

IN THE HIGH COURT FOR ZAMBIA      HP/70/2015  
 HOLDEN AT LUSAKA  
 (CRIMINAL JURISDICTION)

THE PEOPLE  
 VERSUS

MUSONDA YANKONDE SANDRAS  
 SEPISO NASILELE



*Before The Honourable Mrs. Justice P.C.M. Ngulube in Open Court*

For the People: Mrs. M.P. Lungu Senior State Advocate

Ms. M. Chanda State Advocate

Ms. C. Lupili State Advocate

For the Accused: Mr. Cheelo, Messrs Muleza, Mwiimbu and  
 Company

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## JUDGMENT

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### **CASES REFERRED TO:**

1. *Shamwana and Seven Others vs. The People* (1980) ZR 81
2. *Wynter Makowela vs. The People* (1979) ZR 290
3. *The People vs. Njapau* (1967) ZR 95
4. *Simutenda vs. The People* (1975) ZR 294
5. *George Nswana vs. The People* (1988-89) ZR 174 SC,
6. *Machipisa Kombe vs. The People*, SCZ Judgment Number 27 of 2009
7. *Bright Katontoka Mambwe vs. the People* SCZ Judgment Number 8 of 2001 2014, Appeal Number 113 of 2012

8. *Mwewa Muroho vs. The People* (2004) ZR 204
9. *George Nswana vs. The People* (1988-89) ZR 174
10. *Li Shu vs. R.* (1989) A.C. 143-281
11. *David Zulu vs. The People* (1977) ZR 151

The two accused persons stand charged with the offence of Aggravated Robbery, contrary to Section 294(1) of the Penal Code, Cap 87 of the Laws of Zambia.

The particulars of the offence are that Musonda Yankonde Sandras and Sepiso Nasilele, on the 19<sup>th</sup> of December, 2014 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, and whilst armed with iron bars, did steal from Kahilu Kapinda, one speaker, one DSTV Decoder, one Television set and one Juke box, altogether valued at K2,880-00 the property of Yobe Nyirenda, and at or immediately before, or immediately after the time of such stealing did use or threatened to use actual violence to the said Kahilu Kapinda in order to retain or obtain the said property or prevent or overcome resistance to its being stolen or retained.

The two accused person denied the charge.

The Prosecution called four witnesses.

PW1, Kahilu Kapinda, aged 37 years of Matero, a barman, gave sworn evidence that on the 19<sup>th</sup> of December, 2014 at 0200 hours he was asleep in the bar where he worked at Buseko market. He heard a bang on the door and when he woke up, he realised that people had gotten into the bar. He was hit on the head and he fell down. He became unconscious and when he came round, he found the door open and found some items had been taken away. PW1 stated that he found a television set, a DSTV decoder, a speaker, and a Juke box missing.

During the attack. PW1 was beaten and he sustained a deep cut on the right side of the head. He called the owner of the bar, who went to the Police Station with him. He was subsequently taken to Chingwere Clinic after the Police issued him with a medical report form. It was signed by the doctor when he was treated at the clinic. If he saw the medical report again, he would be able to identify it. It bore a Police date stamp from Matero Police, a date stamp from Chingwere clinic and the details of his injuries, that he sustained a cut.

PW1 was shown a document which he identified it as the medical report that was signed by the doctor at Chingwere Clinic. He showed the court the identifying features. The medical report

was accordingly marked ID1. PW1 stated that he did not see the people who attacked him.

PW1 was not cross-examined. PW2, YOBE NYIRENDA, aged 45 years, of Chunga, a businessman gave sworn evidence that on the 20<sup>th</sup> of December, 2014, he was called on his phone and informed that property had been stolen at his bar at Buseko. He rushed to Buseko market and found Kahilu Kapinda had a cut on the head. He also found that his property in the bar, such as the Juke box, a speaker, a DSTV Decoder and a Television Set were missing. If he saw the property that was stolen from him, he would be able to identify it. The TV set was a Royal by make and it was black and silver, the DSTV Decoder was black. PW2 further described the juke box as having been green in colour while the amplifier had black capacitors as well as a blue transformer which was white on top.

PW2 was shown some items. He identified a television set, Royal by make, which was black and silver in colour and stated it was stolen from his bar when Kahilu was attacked and robbed. The television set was marked ID2 for purposes of identification. He further identified an amplifier which had a blue transformer. It was marked ID3. The DSTV Decoder was not recovered. PW2

was shown a speaker before he could describe it. The Learned Defence Counsel raised an objection that the same was not properly placed before the witness as no proper ground was laid. As such, the speaker was not identified by PW2. PW2 was not cross-examined.

PW3, Ackim Zulu, aged 39 years, gave sworn evidence that on the 13<sup>th</sup> of December 2014, while he was at Chifundo Market, a young man approached him and offered him a transformer and a juke box for sale. The price was K150. PW3 bought the items and the man left. However, two weeks later, he returned with the Police and they wanted to know what he bought from the young man. PW3 explained that he bought a transformer and a juke box. Upon being told that they were stolen items, PW3 handed them over to the Police.

PW3 stated that the person who sold him the items was found at Buseko Market and if he saw him again, he would identify him. He looked around the court room and identified Accused Two as the person who sold him the said stolen items. PW3 stated, that the juke box had a green plastic, while the transformer has copper wires. PW3 was shown some items. He identified a transformer and showed the court the identifying feature, this

being a green card. He further stated that he bought the juke box in December, 2014.

In cross-examination, PW3 stated that he told the Police that the seller of the items was unknown to him. However, PW3's statement was read to him, in which he stated that he knew Sepiso Nasilele, the person who sold him the transformer and the juke box. An elderly man who was present when PW3 bought the items. PW3 stated that the Police apprehended him and remanded him in custody for three days. He was later released because he gave the Police honest answers. He merely bought the items from Accused Two. He led the Police to the recovery of the items that he brought from the PW3.

In re-examination, PW3 stated that he came to know the name of the accused person who sold him the stolen items at the time of his apprehension. The person is Sepiso Nasilele, Accused Two. He was a familiar person as he was found in Buseko market.

PW4, Ernest Kalasa, Detective Constable whose Service Number was 35789, gave sworn evidence that on the 7<sup>th</sup> of January, 2015, he was assigned a docket. He commenced investigations and interviewed the suspect who was already in custody, One

Sepiso Nasilele. He led PW4 to his friend, Sandras Musonda, within George Compound. He led PW4 to the said Sandras's house by walking to the house after giving the taxi driver who drove them there directions. Sandras was then apprehended. At Sandras's house, PW4 recovered a television set and it was taken to the Police Post. The two accused persons later led PW4 to a shop in Buseko where an amplifier for a juke box and a speaker were recovered.

PW4 stated that the following day, the two suspects led him to Buseko market and showed him how they broke into the shop. PW4 then charged and arrested the two accused persons for the offence of Aggravated Robbery. Under warn and caution in Nyanja, both accused persons gave free and voluntary replies denying the charge. Of the items that were stolen, the TV set was recovered. A spare part for the juke box and the amplifier was also recovered. The TV set was a 14 inch, which was black and silver in colour.

PW4 stated that he recovered the television set from Sandras's house and he recovered the amplifier for the juke box from Ackim Zulu. PW4 applied to admit the TV set, **ID2**, the amplifier, ID3 and the speaker, ID4 in support of the Prosecution's case. The

TV set was admitted into evidence and marked exhibit P2, the amplifier was also admitted and was marked exhibit P3. The speaker, on the other hand, was not admitted into evidence because it was not properly identified by the said owner, PW2. PW4 stated that PW1 was attacked brutally and robbed while he was at PW2's bar. He was issued with a medical report and was taken to George Clinic for treatment. He described the medical report, which he said was in the name of Kahilu Kapinda, had a date stamps and a Zambia Police logo. PW4 was shown an item. He identified it as the medical report that was issued to PW1. He showed the court the identifying features. The medical report was subsequently admitted into evidence and was marked exhibit P1. PW4 also identified Sepiso Nasilele and Sandras Musonda as the people that he arrested for the subject offence.

In cross-examination, PW4 stated that he apprehended Sandras when he was led to his home by Sepiso Nasilele, his co-accused. Both accused persons led him to Ackim Zulu's shop. The speaker was recovered at a shop that was next to Ackim Zulu's shop.



Accused Two therefore connected Accused one to the offence. PW4 admitted that Ackim Zulu was suspected of stealing because the amplifier was found with him.

When the two accused persons led him to the scene, they showed PW4 how they broke the door of the bar using iron bars. The medical report, exhibit P1 shows that force was used when Kahilu Kapinda was beaten up during the robbery. PW4 could not establish the identity of the owner of the shop where the speaker was recovered.

In re-examination, PW4 stated that he was led to Ackim's shop by the two accused persons. This was the close of the case for the Prosecution. The Learned Defence Counsel, Mr. Cheelo filed written submissions at case to answer stage. Mr. Cheelo submitted that Accused One was only connected to the offence on the evidence of PW4 and that of his co-accused, Accused Two. Mr. Cheelo, cited the case of **SHAMWANA AND SEVEN OTHERS VS. THE PEOPLE<sup>1</sup> (1980) ZR 81** and urged the court to acquit Accused One, on the ground that the Prosecution had failed to establish a prima facie case against him.

Mr. Cheelo submitted that Accused Two led the Police to the recovery of the stolen items in the company of the arresting officer. However, the said officer states that he went to recover the stolen items in the company of both accused persons. This piece of evidence, Mr. Cheelo submitted, creates a doubt which should result in the court finding in favour of the Accused. Mr. Cheelo cited the case of **WYNTER MAKOWELA VS. THE PEOPLE<sup>2</sup> (1979) ZR 290** where the High Court held that where the Prosecution evidence is found to be manifestly unreliable, it is mandatory for the court to acquit the accused at the case to answer stage

Mr. Cheelo further cited the case of **The People vs. Njapau<sup>3</sup> (1967) ZR 95**, and urged the court to acquit the two accused persons because the Prosecution had failed to link the two accused persons to the commission of the offence.

The two accused persons were found with a case to answer and were accordingly put on their Defence. The First Accused, Sandras Musonda, elected to remain silent did not call any witnesses. The Second Accused, Sepiso Nasilele gave sworn evidence and did not call any witnesses.

Sepiso Nasilele, Accused Two, gave sworn evidence to the effect that a friend of his one Ben gave him the items which he was later told were stolen, to sell. He carried the amplifier and the speaker and he sold the items on behalf of his friend. He gave the money to the friend on whose behalf he sold the items and he was given K50. He led the Police to Ben's place but they did not find him. The items were taken to him on the 24<sup>th</sup> of December, 2014. His co-accused got the TV and Accused Two managed to sell the other items on behalf of Ben.

In cross-examination, Accused Two stated that he told the Police that the items were not his and he went to Ben's home with the Police but they did not find him there. Ben ran away after he heard that the Police were looking for him. Accused Two stated that he sold the amplifier and the speaker. Ben sold the TV set to his co-accused.

On the 19<sup>th</sup> of December, 2014, Accused Two was asleep at home. Ben found him at home and asked him to sell the items on his behalf. This was the close of the case for the Defence.

The Learned State Advocate, Ms. Chanda filed Final Submissions on behalf of the Prosecution. Ms. Chanda submitted that the

evidence against Accused One is that he had recent possession of the Television set that was stolen. He opted to remain silent. Ms. Chanda cited the case of **Simutenda vs. The People<sup>4</sup> (1975) ZR 294** where the court held that -

*“There is no obligation on an accused person to give evidence, but where an accused person does not give evidence, a court cannot speculate as to the possible explanations for the event in question. The court’s duty is to draw a proper inference from the evidence before it.”*

Ms. Chanda also cited the case of **George Nswana vs. The People<sup>5</sup> (1988-89) ZR 174 SC**, where the court held inter alia 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 reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of possibility that the person in recent possession himself obtained them and committed the offence.”*

Ms. Chanda submitted that since Accused One failed to inform the Police how he acquired the television set, the only conclusion that the court can reach is that he was one of the robbers. Regarding Accused Two, Ms. Chanda submitted that he led the Police, including PW4, to the recovery of some of the items that were stolen. He further led the Police to Accused One who was found in possession of the Television Set. Ms. Chanda submitted that it is an odd coincidence that Accused Two led the Police to Accused One's house where the TV set was recovered. The two accused persons also led the Police to the market where the speaker was recovered. **Ms. Chanda cited the case of Machipisa Kombe vs. The People<sup>6</sup>, SCZ Judgment Number 27 of 2009** where the court held that -

***“odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account.”***

Ms. Chanda submitted that Accused Two's conduct, who led to the recovery of the stolen items constitute the something more that the court referred to in the **Machipisa** case. Accused Two led the Police to the recovery of the Amplifier from PW3. Both accused persons led the Police to the recovery of the speaker.

Ms. Chanda further cited the case of **Bright Katontoka Mambwe vs. The People**<sup>7</sup> **SCZ Judgment Number 8 of 2014**, Appeal Number 113 of 2012 where the court held that -

***“the doctrine of common purpose, common design or joint enterprises refers to a common purpose which results in the commission of a crime.”***

The Learned State Advocate submitted that the two accused persons acted with common purpose to stab and cause injury to anyone who would resist or attempt to interfere with their commission of the offence. Ms. Chanda submitted that the Prosecution had proved its case against the two accused persons beyond all reasonable doubt and urged the court to convict the two accused persons as charged.

Section 294(1) of the Penal Code, Cap 87 of the Laws of Zambia under which the two accused persons stand charged provides that-

“ Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any

person or property to obtain or retain the thing stolen, or to prevent or overcome resistance as 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), shall be sentenced to imprisonment for a period of not less than fifteen years.

In the present case, there is no direct evidence against the two accused persons. Kahilu Kapinda the person who was robbed from the bar stated that he was hacked with an iron bar on his head during the robbery and could not identify his assailants. This was on the 19<sup>th</sup> of December, 2014. The evidence against Accused Two was led from PW3 who stated that he bought a transformer from Accused two at Market in December, 2014. He paid Accused Two K150 for the items he bought. Two weeks later, Accused Two went back to PW3 in the company of the Police and they recovered the transformer and the juke box from him. The amplifier, P2 was identified by PW2, the owner as one of the items that was stolen from PW1, Kahilu who was robbed at the bar on the 19<sup>th</sup> of December, 2014.

In the case of **Mwewa Murono vs. The People<sup>8</sup> (2004) ZR 207**, the Supreme Court stated that-

**“In criminal cases, the rule is that the legal burden of proving every element of the offence, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.”**

The evidence on record is that both accused persons were implicated or found with property that was robbed from PW1 in a bar at Buseko a few days earlier. The evidence on record is mainly circumstantial and hinges on the doctrine of recent possession is not in dispute that Accused one was found with the Television set that was stolen from the Pa Nyirenda bar during the robbery. PW4 recovered the Television set from Accused One after was led there by Accused Two.

It is also not in dispute that Accused One and Accused Two later led PW4 to a shop in Buseko market where for a juke box and a speaker were recovered. PW2 identified the Television Set and the property that was from his shop when his worker Kahilu was attacked and robbed on the material night.

It is not in dispute that PW3 testified that Accused Two sold a transformer and a juke box to him for K150. Accused Two later



led PW4 to his shop where the transformer and juke box were recovered.

From the evidence on record highlighted above Accused One was found in possession of PW2's Television set while Accused Two was found in possession of the transformer and the juke box. In the case of **George Nswana vs. The People**<sup>9</sup> (1988-89) ZR 174, 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 changes hands in the meantime and the consequent high degree of probability that the person in recent possession obtain them and committed the offence during which they were criminally obtained.”**

Accused One did not offer any explanation on how he came to be in possession of the stolen Television Set. He elected to remain silent, which is his constitutional right. However, as was held by the Supreme Court in the case of **Simutenda vs. The People**<sup>10</sup>, an accused person who does not give evidence allows the court to make a proper inference on the evidence before it as the court

cannot speculate on the possible events of how he came to be in possession of the Television Set a few days after the robbery at the Nyirenda bar.

Accused Two, on the other hand stated that he was given the stolen items to sell by his friend Ben. After the sales, Accused Two gave Ben the money and he then gave him K50 as his share of the proceeds of the sale.

PW4 stated that both accused person led him to the recovery of the amplifier and the juke box in Buseko market. This was from PW3 who was at his shop. Accused Two gave an explanation about how he came to be in possession of the stolen items, that he got them from his friend Ben. However, the question that begs an answer is why did Accused Two not lead the Police to Ben who gave him the stolen items to sell?

PW4 testified that Accused One and Two led him to Buseko market and showed him how they broke into PW2's shop and stole the property therein.

In the case of **LI Shu vs. R (1989) AC 145-281<sup>11</sup>**, **The Privy Council** observed that-

**“The truth is that if an accused person has himself voluntarily agreed to demonstrate how he committed a crime, it is very much more difficult for him to escape from the visual record of his confession than it is to challenge an oral confession when suggestion that he was misunderstood for misrecorded or had words put in his mouth.”**

The evidence against both accused person is that of being in possession of stolen property that was robbed from Kahilu at Pa Nyirenda Bar a few days after the robbery. Both accused persons failed to account for their possession of the stolen property. Accused One remained silent while Accused Two gave an explanation, that he got the goods from Ben but failed to lead the Police to Ben. I find that the Accused Two's explanation is not reasonable in the circumstances. Accused One elected to remain silent in the face of overwhelming evidence against him.

The case against the two accused persons is fortified by the evidence of PW4 who stated that they led him to Pa Nyirenda bar and demonstrated how they broke into the bar and carried out the robbery. I accept the evidence of PW4, that the two accused persons led him to Pa Nyirenda bar and demonstrated how they conducted the robbery. No doubt, PW4's testimony of the

evidence of leading and demonstrating how they robbery was carried out places the accused persons at the scene of the robbery. If the accused persons merely came in possession of the stolen goods later, how did they manage to lead PW4 to the bar and demonstrate how they staged the robbery? I find that this is because they were the ones who robbed PW1 of the goods in the bar and later sold some to PW3 and others in Buseko Market. As was held in the case of **David Zulu vs. The People**<sup>12</sup> (1977) **ZR(S) (SC)**, the circumstantial evidence has taken this case out of the realm of conjecture to attain a degree of cogency and I find that the inference of guilt is the only reasonable inference that can be drawn in this case.

I am therefore satisfied that the Prosecution has proved its case against Accused One and Accused Two beyond all reasonable doubt. I accordingly convict Musonda Yankonde Sandras and Sepiso Nasilele of the offence of Aggravated Robbery as charged.

**Delivered this 24<sup>th</sup> day of June, 2015.**



**P.C.M. NGULUBE**  
**HIGH COURT JUDGE**