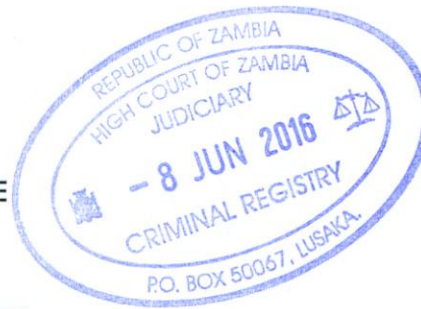


IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/66/2016

BETWEEN:

THE PEOPLE
V
NOAH NG'ANDU



Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the People: M. Chanda, State Advocate, National Prosecution Authority

For the Respondent: K Muzenga, Deputy Director, Legal Aid Board

JUDGMENT

Cases referred to:

1. George Lipepo and Others v. The People SCZ No. 20 of 2014
2. Peter Yotamu Haamenda v. The People (1977) Z.R. 184
3. Nzala v. The People (1976) Z.R. 221

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia

Noah Ng'andu, the accused person, stands charged with one count of the offence of Aggravated Robbery contrary to **Section 294(1) of the Penal Code**. The particulars of offence allege that on 2nd July 2015, at Lusaka in the Lusaka District of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed

with firearms stole K51,000 from Peng Kun the property of Shangdong Degin Construction Company and immediately before or immediately after stealing did use or threaten to use actual violence to the said Peng Kun in order to obtain or retain or prevent or overcome resistance to the money being stolen. When called upon to plead, he denied the charge and the matter proceeded to trial. Five prosecution witnesses were called in support of the charge.

Noah Njobvu was the first prosecution witness (Pw1). His evidence was that on 2nd July 2015, between 08:00 and 09:00 in the morning, he was on duty at the Shangdong Degin Construction Company premises when he heard the hooter of a motor vehicle at the gate. He opened the gate and found two men in blue uniforms. They told him that they were from the council and wanted to see his boss. He allowed them to enter the yard.

The motor vehicle was a white Mazda with a canopy and tinted windows. Two men came out whilst others remained in it. As he took them to the office, he was hit on the back and everyone in office was ordered to lie down at gun point. He could not identify them because he was made to lie down. He did not see what was happening but heard them demanding for money. They subsequently left and the whole incident

took about 15 minutes. He identified a Mazda, Exhibit P1 as being the motor vehicle that the robbers used.

When he was cross-examined, Pw1 admitted that there many Mazdas but maintained that Exhibit P1 was the motor vehicle that he saw. He admitted that motor vehicles are distinguished by number plates and he did not pay attention to the spot lights it had. He was still working for the same employer and denied being told what to say. He confirmed that a statement was recorded from him by the police and it was read back to him. He recalled telling the police that he could identify the suspects but was not taken to the identification parade at the police station. Pw1's statement was admitted into evidence as Exhibit P2.

Peng Kun was the second prosecution witness (Pw2). His testimony was that on 2nd July 2015, around 08:00, he was sitting in his office in Kabulonga when a stranger came in. He asked him who he was but in no time others entered with an AK 47 rifle. All his colleagues in the meeting room were ordered to lie down and he joined them. The other director, Mr. Wang who was in another office, was brought into the meeting room.

Thereafter, they took him, Miss Laura and Mr. Wang to his office where they opened the safe in which there were two boxes and cheques. They got K41, 000.00 from the big box and about U\$D2, 000 from the smaller box. They left after getting the money and the robbery lasted for about 20 minutes. He could not identify the robbers. The total value of the money that was stolen was K52, 000.00.

When he was cross-examined, Pw2 said the robbery was quick and he was very scared. He saw Laura and she was very scared as well. He did not see Sofia during the robbery but she told him afterwards that she was beaten on the chest.

Sofia Ilunga was the third prosecution witness (Pw3). Her evidence was that on 2nd July 2015, she reported for work around 07:30. As she was arranging for water to put in the washing machine, she found a white motor vehicle with a canopy and tinted windows. She also found a man she thought was waiting for the offices to be opened. For about 10 minutes, she stared into the face of the stranger. When she entered the building, she found all the people lying on the ground.

The people inside the building were Pw1, William, Madam Laura, Mr. Chris and Mr. Wang. Pw1 gestured her to go out and as she was

retreating she was pushed by a person she did not see. Madam Laura was dragged and they threatened to kill her if she did not show them where the money was. Mr. Yung told them not to kill anyone because they would give them all the money they had. They went to William's office.

She later heard the motor vehicle speed off. Thereafter, Pw3, Mr. Noah and Mr. Wang went to Woodlands Police Station to report. She did not see the robbers but only managed to see the one who was outside. She stated that the motor vehicle was recovered and they were called to Central Police Station and she managed to identify it.

On 13th August 2015, she was called to an identification parade at Central Police Station where 10 men were lined up. She was able to identify the person who was standing by the car and she spent about 10 minutes with him. She could not tell how long it took from time she saw the accused person up until they left.

Under cross-examination, Pw3 admitted seeing the accused person for the first time on the day of the robbery. She maintained that they looked at each other for about 10 minutes without saying anything. They were about 5 to 7 metres apart and she did not know whether or not he saw her but they faced each other. He was standing still and

she did not think that he was a robber. She thought that he was waiting to go into the office and that he had not been attended to because the back door was not open but she did not ask him. She told the police officers that she observed the accused person for about 10 minutes. Even though she remembered telling the police that they had looked at each other, she admitted that 10 minutes duration was not recorded in her statement that was admitted into evidence as Exhibit P3. She also maintained that she told the police that she saw a white motor vehicle with tinted windows.

Though she told the police that she could identify the person she saw, she admitted not giving them his description. She admitted that the accused person can easily be identified by his big nose. She denied seeing the accused person in a room before the identification parade. She did not enter any room when she was called to the police station for the parade and they did not give her his description before the parade.

When she was re-examined, Pw3 said that she was looking for a hose pipe when she saw a man standing near a motor vehicle. She told the police that the person she saw was of medium height and dark in complexion. She also told them that she could identify him if she saw

him. She denied being assisted by the police to identify the accused person.

The fourth prosecution witness was Detective Inspector Charles Tembo (Pw4). His evidence was that on 13th August 2015, he conducted an identification parade at Lusaka Division Headquarters. The parade started at 12:16 hours and ended at 12:30 hours. The people on the parade were of the same height and same physical appearances. There were about 12 people on the parade and he explained to the accused person his rights before the parade. He informed him that he had the right to change his position and clothes.

Sofia Ilunga, Pw3, was the only witness and she identified the accused person. He was on position number 7 from the right to the left. The people on the parade also changed positions before the witness identified anyone. There was no complaint from the accused person after the parade.

When he was cross-examined, Pw4 maintained that he was present during the parade and was the one in charge of it. He admitted not indicating in his report that he conducted the parade. He also maintained that there were 12 people on the parade. He said Detective Constable Victor

Shamango took photographs. He did not give the people on the parade the opportunity to change their clothes because the witness only identified once. He did not remember the witness being taken to the office before the parade. That the parade was from 12:16 to 12:30 hours but according to the report it was from 12:16 to 12:20 hours.

When he was re-examined, Pw4 said he is the one who conducted the identification parade and he paraded 12 people. He informed the persons on it the parade their rights including the right to complain and the parade took about 14 minutes. He told the accused person his rights before the parade and not after.

Constable Victor Shamango was the fifth prosecution witness (Pw5). His evidence was on that on 13th August 2013, he was on duty and was assigned to take photographs of an identification parade for an Aggravated Robbery case. There were 9 male persons on the parade and before it commenced, he informed told them of their rights. It included the right to change positions if they wanted.

Sofia Ilunga, Pw3, identified the accused person who was on position number 7 from right to left and he took three photographs. The parade

started at 12:16 and ended at 12:20 hours. The photographs were compiled into an album which was admitted into evidence as Exhibit P4.

When he was cross-examined, Pw5 said Pw4's evidence that there were 12 people on the parade was not true. He heard Pw4 tell the men on the parade their rights which included the right to change position, clothes and to complain. They changed position before the witness was called.

The arresting officer, Detective Sergeant Joseph Simuchembu was the sixth prosecution witness (Pw6). His evidence was that on 2nd July 2015, he was assigned to investigate a case of an aggravated robbery in which Peng Kun was the complainant. The report was that 5 armed criminals attacked him and stole K51, 000.00. During the robbery, the CCTV was disabled.

It was also his evidence that the witnesses reported that the robbers were driving a white Mazda with a canopy but its registration number was not known. Pw3 told him that she could identify some of the robbers. He received information from his informers that one of the robbers stayed in John Laing Compound. The informer led him to the accused person's house in John Laing and to where the motor vehicle

was parked on the 14th July 2015. It was parked in a car park with vehicles which were immobile.

The following day, they apprehended the accused person and when he was asked him if he owned a motor vehicle, he refused. He searched the house and found a single key underneath a Bible. He questioned him about the key and asked him where the motor vehicle was parked. The accused person led him to a car park and thereafter they took him to the police station where he was locked up. After the identification parade, he interviewed the accused person on the robbery but he expressed ignorance. He was asked if he had given anyone his motor vehicle at the material time but he refused.

He produced both the motor vehicle and the warn and caution statement in which admitted into evidence as exhibit P1 and P5 respectively.

Under cross-examination, Pw6 said he found the motor vehicle in the car park but he did not establish where the accused person always parked it. He did not talk to the owner of the car park nor look at the register of the car park. They went to the car park between 05:00 and 06:00 and found a number of vehicles parked there. He spoke to the guard but did not get any statement from him. They went there 13 days

after the robbery. They and did not find any money in the accused person's house. He confirmed that in Exhibit P3, Pw3 did not indicate that she was able to identify the accused person. The Accused person did not tell him that he had travelled to the Copperbelt or show him the receipts exhibits D1 and D2. Had it been the case, he would have made a follow up from the receipt book. He was not aware of the accused person's frequent visits to Kapiri Mposhi.

At the close of the prosecution's case, I found that a prima facie case had been made against the accused person and I placed him on his defence. He elected to give evidence on oath and did not call any witness.

In his defence, the accused person's evidence was that on 15th July 2015, around 05:30 hours, he heard a knock and people started breaking windows. When he opened the door, he found more than eight police officers and they told him to hand over the gun. He allowed them to enter his house and search for the gun but they did not find it. When they found the car keys he told them that the car was at the car park.

It was also his evidence that the police officers got a 13 inch Plasma TV, plates and both his old and new driver's licences. They then

proceeded to the car park where there they collected his motor vehicle. From there they went to the police station where they detained him and his wife in police cells. They later questioned him about some motor vehicles in Chelston. He was also asked on what he used to do went to do in Kapiri Mposhi and he told them that he had a field there. His wife was released after paying money.

He was kept in cells for unknown reasons and on 13th August he was called to the flying squad office where he found Pw3 seated looking at pictures. When she saw him, she was asked to go outside. They started showing him pictures of dead people and told him that they would kill him because they had information that he had motor vehicles in Chelston. He was taken back to the cells and 10 minutes later Pw4 took him to an identification parade where Pw3 identified him. He complained about it. He then told them that the parade was unfair because it was arranged. He added that there was no parading officer but only the photographer. PW4 was not present at the parade. He did not know anything about the charge and only heard about it in Court.

Further, on 28th June 2015, he received a call that his uncle had passed away so he started off to Ndola. He stayed there for seven days and returned on 7th July 2015. He told the police that he was not

around at the time of the robbery but they told him that the information was irrelevant. He also showed them the tickets which he produced in court as Exhibits D1 and D2.

When he cross-examined, the accused person said he told the police that he had gone to Ndola for a funeral for his late uncle Richard Sakala. He remembered making a statement to the police but cannot recall if it was reduced into writing. He admitted that there were many people at the funeral and if he was given time he could call some people. He admitted that it was possible for one to go to Ndola and return on the same day. He maintained that he was in Ndola. He said he did not know that one could buy a receipt from a bus conductor.

In relation to the motor vehicle, he said it was not used in the robbery because if it had, the witnesses would have mentioned the registration number. He admitted that it was strange that he was identified and had a white car. He said he was identified because Pw3 saw his picture which was collected from his house in an office at the police station. He maintained that Pw4 was not present at the parade even though Pw5 said that he was.

When he was re-examined, the accused person said on 2nd July 2015, he was in Ndola for a funeral. He was there from the 29th of June 2015 up to the 7th of July, 2015.

Submitting on behalf of the People, counsel pointed out that the evidence linking the accused person to the commission of the offence was that of a single identifying witness Sofia Ilunga, Pw3. It was submitted that her evidence was reliable because she had the opportunity to positively identify the accused person; reference was made to the cases of **George Lipepo and Others v The People (1)** and **Peter Yotamu Haamenda v The People (2)**. In addition, it was submitted that the fact that the accused person owned a white Mazda with a canopy and tinted windows, a motor vehicle identified by Pw1 and Pw3 as being the one that was used by the robbers, was an odd coincidence which supported the identification evidence.

As regard the alibi, it was submitted that at the time of apprehension, the accused person did not raise any alibi thus the arresting officer did not investigate it; reference was made to the case of **Nzala v The People (3)**. It was then submitted that Exhibits D1 and D2 were an afterthought and a mere fabrication.

I am indebted to the counsels for their submissions and I have taken them into account in arriving at my decision.

The offence of Aggravated Robbery is set out in **Section 294(1)** of the Penal Code, it 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 to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years.”

From the evidence before me, I find that it is not in dispute that on 2nd July 2015, Pen Kun was robbed of K51,000 from his office in Kabulonga. It is also not in dispute that the robbers went to his office in a white motor vehicle with a tinted windows and a canopy.

What is disputed is whether the accused person was one of the robbers. The evidence implicating him is that provided by Pw3. Her evidence was is that she saw him outside the office on the day of the robbery standing near a white motor vehicle which was carrying the robbers. There was also evidence from Pw6 the white motor vehicle, Exhibit P1

which Pw1 saw at the scene of the robbery, was recovered from the accused person. The accused person's position is that he was not in Lusaka at the time of the robbery. He submitted two bus tickets indicating that he travelled days before the robbery and also returned days later.

Pw6's evidence, which is confirmed by the accused person's warn and caution statement (Exhibit P5) that was admitted without objection, was that the accused person did not tell him that he had travelled to the Copperbelt at the time of the robbery. I accept the prosecution's submission that the accused person's claim that he travelled to Ndola was an afterthought because it was only raised in court when the accused person was giving his defence. It was not raised when he was initially interviewed. Consequently, I find that the receipts he submitted in court are either forged or were used by someone other than himself. They are of no evidential value to the accused person's defence.

Pw3's evidence is that she identified the accused person because she spent 10 minutes with him. The circumstances were friendly in that she was not threatened but believed that he was one of their customers.

The accused person's evidence is that she was assisted to identify him.

His evidence is unclear on whether they showed her photographs or deliberately exposed her to him. Pw3 denied being exposed to the accused person and I accept her evidence as being truthful. This being the case, I find his claim that he was exposed not to be true and I dismiss it.

I note that Pw3 did not give a description of the accused person in her statement to the police notwithstanding, I find that the 10 minutes she spent with the accused person under circumstances that were not threatening or intimidating, gave her sufficient opportunity to identify him. It was in the morning and she had the opportunity to identifying him. The evidence of this single identifying witness is supported by the evidence of recovery of the motor vehicle from the accused person.

The evidence of both Pw1 and Pw3 is that they saw Exhibit P1 at the scene of the robbery. Though the witnesses did not see the number plate of the motor vehicle that the robbers were using, they are agreed that it was white with a canopy and tinted windows. It would

too much of a coincidence that the robbers were using a Mazda with a canopy and tinted windows and the accused person who was seen at the scene is found with a similar motor vehicle. I find that the recovery of the motor vehicle from the accused person by Pw6 corroborates Pw3's identification evidence.

Sections 21 of the Penal Code provides as follows:

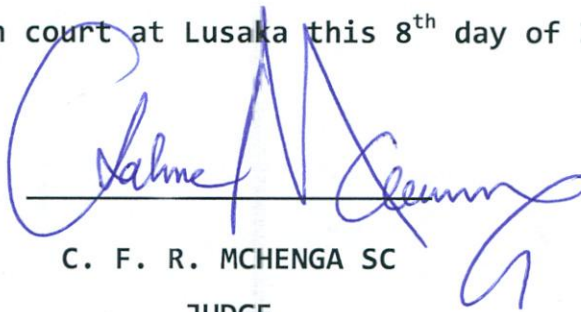
(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

- (a) every person who actually does the act or makes the omission which constitutes the offence;*
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
- (c) every person who aids or abets another person in committing the offence;*
- (d) any person who counsels or procures any other person to commit the offence.*

Though no witness identified the accused person as being one of the persons who threatened Pw2 and got the money from him, I have no doubt that he was aware of what his colleagues had gone to do at the premises. They went there in execution of a common purpose, namely to steal using force. Though particulars indicate that they were armed with firearms, there is no evidence that what the robbers were carrying were firearms.

Consequently, I find that though the prosecution has not proved that the accused person and his colleagues were armed with a firearm, the evidence has proved that jointly and whilst acting together with other persons unknown, they stole K51,000 from Peng Kun the property of Shangdong Degin Construction Company. At or immediately before stealing the money, they threatened to use violence to the said Peng Kun in order to obtain the money. I convict him of the offence of aggravated robbery contrary to Section 294(1) of the Penal Code.

Delivered in open court at Lusaka this 8th day of June, 2016

A handwritten signature in blue ink, appearing to read 'C. F. R. Mchenga', is written over a horizontal line. The signature is stylized and includes a large flourish on the right side.

C. F. R. MCHENGA SC
JUDGE