

IN THE HIGH COURT OF ZAMBIA

HP/109/2017

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN



THE PEOPLE

V

BOYD MWAPE KAWANDA

ROBERT LUPIYA

Before the Hon. Mrs. Justice I. Z. Mbewe at Lusaka on the 14th day of July 2017

For The State: Ms. E. Mulele State Advocate, National Prosecution Authority

For The Accused: Mr. H.Mweemba of Legal Aid Board

JUDGMENT

Cases Referred To:

1. *Mugala v The People* (1975) Z.R. 282
2. *Kapowezya v The People* [1967] ZR 35
3. *Chimbini v The People* [1973] ZR 191

4. *R v Turnbull* [1977] QB 224
5. *Machipisha Kombe V The People* [2009] Z.R. 282
6. *Katebe v The People* [1975] ZR 13

Legislation Referred To:

1. *Penal Code Cap 87 of the Laws of Zambia*
2. *Criminal Procedure Code, Cap 88 of the Laws of Zambia*

The Accused persons stand charged with the offence of aggravated robbery contrary to section 294 of the **Penal Code Chapter 87 of the Laws of Zambia**. Particulars of the offence are that Boyd Mwape Kawanda **(A1)** and Munengo Siamachila **(A2)** on 26th February, 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 did steal from Wellington Malata, 1 pair of shoes, Samsung phone and K470.00 cash altogether valued at K2,190.00 the property of Wellington Malata and at or immediately before or immediately after the time of such stealing, did use or threatened to use actual violence to the said Wellington Malata in order to obtain or retain the said property or prevent or overcome resistance to its being stolen.

Both Accused persons pleaded not guilty.

The prosecution called a total of four (4) witnesses.

PW1, Wellington Malata gave evidence to the effect that on 26th February, 2016 his mother asked him to take a vehicle to his young brother in garden compound which vehicle was to be delivered to his colleague in Kitwe who had purchased it. **PW1** testified that around 04:00 hours in the morning he left Olympia Park and took the vehicle to his young brother in Garden compound near the Police station and thereafter headed back home. **PW1** testified that on his way back he saw three men in front of him and one man behind him and the one who was behind him asked where he was going and before he could answer he was grabbed and the other three who were in front started searching his pockets and took his phone a Samsung S5 galaxy, wallet containing a sum K470.00, a shirt valued K70.00 and shoes valued K150.00. **PW1** testified that he identified one of the attackers as someone he usually saw in Garden Compound and that the same person told the others that they should just kill him and produced a knife, at that moment the one that held him from behind bit his finger. **PW1** testified that

before the assailant with the knife could stab him a minibus came by and he managed to get hold of the person that held him (**A1**) with the help of someone from the bus. Thereafter he was assisted to take **A1** to the Police where he was given a Medical Report and he proceeded to the Chipata clinic where he was administered a tetanus vaccination then he went back to the Police and opened a docket.

That he later went to Livingstone for business and whilst there he learnt of the apprehension of **A2**. It was his testimony that he did not know **A1** prior to the attack. **PW1** testified that at the time of the attack it was in the morning with clear lighting hence he was able to identify the attackers. **PW1** testified that **A2** was the person that produced the knife during the attack and that the whole incident lasted about 10 to 15 minutes. Further that **A2** was nick named Nene and he knew him as they stayed in the same area. **PW1** identified the Medical Report that he was given at the police station and also identified **A2** from the dock as the person who was known as Nene in the community. **PW1** identified **A1** from the dock as the person who was apprehended at the scene of the crime. **PW1**

testified that none of the things that were stolen from him were recovered.

In cross-examination **PW1**'s evidence was that he was alone when the attack occurred and that he did not know the assailants at the time but came to know one of them. He admitted that he told the Police that at the time of giving his statement he did not know the assailants but came to know one of them afterwards.

The evidence of **PW2** Sergeant Pumulo Nawali was that on 26th February 2016 she was on duty when **PW1** reported that he was attacked around 05:00 hours in the morning by unknown people who stole a Samsung galaxy phone valued at K1600.00 and cash money K470.00 and was bitten on the finger. That acting on the information she issued a Medical Report. Since **A1** was in police custody she came to know him as Boyd Mwape Kawanda. That she handed over the case to her colleague who opened a docket.

PW3 was Detective Constable Kennedy Kayama Kabwe whose evidence was that on 24th May 2017 he was stationed at Garden police post when he received a phone call from his colleague from Emmasdale Police that the suspect they were looking for (**A2**) who

was commonly known as Nene was seen at a bar in Garden Compound. **PW3** rushed to the said bar and found **A2** and took him to the Police Station and that at that time **A1** was already in custody.

Under cross-examination **PW3** admitted that **A2** was apprehended about three months after the commission of the offence.

PW4 was Detective Sergeant Conrad Andeleki who testified that on 27th February 2016 whilst on duty at Garden Police Post he was allocated a docket of aggravated robbery in which **PW1** complained that he was attacked on his way home around 05:00 hours in the morning of 26th February 2016 by four criminals who robbed him of his pair of shoes, cash money and a Samsung phone all together valued at K2,100.00. That acting on the matter he interviewed **A1** who was in custody and recorded a statement from him, and that **A1** told him that he was with his friend **A2**. Further that on 24th May 2017, **PW4** with other officers apprehended **A2** from whom he also recorded a statement and charged both Accused for the offence of aggravated robbery which they both denied.

PW4 added that the complainant mentioned that he did not know the attackers prior to the incident but that he recognized one of them as 'Nene' who is **A2** who was apprehended in May, 2016. It was also **PW4**'s testimony that he did not recover any of the stolen items from the accused persons, but that he was directed to a Congolese national called Julube who was not found at his shop as he had fled to Congo. **PW4** testified that **A1** did not tell him that he was trying to help **PW1** who was being attacked and was mistakenly apprehended.

At the end of the prosecution case, the Accused persons were found with a prima facie case and put on their defence. They both elected to give evidence on oath.

Boyd Mwape Kawandama **A1** testified that on 25th February 2016 he went to Shegen Bar in Garden compound around 21:00 hours to watch soccer. That he found **A2** with his other friends and they started drinking following which he got too drunk and slept right at the table they were drinking from. **A1** informed the Court that he was only woken up by one of the workers from the bar around 04:00 hours in the morning and told that his friends had left him.

That upon hearing that, he left the bar. **A1** testified that on his way home he saw people beating up someone and when they saw him they ran away but when the complainant got up he grabbed him and started beating him whilst shouting thief and a crowd of people gathered and he was then taken to the Police. Upon the complainant making his report at the Police station the officers started beating him and asked him to name the people he was with and he mentioned that he was **A2** and another person called Beatie. That the police told him that he would only be released when the people he attacked the complainant with were found. A month later he was taken to Emmasdale Police and there after he was moved to Chimbokaila Correctional Facility and three months later Munenge Siamachila **A2** was arrested and the duo were jointly charged.

In cross-examination he confirmed that **A2** is the person he was drinking with on the night in question and that he has known him for a about a year. **A1** also stated that he was at the bar till 04:00 hours in the morning although he was not calling the bartender as a witness to confirm that he was at the bar. Further that the time he saw **PW1** being attacked he was about 30 meters away and that

he did not count the number people who were attacking him but that he saw one person beating **PW1** whilst the other one searched his pockets. **A1** stated that he was the only passer-by at the time and that is the reason why the complainant apprehended him as he was mistaken for an attacker. He stated that he was able to see the attackers as there was a spot light and a light from the bar. **A1** stated that he told the Police that he was drinking with **A2** on the material night.

Munengo Siamachila **A2** gave evidence that on 26th February 2016 after knocking off from his barbershop he was invited to go and watch soccer by his friend Joe. Around 20:30 hours he met his friend Joe with his girlfriend Beatie and the trio went to Shegen Bar and started drinking beer. Whilst there **A1** joined them and they continued drinking together until **A1** got too drunk and dozed off and eventually slept. He stated that they tried to wake **A1** up but he kept saying he would wake up and the three decided to leave and booked a taxi back home, and **A2** was dropped home first before Joe and Beatie.

That on 15th May 2016 his phone a Samsung D900 fell in water and he took it to Julube a Congolese national for repair but was told that he had to buy an alternative phone. On 17th May 2016 he went back to Julube's shop and still found that his phone was not fixed that is how he decided he sell the phone to Julube and Julube told him to go back on 20th May 2016 to buy another phone. On 20th May 2016 around 15:30 hours he went to see Julube but did not find him and he decided to go the nearby shebeen and started drinking. Whilst there two men approached him and asked him who Nene was and he responded that he was the one. There after the men asked him to get into the car and told him that they were Police officers of which he obliged. They took him to Garden Police Post where he was question about the stolen items and he denied having stolen anything. **A2** testified that he was asked if he knew **A1** and he admitted that. He was also asked about the stolen phone and he denied having ever stolen a phone but told them that he took his phone to Julube for repair and even sold it to him, he was asked to lead them to the said Julube's shop which he did and when they got there he was left in the vehicle at a distance. That the police officers returned to the vehicle and told him that they did not

find Julube. On 11th June 2016 he was called from his cell and taken to Emmasdale Police Station and later he appeared in Court where he was jointly charged with **A1**.

In cross-examination **A2** gave evidence that he was drinking with **A1** whom he had known for a period of about one year as they lived in the same area and he would go to his barbershop. He stated that he left the bar around 23:00 hours and went home to his wife leaving **A1** at the bar. **A2** informed the court that he did not know that the wife would be needed as a witness hence he was not calling her. Further that he did not know anything about the offence until the day of his arrest. That he did not know the whereabouts of **A1** after the night they watched soccer and drunk together at the bar. He stated that his phone was a Samsung D900 slide, and he did not know where Julube was as he was in custody, and that he sent his sister Florence to check for Julube at his shop but that she did not find him. In further cross examination, he informed the Court that he did not know that he needed to call Joe and Beatie as witnesses. In conclusion he stated that the reason the police arrested him was because **A1** mentioned that he was drinking with

him at the bar but that he was not there when the offence was committed, and that **A1** opted to mention his name to the Police because he knew him more than Joe and Beatie did.

The evidence on record shows that **PW1** was attacked on 26th February 2016 around 04:00 to 05:00 hours and robbed of a Samsung phone, a pair of shoes and K470.00 cash all together valued at K2,190.00. It is common cause that **PW1** managed to apprehend **A1** at the scene of the crime and took him to the police where he was detained. **PW2** confirmed that **PW1** reported an incident of an attack and robbery on 26th February 2016 and issued a medical report to **PW1** who had been bitten on his finger. **PW3** gave evidence that on 24th May 2016 **A2** was arrested and detained in police custody in relation to the attack and robbery reported by **PW1**.

PW4's testimony was that he interviewed **A1** who was in police custody and that he mentioned that he was with **A2** on the night of the attack and that some time in May 2016 **A2** was also apprehended, and when asked about the phone that was stolen from **PW1** he said he had sold it to a Congolese national called

Julube who had since fled to Congo. **PW4** stated that **PW1** later identified **A2** as one of his attackers.

The offence that the Accused persons herein are charged with is provided for under Section 294 (1) of the **Penal Code Cap 87 of the Laws of Zambia** which states that:

“(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.”

The prosecution has in this case a duty to prove beyond reasonable doubt that the Accused persons did in fact have an offensive weapon or instrument which they used or threatened to use when stealing from **PW1**.

PW1 testified that his assailants had a knife and actually threatened to stab him with it but was rescued by someone from a passing mini bus. I find that there is no other evidence led by the prosecution to show that an offensive weapon was used. The prosecution did not call any evidence from the people who rescued **PW1** nor was a knife found at the crime scene or even on **A1** who was apprehended at the crime scene.

The question for my determination therefore is whether based on the evidence on record the prosecution has proved beyond reasonable doubt that the Accused persons committed the offence with which they are charged. In answering this question I shall refer to the case of **Mugala v The People (1975) Z.R. 282** in which the Supreme Court held that in a case of aggravated robbery:

“It is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen”

The evidence on record as stated above shows that the prosecution has not produced evidence that an offensive weapon was used in this attack. However, there is evidence showing that violence was used on the complainant at the time of robbing him as the medical

report shows that **PW1** was bitten on his finger. This being the case, I invoke the provisions of Section 181(2) of the **Criminal Procedure Code, Cap 88 of the Laws of Zambia** which provides as follows:

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"

The effect of this provision is that the minor charge has to be cognate or related to the major offence, that is, being in the same genus. Instructive is the case of **Kapowezya v The People [1967] ZR**. The ingredients of the major offence included those ingredients of the minor offence. Based on the aforesaid provision of the law, I find that the Accused persons herein should be charged with the offence of robbery under **section 292 of the Penal Code, Cap 87 of the Laws of Zambia** as opposed to aggravated robbery. Section 292 provides that:

"Any person who 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 robbery and is liable on conviction to imprisonment for fourteen years.”

In the present case, **PW1** was the single identifying witness. I warn myself of the danger of a single identifying witness. **A1** alleged that he just happened to be on the road at the time **PW1** was being attacked, and that he was mistaken for an attacker by **PW1**. I find it difficult to believe that **PW1** was being attacked by different people and elected to get hold of **A1** who was trying to rescue him and fabricated a robbery and attack on **A1**. I find that **A1** and **A2** were in the group of people that **PW1** said assaulted him and stole his phone, a wallet containing money and a pair of shoes.

In terms of the identification of **A2**, **PW1** too was the single identifying witness. I am guided by the Supreme Court that held in **Chimbini v The People [1973] ZR 13** that such evidence should be clear and satisfactory in every respect. **PW1's** evidence must be reliable. I am fortified by the case of **R v Turnbull [1977] Q.B 224** where Lord Widgery L J observed that:

"where the quality of the identification is good and remains so at the close of the defence, the danger of mistaken identification is lessened; the poorer the quality, the greater the danger. In the latter event the court should look for supporting evidence of identification. Odd coincidences can provide identification."

PW1 in his statement to the Police stated that he was able to identify **A2** being a person he knew from the community. In other words, identification of **A2** was by recognition. I find that **PW1** was in a position to identify both **A1 and A2** as the incident took between 10-15 minutes, and that there was ample lighting as there was a spotlight and a light near the crime scene. Having warned myself of the danger of false implication of or allegation against the Accused persons in this case as emphasized by the Supreme Court in the case of **Machipisha Kombe V The People [2009] Z.R. 282**, I have not found any motive as to why **PW1** would implicate **A1** and **A2** in the robbery if at all they were not part of it. **PW1** did not know **A1** at the material time, but having apprehended **A1** at the crime scene, he was able to clearly identify him as the person who

attacked him on the material day. In fact **A1** does not deny being at the scene of the crime, but alleged that he was an innocent bypasser.

In a robbery offence, the prosecution has to prove that something has been stolen and the person 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. In regard to the threats or actual violence used to steal from **PW1**, he testified that he was bitten on his finger and that a knife was used in the attack. From the evidence, I find as a fact that no knife was used to attack **PW1**, nor was it found at the crime scene. The prosecution evidence of **PW1** confirms through the medical report that **PW1** was bitten on his finger in the process of the assailants stealing from him. I find the evidence of **PW1** credible and it was not discredited during cross examination.

The next question for determination is whether the Accused persons stole from the complainant. **PW1's** evidence is that he was attacked and 1 pair of shoes, Samsung phone and K470.00 cash altogether

valued at K2,190.00 was stolen from him. **A1's** evidence was that he was at the bar until around 04:00 hours as he had fallen asleep and was only woken up by a bartender. I remind myself that the burden of proof throughout remains with the prosecution. In the present case, **PW1** testified that he was robbed by a group of three men. **PW1** placed **A1** and **A2** at the crime scene as the persons who robbed him.

A2 gave an alibi that at the material time he was at home. An alibi is a form of defence used where a person attempts to prove that he or she was in some other place at the time the alleged offence was committed. I rely on the case of **Katebe v The People [1975] ZR 13**. I find that **A2's** alibi is a bare denial unsupported by the prosecution evidence on record.

Further, apart from threatening **PW1** that they would kill him if he did not surrender his possessions, **PW1** was actually bitten on his finger prompting him to shout for help when he feared that the assailants could kill him. I am also satisfied that the prosecution have proved that 1 pair of shoes, Samsung phone and K470.00 cash altogether valued at K2,190.00 was stolen from **PW1**

which property has not been recovered. The fact that the said property was not found on **A1** and **A2** at the time **A1** was apprehended at the crime scene, and similarly when **A2** was apprehended two months later, is in my view an irrelevant consideration in the charge in the present case. I find that the three men who attacked **PW1** had a common design, namely to rob **PW1**.

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:

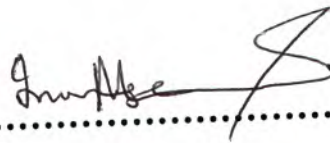
- (a). every person who actually does the act or makes the omission which constitutes the offence;*
- (b). every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*

(c). *every person who aids or abets another person in committing the offence.....”*

On the totality of the prosecution evidence, I find that the prosecution has proved the case of robbery against the Accused persons beyond reasonable doubt.

In the circumstance I find the Accused persons **A1** and **A2** both **GUILTY** of the offence of robbery and convict them accordingly.

Delivered in Open Court this 28th day of July 2017



.....
HON JUDGE IRENE Z MBEWE
HIGH COURT JUDGE

