

**IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA**

HP/112/2077

(Criminal Jurisdiction)

BETWEEN:

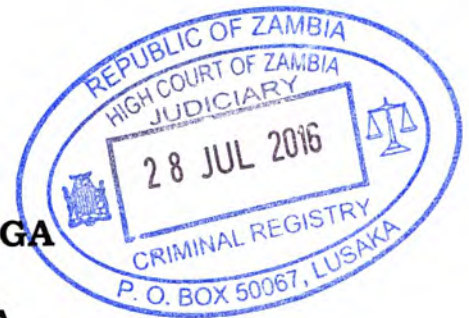
THE PEOPLE

AND

STEPHEN SAMUKONGA

JOE PETER BANDA

VICTOR MULENGA



Before the Hon Lady Justice Irene Zeko Mbewe

For the State : *Mrs. Kayombo Senior State Advocate*
For the Defence : *Mr. I Nyambe Legal Aid Counsel and*
Mr. H Mweemba Principal Legal Aid
Counsel

JUDGMENT

Cases Referred To:

1. *Mwewa Murolo v The People (2004) ZR 207.*
2. *Donald Fumbelo v The People SCZ Appeal No 476/2013*
3. *Bwalya v The People [1975] Z.R 125*

4. *Anayawa and Sinjambi v The People Appeal No 143/144 of 2011*
5. *Robertson Tembo v The People Appeal No 309 of 2015*
6. *Ernest Mwaba and Others v The People [1987] Z.R 19*
7. *Katebe v The People [1975] Z.R 113*
8. *Ilunga Kalaba and John Masesu v The People*

Legislation referred to:

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

The accused were charged with three counts of aggravated robbery contrary to Section 294(1) of the **Penal Code Chapter 87 of the Laws of Zambia**. The particulars of the offence were that the Accused, on the 7th day of November 2016 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 offensive weapons did steal Zosatav pistol, 8 rounds of ammunition, a head dress, wrist watch, techno cell phone and a Samsung cell phone altogether valued at K55,532.00 the property of **NOAH BANDA** and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to **NOAH BANDA** in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

The particulars of the offence in the second count are that on the 7th day of November 2016 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 offensive weapons did steal a Zasatav pistol, 8 rounds of ammunition, a head dress, wrist watch, techno cell phone and a Samsung cell phone altogether valued at K9,036.00 the property of **SIMON PHIRI** and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to **SIMON PHIRI** in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

The accused persons were charged with the third count of aggravated robbery. Particulars of the offence were that the Accused, on the 7th day of November 2016 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 offensive weapons did steal a wallet, and a car key all valued at K2,060.00 the property of **KEBBY PHIRI** and at or immediately before or immediately after the time of such stealing

did use or threatened to use actual violence to **KEBBY PHIRI** in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

The Accused persons denied the charge.

In a criminal case, I remind myself that the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of an Accused lies from beginning to end on the prosecution. The standard of proof is high, that is, one beyond reasonable doubt. Therefore, if I entertain any doubt as to the Accused person's guilt in this case I am required to resolve that doubt in favour of the Accused person and to acquit him. Instructive is the case of **Mwewa Muroho v The People¹ (2004) ZR 207**).

The Accused are charged with the offence of aggravated robbery pursuant to Section 294(1) of the **Penal Code, Cap 87 of the Laws of Zambia** which states as follows:

“294(1) Any person who, being armed with any offensive weapon 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”.

Section 264 of the **Penal Code** provides:

“264(1) Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.”

The definition of theft is given under section 265(1) of the Penal Code as follows:

“265(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or

fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if does so with any of the following intents, that is to say;

(a) an intent permanently to deprive the general or special owner of the thing of it”

In order for me to convict the Accused of the subject offence, I must be satisfied beyond reasonable doubt that the prosecution have proved every element of the offence as outlined in the foregoing legal provisions.

In support of their case, the prosecution called five witnesses whose evidence I now summarize.

PW1 was NOAH BANDA, the complainant, who testified that on 6th November 2016 whilst on duty, he was assigned to deal with the issue of encroachment on the land at Star Cottage belonging to the

Security Wing of the Government, Office of the President. The property has a training school and bare land which the Government intends to develop in the future. That as a result of encroachments on the said land, routine inspections were being carried out such as the one on the material day. **PW1** testified that he was in the company of Mr. Simon Banda another Officer and Kebby Phiri a nephew to **PW2**. As they were patrolling the area, they met a group of 7 people who inquired what the trio were doing there. **PW1** responded that they were checking on the wire that had been erected around the parameter of the land belonging to the Office of the President Training School. As they were coming back from the inspection, they noticed the same group of 7 people had increased to about 50-60 people and they were surrounded and were harassed by the same mob of people. That **A1** appeared to be the ringleader and **PW1**, **PW2** and **PW3** were told to sit on the ground and **PW1** refused as he together with **PW2** were in Police uniform. That someone in the mob then proposed that **PW1**, **PW2** and **PW3** be taken to the Police. A few minutes later **PW1** together with **PW2** and **PW3** were told to empty their pockets.

PW1 testified that he surrendered his wallet, wristwatch a techno cellphone and his pistol a Zastava Serial Number B239031. That thereafter he was beaten with planks, stones and whatever the mob could get hold of and sustained injuries namely a swollen elbow and general body pains. That he was given a Medical Report which was produced in Court as "**P1**". In Court, **PW1** identified his pistol which was produced as "**P2**" and the recovered magazines. That he identified **A1** and **A2** in the initial group of 7 people and later in the mob. He described **A1** clothing and complexion as being brown and tall in height. That **A1** was merely half a meter away from him during the ordeal which lasted about 15-30 minutes. **PW1** testified that it is **A1** who had said "*let's burn them*".

That at some point, the trio managed to run away and went to a nearby house where they requested for a phone. When Police reinforcements arrived the mob dispersed and **PW1** and **PW2** gave chase to one person who they found hiding in a shrub and apprehended him. This person was **A3** who explained that he was bricklayer and doing some work in the area. **PW1** thereafter went to Westwood Police Station together with **A3**. That **A2** was

apprehended in the early hours of 8th November 2016 near Garden House Motel area who then led the investigating team to **A1's** house in the Kalundu Area. The trio were then taken to Lusaka Central Police Station.

Under cross examination, **PW1** reiterated that he did not know **A1 and A2** but had merely heard of them. That he was able to identify **A1** and **A2** in the mob as they were at close range and that the incidence took place during the day and that it lasted for between 20-30 minutes. When asked as to whether he identified **A1** and **A2** from the driver of the tractor who had been harassed and assaulted by **A1** and **A2** the previous day, **PW1** responded in the negative. That he independently identified **A1** and **A2** from their clothing, complexion and height. He testified that it was a traumatic incident. When asked as to where the statements were taken, **PW1** testified that statements were taken at Lusaka Central Police and not at Westwood Police Station. **PW1** confirmed that he did not see **A3** in the mob but he was apprehended on the basis that he was seen running away from the direction where the mob had dispersed to. That the tractor driver informed him that the previous day, **A1** and

A2 had assaulted him. That he did not know whether any of the stolen items were recovered from the accused persons. **PW1** stated that **A1** was light in complexion even though he was now dark.

SIMON BANDA (**PW2**), the complainant, testified that he is in charge of Star Cottage College for Office of the President. He testified that over the years there has been an encroachment on the said land and a wall fence covering an area of about 6.5 kilometres was erected around the premises representing a small portion of the land in question. That on 7th November 2016 whilst on duty, **PW1** who is the Commandant requested him to join him on a routine check and to assess the extent of the damage on the wire fence at the Star Cottage training school. Upon reaching the western side, they met a group of about 7 people and informed the group that they were conducting a routine check. As he was coming back with **PW1** and **PW3** Kebby Phiri, the group of 7 had multiplied to about 20 and finally they were surrounded by between 50-60 people. **PW2** testified that these were political cadres who were demarcating the land in that area. The trio were stopped and put in the middle of the mob and told to sit down which **PW1** and **PW2** refused to do as

they were in police uniform. **PW2** testified that the mob then suggested taking them to the Police and thereafter changed their mind and the trio were ordered to stop and surrender anything they had with them. **PW2** surrendered his pistol Serial 238551, a wallet with 2 ATM Card his NRC and a cash amount of ZMW1,200.00. The Zastava pistol he surrendered had seven (7) rounds of ammunition and an extra magazine. He observed that the pistol was passed on from one person to another using a handkerchief. **PW2** testified that he was assaulted by the mob on his right eye and beaten with sticks, stones and different weapons. That **A1** who appeared to be the ring leader uttered the words "*you are going to be killed and this is your last day*". That he witnessed **A2** chasing **PW3** Kebby Phiri and getting the car keys of the Toyota Corolla from him. That at some point, **PW2, PW1 and PW3** managed to run away from the mob and after a few minutes Police reinforcement arrived at the scene and fired warning shots. **PW2** testified that he chased one person who was running and hid in the grass and came to know him as **A3**. That they met Davy Banda (**PW4**) a tractor driver who had his keys grabbed from him by **A1 and A2** when he was delivering blocks on 6th November 2016 in the same area on behalf

of a customer who had booked him to transport the blocks. That he together with **PW1, and PW3** were taken to Westwood Police Post together with **A3** and whilst there, the Officer In Charge informed him that his wallet and pistol had been recovered with a total of 15 rounds of ammunition. That at 2.00 am of 8th November 2016, **A1 and A2** were brought to Star Cottage and he recognised them as being part of the mob that surrounded them on 7th November 2016. That **A2** was the one who followed him after grabbing the keys from Kebby Phiri (**PW3**). He identified **A1** as being light in complexion even though he appeared dark in Court. **PW2** testified that at Westwood Police Station he got a Medical Report and went to Kanyama Clinic. The Medical Report was produced as evidence and marked Exhibit "**P2**".

In cross-examination, **PW2** stated that he did not know the attackers prior to being attacked. That **A3** was apprehended at the scene whilst **A1 and A2** were apprehended at 2am on 8th November 2016. **PW2** reiterated that **A3** was apprehended as he was running from where the mob had run to. **PW2** confirmed that the reason why **A1 and A2** were arrested is on the basis that Davy Banda the

tractor driver had also been attacked by **A1 and A2**. That the tractor driver was not part of the mob.

In re-examination, **PW2** told the Court that **A1 and A2** were arrested as they were identified by himself, **PW1 and PW3** as their attackers.

PW3 was Kebby Collins Phiri who testified that on 7th November 2016, around 12.00 hours Noah Banda (**PW1**) called him to assist to supervise construction on a plot that he had acquired on title. That he was told to go to Star Cottage training school as **PW1** was on duty at the material time. That he then picked up **PW1** and as they were going to the plot they noticed a group of between 7 to 10 men who appeared to be cooking under a tree. As the trio were coming back from the plot they noticed that the 7-10 men had increased in number and the big group were approaching the trio with stones and sticks. That **PW2** gave him the car keys but before he could proceed, one of the ring leader **A2** told him to stop. **PW3** was asked to remove everything in his pockets, an Astro tablet, Samsung Galaxy tablet and cash of ZMW1310.00. That **PW2** Simon

Banda was grabbed after he refused to empty his pocket and subsequently he removed a pistol from his pockets. That when the trio began to run, **A2** followed **PW3** and was told to give him the car keys. **PW3** continued to run away from the mob. That gunshots were heard and everyone scampered and **PW1** and **PW2** gave chase to a person who was seen running in the direction of where the mob had dispersed, and apprehended that person who was **A3**. **PW3** testified that he gave his statement at Central Police Station. He identified **A2** as the person who beat him and pursued him for the car keys. **A1** was identified as the person who told them to sit down and remove everything from the pockets. He identified **A3** as the person who was apprehended at the scene. **PW3** testified that he sustained injuries, bruises to his shoulder and back and thighs.

In cross-examination, **PW3** stated that he gave 2 Police statements one on the day of the attack and another statement a few days after the incident. He gave a description of the attackers and that one was tall with a beard and slightly light in complexion whilst the other one was dark in complexion. That he was able to identify **A1** and **A2** due to the personal contact he had with them at the scene

of the incidence. That **A3** was apprehended as he was running away from the direction where the mob had run to and not that he was one of the people who attacked **PW1, PW2** and **PW3**.

There was no re-examination of **PW3**.

PW4 was Bornwell Katongo who testified that on 7th November 2016, at around 10.00 hours, he arrived home from Nampundwe Turn off and received a phone call from a Police officer Mr. Nyirenda of Westwood Police Station, that a person by the name of Davy a tractor driver had been assaulted by political cadres and that his keys had been grabbed by a group led by **A1**. That **PW4** called **A1** who agreed to return the keys and whilst waiting for the Police Officers, the Police officers went to where **A1** was on the gravel road leading to the ZESCO sub station and met with the Police officers and handed over the keys for the tractor. **PW4** testified that he was merely communicating on the phone with the Police Officers and **A1** and was not present during the actual handover of the keys. That Mr. Nyirenda the Police officer called **PW4** to inform him that he had received the keys for the tractor from **A1** who was known as

"Saparado" a nickname. That he has known **A1** for a period of over four (4) years and identified him in Court.

In cross-examination, he conceded that he had no knowledge of what transpired on the 7th November 2016 as he was not present.

There was no re-examination of the witness.

PW5 was David Banda who testified that on 6th November, 2016 he was booked from Kalundu to deliver some blocks to the plots near Star Cottage. After delivery and as he was going back home, he was stopped by a group of people who grabbed him by the neck and assaulted him. The same group asked him why he had carried the blocks and he informed them that he was booked to do so. He then took the group to the person who had booked him and he too was assaulted and told that why did he receive and enjoy the money for the blocks alone. **PW5** testified that from the group he knew **A1 and A2** as the people who assaulted him on 6th November 2016. The group demanded money and at first he gave them K200 and then a K400. They directed him to bring back the blocks the following day

of which he did. **PW5** testified that the same group came in the morning to get the keys for the tractor. He recognised **A1** and **A2** as the people he gave the keys for the tractor to, and his boss by the name of Abdul the owner of the tractor thereafter made a complaint to Emmasdale Police Station. That on the 7th November 2016 when taking back the blocks as ordered by **A1** and **A2**, he found the Police who then called a Mr. Katongo (**PW4**) to retrieve the keys for the tractor from "his" people. The keys were retrieved and given back to **PW5**. That he then got the tractor and loaded the blocks and took them back where he had got them from at the Plots at Star Cottage. He testified that whilst at the Plots, he was asked by the Police if he was part of the mob that attacked **PW1, PW2 and PW3** and he informed that he too had been a victim of an assault the previous day. He informed the Police that he knew where **A2** lived and led the Police to **A2's** home but did not find him there and later went to his mother's place after **A2's** wife informed them to check there. In Court, **PW5** identified **A1** and **A2** as the people who stopped him and grabbed the keys to the tractor.

In cross-examination, **PW5** stated that the people who assaulted him over the issue of blocks were many and questioned him as to why he was transporting the blocks in that area. He stated that **A1** and **A2** were issuing plots in the same area. That he led the Police to **A1 and A2** as the people who attacked him together with a person called "Shansha". He confirmed that **A3** was not part of the group that attacked him. **PW5** told the Court that he never witnessed the incident where **PW1, PW2** and **PW3** were attacked by a mob.

There was no re-examination of **PW5**.

PW6 is Emmanuel Mumba who is a Police Officer stationed at ZRA Kazungula BP Project. He testified that on 7th November 2016, at around 12.30 hours he received a call that two commanders under the Office of the President had been attacked in the Star Cottage area. That he mobilised other officers and went to the scene where he found **PW1 and PW2** who informed him that they had been attacked by suspected cadres. That he also received a report that a Davy Banda (**PW4**) had been attacked the previous day. **PW6**

interviewed **PW1 and PW2** and was informed that government property two pistols and cash amounting to K44,510 was grabbed from the duo. That whilst in the area, Davy Banda was delivering some blocks and he was interviewed and informed **PW7** that he too had been attacked the previous day by **A1, A2** and **A3**, and that he knew where **A1 and A2** lived. That **A2** was apprehended at his mother's house in Garden House whilst **A1** alias Separado was apprehended at his house and both were taken to Star Cottage Office of the President Training School. That **A3** was also apprehended. All three were taken to Lusaka Central Police Station where they were handed over for further investigations. **PW6** identified **A1, A2** and **A3** in Court as the people he apprehended.

In cross-examination, **PW6** stated that he did not recover any of the alleged stolen property from **A1, A2** and **A3**. He confirmed that **A1 and A2** were apprehended based on information from **PW5** that he had been attacked on the 6th November 2016 by **A1** and **A2**.

There was no re-examination of **PW6**.

PW7 was Doreen Sumbula a Detective Inspector based at Westwood Police Station. She testified that on 7th November 2016, whilst on duty, she received a report of aggravated robbery in which Noah Banda (**PW1**) an officer at Office of the President Star Cottage reported that whilst in the company of Simon Banda (**PW2**) he was attacked by persons he could identify who were armed with sticks and stones. That he was robbed of cash amounting to K51,491.00 and two pistols Serial Number 239031 and 238731. That there were three magazines with 23 rounds of ammunition. That she visited the scene behind Star Cottage and received information that there was a black handbag dumped by unknown people opposite the Star Cottage along Mumbwa Road in an unfinished wall fence. That upon checking the bag, she found two pistols, three magazines with 23 ammunition. That when she showed the pistols to Noah Banda (**PW1**) he identified the pistol and three magazines as the ones robbed from him and Simon Banda (**PW2**). **PW7** took the pistols and magazines including 23 rounds of ammunition and kept them in her custody and later handed them over to Lusaka Division Headquarters. She identified the two pistols Serial Number 239081

(ID2) and 238751 (ID4) and three magazines and the 23 rounds of ammunition.

There was no cross-examination of **PW7**.

PW8 was **Sunday Fwambo** a Detective Sergeant based at Lusaka District Rural under Lusaka Division. He testified that on 11th September 2016 he was allocated three dockets of aggravated robbery to investigate, and the complainants were Noah Banda (**PW1**), Simon Banda (**PW2**) and Kebby Phiri (**PW3**). They complained that they were attacked by a group of people suspected to be Patriotic Front (PF) cadres who were armed with sticks and planks and robbed them of various properties. **PW1** and **PW2** further informed **PW7** that their pistols were stolen with one magazine containing 8 rounds of ammunition whilst Simon Banda's pistol had one magazine and a spare magazine containing 15 rounds of ammunition.

That he discovered that some suspects had already been apprehended and the three suspects did not give him satisfactory

answers thus he made up his mind to charge and arrest them with the offence of aggravated robbery. The suspects were warned and cautioned in Njanja the language they all understood and gave free and voluntary statements denying the charge. That the two pistols were recovered by officers from Westwood Police Station including ammunition. Two medical reports were also issued to Noah Banda and Simon Banda which he identified in Court and tendered them as evidence and marked "**P1**" and "**P2**" respectively. The two pistols were identified in Court including the 23 rounds of ammunition and tendered as evidence. **PW7** identified **A1**, **A2** and **A3** as the people he charged in connection with the matter.

In cross-examination **PW8** agreed that **PW1**, **PW2** and **PW3** were attacked by a group or mob of people. That the K51,000.00 cash was not recovered and the pistols in question were also not recovered from the Accused persons. That Davy Banda (**PW5**) was the critical person in identifying the Accused persons. **PW8** testified that the mob was large and it would be difficult to identify the specific attackers except if you know them. That Helen Banda who was with **A3** was not brought as a witness as she was evasive and

refused to come to testify. That Helen Banda's statement and **A3** correlate in respect to him being a bricklayer and doing some work at the plots on the material day. That fingerprints were not taken from the firearms as they would not have yielded anything. That she was handed the docket on the 11th November 2016 after **A1, A2 and A3** had already been apprehended.

There was no re-examination of **PW8**.

After the close of the case for the prosecution, I found, the Accused persons with a case to answer and I put them on their defence. After explaining their rights, the Accused persons elected to give evidence on oath and said they would not call any witnesses.

Stephen Samukonga **A1** testified that on 7th November 2016, between 9.00 to 10.00 hours, he received a call from Becks Katongo who told him to go to the plots near Star Cottage and ask for tractor keys from the cadres who had apprehended a person who was stealing blocks. That the keys were to be given to police officers who were looking for the keys. That he called **A2** to escort him and when

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• they reached a dust road they found some young men drinking beer by a makeshift stand. **A1** testified that he called one person from the group who admitted to having got the keys. **A1** testified that he called the Branch Chairman who told him to wait for the Branch Chairman who too was along Lion Road. That he handed over the keys to the Police Officer from Westwood Police Station and parted company with **A2**. That at 2.00 am the Police came to his house inquiring about keys to which he told them that he had given them to the Police Officers from Westwood Police. **A1** denied ever attacking **PW1**, **PW2** and **PW3** nor stealing their money and pistols as he was nowhere near the scene of the crime but was at his house the whole time on the material day.

In cross-examination, **A1** denied that he was the one that took the keys from the driver of the tractor **PW4**. He denied knowing or ever seeing **PW1**, **PW2** and **PW3**. That he told the Police that he was not present during the incident of 7th November 2016. He denied being a cadre and was merely sent to collect the keys to the tractor as he worked with the Branch Chairman in the community. **A1** testified that his name was given to the Police by **PW4**.

- There was no re-examination.

Joe Peter Banda is **A2** who testified that on 7th November, 2016 **A1** called him to escort him to get keys for a tractor. **A2** testified that they found people at a makeshift stand drinking beer and identified one as a political cadre whom they asked about a person having been assaulted and keys for a tractor having been grabbed. That the same person then produced keys for the tractor and gave them to **A1**.

A2 testified that when **A1** called the Branch Chairman, the phone was on speaker and he could hear the conversation between the two. That he together with **A1** then met the Police Officers from Westwood Police Station and handed them the keys for the tractor. That on the same night, he was picked up from his mother's place by the Police who beat him up. That the Police asked him about the keys for a tractor and he responded that they were with **A1**. **A2** testified that the Police also asked about a gun, and **A2** responded that he did not know anything about guns.

In cross-examination, **A1** testified that on 7th November 2016, he had a job at Lusaka International Hotel near Garden House Motel Area and some incomplete works at a Plot somewhere in Kalundu which he carried out. **A2** testified that **A1** was his good friend and that he stayed at Garden House and not Kalundu. That the cadres were found along Lions Road at a makeshift stand and he called one person out of the group who gave **A1** the keys of the tractor. **A2** testified that he had never met **PW1**, **PW2** and **PW3** and has never quarreled with them and did not know their motive or what their plans were. When asked about the distance between where he was working to his house and his mother's house, **A2** responded that the distance was the same as to his mother's house and opted to go to his mother's house on the night of 7th November 2016 after he finished working.

When asked as to his whereabouts on the 7th November 2016, **A2** testified that around 12.00 hours he was at Garden house at his mother's place. That around 9.00 to 10.00 hours he was with **A1**, and on the same day was building at a far off place from his mother's place. **A2** admitted to knowing **PW4** as a person who

drives a tractor. He denied ever being at the crime scene or being part of the mob that attacked **PW1, PW2** and **PW3**.

There was no re-examination.

Victor Mulenga is **A3** who testified that on 7th November 2016, he had some piece work to do of constructing a wall fence for a person by the name of Joseph of Kanyama who lives near Sekeleta market. That the Police arrived and fired warning shots and people scampered including himself. That he was apprehended by **PW1** and **PW2** and he explained to them that he was merely doing some work and was not part of the mob that attacked **PW1, PW2** and **PW3**. That he did not know **A1** and **A2** and why he was implicated in this case.

In cross-examination, he reiterated that he was at the Plots constructing a wall fence for a person by the name of Joseph who stayed in Kanyama and that Helen Bwalya was aware of this. That he did not know where to find Joseph to come and corroborate that he was working for him as a bricklayer at the material time.

The defence closed their case.

The prosecution made written submissions in which they set out the ingredients for an aggravated robbery case, namely that there should be two or more assailants, the assailant being armed with an offensive weapon, the aspect of stealing and the use or threats to use violence to overcome resistance or retain the stolen article. The prosecution submitted that all the elements of the offence of aggravated robbery have been satisfied. That in relation to the defence of alibi of **A1** and **A2**, the case of **Donald Fumbelo v The People, Bwalya v The People, Anayawa and Sinjambi v The People and Robertson Tembo v The People** were cited. The prosecution submitted that **A3** be acquitted as no evidence was adduced against him.

The defence relied on the evidence on record.

From the evidence on the record, I am satisfied and I find it as a proven fact that on the 7th November 2016, **PW1, PW2** and **PW3** were accosted and attacked near Star Cottage area. It is not

disputed that the incident happened around 12:00 hours according to **PW1, PW2 and PW3 and A3**. That **A3** was apprehended when he tried to run away from the crime scene. It is not disputed that the mob that attacked **PW1, PW2 and PW3** robbed the trio. That threats were made to **PW1, PW2 and PW3**.

To constitute the offence of aggravated robbery, the accused must first be armed with an offensive weapon or being together with one or more persons; secondly steal anything, and thirdly at or immediately before or immediately after the time of stealing, uses or threatens to use actual violence to any person or property and lastly with intent to retain the a thing stolen or prevent or overcome resistance to its being stolen or retained.

I shall first deal with the issue of identification of **A1** and **A2** as the two allege that they were nowhere near the scene of the incident on 7th November 2016. I find the duo to have been among the mob that attacked **PW1, PW2 and PW3**. The incidence took between 20-30 minutes and it happened during the day between 13-14 hours and thus **PW1, PW2 and PW3** were able to see and identify their

assailants. I find that this was sufficient time to identify **A1** and **A2** who appeared to be the ring leaders in the mob. I have therefore ruled out mistaken identity or the possibility that **A1** and **A2** were falsely implicated in this case. **PW1** and **PW2** admitted that they did not know **A1** and **A2** but had only known of them whilst **PW3** did not know them prior to this incidence. **A1** and **A2** did not know **PW1**, **PW2** and **PW3** and I find that there was indeed no reason for witnesses to falsely implicate **A1** and **A2**. Apart from being in the first group of 7 people, and later in the mob of 50-60 people, there was ample time to clearly identify them as the incident took between 20-30 minutes.

In proving the first element that the accused must have been armed with an offensive weapon or being together with one or more people, **PW1**, **PW2** and **PW3** all adduced evidence that people in the mob had sticks, planks and blocks which they used to assault **PW1**, **PW2** and **PW3**. In my view, the sticks, plans and stones fall within the definition of the offence in Section 294 (1) of the **Penal Code, Cap 27 of the Laws of Zambia** which provides as follows:

"Any person who, being armed with any offensive weapon or instrument, uses or threatens to use actual violence to any person or property or obtain or retain the thing stolen....."

PW1 and **PW2** produced medical reports in Court which findings were consistent with an assault having occurred on the material day. The Medical Reports were identified and produced in Court as exhibit "**P1**" for **Noah Banda (PW1)** and "**P2**" for **Simon Banda (PW2)**. **PW1, PW2** and **PW3** in their respective evidence were each able to identify and recognise the person in the mob that issued or uttered threats to them as **A1** and **A2**. Specifically **A1** said to the trio that *"Today you shall see this is your last day"* whilst **A2** told the trio that *"today we shall kill you"*. In the case of **PW3**, it was his testimony that **A1** ordered him to sit on the ground and kicked him thereafter. I find that the element of the use of threat or violence has been met against **A1** and **A2**.

Another ingredient of aggravated robbery is that there is an aspect of stealing and that use or threats to use violence to overcome resistance or retain the stolen articles. It goes without saying that

both a cell phone, pistols as well as cash are inanimate things which are movable and are capable of being stolen. I am also satisfied that the prosecution have proved that a techno cellphone, wrist watch and a Pistol Zastava Serial Number B239031 and a wallet were stolen from **PW1**, which property has not been recovered except for the Zastava Pistol Serial Number B239031 and a round of ammunition that was recovered in a bush near the crime scene. I find that Simon Banda (**PW2**) had his Zastava Pistol Serial Number 238551, a wallet with 2 ATM Cards, a National Registration Card and cash of K1200.00 stolen. I also find that during the incident, **PW3** had his Astro Tablet, Samsung Galaxy Tablet and cash of K1310 stolen from him. The fact that the said property was not found on the **A1** and **A2** at the time they were apprehended is, in my view, an irrelevant consideration in the charge in the instant case. I find that the people including **A1** and **A2** who attacked **PW1**, **PW2** and **PW3** had a common design, namely to rob and harm **PW1**, **PW2** and **PW3**.

Under section 21(1) of the **Penal Code, Cap 87 of the Laws of Zambia**

“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**”

Instructive on a common scheme is the case of **Ernest Mwaba and Others v The People (1987) Z.R. 19**, where it was held:

- “(i) where joint adventures attack the same person, then unless one of them suddenly does something which is out of line with the common scheme and to which he alone the resulting death is attributable, they will all be liable.**

(ii). where the evidence shows that each person actually participated in an assault then they were all **Crimines Participes**.

In the instant case, it is not necessary for the prosecution to show that it was actually **A1** and **A2** who took the cell phone and the cash from **PW1**, cash cellphone and money from **PW2** and car keys, Astro tablet, Samsung Galaxy Tablet and cash of K1310.00 from **PW3**. I do find in the case of **PW3** that it is **A1** who took the car keys from him and **PW3** positively identified him. I am satisfied that the **A1 and A2** acted together with others in attacking and stealing from **PW1, PW2 and PW3**. They had a common scheme to attack and steal from **PW1, PW2 and PW3**. There is no evidence that it was one of those other people, and not **A1 and A2**, who had done something out of line with the common scheme. The common scheme is deduced from all the two men namely **A1 and A2** who were armed with offensive weapons, threatening death to **PW1, PW2 and PW3** proceeding to beating and stealing from **PW1, PW2 and PW3**. The purpose of the attack was to subdue **PW1, PW2 and PW3** and to steal from them. And having stolen, they assaulted **PW1,**

PW2 and **PW3** and only ran away after Police reinforcement came to rescue the trio. In the circumstances of this case, particularly from the evidence of **PW1**, **PW2** and **PW3**, I am unable to accept the explanation by **A1** and **A2** that they are falsely implicated as they were not part of the mob and the incident that occurred on the 7th November, 2016.

A1 and **A2** raised an alibi that they were nowhere near the crime scene on the material day. An alibi is a form of defence used in criminal cases where the accused attempts to prove that he was in some other place at the time of the alleged offence was committed. The defence must disclose an alibi with sufficient time for the authorities to investigate the alibi and with sufficient particularisation to allow for a meaningful investigation. On the question of alibi, in the case of **Katebe v The People**, it was held as follows:

"Where a defence is set up and there is some evidence of such an alibi it is for the prosecution to negative it, There is no onus on the accused person to establish his alibi the

law as to the onus is precisely the same as in cases of self-defence or provocation."

Similarly, in the case of **Ilunga Kalaba and John Masesu v The People**, the Supreme Court said that:

"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution take a serious risk if they do not adduce evidence from the witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it."

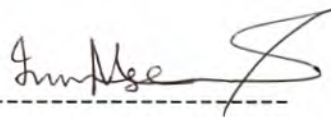
That for an alibi to require negation by the prosecution it must have been substantiated by material particulars at the time of being set up and it must be set up early enough for the state to have an opportunity to investigate it. The state is not obliged to investigate an alibi if it is but a bare denial and devoid of any material particulars to establish it. The evidence in this case reveals that the alibi in question by both **A1** and **A2** was a bare denial unsupported by the evidence on record. The evidence of **PW1, PW2** and **PW3** placing and identifying **A1 and A2** as being present during the incidence and ordeal is conclusive as to negate the alibi.

In the case of **A3** , **PW1** and **PW2** testified that they gave chase to him as he was seen running in the same direction from which the mob earlier was. That **A3** hid in a bush and that is the only reason he was apprehended. **PW1, PW2 and PW3** did not identify him as being part of the mob that had assaulted them and stole from them. In fact **PW2** confirmed that the only reason he was apprehended is that he was seen running. I find that **A3** was not identified as part of the mob that had attacked **PW1, PW2** and **PW3** but merely as a person who was seen running in the vicinity from where the mob had dispersed. The stolen items were not recovered from him. In his defence, **A3** testified that he was a bricklayer who at the material time of the incidence was constructing a wall fence for a client who had engaged him. The proper inference to draw is that it is a reasonable and plausible story and such inference drawn should be in favour of **A3**. The prosecution submitted that **A3** be acquitted. I find that there is nothing to tie him to the offence and it would be dangerous to convict him of the offence of aggravated robbery.

On the totality of the evidence, I find that all the essential elements of the offence have been proved beyond reasonable doubt. I therefore, find Steven Shamukonga **(A1)** and Joe Peter Banda **(A2)** **GUILTY** as **CHARGED** and I convict **A1 and A2** accordingly on all three counts.

In the case of **A3**, I find that the prosecution has failed to prove the case beyond all reasonable doubt and I accordingly **ACQUIT** him of the charge of aggravated robbery on all three counts.

Delivered at Lusaka in Open Court this 28th day of July, 2016



HON IRENE Z MBEWE
HIGH COURT JUDGE