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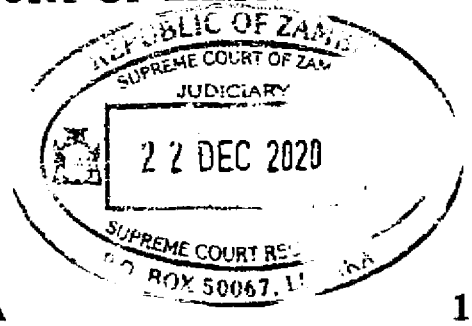
IN THE SUPREME COURT OF ZAMBIA APPEAL No.72, 73/2017
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

CLAUDE MATAMBIKA **1ST APPELLANT**

REUBEN AARON MWANYALILA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Phiri, Muyovwe, and Chinyama, JJS
10th April, 2018 and 22nd December, 2020

For the Appellants: Mrs. M. K. Liswaniso-Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. R.N. Khuzwayo-Chief State Advocate, National Prosecution Authority

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JUDGMENT

MUYOVWE, JS delivered the judgment of the court.

Cases referred to:

1. **Robertson Kalonga vs. The People (1988-1989) Z.R. 90**
2. **Nachitumbi and Another vs. The People (1975) Z.R. 285**
3. **John Mkandawire and Others vs. The People (1978) Z.R. 46**
4. **Dorothy Mutale and Richard Phiri vs. The People (1995 -1997) Z.R. 227**
5. **Bwanausi vs. The People (1976) Z.R. 103**
6. **Katebe vs. The People (1975) Z.R. 13**

7. **Crispin Soondo vs. The People (1981) Z.R. 302**
8. **Charles Lukolongo and Others vs. The People (1986) Z.R.115**
9. **Yoani Manongo vs. The People (1981) Z.R.152**
10. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
11. **Machipisha Kombe vs. The People (2009) Z.R. 282**
12. **Chizu vs. The People (1979) Z.R. 225**
13. **Sammy Kambilima Ngati Mumba Chishimba Edward and Davy Musonda Chanda vs. The People (SCZ Judgment No. 14 of 2003)**

Legislation referred to:

The Penal Code, Cap. 87, s.294 (2)

When we heard this appeal, we sat with Hon. Mr. Justice G.S. Phiri who has since retired. Therefore, this is a judgment by majority.

The appellants were tried and convicted of the offence of armed aggravated robbery contrary to Section 294(2) of the Penal Code Cap 87 of the Laws of Zambia. The presiding judge (Sharpe-Phiri J) condemned the appellants to the mandatory death sentence.

The facts were that on the 25th January, 2015 Simon Phiri (PW1) and Terry Shaloba (PW2) were working in the shop belonging to Lipo General Dealers in Lusaka's Garden Compound. PW1 was a cashier while PW2 worked as a checker. Around 11:30 hours a

Toyota Corolla car parked outside the shop. PW2 who was standing outside the door of the shop observed three men come out of the vehicle leaving the car doors open. PW2 observed that an old man remained in the vehicle. One man armed with a firearm and the other armed with an axe raided the shop. They got away with K9500 before they sped off in the Toyota Corolla at high speed. The matter was reported to the police who put up surveillance on the roads in Lusaka. The police got wind that the robbers were heading to Matero Township and they pursued them. In the process the robbers started throwing money in the air to cause confusion and derail the police chase as people rushed on the road to pick the money. In spite of this confusion, the police persisted in their chase until the robbers' motor vehicle crashed in a ditch. The police motor vehicle also fell into the same ditch. The occupants of the getaway car scampered out of the vehicle. One occupant was seen limping away and then he returned to the motor vehicle and fired two shots at the police officers. The police fired back. In the cross fire, he was gunned down and the police recovered an AK47 rifle, seven rounds of ammunition, an axe, three mobile phones and some money from the getaway car.

It was discovered upon investigation that the getaway car had two number plates placed on top of each other. The information obtained by the police from the Road Traffic and Safety Agency revealed that one of the two number plates, namely number ALV5160 belonged to a motor cycle owned by Mr. Frank Bwalya. The other number plate ALK4362 which was found to be genuine and belonged to the vehicle at issue was traced to Musonda Mutale PW4 who sold the vehicle on 26th April, 2014 to Chrispin Matambika (PW6), the elder brother to the 1st appellant herein.

According to PW6, after purchasing the vehicle, he gave it to the 1st appellant to use. It was PW6's evidence that on the material day, the 1st appellant visited his home in the morning and left around 11:00 hours. He heard about the road accident involving the getaway car and learnt that his brother had given the car to his cousin, Patrick Matambika the gunned down robber.

The 1st appellant was detained at Longacres Police Post after he went to inquire about his vehicle which as we have noted was involved in the robbery.

With regard to the 2nd appellant, the evidence from PW9 the investigations officer was that he was traced through a phone call he made to the mobile phone belonging to Patrick Matambika, the gunned down robber. The mobile phone was one of the three mobile phones recovered from the getaway car after the road traffic accident. According to PW9, the 2nd appellant was inquiring whether the deceased had survived the shoot-out with the police and he wondered what could have gone wrong "this time since they had been doing this successfully for a long time." PW9 who had custody of the mobile phone and pretended to be the gunned down robber lured the 2nd appellant into an ambush. PW9 arranged to meet the 2nd appellant at Total Filling Station situated in Mandevu Compound. It was at that meeting that the 2nd appellant was apprehended by the police.

An identification parade was conducted where PW1 and PW2 identified the 1st appellant while PW2 identified the 2nd appellant and the two witnesses were able to describe the role that each appellant played during the robbery.

The 1st appellant denied being involved in the robbery. He stated that on the evening of 24th January, 2015, his cousin Patrick Matambika (deceased) went to his house and borrowed his car, which was used in the robbery. This fact was explained to the police. The 1st appellant raised an *alibi* that he was at home from about 11:00 hours, which could be verified by his neighbour and therefore, he could not have participated in the robbery. He assailed the credibility of the identification parade on account that it was allegedly stage managed, when the police told PW1 and PW2 to identify him.

Equally, the 2nd appellant denied his involvement in the robbery. He stated that he had been introduced to the deceased Patrick Matambika by an agent in Matero Township in connection with the sale of plots in Chalala. According to the 2nd appellant, Patrick wanted to buy a plot in Chalala hence his communication on the date in question which led to his detention by police who alleged that he was involved in the robbery. On the evidence of identification, he discredited the parade as a sham because the police instructed PW2 to identify him at position number five.

The learned trial judge considered the evidence on both sides and accepted the evidence of identification given by PW1 and PW2. The Court reasoned that PW1 and PW2 had an opportunity to observe the 1st appellant as the robber who was armed with an axe during the robbery. The learned trial judge accepted that PW2 was able to identify both appellants because he was a Checker stationed at the entrance to the shop and he had the opportunity to see the 2nd appellant who remained in the getaway car. The learned trial judge found that the evidence by the two witnesses was reliable because the robbery was committed during day time and they remained consistent and unshaken even during cross-examination. The learned trial judge concluded that the evidence of identification in relation to the 2nd appellant was supported by PW9's evidence.

The learned trial judge found both the 1st and 2nd appellants to be evasive and that their defences were characterised by lies. After considering the totality of the evidence, the trial judge convicted both appellants and sentenced them to death.

Aggrieved by the decision of the lower Court, the appellants advanced four grounds of appeal as follows:

1. **The Court erred in law and in fact when it convicted the appellants based on the identification by PW1 and PW2 when the two had a short period to observe their assailants in circumstances that were marred with fear and confusion without considering the possibility of honest mistake.**

2. **The lower court erred in law and in fact when it convicted the 2nd appellant on the evidence of a single identifying witness PW2.**

3. **The lower court erred in law and in fact when it convicted the 1st appellant when there was unrebutted evidence of alibi which was not investigated.**

4. **The lower court erred in law and in fact when it convicted the appellants based on an unfairly conducted identification parade.**

On behalf of the appellants and arguing in support of ground one, Mrs. Liswaniso assailed the evidence of identification and contended that the two identifying witnesses PW1 and PW2 could not be relied upon. Counsel pointed out that the two witnesses did not have ample time to observe their assailants as the attack took less than three minutes and they were gripped with fear as the assailants were armed during the time of the attack. She submitted that three minutes is not sufficient time for PW1 and PW2 to have been able to identify their assailants after some days. She further argued that despite the attack having occurred during the day, the

assailants were strangers to the two witnesses and she opined that the identification was of poor quality and, therefore, the possibility of an honest mistake was not ruled out. Counsel relied on the case of **Robertson Kalonga vs. The People**[1] where we held that poor identification evidence required corroboration such as a finding of recent possession of stolen property. That none of the appellants was found with the stolen property and the 1st appellant gave a reasonable explanation that he had given the vehicle to his relative who was gunned down during the robbery. Counsel also referred us to **Nachitumbi and Another vs. The People**[2] and argued that the trial court having failed to take into account the possibility of an honest mistake and the traumatic factors, the appellants should be acquitted.

In ground two which relates only to the 2nd appellant, Mrs. Liswaniso argued that this was a case of a single identifying witness. She referred us to the cases of **John Mkandawire and Others vs. The People**[3] and **Nachitumbi and Another vs. The People**[2] both authorities on the evidence of a single identifying witness. She contended that there was nothing connecting the 2nd

appellant to the offence. The fact that the 2nd appellant is alleged to have called the mobile phone belonging to the gunned down robber cannot be considered as a connecting link. That the 2nd appellant explained that he was calling the deceased's phone to discuss with him about the plot he was organizing for him to purchase. It was contended that there was no proof to support the nature of the conversation between the 2nd appellant and PW9 and it was the 2nd appellant's words against that of PW9. That, therefore, two or more inferences could be drawn from the conversation: that the 2nd appellant called about the plot or as testified by PW9 that it was in connection with the robbery. Counsel submitted that the trial court went astray when it stated that the 2nd appellant should have suggested to meet the deceased at the plot and not at a filling station if indeed, he was calling about the plot. Mrs. Liswaniso urged us to adopt the more favourable inference in line with our holding in **Dorothy Mutale and Another vs. The People**[4] as well as **Bwanausi vs. The People**.[5] Counsel accused the learned trial judge of basing its findings on its own opinion and not on the facts on record.

Turning to ground three, Mrs. Liswaniso assailed the conviction of the 1st appellant on the basis that the *alibi* was not challenged or investigated and the prosecution failed to negative it. In support of this argument, Mrs. Liswaniso relied on the cases of **Katebe vs. The People**[6] and **Crispin Soondo vs. The People**[7] both on the defence of *alibi.* Mrs. Liswaniso submitted that the 1st appellant called a witness DW3 on the *alibi* whose evidence was corroborated by PW6. Counsel contended that the trial court ought to have upheld the 1st appellant's defence as there was dereliction of duty on the part of the police who failed to investigate his *alibi.*

Turning to ground four, Counsel argued that the identification parade was not conducted fairly. Mrs. Liswaniso submitted that the pictures of the identification parade clearly show that only the appellants were conspicuously dressed in shirts while the rest of the persons on the parade were dressed in t-shirts. Counsel relied on the case of **Charles Lukolongo and Others vs. The People**[8] where we held that:

> **(v) At identification parades, accused persons should not be dressed conspicuously differently from the others taking part in the parade**

Mrs. Liswaniso further relied on the cases of **Yoani Manongo vs. The People**[9] and **Ilunga Kabala and John Masefu vs. The People**[10] where this court gave guidance on the conduct of a fair identification parade. In light of the foregoing, Counsel urged us to acquit the appellants.

On behalf of the respondent, Mrs. Khuzwayo combined grounds one, two and four and submitted that the lower court rightly convicted both appellants after finding that they were both properly identified by the prosecution witnesses and that the possibility of an honest mistake in their identification had been excluded. She argued that an accused can be convicted on the evidence of a single identifying witness so long as the court has excluded the possibility of an honest mistake. It was submitted that in respect of the 1st appellant, it was sufficient that two witnesses identified him.

As regards the 2nd appellant, Mrs. Khuzwayo submitted that it was odd that this is the person who was seen by PW2 as one of the armed robbers and he ended up being the person who called the mobile phone recovered from the getaway car. According to PW9,

the caller who turned out to be the 2nd appellant was calling to find out if the owner of the mobile phone had survived the shootout. Counsel for the State contended that the evidence strengthened the evidence of PW2. She argued that the learned trial judge rightly rejected the explanation given by the 2nd appellant that he was calling the deceased because he had wanted to show him land he found for him in Chalala. Counsel contended that the learned trial judge rightly believed PW9's evidence. Relying on the case of **Dorothy Mutale and Richard Phiri vs. The People**[4] Mrs. Khuzwayo argued that the lower court, after weighing all the evidence found that it did not make sense for the 2nd appellant who wanted to show the deceased robber land he had found for him in Chalala to accept to meet at a filling station in Mandevu. She asked us to take judicial notice of the fact that Mandevu is very far from Chalala. Mrs. Khuzwayo argued that the lower court's decision to reject the 2nd appellant's explanation was proper.

On whether the identification parade was unfairly conducted, Mrs. Khuzwayo argued that the evidence suggests otherwise. Counsel contended that a close look at the pictures depicting the

parade shows that three people on the parade wore shirts at numbers four, five and nine.

In response to ground three which relates to the 1st appellant, Mrs. Khuzwayo submitted that the 1st appellant did not raise an *alibi* to account for the time the offence was committed between 11:30 to 12:00 hours and the learned trial judge was on *terra femma* for not considering it. It was submitted that there is evidence on record that the 1st appellant parted with PW6 at 11:00 hours. Counsel contended that no witness was cross examined on the whereabouts of the 1st appellant from the time he parted with PW6 and that the 1st appellant did not raise issue with PW9 the investigating officer on his whereabouts on the material day between the stated times.

In the alternative, it was submitted that should this court be inclined to find that the 1st appellant had raised an *alibi*, the same was investigated by interviewing PW6 who did not exonerate the 1st appellant. It was contended that DW3 was not conclusively certain that the 1st appellant was at home during the period in question and she merely estimated the time she thought the 1st appellant

was at home. Further, that the evidence reveals that there was a time DW3 went off to prepare lunch and could not account where the appellant was at the time and the lower court properly discounted the *alibi*.

We have carefully considered the evidence on record, the submissions by both parties and the judgment of the lower court. We propose to deal with all the grounds as they are interrelated. However, we will first consider the issue of identification as it relates to the appellants and is the central issue in this appeal. The facts which we have narrated in detail, establish that the robbery took place in broad day light when PW1 and PW2 were confronted by the robbers. These two witnesses gave the police through PW9, a description of how the robbers appeared, how they were dressed, what car they used, and the roles each one of them played during the robbery. Both witnesses identified the 1st appellant while the 2nd appellant was identified by PW2 at the identification parade.

We have examined the record and we have not seen any evidence which supports Counsel's argument that the identification

parade was unfairly conducted. The record shows that the witnesses were categorical that prior to the identification parade they did not see the appellants nor were they shown the pictures of the appellants prior to identifying them. And there is no evidence on record which suggests that the appellants were dressed in a manner that made them stand out. Further, we note that the offence was committed on 25th January, 2015 while the appellants were apprehended the following day and the identification parade was conducted two days later on the 27th January, 2015. Our view is that the memory of the identity of the appellants was still fresh in the minds of the witnesses.

With regard specifically to the 1st appellant, in addition to the evidence of identification which placed him at the scene of crime, he admitted that the vehicle used by the robbers belonged to him. It is an odd coincidence that both PW1 and PW2 identified the 1st appellant at the parade and he turned out to be the owner of the vehicle which was used in the robbery. In our view, this evidence lends support to the evidence of PW1 and PW2. **See Machipisha Kombe vs. The People**[11] where we held that odd coincidences

constitute evidence of something more which the court is entitled to take into account. We must hasten, however, to state that the evidence of PW1 and PW2 was sufficient to prove that the 1st appellant was one of the perpetrators of this crime. It is not the duration of the attack that matters but the witness' ability to identify the assailant. Two people surely cannot be mistaken as to the person they saw. In this case, we agree with the trial court that the witnesses had the opportunity to observe the robbers as the attack took place in broad daylight.

Still on the 1st appellant, Mrs. Liswaniso argued that his *alibi* was not investigated and, therefore, not negatived by the prosecution. We held in **Katebe vs. The People**[6] (cited by Mrs. Liswaniso) that:

> **"where a defence of alibi is set up and there is some evidence of such an alibi it is for the prosecution to negative it. There is no onus on an accused person to establish his alibi; the law as to the onus is precisely the same as in case of self-defence or provocation. It is a dereliction of duty for an investigating officer not to make a proper investigation of the alleged alibi."**

A perusal of the 1st appellant's defence shows that it left much to be desired and the learned trial judge questioned his credibility.

In his quest to establish his *alibi,* the 1st appellant called (DW3) a neighbour whose evidence was not precise on whether he was at home at the time the robbery was taking place. We take the view that the trial court rightly rejected DW3's evidence on this score. In fact, the 1st appellant cannot seek support from PW6 because his evidence was that they parted company around 11hours on the day of the robbery. The argument by Mrs. Liswaniso that the 1st appellant's *alibi* was not investigated or that there was dereliction of duty on the part of the police cannot be sustained as the evidence against the 1st appellant was overwhelming leaving no room for his so-called *alibi* to stand. The learned trial judge cannot be faulted for rejecting the defence raised by the 1st appellant in the face of the prosecution evidence which placed him at the scene of crime.

We find that the prosecution proved their case against the 1st appellant beyond reasonable doubt and we uphold his conviction.

Coming to the 2nd appellant who was identified by PW2, we stated in **Chizu vs. The People**[12] that:

> **"There is no rule of practice or law for the corroboration of the evidence of [a] single witness and there is nothing improper in**

allowing the conviction to stand on the evidence of one prosecution witness alone."

Further, in the case of **Sammy Kambilima, Ngati Mumba, Chishimba Edward and Davy Musonda Chanda vs. The People,**[13] we held, *inter alia*, that it is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated. In this case, the single identifying witness is PW2. His evidence was that as he stood at the entrance to Lipo General Dealers he saw the armed robbers disembark from the vehicle but an old man who turned out to be the 2nd appellant remained in the vehicle. It is, therefore, an odd coincidence that the same old man who PW2 placed at the scene of crime, should call Patrick Matambika's number to check whether he had survived the police shoot out, if indeed he was not part of the gang that robbed Lipo General Dealers on the material day. The 2nd appellant admitted calling the deceased's phone albeit, according to him, for a different issue. In the case of **Ilunga and John Masefu vs. The People**[10] 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.

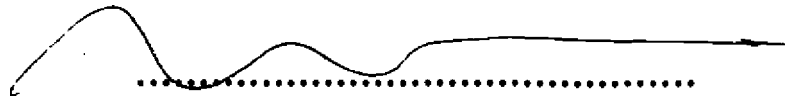
And in the case of **John Mkandawire and Others vs. The People**[3] we held, *inter alia*, that:

> **(vi) Odd coincidences can, if unexplained, be supporting evidence for an identification.**

Applying the above authorities to the case in *casu* we cannot fault the trial judge for rejecting the 2nd appellant's explanation on why he called Patrick Matambika's mobile phone. We are of the view that had the conversation between PW9 and the 2nd appellant been about the plot as alleged by the 2nd appellant, PW9 would not have bothered to lure the 2nd appellant to meet him as the topic was unconnected to the robbery under investigation. It is common cause that PW9 and the 2nd appellant were total strangers and we see no motive for PW9 to apprehend him if indeed the conversation was about the plot. We, therefore, find credence in PW9's evidence as did the learned trial judge, that the discussion between him and the 2nd appellant was about the robbery and that the 2nd appellant was correctly identified by PW2.

In conclusion the evidence against the appellants was overwhelming and the learned trial judge cannot be faulted for convicting the appellants as charged.

We find no merit in all the grounds of appeal, and we dismiss this appeal.



E.N.C. MUYOVWE
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE