

**IN THE HIGH COURT OF ZAMBIA**

**HP/111/2017**

**AT THE CRIMINAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN**

**THE PEOPLE**

**V**

**PHILIP KANGWA**



**Before Hon. Mrs. Justice I. Z. Mbewe at Lusaka, the 28<sup>th</sup> day of  
July 2017**

*For The State* : Ms. E. Mulele –State Advocate, NPA

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

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## **JUDGMENT**

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### **Cases Referred to:**

1. *Chimbini v The People* [1973] ZR 191
2. *Muvuma Kambanja Situna v the people* [1982] ZR 115
3. *Nsofu v The People* [1973] ZR 87
4. *Valentine Shula Musakanya v Attorney-General* [1981] ZR 44
5. *Woolmington v DPP* [1935] A.C 1
6. *George Misupi v The People* [1978] ZR 271

**Legislation Referred To:**

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

The Accused person stands charged with two counts, the first count is of aggravated assault with intent to steal contrary to section 295(1) of the **Penal Code Chapter 87 of the Laws of Zambia**. The particulars of the offence are that Philip Kangwa on the 30<sup>th</sup> September 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other unknown persons and whilst armed with a toy pistol with intent to steal did assault Yvonne Mwamba.

Count two is assault contrary to section 247 of the **Penal Code Chapter 87 of the Laws of Zambia**. Particulars of the offence are as follows: That Philip Kangwa on the 30<sup>th</sup> September 2016 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia did unlawfully assault Yvonne Mwamba.

The accused pleaded not guilty to both counts.

The prosecution called five witnesses in support of their case.



The evidence of **PW1**, Mulenga Muloshi was that on 20<sup>th</sup> September 2016 around 20:00 hours, he was in the living room when he heard a loud bang of car doors and noise outside and was prompted to go outside to check what was happening. That he found Clive Dube (**PW2**) his neighbor fighting with the Accused and his wife Yvonne the complainant (**PW4**) was shouting "thief". **PW1** went outside to assist and other people subsequently joined him and the Accused was apprehended. That the Police only came to the scene after an hour after they subdued the Accused and the Accused was handed over to them. That during the fracas the Accused dropped two phones which his niece picked up and the same were handed over to the Police. That the Accused dropped a toy gun which **PW1** later noticed at the time it was being handed to the Police that it was broken. That the phone was black in color and he did not pay attention to the make of the phone. He described the Accused as being fattish not very tall and a bit light in complexion.

In cross-examination he informed the Court that when he rushed outside his house he saw a silver vehicle drive off before he could join in the wrestle between Clive Dube (**PW3**) and the Accused.

The evidence of **PW2** Japhet Nyati was that it was barely after 19:00 hours when he heard a loud bang and someone screaming outside the flats where he resides. When he went outside his flat, he saw a Corolla silver in colour with a number plate ALD driving off at high speed. When he went to see what was happening he saw Clive Dube (**PW3**) and **PW1** his neighbor struggling with a huge man, whilst Yvonne (**PW4**) was shouting from next to her flat. The Accused was aggressive in fighting Clive Dube (**PW3**), but with his help and that of **PW1** they managed to apprehend the Accused. Three minutes later, 3 men came on the scene and one had a gun and said they were from a security firm and came to arrest the Accused but they refused to hand him over and the same people left in a white car. Whilst waiting for the Police, the Accused tried to break his phone which they confiscated and that they also found him with a toy gun. Under cross-examination he stated that there was enough light at spot where the incident took place.

There was no re-examination of **PW2**.

**PW3** was Clive Tembo Dube the complainant's husband (**PW4**), whose evidence was that on the 30<sup>th</sup> September 2016 between



19:00 hours and 20:00 hours he was with his wife Yvonne Mwamba (**PW4**) at Arcades Shopping Mall where she works. He had parcels with him which he decided to put in the **PW4's** car then went to his car and started driving off to their home, and that the complainant was driving in front of him. When the complainant reached Kabwe Road she stopped at Total filling station which is just before Washama Road and **PW3** proceeded to his home. When he got home he went to the bedroom and just after he took off his shoes he heard a hoot and the children went to open and almost immediately he heard them crying and at that same time he heard a sound of a glass shattering. He then quickly rushed to the door and saw a man wrestling with his wife who was still seated in the driver's seat. He went to the complainant's car and as he lifted the assailant the Accused, the Accused punched him in his face and then he held on to him. As the Accused tried to run away, he saw a pistol fall off him and the Accused stepped on it. He also noticed a Corolla behind the complainant's car reversing and the Accused tried to get into the reversing vehicle and in preventing him from doing so he jumped on him, and both fell to the ground, and his neighbors came on the scene to assist. That the Accused used his hands and

legs to break his phone which was black in color and in that phone he saw messages describing him and how he was dressed. He described the pistol as an old fashioned and black in color.

He testified that one of his neighbors contacted the Police, and that whilst waiting for the Police a group of armed men went to the scene and informed the people there that they were from a security company and were manning Cavendish University which is the premises opposite the flats. That the said men commanded them to hand over the Accused but they refused to do so as the purported security officers failed to produce identification documents upon which they left. **PW3** described the lighting as being sufficient at the time as there were two fluorescent tubes and one bulb outside. That he spent enough time with the Accused as they waited for the Police who came an hour later and picked the Accused. That during the scuffle with the Accused, **PW3** got injured on his leg and hand and was given a Medical Report at Emmasdale Police Station and was subsequently treated at UTH. He also identified the Accused person from the dock as being the assailant who was apprehended on the night of the incident.



In cross-examination he stated that he had never seen the Accused before the incident and that the attack lasted about 10 minutes. He reiterated that the Accused was by the driver's window which was broken when he attacked the complainant who was inside the car on the driver's seat and that when he lifted the Accused, the Accused was the first one to punch him on the face. He also stated that he remembered giving a statement at the Police station but that he did not remember if the issue of the toy gun was in the statement. On the toy gun, it was his testimony that he did not have proof that it belonged to the Accused.

In re-examination **PW3** informed the Court that he saw the pistol drop from the Accused's pocket and that he told the Police about it. He also maintained that the Accused was wrestling with **PW4** the complainant and not trying to assist her.

**PW4** Yvonne Mwamba the complainant, gave evidence that on Friday 30<sup>th</sup> September, 2016 around 19:00 hours she called **PW3** Clive Dube her husband and asked him to go to her workplace at Arcades Shopping Mall. Before **PW3** arrived she bought one smoked chicken from a young lady and put it same in a brown envelope as

it was in a transparent plastic. When **PW3** got to Arcades Shopping Centre they went to Spar and bought bread and **PW3** walked her to the vehicle first and passed on the brown envelope with the chicken together with her handbag and school bag. She then drove off and **PW3** was driving behind her. That whilst on Great East Road just near Pangea Offices she saw a vehicle with flashing lights drive past her at high speed. As she approached the Manda Hill traffic lights she saw a Corolla move to her left and started moving behind her closely. As she approached Bwinjimfumu traffic lights, the vehicles slowed down and at the stretch between Northmead and ZESCO she got concerned because the driver of the Corolla started moving closer to her vehicle and was flushing lights at full beam. That as her vehicle was descending on the ZESCO fly over bridge she noticed another vehicle that looked like a security van also moving in close proximity to her vehicle and at the round-about both vehicles went the other way towards Zambia Revenue Authority and she joined Great North Road and went to Total Filling Station where she bought sanitary pads from the Kwik Shop and drove back into Great North Road. When she turned to join the Close where her flat is, she found the gate open, drove in and reached the fourth flat



and started reversing so that she could park the vehicle. It was at that moment that she saw a vehicle driving at high speed with lights on full beam then realized it was the same Corolla that had followed her from Arcades Shopping Mall. She saw the people seated in front of that vehicle switch seats and held out pistols whilst approaching her vehicle and commanded her to give them money. It was her testimony that one of them was slim and short whilst the other one was tall and huge and she identified the person as the Accused herein. At that moment she could still see her children through the glass window on the veranda of her flat. That the Accused went to her window and she heard a loud bang and her window got shattered and she started screaming "thieves, thieves". That the Accused hit her on the leg and pushed her, and that the bags and brown envelope were on her front passenger seat and the attacker tried to reach for the brown envelope and it was at that point that she realized that he thought there was money in the envelope. She heard **PW3** asking the Accused who was wrestling with her as to what she had done to him whilst pulling him from the window. At that point, the Accused turned and hit **PW3** on his face.

During this time the car was still in motion and it hit into her neighbors carter vehicle that was behind. The Accused tried to run away and get into the Corolla that was being driven by the short man but **PW3** managed to hold him and the neighbors came out and helped apprehend him. In a split of a moment another vehicle that looked like a security van drove in the yard and one man from the said vehicle asked if the person they apprehended was a thief and told them to hand him over so that he would be taken to the Police station. She recognized the said man as the driver of one of vehicles that had been trailing her along Great East Road near the ZESCO fly over bridge. That she asked for identification cards but the man said they were security guards from Cavendish University and **PW4** told the man that she remembered him of which he disputed and left when someone from the crowd said they had called the Police. That the Accused got his phone and broke it and removed the simcard and chewed it, and that the Accused had another phone which dropped during the scuffle and a pistol was also discovered. **PW4** testified that the Police came to the scene about an hour later and took the Accused to Emmasdale Police Station. That at the scene they also discovered cowboy boots black



in colour with a strap and a grey hoodie belonging to the Accused. She stated that the distance from the parking slot to where the lights are is about one (1) meter. Further that the attack lasted a few minutes but it took about an hour for the Police to arrive at the scene. It was her testimony that she sustained a cut on her knee and her leg was swollen to which she was given a Medical Report at the Police station. That she had sustained an inflamed tendon on the knee and a plaster was put on it which she stayed with for about two (2) weeks. She identified the Accused from the dock and also identified the pistol as the one she saw fall from the Accused, the boots that the Accused wore on the material day, and the Medical Report.

In cross-examination, it was **PW4's** evidence that it was her first time to see the Accused on the day of the attack and she was scared for her life when he demanded for money and pointed a gun at her. She went on to state that she did not close the gate and that the bang on the window was loud but she would not know if it was loud enough for other people to hear it. She stated that from the positioning of the flats in the yard, if one parked the car and the

gate was open, someone passing on the road opposite Cavendish University was not able to see. That people only started coming during the wrestle between **PW3** and the Accused, and that the Accused attempted to escape but was apprehended by **PW3**. The boot was discovered when the Accused was apprehended and he still had one on his foot. She described the Accused as huge, fat and tall as compared to the other person that escaped whom she described as slim, adding that the shoes the Accused wore on that day made him look tall.

In re-examination she reiterated that the Accused rammed and hit her vehicle and shattered the window, he tried to enter the vehicle whilst reaching for the envelope on the passenger's seat and hit her hence she saw his face vividly and could not mistake another person for him.

**PW5** was Detective Sergeant Justin Banda, whose testimony was that on 2<sup>nd</sup> October, 2016 whilst on duty in the CID office he was assigned a docket of aggravated assault with intent to steal in which the complainant **PW4** reported that she had been trailed by unknown people and was later attacked by 2 unknown male people



after they damaged the window of her car. That at the time he received the docket, there was one male person in Police custody whom he came to know as Philip Kangwa (the Accused). He interviewed the Accused who insisted was that he was coming from a drinking spree with an unknown woman when he heard someone shouting for help and rushed to the scene to rescue the complainant (**PW4**). That he later came to know that one shoe was picked at the scene which belonged to the Accused and that the Accused had the other one at the time he was taken to the Police. He discovered that a toy pistol was picked at the scene allegedly belonging to the Accused.

He went on to state that the complainant and **PW3** were assaulted by the Accused. Having conducted investigations and having interviewed the witnesses who perceived the events he decided to charge the Accused with aggravated robbery with assault with intent to steal. However, under the warn and caution statement the Accused told him that he had nothing to do with the matter. On the evidence gathered, he informed the Court that he had in his custody a pistol, a cell phone, a shoe, and Medical Reports which

he tendered as part of his evidence. He also identified the Accused person from the dock.

In cross-examination **PW5** admitted that at the time he was handed the docket, the Accused was already in custody. He also confirmed that the Accused told him at the time of recording a statement that he was just a passer-by that heard the **PW4** the complainant screaming for help and went to the scene to rescue her. When asked if he had come across a hoodie that the Accused was allegedly wearing at the time he was apprehended, he responded that he never came across it. He added that he did not pick any fingerprints from the toy pistol and that it was impossible to do so as it had been handled by many people.

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

At the end of the prosecution case, the Accused was found with a prima facie case to answer and was put on his defence. He opted to give evidence on oath and called two (2) witnesses.

The Accused Philip Kangwa gave evidence that on 25<sup>th</sup> September 2016 his wife called to inform him that she was admitted in Liteta hospital as her blood pressure (BP) has shot up due to pregnancy



complications. The following day he went to see his wife and found that she was in a critical condition and was referred to Kabwe General Hospital. That on 27<sup>th</sup> September 2016 she went into surgery and delivered a baby girl, and he spent time there with her as she was admitted.

That on 30<sup>th</sup> September 2016 he decided to return to Lusaka to attend to his businesses and collect money from his tenants. It was his testimony that he left Kabwe around 15:30 hours to 16:00 hours using a private vehicle a Toyota Noah which he hired from Kabwe General Hospital junction. When they got to Mandevu junction they branched into Lumumba Road around 17:00 hours to 18:00 hours and went to a place called the Bridge a bar in Villa Elizabetha around 17:00 hours to 18:00 hours and he went inside the bar and found a lady he never knew drinking alone and he joined her. They drank beer together up to around 19:30 hours when he left the place as it was getting late. The lady introduced herself as Patricia Nambeya, and they exchanged phone numbers. When he reached Cavendish University, he saw a vehicle drive in a yard and another vehicle followed at high speed behind it. He saw

three men come out of the vehicle and heard a lady screaming followed by a loud bang and the three people started demanding for money from the lady who was in the vehicle. Two men were behind her vehicle and the person who was tall and huge wearing a grey hoodie was by the driver's door, and at that moment the Accused went to the person who was at the driver's door and pushed him to the ground. The other one hit him with something on his head and he sustained a cut and fell down. While he was still laying on the ground, he heard another person shouting "thief, thief" then some other people came and descended on him, took his phones and searched his pockets, and that he had about K800.00. That when he reached the Police Station he only found K370 or K350. At the Police, he was charged with aggravated assault with intent to steal and assault. He stated that on the material day he wore a checked shirt bluish and black in color and a charcoal grey trousers. That the checked shirt had blood stains and he wore it in the Police cells for three days. He denied ever wearing a hoodie.

He further reiterated that he went to the said flats to help when he heard **PW4** the complainant screaming, but that **PW4** mistook him



for the man he pushed to the ground who was attacking her. That he never wrestled with **PW3** but that **PW3** was the one that hit him and he fell to the ground. Further, that it is not true that he was with the short man that trailed the complainant from Arcades Shopping Centre as alleged and that the evidence that he broke his phone and chewed the simcard was not true. He stated that he had two phones with him that night, one belonged to his wife which he was bringing for repair and the other one was his, and that his phone has never been recovered.

It was his testimony that he informed the Police officer that the pistol did not belong to him but that it was picked from the ground after the fracas. In conclusion, he stated that having left the Bridge bar around 19:30 hours there was no way he could have been part of the group that trailed the complainant from Arcades Shopping Centre.

In cross-examination he stated that he has never owned a Corolla and that he never knew **PW3** and **PW4** prior to the incident. He stated that he was familiar with that area because of Cavendish University and that he passed there sometimes and frequented the

Bridge bar. However, he denied knowing **PW4's** place adding that he only knew it when the **PW4** was attacked. That at the time he rushed to assist the complainant, there was a fluorescent tube which was not clear and it was about two (2) meters away from the complainant's vehicle. As regards the shirt that he produced before Court, he stated that it became dirty when he fell down after the attackers hit him with something like an iron bar and also due to the subsequent beating from people in **PW4's** yard. The Accused stated that he did not inform the arresting officer that he was wearing a shirt as opposed to a grey hoodie since the officer saw him wearing a shirt at the time of taking a statement from him. He reiterated that when he went to the scene he found two men trying to open **PW4's** car door, and he pushed the one who was wearing a hoodie to the ground and the other one hit him from behind and he fell down. He stated that there was not enough lighting at the premises hence it was difficult to see properly. The Accused went on to state that **PW3** in his testimony admitted to having eye problems and as such with the lighting from the fluorescent tube at the flats, he could not see properly and **PW4** was in a state of shock when she was attacked so she mistook him for the attackers. Further that



he informed the arresting officer that he was with a lady at the Bridge bar and that he had just come back from Kabwe. The Accused stated that the testimony of **PW4** was untrue that he chewed his simcard. He stated that he was badly beaten and there was no time and chance for him to open the phone. In relation to people claiming to be from a security company, he informed the Court that he neither saw nor heard them and later in a twist of events he stated that he heard them asking for him.

**DW1** was Patricia Nambeya. Her evidence was that on 30<sup>th</sup> September 2016 around 17:00 hours she went to the Bridge bar in Villa Elizabetha. That whilst she was waiting for her friends, the Accused went and sat next to her and they engaged into a conversation and drunk together and later on exchanged phone numbers after which the Accused left around 19:30 hours and promised that he would call her the following day. That the following day she waited for a call from the Accused but he did not call, and she later decided to call him but his phone was off. After a month and two weeks his number went through and she met him after three days and he narrated what had happened to him.

Under cross-examination **DW1** stated that she was not with the Accused when he left the bar and as such she would not know what he did after he left the bar.

There was no re-examination of **DW1**.

**DW2** was Getrude Mweemba Kangwa who stated that she was the Accused's wife. Her testimony was that on 25<sup>th</sup> September 2016 she was admitted at Kabwe General Hospital due to gestational high blood pressure and that she informed the Accused who was in Lusaka and he went to the hospital immediately. That she was operated on and delivered a baby girl on 27<sup>th</sup> September 2016, and the Accused was with her in the hospital until 30<sup>th</sup> September when he decided to come back to Lusaka to attend to his business. It was her testimony that the Accused left Kabwe for around 15:00 hours and after 18:00 hours he phoned her informing her that he had arrived but had not reached home as he was going to some drinking place. Around 19:00 hours she tried to call him but the phone went unanswered and the following day she tried to call and his phone was off. That after three or four days her in-laws called her and told her that the accused had been arrested, and when he was released



he went to Kabwe and told her what had happened to him. She stated that when the Accused left Kabwe on 30<sup>th</sup> September, 2016 he was wearing a grey trousers and a short sleeved checked shirt, and that she did not see him wear any hoodie.

In cross-examination she stated that she did not know the Accused's movement after he left Kabwe for Lusaka.

There was no re-examination of **DW2**.

At the end of the case, the prosecution filed written submissions on 5<sup>th</sup> July 2017 in which it was submitted that the Accused had duly been identified and apprehended and that the evidence of **PW1**, **PW2**, **PW3** and **PW4** is clear in that there was enough light emanating from the fluorescent tube at the scene. That **PW4** gave evidence that the Accused attacked her from the driver's seat window and as such she was able to see him clearly and that the defence has not brought any evidence to show why the witnesses would falsely implicate the Accused. In fortifying this position, the case of **Chimbini v The People [1973] ZR 191** was cited.

It was further submitted that in the event that the Court finds the identification of the Accused to be flawed, then this can be

supported by something more connecting him to the commission of the offence. That the fact that **PW4** had seen vehicles trailing her from Arcades Shopping Centre and she identified the driver of one of the vehicles as the person that went to look for the Accused at the scene. Counsel referred to the case of **Muvuma Kambanja Situna v The People [1982] ZR 115** in which the Supreme Court held that:

*“If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.”*

It was also submitted that the Accused having been within the vicinity of the crime scene, had the opportunity to commit the offence. Further that **PW4** saw him brandish a pistol at her, and in support of this, the case of **Nsofu v The People [1973] ZR 87** was cited where it was held that:

*“Mere opportunity alone does not amount to corroboration, but ... the opportunity may be of such a character as to bring in the*



*element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration.”*

It was further submitted that it is odd how the Accused was found and apprehended at the scene and why the people identified by **PW4** as being the ones that pursued her from Arcades Shopping Centre went to look for him at the crime scene when he claims that he did not know who they were.

In respect to the Accused alibi, it was submitted that both **DW1 and DW2** gave evidence pertaining to the Accused’s whereabouts before the attack and not during the material time. In support of this the case of **Valentine Shula Musakanya v the Attorney General [1981] ZR 14** was referred to where it was held that:

*“Unless a detainee is able to adduce credible evidence of alibi covering the whole of the period stated in the grounds, he cannot be said to have put forward an alibi.”*

In regard to **DW1**, the prosecution argued that her testimony should be treated with extreme caution owing to her demeanor during examination in chief and also that she failed to give her

correct name. It is submitted that she did not produce any documentation to prove that she was the person she claimed to be.

In conclusion, the prosecution submitted that the Accused did with intent to steal assault **PW3** and **PW4** as evidenced by the Medical Report. It is submitted that the Accused was sufficiently identified by all the witnesses present at the scene and there is further corroborative evidence against him in the form of the Medical Reports, odd coincidences and a failed alibi.

The defence filed written submissions dated 13<sup>th</sup> July 2017 in which it was submitted that the issues to be resolved centre on identification of the Accused as the perpetrator of the offence. That **PW4** the complainant described the Accused as a tall and huge man who was wearing a hoodie on the material day but that a comparison of the Accused with his defence Counsel Mr. Mweemba showed that the two were of the same height.

Based on the foregoing it was submitted that there is nothing linking the Accused to the offence apart from him being at the scene of which fact he had a reasonable explanation. It is submitted that the Accused in trying to rescue the complainant was mistaken to be



the perpetrator of the offence. Counsel went on to state that the burden of proof is on the State to prove the guilt of the Accused beyond reasonable doubt as was stated in the case **Woolmington v DPP [1935] AC 1** case. It was the defence submission that there is doubt with regard to the description of the Accused in relation to his height, and Counsel reiterated that there is a possibility and an inference of the probability that the Accused was only assisting the complainant. It is submitted that the Accused's explanation was logical and reasonable and that both his witnesses showed that he was in Kabwe and thereafter at a bar which made him a victim of circumstances.

It was further submitted that **DW2** confirmed the Accused's testimony that he was at the bar with her until 19:30 hours when he left to go home, and that **PW4** also stated that it was around that very time when she left Arcades Shopping Centre and she managed to see who was trailing her clearly. Nevertheless **PW4** confirmed that she never saw the Accused in the said vehicle and that this confirms that the Accused was not part of the attackers, meaning she was attacked by other unknown people and not the Accused.

It is submitted that according to **PW4's** evidence the Accused was wearing a hoodie, the Accused on the other hand refuted that allegation and gave evidence that he was wearing a checked shirt and the evidence of **PW5** was that he never learnt anything about the hoodie, which confirms that the Accused was mistaken for the attacker as alleged by **PW4**. On the issue of the phones it was submitted that **PW1** said the Accused's phones were found by his niece in contradiction to **PW2's** evidence that the Accused wanted to break his phone. That all the prosecution witnesses confirmed that they just beat the Accused without giving him a chance to explain what had happened, and that had they done so, the Accused would have stated where he was coming from so as to let them know that he only went to help. Counsel for the Defence Mr. Mweemba went on to state that **PW3** had proved that he has bad eye sight and that in Court he failed to read his Police statement and questioned how he could have managed to see the attackers at night with no clear light. That **PW5** had confirmed that the Accused told him that he came from a drinking spree and that he was with a lady.



In conclusion, the defence submitted that the State has failed to prove their case beyond reasonable doubt and that the Court should acquit the Accused forthwith.

I have considered the evidence and submissions by both the prosecution and the defence herein.

I warn myself that in criminal cases the burden of proving the guilt of an Accused lies from beginning to end on the prosecution, they must prove each element of the offence charged beyond reasonable doubt. If at the end of the day I harbor any doubt as to the guilt of the Accused, I must grant him the benefit of that doubt and acquit him. The Accused has no obligation to prove his innocence.

The Accused is charged with two counts, the first count is aggravated assault with intent to steal contrary to section 295 of the **Penal Code, Cap 87 of the Laws of Zambia** and the second count is assault contrary to section 247 of the **Penal Code, Cap 27 of the Laws of Zambia**.

Section 295 of the Penal Code provides that:

*“Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, assaults any person with intent to steal anything, is guilty of a felony and is liable on conviction to imprisonment for a period (notwithstanding subsection (2) of section twenty-six) of not less than ten years and not exceeding twenty years.”*

Section 247 of the Penal Code provides as follows:

*“Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.”*

From the above provisions of the law, the ingredients that have to be proved in respect to aggravated assault with intent to steal are that an Accused person must be with another person or must be armed or with an offensive weapon and there should be an assault of a third party with intent to steal.

An offensive weapon is defined in Section 4 of the **Penal Code, Cap 87 of the Laws of Zambia** as:



*“means any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article;”*

From the outset, I warn myself with regard to the possibility of an honest mistake on the part of **PW1, PW2 and PW3** with respect to the identity of the Accused as the person who attacked **PW4** on the material day. **PW4** testified that the person who attacked her wore a hoodie. She also categorically stated that the person who broke the driver's passenger window and tried to grab her handbag and parcels on the front passenger seat was the Accused. Can the person dressed in the grey hoodie be the person who got away in the Corolla vehicle, or was it the Accused?

**DW2** the Accused's wife testified that on the material day the Accused was wearing a checked shirt before he left Kabwe for Lusaka. She testified that the Accused does not have a grey hoodie. The issue is one of credibility of the witnesses. I find **PW1, PW2** and **PW3** consistent in their evidence and demeanour and there is nothing to lead me to conclude that these were untruthful in

material respects. This is supported by the fact that the Accused was identified as the assailant and **PW4** was in close proximity with the Accused and identified him as the person who not only assaulted her but tried to steal from her. It is the duty of this Court to satisfy itself that in all circumstances, it is safe to act on such identification of the Accused. Having warned itself of the need to exclude the possibility of an honest mistake, I find that the prosecution evidence is cogent and inevitably, the Court has come to the conclusion that there is no danger of mistaken identity between the person seen wearing a hoodie and the Accused. Even though **PW4** testified that she was attacked by a person wearing a hoodie, the person found at the scene who was reaching for the front passenger seat where the handbag and other parcels were was the Accused. This is corroborated by **PW3** who found the Accused in that position as he wrestled with the complainant **PW4** who was still in the driver's seat. I find that there was positive and reliable identification of the Accused as the assailant therefore the possibility of an honest mistake is ruled out.



Instructive is the case of **George Misupi v The People [1978] ZR 271** where it was held inter alia that:

*“Once in the circumstances of the case it is reasonably possible that the witness has a motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe,”*

I take note that **PW3** and **PW4** are husband and wife and I will treat their evidence cautiously. This does not however, mean that they are unreliable witnesses. There is no evidence indicating that **PW3** and **PW4** had the motive to falsely implicate the Accused to the commission of the offence. They did not know each other prior to that encounter.

An ingredient of the offence of aggravated robbery with intent to steal is that the Accused person must be armed with an offensive weapon. In the present case **PW4** said that she saw a pistol fall from the Accused as he was trying to run away. The Accused denied the allegation that the plastic pistol belonged to him and that it was picked up at the scene of the crime. He also testified that he was not with the attackers. Specifically, **PW4** testified that she saw a

pistol which the Accused used to point at her. According to **PW4**, this toy pistol was used for threatening injury to her. At the trial, **PW4** identified the pistol as the one she saw fall out from the Accused's pocket. Since there was sufficient lighting and **PW4** was able to see that the Accused had a pistol, I find so. **PW1** testified that during the fracas with the Accused, he saw the Accused drop a pistol. In the case of **PW3**, he testified that when the Accused was trying to run away from **PW4's** vehicle, he noticed a pistol drop from the Accused. In the case of **PW2**, after the apprehension of the Accused and as they waited for the Police, he noticed that the Accused had a toy pistol. **PW5** being the arresting officer did not run finger prints on the said toy pistol to show that it belonged to the Accused as he said it had been handled by many hands. In cross-examination, **PW3** testified that he wouldn't know if the pistol belonged to the Accused. This evidence is negated by the fact that the issue of the toy pistol is corroborated by the evidence of **PW1**, **PW2**, **PW3** and **PW4** who all testified that they saw the toy pistol with the Accused, either falling out of his pocket, and also being in his hands. The said witnesses all connected the toy pistol to the Accused. I find the evidence of **PW1**, **PW2**, **PW3** and **PW4** credible



moreso that there was sufficient light where the incident took place. This is the offensive weapon connected to the offence.

Another ingredient of the offence is that there should be an assault of a third party with intent to steal. That the Accused was reaching out for the brown envelope that was on the passenger's seat with an intent to steal, and in the process hit **PW4** with whatever he had which resulted in her having an inflamed knee tendon. A Medical Report was produced to this effect. I find that **PW3** and **PW4** were both attacked by the Accused. **PW4** testified that the Accused was the person who attacked her, whilst **PW3** testified that the Accused is the person he saw and grabbed whilst in a scuffle with **PW4**. I find that **PW4**'s vehicle window on the driver's side was smashed by the Accused in order to try and gain access to the parcels on the front passenger seat. This ingredient has been proved by the prosecution.

Another ingredient of the offence of aggravated robbery with intent to steal is that an Accused person must be with another person. As to whether the Accused was with another person or persons, **PW4**

testified that the Accused was with other persons who fled from the scene the moment **PW3** came to her rescue. **PW4** confirmed that there was someone else at the scene who came out of a car whose description was a slim tall person who tried to come to the aid and get the Accused but he was held by **PW3**. The Accused's version is that the attacker hit him and he fell to the ground. I find it odd that the Accused opted not to call for more help from the residents of the flats or from the security people that showed up later claiming they were stationed at Cavendish University. I am inclined to believe the prosecution evidence of **PW1, PW2, PW3 and PW4** that the Accused was together with the other attackers who fled from the scene upon seeing **PW3**. I also find it difficult not to believe that the people that went to look for the Accused claiming to be from a security company that manned Cavendish University were actually the same people that trailed **PW4** from Arcades Shopping Centre. My view is that if those people were genuinely guarding Cavendish University which is opposite the flats where the incident took place, they would have come to the scene to rescue **PW4** at time that she screamed for help and not after the scuffle and



apprehension of the Accused. This cannot be an odd coincidence. The element of the Accused being with another person is met.

The Accused gave an alibi. It is trite that an Accused does not have to prove his alibi but the prosecution must provide evidence to disapprove the said alibi. I find that the defence's alibi evidence is not helpful to their case as both **DW1** and **DW2** gave account of the Accused's whereabouts before the incident and not at the time of the incident. With the guidance of the holding in the **Nsofu v The People [1973] ZR 87** case, I find that the circumstances in the present case and the locality of opportunity on the part of the Accused brings an element of suspicion.

Other connecting links between the Accused and the offence is that **PW3** and **PW4** identified him as the person who they found by **PW4's** vehicle and that he was attempting to reach the front passenger seat. **PW2** testified that he found the Accused in that position. If indeed he was trying to assist **PW4**, there was no need to shatter the glass or attempt to get hold of her handbag on the front passenger seat. This behaviour on the part of the Accused was not

an odd innocent coincidence. I find that the prosecution has proved the first count of aggravated assault with intent to steal.

The Accused is charged with a second count of assault contrary to Section 247 of the **Penal Code, Cap 87 of the Laws of Zambia.**

**PW4** testified that the Accused after breaking the window to the driver's seat, assaulted her on her legs as he was trying to reach across to the parcels on the front passenger seat. The Accused testified that he had come to **PW4**'s rescue hence his presence by **PW4**'s vehicle. I find this hard to believe as it is evident that there was a scuffle between **PW4** and the Accused. **PW4** was trying to protect herself from the Accused. She testified that she suffered injuries as a result of the assault, and was given a Medical Report by the Police at Emmasdale Police Station. The Medical Report was exhibit "P3". The Medical Report supports and is consistent with the finding that **PW4** was assaulted on the material day. I find that it is the Accused who assaulted her.

Based on the foregoing I find the Accused **GUILTY** as **CHARGED** on both counts and convict him accordingly.

Dated in Open Court this 28<sup>th</sup> day of July, 2017.





*Irene Mbe*

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**HON IRENE ZEKO MBEWE**

**HIGH COURT JUDGE**

