

IN THE HIGH COURT FOR ZAMBIA

HOLDEN AT LUSAKA

(Criminal jurisdiction)

BETWEEN:



HP/69/2016

THE PEOPLE

V

DANIEL NTULISHA AND ALICK MUNAMONGA

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

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## JUDGMENT

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Cases referred to:

1. Chimbini v The People Z.R. [1973] 179
2. Tobias Kambenja v The People App No. 157/2009 Judgment No22 of 2014
3. George Lipepo and 3 Others v The People Judgement No. 20 of 2014
4. Bright Katonka Mambwe v The People Judgement No.8 od 2014
5. Yoani Manongo v The People [1981] Z.R. 152
6. Dorothy Mutale and Richard Phiri v The People (1997) S.J. 51

Legislation referred to:

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

Daniel Ntulisha, the 1<sup>st</sup> accused person and Alick Munamonga, the 2<sup>nd</sup> accused person, stand charged with one count of the offence of Aggravated Robbery contrary to **Section 294 (1) of the Penal Code**. The particulars of the offence allege that on 4<sup>th</sup> October 2015, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together stole from Angel Mboela a cell phone and K1,480.00 cash both valued at K1,680.00 the property of Angel Mboela and at or immediately before or immediately after stealing used or threaten to use actual violence to the said Angel Mboela, in order to obtain or retain the said property or prevent or overcome resistance to its being stolen. When called upon to plead, they denied the charge and the matter proceeded to trial. Three prosecution witnesses were called.

Angel Mboela was the first prosecution witness (Pw1). His evidence was that on 4<sup>th</sup> October 2015, between 2100 and 2200 hours, while on his way home, he entered one of the bars in Kanyama Compound to relieve himself. As he was about to leave, some young men blocked the way out claiming that one of them had lost a wallet. They demanded that all of those leaving empty their pockets and he surrendered his phone and money.

He also testified that the young men were four in number. One of them was huge, another was medium sized and light in complexion whilst the other two were short. The 1<sup>st</sup> accused person was one of the four and was wearing a camouflaged trousers and a T-shirt. He also had an identification tag that made him believe he was a police officer.

There was bright light from a bulb at the place where they were searched. They were made to sit under a tree and the whole incident lasted about 20 minutes. When he asked them to return his phone, they said he was very stubborn and begun to beat him. They put him at back of a motor vehicle and drove to Makeni whilst they were beating him. At some point, they hit him with an iron bar and he passed out. When he re-gained consciousness, he found that they had dumped him.

The following day, he reported the incident to Kanyama Police Station. He was given a medical report which he took to Kanyama Clinic where he was examined by a doctor. When he took it back to the police station, he saw the two accused persons being removed from the police cells. He informed the police officers they were the people who attacked him. He knew the 1<sup>st</sup> accused person because he used to see him in Kanyama and his nickname was Baba. He had known him for about five years.



Under cross-examination, Pw1 said a phone was taken away from him during the attack. In his statement to the police he did not mention losing money because he was not asked about it. The identification card the 1<sup>st</sup> accused person had was similar to those taxi drivers carry. Since he was at a distance, he could not give the details of the information that was on the card. His phone was not recovered and he did not know the phone number because he had just bought it.

Further, he said they used a taxi to carry him away but he did not see its registration number. He has known the 1<sup>st</sup> accused person for some time, he is a taxi driver and they used to see each other. On the day of the robbery, he pretended to be a police officer. He did not tell him that he had recognised him due to fear of being killed. He maintained that 2<sup>nd</sup> accused person was light in complexion. He went to the police station the day after the robbery and found the accused persons. He denied the suggestion that they were pointed out to him by the arresting officer.

When he was re-examined, Pw1 said that the money stolen from him belonged to his employer.

The second prosecution witness was Kingsley Luneta (Pw2). His evidence was that on 3<sup>rd</sup> October 2015, around 2100 hours, as they were going home with Pw1, they entered a bar. When they were coming out, they found four young men at the gate who told them that they could not leave because their friend had lost his wallet. They were made to sit under a tree and the young men searched them. There was light at the place. He was not found with anything.

Pw1, who had a phone and money, was beaten because they said that he was stubborn. The young men then took him away. The 1<sup>st</sup> accused person was one of their assailants and he was carrying a plank. The 2<sup>nd</sup> accused person was also present. The incident lasted for between 5 to 7 minutes. The following day he went with Pw1 to Kanyama Police Station to report and Pw1 was issued with a medical report form.

On 5<sup>th</sup> October 2015, they took the medical report form to the police station when they saw the two accused persons being taken to an office. Pw1 told the police officers that the people who had attacked them were in that building. They then showed them to Constable Mwanza (Pw3). He said he first saw the accused persons on the day there were attacked.

When he was cross-examined, Pw2 said he works at a warehouse at City Market and so does Pw1. He confirmed that Pw1 had some money and a phone on him. He did not have Pw1's phone number because he did not own a phone at the time. He denied knowing the accused persons prior to the attack but he identified them at the police station when Pw1 showed them to him.

Detective Constable Shadreck Mwanza, the arresting officer, was the third prosecution witness (Pw3). His testimony was that on 4<sup>th</sup> October 2015, he was on duty and around 1000 hours he received a report from Pw1 that he was attacked and robbed of a Nokia cell phone and K1,480 by a group of criminals at a bar. He examined Pw1 and found that he had a cut across his right eye and a swollen right cheek. Pw1 told him that could identify some of the people who attacked him. He issued him with a medical report. Pw1 was unable to give him the phone number or serial number because he said he could not recall them.

The following day, on 5<sup>th</sup> October 2015, around 13:00 in the afternoon, he was on duty when Pw1 approached him and told him that he had seen two of the people who had attacked him. Pw1 led him to the CID office where he identified the two accused persons. He discovered that they were detained at Kanyama Police Station on a charge of robbery. He



interviewed them and decided to arrest them when they failed to give him a satisfactory answer. Under warn and caution statements in Nyanja they denied the charge. He discovered that they were detained on 4<sup>th</sup> October 2015 and were apprehended by Detective Inspector Musanje. The medical report was admitted into evidence as exhibit P1.

When he was cross-examined, Pw3 said he recorded a statement from Pw1 around 10:00 and he told him that he was able to recognize some of his assailants because he knew some of them but he did not mention their names. He did not mention that he had met them prior to the attack and he was not aware that he knew the 1<sup>st</sup> accused person as Baba. The accused persons were detained on 4<sup>th</sup> October 2015 and he established that they were taken into custody on 3<sup>rd</sup> October 2015 around 19:00 at Kanyama Police Station.

Pw1 identified them on 5<sup>th</sup> October 2015 and he is aware that the offence was committed on 4<sup>th</sup> October 2015, around 21:00. He denied the suggestion that they were in police custody at the time the offence was committed. He said the date and time of their arrest was recorded in the Occurrence Book. He denied searching the 2<sup>nd</sup> accused person's house or being privy to information that a search was conducted because the officers carried out the search on a different charge in

another matter. He said that it was not true that he got the accused persons from the police cells and asked Pw1 if they were his attackers.

Pw1 informed him that he lost a phone but he did not conduct a search because Pw1 could not remember the number that he was using.

When he was re-examined, Pw3 said that the accused persons were arrested on 4<sup>th</sup> October 2015 and the alleged robbery was committed on the same day around 21:00 hours. Cash amounting to K1,480 and a phone were stolen. They accused persons were arrested on the day of the robbery in the evening.

At the close of the prosecution's case, I found that a prima facie case had been made against both the accused persons on the charge indicated in the information. When I placed them on their defence, they both elected to give sworn evidence and did not call any witnesses.

The 1<sup>st</sup> accused person's evidence was that on 3<sup>rd</sup> October 2015, around 14:00, he took his motor vehicle to Masuko Market to have the exhaust pipe welded. Four police officers, who included Mr. Musanje and Pw3



came to where his motor vehicle was being welded. After explaining that they had followed him over a phone, they asked him to accompany them to the police station. He did and was detained in police cells. While in cells, he gave them the 2<sup>nd</sup> accused person's number and they called him to the police station over the same phone. The 2<sup>nd</sup> accused person got to the police station around 1800 hours and was detained.

They spent the night in police cells and the officer did not show up the following day. On the 5<sup>th</sup> of October around 10:00, he was taken out of the police cells and taken to the CID office where he was asked to pay some money. After he declined, he was taken him back and when they got to the reception, Pw3 asked Pw1 if the 1<sup>st</sup> accused person is the one who attacked him. Pw1 did not say anything. Twenty minutes later, Pw3 got him out of the cells and took him to the CID office where he found Pw1. Pw3 told Pw1 that it was the 1<sup>st</sup> accused person who attacked him. He took him back to the cells and collected the 2<sup>nd</sup> accused person. He does not know what happened where they took him.

He said he was in police cells on 4<sup>th</sup> October, 2015. He refused being known as Baba. He said Pw3 is the one who apprehended him.

Under cross-examination, the 1<sup>st</sup> accused person said he is known as Daniel and not Baba. He is a truck driver and works for Delia in Makeni Villa. He was apprehended on 3<sup>rd</sup> October 2015, at 14:00. He has known Pw3 since 2013 but were not friends. He maintained that at the reception and in the CID office, Pw3 pointed him out to Pw1.

The 2<sup>nd</sup> accused person's evidence was that on an unknown day, the 1<sup>st</sup> accused person gave him a phone as a surety for a K100 loan. A week later, on 3<sup>rd</sup> October 2015, around 18:00 hrs he received a call from Pw3 who asked him to go to the police station over the same phone. He took it to Kanyama Police station where he was detained in police cells.

The following day, on 5<sup>th</sup> October 2015, police officers went and searched his house. They collected household property and went back to the police station. They took the 1<sup>st</sup> accused person out of the cells but brought him back later. He was then taken to a place where he found Pw1. Pw1 was asked if he knew him. He said he could be one of the robbers because there was a light person in the group that attacked them. He said that he was in police cells on 4<sup>th</sup> October 2015.

Under cross-examination, the 2<sup>nd</sup> accused person said that he was beaten and he narrated the events to the lawyers but he could not recall when he told them. He maintained that Pw3 hired a truck to collect his household goods. He maintained that he was shown to Pw1.

When he was re-examined, he said that he did not see Pw2 at the police station and the first time he saw him was in Court.

Counsel representing the State filed in written submissions. She referred to the case of **Chimbini v The People (1)** and submitted that Pw1 had the opportunity to reliably identify the accused persons because they spent several minutes together. In the case of the 1<sup>st</sup> accused person, the identification evidence was even more credible because he knew him prior to the incident, reference was made to the case of **George Lipepo and 3 Others v The People (2)**.

As regards the date when the accused person's were apprehended, counsel submitted that Pw3's evidence is that they were apprehended on 4<sup>th</sup> October 2015 while the robbery was on 3<sup>rd</sup> October 2015. She submitted that though Pw3 did not confirm the date of their arrest, dereliction of duty does not arise because there is overwhelming that they committed the offence and there is good evidence of



identification. Not only did Pw1 previously know the 1<sup>st</sup> accused person, he also had ample opportunity to see his assailants.

Finally, counsel referred to the case of **Bright Katontoka Mambwe v The People (3)** and submitted that since both accused person's were working together with the other robbers, they had a common purpose and they should be both held liable for the robbery.

I am indebted to counsel for her 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."*

On the evidence before me, I find that it is not in dispute that on 4<sup>th</sup> October 2015, Pw1 was robbed of a phone and K1,480 cash by a group of 4 men. It is also not in dispute that Pw1 suffered the injuries set

out in the medical report during the robbery. What is in issue is whether two accused people were part of the 4 robbers.

The evidence implicating them is their identification by Pw1 and Pw2. According to Pw1 and Pw2 they were attacked by a group that included the two accused persons. There was lighting at the place where the robbery took place and they spent some time with their assailants. In the case of the 1<sup>st</sup> accused person, Pw1 said he previously knew him as a taxi driver called Baba. The witnesses were able to recognise the accused persons when they saw them at the police station. The accused person's position is that they were deliberately exposed to both witnesses by Pw3. This is after they refused to pay the police after being detained over a phone that is not connected to this case.

First of all, I don't believe the accused persons claim that they were lumped with this charge after being detained in connection with a phone not linked to this case and refusing to pay a bribe. The 2<sup>nd</sup> accused person's evidence is that they actually ended up in court over the phone. I accept Pw3's evidence and find that that they were detained in connection with a different case which terminated after they appeared in court.

Since the money and the phone that was stolen from Pw1 were not recovered, the only evidence implicating the accused persons is the evidence of their identification at the police station. Counsel submitted that the quality of the identification was good because the 1<sup>st</sup> accused person was previously known to Pw1.

In the case of *Yoani Manongo v The People (4)*, it was held, *inter alia*, that:

*"The concept of honest mistake is normally associated with single identifying witness cases, but of course it is not inconceivable that in a case where there are more than one identifying witness, an honest mistake can be made."*

In this case, Pw1 told the court that he knew the 1<sup>st</sup> accused person as Baba. If this was the case, it is odd that he did not tell the police when he reported the incident that he had been attacked by Baba a person he had known for about 5 years. Even when he was giving his evidence, he indicated that he was dressed in a manner that made him appear like a policeman. How could a taxi driver who was well known to him have appeared like a policeman? It is my finding that the 1<sup>st</sup> accused person was not known to Pw1 prior to the robbery.

In the case of *Peter Lifunga Machilika v The People (5)*, a case in which the appellant had been convicted of the charge of rape, the Supreme Court held, *inter alia*, that:



*"once a complainant is shown to be untruthful in very material respects such as the use of violence her evidence can carry very little weight, since her evidence of rape cannot be separated from these allegations of violence".*

In this case, the identification evidence is crucial and I have found that Pw1 was not truthful when he claimed that he previously knew the 1<sup>st</sup> accused person. This being the case, the remainder of his identification evidence must be treated with caution.

The accused persons' defence is that on the day of the robbery they were in police cells. They were detained on 3<sup>rd</sup> October 2015 and the robbery was on 4<sup>th</sup> October 2015. The prosecution did not lead any evidence of when the accused persons were placed into police custody. The arresting officer's evidence is contradictory on when they were apprehended. He said they were taken into custody on 3<sup>rd</sup> October 2015, at Kanyama Police Station but when he was re-examined, he said they were taken into custody on the date of the robbery in the evening. According to Pw1, the robbery was between 2100 and 2200 hours. It follows that the precise time of their apprehension is crucial in this matter as there is no other evidence linking them to the offence other than the suspect identification evidence.

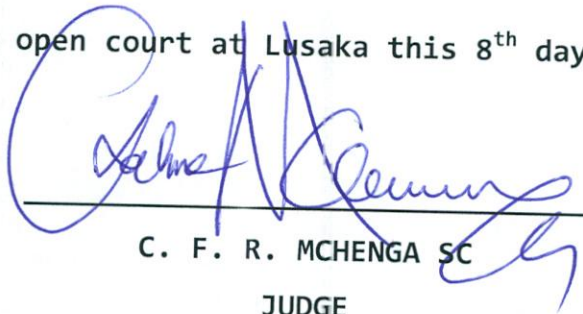
In the case of **Dorothy Mutale and Richard Phiri v The People (2)**, it was held that:

*"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference"*

The prosecution's failure to produce convincing evidence of the date and precise time at which the accused persons were apprehended, has seriously prejudiced their case. I have already indicated that the identification evidence is compromised. It cannot, in the circumstances, be said that there is overwhelming evidence that offsets their failure to lead apprehension evidence. Since it is possible that they were in custody when the offence was committed, and such inference is favourable to them, I am compelled to draw it.

There is doubt in my mind on where the accused person's were at the time of the robbery. Consequently, I find that the charge against them has not been proved beyond reasonable doubt and I acquit them.

Delivered in open court at Lusaka this 8<sup>th</sup> day of June, 2016



C. F. R. MCHENGA SC  
JUDGE