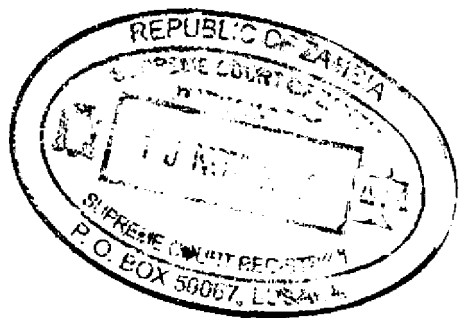
**APPEAL NO.173/174/175/2020**

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




BETWEEN:

**TITUS MULONGA** **APPELLANT**

**V**

**THE PEOPLE** **RESPONDENT**

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

For the Appellant : Ms M. Nzala, Legal Aid Counsel

For the State : Mr C. K. Sakala, State Advocate

---

## JUDGMENT

---

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

Cases referred to:

1. **Issa Mwansumbe v The People (1978) ZR 354**
2. **Muvuma Situna Kambanja v The People (1985) ZR 115**
3. **Kenneth Mtonga and Victor Kaonga v The People (2000) ZR 33**
4. **Kalonga v The People (1988-1989) ZR 90**

The appellant, Titus Mulonga, appeals against his conviction by the High Court for the offence of aggravated robbery and the sentence of 45 years imprisonment that was meted out to him.

The appellant, together with two co-accused, Arnold Mwiiya, (who was the 2nd accused in the court below) and Jonathan Mwansa (who was the 3rd accused), were charged with the offence before Chali, J. sitting at Ndola. Before that court, Brian Maluba (PW1) a taxi driver and victim in the case told the court that on 1st August, 2015, around 16:00 hours, he was hired by three men from Kamuchanga bus station in Mufulira to take them to some destination on the Mufulira-Ndola road. On the way, his passengers pounced on him and beat him up severely until he lost consciousness. He re-gained consciousness around 20:00 hours and found himself in the bush, on an anti-hill. Missing, were; his pair of trousers, a sum of K165.00, his Zamtel phone and the motor vehicle. He sought assistance from some people in the area who referred him to Jannot Kahembe (PW3), a village headman and member of the local crime prevention unit. Because of the late hour, PW3 kept PW1 at his home until the following morning when the police were called. The police came and PW1 was eventually taken

to the hospital where he was admitted. Later, at two different parades, PW1 identified the appellant and his two co-accused as the people who hired and later attacked him. He also identified the motor vehicle and a Zamtel phone as the items that were taken from him.

There was also the evidence of PW8, Wisdom Chingangu, who told the court that, in the evening of the 1st August, 2015, he met the appellant on two occasions driving the subject motor vehicle in a rather reckless manner. The witness said that the first occasion was between 20:00 hours and 21:00 hours at a filling station in town; and that the second occasion was between 21:00 hours and 22:00 hours in Murundu township. PW8 said that he even spoke to the appellant and cautioned him against his manner of driving.

Then there was the evidence of PW4, Steven Mpundu, who told the court that on 2nd August, 2015, between 08:00 hours and 09:00 hours the appellant, in the company of his second co-accused Arnold Mwiiya, came to his shop in Murundu Township and left a Zamtel phone for charging. PW4 said that the appellant did not come back for his phone; and that the following day when he learnt that the appellant had been apprehended by the police, he took the

phone and handed it to Liberty Lungo (PW5), a member of the area crime prevention unit.

Details of the other evidence leading to the arrest of the appellant and his co-accused are not particularly relevant to this appeal. It shall suffice to say that the three were eventually apprehended on different days.

The appellant did not dispute being in possession of the motor vehicle and the phone. With regard to the vehicle, he explained that he had rescued it from people who were beating the driver somewhere near Mufulira black Pool stadium; and that his intention was to take it to the police station, but that he however ended up in Murundu township because PW8 had convinced him that he knew the owner of the vehicle and they could contact him. The appellant said that, unfortunately, the vehicle ran out of fuel in Murundu township.

As for the Zamtel phone, he confirmed having taken it to PW4 for charging; however, he told the court that the phone was his.

The second accused confirmed having been with the appellant when the latter left the phone with PW4 for charging. He, however, denied having been present when the vehicle was stolen.

The third accused denied any knowledge of the appellant and the second accused. He also denied participating in the robbery.

The trial judge first resolved the facts as regards how the motor vehicle left the possession of PW1. He found that PW1's version of the story was confirmed by independent witnesses, such as PW3 and the police officers who went to the scene. Coming to the appellant's version, the learned judge observed that, from the point where the appellant said that he had collected the vehicle up to Murundu township, there were two police stations that the appellant had by-passed; namely Kamuchanga police station and Mufulira central police station. Consequently, the judge found the appellant's explanation to be unreasonable. He, therefore, accepted PW1's version of the facts and found that an aggravated robbery had taken place involving the theft of the motor vehicle and other items.

The learned judge next dealt with the issue of identification. He, properly, treated the matter as a single identification witness case. The judge relied on our decisions in two cases; **Issa Mwansumbe v The People**[1] and **Muvuma Situna Kambanja v The People**[2]. In the latter case, particularly, we said that the

evidence of a single identifying witness must be tested and evaluated with care in order to exclude the danger of an honest mistake. We went on to say that the witness should be subjected to searching questions; and that careful note should be taken of the prevailing conditions and the basis upon which the witness claims to recognize the accused. Guided by this statement, the judge said that he could not rule out an honest mistake on the part of PW1 because the witness had, prior to the identification, not given the police a clear and accurate description of his assailants; and that he did not give the court salient identifying features of each of the accused that he had identified. Finally, the judge said that, to compound the matter, PW1 in court identified the appellant and the third accused as the men who had sat in the front seat. He, therefore, found the identification evidence unreliable.

We should point out here that in the same case of **Kambanja v The People**[2] we further held as follows:

> **"If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence"**

We had earlier held likewise in the case of **Mwansumbwe v The People**[1]. The point raised in the above holding is cardinal in this appeal.

Coming back to the learned judge's judgment, having found that PW1's evidence of identification was unreliable, the judge then looked at the position of each accused person individually. He saw nothing wrong with the second accused having been in the company of the appellant when the latter left the phone with PW4. The judge also found no other evidence linking the third accused to the offence. Consequently, he acquitted the two.

As for the appellant, the judge found that it was not in dispute that the appellant had been in recent possession of the motor vehicle and the phone. As regards the latter item, the judge found that PW1 had positively identified it as his. The judge then found that the appellant had not given any reasonable explanation as to how he had come into possession of the two items. The appellant was convicted of aggravated robbery and sentenced to 45 years imprisonment.

On behalf of the appellant, it is argued that an inference of guilty was not the only one that could be drawn from the

appellant's possession of the two items. Ms. Nzala, counsel for the appellant, argues that, for instance, the prosecution did not adduce evidence that could put the dispute over the ownership of the phone between PW1 and the appellant to rest.

As regards the motor vehicle, learned counsel faults the learned judge for overlooking the explanation that the appellant gave as to how he came into possession of the vehicle; and instead dwelling on how the appellant behaved with the vehicle.

Mr Sakala, the learned State advocate, submits that, in fact, there was nothing weak about PW1's evidence of identification because he had spent about 45 minutes with the people that eventually attacked him. Counsel argues that this evidence is coupled with that of recent possession by the appellant of the stolen motor vehicle and the phone, a fact which the appellant does not deny.

As we are about to point out, this was not a case that fell to be resolved on recent possession only. It would seem to us that, in treating PW1's evidence of identification the way he did, the learned judge not only ignored the effect of our second holding in the case of **Kambanja v The People**[2] but was completely oblivious of the

mutual corroborative support that pieces of evidence of identification and recent possession render to each other when they both arise in the same case. In **Kenneth Mtonga and Victor Kaonga v the People**[3] we held:

> **"(iii) if the identification is weakened then, of course, all it would need is <u>something more, some connecting link in order to remove any possibility of a mistaken identity</u>.**
> **(iv) It is not always necessary that the doctrine of recent possession must be invoked especially where there is evidence of identification which if adequate on its own will be sufficient to sustain a conviction or <u>which if requiring to be supported will then be supported by the possession of stolen goods</u>"** *(underlining ours for emphasis).*

Perhaps the case that clearly demonstrates the application of the above principle is that of **Kalonga v The People**[4]. In that case, the only evidence of identification that was presented to the court was a courtroom one, which we have previously said to be poor; but there was also evidence that the appellant in that case was found in possession of recently stolen property. This is what we said:

> **"The learned Director further argued that the only identification of the appellant in this case took place in Court. We have in the past criticized the production of evidence of identification in Court. However, in this case, there is clear evidence that the possible identifying witness had an**

> **opportunity to see the appellant before there was any chance of holding an identification parade. This is a situation that cannot be helped, and, when it does occur, a trial judge in any such case can only look for corroborating evidence of what is admittedly poor evidence of identification. In this particular case the learned trial judge did look for this corroborating evidence and he found such evidence in the fact that the appellant was found in possession of stolen property shortly after the offence. We would emphasize that the appellant was not convicted on evidence of being in recent possession of stolen property, in which connection the learned Director drew our attention to the fact that the appellant gave an explanation which might reasonably be true. This argument is irrelevant. The appellant was convicted because he was identified and the identification evidence was corroborated by the fact that he was found in possession of stolen property"** *(underlining ours for emphasis).*

So when the evidence of identification is weak, but there is evidence of recent possession or some other connecting link, the evidence of identification should not be discarded at all; this is because it becomes strengthened by the recent possession or other connecting link, so that, as we held in **Kambanja v The People**[2], it becomes too much of a coincidence that the identifying witness could have

made an honest mistake. In other words, the danger that the identifying witness could have made an honest mistake is excluded in those circumstances. The trial court should therefore proceed to convict on the evidence of identification.

In the instant case, there was no dispute that the appellant was in possession of the motor vehicle. Since the learned judge found as a fact that the motor vehicle left PW1's possession by way of an aggravated robbery, and PW1 identified the appellant as being one of the people that took the vehicle from him in that manner, the latter's recent possession of it only went to corroborate that identification; and, hence, the danger of an honest mistake on PW1's part had been excluded: At this point, the appellant's explanation of his possession became irrelevant. The trial judge should, therefore, have proceeded to convict the appellant on PW1's evidence of identification. The same can be said of the appellant's second co-accused: He was identified by PW1. The evidence that he was in the company of the appellant the following morning after the robbery, was a connecting link which corroborated PW1's identification. That should have earned the second accused a conviction. However, there is no appeal by the State against his

acquittal. Therefore, our comments on his position are merely obiter.

We, accordingly find no merit in the appeal against conviction.

On the ground against the sentence, Ms Nzala submits that, as a first offender, the appellant deserved some leniency. Mr Sakala, on the other hand submits that, since sentencing is in the discretion of the trial court, we should not interfere with the sentence unless it comes to us with a sense of shock.

We should state that we do not have the full record of the proceedings in the court below to enable us examine the reasons given by the trial judge in arriving at that sentence. However, we note from the judge's review of PW1's testimony that the appellant and his associates severely beat PW1 with sticks until he was unconscious; and then left him for dead on an anthill in the bush. In fact, the learned judge, in his findings of fact, described the attack on PW1 as ferocious. In the circumstances, we find that there were very aggravating factors concerning this robbery, and, hence, the sentence of 45 years imprisonment does not come to us with a sense of shock. We, consequently, find no merit in the appeal against sentence as well.

The net result is that the whole appeal has failed. It stands dismissed.

.....

E.N.C Muyovwe

**SUPREME COURT JUDGE**

.....

E. M. Hamaundu

**SUPREME COURT JUDGE**

.....

J. Chinyama

**SUPREME COURT JUDGE**