined, he said he was not aware that there were lots of taxis at Northmead. That he was not familiar with Northmead and that was his second time frequenting the area. That was the evidence on behalf of the accused.

The learned Senior State Advocate, Mr. Mpalo, submitted *viva voce* that the prosecution has proved its case beyond reasonable doubt. That *PWI* testified that he was attacked and his properties stolen among them the phone 'P1' which was found in possession of the accused. That the accused was found in recent possession and in his defence failed to give a reasonable explanation as to how he came in possession. It was counsel's

further submission that the doctrine of recent possession applies and entitled the Court to make an inference that the accused was one of the persons who attacked *PW1* and stole his properties including the phone 'P1'.

The learned defence counsel, Mrs. Marabesa, filed written submissions. She submitted that the following are the elements, to be proved by the prosecution, and the accused to be convicted of aggravated robbery under *Section 294(1) of the Penal Code*:

1. The person must be armed with an offensive weapon or instrument
2. The person must be with one person or more
3. The person must steal
4. Immediately before and or immediately after they must use actual violence to any person or property to obtain or retain the thing stolen.

It was counsel's submission that it is a well settled principle of criminal law, as established in the case of **WOOLMINGTON V. DPP [1]** that the burden of proving the guilt of the accused lies with the prosecution and the standard to which the guilt of the accused is to be proved, is beyond reasonable doubt.

Mrs. Marabesa amplified that there is no burden laid on the accused to prove his innocence, let alone to any standard. Further, that in **DOROTHY MUTALE & RICHARD PHIRI V. THE PEOPLE [2]**, the Supreme Court upheld the cardinal principle of criminal law that "where two or more inferences are possible, the court will adopt one that is more favourable to the accused, if there is nothing to exclude that inference."

And also that "*where there are lingering doubts, the Court is required to resolve such doubts in favor of the accused.*"

It is learned counsel's submission that on the whole of the evidence adduced, from both the prosecution and the defence, there are a lot of doubts and suspicion as to the guilt of the

accused and he ought to be acquitted. That the doubt was, that if really the accused attacked *PW1* as alleged, would he be heading to the direction of the Police or indeed Texaco Night Club? According to counsel the explanation by the accused is corroborated by *PW1* and *PW2* that he was heading to the direction of Texaco Night club and the Police Post. And that he gave an explanation to the court as to how he was found in possession of the stolen property. Therefore, that there is a doubt if, indeed the accused was the thief. That it was more probable that it was an afterthought from the complainant (*PW1*) to state that the other two were acting together with the four who attacked him and that it was not established that there was common purpose in this case. That *PW1* said he was initially attacked by four guys and two later joined. That there can be no common purpose that can be attributed to the accused because he stood at a distance as corroborated by *PW1*. That in fact *PW1* did not state clearly which one of the six people who attacked him did what.

Learned counsel also argued regarding the doctrine of recent possession relied upon by the prosecution that in the case of **GEORGE NSWANA V. THE PEOPLE (3)**, the Supreme Court held that:

“the inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features summon the case that indicate that the Applicant cannot reasonably claim to have been in innocent possession, the question remains whether the Applicant not being in innocent possession was the thief or a guilty receiver or retainer”

A plethora of cases was cited on this doctrine including also **YOANI MANONGO V. THE PEOPLE (4)** that

“where evidence of recent possession is used as corroboration, it is not necessary to draw there from an inference as to the guilt of an accused person, but where it is used somewhere, the inference to be drawn must be the only inference reasonably possible, otherwise an acquittal must follow as a matter of course.”

According to counsel the accused has given an explanation that he was heading to the direction of Texaco and the Police, hence an inference of not guilty must be drawn and he be acquitted.

After careful analysis of the evidence including the submissions by both counsel, I make the following findings of fact:

1. On 14th March 2014, around 19:00hours to 20:00hrs *PWI* was at Texaco Night Club in Northmead and the accused (*DW*) was also at the same club.
2. Later in the night, *PWI* decided to get back home in Kalundu. He decided to walk to Manda hill to get a taxi. At about the same time the accused (*DW*) and another person were also headed in the same direction, also walking.
3. As *PWI* was walking he was attacked by six men. Initially, he was stopped by two guys then a few minutes later another two joined them and they assaulted him and he tried to fight back. Then the last two appeared and one had a knife. Five guys beat him up while one was on the lookout. They removed his pants, shoes, and got his two phones i.e. one Samsung P1 and the other a Blackberry and his wallet.
4. The Samsung phone 'P1' was on the same night shortly found with *DW*, the accused herein.

The accused is facing one count of *Aggravated Robbery contrary to section 294(1)* of the Penal Code. To constitute aggravated robbery, the prosecution must prove all the elements beyond reasonable doubt as submitted by the defence counsel.

Accordingly, the issues for my determination are:

- (i) whether on the facts and evidence before me, the complainant had the following items stolen from him: 1 brown wallet valued at K150, 1 samsung duo phone worth k1,200, and 1 Blackberry cell phone valued at K800.
- (ii) whether the accused acting with others attacked and robbed him.
- (iii) whether the complainant suffered violence in the course of the robbery and whether offensive weapons were used to inflict injuries on him or to threaten him.

Is the accused guilty of stealing the aforementioned items? In proving theft, the prosecution relied on the sworn testimony of the complainant, *PWI* who testified that he was attacked by six men. They undressed him and got away with a Samsung SGT 75 phone 'P1', a Blackberry 1300 phone, and wallet. *PWI* identified the phone 'P1', as the one that was stolen from him on

the night of 14th March 2014. He actually described its features to the court before it was shown to him. The other items were never recovered. It was also his testimony that the phone 'P1' was found with the accused, shortly after his attack.

Further, that the accused was apprehended as he walked near the scene with a friend. *PW1* pointed them out to the Police after they picked him up in the taxi. He said he was able to identify them by their clothes.

The accused was later searched and found with the phone 'P1'. *PW2* corroborated *PW1*'s testimony as to how the accused was apprehended and found with the phone. They both alluded to the taxi driver who stopped and tried to help *PW1* but was threatened by the assailants. *PW2*'s testimony was that the same taxi driver went and reported to the Police. The accused also corroborated *PW1* to a great extent, as to how he was arrested and found with the phone. And that *PW1* was attacked by four men. Of course he denied stealing or attacking the accused.

I must state that I am inclined to accept *PWI's* testimony that the accused was part of the group that attacked and stole from him. *PWI* did not contradict himself in any way even when cross examined. His testimony was simple and straightforward. He also admitted some shortcomings like the scene being dark and not being able to see the faces of his attackers. He said he was able to see what they were wearing and that is how he was able to identify the accused and his friend as they were walking. I find him to be a credible witness and accept his testimony.

I find the accused's version not to be reasonably possible and therefore an afterthought. I am not persuaded by arguments by his counsel. I also noticed his demeanor in court he kept looking down, could not stand still and took time to answer simple questions. It also defies belief that he did not know Northmead area or where to get taxis and yet he was walking there in the middle of the night, with a total stranger whom he never spoke to.

I am inclined to find that he was with a friend whom he left the club with and the two of them and others followed *PWI*. I discern that the group were observing him from the Night Club and saw him with the two phones. When he left they followed him and attacked him. I do not accept his testimony that he was alone at the club. I note that when he started defending himself the first sentence he uttered was “*we were at a bar in Northmead.*” It was after the court sought clearance as to who was ‘we’ and the defence counsel told him to speak for himself that he said ‘we’ meant other people in the bar. This is an indication to me that he was in a group of friends and he quickly changed to say ‘other people’ after he realised his folly.

Further, he also narrated that *PWI* was attacked by four people. I do not see why he would rush to the scene were according to him the attackers and victim fled nor why he stood to wait for a stranger instead of getting away from trouble or reporting to the Police like the taxi driver did.

I have no reason therefore, to doubt that *PW1* was robbed and attacked. His items were capable of being stolen, and the accused had no claim of right to them.

I note as argued by both counsel that the doctrine of recent possession applies in this case. As aforestated I do not accept the accused's version of events and thus am not persuaded by arguments by his counsel. I find that the authorities she has cited do not apply in this case.

I am fortified by the Supreme Court decision in **ZONDE AND OTHERS V. THE PEOPLE [5]**: that,

“the doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery.”

The accused herein was found with *PW1*'s phone 'P1' shortly after *PW1* was attacked and robbed.

Accordingly, I find that the prosecution has proved beyond reasonable doubt that the accused acting with others on the run stole the Samsung phone 'P1' and other items from *PW1*.

I also have to determine whether the complainant was a victim of violence or threats of violence and whether the accused and others were armed with an offensive weapon when they stole from him.

The complainant's testimony was that he was hit with a brick by one of the four who attacked him first. I have seen the exhibit 'P2' which is a medical report showing that *PW1* suffered soft tissue injury, right shoulder, and upper lip. *PW1* said he was hit on the left side of his face and I take the injuries on the upper lip to have been inflicted then. I note also that the brick was not recovered, nor produced in court but I am inclined to accept *PW1's* testimony who I have already found to have been a credible witness. In addition he did testify that he was dragged to the next road where the other two appeared. This was after he was hit with the brick.

I note also the other injuries and his testimony that he was hit by five people while one who also had a knife kept a look out.

Again the knife was not recovered but I have accepted the testimony of *PW1*. He was corroborated by *PW2* and to some extent by the accused. I take the brick and knife to be offensive weapons capable of causing injuries and fear.

I, therefore, find as a fact that the prosecution has proved that *PW1* was a victim of violence at the hands of the accused and others while they were armed with a knife and brick as they attacked and robbed him.

It is immaterial whether the accused was the one with the knife or it was him who hit *PW1* with the brick. I have found that he and his friends attacked *PW1* and all had a common purpose.

PW1 testified the one who kept guard appeared to be in charge and gave orders while the five assaulted him. And that the items were shared.

I find that the prosecution has proved the offence of aggravated robbery beyond reasonable doubt.

I find the accused guilty and I convict him.

Delivered in Open Court this ^{25th} day of ^{July}..... 2014.



**J. Z. MULONGOTI
HIGH COURT JUDGE**