

Appeal Nos. 116, 117 &

118/2010

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT KABWE  
(Criminal Jurisdiction)**

**BETWEEN:**

**BALDWIN BODA KALENGA  
ONGRE ISAKI CHOLA  
OKETE KAPWILA (Deceased)**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
3<sup>RD</sup> APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENT**

Coram: Chirwa, Chibomba and Phiri, JJJS  
On 2<sup>nd</sup> November, 2010 and 9<sup>th</sup> April, 2014

**For the Appellants: Mr. K. Phiri, Senior Legal Aid Counsel  
For the Respondent: Mrs. Hambayi, Acting Senior State Advocate**

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## **JUDGMENT**

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**Phiri, JS, delivered the Judgment of the Court**

**Case referred to:**

**1. Timothy and Mwamba vs. The People (1977) ZR  
394(SC).**

When we heard this appeal, Honourable Mr. Justice D. K. Chirwa was part of the Court. He has since retired. Therefore, this is a majority Judgment.

This is an appeal against conviction. The appellants were convicted on one Count of ***Armed Robbery Contrary to Section 294(2) (a) of the Penal Code Cap 87 of the Laws of Zambia***. They were sentenced to death.

The particulars of the offence are that on the 4<sup>th</sup> March, 2001, at Chingola in the Chingola District of the Copperbelt Province of the Republic of Zambia, the appellants, jointly and whilst acting together with other persons unknown and whilst armed with offensive weapons; namely, AK47 Rifles, did steal the various items listed in the information, including a motor vehicle Isuzu KB Registration No. AAV 2723, altogether valued at K194,064,000.00 from Augus Collins King Reed and at or immediately before or after the time of stealing, did use or threatened to use actual violence to the said Collins King Reed in order to prevent or overcome resistance to the property being stolen.

The case for the prosecution rested on the evidence of four (4) witnesses. These were Augus Collins King Reed (PW1); his wife, Kathryn Anne Reed (PW2); Amos Banda, a Zambia National

Service Camp Security Officer (PW3) and Detective/Inspector Joseph Mweemba (PW4) who investigated the case.

The testimony of PW1 was that on the material day, he and his family, consisting of his wife (PW2) and their two children were returning to their Farm after visiting friends. Their Farm road was about 14 kilometers from Chingola/Chililabombwe Roads and they used an Isuzu Double Cab Registration No. AAV 2723, driven by PW1. At about 17.50 hours when visibility was clear, PW1 turned left at a T-junction and immediately saw three men who ran towards the car. As the men approached from a distance of about 200 meters away, he noticed that they carried what looked like AK47 guns. He tried to reverse the car but the men fired their guns towards them, forcing him to stop.

Soon thereafter, the car was surrounded by five men; some of those men were dressed in Military Combat uniforms and three of them carried AK47 Rifles. PW1 and his wife pleaded for mercy, but they were pushed to the rear seat and placed under guard at gunpoint and with a machete. PW1 had his wrists bound and tied at his back. The five men took various positions in the vehicle

while one of them drove the vehicle from the scene at excessive speed. PW1 and his family members were covered with a black cloth. As they drove from the scene, PW1 managed to break loose and pushed the cover until he was able to see what was happening. PW1, PW2 and their children were later abandoned by the bush. They walked to Chingola and reported at Chingola Central Police Station at about 22.00 hours.

Seven days after the robbery, PW1 was called by the Police to identify some of the stolen items that had been recovered. These included sunglasses, two pairs of shoes, motor vehicle keys and a remote control device, the motor vehicle discs, registration number and sticker as well as gate pass and a Nokia phone. Two weeks later, he was again called by the Police at Chingola Police Station where he identified his stolen motor vehicle. This witness identified all these items during trial and they were admitted in evidence without objection.

PW2's testimony was materially similar to that of her husband PW1. She was travelling in the company of her husband and two of their children aged five and three years, respectively, when the

robbery took place. They used the Isuzu Twin Cab motor vehicle which was stolen together with many other items. Earlier, she saw three men standing on the road with Rifles and when her husband stopped the vehicle and tried to reverse, she heard some gunshots. Soon thereafter, the motor vehicle was surrounded by five armed men with guns and Machetes. Those men directed PW1, herself and their two children out of the vehicle and pushed them to the backseat. According to PW2, she had a proper look at the robbers who appeared dirty. She joined her husband in pleading for mercy. The robbers took up various positions in the vehicle. They were aggressive and threatened to shoot if they shouted for help. They also demanded for money. The robbers spoke in fluent English.

While this was going on, PW1's hands were tied and they were all covered in a black cloth. Later, the vehicle was stopped and they were pulled out of it. The robbers instructed PW1 to remove his shoes while they tore off her gold chain from her neck. They also got PW1's wedding ring and her Rolls Royce wrist watch. As all this was happening, the robbers kept pointing their Rifles at PW1 and PW2. When a chance arose, PW1 and PW2 escaped from the

robbers with their children, and sought refuge in a ditch. Thereafter, they heard their motor vehicle being driven off. Thereafter, they walked all the way to Chingola where they reported the robbery. Under cross-examination, PW2 testified that she did not identify any of the assailants.

PW3 testified that on the 5<sup>th</sup> of March, 2001, at about 20.00 hours, he was at his house at the Kamuntonte Zambia National Service Camp when he received a report from a villager of Muchaile Village to the effect that there were two suspicious men who posed as businessmen and were buying beans in the area. PW3 organized his Camp security men and proceeded to the village where he apprehended the two men from a village hut where they were drinking local beer. PW3 took the men into his custody at the Zambia National Service Camp until the following day when they were picked by Police Officers from Chingola. When cross-examined, PW3 stated that he did not search the two men.

PW4 investigated this case. His testimony was that he received a report about this robbery from PW1 after which he visited the scene in the outskirts of Chingola Town. He observed the tyre

marks and begun to search for the stolen vehicle in Chingola. In the course of the search he received information that a vehicle, whose description matched with the stolen vehicle was seen heading to Mushindano Border Post. Along the way to the Border Post, he picked up the motor vehicle's licence discs and a sticker bearing the registration number of the stolen motor vehicle. In the process of the investigation, PW4 learnt that the stolen motor vehicle was initially headed for Congo but U-turned when it was shot at by Congolese soldiers manning a roadblock. After being shot at, the occupants abandoned it. When PW4 approached the Congolese to handover the vehicle to Zambia Police, they refused to do so.

On his way back, PW4 and his search party, passed through Kamuntonte Zambia National Service Camp where he found two people, identified as John Mwansa and Baldwin Kalenga, in detention. He warned and cautioned them and took them into his custody at Solwezi Police Station. They had in their possession half a bag of beans. At Solwezi Police Station, the beans were poured out of the bag and the stolen wristwatch was discovered. The two suspects accused each other of being the owner.

On the 8<sup>th</sup> of March, he rescued a man suspected of being a criminal from Congo. The man was about to be lynched by members of the public. PW4 took that man to Solwezi Police Station where he interviewed him, and during the interview, the man claimed to be from Congo. He searched the suspect and found in his possession, a blue wallet containing 20 British Pounds sterling, two Zimbabwean coins and some Library Cards one of which bore the name of the Complainant, (PW1). He also recovered a key holder and nail cutter. The suspect claimed that he was given those things by his friends who he named as Rambo Musonda Balukula and John Dodo Chikwala. PW4 identified the man he took into custody as Ongre Isaki Chola, the second appellant. He later came to know that John Rambo Musonda and Baldwin Kalenga had already been taken into Police custody.

On the 9<sup>th</sup> of March, 2001 at about 03.00 hours the second appellant led PW4 to John Chipela's house in Zambia Compound in Solwezi which was searched and a pair of PW1's shoes was found under the bed. Also found on a chair were PW1's pair of sunglasses. John Chipela claimed that the items were his. PW4 took John Chipela into custody together with the recovered item.



Later, the second appellant led PW4 and the search party to the house of Ilunga Dodo in Zambia Compound. The Police recovered a purse, two bottles of perfume, a Nokia cell phone and a small motor vehicle tool. On searching Ilunga Dodo's pockets, PW4 recovered the keys for PW1's stolen motor vehicle and its remote control device. The five suspects later led PW4 and the search party to the stolen motor vehicle which was retrieved from the Congolese authorities. John Rambo and Baldwin Kalenga led the Police to the scene of crime where two empty cartridges were recovered. PW4 later arrested and charged the suspects for the offence of Aggravated Robbery. Each of them was warned and cautioned and their statements in reply were recorded in the Police Notebook.

On the basis of the afore-recited evidence, each of the appellants was found with a case to answer. In their defence, they each denied committing the offence and gave their own stories and explanations which the learned trial Judge did not believe. After analyzing the evidence received, the learned trial Judge was satisfied that the appellants were guilty as charged. They were

convicted and subsequently sentenced to death. The third appellant died before his appeal was heard.

The appellants advanced three grounds of appeal as follows:

- 1. The Court below erred both in law and fact by convicting the appellants in the absence of evidence from a ballistics expert.**
- 2. The Court below erred both in law and fact by convicting the appellant in the absence of any examination being conducted on the firearms and the cartridges purportedly used in the commission of the crime.**
- 3. The Court below erred in law and in fact by relying on its feelings and making an exception to the general rule regarding ballistics expert evidence.**

Mr. Phiri, learned Counsel for the appellants, relied on the written Heads of Argument, and argued the three grounds together. The gist of the appellants' arguments is that the prosecution did not adduce any ballistics expert's evidence to show that exhibit "**P18**" (the bullet empty cartridges), were fired from an AK47 Rifle; that it was unsafe to convict the appellants in the absence of any examination of the firearms and the cartridges purportedly spent in the commission of the crime; and that, by making an

exception to the general rule regarding ballistics expert evidence, the trial Court fell in error.

In response, Mrs. Hambayi on behalf of the State and the People supported the conviction. She argued that there was direct evidence from PW1 who saw three men among the five robbers who attacked them carrying what appeared to be firearms of the AK47 type. The robbers fired their firearms at PW1's motor vehicle to prevent him from reversing and escaping from the scene with his wife and the two children; that PW1's evidence is supported by that of PW2, his wife, who also saw the robbers with guns and heard gunshots from their direction.

Mrs. Hambayi further argued that there was further supporting evidence from PW4, the Police Officer who was led to the place where the robbers had camped before effecting their attack and two spent cartridges were found and retrieved from the scene. According to Mrs. Hambayi, the evidence given by PW1, PW2 and PW4 should lead to an inference that the firearms seen by PW1 and PW2 were capable of firing as defined by **Section 2 of the Firearms Act Chapter 110 of the Laws of Zambia**. In aid of

this proposition, Mrs. Hambayi cited this Court's decision in the case of **JOHN TIMOTHY and FESTON MWAMBA VS. THE PEOPLE<sup>(1)</sup>**

It was further contended that the evidence from PW1, PW2 and PW4, on the presence of a Machete and guns being used at the scene of crime, was not challenged during trial. In this regard, we were referred to pages 61; 67 and 68 of the record of appeal, where the learned trial Judge outlined his analysis of the evidence on the basis of which he convicted the appellants.

We have very carefully considered the record of appeal, the grounds of appeal and the Heads of Arguments and submissions before us. We have paid much attention to the evidence on record from both sides; and examined the Judgment of the trial Court. It is apparent that grounds 1 and 2 are directly related and substantially deal with the same issue; namely, the absence of ballistics examiner's evidence on firearms and cartridges from the prosecution's case. It was argued that this rendered the appellants' conviction unsafe; that the cartridges should have been matched with the firearm in question, and that it was not

enough to say the cartridges were found at the scene of the crime.

From the outset, we must state that we have serious difficulties with the latter part of the appellants' argument because we have not seen any evidence that any gun(s) were recovered by the Police at the scene of crime or elsewhere during the investigation. We therefore, do not accept the suggestion that any cartridges purported to have been used at the scene of crime should have been expertly matched with any firearm. Be that as it may, we take it that the appellants suggested that the two empty cartridges recovered near the scene of crime should have been examined by an expert and that it was unsafe to convict the appellants in the absence of such ballistics expert evidence.

We do not find much value in such evidence when no gun was found during the Police investigation. An empty bullet cartridge or bullet shell usually speaks for itself; particularly in circumstances where it was recovered from a scene of crime where gunshots were heard and guns were seen. In most cases, it is not necessary to establish which type of gun was seen and

fired in order to prove that guns were used in a robbery. The presence and recovery of empty bullet shell(s) at the scene of crime materially signifies the use of a firearm or firearms that are in good working condition and capable of being fired. In our view, Ballistics Expert evidence in cases where only an empty bullet shell was recovered, could be vital in cases where the identity of the bullet shell itself, is in issue; that is, whether it is a bullet shell or not. None of this was in issue in the present case.

We are fortified by what we stated in the case of ***Timothy and Mwamba vs. The People***<sup>(1)</sup>. This is as follows:

**“The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired. This can be proved by a number of circumstances even if no gun is ever found”.**

In the present case, guns were seen and heard by PW1 and PW2 at the scene of robbery and when PW4, the Investigating Officer, was led to the scene, he recovered two empty bullet cartridges which he produced before the trial Court. In addition, each of the

appellants was found in possession of stolen items which were identified by the owners, barely within two days of the robbery.

Further still, the appellants led the Police to the recovery of the stolen motor vehicle which was retrieved from the Democratic Republic of Congo border; they also led the Police to the scene of crime; and, in particular to a spot in the bush along the road, where the robbers camped and lay in wait for their victims. That is the spot the appellants emerged from while running and shooting towards the victims. The learned trial Judge correctly considered and evaluated this evidence and found it overwhelmingly in support of the prosecution's case. We cannot fault the findings of fact made by the Court below. We find no merit in grounds 1 and 2.

The third ground alleged that the Court below erred in law and in fact by relying on its feelings and making an exception to the general rule regarding ballistics expert evidence. An examination of the record of proceedings and the Judgment of the Court below clearly reveals to us that the appellants' allegation is nowhere near the truth. To the contrary, the learned trial Judge did base

his findings of fact and conclusions on the totality of the evidence received and the demeanour of witnesses which the appellants failed to dislodge in cross-examination. Most importantly, the appellants' allegation and argument in support of ground 3 are caught up in the jaws of our decision in the case of ***Timothy and Mwamba***<sup>(1)</sup>, already cited. We find no merit in ground 3 as well.

The net result is that this appeal cannot succeed on any of the arguments advanced. We dismiss it and uphold both the Conviction and the mandatory Sentence of Death.

(RETIRED)  
**D. K. CHIRWA**  
**SUPREME COURT JUDGE**

**H. CHIBOMBA**  
**SUPREME COURT JUDGE**

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