SCZ APPEAL NO. 251/2012

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

LUCKSON KACHA NGOSA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mumba, Acting DCJ, Muyovwe JS and Lisimba, AG. JS

On the 9th April, 2013 and 3th September, 2013.

For the Appellant: Mr. K. Muzenga, Principal Legal Aid Counsel

For the Respondent: Mr. P. Mutale, Deputy Chief State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **John Timothy and Feston Mwamba v The People (1977) Z.R. 394**
2. **Jonas Nkumbwa vs. the People (1983) Z.R. 103**
3. **Peter Yotamu Hamenda vs. The People (1977) Z.R. 184**

The appellant was convicted of two Counts of aggravated robbery contrary to **Section 294 (2) (a) of the Penal Code Cap. 87 of the Laws of Zambia**.

In Count 1, the particulars were that the appellant on the 15th day of June, 2009 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed with a firearm, did steal from Mukuba Chivweka, one Television set, one DVD Player and two cell phones altogether valued at K1,725,000.00 the property of Mukuba Chivweka and at or immediately before stealing, did use actual violence to the said Mukuba Chivweka in order to obtain, prevent or overcome resistance to the said property being stolen.

In Count 2, the particulars were that the appellant on the same day, at the same place, jointly and whilst acting together with other persons unknown and whilst armed with a firearm, did steal from Nyembezi Ndhlovu, 1 Television set, 1 DVD Player and one cell phone all valued at K1,400,000.00 the property of Nyembezi Ndhlovu and at or immediately before or immediately after the time of such stealing did use or threaten

to use actual violence to the said Nyembezi Ndhlovu in order to obtain, prevent or overcome resistance to the said property being stolen. The appellant pleaded not guilty to both Counts.

The state called six (6) witnesses in support of the charges.

The evidence in the 1st Count was that on 15th June, 2009 the complainant (PW1) was in the sitting room of the family farm house when at about 1700hours there was a knock at the door and his mother (PW2) opened the door. PW1 saw a man holding a gun which was pointed at his mother's chest entering the sitting room. The man ordered PW1 and PW2 to lie down on the floor and the robbers tied their hands and legs and blind-folded them and thereafter, the robbers collected the Television set and two cell phones. The evidence of PW1 was that the gunman was wearing a head sock; that at that time the lights were on in the house; and that the whole ordeal lasted about 20 minutes. His evidence was also that he identified the gunman by his voice as a person who had previously worked for the family for about two years and that his name was Ngosa.

According to PW1 the value of the stolen property was K1.7million and that the Television set and Nokia cell phone were recovered and he identified these in Court.

In relation to the 2nd Count, PW3 Nyembezi Ndhlovu testified that on 15th June 2009 around 1800 hours she heard a knock at her kitchen door and upon opening the door, immediately she saw a gun pointed at her and the gunman who was wearing a mask entered the house and he ordered her to lie down after she asked him what was going on. PW3 refused to lie down and a struggle ensued between them for sometime until he managed to overcome her. Her assailant then tied her hands and legs and he used her jacket to wrap her face and that, thereafter, the gunman stole her Television set, DVD and her cell phone. After the gunman left, PW3 untied herself and she fled to the neighbour's house where she called her husband. The matter was reported to Mwembeshi Police where she was given a Medical Report Form and later she was treated at UTH. According to PW3, she was able to see the gunman's face during the struggle as she managed to unmask him at some point and she identified him as Ngosa, the appellant, whom she said she had known for some time as he used to do

some piecework at the farm. Later on, the DVD was recovered as well as her cell phone.

The evidence of PW4 , Inspector Winter Mumbe was that on the 8th July 2009 while deployed at Matero Zesco Complex he was alerted around 2030hours by a Zesco Guard to the effect that there was a suspect who was armed with an AK47 Rifle at the Taxi rank opposite the Matero Zesco Complex. Upon receiving this information he rushed to the Taxi rank and found a suspect in a taxi which was about to be driven to Lusaka West. That he apprehended the suspect (the appellant) with the help of members of public and he handed him over to Matero police station pending further investigations. PW4 testified that he found the appellant with an AK47 Rifle with three rounds of ammunition.

PW5 a technician testified that on 24th July 2009 around 1400hours he was at his makeshift stand within Lilanda compound. **The appellant approached him and offered for sale a 14 inch** Phillips television set, a 21 inch LG television set and a DVD player. According to PW5 he knew him because he used to see him at the video room where he showed video games and that the appellant told him that he was selling the

items because he was migrating to the village due to problems he had experienced in town. And after negotiations he advised him that he should come the following day as he needed time to raise some money. PW5 said the appellant returned the following morning with a 14 inch television set and a DVD player. After negotiations, they agreed on the price of K260,000 for the DVD and K180,000 for the 14 inch colour TV. After he paid for these two items the appellant asked PW5 if he could also buy a 21 inch colour TV and he told the appellant to see him after four days. The appellant returned after four days and PW5 eventually paid him K400,000 for the 21 inch colour TV and the appellant told PW5 that he was migrating to the village and he never saw him again until the day when he saw the appellant in the company of the police who also apprehended him. PW5 was detained at Matero police station for one day and that he identified the appellant as the person who sold him the recovered items.

PW6 the arresting officer testified that he was assigned to investigate the case involving the two counts and during his investigations, the appellant led him to George Compound where he recovered the exhibited stolen items from PW5. The

officer later arrested and charged the appellant with the two Counts.

When put on his defence, the appellant gave evidence on oath. The appellant stated that he knew nothing about the two offences which he is alleged to have committed and he denied that he ever worked for the complainants in the two Counts. He maintained that he was apprehended by the police for loitering in June, 2009.

On this evidence, the learned trial Judge convicted the appellant and sentenced him to the mandatory death sentence. The learned trial Judge found that although it was desirable for the state to have subjected the firearm to ballistic examination as is normally the practice, he was of the view that the evidence before him established beyond reasonable doubt that the firearm that was used during the robbery was the one that was produced before Court and that, therefore, the appellant had to suffer the death penalty in respect of the two Counts.

On behalf of the appellant, Mr. Muzenga submitted that the appeal was against sentence only. The sole ground of appeal is that the learned trial Judge erred in law and fact in

convicting the appellant of armed aggravated robbery in the absence of proof beyond reasonable doubt that the weapon in question was a firearm under the **Firearms Act, Cap. 110 of the Laws of Zambia**. Learned Counsel pointed out that the learned trial Judge found that the firearm was never subjected to ballistic examination. That the test should not have been whether or not a firearm was used in the robbery. It was submitted that had the learned trial Judge properly directed his mind, he would not have imposed a mandatory death sentence. The case of **John Timothy and Feston Mwamba vs. The People**[1] was cited where it was held:

> **(i) To establish an offence under Section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act, Cap 111, i.e. That it was a lethal barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.**
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> **(ii) The question is not whether any particular gun which is found is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.**

It was submitted that in this case the firearm which was used in the robbery was not fired at the scene and even after being recovered it was never subjected to ballistic examination. And that even though the firearm was examined and found to be a firearm under the **Firearms Act**, the identification of the recovered firearm by PW2 could not be said to sufficiently establish it as the gun that was actually used in the robberies. Counsel further cited the case of **Jonas Nkumbwa vs. The People[2]**

It was submitted that failure by police to subject the evidence which was in their possession for examination was a dereliction of duty which dereliction must be resolved in favour of the appellant.

Counsel further relied on the case of Peter **Yotamu Hamenda vs. The People[3]** and urged this court to quash the conviction and set aside the sentence and substitute it with a conviction of aggravated robbery under Section 294 (1).

On behalf of the state, Mr. Mutale did not support the conviction and conceded that the trial Court misdirected itself in convicting the appellant under Section 294 (2). Counsel

agreed that this is due to the fact that the firearm which was the subject matter in the robbery was never subjected to ballistic examination as provided for under the law.

We have considered the evidence in the Court below, the judgment of the lower Court and the submissions by both learned Counsel.

In the sole ground of appeal, the thrust of the argument is that the learned Judge erred in convicting the appellant for armed aggravated robbery contrary to Section 294(2) and that, therefore, the death sentence should be set aside.

From the outset, we note that although Mr. Muzenga indicated that this appeal is against sentence only, we cannot look at the sentence without also looking at the conviction as the two are inter-twined. In this connection, we agree with both learned counsel that the trial Judge erred in convicting the appellant for the offence of armed aggravated robbery contrary to Section 294(2). As rightly conceded by Mr. Mutale, the firearm allegedly used in the robbery was not subjected to a ballistic examination to determine whether it was a firearm

within the meaning of Section 2 of the Firearms Act which defines a “firearm” to mean…

“(a) Any lethal barreled weapon of any description from which any shot, bullet, holt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile”

Indeed, the fact that the exhibited firearm was identified during the trial as the one used during the robbery, cannot, without a ballistic examination, lead to a conclusion that it was a firearm within the definition under the Firearms Act. It is not in dispute that a firearm was used during the robbery and it is also true that although the complainants in both counts were threatened with a firearm, there was no shooting in both incidents. Therefore, in the absence of any shooting, it was important to subject the firearm to a ballistic examination. Authorities cited by Counsel for the appellant such as the case of **John Timothy and Another**[1] are quite instructive as to the requirement in cases of this nature. It must be emphasized that trial courts must bear in mind that the mere use of a firearm does not make a robbery an armed robbery unless the firearm is properly examined and that it is established it is a firearm within the meaning of the Firearms Act. As we stated in

the case of **John Timothy and Another**[1], the issue is whether the firearm allegedly used was capable of being fired. In this case, no such evidence was led by the prosecution. In the circumstances, it would be unsafe for us to uphold the conviction under Section 294(2). We set aside the conviction under Section 294(2) and we also set aside the death sentence. Instead, we substitute a conviction of aggravated robbery contrary to Section 294(1).

Turning to sentence, we are of the view that a sentence of 30 years is appropriate under the circumstances.

To that extent the appeal is allowed.

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F.N.M. MUMBA
ACTING DEPUTY CHIEF JUSTICE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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M. LISIMBA
ACTING SUPREME COURT JUDGE