KAPOSA MUKE AND ANOR v THE PEOPLE (1983) Z.R. 94 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
12TH JULY, 1983 AND 13TH JULY, 1983
(S.C.Z. JUDGMENT. NO. 10 OF 1983)
APPEAL NO. 244 AND 245 OF 1983

## Flynote

Evidence - Exhibits - Stolen articles - Production of - Mandatory need for.
Evidence - Fingerprints - Failure to test for - Dereliction of duty - When amounts to.
Sentence - Series of offences - Course of conduct - Consecutive sentence - Propriety of imposition.

Headnote

The two accused persons were convicted of aggravated robbery of two counts and sentenced to fifteen years imprisonment with hard labour on each count, to run consecutively. The facts of the case revealed a series of offences forming a course of conduct. The accused persons appealed against conviction and sentence on the ground that there was no proper identification, no exhibits, were produced and the police failed to produce any evidence of fingerprints.

**Held:**

(i) There is no rule of law that an allegedly stolen article must be an exhibit in a trial unless the question of its identity or owner ship arises.
(ii) Before there can be a duty upon the police to test for fingerprints, there must be evidence that the article in question, had surfaced receptive to fingerprints.
(iii) Where the facts of the case disclose a series of offences, forming a course of conduct, the proper procedure is for the sentences imposed to run concurrently.

**Cases cited:**

(1) Kalebu Banda v The People (1977) Z.R. 169.
(2) Kunda and Anor v The People (1980) Z.R. 105.

p95

For the appellants: In person.
For the respondent: R. R. Balachandran Senior State Advocate.

---

## Judgment

**GARDNER, J.S.:** delivered the judgment of the court.

After dealing with the facts the learned trial judge went on to say:

The appellants put forward a number of written arguments on their appeal. The first was that there were no proper descriptions by the witnesses who purported to identity them, and that, prior to the arrest of the appellants, no descriptions had been given to the police. In fact in their evidence all the

prosecution witnesses gave detailed descriptions of the people who attacked them, although one of the prosecution witnesses concentrated solely on the description of the two appellants. These descriptions were not contradictory and none of the witnesses was asked what identification had been given to the police prior to the arrest of the appellants. Nor did the police give any evidence of contradictory descriptions having been given to them. There is therefore no merit in the first ground of appeal put forward by the appellants.

In their second ground of appeal the appellants said that there had been a failure by the police to test the two motor vehicles for fingerprints and, following the case of *Kalebu Banda v The People* (1), they argued that the failure to test for fingerprints resulted in a rebuttable presumption that their fingerprints were not in the vehicles in circumstances in which one would expect them to be found. In fact there was no evidence as to whether or not fingerprint tests had been made and no questions about such tests were asked of any of the appropriate prosecution witnesses. It was said by this court in *Kunda v The People* (2), that the proposition depends upon whether the police were in dereliction of their duty. If the surface of an article alleged to have been handled is one which is smooth and obviously receptive of fingerprint traces there is quite clearly a duty on the part of the police to test such a surface, but, if the surface is rough or has been affected in some way, for instance by the elements, to the extent that fingerprints would not be expected, there would be no dereliction of duty. Although in the *Kalebu Banda* case the court took judicial notice of the fact that in the vehicle concerned in that case there were surfaces on which fingerprints were likely to be left, in the case before us there was no evidence relating to the motor vehicles concerned of the type of surfaces likely to be touched by the passengers in the vehicles. There was no evidence that either of the appellants was driving either vehicle, so the texture of the gear lever, which was relevant in the *Kalebu Banda* case, did not have the same relevance in this case. In the circumstances of this case there was no evidence to support a finding that the police were in dereliction of duty.

The third ground of appeal was that the two motor vehicles alleged to have been stolen were not produced as exhibits to the trial court. There is no rule of law that an allegedly stolen article must be an exhibit in a trial



and the necessity for the production of such an article as an exhibit does not arise unless some question is raised as to its identity or the ownership thereof. There is no merit in this ground of appeal.

The fourth ground of appeal again criticises the identification evidence. This ground repeats the arguments put forward the first ground of appeal and must similarly be dismissed.

The fifth and sixth grounds of appeal attacked the credibility of the third and fourth prosecution witnesses and generally the quality of their evidence. The learned trial judge dealt with the evidence of these two witnesses in detail and did not misdirect himself in arriving at the conclusion that they were reliable witnesses, and that the opportunity to observe was good in respect of the fourth prosecution witness. There is no merit in this ground of appeal.

The seventh ground of appeal dealt with the prosecution witness number 6, the special constable

who was responsible for the arrest of the two appellants at the foot of the anthill. There was criticism of his description of the two appellants which was completely ill-founded, because the witness was present when both appellants were apprehended and they did not leave his sight.

The eighth ground of appeal consisted of a recapitulation of the previous grounds. As we have said there is no merit in any of the grounds and they cannot succeed. The appeals against conviction are dismissed.

So for as the sentence is concerned both appellants ware sentenced to a maximum of fifteen years imprisonment with hard labour on both counts to run consecutively. The learned trial judge imposed the sentences consecutively on the grounds that they were two different convictions relating to two different complaints. He did not take into account that there was a course of conduct disclosed by the facts of this case in which the second offence followed the first. The sentences were therefore wrong in principle. The appeals against sentence are allowed. The sentences are set aside and in their place we substitute the sentences of twenty years imprisonment with hard labour in respect of both appellants on each count, such sentences to run concurrently with effect from 21st August, 1981.

Appeal against sentence allowed

_____