

**IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)



HP/228/2017

THE PEOPLE

V

VICTOR MUTEMELA

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 29th DAY OF
JANUARY, 2018**

For the State : Mr F. Sikazwe, State Advocate

*For the Accused : Mrs P.S Mumbi, Charles Siamutwa Legal Practitioners for
Legal Aid Board*

J U D G M E N T

CASES REFERRED TO:

1. ***Jordan Nkoloma V The People 1978 ZR 278***
2. ***Mark Herbert Kaunda V The People 1982 ZR 26***

LEGISLATION REFERRED TO:

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

The accused person stands 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 Victor Mutemela on 22nd August, 2016, at Lusaka in the Lusaka district, of the Lusaka Province of

the Republic of Zambia, jointly and whilst acting together with other persons unknown, and whilst armed with a toy gun did steal a motor vehicle namely Toyota Corolla, valued at K45, 000.00, the property of Mwerwa Tembo, and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to the said Mwerwa Tembo in order to obtain or retain, prevent or overcome resistance to its being stolen or retained.

The accused person denied the charge, and the matter proceeded to trial where the State called eight witnesses, while the accused person gave his defence on oath, and did not call any witnesses. The onus is upon the State to prove the case beyond all reasonable doubt.

PW1 was Michael Zulu a taxi driver. His testimony was that on 21st August, 2016 he was working as a taxi driver, operating at the Cockpit rank in Kaunda Square Stage II, and was using a Toyota Corolla registration number AIB 2408. He testified that he was booked by two male persons, one who wore a ZAF combat uniform, and another in civilian clothes, and they asked him to take them to Twin Palm.

PW1 further testified that he charged the men K70.00, and that as he spoke with them, he was able to see them as there was a spot light there. That after they started off, and they reached Twin Palm Mall, the one in the ZAF uniform told him that when they reached Chainda, they would pick up another boss. He went on to testify that when they reached Meanwood Chainda, they turned into Meanwood, and the men directed to him to stop at a house where they said their boss was at his girlfriend's house.

When PW1 switched off the engine, the one wearing the ZAF uniform left the vehicle and went into the bush, and when he returned he stood by the driver's door. That as they waited for the boss, he got a gun and pointed it at PW1, and told him that they only wanted the vehicle. That PW1 got out of the vehicle, and the one wearing the ZAF uniform got in, and drove off with the vehicle. PW1 told the Court that he went and reported the matter at Chelstone Police, and he was detained for two days.

It was his evidence that when he was released, he started looking for the vehicle, and later police officers from Central Police told him that the vehicle had been recovered. He also told the court that he went and identified the vehicle at the police station by virtue of the dents that it had. Then after a few days he was called by the police again, this time to identify his attackers at an identification parade, and he identified one of them.

PW1 further testified that the vehicle that was stolen from him is registered in Mwerwa Tembo's name, and he identified the registration certificate for the vehicle and it was marked 'ID1'. He described the gun that he was threatened with as being greenish black in colour, and he identified the vehicle and it was marked 'ID2'.

In cross examination, PW1 testified that he was booked by two people. He told the court that he could clearly see what was happening when the two approached him, saying that they had gone there in a either a dark blue or maroon Toyota Spacio, a latest model. He stated that he could not recall the number plate of the vehicle they were in as it was parked away from them, and he stated that the men had signaled for a taxi, and

he went to where they were, but that there was not a lot of light there, compared to where he had parked.

That thereafter they had walked back to his vehicle after one of the men remained in the vehicle they went with, and he maintained that he was able to identify the two who he went with as he spent time with them. It is his evidence that when they got into the vehicle, the one in civilian clothes sat in the front passenger seat, while the one in the ZAF uniform sat behind, and he was the one that told him to turn into Meanwood, Chanda to pick up his boss.

On the description of the two, PW1 stated that the one who wore the ZAF uniform was light in complexion, and the other in civilian clothes was also light in complexion, and was tall. When cross examined further PW1 stated that the accused person looked dark in court. That he identified his assailant three months after the attack.

Evans Mwenya Chanda a taxi driver was PW2. In his testimony he told the court that on 26th October, 2016 between 17:00 and 18:00 hours, his friend Chanda went to his house with another friend, and they were with a vehicle that had no number plate. They asked PW2 if they could park the vehicle there and collect it the next day, and that Chanda had insisted that they park the vehicle there, even when PW2 told them that his house did not have a wall fence, and that is how he had allowed him.

PW2 also testified that he knew only Chanda, and not the owner of the vehicle. That the next day around 06:00 hours, police officers went to his house and they were with the man who had gone to his house the previous day with Chanda, and the man was handcuffed. He explained that the police officers got the vehicle, and asked him to go to the police

station to give a statement, which he did with Chanda Mosha. PW2 identified the accused person as the man who went with Chanda to his house to park the vehicle. He identified 'ID2' as the vehicle that was parked at his house by Chanda and the accused person.

When cross examined, PW2 told the court that when the vehicle was taken to his house he had raised concern that it had no number plate, and his house was at an open place, and if anything was stolen from it, he would not be accountable. PW2 stated that it was normal for Chanda to ask to park the vehicle at his house as they worked together at the station. That he did not ask who the owner of the vehicle was, as he was not suspicious. Whilst agreeing that there are a lot of Toyota Corolla's, PW2 testified that he could still identify the one that was parked at his house.

Derrick Nalikena was PW3, a Detective Sergeant. He told the court on 21st August, 2016 he was on duty at Lusaka Central Anti- Robbery Squad around 24:00 hours, when they received information of an aggravated robbery in Chainda, Ibex Hill, and they followed up the report. He stated that they interviewed the victim who explained that he was booked from Cockpit night club in Kaunda Square Stage II, and that an interview with taxi drivers at the rank confirmed so. Then on 27th October, 2016 an informer told him that he had information about the people who had stolen the vehicle, and he was shown the suspects house in Chainda Compound.

PW3 told the court that around 04:00 hours he went with the crew to the house where the suspect was apprehended and taken to Central Police. There he warned and cautioned him, and came to know him as Victor Mutemela. That Victor led him to a house in Chainda compound where

the vehicle was recovered at Mwenya's house, and the vehicle was handed over to Detective Simuchembu together with the suspect. He identified 'ID2' as the vehicle that was recovered.

PW3 in cross examination testified that the informant told him that he knew who had stolen the vehicle on 27th October, 2016. That when they went to apprehend the suspect, the informant was not there, but the informant had described the suspect as a bit short being about 1.6 metres tall, and a bit light in complexion. When asked if the accused person is light in complexion, PW3 said that he is, but when pressed further he said that he is not. PW3 told the court that the accused person led him to the recovery of the vehicle, and that the informant did not know where the vehicle was. PW3 denied knowing Evans Chanda or Chanda Mosha.

He further testified that the scratches on the vehicle were there when the vehicle was recovered, and that the registration number of the vehicle was on the side mirrors. He denied that the registration number of the vehicle was etched onto the side mirrors after it was recovered, as it was parked at the police, and was being guarded.

Major Chimuka Phiri a Procurement Officer at the Zambia Airforce (ZAF) was PW4. In his evidence he stated that on 22nd November, 2016 the Zambia Police Service wrote a letter to ZAF requesting it to identify some uniforms believed to be for ZAF. He stated that he went and identified the uniform which was carmaflouge, and called a combat uniform, manufactured by Kent of Hong Kong. PW4 identified the said uniform before court and it was marked 'ID3'.

When cross examined, PW4 told the court that the uniform he had identified could only be obtained from Kent, but could not confirm if the material used to make the uniform could be obtained from another source, or that the label on the uniform could be printed anywhere else. When asked the size of the uniform he had identified, he said that it XXL, and it was his testimony that looking at the size of the accused person, he could wear medium size. He however stated that the accused person could fit 'ID3', as part of it could be tucked into the boot.

In re-examination, PW4 stated that even if the uniform was not the accused person's size, he could still wear it.

Vincent Rick Chibesa was PW5, and he is a police officer based at the Zambia Police Service Headquarters Forensic Laboratory. He told the court that he is a Ballistics Expert having acquired a certificate in ballistics dactylospy obtained from Mosco University in Russia, and had worked in that field for twelve years. In respect of his duties, PW5 testified that he exams firearms which include hand held guns, cartridges and their casings, as well as non-gun firearms and anything related to guns.

In relation to the matter before Court, PW5 stated that Detective Inspector Simuchembu of the Flying Squad submitted a pistol with serial number PFD 465677 for forensic ballistic analysis. That when he examined the said pistol, which is known as a Rings Pistol, he found that it could neither load nor discharge any cartridges, and had no ballistic data, and he concluded that it was a toy pistol. He went further to testify that the said pistol was harmless but could cause fear or panic to a person with a right state of mind when challenged or threatened with it,

as it was a dummy of a real pistol. That one did not need to have a licence to possess it.

PW5 explained that after he analysed the pistol, he prepared a report which he identified and it was marked 'ID4'. On production it was marked 'P4'. He further identified the pistol that he analysed and it was marked 'ID5'.

In cross examination, PW5 stated that his analysis does not include fingerprinting, and he stated that he did not know if the pistol was used in this case.

PW6 was Detective Ackson Phiri. His testimony was that he was based at the Lusaka Anti-Theft of Motor Vehicle at the time the offence was committed. That on 22nd November, 2016, he was at work when he was asked to conduct an identification parade in a case of aggravated robbery comprising suspects dressed in ZAF combat uniforms, as the allegation was that the perpetrators of the offence were dressed in the said uniform. He told the court that the suspect was Victor Mutemela, who was informed of his right to have Counsel present. Then the witness Michael Zulu was taken there, and he identified Victor Mutemela in position 4 from right to left. That thereafter the men on the parade were allowed to change positions, and Michael Zulu still identified Victor Mutemela who was in position 5 from right to left, and that photographs were taken. PW6 also testified that no complaints were raised in respect of identification parade, and after it was dismissed, he wrote a report.

PW6 in cross examination told the court that he informed the suspect Victor Mutemela of his rights before the identification parade was mounted, and that at time the witness was somewhere else, and they

signaled the witness to go there or would send an officer to get them. He agreed that the person sent to call the witness may have seen PW6 inform the suspect of his rights, but stated that the rights were explained to all the suspects on the parade at the same time. He denied that the person who called the witness knew the suspect in advance.

The seventh witness was Whitehead Kamanga a police officer. The role that this witness played in this matter was that on 27th November, 2016 he inspected the motor vehicle that was recovered, being a Toyota Corolla silver in colour, and compared the details on the vehicle with those on the registration certificate. He identified 'ID2' as the vehicle that he examined. He was not cross examined.

The last witness was the arresting officer Joseph Simuchembu. He testified that he was allocated the case to investigate on 22nd August, 2016, and on 22nd October, 2016, Detective Sergeant Nalikena informed him that he had received information from an informer that one of the suspects lived in Chainda Compound. That he had advised Detective Sergeant Nalikena to apprehend the suspect and recover the vehicle, and on 28th October, 2016 he reported for work, and found that the suspect had been apprehended and the vehicle recovered at the suspect's lead.

He told the court that the vehicle was subjected to inspection, and that the details on the vehicle corresponded with those on the registration certificate submitted by the owner Mwerwa Tembo. That on the same day they went to the suspect's house where a ZAF uniform and toy pistol were recovered. PW8 testified that the toy gun was subjected to ballistic examination, and he requested ZAF to examine the uniform to ascertain if it was issued by them, and they confirmed so. Still in his evidence, PW8 testified that he asked ZAF to assist him with officers wearing the

combat uniform who could be on the identification parade, and the said officers were provided on 22nd November, 2016.

He explained that after the identification was parade was conducted, Inspector Phiri submitted a report showing that the accused person was identified by the witness. PW8 then made up his mind to charge and arrest the accused person for the subject offence, and he denied the allegation. He produced the white book for the vehicle, the vehicle, the ZAF uniform and the toy pistol, and they were marked 'P1', 'P2', 'P3' and 'P5'.

When cross examined, PW8 stated that he convinced that the accused person committed the offence, as he led police to the recovery of the vehicle, and that the toy pistol and the ZAF uniform were recovered from his house. He told the court that he recovered the ZAF uniform and the toy pistol from the accused person's house, while the accused person led Detective Sergeant Nalikena to the recovery of the vehicle.

That the accused person led him to a small house where the items were recovered, and that the informer had directed them to where the accused person lived. He maintained that the accused person told him that he stayed at that house, and that it was his. He told the court that he did not know who owned the house, and that he was hearing it from Counsel that the accused did not own the house. It was also his evidence that he was with Detective Mwiya when the accused person led them to the house.

The accused person in his defence testified that on 21st August, 2016, he was apprehended from his house and accused of having stolen a Toyota Corolla. His defence was that he had seen the vehicle before on 26th

October, 2016 at Kushako in Chainda Compound, and that Chanda was driving it. The accused person stated that he lived with Chanda in Chainda, and that they had worked together at a Chinese company. Still in his defence, the accused person testified that when he met Chanda with the vehicle, Chanda had given him for a lift, and Chanda had told him that he wanted to leave the vehicle at his elder brother's house. He stated that the two had gone to Chanda's elder brother's house, where Chanda left the vehicle.

That he next saw the vehicle on 27th October, 2016 around 05:00 hours after police officers went to his house and apprehended him, and took him to Lusaka Central Police. He further testified that he saw Michael Zulu at the police station when he was being taken out to the identification parade at the reception, but he was taken back to the cells. Then ten days later the identification parade was conducted, and that when he was taken to the reception, officer Simuchembu suggested that he be taken to the barbershop for a hair-cut but it was resolved that the barber be taken to the cells to cut his hair. Thereafter he was given a ZAF uniform to wear and was taken out for the identification.

He stated that he had nothing to say about PW1's evidence that he produced the toy gun and robbed him of the vehicle, and he denied having stolen the vehicle.

It was the accused person's evidence in cross examination that he first saw the vehicle on 26th October, 2016, when Chanda was driving it, and he gave him a lift. That Chanda parked the vehicle at his elder brother's house in Chainda, and that Chanda's elder brother testified in court. He told the court that PW2 was Evans Chanda, and denied that he drove the

vehicle and parked it at his house. He agreed that PW2 testified that the accused person drove the house to his house, and asked to park it there.

The accused person could not recall where he was on 22nd August, 2016, when the vehicle was stolen, but agreed that PW1 testified that the accused person wore a ZAF uniform and threatened him with a pistol, and that Detective Simuchembu testified that the ZAF uniform and pistol were recovered from his house. He denied having led police to his house and showing them the uniform and pistol. The accused person agreed that he was identified at the identification parade as the assailant, but he denied having led police to Chanda's house, stating that Chanda was just taken to the police.

When cross examined further, he stated the he led police to where Chanda left the vehicle. He agreed knowing Crispin but not Samuel, and further agreed that he had a friend called Mcgiver, but denied having been with them at Cockpit Night Club on 22nd August, 2016 and booking PW1. He denied living at the house where the ZAF uniform and pistol were recovered. It was his evidence that the uniform was found with Crispin, and that he led police to Crispin as police asked him to lead them to his friends who work for ZAF. The accused person said that he was not calling Crispin as a witness, but denied that it was because he was wearing the ZAF uniform on the material night, and that Crispin does not work for ZAF. When further cross examined, the accused person stated that Crispin did not arise during the investigations.

In re-examination, he testified that he could not call Crispin as he did not have his phone number.

I have considered the evidence. It is not in dispute that PW1 reported that on 22nd August 2016 he was booked at the Cockpit Night Club in Kaunda Square stage II by two men, one who wore a ZAF combat uniform, as he drove a taxi Toyota Corolla registration number AIB 2408. That PW1 was robbed of the said taxi after the person dressed in the ZAF combat produced a pistol and threatened him with it.

The accused person is charged with the offence of aggravated robbery contrary to Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia. The section provides 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”.

Therefore to prove the case it must be established beyond all reasonable doubt that it is the accused person who wore the ZAF combat uniform and threatened PW1 with a pistol, and then stole the Toyota Corolla vehicle. The evidence as given by PW1 is that he was booked by two men on 22nd August, 2016, who came from a vehicle driven by another person, and booked him from Cockpit in Kaunda Square Stage II to Meanwood Chainda. That there one of the men who wore a ZAF combat

uniform produced a pistol and threatened him saying they only wanted the vehicle, and PW1 came out of the vehicle, and the man got into the driver's seat, and drove off with the vehicle.

That thereafter PW3 a police officer was tipped by an informant that there was a suspect that had been identified in the matter, and PW3 at PW8's direction apprehended the suspect who led him to PW2's house where the vehicle was recovered. This suspect was identified as the accused person. PW2 told the court that his friend Chanda whom he worked with went to his house with a vehicle that had no number plate and he was with a person that he did not know, and asked to park it at his house. Then the next morning police went with the man Chanda had been with who was handcuffed and recovered the vehicle.

PW8 on the other hand stated that after he interviewed the accused person after he was apprehended, he had led him to a house where he said he lived, and there a ZAF combat uniform and a pistol was recovered.

The accused person in his defence denied having stolen the vehicle. He also denied having led police to the recovery of the vehicle or to the house where the ZAF combat uniform and pistol were recovered. He also alleged in his defence that PW1 was taken to the police station when an initial identification parade was supposed to have taken place, but it was aborted, and he had seen him at the reception.

The burden rests on the prosecution to prove the case beyond all reasonable doubt. The evidence as adduced is that accused person and Chanda took the vehicle to his house to park. PW2 testified the other man whom he identified as the accused person was the owner of the

vehicle. When PW2 testified he was not cross examined on whether the accused person was indeed not the person who went to park the vehicle at his house with Chanda. PW2 was only asked on whether he had asked who the owner of the vehicle was, and he had responded that he did not so as he did not suspect anything about the vehicle.

Then there is the evidence that the accused person led PW3 to PW2's house where the vehicle was recovered. In cross examination the accused person initially denied that he led PW3 to PW2's house saying that PW2 just went to the police station. His defence was that Chanda is the person who had the vehicle. However when cross examined further, the accused person agreed that he led police to Chanda's house. I therefore find that PW2 identified the accused person as having been with Chanda and the vehicle when they parked the vehicle at his house.

Then PW8 testified that the accused person led him to the house where he stated he lived and the ZAF combat uniform and the pistol were recovered. It has been seen that the accused denied having led PW8 there. When PW8 was cross examined he was challenged on whether the accused person led him to the house where the ZAF combat uniform and the pistol were recovered. In cross examination the accused person stated that the uniform was found with Crispin. However when cross examined further he admitted that Crispin did not come up in the investigations. If indeed Crispin was the person that was found with the ZAF combat uniform, the accused person would have cross examined PW8 on this issue. He did not do so, and it is my finding that alleging that Crispin was the person that was found with the ZAF combat uniform in his defence was just an afterthought.

The accused person did in fact lead PW8 to the house where the ZAF combat uniform and the pistol were found. Then there is the evidence that PW1 identified the accused person at the identification parade. The accused person in his defence alleged that PW1 went to the police station on the initial day that the identification parade was supposed to be conducted but was aborted, and that the two had met at the reception. PW6 is on record as the officer who was in charge of the identification parade. When this witness was cross examined it was not put to him that PW1 went to the police station before the identification parade was conducted, and he was therefore exposed to the accused person at the reception.

What was raised was a general question regarding whether the officer who calls in the witness to identify the suspects on the parade has knowledge of who are the suspects are, and this was denied saying that the rights are explained to all the persons placed on the identification parade at once, and not to only the suspects. Therefore no allegations were made to the effect that there was impropriety in this case with regard to the manner that the identification parade was mounted and conducted. In fact PW6 testified that there were no complaints raised over the conduct of the identification parade, and it is my finding that the identification parade was properly conducted, and PW1 identified the accused person as the person who threatened him with a pistol and stole the vehicle.

The evidence establishes that the accused person was wearing a ZAF combat uniform and he was with another person when they attacked PW1. The defence led evidence to show that the uniform was size XXL, and PW4 the Procurement Officer from ZAF stated that the accused

person could wear a medium size, and thereby suggested that he could not have been wearing the uniform in issue. PW4 stated that it was possible for the accused person to wear the uniform as it can be tucked into the boots. PW1 is the person who testified that the accused person wore 'P3', the uniform.

PW1 in cross examination was not asked anything regarding how the uniform had fit the person who attacked him, and therefore no doubt was cast on his evidence with regard to that aspect. If PW1 had been mistaken in his identification of the accused person as his assailant, then the evidence of identification was supported by the fact that a ZAF combat uniform and pistol were recovered from the house where the accused person lived and where he led PW8, which has not been rebutted. It is too much of a coincidence that after PW1 alleged that he was attacked by a person who wore a ZAF combat uniform and threatened him with a pistol, the accused person was apprehended and he led police to a house where the said items were recovered.

Odd coincidences if unexplained amount to corroboration, and in this case no explanation was successfully raised. The prosecution has therefore proved that the accused person was armed with a toy gun when he threatened PW1 and stole the vehicle from him. The fact that a toy gun was used still qualifies the offence as aggravated robbery. This is so in light of the holding in the case of **JORDAN NKOLOMA V THE PEOPLE 1978 ZR 278** where the appellant was convicted of aggravated robbery. It was alleged that with another man he entered the house of the complainant on the pretext of wishing to speak to him, and then produced firearm and threatened the complainant with it.

It was submitted that since no actual violence was used, and since it was accepted by the trial court that the threat was with a toy pistol the offence of aggravated robbery was not committed. It was held in that case that;

“(i)Where violence is not actually used but is merely threatened the essence of the offence of aggravated robbery is the threat; putting a person in fear by threats, even though the threatener is not in a position to carry them out, is squarely within the words used by the legislature in s. 294 (1) of the Penal Code.”

Further while the particulars of the offence allege that the violence was used on Mwerwa Tembo, they should have alleged that the violence was used on Michael Zulu, as he is the person who had the vehicle at the time. This error could have been cured by amendment. However no amendment was made, but this not fatal as no prejudice was occasioned to the accused.

This is because in the case of ***MARK HERBERT KAUNDA V THE PEOPLE 1982 ZR 26*** where one of the issues which arose was the defect in the particulars of offence which should have charged him with obtaining of a cheque by false pretences and not money, it was held that;

“(i) Where the indictment is defective in mere description of the thing obtained and the substance of the charge remained the same, an amendment could cure the defect.

(ii) Where the error did not make the charge bad but simply defective and no embarrassment or prejudice was suffered by

