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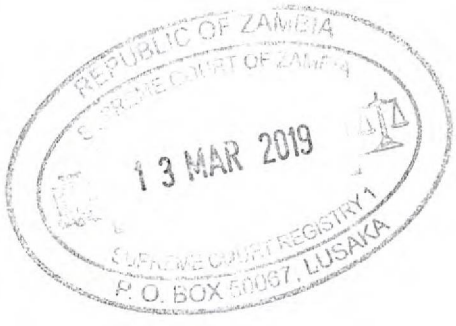
SCZ. Appeal No. 190/2017

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA
(Criminal Jurisdiction)



BETWEEN:

EDYSON MBEWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
On the 5th March, 2019 and 13th March, 2019

For the Appellant: Mr. H. M. Mweemba, Principal Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. S. C. Kachaka, Senior State Advocate, National Prosecutions Authority

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Nevers Sekwila Mumba vs. Muhabi Lungu SCJ. No. 55 of 2014**
2. **John Timothy and Feston Mwamba vs. the People (1977) Z.R. 394**
3. **Nkumbwa vs. The People (1983) Z.R. 103**
4. **Dorothy Mutale and Richard Phiri vs. The People (1997) S.J. 51**
5. **Joseph Mulenga, Albert Phiri vs. The People (2008) Z.R. 1 Vol. 2**

This is an appeal against the judgment of the High Court which tried and found the appellant guilty of two counts of the offence of **Armed Aggravated Robbery contrary to Section 294(2) (a) of the**

Penal Code, Chapter 87 of the Laws of Zambia, and one count of **Attempted Aggravated Robbery contrary to Section 294(2) (a)** as read with **Section 389(1) (2) of the Penal Code.**

Particulars of the first count were that the appellant, on the 8th day of April, 2015 at Chipata, in the Chipata District, jointly and whilst acting together with other persons unknown and whilst armed with a firearm did steal from Maron Mwanza, 1 motor vehicle, namely Toyota Allion registration number ALM 1489, 1 Pistol, K30,000.00 cash and one cell phone altogether valued at K85,000.00 and at or immediately before or immediately after the time of such robbery did use or threatened to use actual violence in order to prevent or overcome resistance to its being stolen or retained.

The particulars of the second count were that the appellant on the 30th day of July, 2015 at Chipata in the Chipata District jointly and whilst acting together with other persons unknown and whilst armed with firearms did steal from Lloyd Ngoma, K3,600.00 cash, the property of Lloyd Ngoma and at or immediately before or immediately after the time of such robbery did use or threatened to

use actual violence in order to obtain or retain the thing stolen or, to prevent or overcome resistance to its being stolen or retained.

The particulars in the third count were that the appellant on the 7th day of August, 2015 at Vubwi in the Vubwi District jointly and whilst acting together with other persons unknown and whilst armed with firearms did attempt to rob Fregencio Mbewe using or threatening to use actual violence to the said Fregencio Mbewe in order to obtain or retain his property or to prevent or overcome resistance to its being stolen or retained.

The prosecution's case based on ten witnesses was that between April, 2015, and August, 2015, there were two incidents of **Armed Aggravated Robbery** and one of **Attempted Armed Aggravated Robbery** committed in the two neighbouring Districts of Chipata and Vubwi by a group of three men armed with firearms. All the three offences were committed in a similar manner during the night at the complainants' homes. In counts two and three, the robbers posed as police officers performing police duties in search of prohibited drugs and counterfeit money from the complainants' homes. In the

process, the complainants were dispossessed of the property listed in the particulars of the offences.

The complainants, Marron Mwanza, Lloyd Ngoma and Fregencio Mbewe, testified as PW1, PW2 and PW5. PW1 was attacked around 19.30 hours while driving into his premises. A gun was pointed to his head and a shot was fired but missed him. He was thrown out of the car. The car, his personal Pistol and all the cash that was in his possession were forcibly taken from him. The police recovered a magazine for an AK47 assault rifle at the scene of crime. The car was recovered the next morning in a wrecked condition.

The Pistol which was stolen together with PW1's car was recovered from the appellant by PW5 Fregencio Mbewe who was the complainant in count three. The circumstances of the recovery of the pistol were that during the night of 6th August, 2015 at about 21.00 hours PW5 was woken up from sleep by a gang of robbers who invaded his premises. PW5 took hold of an axe and went to confront the thieves in the sitting room. He saw a gang member and struck him twice with the axe, as a result of which the gang member dropped to the floor and crawled out of the house to escape. While the

commotion was going on, PW5's son, Samuel Mbewe (PW8) emerged from his bedroom to join the fight with the robbers. He confronted the appellant who carried a pistol and threatened to shoot PW5. Equally armed with a stool, PW8 struck the appellant with it. The appellant dropped his pistol and fell to the floor.

Thereafter, PW5, his wife and PW8 overpowered the appellant and pinned him to the floor. PW5 returned to the front door and struggled to push it to close in order to prevent the other robbers who were pushing it to re-enter the house. As all this was happening, the neighbours responded to the distress calls and came to PW5's house. The robbers who were outside the house abandoned the car which they had used and disappeared into the night. People in the neighbourhood set fire to the car which the robbers abandoned.

The matter was reported to the police who visited the scene and apprehended the robber who was overpowered. The overpowered robber happened to be the appellant. The police recovered the pistol which the appellant carried during the attack. They also recovered a blue Zambia Police marked jersey which the appellant wore during the attack. The police also recovered an AK47 assault Rifle some 100

meters from PW5's house. All these items were identified by PW2, PW3 and PW5 who also identified the appellant on the police identification parade. The appellant's blue police jersey which the police recovered was identified by PW4 (Mabvuto Lungu), a passerby who found himself at the scene of crime during the robbery in Count two. PW4 identified the appellant as one of the two people who posed as policemen in PW5's house. He had been ordered by the robbers to join PW2 in the latter's well-lit house when the appellant and his friends were conducting the false police raid. PW4 lost his mobile phone to the robbers.

The police also established that the car which was set ablaze by members of the public outside PW5's house was earlier hired by the appellant from PW7 on a self-drive arrangement. PW7 identified the remains of his car and the appellant as the person who had hired it but failed to return it. According to police evidence on record, the appellant led the police officers investigating the three offences to the scenes of crimes where he demonstrated how the crimes were committed and how the escapes were made. The recovered guns were submitted to the ballistic examiner for forensic examinations.

The appellant was subsequently charged with the three subject offences which he denied. In his sworn evidence in defence, the appellant explained that on the 7th of August, 2015, he hired PW7's vehicle and drove to Malawi to order planks and Sobo drink. He drove PW7's car to the border and crossed over to Malawi.

After shopping he came back after 19.00 hours and hired a truck to carry his goods. However, before he could disembark from the truck, a man appeared at the scene and accused him of causing trouble. The man hit him three times on his head with an axe and he collapsed.

Thereafter, he heard voices of people screaming and someone conveyed him to Mwami Hospital where he regained consciousness and was treated. He saw a police officer on his bedside. Thereafter, he was visited by police officers from Chipata who transferred him to police cells where he was beaten. He was later taken to offices where he met other people.

Thereafter, he was driven to Mtenguleni and Katete while being repeatedly beaten and forced to demonstrate the way he did while

other suspects travelling with him demonstrated how they stole property from other people.

Thereafter, a police identification parade was conducted and he saw the people he had earlier seen. Three of those people touched his shoulders on the parade. He claimed that he was not properly identified by the witnesses. He also denied going to PW5's house and denied any knowledge about the Pistol and the exhibited blue police jersey. He denied the charges.

In cross-examination, he conceded that he did hire a car from John Phiri (PW7) and went to PW5's house to look for a truck at 19.00 hours. He also conceded, that he was apprehended at PW5's house. This was the nature of the appellant's defence in the Court below.

In her judgment, the learned trial Judge accepted the evidence of identification given by PW2, PW3, PW4 and PW5 who were all eyewitnesses to the offences in all the three counts. She also accepted the prosecution's evidence to the effect that the appellant was caught red handed in PW5's house where he was found in possession of the exhibited Pistol and the blue Zambia Police jersey, which exhibits also connected him to the armed robbery in count one

because the pistol belonged to PW1. The learned trial Judge also found that the appellant was connected to count 2 by PW2 and PW4 who positively identified him as one of the two robbers who entered PW2's house to conduct a false police raid.

The appellant was found guilty and convicted of all the three charges. He was given the mandatory sentence of death for the armed aggravated robbery in counts one and two, and 7 years imprisonment for the attempted aggravated robbery in count three. He now appeals against conviction canvassing two grounds of appeal as follows:

1. The learned trial Judge erred both in law and fact when she convicted the appellant with armed aggravated robbery in counts one and two and **Attempted Aggravated Robbery** in count three on the evidence that tends to suggest inadmissible hearsay evidence.
2. The learned trial Judge erred in law and in fact when she convicted the appellant on all three (3) counts on insufficient evidence.

In support of the first ground of the appeal, Mr. Mweemba, Principal Legal Aid Counsel submitted that the evidence that was brought to suggest that the robbers used firearms; namely, a Pistol and an AK47 assault rifle included the Ballistics report which the learned trial Judge referred to in her judgment. According to this evidence, the ballistics report was produced by the arresting officer instead of the Ballistics examiner who examined the particular firearms as was the usual practice. Mr. Mweemba suggests that failure by the prosecution to summon the Ballistics examiner rendered the admission of the ballistics report erroneous on the part of the trial Court notwithstanding the absence of any statutory provisions in the **Criminal Procedure Code, Cap 88 of the Laws of Zambia** on the requirement that the ballistic report must be produced by the ballistic examiner who prepared it.

Mr. Mweemba suggests that the Ballistics report in this case qualified as inadmissible hearsay evidence which should never have been tendered in evidence, notwithstanding the fact that the Ballistics examiner's report was not objected to during the trial. Mr. Mweemba implored us to find that the admission of the report was

erroneous. In support of this proposition, Mr. Mweemba cited the case of **Nevers Sekwila Mumba vs. Muhabi Lungu**[1] where we stated that:

> **"This Court will however affirm or overrule the trial Court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected"**

We were consequently asked to quash the convictions and sentences on all the charges and substitute the death sentence with the sentence under **Section 294(1) of the Penal Code.**

In support of ground two of the appeal Mr. Mweemba submitted that the Pistol recovered from the appellant cannot be said to have been used in the robbery in count one because the same Pistol was alleged to have been stolen from PW1 in count one and that PW1 was unable to identify the assailants who robbed him. It was further submitted that the AK47 assault rifle which was exhibited was not recovered from the appellant and it was not known who left it where the police found it. Further still, the AK47 assault rifle was recovered without its magazine and, therefore, there was no proof that it qualified as a firearm within the meaning of **Section 2 of the Firearms Act, Cap. 110 of the Laws of Zambia**. In support of this

proposition, Mr. Mweemba cited our decision in the case of **John Timothy and Feston Mwamba vs. the People**[2], in which we held that:

> **"(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 weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.**
>
> **(ii) 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, but whether the gun seen by the eyewitnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found".**

We were also referred to our decision in the case of **Jonas Nkumbwa vs. The People**[3], in which we held that:

> **"It is unsafe to uphold a conviction on the charge of armed aggravated robbery where there is no direct evidence of the use of firearms.....**
>
> **As we have already stated, there is an allegation that two of the robbers were armed with firearms. There was no direct evidence of the use of firearms as they had not been found and tested to be firearms within the meaning of the Firearms Act. As Mr. Mwambachongo properly observes, they may have been imitations. In the premises we find that it would be unsafe to uphold a conviction on a charge of armed aggravated robbery. A firearm under the Firearms Act, Cap. 110 of the Laws of Zambia in Section 2 means:**
>
> **Any lethal barreled weapon of any description from which any shot, bullet, bolt or other missile or which can be adapted for the discharge of any shot, bullet, bolt or other missile".**

Taking a cue from the foregoing observation made by this Court, Mr. Mweemba's submission was that the AK47 assault rifle exhibited in this case, in the absence of its magazine at the point of use, does not qualify under the **Firearms Act.** Mr. Mweemba also assailed the identification of the exhibited firearms by the witnesses in all the counts. He contended that the identification was rather too general such that there are uncertainties as to whether the exhibited firearms would be the same weapons used in the commission of all the offences alleged.

According to Mr. Mweemba, a description of colour and size of a firearm was a general description applicable to most firearms; thereby bringing other inferences other than the inference that they were the contended firearms. We were referred to the case of **Dorothy Mutale and Richard Phiri vs. The People**[4] in which this Court emphasized that to convict on evidence of this nature the inference of guilt ought to be the only reasonable inference that could be drawn by a trial Court.

It was therefore, contended that the evidence in the present case was insufficient to sustain a conviction for armed aggravated robbery

and attempted armed aggravated robbery. We were urged to quash the convictions.

In her response Mrs. Kachaka, reacting to both grounds of appeal simultaneously, supported both conviction and sentence for each count. She contended that the evidence of PW1 was sufficient to establish that the appellant was armed with a lethal weapon falling within the meaning under the **Firearms Act.** She also submitted that it is trite law that an accused person can still be convicted of armed aggravated robbery even where the gun used in the act was never recovered, so long the use of the gun is proved by other circumstances **(see John Timothy and Feston Mwamba[2]),** because the issue is whether the guns seen by the eyewitnesses were capable of being fired; and for this reason even if the Ballistics report was to be expunged from the record, the conviction would still stand on the premise that the robbers used guns on other witnesses and earlier pointed a gun to PW1's head and fired a shot before robbing him of his car, his Pistol and his K30,000.00 cash. It was submitted that PW1's evidence was unchallenged because he was not cross-examined. In support of this proposition we were referred to the case

of **Joseph Mulenga, Albert Phiri vs. The People**[5], in which this Court commented that:

> **"During trial, parties have the opportunity to challenge evidence by cross-examining witnesses. Cross-examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts that are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial".**

It was also submitted that the appellant failed to give any explanation as to how he was found in possession of the Pistol in a space of only four months after it was stolen from PW1 at gunpoint, having regard to the fact that guns do not easily change hands. It was also submitted that the magazine found at the scene of the robbery at PW1's premises must have been abandoned by the robbers when it dropped after they used the gun to smash and break PW1's car window and drag him out.

On the suggestion that the Ballistics report is hearsay evidence because it was admitted through the arresting officer and not the Ballistics officer who authored it, Mrs. Kachaka agreed with Mr. Mweemba that there is no provision in the **Criminal Procedure Code** for Ballistics reports to be produced by the arresting officer. She was

of the view, however, that just as arresting officers are used to produce medical reports that are straightforward, the same can be done with Ballistics reports on the basis of custody, relevance, and identification by witnesses in all the counts. With these submissions, we were urged to uphold the convictions in all three counts.

We have considered the submissions made by both learned Counsel. As correctly observed by Mrs. Kachaka, the two grounds of appeal are related. They both raise the issue of whether the evidence that was before the lower Court was sufficient to sustain a conviction on all three charges.

With regard to the first ground of the appeal, it is argued that the Ballistics examination report produced by the arresting officer was improperly admitted in evidence because the forensic ballistic examiner was not called to testify and produce his report. We take note that both learned Counsel agree that there are no provisions in the **Criminal Procedure Code, Cap. 88, the Evidence Act, Cap. 43** or indeed any other written law in our jurisdiction that deals with how Ballistics examination reports should be produced before the trial Court. There is no legal rule or rule of practice which demands

that the Ballistics examiner's report cannot be produced to the Court by the arresting officer who is the custodian of all exhibits when no objection is raised, like was the case in the Court below.

Our considered view is that the Ballistics examiner's report is as good as any other expert opinion evidence, like a medical report, and in appropriate cases where there is no objection raised to both the exhibit and the report, the arresting officer can produce it during trial and the trial Court will have no obligation to reject its production. We are fortified in this position by the cognizance of the fact that forensic Ballistics examiners are not readily available in most rural areas of our country and that this service is mostly centralized at the police service headquarters. We therefore, do not agree with the suggestion that the Ballistics examiner's report in this case produced by PW10 Christian Kalonde Mutale, qualified as inadmissible hearsay evidence.

We take the view that although there has been general acceptance that Ballistics reports are ideally produced by the authoring police experts, where there is no dispute as to the identity of a firearm and no objection is raised, the arresting officer with

custody of the firearm and the accompanying Ballistics report can produce both the firearm exhibit and the report to prove that the identified firearm is a firearm within the meaning of the **Firearms Act.** Consequently, we do not find any merit in the first ground of appeal.

The second ground of the appeal alleges that the evidence on record was insufficient to sustain the convictions in all the three counts. In our narration of the evidence that is on record, we pointed out the pillars of the prosecution's case anchored on the evidence given by eyewitnesses in all the three counts. We said that the appellant was identified by PW2, PW3, PW4 and PW5. These eyewitnesses also identified the firearms which they saw during the attacks. They also identified the blue police jersey which the appellant used during the attacks.

Regarding PW1, we stated that this witness was attacked as he drove into his premises. He was confronted by three or so robbers. Two of these robbers carried guns. They smashed his car window and fired a warning shot to stop him from resisting. Thereafter, they stole his car, his Pistol and his money. There is no evidence on record

to suggest that the stolen Pistol was the one used by the robbers to fire at PW1. The robbers used an AK47 whose magazine they dropped at the scene. Although PW1 did not identify any of his assailants, the use of the gun was established by the gunshot which the robbers fired at the scene. The appellant was specifically connected to that robbery by PW1's Pistol recovered from him at PW5's house where he was overpowered and apprehended while his friends escaped. Although PW1's Pistol was recovered three months after it was stolen, we agree with Mrs. Kachaka that there was nothing unusual because firearms do not easily change hands and when confronted by the police, the appellant failed to provide any explanation.

The appellant was also connected to PW1's robbery by the magazine of an AK47 rifle that was recovered at the scene of PW1's attack. It cannot be an odd coincidence that an AK47 rifle without a magazine was recovered near PW5's house where the appellant was overpowered during a planned robbery. On his part, the appellant conceded that he went to PW5's house where he was apprehended from. In our view, the evidence against the appellant was simply overwhelming. We find no merit in the second and last ground of

appeal and we dismiss it. The net result is that this appeal is dismissed.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE