IN THE SUPREME COURT OF ZAMBIA | SCZ APPEAL No.15 OF 1994

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

B E T W E E N:

EDWARD KAOMA KIBANGO — APPELLANT

AND

THE PEOPLE — RESPONDENT

Coram: Gardner, Chaila and Muzyamba, J.J.S.

23rd August 1994 and 18th October, 1994

For the Appellant: V.A.L. Kabonga, Director of Legal Aid

For the Respondent: N. Mwuka, Senior State Advocate

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court

CASE REFERRED TO:

(1) KAPOSA MUKE AND ANOTHER Vs THE PEOPLE 1983 Z.R. 94

The appellant was convicted of murder and aggravated robbery Contrary to Sections 200 and 294 respectively of the Penal Code, Cap. 146 of the Laws of Zambia and sentenced on each count to death by hanging.

The particulars of the offence on count 1 were that Edward Kaoma Kibango, on the 18th day of April, 1991 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia did murder ELIKO PELEMBE and on count 2 were that Edward Kaoma Kibango with other persons unknown, on the 18th day of April, 1991 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia jointly and whilst acting together with other persons unknown, whilst armed with a pistol did rob Eliko Pelembe of his one motor vehicle registration No.ACC.1291 Toyota Hilux valued at 1.8 million and at or immediately before or immediately after the time of such robbery did use or threatene to use actual violence to the said Eliko Pelembe in order to obtain or retain the said property.

He has now appealed to this court against conviction only.

Briefly the prosecution case was that the deceased was employed by Zambia Flying Doctor Service as a driver. On 18th April, 199 he was on night shift. Around 03.30 hours he and PW.1, Cosmas Biyela drove to Pamodzi Compound, in Ndola and collected a relief worker PW.2, Mr. Ezron Mwape. From there they drove to Kawama Compound to collect a Mr. Edward Musonda. At Musonda's house the deceased was shot as he

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reversed the motor vehicle, a Toyota Hilux Vanette Reg. No.ACC.1291. PW.1 and 2 jumped out of the vehicle and ran away. The robbers then pulled the deceased out of the vehicle, got into the vehicle and drove away. Around 04.30 hours or thereabouts the appellant was caught in Chichele Plantation near the border with Zaire by PW.3, Lt. Ronald Caleb Zulu and PW.4, a private soldier by the name of Victor Liteta. At the time the appellant had a pistol. The appellant then led PW.3 and 4 across a railway line within Chichele Plantation to the stolen motor vehicle. He later led PW.7 Patrick Mangolwa, the arresting officer to the scene of crime. Under warn and caution the appellant made a statement which was objected to on the ground of duress but admitted in evidence after a trial within trial was held.

In his defence on oath the appellant denied both charges. He said he had come to Kaniki border to buy essential commodities. That about 500 metres from the border while still in Zaire PW.3 apprehended him and took him to Paramilitary Police in Chichele Plantation and later to Chifubu Police Station.

The appeal was argued on three additional grounds. We will first deal with ground 1 then 3 and 2

The first ground was that the then learned trial Commissioner failed to use his discretion to exclude the alleged confession which operated prejudicially against the appellant. In support of this ground, it was argued by Mr. Kabonga that although the appellant was not subjected to physical torture yet the fact that he was held in custody for five days before he signed the alleged confession must have induced him to make the confession and therefore that the learned trial Commissioner should have exercised his discretion and exclude the confession. That failure to do so amounted to a misdirection. In considering this ground of appeal and argument we have examined the evidence on record, the ruling in the trial within trial and the judgment of the then learned trial Commissioner. The alleged confession was objected to on the ground that the appellant was promised that if he signed the statement he would be taken to court and released from custody. In his ruling the learned trial Commissioner did not consider this ground. Instead he found and held at page 14 of the record that the confession statement objected to by the appellant was a different statement and not the subject of the proceedings before him and on that ground admitted the confession. There is no doubt therefore that he misdirected himself. Had he considered the objection he might have come to a different conclusion. However, it is

quite clear from his judgment that the learned trial Commissioner did not rely on the confession to come to his conclusions. The appellant was therefore not prejudiced in any way by the admission of the alleged confession. This ground therefore fails.

The third ground was that no finger prints were raised from the firearm and the motor vehicle to connect the appellant to the charges. Arguing this ground Mr. Kabonga said that the Police should have raised finger prints from the pistol and steering wheel of the stolen motor vehicle. That failure to do so amounted to dereliction of duty on their part. In considering this ground and argument we note that this issue was never raised in the court below. It is being raised before us for the first time. This was improper and we would draw counsel's attention to this court's decision in the case of Kaposa Muke and Another (1), at page 95, that before there can be a duty upon the Police to test for finger prints there must be evidence that the article in question had surfaces receptive to finger prints. No such evidence was established in this case. In any event, the appellant was seen dropping the pistol by PW.3 and 4. There was therefore no need to lift finger prints from the pistol. This ground therefore also fails.

The second ground was that there was no direct link connecting the appellant to the two charges. The argument on this ground was that the evidence against the appellant was circumstantial. That no one saw the appellant shoot the deceased or drive away the stolen motor vehicle. That possession of the pistol and being found within the vicinity of the stolen motor vehicle was not sufficient to connect the appellant to the charges. Moreover, that the bullet which killed the deceased was never recovered and therefore not proved that it was fired from the pistol allegedly found on the appellant. We agree that there was no direct evidence against the appellant. That the evidence against him was mainly circumstantial. In his judgment the learned trial Commissioner found that the appellant was found with the stolen motor vehicle a few minutes after it had been stolen and then applied the doctrine of recent possession to arrive at his conclusions. We have examined the evidence on record and it shows that the robbery took place around 04.00 hours on 18th April, 1991 and 30 minutes or so later the appellant was apprehended in Chichele Plantation. He had a pistol and led PW.3 and 4 to the vehicle across the railway line within Chichele Plantation. On these facts we cannot say that the learned trial Commissioner misdirected himself in applying the doctrine of recent possession. This ground also fails.

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For the foregoing reasons we would dismiss the appeal against conviction and there being no extenuating circumstances we confirm the sentences of death on each count.

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S.T. GARDNER
SUPREME COURT JUDGE

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M.S. CHAILA
SUPREME COURT JUDGE

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W.M. NGULUBE
SUPREME COURT JUDGE