Appeal No. 135/2012

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT KABWE

(Criminal Jurisdiction**)**

RICHARD NGOLOFWANA KUNDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: PHIRI, MUYOVWE and HAMAUNDU, JJS

On the 6th November, 2012 and 5th June, 2013

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

For the Respondent: Mrs. C.M. Hambayi, Assistant Senior State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Douglas Mpofu and Washington Magura v. The People (1988-1989) Z.R. 24**
2. **Kenneth Mtonga and Another v. The People (2000) Z.R. 33**
3. **Boniface Chanda and Others vs. The People (1988-89) Z.R. 164**

The appellant together with Brian Awilo Chibuye was convicted of the offence of aggravated robbery contrary to Section 294 (1) of the Penal Code Cap 87 of the Laws of Zambia. The particulars of the case were that the appellant together with one Brian Awilo Chibuye (hereinafter referred to as 'Brian') on the 30th of June 2002 at Kabwe in the Kabwe District of the Central Province of Republic of Zambia jointly and whilst acting together and being armed with an AK47 did steal from Emmanuel Ponayotopolus 1 telephone receiver, 2 driving licences, 1 hand bag, 1 passport, 1 permit document, 3 packets of vanilla biscuit, 1 vaccination certificate, 1 pocket of Butone, 2 packets of Jaribu, packets of matches, 1 tube of Mekako cream and 1 wallet all valued at K8,100,000.00 and at or immediately before or immediately after such stealing used or threatened to use actual violence against the said Emmanuel Ponayotopolus in order to obtain or retain the said property.

The appellant and Brian were also charged with two counts of attempted murder contrary to Sections 215 and 200 of the Penal Code. It was alleged that on the 30th June, 2012 at Kabwe in the Central Province of the Republic of Zambia jointly and whilst

acting together they attempted to murder Emmanuel Ponayotopolus and Dorice Musonda.

On the two counts of attempted murder, the appellant and Brian were acquitted by the Court below. Suffice to note that at the hearing of this appeal, Brian withdrew his appeal and we accordingly dismissed it.

During trial, the prosecution called five witnesses. PW1 said that on the material day as she was going home with her mother they were bypassed by two young men. She greeted the appellant and the two proceeded. According to PW2 and PW3, they had driven to Kapiri Mposhi on the material day. On their way back around 1700 hours and after they crossed the river, they met PW1 and ahead were two young men who were not using the main road. Both witnesses observed the two young men who turned out to be the appellant and Brian. That as PW2 drove on, suddenly Brian started firing at the vehicle and PW2 lost control of the vehicle as a result of the barrage of bullets fired at them. The vehicle came to a stop in the bush. PW3 was injured and was bleeding from her hand. PW2 and PW3 said that the

appellant went to PW3's side of the vehicle and told her to run for her life and at this time Brian had his gun pointed at her. PW3 ran into the bush where she found PW1 and her mother and she was taken to the nearby village. Eventually, she was taken to the hospital and one of her fingers was amputated due to the injuries she sustained as a result of the gunshot wound.

Meanwhile, PW2 had suffered gunshot wounds on both his arms. According to PW2, he was ordered out of the vehicle and his hands were tied from behind by the appellant. He said the appellant demanded money from him while Brian who was armed was standing nearby. The appellant demanded money from him and he told him to get K5m from his wife's handbag but the appellant told him that for his life he should pay K10m. PW2 told him he could have some more money at his house and he led the two assailants to his house which was about a kilometre from the scene of attack. When they reached the farm, Brian fired in the air and the three of them entered the main house. After ransacking the house, the assailants found PW2's brief case which had US$2000 and other important documents. PW2 was forced to open the grocery shop on the farm and, inside the shop, the

appellant got the money from the till and the two of them got biscuits and other groceries but they locked PW2 inside and left. PW2 managed to come out of the shop through an open window with the help of his workers after he cut the fibre tied around his hands. With the help of neighbours within the farming area, he was taken to the hospital and the x-ray showed that he had two bullets lodged in his right arm. Some of the stolen items were recovered by the police after two weeks.

PW4 and PW5's evidence supported PW2's evidence regarding what transpired at his farm when he led his assailants there. PW4 and PW5 both saw PW2 coming into the farm with his hands tied behind in the company of the assailants. PW5 said the appellant had earlier on in the day gone to the grocery shop to buy a needle.

PW1, PW2, PW3 and PW5 attended an identification parade at Masansa Police Post at which they identified the appellant and Brian among other suspects who were found in a seated position. The appellant was identified as the person who was in the company of Brian who was armed.

PW6 was among the officers who apprehended the appellant and Brian after receiving information from members of the public while PW7 was the ballistics expert. PW8 took photographs at the various scenes which were visited as they were led by the appellant and Brian. The photos were admitted in evidence without objection from the defence.

The arresting officer (PW10) explained how he investigated the matter and that he visited the scene of crime and the farm of the complainant who was in hospital at the time when he went with the suspects. He was shown the vehicle which had bullet holes. Following information from the members of the public, they managed to apprehend the appellant and Brian. The two suspects led the police to the recovery of various items including PW2's passport and other items which had been stolen during the robbery. Later, it was revealed that the elder brother to Brian by the name of Salaza was involved; he was apprehended but was shot dead as he attempted to escape in the bush near Chengelo School where he had led the police in search of a firearm. PW10 later made up his mind to charge and arrest the appellant and Brian with the subject offences. He explained that an

identification parade was conducted by Sub-Inspector Moonga. The arresting officer stated that he was informed that the appellant and Brian were fighting over stolen money at the police station.

At the close of the prosecution case, the appellant was put on his defence and he elected to give evidence on oath and called no witnesses.

The appellant's evidence was that he was a visitor to Chalata area where he had gone to barter fish with maize. He said that he was apprehended by the police during the night. He explained to the police that he had just returned from Serenje where he had gone to buy maize bags. He said he was questioned about Salaza Chibuye and the police took him to Mkushi Police Station where they beat him. He denied leading the police to the complainant's farm or to any other place. That the photographs produced in Court did not depict the correct picture, because the police forced them to pose for the photographs at various scenes. The appellant denied any knowledge of the subject offences.

On the above evidence, the trial Judge found that the appellant and his co-accused acted in collusion to rob the complainant and that the appellant did not disassociate himself from the acts of his colleague who was armed with a firearm. He convicted them of aggravated robbery and sentenced them to the mandatory death sentence.

On behalf of the appellant, Mr. Muzenga advanced one ground of appeal:

1. **The learned trial Judge erred in law and in fact when he convicted the second appellant on weak evidence of identification in the absence of corroborative evidence or evidence of something more.**

Mr. Muzenga relied on his filed Heads of Arguments. In his written submissions, Mr. Muzenga submitted that the evidence of identification was basically from PW1, PW2, and PW3. And that the evidence given by PW4 and PW5 consists of Court-room identification which has no probative value. Mr. Muzenga argued that PW1 only had a momentary glance of the assailants as they crossed each other. That, later on, the suspects were taken to the farm when they were first apprehended and that PW1, PW2 and

PW3, who were obviously greatly traumatized by the incident, probably saw the appellant at the farm although they all denied this.

It was pointed out that PW2 was an extremely forgetful witness who could not remember the number plate of his motor vehicle which he owned for about 4 years. It was submitted that, from PW3's evidence, it is clear that the witnesses were together during the identification parade. The gist of Mr. Muzenga's argument is that the identification parade was unfair as the witnesses merely identified the suspects who were identified by those who preceded them. Mr. Muzenga argued that the whole ordeal was traumatic for the witnesses who were closely related to each other and that their evidence required corroboration. That in the circumstances, the evidence of identification was extremely faulty and cannot be relied upon. That had the learned trial Judge directed his mind to the issues raised and the circumstances in which the identification was purportedly made, he would have discounted the identification evidence.

Counsel attacked the evidence of leading and the recoveries that were made after the robbery. Mr. Muzenga conceded that this evidence could be considered as corroboration of the poor evidence of identification. However, that the evidence of PW6 indicated that Brian led the police to where he had hidden the firearm and to the Mapapa area where some of the stolen goods were found and that the appellant assisted them in the recoveries of the stolen property. He pointed out that from PW6's evidence it was not clear which specific stolen items the appellant allegedly assisted to recover and also it was not clear what was meant by 'assisted'. He pointed out that PW10 told the trial Court that the two suspects led him to a place in the bush where stolen properties were recovered and that it was not clear who between the two suspects led him to the recovery of the stolen properties. Counsel relied on the case of **Douglas Mpofu and Washington Magura v. The People[1]** where this Court held that:

Where a number of persons are alleged to have led the police to where incriminating evidence is found, it is essential for the trial court to ascertain what is exactly meant by leading. Except in the most exceptional cases only one person could do the actual leading and evidence should be adduced to show which of a number of the

persons alleged to have done the leading did in fact have the guilty knowledge.

Mr. Muzenga contended that, in this case, the evidence of leading cannot be sustained as there exists a doubt as to who had the guilty knowledge.

Counsel submitted that the confession made by Brian to this Court at the hearing of this appeal is a clear pointer to the fact that he is the one who did the leading and that he is the one who had a guilty knowledge. Mr. Muzenga argued that, in the circumstances and on the totality of the evidence, the conviction of the appellant cannot stand. He contended that had the learned trial Judge addressed his mind seriously to the evidence of leading he would not have convicted the appellant. He urged this Court to allow the appeal, quash the conviction and set aside the death sentence and set the appellant at liberty.

In response, Mrs. Hambayi submitted that she supported the conviction. She argued that the evidence of identification was adequate to warrant conviction as five witnesses testified that the appellant was one of the two persons who committed the offence.

She submitted that the evidence of PW1 was to the effect that she came across the appellant as they crossed paths and that she greeted him and he answered and that this was at 17:00 hours and that PW1 was not labouring under any fear as she met the appellant and his colleague before the attack. PW1 said subsequently the motor vehicle belonging to PW2 and PW3 proceeded after a brief chat and shortly they fell under a hail of gun fire. That PW1 could hear the appellant tell PW3 to get out of the vehicle and run for her life. Mrs. Hambayi argued that PW1 had ample opportunity to observe the appellant as she did not bear the brunt of the attack. Further, that PW2 who was the driver of the vehicle under attack said he spent over an hour with the appellant and during that time he never lost sight of him and further it was around 17:00 hours and visibility was sufficient. That PW2's evidence was that the appellant ordered his wife to come out of the vehicle and run for her life. That it was the appellant who demanded money from PW2. That in addition after the attack he was ordered to take his assailants to the farm. She submitted that evidence showed that when they got to the farm the appellant asked PW2 about the aerial which was outside the

house. That the appellant went into the bedroom and got US$2000 and other documents as testified by PW2. This evidence, she submitted, revealed that the appellant was part and parcel of the commission of the offences as shown by the vivid evidence of PW2 and by virtue of the time spent with him. She submitted that this rendered the identification safe.

In relation to PW3, she identified the appellant as the person who ordered her out of the vehicle. That she described him as being tall, dark and with a round face. Counsel further submitted that PW4 also testified that she saw the appellant walking in the yard of the complainant's farm house and that the appellant was walking behind the person who was armed and that the appellant did not distance himself from the gun man. Further, PW5 testified that the appellant prior to the attack had gone to buy a needle from the shop on the farm and that, therefore, she had opportunity to observe him in a calm environment and so her identification was not clouded by fear.

In relation to the identification parade, she submitted that it was clear that suspects on the parade were seated on a bench as

PW1, PW2, PW3, and PW5 went to identify them. That this was an irregularity but that the manner in which the witnesses were able to see the suspects supersedes this irregularity and that the identification parade should not be nullified. She relied on the case of **Kenneth Mtonga and Another v. The People**[2]. She submitted that there was 'something more' which connected the appellant to the offence as the evidence of PW9 revealed that the appellant had gone to the police to report on the unfair sharing of the proceeds of crime. And that there was no cross-examination on this point. She submitted that when the appellant was apprehended and taken to the police station he was told to take off his trousers and he was found wearing a short which PW4 identified as the short the person who was wielding the gun was wearing. She submitted that the appellant was properly identified and connected to this offence and that this Court should uphold his conviction.

We have considered the evidence on record, the judgment of the lower Court and the submissions of learned Counsel.

The sole ground of appeal attacks the quality of the evidence of identification and that it needed 'something more' or some evidence to connect the appellant to the offence. It is not in dispute that the witnesses were related to each other. We held in **Boniface Chanda and Others vs. The People**[3] that:

"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe…"

In this case, as Mrs Hambayi submitted the witnesses had ample opportunity to observe their assailants and the appellant was clearly identified as one of the persons who was present. The evidence of PW3 was clear that the appellant was the one who told her to run for her life and PW1 was in the bush watching the whole incident and she heard the appellant as he spoke to PW3. We do not agree with the submission that PW1 only had a momentary glance at the appellant because they had greeted

each other before the attack and PW1 who was hiding in the bush watched the whole incident and in broad day light. And, surely, how could PW3 forget the person who told her to run for her life? As pointed out by Mrs. Hambayi, the evidence of PW5 was that the appellant had earlier gone to buy a needle from the shop at the farm before returning later with Brian to raid PW2's house and shop. The events as narrated by the witnesses clearly show that the appellant did not disassociate himself from the robbery and it was clear he was part of the whole scheme.

Mr. Muzenga submitted that since Brian confessed before this court that he committed the crime, we must conclude that he is the one who had the guilty knowledge. This is an assumption which we cannot accept for obvious reasons. The fact that Brian confessed before this Court cannot operate in favour of the appellant in the face of the evidence led against him in the court below. We do agree that the prosecution should have presented evidence to indicate which of the two suspects led them to the recovery of the stolen items in line with the holding in the case of **Douglas Mpofu.**[1] However, looking at the case holistically, this

anomaly cannot affect the prosecution's case to the extent that the appellant can be set at liberty.

As regards the issue of the appellant having gone to the police to lodge a complaint regarding the unfairness in the sharing of money, we take the view that the prosecution should have called a witness to testify to this fact. As matters stand it is difficult to accept this piece of evidence which was alluded to by the arresting officer.

Mr. Muzenga charged that the identification parade was flawed and the State has conceded to this somewhat. However, we take the view that it cannot be a mere coincidence that the appellant was named as a suspect together with Brian from the very beginning; he was said to have assisted in the recovery of the stolen items although it was not clear from the evidence as to who between the two did the leading; he was identified as the one who had earlier gone to the farm to buy a needle; and he was found wearing the short which was identified to be the same type of short worn by Brian on the day of the robbery. It has been argued that the identification parade was flawed because the

witnesses were together and could see each other as identification was conducted. Mr. Muzenga based his argument on the evidence of PW3 who said:

"We were called at Masansa Police Post. We found many persons seated on the bench. We stood at a distance, we were called one by one to identify the assailants. I identified both by facial appearance they are in court today as they were at Masansa Police Post."

Mrs. Hambayi has rightly conceded that the identification parade was irregular, however, we do not agree with Mr. Muzenga that this evidence should be discounted. We do note as we have been urged by Mr. Muzenga that only PW1, PW2, PW3 and PW5 attended the identification parade. In the case of **Kenneth Mtonga and Another[2]** we held that:

(ii) If, therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever on the identification, it would not be to nullify the identification given the ample opportunity available to the witnesses.

Indeed, as was noted in the **Kenneth Mtonga[2]** case, a nullification can only result in a proper case and in this case more than one witness identified the appellant and they were able to describe the role he played during the robbery which took place

around 1700 hours. The circumstances described by each witness confirm that the witnesses had ample opportunity to observe the assailants and we are satisfied that they were able to make reliable observations. We do not find that this is a proper case in which we can nullify the evidence of identification. We agree with Mrs. Hambayi that the appellant was properly identified and that indeed there was sufficient evidence pointing to his participation in the robbery and to his guilt thereby removing any possibility of a mistaken identification. We cannot fault the learned trial judge.

In sum, we find that this appeal has no merit, we uphold the conviction and the mandatory death sentence by the lower Court and the appeal is hereby dismissed.

.....
G.S. PHIRI
SUPREME COURT JUDGE

……
E.N.C. MUYOVWE
SUPREME COURT JUDGE

……
E. M. HAMAUNDU
SUPREME COURT JUDGE