TOKO v THE PEOPLE (1975) ZR 196 (SC)
SUPREME COURT
SILUNGWE CJ, GARDNER AND HUGHES JJS
10th SEPTEMBER 1975
SCZ Judgement No. 66 of 1975
Flynote
Criminal law - Identification - Need to be proper, fair and independent - Failure - Effect.
Criminal law - Aggravated robbery - Failure to specify nature of aggravation in particulars of offence - Effect.
Headnote
The appellant was convicted on two counts of aggravated robbery and sentenced to imprisonment for fifteen years on each count to run concurrently. He appealed against the conviction and sentence.
The incident occurred when two women were on a service road proceeding to the Regional Station Farm at Mufulira where they were to buy some eggs. Both of them had seen the appellant emerge from

behind an anthill holding a knife in his raised right hand. He had threatened them with death if they did not surrender their money to him. One of them was robbed of K16.50 cash and the other was robbed of K14.50. About two days later of them both unhesitatingly picked out the appellant as the robber at an identification parade comprising nine men. The particulars of offence did not specify the nature of the aggravation.

Held:

(i) The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

(ii) In a charge of aggravated robbery, failure to specify the nature of the aggravation in the particulars of offence is an irregularity but one which can be cured unless the accused has thereby been prejudiced.

Cases referred to:
(1) *Machobane v The People,*(1972) ZR 101.

(2) *Nalishwa v The People,*(1972) ZR 26.

M S Kapumpa, Acting Assistant Senior Legal Aid Counsel, for the appellant.
R E M Mwape, State Advocate, for the respondent.
Judgment
Silungwe CJ: delivered the judgment of the Court.
This is a case in which the appellant was convicted on two counts of aggravated robbery and sentenced to imprisonment for fifteen years on each count to run concurrently.
Two issues emerge on appeal. First: was the appellant correctly and properly identified as the robber? Second: was the appellant's confession admissible in evidence? These issues will now be resolved in the order in which they appear above.
It is common ground that two women, Lina Musnuko and Letasi Kondowe, prosecution witnesses 5 and 6 respectively, were robbed at about 0800 hours on 19th October, 1974. The incident occurred when they were on a service road proceeding to the Regional Research Station Farm at Mufulira where they were to buy some eggs. The question is: who committed the robberies? Both ladies told the trial court that they saw the appellant, whom they did not know before, emerge from behind an anthill holding a knife in his raised hand, He threatened them with death if they did not surrender their money to him. Lina

Musuko was then robbed of K15.50 cash and Letasi Kondowe of K14.60. They saw him wearing black long trousers, black shoes and a "knitted" hat; he had no shirt on. They described him as tall and black complexion with reddish eyes. About two days later both ladies unhesitatingly picked out the appellant as the robber at an identification parade comprising nine men. It is not

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clear on the evidence whether or not these ladies were placed in one or two separate rooms prior to identification. According to the testimony of Lina Musuko it would appear that they were put in one room. There is, however, nothing to suggest that after she had identified the appellant she either gesticulated to or conversed with Letasi Kondowe who was immediately called out to the parade. The latter's evidence is that the two were kept in separate rooms.

It is necessary to point out that it is improper for a witness who has identified a suspect at an identification parade to be brought into contact with witnesses who are yet to visit the parade. The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

In the present case, however, we are satisfied that nothing prejudicial to the appellant transpired between the two identifying witnesses after the first one had identified the appellant and before the second witness did likewise; we consider that each of these witnesses independently identified the appellant.

After observing that he was "signally impressed" by both ladies the learned trial judge went on:

"I do not think that they conspired together to ensure that they identified the accused - I am quite certain that they had ample opportunity to recognise the accused in broad daylight committing two robberies. Certainly P.W.5 was a steady person obviously not given to panic. I am convinced they recognised the accused and unerringly picked him out on the parade with no help or prompting."

After all has been said on this question of identification, we are of the opinion that the appellant was correctly identified by two witnesses independently as the man who had perpetrated the two robberies.

We now turn to the second issue. The appellant contended that he had been starved and beaten by the police prior to the making of his confession. After holding a trial within a trial the court found that the confession had been made freely and voluntarily. This confession was made shortly after he had been pointed out at the identification parade. It is argued before us that the confession ought not to have been admitted in evidence because firstly there was a discrepancy as to the time between the recording of the vernacular version and the English translation and secondly the court ought to have exercised its discretion by rejecting the confession on the ground that the appellant had been starved.

As to the first point, the learned judge made a finding of fact when he said:

"I questioned the officer myself closely on this and I think he did make a mistake, I think having observed him he was careless. I do not think he was being dishonest with the Court."

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We are unable to interfere with that finding as the court below was in a better position to judge the demeanour of the witness which he did in accordance with the principle laid down by this court in *Machobane v The People* [1] as to the necessity to record the demeanour of a witness.

With regard to the second point, the judge dealt with it when he referred to the "possible failure" by the police to supply the appellant with any food for a period of about twenty - four hours. He said in his judgment that police failure to provide an accused person with food is "thoughtless" and can prove fatal. He then proceeded to ask himself:

"Can I see anything in what has happened to the accused as being unfair to him to such a degree that it should raise that doubt in my mind as to whether he is guilty or not? "

The answer was in the negative with the result that the appellant was found guilty as charged.

Clearly, the trial judge here dealt with principles of fair conduct referred to in *Nalishwa v The People* [2]; it is therefore untenable to argue that the learned judge did not direct his mind to the exercise of his discretion.

This is not the end of the matter for it is necessary to draw attention to the defective nature of the particulars of offence in this case. Nowhere is it alleged that the appellant, who was alone at the material time, used a weapon, namely a knife, in order to effect the robberies. Failure to specify the nature of the aggravation is an irregularity but one which can be cured unless the accused has thereby been prejudiced. In this case there was no such prejudice. Accordingly we uphold the conviction and amend the particulars of both counts by the insertion immediately following the name of each complainant of the words "by means of a knife".

Sentences were the minimum that could lawfully be imposed. We consider that the trial Court quite properly ordered them to run concurrently as both offences were committed during the same transaction. These sentences will not be interfered with.

Appeal dismissed

Conviction upheld

Particulars amended

1975 ZR p199