

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

HP/15/2016

BETWEEN:

THE PEOPLE

V

PETER MUMBA
ISAAC MWANZA
PATRICK LUNGU



BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 16TH DAY OF JUNE, 2017

APPEARANCES

FOR THE PEOPLE : C. LUPILI FROM NATIONAL PROSECUTION AUTHORITY

FOR THE ACCUSED : H.M.MWEEMBA AND 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

CASES REFERRED TO:

1. JOSEPH MULENGA AND ANOTHER V THE PEOPLE (2008) Vol. 2 ZR 1.

This Judgment is in respect of Isaac Mwanza and Patrick Lungu, the 2nd and 3rd accused persons, as Peter Mumba hereinafter referred to as the 1st accused person, pleaded guilty to the charge and has since been sentenced.

The second and third accused persons (A2 and A3) stand charged with one count of aggravated robbery contrary to *Section 294 (1) of the Penal Code Cap 87 of the Laws of Zambia*. The particulars of the offence allege that on 14th October, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, the accused persons jointly and whilst acting together with other persons unknown, did steal Airtel, MTN and Zamtel talktime scratch cards valued at K20,070.00 and K24,112.00 cash altogether valued at K44, 182.00 the property of **CHRISTINE KAZOVU** and, at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Christine Kazovu in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.

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

The first prosecution witness (**PW1**) was **CHRISTINE KAZOVU**. PW1 testified that she operated from garden complex as a sales representative, where she sold talktime scratch cards and pepsi drinks. PW1 narrated how on 14th October, 2015 she was attacked and robbed of K24,112.00 cash and talktime scratch cards worth about K20,000.00 on her way home from her

working place. She further narrated that during the robbery the attackers covered her face with a cloth soaked in liquid chilli and battered her.

PW1 testified that she managed to apprehend A2 who was one of the attackers and took him to Mwembeshi Police Post with the help of members of the public. The witness informed the court that at the time of apprehending A2, he had a brown bag which contained a bottle of liquid chilli. She stated that she was issued with a medical report at Mwembeshi Police Post and received treatment from George Clinic. PW1 explained that the police officers later recovered K7,000.00 cash and some talktime scratch cards. She asserted that the talktime scratch cards were accordingly disposed off at the Subordinate Court.

In cross-examination, PW1 denied having told the police that two people had attacked her. PW1 clarified that the liquid chilli was put on a head sock which was then placed onto her eyes before the attackers started hitting her.

PW2 was **ALEX MUSHIKA** a stock controller for Ethan Suppliers and Retail. He testified that on 14th October, 2015 he received information that PW1, one of their sales representatives, had been robbed and the matter was reported to Mwembeshi Police Post. PW2 stated that when he went to Mwembeshi Police Post he found A2 who was one of the suspected attackers in custody. PW2 testified that he was allowed by the police officers to speak to A2. When PW2 interrogated A2, he revealed that he was with

Peter, Chansa and Junior when they attacked PW1 and that his counterparts were in garden compound. PW2 informed the court that A2 led him and some police officers to the apprehension of A3 who was found in possession of talktime cards worth K4,095.00 and K1,265.00 cash. The witness stated that they took A3 to Mwembeshi Police Post. A3 indicated that he did not know where A1 and Chansa lived but he provided details of persons who could help the police locate where A1 lived. PW2 narrated that through the lead that A3 provided, the police managed to locate A1's residence. The witness asserted that with the help of A1's wife, talktime cards worth K16,000.00 and K5,000.00 cash were retrieved from A1's house.

During cross-examination, PW2 explained that he was alone when A2 confessed to him but that he went to apprehend A3 in the company of the police officers. PW2 further explained that he was not aware if A2 had made a statement to the police officers prior to his arrival at the police post. PW2 denied having promised A2 anything in exchange for his confession. In further cross examination, the witness stated that they retrieved the airtime scratch cards and the money from A3's pockets.

The third prosecution witness was **SERGEANT PADDY MUKWATO (PW3)** a police officer, whose testimony was that on 14th October, 2014 around 19:00 hours he was on duty when PW1 with some members of the public took A2 to the police post. PW3 testified that he received a report from PW1 who indicated that robbers wearing head socks and masks had attacked her and that A2 was

suspected to have been among the attackers. PW3 narrated that PW1 told him that airtime scratch cards worth K20,000.00 and K24,112.00 cash had been stolen from her. When PW3 searched the bag found with A2, there was a bottle containing liquid chilli and airtime scratch cards worth K200.00. PW3 stated that he issued PW1 with a medical report form and advised her to go to the hospital. PW3 informed the court that he also visited the scene of the crime and found two head socks there; one seemed to have been soaked in chilli.

The witness narrated that he commenced investigations and discovered that A2 had been with A1, A3 and Chansa during the incident. PW3 was then led to A3 who was found in possession of airtime cards worth K4,000.00 and K1,265.00 cash at the time of his apprehension. PW3 charged both A2 and A3 with the offence of aggravated robbery.

PW3 informed the court that the following morning, he and some other officers traced A1's residence where they recovered talktime cards worth K16,000.00 and K5,735.00 cash. PW3 testified that he then handed the matter over to the criminal investigations department.

During cross-examination, PW3 stated that when he received the report, PW1 had indicated that the attackers had used tear gas. He agreed that only an expert could have confirmed whether the substance that was found on the head sock was in fact chilli. PW3 denied anyone having beaten A2 to pressurize him into

leading the police to the arrest of A3. He also confirmed having been among the people that apprehended A3.

In re-examination, PW3 clarified that PW2 was with the police at the time they apprehended A3 because they wanted to be transparent as the investigations involved a large sum of money. PW3 added that A3 admitted being in possession of the airtime cards and money upon being arrested.

The last prosecution witness was **DETECTIVE CONSTABLE EDWIN TOLOPA PEPALA (PW4)**. He testified that after being assigned to investigate a report from PW1 on 15th October, 2015 he made inquiries and as a result of which, he arrested the accused persons for the offence with which they are now charged. He stated that after being warned and cautioned they denied the charge.

PW4 explained that at the close of the investigations, a total of K20,000.00 worth of talktime and K7,000.00 cash was recovered and the talktime cards were disposed off through the Subordinate Court. He produced the brown bag, the bottle of chilli, the medical form, the disposal of exhibits form, 2 head socks and K7,000.00 cash as part of his evidence.

In cross examination, PW4 stated that the liquid chilli was found in A2's possession and that one of the head socks found was wet with chilli. PW1 agreed that he should have taken the chilli and the wet head socks to an analyst for confirmation. He denied

possessing any knowledge of either A2 or A3 undertaking the business of selling talktime prior to the attack.

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 A2's testimony that on 14th October, 2015 between 17:00 hours and 18:00 hours, he was buying cigarettes at a makeshift stand when PW1 with a group of others approached him alleging that he had stolen a bag containing money. The group then took him to Mwembeshi Police Post. At the police, A2 explained that Peter Mumba (A1) left the bag that had been found with him at the stand. He further told the police officers that he did not know where A1 lived. He stated that while in custody, A3 phoned him and the Police inquired of who A3 was. A2 informed them that he conducted business with A3. He was then asked to lead the police to where A3 was.

During cross-examination A2 denied being found with any money or talktime cards worth K200.00 when he was apprehended. He expressed his surprise that A1 who he said was with him at the makeshift stand was later found with talktime cards worth K16,000.00. He expressed further surprise that A3 was also found with talktime cards when he was apprehended.

A2 confirmed that it was A3 who led the police to the arrest of Peter Mumba. A2 also confirmed that there was no reason why PW1 could falsely implicate him in the robbery.

A3's evidence was that on the material date, he was at a funeral house around 20:00 hours when he called A2 to ask if he was going to join him there. A2 agreed and around midnight, A2 called A3 to inform him that he had arrived at the roadside. A3 explained that when he went there, he was apprehended by the police. He stated that the police took K1,500.00 cash from him which was meant for his business. A3 denied being in possession of talktime cards at the time of his apprehension. He further denied leading the police to A1's house. A3 informed the court that at the time of PW1's alleged attack, he was at the funeral house.

In cross-examination, A3 admitted knowing A1, A2 and Chansa as they operated from the same market. He stated that he found it odd that all the suspects in the matter operated from the same market. He further stated that although A2 was attending the funeral because of him, they were not good friends.

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

I have considered the evidence before me and it is my immediate affirmation that the offence of aggravated robbery is provided for in *Section 294 (1) of the Penal Code*. For case of reference *Section 294 (1)* is couched in the following terms:

“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.”

From the forgoing, it is clear that to prove a charge of aggravated robbery under Section 294 (1) of the Penal Code, there must be evidence that a theft took place and violence or the threat of it was used to facilitate the theft.

In the matter before me, I find that PW1 was on 14th October, 2015 at about 18:30 hours attacked robbed of Airtel, MTN and Zamtel talktime scratch cards valued at K20,000.00 and K24,112.00 cash by a group of men. I also found that during the robbery PW1's face was wrapped with a cloth soaked in chili and she was physically battered. According to the medical report which was produced in court as exhibit "P3", PW1 sustained a bruised right knee, broken upper lip and she complained of general body pains due to the trauma. I equally find that immediately after the robbery, A2 was apprehended by PW1 with the aid of the members of the public and taken in Mwembeshi Police Post. It is common ground that A2 led PW2 and some police officers to the arrest of A3. I further find that the arresting

officer made some recoveries of talktime scratch cards amounting K20,000.00 and K7,000.00 cash.

Having found that PW1 was robbed of K24,112.00 cash and K20,000.00 worth of talktime scratch cards, the issue for determination is whether the accused persons were part of the robbers.

According to PW1, A2 was nabbed at the scene of crime with a bag containing a bottle of liquid chilli and was immediately handed to Mwembeshi Police Post.

There is also evidence from PW2 that when A3 was apprehended with the help of A2 he was found in possession of talktime scratch cards worth K4,095.00 and K1,265.00 cash.

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 have carefully analysed the evidence and considered the possibility of the accused persons being falsely implicated by PW1 and PW2. There is no evidence advanced on record to suggest any reasonable circumstance that the two witnesses have motives to give false evidence. I find the testimony of the prosecution witnesses to be plausible and true. In particular, I affirm that the evidence of PW1 and PW2 was substantially not contradicted in cross-examination by the accused persons.

It is trite law that where an accused person fails to challenge the prosecution version in cross examination and advances a version in his own testimony, the trier of the fact would be entitled to treat his version as an afterthought. I am fortified on this position by the holding of the Supreme Court in the case of **JOSEPH MULENGA AND ANOTHER V THE PEOPLE**¹ where their Lordships had this to say:-

“During trial, parties have the opportunity to challenge evidence by cross examining witnesses. Cross examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed.”

Similarly, in the matter before me the evidence of the main prosecution witness on how the accused persons were apprehended on the same day of the robbery and found with some of the stolen items has not been challenged. In the same vein the evidence regarding A3 leading the police to the arrest of A1, who readily admitted the charge, remain unshaken. In fact the evidence of how the apprehension of A1 was facilitated by A3 has also been corroborated by A2's testimony.

In the circumstances, I therefore find the version of the accused's evidence to be a clear afterthought aimed at misleading the court and it is hereby disregarded. I am satisfied that the recoveries that were made of some of the stolen items as exhibited before

the court and the bag containing the liquid chilli that was found with A2 clearly show that the accused were part of the robbery.

It is my finding that the prosecution have proved the charge against the accused persons beyond all reasonable doubt. I find the accused persons guilty as charged and I accordingly convict them for the offence of aggravated robbery contrary to *Section 294 (1) of the Penal Code*.

Delivered in open court this 16th day of June, 2017.



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M.CHANDA
JUDGE