

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

HP/13/2016



BETWEEN:

THE PEOPLE

V

RODRICK KUNDA
STEPHEN CHIPUMBU

**BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS
DAY OF 25TH FEBRUARY 2016**

APPEARANCES

FOR THE PEOPLE : MS C. LUPILI FROM NATIONAL PROSECUTION
AUTHORITY

FOR THE ACCUSED: MR H.M.MWEEMBA MR K.MWEEMBA
FROM LEGAL AID BOARD

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA.

AUTHORITIES REFERRED TO:

1. ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE, 2010 EDITION
2. MUSHEMI V THE PEOPLE (1982) ZR 71

Rodrnick Kunda and **Stephen Chipumbu** hereinafter referred to as the first accused (**A1**) and second accused person (**A2**) stand charged with one count of aggravated robbery contrary to *Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia*.

The particulars of the offence allege that **Rodrnick Kunda** and **Stephen Chipumbu**, on the 27th day of August, 2015 at Lusaka in the Lusaka District of the Lusaka Province of Republic of Zambia, jointly and whilst acting together with other persons unknown, did steal 1 Nokia cellphone, 1 Samsung S4 cellphone, 2 memory cards, 1 waistcoat, 1 short and USB cable altogether valued at **K4,390.00** property of **Stephen Simusokwe** and, at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said **Stephen Simusokwe** in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.

When called upon to plead, the accused persons denied the charge and the prosecution then called 6 witnesses.

The first prosecution witness (**PW1**) was **Stephen Simusokwe**. **PW1** narrated that on 27th August, 2015 as he was walking along Katima Mulilo road after midnight, he realised that he was being followed by a Toyota Corona vehicle. He told the Court that when the vehicle eventually blocked his way, the six men who came out of the car pursued him. **PW1** testified that when the men caught up

with him, they dragged him back to their car while searching his pockets. He further testified that they threatened to kidnap him and in the process he was robbed of a white Samsung galaxy S4 phone, a grey Nokia 101 phone, 2 memory cards and a USB cable. PW1 also narrated that the robbers got away with a pair of shorts and a waistcoat that he was wearing.

It was PW1's further testimony that the next day, he received information that some suspects had been apprehended in connection with his attack and that he was required at Embassy Police Post. He stated that at Embassy Police, he was informed that some items were recovered. He was issued with a medical report and was later attended to at Chipata Clinic.

PW1 clarified in cross-examination that he did not know the exact number of people that attacked him because it was dark.

The second prosecution witness was **Isaac Mubita (PW2)**. PW2 basically told the Court that sometime in 2015 he confirmed with Embassy Police Post that he was the owner of a green Toyota Corona registration number ABF 3210 which had been impounded in connection with the matter before this court.

PW3 was **Constable Chambula Chibwe**. He indicated that on 27th August, 2015 at 02:00hours, he was from C.C Night

Club with **Sergeant Christopher Kaswalo (PW3)** where they had received a report of a fight. The witness indicated that on their way back, they saw a green Toyota Corona with registration number ABF 3210 heading towards Petroda Filling Station and a man in the passenger seat jumped out and bolted. He stated that people in the other two vehicles that were in pursuit of the Toyota Corona alerted him and PW4 that the men from the said Car had attacked a person along Kafue road. PW3 stated that when the Toyota Corona came to a stop four other people disembarked from it. PW3 testified that they immediately gave chase to the alleged attackers and as a result of which he managed to apprehend A2 while A1 was apprehended by PW4. PW3 further testified that the vehicle together with the two accused persons were taken to Embassy Police Post.

In cross-examination, PW3 reiterated that it was the people in the other two vehicles who brought it to their attention that the men who alighted from the Toyota Corona had attacked a person along Kafue road.

PW4 was Sergeant **Christopher Kaswalo** whose testimony was similar to that of PW3.

During cross-examination, PW4 confirmed that it was the people that pursued the accused persons who told them that the accused were thieves.

The fifth prosecution witness was **Chembo Bwalya (PW5)**. PW5 narrated that he was employed by PW2 to work with his vehicle as a taxi driver. It was PW5's testimony that he operated with a green Toyota Corona, registration number ABF 3210. PW5 informed the court that on the material date, he had a funeral and gave the vehicle to Siame to operate with it from 19:30hours to 05:00hours.

He further testified that in the morning Siame did not take back the vehicle as agreed. PW5 explained that he later received information that the said vehicle was at Embassy Police Post. He testified that at the Police Post A1 and A2 were presented to him as the suspects who were apprehended in connection with his taxi. He then informed the police officers that he did not know the accused persons. He also stated that he was detained pending further investigations and only released upon verification that he was the legitimate employee of PW2.

During cross-examination, PW5 explained that he trusted Siame with the car because he worked with him at the taxi rank.

The last prosecution witness was Detective Sergeant Emmanuel Mukalula (PW6). He said that when he reported on duty on 27th August, 2015 at 08:00hours, he was informed that Sergeant Kaswalo and Constable Chibwe had apprehended A1 and A2 who were suspected to have attacked a person. He told the Court that he was further

informed that a Toyota Corona with registration number ABF 3210 had also been impounded. PW6 stated that when the Car was searched he found a Nokia 101 phone and a white USB cable in the glove compartment. He also found an axe at the back of the vehicle. PW6 testified that he used the contacts on the phone to trace Stephen Simusokwe (PW1). PW6 averred that when PW1 was later interviewed, he confirmed having been attacked and robbed of property worth about K4,150. He stated that PW1 also identified the phone and the USB cable as part of the property that was stolen from him.

It was PW6's testimony that when A1 and A2 were interviewed under warn and caution, they denied the charge. He also stated that he carried out investigations and came to know that the car belonged to PW2 who had employed PW5 as a taxi driver. PW6 testified that he was shown the white book and the letter of sale by PW2 as proof of ownership. He stated that he later discovered that PW5 was not with A1 and A2 when they were apprehended. He produced the cell phone, USB cable, medical report, white book and letter of sale as part of his evidence.

Under cross-examination, PW6 stated that there was no statement recorded from the people that were in the two vehicles that pointed out the attackers. He agreed that the informers would have been better placed to identify the accused persons.

In re-examination, PW6 clarified that he did not record any statement from the informers because they immediately drove off after alerting the police officers.

After the close of the prosecution's case, I found that the state had established a *prima facie* case against the accused persons and I found them with a **case to answer**. When put on their defence in compliance with section 291(2) of the *Criminal Procedure Code*, the accused persons elected to give sworn evidence and did not call any witnesses.

It was A1's evidence that on 27th August, 2015 he was walking from drinking beer at C.C Night Club when three people apprehended him and took him to Embassy Police Post. A1 narrated that the following day, he was taken to Chawama police where he was called with A2 to explain why they were moving at night. He stated that the policemen decided to charge them with aggravated robbery. In his further evidence A1 denied having disembarked from the vehicle at the time of his apprehension. He also denied knowing a person called Siame.

During cross-examination, A1 narrated that he was selling shoes earlier that day but could not remember the time he finished selling them. He also stated that he could not remember the exact time he was arrested. In further cross examination A1 testified that he was not with A2 because he only found him later at Chawama Police Station. He also

denied having known A2 prior to this case. He also failed to give a precise location of C.C Night Club.

In re-examination he clarified that he did not know the time he was arrested because he did not have a watch on that day. He then explained that C.C Night Club was in Kuomboka, near Chawama.

A2 in his testimony stated that on the material date, he was on his way to work around 03:30hours when he was apprehended at Castle Shopping Centre and taken to the police station. He said he was then accused of being among those that steal and attack people at night. A2 also denied being at Petroda filling station and further denied knowing Siame or A1 prior to the case.

During cross-examination, A2 revealed that the residential address he had given when the warn and caution statement was recorded was House Number 4 Songo Street New Kabwata. He further stated that it was his parents who resided at the afore mentioned address. A2 informed the Court that he last went to Kabwata in March, 2015. He said he first met Rodrick on 28th August, 2015 while they were both detained in custody.

After the close of the case there were no submissions filed into Court by the parties.

On the evidence before me, I find that it is not in dispute that, PW1 was on 27th August, 2015 robbed of a Nokia cellphone, a Samsung S4 cellphone, two memory cards, a waistcoat, a pair of shorts and a USB Cable altogether valued at **K4, 390.00**. It is also not in dispute that the group of people who robbed PW1 after 24:00 hours alighted from a green Toyota Corona registration number ABF 3210.

I also find that the said vehicle was later impounded around 02:00 hours at Petroda Filling Station along Kafue road by two Police officers from Embassy Police Post. It is common ground that a Nokia phone and a USB Cable belonging to PW1 were recovered in the impounded vehicle. It is also common cause that the Toyota Corona in question was owned by **Isaac Mubita (PW2)** and was being operated as a taxi by his employee **Chembo Bwalya (PW5)**.

It is also my finding that on 26th August, 2015, PW5 had given the vehicle in issue to Siame to operate with it from 19:30 to 05:00 hours the following day. It is also not in dispute that A1 and A2 were apprehended by PW3 and PW4 in the early hours of 27th August, 2015.

What is in dispute in this matter is whether the two accused persons were among the robbers who bolted from the Toyota Corona that was impounded by PW3 and PW4 at Petroda Filling Station.

The offence of Aggravated robbery is provided for in *Section 294 of the Penal Code* and the said Section states as follows:

“294. (1) 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.”

Having stated the provision of the law, the question I ask myself is whether any evidence has been led to show that the Accused persons were part of robbers.

According to PW3 and PW4 they saw A1, A2 and two others disembark from a green Toyota Corona at Petroda Filling Station and they started moving in the same direction.

There is also evidence from PW3 and PW4 that the accused persons were shortly apprehended after the people in the two vehicles that had pursued them signalled that they were criminals. The accused persons deny being robbers and their evidence is that they were separately arrested without any justifiable cause.

A1's explanation is that he was coming from a drinking spree at C.C Night Club when three Police officers apprehended him. He said that he was eventually charged

with aggravated robbery on account that he was moving during the night.

As regards A2's explanation of how he found himself arrested and charged with aggravated robbery, he said on the day in question he was arrested at Castle Shopping Center by one Police officer and three other people as he was going for work.

I have carefully considered the accused persons defences. Their position is that they were falsely implicated by PW3 and PW4 and charged with aggravated robbery on mere assumption that they were responsible for committing various crimes because they were found moving in the night.

It is clear from the evidence on record that there appears to be a disparity between the evidence of the prosecution witnesses and the accused persons.

I note that the resolution of the matter herein hinges on the credibility of the witnesses before Court. The question of the credibility of a witness in any case must be approached in the light of the fact that there appears to be no reason why a witness should not have been telling the truth.

The learned authors of ***Archbold Criminal Pleading, Evidence and Practice, 2010 edition*** said in paragraph 8-137 at page 1359:-

“The credibility of a witness depends upon: (a) his knowledge of the facts to which he testifies; (b) his disinterestedness; (c) his integrity; (d) his veracity; and (e) his being bound to speak the truth by such an oath as deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. The degree of credit his testimony deserves will be in proportion to the jury’s assessment of these qualities.”

I have considered the possibility of the accused persons being falsely implicated in the matter herein by PW3 and PW4. There is no evidence advanced on record to suggest any reasonable circumstance that the two witnesses have motives to give false evidence. In any event I have no doubt in my mind that the accused persons would have been cleared by Embassy Police Post had their warn and caution statements been consistent with their testimony in Court. I say so because PW5 who was equally held as a suspect in connection with this matter, was later released from detention after the same Police Post investigated and verified his statements.

I also find the testimony of the prosecution witnesses to be plausible and true. In particular, I affirm that the evidence of PW3 and PW4 was consistent with the testimony of PW6 and that the two witnesses had the ability to recall the events of 27th August, 2015 accurately.

The versions of the accused persons’ stories during their warn and caution statements recorded on 2nd September, 2015 confirm that they were with Siame on the date and

time in question. This is also corroborated by the statement made by PW5 on 3rd September, 2015 who confirmed that he had given Siame the green Toyota Corona registration number ABF 3210 to operate with between 19:00 and 05:00 hours. It is clear in my mind that the details about Siame were initially provided by the accused persons to PW6. I am satisfied that PW6 could not have invented the name of Siame in the warn and caution statements as he was still at large. In view of these contradictions I find that the credibility of the testimony of the accused persons in Court has been clearly impeached. My reasoning is also anchored on what was stated in the case of **Mushemi v The People**:

“The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness.”

Similarly in the matter before me the credibility of the testimony of the accused persons is doubted as they have been shown not to be telling the truth in the most important aspects of their evidence. Further, I take judicial notice that Filling Stations are always well lit during the night. Given that there was light at the Filling Station, I am satisfied with the evidence of PW3 and PW4 and I rule out the possibility of false or mistaken identification at the time of arrest.

I therefore find the evidence led by the accused persons in Court to be a clear afterthought and it is hereby disregarded. I am satisfied that the accused persons were

part of the robbers who had alighted from the green Toyota Corona with registration number ABF 3210 that was impounded at Petroda Filling Station.

The discovery of the Nokia phone and USB Cable in the said green Toyota Corona is corroborative of the testimony of PW1. I find that the accused persons were part of the group of people who had attacked and robbed PW1 in the early hours of 27th August, 2015.

In the circumstances I have no doubt therefore that the accused persons are guilty of the offence charged, namely aggravated robbery contrary to *Section 294(1) of the Penal Code*, and I convict them accordingly.

Delivered in open Court at Lusaka this **25th** day of **February**, 2016.



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M. CHANDA
JUDGE