

**IN THE HIGH COURT FOR ZAMBIA**

**HP/097/2020**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN:**



**THE PEOPLE**

**VS.**

**BOYD KAUMBA**

**BILLY MUBIANA**

**MATHIAS BUNDA**

**THOMAS MPUNDU**

**PETER SKINNER NGANDU**

**JAMES BANDA**

**EMMANUEL NYIRENDA**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,**

**THIS 1<sup>ST</sup> DAY OF JULY, 2020, IN OPEN COURT, AT LUSAKA.**

*For the People:* Mr. FM Sikazwe – Acting Principal State Advocate,  
National Prosecutions Authority

*For the Accused:* Ms. M Marabesa – Senior Legal Counsel &  
Dr. O. Kaaba – Pro Bono Counsel, Legal Aid Board

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## **RULING**

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**CASE AUTHORITIES REFERRED TO:**

1. *Mwewa Murolo vs. The People* (2004) Z.R. 207;
2. *The People vs. Japau* (1967) Z.R. 95; and
3. *The People vs. Kombe Joseph Chimpako* (2010) Vol. 1 Z.R. 25.

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia; and*
2. *The Criminal Procedure Code, Chapter 88, Volume 7 of the Laws of Zambia.*

## **1 INTRODUCTION**

1.1 The Accused persons stand charged with two Counts of Aggravated Robbery, contrary to **Section 294 (1) of The Penal Code**<sup>1</sup> and one Count of Arson, contrary to **Section 328 (1) (b) of The Penal Code**<sup>1</sup> particularised as follows: -

### **Statement of Offence (Count 1 and 2)**

*In Count 1, the Accused persons **Boyd Kaumba, Billy Mubiana, Mathias Bunda, Thomas Mpundu, Peter Skinner Ng'andu, James Banda and Emmanuel Nyirenda** stand charged with the offence of **AGGRAVATED ROBBERY** contrary to **Section 294 (1) of The Penal Code**<sup>1</sup>.*

### **Particulars of Offence (Count 1)**

*The particulars of the offence are that **Boyd Kaumba, Billy Mubiana, Mathias Bunda, Thomas Mpundu, Peter Skinner Ng'andu, James Banda and Emmanuel Nyirenda** on 13<sup>th</sup> February, 2020, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did steal 1 pistol and 1 Motorola radio altogether valued at K19,750.00 the property of the **Zambia Police Service** from **Muyunda Mwakoi** and at or immediately before the time of such stealing, did use of threaten to use actual violence to the said **Muyunda Mwakoi** in order to retain or prevent or overcome such resistance from its being stolen.*

### **Particulars of Offence (Count 2)**

*The particulars of the offence are that the Accused persons **Boyd Kaumba, Billy Mubiana, Mathias Bunda, Thomas Mpundu, Peter Skinner Ng'andu, James Banda and Emmanuel Nyirenda***

on 13<sup>th</sup> February, 2020 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did steal 1 Samsung S8 cell phone, 1 LG cell phone, 1 wallet, K1,800.00 cash, altogether valued at K6,777.00, the property of **Muyunda Mwakoi** and at or immediately before the time of such stealing, did use or threaten to use actual violence to the said **Muyunda Mwakoi** in order to retain or prevent or overcome such resistance from its being stolen

**Statement of Offence (Count 3)**

In count 3, the Accused persons, **Boyd Kaumba, Billy Mubiana and Mathias Bunda** stand charged with the offence of **ARSON** contrary to **Section 328 (1) (b) The Penal Code**.

**Particulars of Offence (Count 3)**

The particulars of the offence are that **Boyd Kaumba, Billy Mubiana and Mathias Bunda** on 13<sup>th</sup> February, 2020 at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did wilfully and unlawfully set fire to a Toyota Corolla registration number ABR 1248 valued at K30,000.00, the property of **Paul Chisanga**.

- 1.2 The Accused persons pleaded not guilty to all three Counts. As a result, I ordered that the matter proceeds to trial. The case for the Prosecution centred on the evidence of **PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13** and **PW14**.

## **2 PROSECUTION'S EVIDENCE**

- 2.1 **PW1** was **Chief Inspector Muyunda Mwakoi**, the complainant, who testified that on 13<sup>th</sup> February, 2020, at around 02:30 hours, whilst he was at home, he received a phone call from Detective Constable Simasiku who reported that some Chawama residents where rioting and had set someone ablaze. When he and other officers arrived at the scene, he found that the person who had been reported to have been set ablaze was already dead and burnt beyond recognition.
- 2.2 At around 05:00 hours that morning, another report was received that some people where burning a motor vehicle near John Howard Police Post. The officers rushed to the scene and whilst there, people started throwing stones at them. That several warning shots and tear gas canisters were fired, but that unfortunately, PW1 and the other officers run out of ammunition and tear gas canisters, which forced them to withdraw.
- 2.3 PW1 who was the only officer in civilian clothing removed the helmet that he had on and broke away from the uniformed personnel with a view of getting information. Unfortunately, where he went, he found a group of about ten (10) young men, that where armed with machetes, stones and other weapons. They identified him as a police officer from Chawama and started attacking him with stones and other missiles. At that point, PW1 decided to put on his helmet as several stones were thrown at him and he was getting

injured. He fell down and whilst on the ground, he pulled out a pistol which he had in his waist, but that it was not loaded as he had already fired two warning shots. That one person amongst the group that was attacking him, came and grabbed the pistol from his hand, whilst another one reached for his wallet valued at K240.00, which contained cash amounting to K1, 800.00, a Motorola Police Radio, two cell phones (a Samsung S8 valued at K4500.00 and LG Quadro Phone valued at K237.00).

2.4 PW1 was taken to the University Teaching Hospital (UTH) where he was found to have sustained a swollen face, injuries to his head and general body pains. PW1 was attacked between 05:00 and 06:00 hours and could not identify the people that attacked him. He stated that the pistol, the Motorola Radio and LG Quadro Sim had since been recovered and identified them in Court.

2.5 **PW2** was **James Phiri**, an Inspector in the Zambia Police Service who testified that on 13<sup>th</sup> February, 2020, at around 05:00 hours, whilst in the company of other officers, which included Detective Chief Inspector Mwakoi, they went to Jack compound to attend to a report. At the scene, they found a riotous mob and some people burning a motor vehicle. The mob threw stones and other missiles at the officers. The officers reacted by firing warning shots in the air and tear gas to disperse the mob, but when they run out of ammunition and tear gas, they officers retreated with

the mob chasing them. The officers jumped over the wall fence of Kamulanga Secondary School and over another fence into the premises of New Apostolic Church, where they took cover. It was at this point that they noticed that PW1 was not with them. After making several calls, the officers were reinforced by officers from the Para-military who informed them that PW1 was injured and his items had been stolen. PW2 was not able to identify any of the people that were throwing stones at the officers as it was still dark.

2.6 **PW3** was **Detective Constable Cliff Mwanambaba**, who testified that on 29<sup>th</sup> February, 2020, he reported for duty at John Howard Police station and that in the evening at around 22:00 hours, in the company of other officers, they booked out to Jack Compound to follow up on a report. The officers were being led by one male suspect by the name of James Banda (A6) and they managed to apprehend one more suspect by the name of Boyd Kaumba (A1). Whilst in Jack compound, they picked another male suspect called Peter Mwabu who was a friend to another suspect called Peter Skinner Ngandu (A5) so that he could help them with investigations and lead them where Peter Skinner Ngandu was.

2.7 PW3 further testified that on 1<sup>st</sup> March, 2020, at around 01:00 hours, Peter Mwabu led the officers and PW3 to L85 Military camp in Lusaka West where the suspect Peter Skinner Ng'andu (A5) was believed to be staying. Unfortunately, they did not find him but that

he was later apprehended at the said military camp and was taken to John Howard Police Post. Later, Peter Skinner Ngandu (A5) led the officers to Chibolya Compound where they recovered a pistol which was handed over to Detective Sergeant Mukalula who carried on with investigations that led to the apprehension of other suspects, namely Billy Mubiana (A2) and Mathias Bunda (A3). PW3 identified the police pistol and the 5 suspects who had been apprehended as Boyd Kaumba (A1), Billy Mubiana (A2), Mathias Bunda (A3), Peter Skinner Ngandu (A5) and James Banda (A6).

2.8 When Cross examined, PW3 testified that 16 days had passed after PW1's attack when he apprehended the suspects, but that it was not possible that the gun could have exchanged hands during that period. He further stated that he could not collect the finger prints from the gun as it was found in stagnant water in Chibolya Compound.

2.9 **PW4** was **Stephen Lungu**, a child aged 13 years of Jack Compound. A *voire dire* was conducted and I was satisfied that the child understood the seriousness and solemnity of the occasion and the special duty to tell the truth. PW4 testified that on 13<sup>th</sup> February, 2020, at around 12:00 hours, on his way home from buying mealie meal at Chitamanda which is near a Kingdom Hall, he found a radio just behind the Kingdom Hall in the mud near a wire fence, on some grass. He picked up the radio and took the bag of mealie meal home.

Later that day, he showed the radio to his friends Request and Emmanuel and when they went to play, they carried the radio with them. PW4 further stated that he left the radio where he was playing with his friends because he was scared that he would be shouted at if he carried it home with him. PW4 later went to the place where he had been playing with his friends and found that a foreigner wanted to buy the radio. The foreigner then told them that the radio belonged to the Police and that they should tell an elderly person to take it to the Police Station. PW4 stated that his friend Patson suggested that he would be the one to give the radio to an elderly person and took it.

2.10 In cross examination, PW4 testified that he did not know who placed the radio where he had found it and that he did not see anyone placing it there.

2.11 **PW5** was **Osborne Chibinga**, aged 20 years of Kamwala South who testified that on 13<sup>th</sup> February, 2020, he was at church rehearsing at Jack Main SDA Church when a young boy by the name of Patson Mwansa came with a radio message device. Patson showed them the radio and gave it to PW5's friend Emmanuel who later gave it to PW5 who then placed it in his bag with the intention that the following day he would take it to the police station. The next morning, Police Officers went to PW5's house and asked him where the radio message device was. PW5 handed over to the Police Officers the bag where the radio



message device was. The Officers further asked him where the firearm was and PW5 told them that he did not know where the firearm was. PW5 was then apprehended with Stephen Lungu and Emmanuel and taken to the Police Station.

2.12 **PW6** was **Vincent Riggy Chibesa**, a Detective Chief Inspector who is a Ballistic Expert, based at Police Service Headquarters under the Forensic Science Department. He testified that on 11<sup>th</sup> March, 2020, Detective Sergeant Mukalula who is based at Chawama Police station, submitted a fire arm with serial number 20024485 for the purpose of carrying out a Forensic Ballistic analysis, to ascertain the function, the calibre, as well as how lethal the gun was. PW6 carried out an analysis of the said firearm and came to identify it as a Tulska (TT33), which meant that the said firearm was manufactured in 1933. The working mechanism was perfect because the cocking mechanism as well as the firing mechanisms were still intact. He drew a conclusion that the firearm's working condition was good and that it was a dangerous military weapon capable of causing injury to a person or animal once it is discharged. He further stated that apart from the injury, it can cause panic to any sane person if used to threaten them and that it was for that reason that in Zambia that type of firearm is restricted to the Defence and Military, for use in their operations. PW6 prepared a Forensic Ballistic

Report of his findings and it was admitted into evidence marked P6.

2.13 **PW7** was **Brian Chibwana**, aged 18 years of Jack Compound, who testified that on 13<sup>th</sup> February, 2020, around 12:00 hours, his mother sent him to buy some relish at a market. On his way, he met James Banda (A6) who told him that he was selling an LG phone for K20. PW7 informed James that the only money he had was a K5 and James told him that since the phone had no battery, he could get it for K5 on condition that he would pay the balance later. Thereafter, PW7 went back home with the phone and since he had no battery to place in the phone, he packed it in the house. Two days later, PW7 met Stephen in a shop and asked him to use his battery in the phone that he had just bought. When he placed Stephen's battery inside the phone, it did not work and Stephen offered to take the phone to fix it for him.

2.14 On 24<sup>th</sup> February, 2020, Police Officers led by Thomas Mpundu (A4), went to his home and requested PW7 to give them a black buttoned phone that belonged to a Police Officer. PW7 told them that he bought the phone from James Banda and offered to take them where the phone was and to show them where James Banda could be found. They went to Stephen and thereafter PW7 led them to James Banda who was found at the roundabout near Jack Compound bus station. Thereafter, PW7, James and Stephen were taken to the police station. PW7 identified James

Banda (A6) in Court whom he stated that he lives in Jack Compound with him.

2.15 **PW8** was **Stephen Lubinda**, aged 18 years, of Jack Compound who testified that on 15<sup>th</sup> February, 2020, he was at a shop at his neighbour's place when PW7 approached him asking if he had a battery which he could use for an LG phone. PW8 only had a battery for a Nokia phone which he gave to PW7, but the LG phone showed a white screen when the battery was inserted inside it. PW8 offered to fix the phone for PW7 and took it to his home. After some days, his mother went to attend to a knock at their door in the morning and found Police Officers, who requested PW8 to give them the phone that PW7 gave him, which phone was handed over to the Officers. PW8 was apprehended and kept in police custody for 4 days.

2.16 **PW9** was **Penjani Silwimba**, aged 18 years of Jack Compound, who testified that on 13<sup>th</sup> February, 2020, at around 06:00 hours, he was told that someone had been burnt in Chitamanda. When he went to Chitamanda, he found that the place was crowded and that there were Police Officers there. He saw the mob apprehend one police officer whom they threw stones at him. Among the people in the mob that were throwing stones at the police officer, he recognised James Banda (A6), Thomas Mpundu (A4) and B.I. PW9 further testified that there were other people who chased other Police Officers who retreated towards Kamulanga Secondary School. Thereafter, PW9 left

the scene and went home. On the same day, as it was getting dark, PW9 went to the market to buy food for supper and met James Banda (A6) on the way, who told him that he was selling a phone. PW9 requested to see the phone and told A6 that he did not have money. PW9 described the phone as an LG which had black buttons. PW9 then directed James Banda to PW7 as he was aware that PW7 was looking for a phone to buy. On the 24<sup>th</sup> of February, 2020, PW9 was surprised that police officers came to his place in the morning. They came with PW7 and asked him where the phone was. He told the Police Officers that James Banda had the phone. He was then apprehended by the police and stayed in custody for a week. He identified the LG phone, James Banda (A6) and Thomas Mpundu (A4).

2.17 In Cross examination, PW9 testified that he saw James Banda (A6), Thomas Mpundu (A4) and BI beating the Police Officer as they were near him but that he did not participate in the riot. He further stated that there were about 60 people at the scene, some of who were spectators, while others threw stones and stepped on the Police Officer.

2.18 **PW10** was **James Mwale**, aged 16 years of Jack Compound, who testified that on 13<sup>th</sup> February, 2020, at 12:30 hours, he met James Banda (A6) who asked him whether he wanted a battery. He asked A6 what type of battery he had and in response, A6 said that it was an LG battery, which he was selling for K10, but

that he paid A6 K7 for the battery as that was the only money he had. He tried to use the battery in his phone but that it did not work. He kept the battery and after some days, he was surprised to see Police Officers at his home, who apprehended him and kept him in police custody for a week.

2.19 **PW11** was **Peter Lukonde Mwabu**, aged 19 years of Kamwala South, who testified that on 13<sup>th</sup> February, 2020, he was working from Chilanga and that when he knocked off he was told that there had been a riot in Jack Compound. On 29<sup>th</sup> February, 2020, PW11 was surprised to see Police Officers at his home between 21:00 and 22:00 hours. The Officers told him that he was not in any trouble but wanted him to show them where his friend Peter Skinner (A5) lived. The Police Officers assured him that he would be released the following day. PW11 took the Police Officers to John Howard, but they did not find A5 as he was staying in Lusaka West. They proceeded to Lusaka West, but they did not find A5 there. PW11 was taken back to the Police Station and the Police Officers continued with their investigations. The following day, on 1<sup>st</sup> March, 2020, A5 was brought in by the police officers who questioned him. PW11 testified that A5 took the Officers to where the firearm was and was later brought back to the Police Station.

2.20 In cross examination, PW11 stated that he was just told by the Officers that Peter Skinner had the gun, but he did not see him with it.

2.21 **PW12** was **Lloyd Habeenzu**, a Mechanic aged 39 years residing in Jack Compound who testified that on 13<sup>th</sup> February, 2020, he received a phone call from an unknown person at around 03:00 hours. The caller told him that some people wanted to damage his vehicle and had beaten up his driver. He was told by the caller to go to United Church of Zambia in Jack Compound and when he arrived there, he did not see his vehicle, neither did he see the driver but only Police Officers and a crowd. One of the Police Officers received a phone call and was informed of where the motor vehicle that had been burnt was and the Police Officers headed there, followed by PW12. When they reached Jack Compound roundabout, he found his driver and noted that the rear screen of his vehicle was damaged. His driver told him that the vehicle that was driven by John, which belonged to Mr. Chisanga was the one that was burnt near Ring Road. PW12 saw the burnt car and noticed that it had no engine or gear box. At around 03:30 hours, PW12 called Mr. Chisanga, the owner of the burnt vehicle to inform him that his vehicle was burnt. Mr Chisanga proceeded to where his burnt vehicle was and later called PW12 to confirm that his car was indeed burnt. PW12 stated that he knew the vehicle that had been burnt as he was the one that used to repair it.

2.22 **PW13** was **Paul Chisanga**, a driver aged 41 years residing in Chipata Compound, who testified that during the time of the riots, he was staying in Jack

Compound and that on 13<sup>th</sup> of February, 2020, he had given his car to his driver. Whilst he was sleeping on that day, he received a phone call from PW12, who told him that his vehicle had been burnt. He asked PW12 where this had happened and he responded that it happened at the road side near the railway line. He got up and went to where the vehicle was burnt. When he arrived, he found that the vehicle was in flames and was burning. He recognised the vehicle as the number plate at the back of the car had not yet been consumed by the fire and it read ABR 1248. PW13 called back PW12 to confirm that he had seen the vehicle. He further stated that he went and reported the matter to the police.

2.23 **PW14** was **Emmanuel Mukalula**, a Detective Sergeant stationed at Chawama Police Station. He testified that on the 13<sup>th</sup> February, 2020, he reported for duty at 08:00 hours and that later that afternoon he was assigned a docket relating to aggravated robbery to investigate in which PW1 complained that whilst on duty, he was attacked by unruly rioters who later robbed him of the Police Motorola Radio, a Police Pistol, a Samsung S8 cell phone, an LG Quadro Sim cell phone, a wallet which contained K1,800.00 cash, a ZANACO ATM card, an NRC and some business cards. PW14 stated that the property was valued at K26,527.00. PW14 also found a damaged helmet that was worn by PW1 at the time he was attacked. In the evening of the same date, PW14 received a report that

some boys were seen with a Motorola radio which was suspected to have been stolen from PW1 and was shown the residence of the same boys.

2.24 Early the following morning, PW14 with a team of police officers picked up the said boys and recovered the Motorola radio which was identified to be the one that was stolen from PW1. One of the boys, named Stephen Lungu, (PW4) was interviewed and he revealed that he picked up the radio near the Watch Tower Church in Jack Compound on 15<sup>th</sup> February, 2020. PW14 later received a report that one of the people suspected to have attacked PW1, had been seen at Jack Compound market and he mobilised some officers who went to the market. When they arrived at the market and started approaching the suspect, he ran away and they chased him until they managed to apprehend him. The name of the suspect was Thomas Mpundu (A4) who later revealed the names of the other suspects whom he alleged attacked PW1. Through A4, PW14 was able to apprehend other suspects by the name of Emmanuel Nyirenda (A7) and James Banda (A6). PW14 further testified that Thomas Mpundu (A4) led to the recovery of the LG Quadro Sim cell phone and its battery.

2.25 PW14 testified that another suspect by the name of Jonas Makashini who was in custody for a different offence was heard narrating the events that took place during the riot on 13<sup>th</sup> February, 2020 and when interviewed, he revealed that he was at the scene



where PW1 was attacked and that he saw Boyd Kaumba (A1), Julius also known as Jewy Jay, Mathias Bunda (A3) and Peter Skinner Ng'andu (A5) attack the police officer. Jonas Makashini said that he did not know where A5 lived, but that he led them to persons who knew him and this led to the apprehension of A5 who was found at Zambia Army Police Camp in Lusaka West.

2.26 PW14 testified that A5 led the Officers to Chibolya compound where they recovered the pistol which was stolen from PW1. PW14 stated that later other suspects, namely Boyd Kaumba (A1), Billy Mubiana (A2) and Mathias Bunda (A3) were apprehended. He interviewed the seven suspects together who failed to give him a satisfactory answer and therefore, he charged them with the offence of Aggravated Robbery. PW14 further testified that three of the suspects, namely A3, A2 and A1 were also charged with the offence of Arson as a result of the motor vehicle which was burnt. PW14 identified A1, A2, A3, A4, A5, A6 and A7 in Court.

2.27 PW14 also identified all exhibits produced in Court, which were admitted into evidence as follows: -

1. *Medical Report – marked as P1;*
2. *Zambia Police Pistol – marked as P2;*
3. *L.G. Quad Sim Phone – marked as P3;*
4. *Zambia Police Radio – marked as P4;*
5. *Helmet – marked as P5*
6. *Forensic Ballistic Report- marked as P6 and*
7. *Battery for L. G. Phone-marked as P7*

### **3 SUBMISSIONS**

3.1 At the close of the Prosecution's case, Learned Defence Counsel made *viva voce* submissions, wherein she contended that with regards to Count 3, the prosecution had failed to lead any material evidence to connect the three accused persons to the offence, namely Boyd Kaumba (A1), Billy Mubiana (A2) and Mathias Bunda (A3). She therefore submitted that the Prosecution having failed to prove their case at that point, the said three accused persons ought to be acquitted with regards to Count 3. To fortify her contention, Defence Counsel relied on the celebrated case of ***Mwewa Murono vs. The People***<sup>1</sup>.

3.2 With regards Counts 1 and 2, Defence Counsel submitted that Billy Mubiana (A2), Mathias Bunda (A3) and Emmanuel Nyirenda (A7) must be acquitted on the basis that all the prosecution witnesses had not in any material way connected the three Accused persons to Counts 1 and 2. She contends that proceeding to defence regarding these three Accused persons in Counts 1, 2 and 3 would technically be an academic exercise. She urged the Court to acquit them.

3.3 The Prosecution's Counsel stated that he would rely on the wisdom of the Court and the evidence on Record.

### **4 THE LAW**

4.1 At the close of the Prosecution's case, the Court adjourned the matter to consider whether or not a *prima facie* case had been established against the accused persons. If the Prosecution evidence is such

that a reasonable tribunal might convict upon it should the Defence offer no explanation, then there is a case to answer.

- 4.2 In determining whether or not the evidence adduced thus far by the Prosecution is such that a case has been made out sufficient to require the Accused persons to make their defence, I am guided by **Section 291 (1) of The Criminal Procedure Code<sup>2</sup>**, which highlights the procedure to be adopted at this stage. It is couched as follows: -

*"When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding."*

- 4.3 The aforementioned position was reiterated in the case of **The People vs. Japau<sup>2</sup>**, where it was held as follows: -

*"A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved, or when the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict on it."*

- 4.4 Additionally, **Section 206 of The Criminal Procedure Code<sup>2</sup>**, provides as follows: -

*"If, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him."*

4.5 Finally, in the case cited by Defence Counsel of ***Mwewa Muroso vs. The People***<sup>1</sup>, it was held that: -

*"A submission of no case to answer may properly be upheld: -*

- (a) When there has been no evidence to prove the essential element of the alleged offence; and*
- (b) When evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."*

## **5 ANALYSIS AND FINDINGS**

5.1 I must state that the position of the law is that at this stage the Court should not concern itself with the quality of the evidence by considering the veracity of various witnesses and deciding which evidence to accept. Provided that there has been sufficient evidence adduced which if accepted would justify a conviction, then the Court should rule that there is a case to answer. This position was taken in the case ***The People vs. Kombe Joseph Chimpako***<sup>3</sup>, where the Court held as follows: -

*"A prima facie case does not mean proving each and every ingredient of the offence charged. If there is evidence to prove one element there is a prima facie case. That, sufficiently to require him to make a defence, does not mean to prove beyond reasonable doubt."*

- 5.2 *In casu*, the Accused persons, **Boyd Kaumba, Billy Mubiana, Mathias Bunda, Thomas Mpundu, Peter Skinner Ng'andu, James Banda** and **Emmanuel Nyirenda** have been charged with two counts of Aggravated Robbery and **Boyd Kaumba, Billy Mubiana, Mathias Bunda** have been charged with one count of Arson.
- 5.3 According to the provisions of **Section 294 (1)** of **The Penal Code**<sup>1</sup>, the elements for the offence of Aggravated Robbery are as follows: -
1. *Two or more assailants; or*
  2. *Assailant being armed with an offensive weapon;*
  3. *An attempt to steal; and*
  4. *Use or threats to use violence to overcome resistance or retain the stolen article/s.*
- 5.4 Having addressed my mind to the elements of the offence stated above, I will now determine whether the Prosecution has led cogent evidence that prove the essential elements of the offence of Aggravated Robbery to warrant putting the accused persons on their defence. The essential element in this case would be whether the accused persons whilst acting together with others unknown stole or attempted to steal the property of Zambia Police Service and Muyunda Mwakoi.
- 5.6 From my analysis of the Prosecution's evidence and the evidence on Record, I find that with regards to Counts 1 and 2, the Prosecution have led cogent evidence thus far that prove the essential elements of the offence of Aggravated Robbery against three of the

Accused persons, namely, **Thomas Mpundu (A4)**, **Peter Skinner Ng'andu (A5)** and **James Banda (A6)**, that require these accused persons to make their defence. Accordingly, I find that a *prima facie* case has been established against the Accused persons **Thomas Mpundu (A4)**, **Peter Skinner Ng'andu (A5)** and **James Banda (A6)** and I put them on their defence. The said Accused persons are informed that they have the following rights: -

1. *To give testimony on Oath;*
2. *To give unsworn evidence from the dock;*
3. *To choose to remain silent; and*
4. *The right to call witnesses.*

5.7 With regards the other accused persons namely, **Boyd Kaumba (A1)**, **Billy Mubiana (A2)**, **Mathias Bunda (A3)** and **Emmanuel Nyirenda (A7)**, bearing in mind the ingredients that need to be satisfied under the provision of **Section 294 (1)** of **The Penal Code**<sup>1</sup>, I am not satisfied that the evidence adduced so far by the Prosecution if accepted would result in a reasonable jury properly directed to convict on it. Based on the authority of **Section 206** of **The Criminal Procedure Code**<sup>2</sup> cited above, I find that in this case the evidence in support of the charge has not been made out against the accused persons sufficiently to require them to make a defence. Accordingly, I dismiss the case against **Boyd Kaumba (A1)**, **Billy Mubiana (A2)**, **Mathias Bunda (A3)** and **Emmanuel Nyirenda (A7)** and acquit them on both counts of the offence of

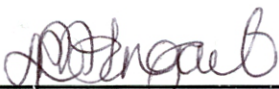
Aggravated Robbery. I order that they be released forthwith.

5.8 With regards Count 3 in which **Boyd Kaumba (A1)**, **Billy Mubiana (A2)** and **Mathias Bunda (A3)** have been charged with the offence of Arson, I find that the essential element of the offence of Arson as set out in **Section 328 (1) (b)** of *The Penal Code*<sup>1</sup> and of relevance to this case, that needs to be satisfied is as follows: -

*"A person must wilfully and unlawfully set fire to any vessel or any motor vehicle as defined in the Roads and Roads Traffic Act, whether completed or not..."*

5.9 Bearing in mind the aforementioned element of the offence of arson that needs to be satisfied and my analysis of the Prosecution's evidence on Record, I find that no evidence has been led which implicates the said Accused persons and thereby warranting them to be put on their defence regarding Count 3. I therefore dismiss the case against the said Accused persons **Boyd Kaumba (A1)**, **Billy Mubiana (A2)** and **Mathias Bunda (A3)** and acquit them of the offence of Arson. I order that they be released forthwith.

**Delivered this 1<sup>st</sup> day July, 2020.**

  
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**P. K. YANGAILO**  
**HIGH COURT JUDGE**