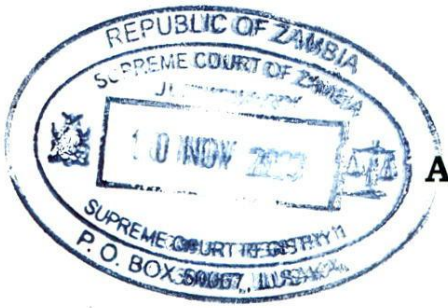
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 145/2014**
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:



ALEX MALAYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on 3rd November, 2020 and 10th November, 2020

For the Appellant: Mr. H.A. Chizu, Chanda Chizu and Associates

For the Respondent: Mrs. M. Hakasenke-Simuchimba, State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chimbala vs. The People (1986) Z.R. 7**
2. **The People vs. Lawrence Mumanga (1985) Z.R. 35**
3. **The People vs. Lewis (1975) Z.R. 43**
4. **Dorothy Mutale and Richard Phiri vs. The People (1995/97) Z.R. 227**
5. **David Zulu vs. The People (1997) Z.R. 151**
6. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
7. **Mutambo and 5 Others vs. The People (1965) Z.R. 19**
8. **Elisha Malume Tembo vs. The People (1980) Z.R. 209**
9. **Edward Sankalimba vs. The People (1981) Z.R. 258**
10. **Kenious Sialuzi vs. The People (2006) Z.R. 87**
11. **Kalaluka Musole vs. The People (1963) Z.N.R.L.R. 173**

The appellant, a paramilitary officer was tried and convicted of one count of murder and one count of aggravated robbery by late Wanki J (as he then was). He was jointly charged with his co-accused William Kampandi. In the count of murder, it was alleged that on 2nd December, 2008 at Nakonde in the Nakonde District of the Northern Province of Zambia, they murdered Kennedy Mutale; and in the count for aggravated robbery, it was alleged that on the same day, jointly and whilst acting together with other persons unknown whilst armed with a firearm, they stole from Kennedy Mutale a Toyota Landcruiser registration number APB 4277 valued at K130,000,000 the property of Zambia Revenue Authority and at or immediately before or immediately after stealing, did use actual violence to the said Kennedy Mutale in order to obtain or overcome resistance to its being stolen. The appellant was sentenced to death in the count of murder and 17 years for aggravated robbery. His co-accused William Kampandi was acquitted of both charges.

We must mention that the prosecution called a total of 12 witnesses most of them police officers who visited the scene of crime after the fact and in our view gave their opinion as to what could have transpired during the commission of the offence.

The undisputed facts were that the appellant and his co-accused William Kampandi a Detective Sergeant and other paramilitary police officers were attached to the Zambia Revenue Authority (ZRA) at Nakonde where they were providing security services. The officers resided at House No. C.18 Zambia Revenue Compound in Nakonde. On the 2nd December, 2008 around 18:30 hours Kennedy Mutale, the deceased herein arrived at the paramilitary officers' residence driving a Toyota Landcruiser registration number APB 4277. The deceased, a driver under the employ of ZRA was sent to pick up the appellant who was due to report for work that evening. As the deceased parked the vehicle waiting for the appellant, he was attacked by two gunmen who began assaulting him. PW1, another driver working for ZRA who lived near to the paramilitary officers' residence witnessed the attack. His story was that he heard the vehicle driven by the deceased arrive outside the paramilitary officers' house. He was in his bedroom when his daughter alerted him that the deceased was being assaulted. PW1 decided to go out of the house but then he observed that the deceased was under attack. Two armed men were assaulting him. PW1 then closed the door and withdrew into

his house. He could not identify the armed robbers because it was dark outside. However, he saw the deceased running into the paramilitary officers' house. He then heard three gunshots. Thereafter, the assailants took off with the Landcruiser which was never recovered.

Suffice to mention that all the police witnesses were agreed that the deceased was shot inside the house, at close range and that the appellant should have waited for instructions or an order from the senior officer before discharging the firearm.

According to the appellant, that evening he heard the Landcruiser arriving outside the house. This was followed by loud voices of people which sounded as if they were quarrelling. The appellant opened the door to see what was happening. There were four gunmen surrounding the vehicle which was parked. He retreated into the house, switched off the lights in the sitting room and informed his housemate who was in the other room that there were four dangerous criminals outside. As he was picking his firearm, he heard two gunshots then the door opened, and a person ran into the house. The appellant thought it was one of the criminals who ran into the house to attack him and he opened fire

killing the deceased instantly. The appellant stated that it was not his intention to kill the deceased but everything happened so fast.

After analysing the evidence, the trial judge acquitted Sergeant Kampandi of both counts.

Coming to the appellant, the trial judge had this to say after considering Section 204 of the Penal Code relating to malice aforethought:

> **"The evidence being that the accused fired at the deceased four shots using an AK47 rifle, the accused could be said to have had intention to cause the death of or to do grievous harm to the deceased within circumstance (a) of Section 204.**
>
> **Further the accused being a highly trained officer in the use of a firearm could be said to have had knowledge that his act of firing such a firearm as an AK47 could probably cause the death of or grievous harm to the deceased within circumstance (b) of Section 204. ..."**

The learned trial judge addressed his mind to the defence of mistaken belief under Section 10 of the Penal code and the case of **Chimbala vs. The People**[1] and found that it was not available to him. He also found that defence of property was not available to the appellant as he faced no imminent danger and that the appellant had no authority to discharge the firearm in the absence

of an order from his superior. The trial judge found him guilty of murder and sentenced him to death.

Turning to the 2nd count of aggravated robbery, he found that it was not in dispute that an aggravated robbery was committed. However, the evidence linking the appellant to the commission of the offence was circumstantial. The learned trial judge found it odd that a highly trained officer failed to prevent the robbery and his conduct did not display innocence. He applied Section 21 (1) of the Penal Code and found that the appellant acted in concert with the armed robbers to rob the deceased of the vehicle. He found him guilty convicted him and sentenced him to 17 years imprisonment with hard labour.

Dissatisfied with his conviction and the sentences, the appellant filed his grounds of appeal and heads of argument by his counsel Mr. Chizu. The grounds of appeal are couched in the following terms:

1. **The court below erred in fact and in law when he held that the accused did not act honestly and reasonably and therefore, he cannot claim to have acted under mistaken belief of facts and therefore convicted the appellant with murder.**

2. **The learned trial judge in the lower court erred both in fact and law when he held that the prosecution had proved beyond reasonable doubt that the accused murdered the deceased.**

3. **The court below erred in law and fact by holding that there was no danger and that even if there was unlawful attack, the accused was not supposed to fire unless his supervisor gave an order for him to fire.**

4. **The court below erred in law and fact when it held that I have found the accused has not adduced any evidence or defence capable of reducing the offence to manslaughter or exonerating him from liability.**

5. **The learned trial judge erred both in fact and law when he held that the prosecution had proved beyond reasonable doubt the appellant was one of the persons involved in the aggravated robbery.**

6. **The trial judge erred in law and fact when he acknowledged that the evidence linking the accused person to robbery was circumstantial but went ahead to convict the appellant on that circumstantial evidence heavily relied on evidence of PW5 who was not an eye witness against the legal principles.**

7. **The court below misdirected itself by stating that the accused person did not act in a normal manner and held him to have omitted his duty or abated the crime contrary to S. 21(1) b of the criminal procedure code thereby found the appellant guilty of aggravated robbery.**

Mr. Chizu argued the first and second grounds of appeal together. It was submitted that the appellant was labouring under an honest mistaken belief that the person who had run into the house was one of the criminals he had seen outside the house

earlier. He relied on the case of **The People vs. Lawrence Mumanya.**[2] It was submitted that the appellant was in a dark room at the time of the shooting and that he was genuinely afraid, and this was corroborated by his co-accused. Counsel argued that having heard gunshots outside, there was no way the appellant would have known that someone other than the robbers themselves could have run into the house. Mr. Chizu also referred us to the case of **Chimbala vs. The People**[1] and submitted that the correct test should have been whether or not the appellant entertained an honest and reasonable but mistaken belief that the deceased was in fact one of the armed robbers whom he had seen outside. Mr. Chizu concluded that the defence of mistake of facts provided in Section 10 of the Penal Code is applicable to the appellant's case.

Counsel argued further that on the evidence, the offence of murder was not proved to the required standard by the prosecution. It was submitted that on the facts of this case, malice aforethought was not established as the appellant shot the deceased under a mistaken belief. That, had the trial judge applied the correct test, he would have held otherwise. Counsel strongly argued that the appellant had no motive to murder the deceased and in line with

the case of **The People vs. Lewis**[3] the trial court was obliged to consider the motive from which the accused acted. It was submitted that the prosecution did not adduce any evidence to show that the appellant did not act out of fear and in reasonable self-defence when he mistakenly shot the deceased. Counsel relied on the case of **Dorothy Mutale and Richard Phiri vs. The People**[4] and argued that there was more than one inference in this case and therefore, this, should have operated in favour of the appellant.

In ground three, Counsel argued that contrary to the holding by the learned trial judge that there was no danger, PW1 testified to the effect that there were armed robbers who waylaid the driver outside the residence of the paramilitary officers. That this was in tandem with the appellant's evidence. Counsel attacked the learned trial judge for emphasizing that before shooting, the appellant should have waited for an order from his superior especially that his superior was in another room.

In relation to ground four, Counsel repeated his arguments in ground one adding that there is nothing on record to suggest that the appellant had the intention to kill or to rob.

In support of ground five, relying on the case of **David Zulu vs. The People**[5] Counsel accused the learned trial judge of drawing wrong inferences from the appellant's action of retreating into the house when he saw the armed robbers roughing up the driver. The learned trial judge interpreted the appellant's retreat as implying that he was an accomplice, but this was a wrong inference considering that such evidence was not corroborated.

Counsel accused the learned trial judge of basing his decision on speculation as there was no expert evidence to show how a trained officer was reasonably expected to behave or act under the circumstances. Counsel submitted that even though the appellant was armed, he could not be expected to confront four armed robbers. Counsel argued that the appellant's explanation was logical and was not rebutted by the prosecution and the learned trial judge erred in applying Section 21(1)(b) of the Penal Code without having due regard to the circumstances of the case. He pointed out that had the learned trial judge considered the imminent danger to both the appellant and the deceased, he would have arrived at a different conclusion.

Turning to ground six, Counsel basically repeated his arguments in ground five and insisted that the issue which confronted the trial judge was whether the appellant entertained a reasonable mistaken belief at the time he discharged the firearm. If the answer is in the affirmative, then the defence must succeed.

In support of ground seven, it was submitted once again that there are lingering doubts as to whether the appellant acted or had planned the robbery together with the armed robbers who stole the vehicle.

In conclusion, he urged us to set aside the conviction for murder and aggravated robbery.

In response to ground one and two Mrs. Hakasenke-Simuchimba argued that the appellant could not have been labouring under a mistake of fact as he is a highly trained police officer whose duty is to prevent, overcome and investigate crime as well as to foil crime in case of armed robbery. It was pointed out that the appellant was on guard duties and he was competent to carry out the duties. Mrs. Hakasenke-Simuchimba questioned whether a trained police officer would have had the belief he claims

to have had given the circumstance that he is a trained police officer who was expecting to be picked up to go and guard the Assistant Commissioner of ZRA that night. Counsel for the State submitted that the appellant's conduct of abandoning the driver who was under attack, hiding in the house, doing nothing, firing without seeing the target and without an order from his superior cannot be said that he laboured under the mistaken belief that the person who ran into the house was a criminal. Counsel submitted that the appellant knew that firing four gunshots at the deceased would cause death and this established malice aforethought under Section 204 of the Penal Code and the appellant was rightly convicted of murder.

In response to ground three, it was submitted that the evidence shows that the one who was in danger was the deceased and not PW1 or the appellant as no one attacked them. Mrs. Hakasenke-Simuchimba took the view that the appellant was part of the attack as he simply chose to do nothing instead of taking action to foil the attack on the driver.

In response to ground four, Mrs. Hakasenke-Simuchimba reiterated her arguments in ground one that the defence of honest

mistaken belief was not available to the appellant as no one harassed or attempted to rob him. Counsel for the State argued that the appellant had switched off the lights in the house so that those outside would not be able to see inside. There were lights outside so he ought to have seen that the person entering the house was not armed. That he deliberately shot the deceased and malice aforethought was established.

In addressing ground five and six, it was submitted that the learned trial judge relied on circumstantial evidence and he cannot be faulted in view of the fact that the appellant as a trained officer saw that the driver was under attack; he did not fire any warning shots or do anything to scare the armed robbers but stayed in silence. The only reasonable inference that can be drawn from his conduct is that the appellant facilitated the commission of the offence. In support of this argument, Mrs. Hakasenke-Simuchimba cited the case of **Ilunga Kabala and John Masefu vs. The People**[6] where we held that:

> **It is trite law that odd coincidences if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.**

It was submitted that the appellant's odd behaviour could only lead to one inference that he aided and facilitated the commission of the offence of aggravated robbery contrary to Section 21(1)(b) of the Penal Code. Mrs. Hakasenke-Simuchimba submitted that the appellant acknowledged that he was a trained officer and the evidence of PW5, a fellow police officer falls in the category of the exceptions to the hearsay rule in that as a trained police officer and investigator, he gave details of his investigations and his conclusions and that the learned trial judge did not err by relying on PW5's evidence. The conviction based on circumstantial evidence was proper according to Mrs. Hakasenke-Simuchimba.

In responding to ground seven, Mrs. Hakasenke-Simuchimba repeated the same arguments advanced in support of ground five and six. She emphasized that the appellant shot the deceased without orders from his superior and without determining whether the target was armed or not and the only inference that can be drawn is that the appellant deliberately killed the deceased. That there are no lingering doubts to be resolved in favour of the appellant as the circumstantial evidence is strong and compelling

and only permits one inference and that is that the appellant aided and facilitated the robbery and as such he was a principal offender.

We have considered the evidence on record, the judgment of the trial court and the arguments by Counsel for the parties. Although seven grounds of appeal have been advanced, we discern the following issues for our determination: whether the defence of mistaken belief as provided under Section 10 of the Penal Code was available to the appellant and whether the appellant was one of the perpetrators of the armed aggravated robbery that led to the killing of the deceased and theft of the Landcruiser belonging to the Zambia Revenue Authority.

In this case, the argument by Mr. Chizu is that the appellant shot the deceased because he believed he was one of the criminals he had seen outside. Mrs. Hakasenke-Simuchimba on the other hand argued that the appellant was not in any danger, the one who was in danger was the deceased who was under attack outside while the appellant retreated into the house, switched off the lights and did nothing. Section 10 of the Penal Code provides as follows:

> **A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of**

things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

We had occasion to discuss the defence of mistaken belief in the cases of **Mutambo vs. The People**[7], **Elisha Malume Tembo vs. The People,**[8] **Edward Sankalimba vs. The People,**[9] **Kenious Sialuzi vs. The People,**[10] **and Chimbala vs. The People.**[1] In the case of **Chimbala vs. The People**[1] which incidentally involved a police officer, the facts of the case extracted from the *headnote* in the law report read as follows:

The appellant a Police Officer at the time of the offence was detailed with many others to go to a house invaded by robbers who were still in the house. When they reached near the house noise was heard emanating from inside, and attributing this to the presence of robbers on the premises, warning shots were fired. Believing that the occupants of the house were in danger the Police forced their way in through a window after demands that the door be opened failed. Upon entry, the appellant saw a figure in one of the bedrooms (which figure was later identified as the deceased), trying to jump out of the window. The appellant ordered the deceased to put his hands up. The deceased tried to hide under a bed. Believing that he was an armed robber the appellant fired three fatal shots. The appellant was convicted of manslaughter. He appealed.

We held that:

(i) **Whenever the issue of mistake of fact arises; the question is not whether the accused acted reasonably, but whether he entertained an honest and reasonable, but mistaken belief as**

to the existence of facts, which if true would make the act or omission charged against him innocent. (Emphasis ours)

In the **Chimbala**[1] case, the thieves had broken into the house and threatened the occupants and were expected to return to the house. The police stepped in without the knowledge of the occupants of the house. In the **Chimbala**[1] case we stated that:

> **This was a case of mutuality of an honest and reasonable, but mistaken belief on the part of the appellant, in particular, and of the police contingent, in general, on the one hand; and on the part of PW1 and the other occupants of her house at the material time, on the other. Had either side not entertained such a mistaken belief, it is highly improbable that this case would ever have arisen at all. As it turned out, the occupants of the house mistakenly believed the police personnel to be robbers, not saviours. On the other hand, the police mistakenly believed that the lawful occupants of the house were being held by robbers at gun-point. And, as we have held, when the appellant opened fire at the victim, he honestly and reasonably, but mistakenly, believed that he was dealing with an armed bandit. In the eyes of the law (that is, in terms of section 10 of the Penal Code), the appellant was not criminally responsible for the act and could thus not be convicted of murder or manslaughter.**

In this case, PW1 the only person who can be described as an eyewitness stated that he saw the deceased being beaten by two unidentified gunmen. He stated that the deceased ran into the house and then he heard three gunshots.

The learned trial judge after considering our holding in **Chimbala**[1] stated the following:

"After considering the evidence and circumstances of this case I am not able to find that the accused acted honestly and reasonably. In his own admission when he peeped he saw the vehicle that had gone to pick him surrounded by people he thought were criminals, as a highly trained paramilitary officer his first duty was to preserve life and protect property. He was therefore expected to find ways and means of saving the driver and protecting the vehicle from being stolen and not to run in the house thereby leaving the driver at the mercy of the criminals. In the circumstances he cannot claim to have acted under a mistaken belief."

The following is part of the appellant's detailed defence:

"I was at the house in the ZRA compound waiting for a vehicle to take me. The vehicle came around 19:00 hours. I heard the sound of the vehicle outside. At that time I was in the house. Before it reached where it used to park, I heard the noise of people outside, it was loud as if they were quarrelling. When I heard that I stood and went to open the door I wanted to see what was happening outside. When I opened the door I saw the vehicle parked I also saw four people standing near the vehicle. The people were around with guns and wearing dark long coats. I was able to see because the electricity lights were on. When I saw that I returned in the house and switched off the lights. Immediately I notified Accused 2 who was in the other room I told him that we were in danger as there were criminals outside. As I was picking my gun I heard two gun shots outside repeatedly. While the gunshots continued I saw the door open and a person came running into the house. When I saw that and thinking that they were criminals who came into the house, I also fired the gun shortly later it seemed quiet. That was when Accused 2 came in the room where I was and switched on the lights. It was then that we saw that the person who ran into the house was Driver Kennedy Mutale."

On the aspect of switching off the lights by the appellant upon seeing armed robbers outside the house, we have noted that Mrs. Hakasenke-Simuchimba blamed him for taking such an action. We

do not agree with the State. We take judicial notice that when there are intruders outside the house at night, security measures dictate that lights inside the house should be switched off so that persons in the house can see those outside while those outside cannot see the persons inside the house. This was a security measure reasonably expected of the appellant or any other reasonable person to be able to see the intruders who were outside where the lights were on.

Continuing with the issue of mistaken belief, in the case of **Musole vs. The People**[11] the defence of mistaken belief was advanced but failed. Blagden J.A. stated after considering Section 11 of the then Penal Code which is exactly our Section 10 in the current Penal Code that:

> **"It will be apparent that here again there are two tests to apply: the objective test of whether the mistaken belief was a reasonable one; and the subjective test of whether the accused honestly held that mistaken belief."**

Further, in **Edward Sankalimba vs. The People**[9] we held that:

> **(i) For the defence of mistaken belief to stand, it must be shown that it was both reasonable and honest. Reasonableness**

cannot be attributed to a person whose mind is in a state of disorder.

In the case of **Chimbala**,[1] we guided that the question is not whether the accused has acted reasonably but whether he entertained an honest and reasonable but mistaken belief. In this case, the learned trial judge misapplied the **Chimbala**[1] case by finding that the appellant did not act honestly and reasonably which is not the correct consideration. In contrast to the situation in **Chimbala**[1] in this case, the armed robbers were three metres away from the entrance of the appellant's house harassing the deceased before he ran into the house. The learned trial judge also misapprehended the facts by accusing the appellant of running away and leaving the deceased at the mercy of the armed robbers. The appellant's explanation was that he never even went outside the house.

In his judgment the learned trial judge, relying on the evidence of the police witnesses, blamed the appellant for shooting without the authority of his superior and co-accused. Notably, Section 24 (2) of the Police Act provides that:

(2) A police officer shall not, in the presence of his superior officer, use a firearm against any person except under the orders of that superior officer.

Looking at the circumstances of this case, the whole incident happened very quickly and his superior and co-accused was in another room. Section 24(2) presupposes a situation where a police officer is in the presence of a superior officer who is capable of giving orders. Being in the same house but being in different rooms does not mean being in the presence of a superior officer. We take the view that Section 24(2) could not come into play. It was, therefore, erroneous for the learned trial judge to hold that the appellant should have waited for instructions from his superior.

The main issue which we must address is whether the defence of mistaken belief can stand under the circumstances of this case. From his narration can we say that the appellant entertained an honest and reasonable but mistaken belief that it was a criminal who ran into the house? We must bear in mind that this was a crime scene, an armed robbery was taking place right outside the appellant's house and the whole incident happened very fast that the appellant equally had to react quickly after seeing someone run into the house which was in total darkness. When the appellant

opened fire, he believed that one of the armed robbers had come into the house, so he said. From PW1's description of what transpired, it is clear that the armed robbers were waiting for the deceased as he drove into the ZRA Compound to pick the appellant. This was an organised armed robbery which from PW1's observation and the appellant's narration happened very quickly and before the appellant could react to thwart the attack on the deceased and the robbery. We do not agree with Mrs. Hakasenke-Simuchimba that the appellant was not in danger. Our considered view is that the appellant was also in danger because there were armed robbers outside the house and then suddenly someone runs into the house – the appellant did not know who had ran into the house because it was dark. The appellant finds himself in this situation because he shot dead the very driver who was to pick him up for work. A perusal of the judgment reveals that the learned trial judge was influenced in discounting the defence of mistaken belief for the simple reason that most of the police officers who gave evidence implicated the appellant and his co-accused in the armed aggravated robbery. They accused the appellant and his co-accused of failing to discharge their duties properly. We hold that their

evidence was hearsay as they did not witness the commission of the offences and came on the scene as investigators who formed their own opinion as to what could have transpired. Their opinion was simply that and was inadmissible. We take the view, looking at the case holistically that the appellant entertained an honest and reasonable but mistaken belief that it was one of the robbers who ran into the house. There is absolutely no reason why the appellant would shoot his own driver. If the person who stormed into the house turned out to be one of the armed robbers, what would have been the verdict? The case of **Chimbala**[1] would have applied. The appellant in our view acted in the anguish of the moment and opened fire and unfortunately an innocent man was killed. We do not see any reason why the case of **Chimbala**[1] should not be applied here. We hold that the appellant in shooting the deceased, entertained an honest and reasonable but mistaken belief that he was shooting one of the criminals who were attacking the deceased outside the house.

In the premises, we find that the learned trial judge misdirected himself when he convicted the appellant of the offence of murder. We set aside the conviction and sentence and the appellant is acquitted of the offence of murder in the first count.

We now turn to consider the conviction in the second count which is for aggravated robbery. The learned trial judge acknowledged that there was no direct evidence linking the appellant to the robbery. However, the learned trial judge opined that the fact that the appellant failed to foil the robbery pointed to his involvement in the scam. The learned trial judge went on to state that:

> **"I have found that the accused did not act in a normal manner. Here is a highly trained paramilitary and armed officer who was waiting to be picked, he hears the vehicle he is expecting, opens the door peeps and find the vehicle surrounded by armed people, he does not do anything but returns in the house pretending everything is normal."** (emphasis ours)

The question that comes to mind is, was there evidence before the trial court that the appellant pretended everything was normal when he retreated into the house. It appears to us that the learned trial judge was greatly influenced and swayed by the evidence of the police officers who visited the scene of crime after the incident. Notably, as pointed out by learned Counsel for the appellant and the State, the learned trial judge relied heavily on the evidence of PW5 whose opinion was that the two officers inside the house failed to discharge their duties as they were part of the group that

harassed the deceased. This was a misdirection as the evidence adduced by the police officers was inadmissible as it was hearsay evidence. We do not agree with Mrs. Hakasenke-Simuchimba submission that PW5's evidence falls under the exception to the hearsay rule. The learned trial judge called in aid Section 21(1) of the Penal Code which states that:

> **21. (1) When an offence is committed, each of the following person is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:**
>
> **(a) every person who actually does the act or makes the omission which constitutes the offence;**
>
> **(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
>
> **(c) every person who aids or abets another person in committing the offence;**

The learned trial judge concluded that the failure by the appellant to prevent the robbery was deliberate as he was part and parcel of the whole enterprise thereby bringing the appellant under Section 21(1)(2). The appellant was found guilty of aggravated robbery and sentenced to 17 years IHL. We do not agree with the conclusions arrived at by the trial court. In this case, there was no circumstantial evidence worth considering. An armed robbery took

place in which the vehicle which was to pick up the appellant was stolen while the appellant was inside the house. There is absolutely no evidence connecting the appellant to the armed robbery except the opinion by police officers who visited the scene that the appellant had connived with the armed robbers. This is another case of strong suspicion by the investigators, but which is insufficient to sustain a conviction. In this regard, we would like to caution trial courts not to be swayed by strong suspicion which is nothing but strong suspicion which is below the required standard in criminal cases. We find that the prosecution failed to prove their case beyond reasonable doubt. The conviction and sentence for aggravated robbery is set aside and the appellant is acquitted accordingly.

Appeal allowed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE