IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 165/2015**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MAKOLA CHILENDE **1st APPELLANT**

JOHN MASAKATI **2nd APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Malila, JJS
On 5th April, 2016 and 22nd December, 2017

For the Appellants: Mr. K. Muzenga, Deputy Director, Legal Aid Board

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

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Joseph Knox Simwanza vs. The People (1985) Z.R. 15**
2. **Double Mwale vs. The People (1984) Z.R. 76**
3. **Musupi vs. The People (1978) Z.R. 281**
4. **Mwambona vs. The People (1973) Z.R. 28**
5. **Chipango and Others vs. The People (1978) Z.R. 304**
6. **Simon Malambo Choka vs. The People (1978) Z.R. 243**

7. **John Mkandawire vs. The People (1978) Z.R417. 46**
8. **Machipisha Kombe vs. People (2009) Z.R. 282**
9. **Fawaz and Prosper Chelelwa vs. The People (1995-97) Z.R. 3**
10. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
11. **John Tapula vs. The People Appeal No. 70 of 2015**

Legislation referred to:

1. **The Criminal Procedure Code, Cap 88 of the Laws of Zambia**
2. **Act No. 6 of 1972**

The appellants were tried and convicted on one count of murder and one count of armed aggravated robbery. It was alleged that on the 1st June, 2012 they murdered John Chilambe and also robbed him of K15,450,000 (unrebased). The appellants were sentenced to suffer death on both counts. Suffice to state that the appellants were initially jointly charged with one Michael Makunda and Saidi. Sadly, Michael Makunda passed away on 1st January, 2015 and his appeal abated while Saidi was acquitted by the lower court.

The prosecution evidence was anchored on the testimony of 12 witnesses. In summary, the facts were that on the material day, John Chilambe (hereinafter referred to as "the deceased")

withdrew some money from the bank which he gave to his cousin, Mathews Mutambala (PW3), for safe keeping as they left Mporokoso for Kasama to purchase 200 crates of beer for his business. The deceased, who was driving his Mercedes Benz truck, travelled with his wife, Joyce Mwansa (PW4). The latter carried their baby along. PW3 sat at the back of the truck together with Stephen, the deceased's driver.

As they proceeded on their journey to Kasama, twice they met an unregistered FunCargo car driving at high speed. Later, they found it parked in the middle of the road and they were flagged down to stop and assist the occupants.

Unfortunately, the occupants turned out to be armed robbers who shot dead the deceased while PW3, PW4 and Stephen were roughed up. PW3, PW4 and Stephen were dragged into the bush; PW3 hid the cash in one of the shrubs but it was later discovered by the robbers. All three were tied up by the robbers who fled in the FunCargo car, taking with them PW4's handbag which contained, amongst other things, baby clothes. Following the robbery and death of the deceased on the spot,

the police were informed of the situation. The shooting and the robbery took place in Mporokoso within Chief Chitoshi's area. The chief mobilised his subjects and with the help of the police led by Dickson Zulu (PW9) they organised three road blocks by laying logs along the Mporokoso-Kasama Road as they awaited the unregistered FunCargo car which was reportedly headed towards Kasama. The FunCargo car managed to pass two road blocks but on the third one, it failed to pass and it stopped. The occupants immediately scampered out of the vehicle. Members of the public then gave chase and managed to apprehend the first appellant. A search in the vehicle led to the recovery of a Tanzanian number plate, PW4's handbag, explosives and a wrist watch.

Three days after the shooting and the robbery, the second appellant and late Michael Makunda were apprehended behind an ant-hill in Nkalanga village in the same area where the shooting and the robbery had taken place. According to Bathromeo Mulunda Lubunda (PW2) the twosome informed him that they were in the area to buy beans. Three days thereafter,

near the place where the second appellant and late Michael Makunda had been hiding, PW2 found a small plastic bag containing a black pistol, a red and yellow rope, a black torch and a passport and yellow fever card in the name of the second appellant. An identification parade was conducted at which PW3 identified the appellants and late Michael Makunda. PW4 also identified her handbag and its contents stolen at the scene of crime and which was recovered from the FunCargo car by PW9. The appellants were subsequently charged with one count of murder and another for aggravated robbery which they denied.

In sum, the first appellant's defence was that on the material day he had arranged with one Mutale to repair his Toyota Corolla. Mutale informed him that there was someone at his village in Mporokoso who was selling a bumper. According to the first appellant, Mutale advised him to travel by bus to Mporokoso and he agreed since he had planned a trip to his village. It was his further testimony that he met Mutale in Mporokoso and Mutale showed him the house of the person who was selling a bumper; that at the time Mutale was in the

company of the late Michael Makunda and Saidi; that at the village, Mutale was driving a FunCargo car owned by Saidi. Later that night, according to the first appellant, he travelled back with Mutale and although there were other passengers in the FunCargo car he could not identify them as it was dark. He stated that as they proceeded they were involved in an accident. The first appellant was surprised that after the accident other occupants of the vehicle including the driver Mutale scampered out of the vehicle. The first appellant stated that he followed suit after seeing an angry mob coming after them. The first appellant tried to seek refuge at a house but instead, the owner of the house took him to the Chief and this is how he was apprehended by the police. He said he was brutally assaulted by the mob and the police. He denied being involved in the murder of the deceased and the armed robbery.

The second appellant, who is a Tanzanian national, stated in his defence that from Morogoro in Tanzania, he entered Zambia through Nakonde. His main purpose of coming to Zambia was to seek medical attention from a traditional healer

in Nkalanga. While in Nkalanga, the second appellant met the late Michael Makunda, a fellow Tanzanian, who was also on the same mission and together they searched for the house of the traditional healer. The second appellant stated that it was during their search for the traditional healer that they encountered a rowdy crowd laden with weapons and due to lack of communication, they failed to explain their presence in the area and they were apprehended, assaulted and stripped of their belongings and later remanded in police custody. He denied having taken a ride in the FunCargo car which he claimed he only saw for the first time during the court proceedings. He denied being involved in the commission of the two offences he is facing.

Although Saidi was acquitted and Michael Makunda passed on, we must mention that it is not in dispute that their evidence was that they entered into Zambia from Nakonde in the FunCargo on the 28th May, 2012 from Tanzania. Apparently, late Michael Makunda was employed by Saidi. Their evidence was that they came into Zambia to sell the FunCargo. It is not

clear whether at the time of entry, the FunCargo had a number plate on. Although neither Saidi nor the late Michael gave the number plate for the FunCargo car, there is uncontroverted evidence that at the scene of crime it had no number plate. The number plate was found in the boot of the FunCargo by PW9.

The learned trial judge found that PW3's evidence of identification was reliable and that with the aid of the headlamps from the truck and moonlight, he saw the first appellant shoot the deceased. She accepted PW3's evidence that the second appellant and the late Michael Makunda were present during the robbery and that they were the ones who dragged PW3 and Stephen into the bush. The learned trial judge accepted that the appellants were identified by PW3 at an identification parade held at Mporokoso Police Station. She dismissed the allegation by the appellants that they were identified at the parade because of the visible injuries they had on their bodies on the basis that the alleged injuries were not visible on the photographs exhibited in court. The learned trial judge took the view that Saidi, who was one of the suspects on the parade, obviously stood out as he

was an Arab but he was not identified by the witnesses and yet PW3 managed to identify the appellants showing that there was no evidence of unfairness. The learned trial judge found that the appellants were connected to the commission of the offence as the handbag belonging to PW4 was found in the car which she accepted was the vehicle in which they were all travelling shortly before they scampered out at the third road block. The learned trial judge found that this was the same FunCargo car which was parked in the middle of the road and from which emerged the robbers who killed the deceased and robbed the passengers of money and goods. She reasoned that the FunCargo car and the handbag connected the appellants to the offence of murder and aggravated robbery. She found that the appellants acted with a common purpose when they ambushed the deceased and his family in a calculated move to steal from them. The learned trial judge found that there was overwhelming evidence against the appellants that they committed the offence of armed aggravated robbery; that the second appellant's claim that he met his fellow Tanzanian, late Michael Makunda,

accidentally was too much of a coincidence in the face of the prosecution evidence which placed them at the scene of crime.

The learned trial judge found the appellants guilty as charged on the two counts and sentenced them to suffer death by hanging.

On behalf of the appellants, Mr. Muzenga the learned Deputy Director, advanced four grounds of appeal framed in the following terms:

1. **The learned trial judge erred in law and in fact when she allowed the prosecution to recall PW9 without considering whether she could lawfully do so in the circumstances of the case.**
2. **The learned trial judge erred in law and in fact when she admitted ID5, ID6, IDII, ID12, ID13, ID14 and ID15 when clearly PW9 was not in custody of the exhibits in question and there was a break in the chain of custody of the exhibits.**
3. **The learned trial judge erred in law and in fact when she convicted the appellants on the evidence of a tainted single identifying witness.**
4. **The learned trial judge erred in law and in fact when she failed to accept the explanations given by the appellants as they could reasonably be true especially that the State neglected to thoroughly investigate and negate their defences.**

At the hearing of this appeal, Mr. Muzenga relied entirely on his filed heads of arguments. We do not intend to recount the arguments at this stage. We will deal with the issues as we analyse the evidence.

Mr. Mutale, the learned Deputy Chief State Advocate made oral submissions in response. He informed the court that the State conceded that grounds one and two of the appeal had merit. He proceeded to argue grounds three and four. For the reasons we shall give, we do not agree with the position taken by both Counsel regarding grounds one and two. Again, we do not intend to recount the submissions at this stage.

We have considered the arguments raised by Counsel for the parties.

In sum, the argument by Mr. Muzenga in ground one is that the learned trial judge should not have allowed the application by the State to recall PW9. Counsel cited the cases of **Joseph Knox Simwanza vs. The People**[1] and **Double Mwale vs. The People.**[2] He argued, *inter alia,* that the application by the State to recall

PW9 was intended to cure defects in their evidence; that the learned trial judge's ruling allowing the application was also defective in that she did not address her mind as to whether she was legally empowered to grant the application and whether in the circumstances of the case, the witness could be recalled to remedy defects which had arisen in the prosecution's case.

Under this ground, Mr. Muzenga raised issue with the holdings in the cases of **Double Mwale vs. The People**[2] and **Joseph Knox Simwanza vs. The People**[1] which, in his view, were decided wrongly as this court allegedly relied on Section 149 of the Criminal Procedure Code which was non-existent as it was amended in 1972 by **Act No. 6 of 1972.** Before the amendment, Section 149 provided that:

> **Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**

> **Provided that the prosecutor or the advocate for the prosecution or the accused person or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of such person as a witness."**

After the amendment, Section 149 provides as follows:

> **"Where the person charged is called by the defence as a witness to the facts of the case or to make a statement without being sworn he shall be heard immediately after the close of the evidence for the prosecution.**

It was argued that as the law stands now a trial court wields no power to recall a witness since the Section in question was amended in 1972. According to Counsel, the cases of **Double Mwale**[2] and **Joseph Knox Simwanza**[1] were erroneously decided since the Section on which they were based was non-existent. In this regard, we were urged to overrule the aforementioned decisions to the extent that they were based on a provision that was non-existent in the statute book. It was also contended that had the learned trial judge applied her mind to the question of whether or not she had authority to recall a witness, she would

have found otherwise. However, Mr. Muzenga conceded that Section 210 of the Criminal Procedure Code still allows the calling of evidence in rebuttal and as such, the exercise of this power is still valid. Nevertheless, his argument is that in this case, the court had no authority to exercise its discretion and power to cure defects that had arisen in the prosecution's case. He cited what we said [at page 79] in the case of **Double Mwale**[2] that:

> **It is our opinion that, before the trial court can exercise the power conferred by the section, regard must be had to the traditional considerations for the exercise of a judicial discretion in a criminal matter. Thus, though the terms of the section are wide and the discretion conferred considerable, the section could not legitimately be used for purposes such as supplying evidence to remedy defects which have arisen in the prosecution case or where the result would merely be to discredit a witness.**

It was submitted that the foregoing guidance, notwithstanding the absence of the statutory provision allowing for recalling a witness, is very instructive and still stands as good law; that the power, therefore, to recall a witness can certainly not extend to supplying evidence to remedy defects which have arisen in the prosecution case. According to

Counsel, in this case contrary to the submission by the State that they intended the witness to clarify issues relating to ID 11 to 15, the witness was intended to mend the gaps and defects in the prosecution's evidence by producing exhibits which the arresting officer failed to produce after objections by defence Counsel. It was submitted that the trial court rendered a ruling that appeared to be sympathetic to the prosecution to the extent that following an objection by the defence, the learned trial judge stated that the exhibits defence Counsel was objecting to would be produced by someone else. It was contended that the conduct of the trial court was uncalled for and clearly showed partiality. It was submitted that this conduct greatly prejudiced the appellants and it significantly influenced the trial court's failure to apply its independent mind when an application to recall a witness was made as it had already made up its mind even before the application was made. It was submitted that on this ground, we should expunge the evidence given by PW9 when he was recalled as it was obtained in error of law and allow the appeal.

In the second ground, it was submitted, *inter alia*, that PW9 was not in custody of the exhibits in question and the learned trial judge erred when she allowed production of the exhibits in question. It was pointed out that the exhibits were handed over to Chief Inspector Moonga who was never called as a witness and there was no explanation as to why he was not called to produce the exhibits in issue.

We have scrutinised the record and as we have already stated, Mr. Mutale agreed with his learned friend's arguments in grounds one and two which are inter-related. The first issue is whether the trial court was on terra firma when it allowed the application by the State to recall PW9 to clarify certain matters relating to the handbag and its contents. The record reveals that the State made an application and cited authorities in support of the application and the defence strongly objected to the application on the ground that the State wanted to recall the witness in order to produce exhibits and remedy the defects in the prosecution of the case. Relating specifically to the

application, what transpired in the lower court is reflected as follows in the record of appeal:

> **Court: Mr. Yalenga do you realise that this court has powers to recall a witness?**
>
> **Mr. Yalenga: Yes my lady.**
>
> **Court: I am sitting here as a court of justice so I am recalling the witness. Where is the witness?**

In our view, the learned trial judge did not apply herself to the application before her and as the excerpt above shows, she did not make a reasoned ruling on the matter. It was a ruling delivered in haste without assigning any reason for granting the application. We urge trial courts to take time to consider any application which is likely to impact on the procedural justice when such applications are brought before them and to render a reasoned ruling to avoid unnecessary appeals and complaints as is the case in *casu*.

Coming back to the issue of recalling PW9, we take the view that in so far as the prosecution had not closed its case, the prosecution's window was still wide open and the prosecution was thus at large to call witnesses or to apply to recall witnesses

to testify on its behalf in order to prove its case to the required standard. Under this limb, Mr. Muzenga brought out the fact that when we decided the cases of **Double Mwale vs. The People**[2] in 1984 and **Joseph Knox Simwanza vs. The People**[1] in 1985 we, *inter alia,* considered the repealed Section 149 of the Criminal Procedure Code and for this reason, he urged us to overrule the decisions in those two cases. We take the view that Mr. Muzenga misapprehended the import of the repealed Section 149 of the Criminal Procedure Code. A clear reading of the repealed Section 149 reveals that it was a section which specifically gave power to a court (not any of the parties) at any stage of the proceedings to summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined. Clearly, Mr. Muzenga's argument cannot be sustained as in the case in *casu* the lower court was dealing with an application by the prosecution to recall a witness.

Before we leave this ground, we note from the proceedings that the application to recall PW9 was camouflaged as an

application for him to 'clarify issues relating to ID11 to ID15' and yet in essence the State seized the opportunity to have the exhibits which had not been in the custody of PW9 produced by him. We take the view that there was no need for the State to camouflage the application, after all, in every case the aim is that justice should prevail. As we have stated already, the prosecution had not closed its case and it was perfectly in order for the prosecution to apply to recall PW9 and the court used its discretion judiciously having regard to the fact that Counsel for the appellant was given the opportunity to cross-examine the witness. Therefore, there was no prejudice to the appellants. We cannot fault the learned trial judge for allowing the State's application to recall PW9. Ground one, therefore, fails.

Turning to ground two, the essence of Mr. Muzenga's argument is that PW9 was not competent to produce the exhibits before the trial court and he alleged that there was a break in the chain of the custody of the exhibits in issue. The question is, what is 'a break in the chain of custody'? In our view, this occurs when an exhibit in the hands of the prosecution which they seek

to produce cannot be identified or traced to anyone, for example, if the owner of the exhibit is unknown and it is not clear how it has found itself in the hands of the witness who seeks to produce it. We note that it has been the practice for arresting officers to produce all the exhibits. We must state here that there is nothing wrong with the owner of the exhibit to produce it as this is the best evidence especially if the arresting officer is not available. In certain cases, even an officer or a person who handled the exhibit is quite competent to produce it. There is no hard and fast rule but each case should be dealt with on its own peculiar facts.

In this case, there are two groups of exhibits in contention. The first is ID5 - the second appellant's passport, and ID6 – the second appellant's yellow fever book which were found near the spot where the second appellant and late Michael Makunda were hiding in Nkalanga village. It is not in dispute that PW2 handed over the second appellant's passport and yellow book to PW9. PW2 confirmed and identified the items as the ones he had handed over to PW9 who in turn handed them over to PW11. It

is common cause that the said items were recovered near the spot where the second appellant and late Michael Makunda were apprehended from. The items in question bore the second appellant's name and were immediately handed over to PW9. In view of the nature of the exhibits under contention here, the issue of any break in the chain of custody cannot arise as the exhibits spoke for themselves. Therefore, PW9 was competent to produce them and Mr. Muzenga's complaint regarding their production cannot be sustained.

The second set comprises PW4's handbag and its contents which were recovered from the boot of the FunCargo car. According to the evidence, the handbag and its contents were stolen from PW4 at the scene of crime including cash in PW3's possession. There is evidence that after shooting the deceased, harassing PW3, PW4 and Stephen, the armed robbers stole the handbag and money from the victims and drove off in the FunCargo car towards Kasama. The learned trial judge found as a fact that PW4's handbag was found in the FunCargo car within two hours of the murder and robbery. The exhibits in issue were

discovered in the FunCargo car after a search by PW9 who handed the same over to Chief Inspector Moonga who did not testify in the court below. It was clear that after handing over the exhibits to Chief Inspector Moonga, PW9 only saw the exhibits in court. When the arresting officer attempted to produce the exhibits, the defence raised an objection which compelled the State to apply to recall PW9 'to clarify' on matters relating to ID11 to ID15 because he is the one who recovered the items.

In the case in *casu*, it is not in dispute that PW4 identified her handbag which she had in her possession in the truck on the fateful day. We also note that it is the same handbag and its contents that PW9 recovered from the FunCargo car after the appellants scampered out of the vehicle and in the process, the first appellant was apprehended. It is an odd coincidence that the FunCargo car which was at the scene of the crime was within a spate of time found in a different location with items stolen from PW4 one of the victims of the robbery. In fact, evidence reveals that PW9 handled this case from inception as he was involved in the interception and apprehension of the appellants,

recovered the stolen items and carried out the initial investigation of this case. Therefore, there is a clear link between the exhibits and PW9 and we are of the firm view that he was competent to produce the exhibits.

Within this ground, Mr. Muzenga lamented that the trial court, without giving an opportunity to the defence to indicate whether they had any objection to the production of the exhibits by PW9 proceeded to immediately admit the exhibits into evidence which, in Counsel's view, was unacceptable and confirmed their contention that the trial court was biased. We have examined the record and it reveals that soon after the exhibits were marked for identification, the learned trial judge proceeded to admit the exhibits into evidence. We agree that the trial court erred. Again, we urge trial courts to adhere to the procedures laid down to ensure fair trial. Be that as it may, in the case in *casu*, we are of the view that had the learned trial judge followed the procedure to the letter, she would have allowed the admission of the exhibits as there was a clear trail of

where the exhibits originated from and their identification was not disputed.

Ground two equally fails.

Turning to ground three, the issue centres on the evidence of PW3 whose evidence Mr. Muzenga claims was tainted. In her judgment, the learned trial judge relied heavily on PW3's evidence. It was submitted that the court relied on the identification evidence of PW3, a single identifying witness; that the identification evidence of PW3 is very problematic and must be disregarded in its entirety. Counsel pointed out that first of all, PW3 was a close relative to the deceased as the learned trial court rightly observed in the judgment. It was submitted that despite the fact that the learned trial judge referred to the cases of **Musupi vs. The People**[4] and **Mwambona vs. The People**[5] she did not analyse the evidence in relation to that of PW3. It was submitted that PW3 was the only witness who gave material evidence; that although PW3 stated that he was able to identify the appellants with the aid of the head lamps from the motor vehicles and the moonlight, his evidence should not be relied on

as it was full of contradictions. It was contended that it was dark at the time of the shooting and, therefore, PW3 was not in a position to identify any of the assailants. It was strongly submitted that there was need for PW3's evidence to be corroborated in order for it to stand. The cases of **Chipango and Others vs. The People**[6] and **Simon Malambo Choka vs. The People**[7] were relied upon. In **Simon Malambo Choka vs. The People**[7] we held that:

> **..... A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.**

Counsel took issue with the fact that Stephen who had been in the company of the deceased was not called as a witness. It was argued that the firearm which was found near the scene of crime was defective and was not connected to the scene of crime by the ballistic expert. It was submitted that the items that were

found in the area where the second appellant and the late Michael Makunda were apprehended from provided no connection to the commission of the crimes in issue. Counsel submitted that in this case there is no corroboration or something more to exclude the dangers of false implication. And that the evidence of PW3 in its entirety cannot stand and as such, must be excluded as the learned trial judge misdirected herself.

In his brief response, the learned Deputy Chief State Advocate submitted, *inter alia,* that the argument by his learned friend that the evidence of identification was tainted and suspect cannot be sustained. He submitted that the two appellants and the late Michael Makunda were identified by the witnesses because of the sufficient lighting provided by the headlamps of the truck. Citing the case of **John Mkandawire vs. The People**[8] he submitted that there were odd coincidences in this case that made identification too much of a coincidence. He pointed out that in respect of the first appellant, immediately after the robbery he surfaced in a motor vehicle which was at the scene of

the robbery and was involved in an accident. It was submitted that he did not deny being in the vehicle but told an incredible story about how he found himself in that vehicle. It was contended that in the vehicle was found items which were stolen from the victims of the robbery making it too much of a coincidence and lends support to the evidence of identification.

With regard to the second appellant, his Tanzanian passport and the yellow fever card were found in the area where the robbery and the killing of the deceased took place and in a hidden place. It was submitted that the fact that the second appellant was a Tanzanian found in the area where the robbery took place and in a vehicle with a Tanzanian number plate carrying the bandits was too much of a coincidence.

We have thoroughly read PW3's evidence. According to PW3 who was sitting behind in the truck driven by the deceased, when they stopped at the scene of the shooting on account of being waved down by some people from the FunCargo car, both vehicles had their headlamps on and there was moonlight. PW3 explained that the people in the FunCargo car wanted help as

they had a breakdown and needed a spanner and he saw the first appellant as there was lighting from the headlamps and moonlight that night. Mr. Muzenga has strongly disputed that PW3 could have seen the first appellant let alone the second appellant because according to him, the appellants never passed in front of the truck. It is our finding and we agree with the learned trial judge that at the time the truck stopped, it had its headlamps on and the FunCargo car was in front of the truck. The lighting from the headlamps of the truck and the moonlight provided sufficient light for PW3 to see the assailants. In any event, the FunCargo car was in front of the truck and anyone who came out of the FunCargo car could obviously be seen by the persons in the truck. PW3 stated that he came down from the back of the truck and offered to look for the spanner that the assailants were asking for and right in front of his eyes, the first appellant shot the deceased. He identified the second appellant as the person who held him by the waist dragging him into the bush.

Turning specifically to the first appellant, he was placed at the scene of crime by PW3; and he was found a few hours later fleeing from the same FunCargo car which was used by the perpetrators of the robbery and murder. That in the FunCargo car in which he was a passenger was found a handbag belonging to PW4, one of the victims of the robbery. This was an odd coincidence which constituted something more in terms of the principles laid down in **John Mkandawire vs. The People**[8] and **Machipisha Kombe vs. The People.**[9] Although we take the view that PW3's evidence was quite sufficient on its own to nail the first appellant, the stolen items found in the vehicle further strengthened PW3's evidence of identification and in addition placed the first appellant at the scene of crime. His own explanation that he had gone with one Mutale to buy a bumper from the village cannot be believed going by the overwhelming evidence presented by the prosecution which is to the effect that he is the one who shot dead the deceased person. We cannot fault the learned trial judge for arriving at the inescapable conclusion that the first appellant is guilty as charged.

With regard to the second appellant, Mr. Muzenga contended that the finding of his passport and a gun near the place where he had been hiding did not connect him to the commission of the crimes. According to the evidence, PW2 saw the second appellant and the late Michael Makunda fleeing from irate villagers. There had been a death in the area and the villagers were alert to the presence of strangers in the area and rightly so. The unchallenged evidence of PW2 was that the second appellant and the late Michael Makunda told him that they were in the area to buy beans. In contrast, the second appellant and the late Michael Makunda claimed that they were complete strangers to each other and they were both in search of a traditional healer in the area when the villagers pounced on them. We find the second appellant's evidence as to the purpose for which he was in Nkalanga village contradictory. Although the second appellant was apprehended separately, the learned trial judge accepted PW3's evidence which placed him at the scene of crime. There is uncontroverted evidence showing that from the scene of crime, the FunCargo car headed towards

Kasama and was halted at the third road block. While the first appellant was apprehended right there, the second appellant was apprehended together with the late Michael Makunda in Nkalanga area. We stated earlier in this judgment that it is not in dispute that Saidi and late Michael Makunda entered Zambia together in the FunCargo. This is the same vehicle which was in Mporokoso with Mutale, the first appellant, Saidi and late Michael Makunda and it is an odd coincidence that the second appellant was in Nkalanga area with the late Michael Makunda whom he claimed was a total stranger as they were both looking for a traditional healer. Our finding is that the second appellant was in the FunCargo car and was one of those who scampered after it failed to pass the third road block along Kasama Road. All in all, looking at the evidence before the lower court, we cannot fault the learned trial judge, for believing PW3's evidence and the contention that his evidence was tainted cannot be sustained.

Within this ground, Mr. Muzenga took issue with the failure by the prosecution to call Stephen who was present at the scene

of crime. On this issue, we gave guidance in the case of **Fawaz and Prosper Chelelwa vs. The People**[10] that the prosecution has the liberty to choose which witness to call and the defence is at liberty to call the witnesses not called by the prosecution if they so choose. Nothing stopped the appellants from calling Stephen if they felt that he was a valuable witness to the defence. In any case, the appellants had legal representation.

Further, within this ground is the accusation that the identification parade was unfair as the appellants were paraded with visible injuries and some blood on their clothes as they were assaulted by members of the public in the process of being apprehended. Counsel concluded that the parade was unfair and prejudicial to the appellants and must be nullified. In the case of **Ilunga Kabala and John Masefu vs. The People**[11] we gave guidance on the holding of identification parades. To begin with, PW3 who was an identifying witness stated that he did not see any injuries on any of the appellants. Further, we note that

the learned trial judge did address her mind to the manner in which the identification parade was conducted and she made a finding of fact that the appellants had no visible injuries at the time the identification parade was conducted going by the evidence of PW3 and the photos of the identification parade. The photos of the identification parade are intended to provide the trial court an opportunity to appreciate the appearance of the suspects and whether or not they were identified. In our view, if there was any truth in the claim that the appellants had injuries such injuries would have been visible on the photos. The learned trial judge saw nothing of that nature. In the case of **John Tapula vs. The People**[12] we reaffirmed the principle that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.

We are of the view that in the case in *casu*, the identification parade was fairly conducted. We, therefore, accept the finding by

the learned trial judge that the appellants had no visible injuries and we find no basis to reverse this finding of fact. Ground three fails.

In the fourth and last ground of appeal, Counsel attacked the learned trial judge for not accepting the explanations given by the appellants which he argued could have been reasonably true. Counsel submitted that the failure by the court below to consider the appellants' defences was a serious misdirection. Counsel prayed that we allow the appeal, quash the appellants' conviction, set aside their sentences and set them at liberty.

We must agree with Mr. Mutale for the State that in her judgment the learned trial judge took into account the defences raised by the appellants and rejected them. The appellants' conviction was based on the evidence before the trial court which pointed to the fact that the appellants were part of the group that brutally murdered the deceased and robbed the victims of money and goods.

Ground four also fails.

All in all, we find that the learned trial judge was on firm ground when she found the appellants guilty on both counts and convicted them. The sum total is that all the grounds of appeal have failed and the appeal is hereby dismissed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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Dr. M. Malila, SC
SUPREME COURT JUDGE