

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

HP/0148/2023

BETWEEN:



**THE PEOPLE
V
MARTIN SIWAKWI
LUCKY NG'ANDU
BOSTON ISAAC SHAKALOMBO
EVANS MWANZA**

Before: Hon. Mr. Justice L. Mwanabo on 14th September, 2023

**For the State: Ms. A. Nyirenda State Advocate – National Prosecutions
Authority**

**For 1st Accused: Mr. K. Mweemba, Mr. G. Mataa and Mr. Basil Mweemba
- Messrs Keith Mweemba Advocates**

✓ **For 2nd and 3rd Accused: Dr. O. Kaaba – Pro Bono Counsel, Legal Aid Board**

**For 4th Accused: Mr. A. Mbambara & Major. Mpundu – Messrs A. Mbambara
& Co**

R U L I N G

Legislation and other Works referred to;

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

Cases referred to:

- 1. Mwewa Murono vs. The People (2004) ZR 207 (SC)**
- 2. The People vs. Japau (1967) ZR 95 (H.C) R1**

3. **The People vs. Winter Makowela and Robby Tayabunga (1979) ZR 290**
4. **The People vs. Mukemu (1972) ZR**
5. **John Nyambe Lubinda vs. The People (1988-89) ZR 111**
6. **Kalebu Banda vs. The People (1977) 169**
7. **Hauti vs. The People (1974) ZR 154**
8. **Joe Banda vs. The People Appeal No. 183/2013 (2016).**
9. **Mushemi vs. The People (1982) ZR 71**
10. **Yoani Manongo vs. The people (1981) ZR. 152**
11. **Charles Lukolongo and Others vs. The People (1986) ZR 115**
12. **Abbot vs. Regina (1955) 39CR App R 141**
13. **Machobane vs. The People (1972) ZR 101**
14. **R vs. Galbraith 73 Cr. App. R. 124**

1. This is a Ruling on a case or no case to answer relating to the Four accused persons herein who stand charged with one offence of aggravated robbery contrary to Section 294(1) of the Penal Code Cap. 87 of the Laws of Zambia. The particulars of the offence are that the four accused on 4th November, 2022 at Lusaka in the Lusaka District of the Lusaka Province jointly and whilst acting together with other persons unknown did steal 2.155 kilograms of Emerald stones valued at K1,939,000.00 the property for Lameck Mtonga and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to Patrick Mtonga in order to obtain or retain the said property or prevent or overcome resistance from its being stolen retained. All the four accused persons pleaded not guilty to the charge against them.

2. The law regarding the standard to be applied at this stage of proceedings before the High Court is set out in Section 291 of the Criminal Procedure Code (CPC) Cap. 88 of the Laws of Zambia. The case of **Mwewa Murano vs. The People**¹ is clear on this point. It must be noted that the finding that the Judge has to record under that section is ultimately the same as the one under Section 206 of the same Act. Section 291(1) categorically states that the prosecution must make out a case against the accused sufficiently requiring the accused person or persons to make a defence. Where there is failure to do so, the Court is empowered to make a finding that the State failed to establish a prima facie case against the accused and acquit the accused immediately.
3. The question for consideration at this stage is whether the evidence so far adduced by the prosecution, in the event that the accused herein opted to remain silent and offered no explanation, a properly directed tribunal could convict them. If the answer is in the affirmative, then there is a prima facie case. If the answer is in the negative, then there is no case to answer and the accused will be entitled to an acquittal. The other cases that give guidance on this principle of law include: **The People vs. Japau**² and **The People vs. Winter Makowela and Robby Tayabunga**³.
4. The Prosecution called 10 witnesses who adduced evidence to support the alleged offence. I will not reproduce the same herein for the purpose of this ruling. However, the sum and substance

of the prosecution witnesses' evidence will be summarized here. On 3rd November, 2023, PW1, Lameck Mtonga, received a call from PW2, James Alick Chikwanda, asking him if he had a good parcel of emerald and he responded in the affirmative. PW1 met PW2 at his office and showed PW2 the emerald which was put on the scale and weighed 2.155kg. PW1 told PW2 that the price for the same was US\$100 per kg but that the last price was US\$50 per kg. PW1 gave the emerald to PW2. After that, PW1's efforts to speak to PW2 after a day failed as he was not picking his calls prompting him to call Patrick Mtonga, PW4, who he knew to be with PW2. He was informed by PW4 that the parcel got lost through a road block that was mounted along Mumbwa Road. PW1 went to Villa Lucia police post where the case was reported. PW1 placed the value for the emerald at US\$107,500.00.

5. PW2, Alick Chikwanda, on his part told the court that he received a call from his colleague Patrick Mtonga (PW4) asking if he had some emerald and responded that he didn't have. PW2 said that he asked his friend PW1 whom he works, if he had some emerald and said that he had. The two were in PW1's office. PW2 informed PW4 that he had some emerald which belonged to PW1. PW2 sent photos to PW2. PW2 said that PW4 promised to get back to him after sending the photos to his buyers and getting a response from them. He said that PW4 later informed him that his buyers were interested. PW2 and PW4 agreed to meet the following day. PW2 said that the

following day after several calls from PW4 and delay to meet him, he collected the stone from PW1 around 11:00 hours and gave Kalunga (PW3) to go and meet PW4. PW2 claimed to have followed up at PW4's office but didn't find PW3 and PW4 there. When he called PW3 and asked of their whereabouts, he was told that the buyers had taken them to Kabulonga. PW2 said that he waited until 20:00 hours for PW3 but was told that the buyers went to Chirundu and they were going to meet the following day. The stones were in the custody of PW3. The following day, PW2 did not manage to meet PW3 because of his funeral but was informed that PW3 was on the way to meet the buyers. Around 19:00 hours when he called PW3 he was told that they were at the police and that the stones were confiscated.

6. PW3, Celestino Kalunga, confirmed being given the stones by PW2 to take to PW4. PW3 met PW4 in the company of two other people, namely; Bwembya (female, PW5) and Mwaba (male). He showed them the minerals and that they took some photos. The meeting was at PW4's office at City Market. He was informed that the buyers were in Kabulonga and they left for Kabulonga using a Yango transport. PW3 said that when they reached Kabulonga Shopping Mall, PW5 left them and came back with two people: these are: Mudenda (male, PW6) and Lizy (female). They then went to a place opposite Rwanda Embassy for PW5's sister. The stones were shown to PW6 and Lizy. That PW6 took photos of the same and he was talking to the buyers. After

negotiations over the price, the price was agreed at US\$80 per kg. They waited for buyers until it was getting late but PW6 told them that the buyer is on his way from Chirundu. By 21:00 hours, the buyer had not yet arrived. They dispersed and agreed to meet the following day. The following day they met at the Post Office in the morning. Around 8:00 hours. They waited until 11:00 hours while PW6 kept talking to the buyer on phone and giving updates. At 11:00 hours a driver said to be sent by the buyer arrived in a Mark X without registration number plate. The driver refused to take all of them to the buyer and insisted that only three people should go with him. The car left them after failing to agree on who should go with the driver for the buyer. However, Mudenda talked to the buyer who said that the car was at COMESA near the filling station. They agreed that PW4, PW6 and PW5 were going to go with the driver for the buyer. PW3 said that Mwaba received a call from PW4 that the police got the emeralds. PW3 said that he went to Villa Lucia with Mwaba and Lizzy. They reached there and met PW6, PW5 and PW4. He said that PW4 reported the matter at Villa Lucia Police Post where PW6 was detained after telling the police that PW6 told them that there was a buyer but were surprised that he took them to a place where they found people who confiscated the minerals.

7. PW4, Patrick Mtonga, said that on 2nd November, 2022 he received a call from Happy Mwaba informing him that there were buyers of stones from Australia. He sent photos of the

stones to Happy Mwaba and was told that they should meet the following day. He met with Happy Mwaba and PW5 the following day. PW4 told PW2 that the buyers from Australia had come. PW4 said that PW2 sent PW3 to meet them and they met at PW4's office. Happy Mwaba and PW5 took photos and told their people that they had seen the stones. PW4 said that PW5 told them to go to Kabulonga to see the buyers. When they reached Kabulonga, PW4 was surprised to see black persons because he thought that they were meeting white people. He said that they met PW6 and Eliza and altogether they were 6 now. The rest of PW4's testimony was similar to that of PW3 up to the point when PW4, PW5 and PW6 got into the Mark X vehicle after the driver insisted that he could only carry 3 people. PW5 said that after getting into the vehicle at the filling station they drove along Lumumba road and turned into Mumbwa road. The driver told them that the dent on the vehicle resulted from hitting into someone. As they were in the vehicle, the buyer called PW6 asking of their whereabouts. PW6 gave the phone to the driver who told the buyer that they were near and would arrive shortly. They turned into a gravel road and the buyer kept calling PW6 and PW6 was giving the phone to the driver. After passing Open University PW4 saw 3 people in front of them. The driver slowed down as they were approaching the 3 people. These 3 people stopped the car and the driver unlocked the doors. An officer with full combat went to the driver and asked him where his boss was. The one in full combat removed the driver from the

vehicle and told him that you hit someone, so this is the route you are using now and they started beating the driver. They handcuffed him and told him that they were taking him to police. The driver was put at the back of the vehicle because PW4, PW5 and PW6 had moved out of the vehicle. One of those 3 people was wearing a vest written police and was wearing a face mask. The other one was wearing a blue T-shirt with some red and white stripes. PW4 said that the one in police uniform started searching them beginning with PW5 followed by PW6. The one in a T-shirt went to PW4 and asked him where they were going and he answered saying that they were going to the buyer for PW6 and the driver is the one who was taking them there. PW4 was asked what they had and what they were taking and he answered that they were taking stones to the driver's boss. From there the one in a T-shirt said that this one is the one with stones. PW4 started struggling with that person because he wanted to get the stones until the stones were grabbed from him. The one in uniform started hitting him and he was pushed into the vehicle. He was asked to produce a licence for the stones business. He told them that he has one but it was not with him. The vehicle started moving driven by the one in blue T-shirt. PW5 and PW6 remained behind. After some distance the vehicle stopped and he was pushed out of the car. His phone was taken away from him and was told to report at Lusaka West police post. He walked back to where the other two were left but saw them getting into a vehicle. He called

Mwaba and informed him of the incident. He later joined PW5 and PW6 at Open University junction. PW4 and PW5 asked PW6 if those are the buyers he brought. PW6 said that he met the buyers on Facebook. They reported the matter at Villa Lucia police post. After giving statements PW6 was detained because he is the one who led them there. They went back to police the following day and PW4 was also detained because PW1 indicated that the parcel came from his hands. They were later called at Force headquarters where they gave fresh statements.

8. While they were at Force headquarters, 2 people came and PW4 saw one who was at the scene and told the officer that he had seen one who was at the scene. The officer asked the person who was identified by PW4 if he was at the scene. This person was also asked about the stones and the Mark X vehicle but he kept quiet. PW4 said that him and others were taken to 3 garages to look for the Mark X but they didn't find it. In about February/ March 2023, they were invited for an identification parade. At the parade PW4 said that he identified the person who was at the scene wearing a T-shirt standing at position number 9 on the parade (A2). PW4 further said that the people who were at the scene were in court and pointed at accused number 2. PW4 said that it took about 15 minutes from the time he was put in the vehicle to the time he was pushed out of it.
9. PW5, Chalanga Bwembya Nkhowani's evidence was similar to that of PW4. The point of departure in her testimony is that sometime in October, 2022, she was informed by Apostle

Stanford Chifita from her church Tabernacle Revival Ministries that there was somebody from Zimbabwe called Eliza who was interested in acquiring some gemstone. She was requested to help that person because she was coming from an organization for women dealing in stones. Apostle Chifita told her that Eliza was coming to Zambia sometime in November, 2022. On 2nd November, 2022 PW5 was introduced to Eliza at the church by Chifita. PW5 had a discussion with Eliza on what type of stones the buyers wanted. She was informed that the buyers were coming from Australia and requested to arrange people in Zambia who had minerals. PW5 told her that she would get back to her the following day. PW5 then got in touch with her network. One of them was Happy Mwaba who she asked to look into the network and see who had stones within Lusaka. After establishing contact of someone who had stones, PW5 continued exchanging information with Eliza. PW5 in the company of Happy Mwaba met PW4 at his office where the stone were brought by PW3. The stones were put on the scale and they weighed 2.155 kg. PW5 called Eliza to find out where she was. PW5 in the company of Happy Mwaba, PW4 and PW3 left for Kabulonga to meet Eliza. PW5 met Eliza in Kabulonga in the company of a black gentleman who was introduced as Mr. Mudenda (PW6) and that PW6 was agent for the buyer at which point PW5 introduced the three people she was with to Eliza and PW6. While waiting for the buyer until evening, PW5 said that PW6 made a conference call and put the buyer on speaker

where the buyer addressed them with the message that they meet the following day. PW5 said that while they were at Police Fore Headquarters giving statements two gentlemen entered the office and PW6 started whispering to her that the person who has entered do you know him, he is the one who was at the scene. At that point PW5 also remembered him. According to PW5 two people entered the office but only one was identified as being at the scene and wearing police uniform. After those men left, PW5 and PW6 told the officer interviewing them that they remembered the man who came. At the identification parade she said that she identified the one at number 9 as the one who was wearing full police uniform and the one at number 11 as the one that was beating the driver, drove the car and went to PW4's side and said that this is the one with the stones. PW5 identified A2 as the one who was at number 9 at the parade and A1 as the one who was wearing the vest, hit the driver and said that this is the one with the stones.

10. PW6, Scene Mudenda's evidence was also similar to that of PW4 and PW5. The only addition is that he was called by Eliza in relation to sale of gemstone. He was told that Eliza was given his number by Oscar. PW5 said that he didn't know Oscar before. PW6 was at some guest house near Intercity while Eliza was at Stay Ease hotel located at Levy Shopping mall. PW6 proceeded to Levy mall where he found Eliza with Oscar. PW6 was informed by Eliza that she was working with some people who had some stones and were looking for the buyer. PW6 was

promised some commission if he found buyers. He thought of a buyer he had in his contact known as Suleman. He said that Suleman had called him about a month earlier looking for high grade emerald and that Suleman got PW6's number on Facebook. PW6 said that he had advertised his business on Facebook. PW6 said that Suleman was offering the highest price among the buyers he had in his contacts and had linked him to suppliers twice. PW6 said that he was told by Eliza that the people who had the emeralds were coming from outside Lusaka and that she would let him know when they arrive. PW6 was called by Eliza on 3rd November, 2022 informing him that the people with the emeralds had arrived. PW6 and Eliza met and went to Kabulonga to meet the sellers. They met in Kabulonga as earlier mentioned by the other witnesses. PW6 called Suleman after seeing the stones and sharing photos of the same. Suleman said that he was in Lusaka but could only buy the stones if they were sorted because what he showed him was not the quality he was looking for. The stones were sorted by Eliza who claimed to be good at doing so. Suleman agreed to buy. They agreed on the price and the commission sharing. PW6 called the buyer to complete the transaction but Suleman told him that he had gone to Chirundu. According to PW6, Suleman is an Indian of Zambian origin. PW6 said that he was making ordinary voice calls when calling Suleman. That day the buyer told him that he was not going to make it and they agreed to meet the following day. The following day PW6, PW3, PW4, PW5,

Happy Bwalya and Eliza met at the post office in Lusaka and that the buyer told PW6 that he was going to send his driver to pick them up. Suleman shared the number for the driver with PW6. PW6 described the three people who stopped the vehicle they were in. At the parade he identified the one at number 9 and in court identified him to be A2.

11. PW7, Detective Inspector Teddy BBumelo, on 2nd February, 2023 was assigned as a photographer to an identification parade at Kabwata Police. He explained the parade preparation and the suspects involved at the time. He also captured photos of the identification parade. He produced the photo album of the photos taken at the identification parade and took the court through the photos by explaining each of the photos.
12. PW8, acting woman inspector Mulenga Misoshi, her evidence was to simply confirm whether Luckson Ng'andu (A2) and Boston Shakalombo (A3) were known by Chawama Police station. She said that she knew A2 as a reserve police officer and A3 as a neighborhood. She identified A2 and A3 in the dock.
13. PW9, Detective Chief Inspector Makukwanu Innocent, was allocated the docket relating to this matter. He told the court the report he received from PW1 on the matter. PW9 said that investigations were instituted and that information gathered from contacts and informers revealed that the Mark X vehicle belonged to Martin Siwakwi. He said that A2 and A3 were on police bond in another earlier matter of similar nature. According to PW9, they had intelligence information earlier

reported to police about A4 but he was not put in custody because he was helping to locate A1. A4 was said to be helping with information on the earlier matter and this matter. As regards the evidence by the other witnesses of the two people who entered the office while he was taking statements from them, PW9 said that he had put A2 and A3 on police bond which they came to renew on that day. That when they entered the office, PW5 and PW6 screamed that these are the people that attacked them. PW9 decided that A2 and A3 should go outside and after concluding with the witnesses, the two suspects then were taken to Kabwata police station. PW9 was given the identification parade report and was told that A1, A2 and A3 were identified by PW6 and PW5. But when he read the report he discovered that only two people were identified. That police uniforms were retrieved from A2's home. However, nothing wrong was said about A2 possessing those uniforms as he was engaged as a reserve policeman. The police property found with A2 was produced in court. PW9 then started giving evidence of the interview he had with the accused persons after verbal warn and caution until an objection was raised against leading evidence of confession in nature by the defence. PW5 said that after warn and caution all the 4 accused denied the charge and he proceeded to charge them with the subject offence of aggravated robbery.

14. PW10, Detective Inspector Paul Mubanga, was assigned to do the parade identification which he did. According to him the

parade involved 12 men of similar physical appearance. That PW4 positively identified A2 and that PW6 also positively identified A2 and someone by the name of James Kutempa and that PW5 positively identified A2 and A1. PW3 failed to identify anyone.

15. All these witnesses were cross examined by the defence. Submissions of no case to answer were filed on behalf of the 1st, 2nd and 3rd Accused but no submissions were filed on behalf of the 4th Accused. The state opted to abandon the earlier position given to court of filing written submissions and relied on the evidence on record. On behalf of the 1st accused several authorities were cited on the test to be applied at no case to answer stage: among them **The People v. Japau**⁽²⁾, **The People v. Mukemu**⁽⁴⁾ and **The People v. Winter Makowela and Robby Tayabunga**⁽³⁾ which all speak to the principle that there is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence and that a submission of no case to answer may properly be held if an essential ingredient 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. It was submitted that the prosecution evidence is unreliable and was discredited by Cross Examination. The court was invited to consider the demeanor of the witnesses. The state was accused of failing to bring corroborative evidence and the cases

of **John Nyambe Lubinda v. The People**⁽⁵⁾ and **Kalebu Banda v. The People**⁽⁶⁾ were referred to. It further submitted that the investigating officer should have produced evidence to include among other things forensic report of the purported emeralds, video evidence in relation to identification, documentary evidence to show the court that the accused indeed committed the offences as being alleged by the State. The submissions highlighted the perceived shortcomings by each prosecution witness as they were being cross examined.

16. The submissions on behalf of 2nd and 3rd accused also drew my attention to several authorities that speak to the topic of case or no case to answer that include: **Hauti v. The People**⁽⁷⁾ **Mwewa Murono v. The People**⁽¹⁾ and **Joe Banda v. The People**⁽⁸⁾. It was argued that there was no evidence led by the state that implicates A3, Boston Isaac Shakalombo, as he was not identified at the scene and at the identification parade. I was asked to acquit him. As regards A2 it was submitted that the three witnesses who identified him at the parade had prior meeting with him at the police force headquarters when they were giving statements. The contradictions in the evidence of PW9 and that of the other witnesses such as: 1. The number of assailants. PW9 said that they were 4 but PW4, PW5 and PW6 said that they were 3. 2. Different descriptions of the attire for the assailants was given by the witnesses. 3. PW6 denied wrongly identifying James Kutemba under XXN but PW10 who was in charge of the parade told the court that PW6 identified

James Kutemba at the parade. 4. The identification of A2 at force headquarters. PW5 said that she only remembered A2 after PW6 whispered to her that he was at the scene of the crime but PW6 simply mentioned of telling the police officer who was interviewing them that he recognized A2 as the one who was in police uniform when they were attached and did not mention this to anyone else. PW9 on the other hand said that PW5 and PW6 screamed when they saw the two men (A2 and another) who entered the office while they were recording statements. It was further submitted that PW10 admitted that the persons on the parade were not all wearing similar clothes and that only A2 was wearing a red T-shirt with long sleeves. The case of **Mushemi v. The People**⁽⁹⁾ was referred to in fortifying the point on how contradictory evidence and credibility of the witnesses should be treated.

17. On the issue of identification, the case of **Yoani Manongo v. The People**⁽¹⁰⁾ was referred to where it was held that:

“where the identification of an accused person is, or might be, in issue it is necessary to hold a properly conducted identification parade and failure to do so is a serious dereliction of duty which may in a suitable case result in an acquittal”.

I was further referred to the case of **Charles Lukolongo And Others v. The People**⁽¹¹⁾ as regards handling of identification parades. In that case the accused persons were the only ones who were barefooted and it was held, *inter alia*, that:

“The practice of allowing suspects in an identification parade to be manifestly and conspicuously different from the others as regards dress was depreciated in the case of Chisha v. The People, and that of allowing identifying witnesses to see the accused persons at a police station before the identification parade was conducted was equally condemned in the case of Musonda v. The People. To these unfair practices we must add the one complained of in this case, namely allowing suspects to be barefooted while others were not. Needless to mention that police officers conducting identification parades ought to show the highest standard of fairness and impartiality. Evidence of identification based on parades which have been unfairly conducted is indefensible and in cases where such evidence is the only evidence implicating an accused person a conviction will be quashed on appeal”.

18. I have carefully considered the prosecution evidence and the submissions filed on behalf of the 1st to 3rd accused persons. I was requested by the defence to consider the demeanor of the witnesses but I hasten to state that at this stage it is not appropriate for the court to consider the credibility of the witnesses as that only applies after full trial where the accused are put on their defence. The accused persons are charged with the offence of Aggravated Robbery contrary to Section 294 (1) of the Penal Code Chapter 87 of the laws of Zambia which provides that:

“292. Any person who, being armed with 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”.

19. The particulars of the offence are as already stated at the beginning. I wish to state that at this point of the proceedings, the Court is not required to find that the prosecution has proved its case beyond reasonable doubt. Rather, the question to be answered is whether there has been a prima facie case made out by the prosecution. In the case of **Abbot v. Regina**⁽¹²⁾ Lord Chief Justice Goddard said:

"A man against whom there is no prima facie case at the close of the case for the prosecution is entitled to an acquittal".

In order to establish a prima facie case against the accused the following are the ingredients of the offence to be considered: 1. That the accused persons did steal something and in this case emerald stones, 2. That they were armed with an offensive weapon or that they were two or more in number when stealing, 3. That they threatened to use violence against any person or

property in order to obtain or retain the stolen thing or to prevent or overcome resistance to its being stolen or retained.

20. I have now to determine whether bearing in mind the elements of the offence herein the accused are charged with there is evidence on which a reasonable tribunal might convict upon it if no explanation was offered by the defence. Evidence was led in this matter to show that there was some emerald that exchanged several hands up to the point when it was allegedly stolen although no record or paper trail of its movement was adduced. Photos were produced to show the type of emeralds alleged to have been stolen. The accused persons herein do not appear in the story until up to the point when PW4, PW5 and PW6 were on the gravel road off Mumbwa road, after Open University, enroute to deliver the contraband to an alleged buyer when the vehicle they were in was stopped by three people who attacked them and went away with the contraband. None of the accused persons herein was found with the emerald alleged to have been stolen. According to the evidence before me, the prosecution witnesses did not know three people who they said attacked them and stole the emeralds prior to the incident. The trigger point from the evidence begins with the entry of two people into the office at police force headquarters where PW9 was taking statement from PW3, PW4, PW5 and PW6 and one of those two persons (A2) was somehow recognized as being at the crime scene. An Identification Parade was held where this same person A2 herein was identified by PW4, PW5 and PW6.

A1 was identified by PW5. A3 and A4 were not identified by anyone. The evidence led against A3 was by PW9 who said that A3 was involved in a similar case that was under investigation and that he was an officer from Chawama police station. As regards A1, PW9 gave a testimony that information gathered from their contacts and informers was that he was the owner of the Mark X vehicle that picked PW4, PW5 and PW6 from town up to the crime scene. As for A4, PW9 gave evidence that there was earlier intelligence information reported against him but he was not put in custody because he was helping to locate A1 and he was taken as police informer because he was giving the police information on the first case and this case. PW9 had embarked on giving evidence of what he was told by the accused persons to strengthen the prosecution case but the same was abandoned after issues of warn and caution and voluntariness were raised.

21. It is clear to me that the evidence by the state linking the accused persons to the commission of the crime is from the identification parade and intelligence information based on alleged contacts and informers. The said contacts or informers were not brought before court. Therefore, the evidence drawn from such sources remained hearsay and inadmissible. There is, in any case, no categorical evidence even from the said informers and those contacts given by PW9 directly linking the accused persons to the commission of this offence. I also find that the identification evidence concerning A1 and A2 is weak

in that the witnesses who were at the scene gave contradictory evidence of what transpired there and on the attire of the attackers. The only consistent part was to the effect that one of the attackers was wearing full police uniform. But as regards the other two persons, PW4 and PW6 said that one of the other two was wearing a police vest with a cap and face mask, PW5 said the other two were wearing police vests. PW4 said that he was searched by the one in a T-shirt, PW5 said that the two in vests went to PW4 removed him from the car and grabbed the bag from him, PW6 said that PW4 was searched by the one in uniform and is the one who grabbed the bag from him. Under Cross Examination PW4, contrary to what he said in examination in chief, said that A2 got the stone from him when A2 is the one said to have been wearing full police uniform by all three of them. PW4 said that the one in T-shirt drove the vehicle while PW5 said that the one wearing a police vest drove the vehicle. PW4 said that the one in full uniform went to the driver's side while PW6 said that it's the one in T-shirt who went to driver's side. According to PW9 there were four attackers but all the three witnesses who were attacked at the scene said that there were only three attackers.

22. On the identification parade, the witnesses who identified A2 said that they had seen him at the police station prior to the parade. The witnesses also differed on their evidence on what happened when A2 and another entered the office where statements were being taken from them. PW9 who was in charge

of taking statements said that PW5 and PW6 screamed when they saw A2 and A3 and said these are the people who attacked them but PW6 said that he just talked to PW9 that he recognized A2 as one of the persons who were at the crime scene. PW5 said that PW6 is the one who whispered to her that he recognized A2 as being at the scene of the crime wearing uniform but PW6 denied telling PW5 anything like that. PW5 further said that he only recognized A2. PW4 stated also that he recognized A2 when he entered the office where statements were being taken and he informed PW9 that he had recognized A2 as being at the scene of the crime after which A2 was interviewed about the stones and the Mark X vehicle but kept silent. On the other hand, PW9 said that after PW5 and PW6 screamed he made A2 and A3 leave the room. PW6 denied identifying two people at the parade while PW10 who was in charge of the parade told the court that he identified two people one whom was not part of the accused. Incidentally, PW7 decided to leave out the photos relating to the identification of James Kutemba by PW6 in his photo album relating to the parade. There was further evidence that A2 was the only one wearing a long-sleeved red T-shirt at the parade. These discrepancies make the identification of A2 and A1 to be weak. Furthermore, it cannot be ruled out that the identification of A1 by PW5 was simply random or a fortuitous coincidence as was the case with James Kutemba. The evidence around the identification parade reveals that the same was not fairly and properly conducted. I take solace in the case cited by the

defence of **Charles Lukolongo And Others v. The People**⁽¹¹⁾ for the view that I have taken where it was held, *inter alia*, that:

“The practice of allowing suspects in an identification parade to be manifestly and conspicuously different from the others as regards dress was depreciated in the case of Chisha v The People, and that of allowing identifying witnesses to see the accused persons at a police station before the identification parade was conducted was equally condemned in the case of Musonda v The People. To these unfair practices we must add the one complained of in this case, namely allowing suspects to be barefooted while others were not. Needless to mention that police officers conducting identification parades ought to show the highest standard of fairness and impartiality. Evidence of identification based on parades which have been unfairly conducted is indefensible and in cases where such evidence is the only evidence implicating an accused person a conviction will be quashed on appeal”.

23. There are several other discrepancies in the prosecution evidence such as the role played by PW6 in the transaction to the extent that PW4 and PW5 doubted his dealings and behavior in the transaction. All the key witnesses called by the state, apart from PW1 and the police officers, they were initially arrested as suspects in the matter therefore, their evidence required independent corroboration. The case of **Machobane v. The People**⁽¹³⁾ solidified this requirement. Evidence of identity and authentication of the emerald stone in issue remains a mystery because, as earlier indicated, no documentation of

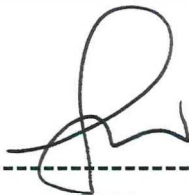
acquisition and exchange of the same was presented. The witnesses kept talking about photos being taken at every point of meetings held but the photos produced did not have dates when they were taken and the quantity was nowhere independently indicated. It is therefore difficult for this court to ascertain if indeed PW1 gave real emeralds to PW2 and PW2 gave those emeralds to PW3 and that PW3 gave the emeralds to PW4 as there was no handover or acknowledgment of receipt of the emeralds in all these exchanges. I am alive to the fact there is no rule of law that an allegedly stolen item must be produced in court unless the question of ownership or identity arises. In this matter the question of identity of the emeralds arose. There was also dereliction of duty by the police in investigating the genuineness of PW6's contacts of the alleged purchasers of the emeralds even when there was evidence adduced that PW6 made several phone calls to the buyer and to his driver whose vehicle was used. No call records were brought before court. There was no proper investigation of the ownership of the vehicle used in committing the crime alleged to belong to A1 as no records to prove the allegation were presented before court. The case in point is that of **Kalebu Banda v. The People**⁽⁶⁾.

24. The For the reasons I have given above, I find that prosecution evidence is unreliable and was discredited in XXN such that I cannot reasonably convict the accused persons herein if they opted to give no explanation. The case of **Mwewa Murono v. The People**⁽¹⁾ is clear that where there is no evidence

establishing a prima facie case the accused must be acquitted at no case to answer. I rule that the accused herein have no case to answer. The essential ingredient of identification of the accused from which the other ingredients follow as covered by Section 294(1) of the Penal Code has not been proved. In the case of **R v. Galbraith⁽¹⁴⁾** it was held that if there is no evidence that the crime alleged was committed by the defendant, there is no difficulty-the judge will stop the case. It has not been shown with credible evidence that it's the accused persons herein who attacked PW4, PW5 and PW6 in order to steal PW1's emeralds to require them to give an explanation. I therefore find no prima facie case against the accused persons. I accordingly dismiss the charge against them pursuant to section 291(1) of the **Criminal Procedure Code**. Each of the accused is acquitted and should be set at liberty.

25. Charges dismissed, accused acquitted.

Delivered at Lusaka on the 14th day of September, 2023



Lastone Mwanabo
HIGH COURT JUDGE