

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL No. 236,237,238
239,240,241,242,243/2017

(Criminal Jurisdiction)

B E T W E E N:

**PETER KATAMPI
LUKA BANDA
MOSES MWAPE
RICHARD BANDA
DAVIES CHISENGA
THOMSON KASUBA
CHARLES SAULOSI
REAGAN CHIMFWEMBE**



**1st APPELLANT
2nd APPELLANT
3rd APPELLANT
4th APPELLANT
5th APPELLANT
6th APPELLANT
7th APPELLANT
8th APPELLANT**

AND

THE PEOPLE

RESPONDENT

**Coram: Mambilima CJ, Malila and Kabuka, JJS
on 4th May, 2021 and 21st May 2024**

For the Appellants: Mrs. S. C. Lukwesa – Senior Legal Aid Counsel – Legal Aid Board

For the Respondents: Mr. F. M. Sikazwe – Senior State Advocate – National Prosecution Authority

J U D G M E N T

Malila, CJ delivered the judgement of the Court.

Cases referred to:

1. *Kenneth Mtonga and Victor Kaonga v. The People* (SCZ Judgment No. 5 of 2000)
2. *Muvuma Kambanja Situna v. The People* (1982) Z.R. 115 (S.C)
3. *Kateke v. The People* (1977) Z.R. 35 (SC)
4. *Dorothy Mutale and Another v. The People* (1997) S. C. 51
5. *Joseph Mulenga and Albert Joseph Phiri v. The People* (SCZ No. 28 of 2008)
6. *Humphrey Daka v. The People* SCZ Appeal of 2016
7. *Timothy and Mwamba v. The People* (1977) ZR 394
8. *Jonas Nkumbwa v. The People* (1983) ZR 103
9. *David Zulu v. The People* (1977) ZR 151
10. *Nyambe v. The People* (1973) ZR 228
11. *Sammy Kambilima and Others v. The People* (SCZ Judgement No. 14 of 2003)
12. *Chabala v. The People* (1976) ZR 14
13. *George Nswana v. The People* (1988-89) ZR 174
14. *John Timothy v. The People* (1977) ZR 394
15. *Attorney General v. Marcus Kampumba Achiume* (1983) ZR 1
16. *Machipisha Kombe v. The People* (2009) ZR 282

Legislation and other works referred to:

1. *The Firearms Act, Chapter 110 of the Laws of Zambia*

1.0. INTRODUCTION AND BACKGROUND FACTS

- 1.1. When we heard this appeal, we sat with the late Chief Justice, Irene Chirwa Mambilima. Although she was in agreement with the conclusion we reached in this judgment, the decision is to be treated as one by majority.
- 1.2. The appellants were convicted by Sichinga J., as he then was, for the offences of aggravated robbery and receiving stolen

property. At the hearing of the appeal, Counsel for the 1st appellant, Mrs. Lukwesa, asked to address us. She informed us that she had just obtained fresh instructions that morning from one of her clients, the 1st appellant. The instructions were to the effect that his appeal be withdrawn. Consequently, we accepted that withdrawal and dismissed the appeal against Peter Katampi, the 1st appellant.

- 1.3. Before we could proceed to hear the substantive appeal, Mr. Sikazwe, for the State, also asked to address us. He presented before us documents indicating that the 5th and 8th appellants had passed on. Having satisfied ourselves from the documentation presented before us that the two appellants were officially recorded as having died, we declared that the appeals with respect to the two appellants abated. We then proceeded to hear the substantive appeals against the 2nd, 3rd, 4th, 6th and 7th appellants.
- 1.4. When it was tried in the High Court, the case involved an indictment with three counts. All counts related to a spate of aggravated robberies that took place on 27th September (count

one), 28th October (count three) and 19th November (count two). The robberies all took place in the year 2014.

1.5. Apparently, robbers had terrorised farms in Mkushi District in Central Province. We gather, from the evidence tendered by the witnesses in the High Court, that the robbers' *modus operandi* appeared to have been well orchestrated. They seemed not to materially depart from it at every turn. They would attack a farm in the evening armed with guns. They would then steal whatever item of value that they could lay their hands on and, if an opportunity presented itself, they would also rape female persons they would find at those farms.

1.6. The victim of the first robbery, on 27th September, 2014, was Jonathan James Cocker (PW7). He told the trial Court that while he was at Mkushi Country Club, he received a call from his Farm Manager, Evaristo Mofya (PW8), to the effect that the farm had just been robbed. Cocker stated that he was told that the guard had been tied up and some items stolen from the farm. He confirmed this when he returned home and found that even his safe had been stolen.

- 1.7. Cocker dashed to a police station while his farm workers pursued the robbers into the night. They regrettably did not catch up with the robbers. The following morning, it was discovered that some of the stolen items had been thrown in the nearby bush. The stolen safe was found open with some of Cocker's personal documents still inside but some valuables stolen from it.
- 1.8. At the trial, Cocker informed the Court that he knew the 1st appellant as he had worked for him as a cook for about four months the previous year.
- 1.9. Evaristo Mofya, the Farm Manager, confirmed that he had in fact called Cocker on the night of the robbery. He also narrated how he heard Royd Kalunga (PW9), a security guard at the farm, call out for him at night. When he got to where Kalunga was, he found that Mr. Kalunga had been tied up. Mofya untied Kalunga who later informed him that he could not identify any of the assailants. According to Kalunga, they pursued the robbers and only turned back after they were shot at by the robbers. He testified that during the pursuit a bicycle and a machete were recovered.

1.10. Another witness, Leonard Chola (PW10), stated that he had been alerted that there was a robbery at Cocker's farm. When he got to the farm, he found Kalunga being untied by Mofya. He testified that he was part of the people that pursued the robbers that night. He confirmed that the pursuit was only abandoned after the assailants opened fire.

1.11. It was Leonard Chola's testimony that at the identification parade, he could only identify four of the seven suspects. During cross-examination, he told the trial Court that the appellants had been brought to the farm for identification by armed police officers who had been guarding them.

1.12. The second robbery took place on 28th October, 2014. This time, the victim was Simon Richards (PW5). He narrated how on the fateful night three masked robbers attacked him at gun point. He was hit with a gun on his head before he was eventually tied up. The assailants managed to locate the keys to his store room. They went away with his vehicle, a generator, water pump, maize seed as well as household goods.

1.13. Richards informed the Court that after the assailants he went to a neighboring farm and called for help. He testified that his vehicle was later recovered after it had been abandoned some 5 kilometers away from the farm. He informed the Court that he was later summoned to identify some of the recovered items at the police station. It was his testimony that he identified some of his goods that were recovered by the police.

1.14. One of Richards' workers, Gertrude Chola (PW6) was also at the farm when the assailants attacked. Her ordeal was different and a lot more traumatising than that endured by Richards. She narrated to the trial court that the robbers wanted money. She went on to narrate how she was grabbed and threatened to be killed if she did not reveal where the money was. It was her testimony that she could clearly see two of the assailants that night as they carried around a torch. The two assailants later took turns in raping her.

1.15. Gertrude Chola confirmed that the robbers took several items from the store room at the farm. They locked her in the house and left. She was later freed by Richards after he

broke the door. She told the trial Court that she had seen a total of 6 assailants.

1.16. It was Gertrude Chola's testimony that the appellants had been brought to the farm by police officers for a scene reconstruction and identification parade. She testified that she was able to recognize the 3rd and 4th appellants as the ones that had been carrying a torch and took turns in raping her.

1.17. The last victim in this series of robberies was Boyd Sinkala (PW1), a shop owner. On 19th November, 2014, Sinkala had been at his home when, around 21:00 hours, he heard dogs barking outside. He narrated to the trial Court how he called out for his friend, Chilambe, but got no response. When he went outside, he met five men whom he could clearly see as there was adequate lighting around. He spoke to one of them whom he described as being of medium build and a little light in complexion. He testified that he saw one of the men holding a gun, and that a shot was fired before he could run away. He was then hit with a gun on his head.

1.18. He went on to tell the Court that the rest of the persons that had been at the farm at the time were rounded up and locked up in a room. The assailants later separated them into two groups; male and female. The appellants went away with phones and several items from the shop. According to Sinkala, they only managed to free themselves around 01:00 am.

1.19. After they freed themselves, Boyd went to a nearby farm where he informed Joseph Mulenga what had transpired. The police were called later. Sinkala testified that later that night he was given a medical report form by the police officers for use at the hospital. Some of the items stolen from his shop were later recovered in the bush.

1.20. In December, 2014 he was called by the police to identify the assailants from an identification parade. He was able to identify the 5th appellant.

1.21. Catherine Musonda (PW2) was also at the farm when the robbery took place. She testified that she too had been locked up in a room with Sinkala. Her account of what happened was that while she was sitting at the Farm with

Jane Musonda (PW4), four strangers showed up. One of them had a gun. According to her, the four strangers, had entered using the back entrance. She recollected having spoken to one of them and was able to see all four of them as the place was well lit.

1.22. She told the Court that later that night one of the assailants raped her. She described one of the assailants as a little light in complexion and of medium built.

1.23. At the identification parade she was able to identify the 3rd appellant as the one that raped her and the 5th appellant as the one she saw stealing items from the shop.

1.24. Rose Mwiinde (PW3) confirmed some of what had transpired on the fateful night, at least insofar as the fact that there was a robbery at the farm that night. She added that she was taken to one of the bedrooms by the robbers in search of money. A total sum of K3, 800.00 was found and collected by the assailants. She told the trial Court that while pointing a gun at her, one of the robbers raped her.

- 1.25.** At the identification parade she was able to identify the 3rd, 5th, 6th and 7th appellants. She identified the 3rd appellant as the one who had raped her. She also identified the gun she had seen one of them carrying.
- 1.26.** For her part, Musonda (PW4), saw a man walk in with a head sock while holding a gun. She narrated to the Court that the place was well lit. She stated that the man carrying the gun was of medium height and had a small body. She recounted how she was taken outside and raped by the 5th appellant while being threatened.
- 1.27.** Jane testified that at the identification parade she was able to identify the 3rd, 5th, 6th and 7th appellants as the assailants who had robbed the farm that night. She also identified the gun that she had seen that night.
- 1.28.** Detective Constable Ketty Nakaona (PW11) narrated to the court how she was informed that a guard had been attacked at Cocker's Farm and various items were stolen. Her investigations led to the arrest of the 1st, 2nd, 3rd, 5th, 6th and 7th appellants.

- 1.29.** She told the trial Court that the 6th appellant led the police to the 3rd and 5th appellants' houses where numerous items stolen from the three farms were recovered. According to her, the 6th appellant was arrested at the market in Nagoli Compound. She testified that it was the 6th appellant's wife who led the police to where he was.
- 1.30.** Detective Nakaona testified that the 7th appellant was apprehended at the 3rd appellant's house. According to her, the 7th appellant tried to run away upon seeing the police officers. She added that the 3rd appellant led the police to his in-law's house where more goods were recovered.
- 1.31.** It was Detective Nakaona's testimony that later, and during the course of investigations, the 1st appellant was apprehended and he assisted the police in capturing the 2nd appellant. According to Detective Nakaona, the two were living together. She added that items stolen from the farms were recovered from them. She told the Court that the 4th appellant, who had been in custody at Kapiri Mposhi police station, led to the recovery of a water pump which had been stolen from Richards' farm.

- 1.32.** The ballistics expert engaged to assist with investigations in the three robberies was Stephen Mvula (PW12). He testified that he examined a gun bearing serial number A54827. His examination revealed that the gun was in working condition.
- 1.33.** Inspector Lewis Kangwa Mwamba (PW13), testified that he conducted an identification parade in relation to the robbery at Boyd Sinkala's farm. He confirmed that Mwiinde, Kalunga, Catherine Musonda and Musonda were able to identify some of the appellants.
- 1.34.** Detective Sergeant Felix Mazuba Mukuwa (PW14) testified that he was asked to carry out investigations in relation to the robberies. Following his investigations, several items were recovered from the appellants. He told the Court that the appellants led him to the scene of the crime and they were later charged for the subject offences.
- 1.35.** PW15 was Detective Constable Masuwa. He attended to a docket involving the October, 2014 robbery. He told the court that his investigations led to the recovery of an abandoned motor vehicle belonging to Richards. He went on to state that

the appellants were apprehended and stolen items recovered from them included a revolver.

1.36. Detective Constable Samuel Masuwa recounted how the suspects performed a scene reconstruction after leading the police to the crime scene. According to him, the 1st, 2nd, 3rd, 4th, 8th appellant and one Musa Saulosi were all found with some items reported to have been stolen from the three robberies.

1.37. PW16, Deputy Constable Jimmy Sikazwe attended to the robbery at Cocker's farm. He told the Court that sometime in November, 2014, he obtained information of some recovered item from the 1st, 2nd and 3rd appellants. Some of those items were identified by Cocker. He told the Court that the appellants led him to the crime scene. Convinced that the 1st, 2nd, 3rd, 4th, 5th appellant and Saulosi had been acting together, Deputy Constable Sikazwe charged them for the subject offences.

1.38. The appellants all denied having been involved in the commission of the offences. The 2nd appellant testified that he was taken to Mkushi on suspicion that he had committed

several offences. He added that he was beaten and charged for the subject offences together with other persons. He stated that he was taken to a farm for a scene reconstruction. He denied that stolen items were recovered from his house.

1.39. The 3rd appellant stated that he had been working when he found that the 7th appellant had been picked up by the police from his home and detained. According to him, when he went to inquire why the 7th appellant was detained, he too was detained. He denied having run away from the police at any point. He also denied that a firearm was recovered from him. In his testimony, he refuted the fact that he had led the police to any of the crime scenes. With regard to the allegations of rape attributed to him, he denied them all.

1.40. For his part, the 4th appellant stated that he was apprehended with the 8th appellant and Saulosi whilst they were trespassing on a farm. Afterwards they were charged with the subject offences with all the appellants. He testified that no stolen items were recovered from him. However, he stated that the 5th appellant had been his neighbor since 2010.

1.41. The 6th appellant stated that on 19th and 20th November, 2014 he had been at his home. He initially denied knowing the 7th appellant. However, he told the court that he had travelled to Mkushi with the 7th appellant. He also admitted receiving a call from the 1st appellant.

1.42. The trial Judge, having considered the evidence before him found that the evidence in count one against the 1st, 2nd and 3rd appellants had been proved and convicted them. With respect to count two, the trial court found that there was overwhelming evidence against the 3rd, 6th and 7th appellants and equally convicted them.

1.43. In count three, he convicted the 8th appellant for the offence of receiving stolen goods contrary to section 318 of the Penal Code.

1.44. Dissatisfied with the decision of the trial Court the appellants appealed to this Court.

2.0. THE GROUNDS OF APPEAL AND THE APPELLANTS' CASE

2.1. The appellants filed the following grounds of appeal:

1. **The trial court erred in law and fact when it convicted the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th appellants in the face of**

insufficient identification by witnesses and there being doubt from the evidence of recovered items from the 1st, 2nd, 3rd, 4th, and 5th appellants.

2. The learned trial judge erred in law and fact in convicting the appellant of armed aggravated robbery in the absence of proof beyond reasonable doubt that the weapon in question was a firearm under the Firearms Act Cap. 110 of the Laws of Zambia.

2.2. Mrs. Lukwesa, for the appellants, split her arguments under ground one into two. Under that ground, she contested the identification of the 1st appellant by Cocker. She argued that Cocker was a witness after the fact and only recognised the 1st appellant because he was a former employee. According to her, Cocker's evidence did not speak to the 1st appellant being part of the robbers.

2.3. She pushed the argument on identification further and questioned how Leonard Chola was able to identify the 1st, 2nd, 3rd and 4th appellants when he did not witness the robbery.

2.4. With regard to identification under count two, Mrs. Lukwesa referred us to several portions of the testimonies at trial and contended that the appellants were not properly identified.

She argued that some of the witnesses had testified that they had seen the appellants prior to the parade at Mkushi. Further, she noted that Catherine Musonda had testified that she could not identify the person that raped her as she was continuously slapped during the ordeal. Counsel wondered how the trial Judge found that Catherine Musonda had identified the rapist.

2.5. Therefore, Mrs. Lukwesa, concluded that the identification of the 3rd, 6th, 7th and 8th appellants was flawed. She challenged the identification of the appellants on account of the fact that there was evidence on record indicating that the witnesses had seen the appellants prior to the identification parade. This, in her view, tainted the identification process. Consequently, she argued that the identification parade was a nullity. To buttress her point, she relied on our decision in **Kenneth Mtonga and Victor Kaonga v. The People⁽¹⁾** where we stated that:

The Police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

- 2.6. With regard to count 3, Mrs. Lukwesa argued that Richards told the trial Court that he was unable to identify the assailants as they wore masks. Further, she contended that Gertrude Chola had testified that she saw the appellants prior to the identification parade at the scene reconstruction when they had been taken there by the police.
- 2.7. Mrs. Lukwesa argued that Gertrude Chola was a single identifying witness. Therefore, there was room for doubting that identification on account of the possibility of mistaken identity. In a nutshell, Counsel was of the view that the question of mistaken identity cannot be ruled out. We were referred to the case of **Muvuma Kambanja Situna v. The People**⁽²⁾ where we discussed the factors that must be taken into account so as to avoid honest mistakes in identification.
- 2.8. In further challenging the identification of the appellants by Chola, Mrs. Lukwesa questioned how Gertrude Chola would have held a lamp which illuminated the assailants' faces as they stole. We were referred to the case of **Kateke v. The People**⁽³⁾ where we cautioned that the greatest care must be taken when it comes to identification of accused persons.

2.9. With regard to recoveries under count one, Mrs. Lukwesa argued that no items had been recovered in relation to that count. As regards to counts two and three, she contended that no evidence was led to show that the 7th appellant knew that the recovered items had been at the 3rd appellant's house. She contended that the 7th appellant had no knowledge of the items recovered at the 3rd appellant's house. She argued that Detective Constable Nakaona had testified that the 3rd appellant was detained at the police station after he had gone to enquire on the 7th appellant's detention.

2.10. According to Mrs. Lukwesa, this evidence fits squarely with the testimony by the 3rd appellant that he had only gone to the police station to inquire why the 7th appellant, his visitor, had been apprehended. She concluded this line of argument by adding that the items recovered at the 3rd appellants' house cannot be attributed to the 7th appellant as he had merely been visiting.

2.11. Concerning the 2nd, 3rd, 4th and 5th appellants, Counsel contended that if the court is of the view that the same were recovered from them, time had lapsed between the robberies

and the recoveries. The items were recovered on 13th November 2014, about two months after the offence in count one was committed and sixteen days after the offence in count two.

2.12. Mrs. Lukwesa argued that it was possible that the items could have changed hands making the identity of the assailants uncertain. To buttress her argument, she referred us to the case of **Dorothy Mutale and Another v. The People**⁽⁴⁾ where we held that where two or more inferences are possible, the court will adopt the inference favorable to the accused person.

2.13. Relying on the above authority, Mrs. Lukwesa argued that, in the circumstances, an inference that the recovered goods changed hands should be the appropriate inference to adopt with regard to the 2nd, 3rd, 4th and 5th appellants.

2.14. Regarding ground two, Counsel referred us to section 294 of the Penal Code which stipulates that:

- (1) Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or**

overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years.

(2) Notwithstanding the provisions of subsection (1), the penalty for the felony of aggravated robbery under subsection (1) shall be death-

(a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and-

(i) that he was not aware that any of the other persons involved in committing the offence was so armed; or

(ii) that he dissociated himself from the offence immediately on becoming so aware; or...

2.15. According to Counsel, the ingredients that ought to have been proved at trial in this case are that the appellants:

- i. were armed with any offensive weapon or instrument;
- ii. stole something;
- iii. used or threatened to use actual violence towards any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained;
- iv. used a firearm.

2.16. Mrs. Lukwesa contended that, in order to prove that there was a firearm used, it must be shown that the gun seen by the witnesses was the gun which was actually produced and that it was capable of being fired. According to her, the use of the firearm was not proved beyond reasonable doubt. To concretise her argument, she referred us to the case of **Joseph Mulenga and Albert Joseph Phiri v. The People**⁽⁵⁾ where we guided that the prosecution must adduce evidence to prove all material particulars of the offence charged beyond all reasonable doubt.

2.17. Mrs. Lukwesa argued that the State failed to prove to the requisite standard that the firearm allegedly used was a firearm within the meaning of the Firearms Act Cap. 110 of the Laws of Zambia. In her view, the evidence on record shows that there was conflicting evidence from the witnesses with regard to a gun being seen and fired. According to her, other witnesses did not testify that they heard gunshots. Therefore, she contended that one would properly infer that no gunshots were heard as this inference is favorable to the appellants.

2.18. According to Mrs. Lukwesa, the identification of a gun is not sufficient to prove the offence as there must have been evidence that the gun was in fact used in the commission of the offence. She added that it must be shown that the said gun was capable of being fired. To tie in with her analysis of the evidence, she contended that no spent cartridges were picked from the crime scene despite witnesses testifying that gunshots were fired. To support her view, she pointed us to the case of **Humphrey Daka v. The People**⁽⁶⁾ where the principle in **Timothy and Mwamba v. The People**⁽⁷⁾ was followed. In **Timothy and Mwamba v. The People**⁽⁷⁾ we stated that:

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 eye-witnesses was so capable. This could be proved by a number of circumstances even if no gun is ever found. For instance, if the gun was actually fired, the hearing of the shot and the finding of spent bullets could provide the proof necessary to bring the weapon seen within the definition of a firearm...

2.19. It was Counsel's argument that the gun recovered by Detective Constable Nakaona did not match the serial number of the gun examined by the ballistics officer, Stephen Mvula. No explanation was given for the differing serial numbers.

Counsel argued that even if the gun used in the subject offences was recovered, it was never subjected to ballistic examination. Mrs. Lukwesa referred us to the definition of a firearm under section 2 of the Firearms Act. There, a firearm is defined as:

any lethal barreled weapon of any description from which any shot, bullet, bolt or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet, bolt or other missile

2.20. The learned Counsel maintained that the recovered firearm was different from the one examined. Her conclusion was that the recovered firearms were not subjected to ballistic examination to ascertain whether or not they were capable of being fired. Further, that it was not even clear that the gun used in the robbery was the one produced in Court.

2.21. Counsel for the appellants was of the view that the evidence is not clear as to whether the gun used fell within the definition given under the Firearms Act. To buttress her point, we were referred to the case of **Jonas Nkumbwa v. The People**⁽⁸⁾ where the Court held that it was unsafe to uphold a conviction of armed

aggravated robbery where there is no direct evidence of the use of a firearm.

2.22. Mrs. Lukwesa submitted, in the alternative, that the convictions under section 294(2) of the Penal Code were unsafe and that the appellants ought to have been convicted for the offence of robbery under section 294(1) of the Penal Code.

3.0. THE RESPONDENT'S CASE

3.1. Mr. Sikazwe, for the State, argued that there was overwhelming evidence on record implicating the 1st, 2nd and 3rd appellants in relation to count one. According to him, Detective Constable Nakaona testified that certain items which were stolen from Cocker were recovered from the 1st, 2nd and 3rd appellants. Further, that the three appellants had led the police officers to the crime scene and demonstrated what their various roles were during the robbery.

3.2. The learned Counsel argued that the circumstantial evidence against the appellants was overwhelming so as to take the case against them out of the realm of conjecture. In support of this proposition, Counsel referred us to the case of **David**

Zulu v. The People⁽⁹⁾. He submitted that the appellants' conviction must be upheld as violence was used against Kalunga and property belonging to Cocker was stolen.

- 3.3. With regard to count 2, Counsel argued that there was overwhelming evidence against the 3rd, 5th, 6th and 7th appellants.
- 3.4. According to Counsel, the witnesses that testified had the opportunity to observe the assailants and properly identify them. Counsel pointed us to the evidence of Sinkala where he describes the setting for the attack. The 3rd appellant was identified by Catherine Musonda as the person that raped her. Mwiinde also identified the 5th appellant as the one that raped her after identifying his features. There was evidence that the place was well lit. Mwiinde also identified the 6th and 7th appellants and the firearm.
- 3.5. Counsel for the respondent contended that Jane Musonda placed the 5th appellant at the scene of the crime as the one who raped her and he was armed. There was evidence that the place was lit and she was able describe the 5th appellant's features. According to Counsel, she also placed the 3rd, 6th

and 7th appellants at the scene. They were also identified at the parade by Sinkala, Catherine Musonda and Mwiinde. To support this line of argument, Counsel referred us to the decision in **Nyambe v. The People**⁽¹⁰⁾ where we held that:

There is perhaps no area in which there is a greater danger of honest mistake than in the area of identification, particularly where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence, the witness should be asked to specify by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed - the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed.

3.6. The learned Counsel also contended that there was evidence by Detective Nakaona that firearms were recovered from the 3rd and 5th appellants which confirmed the testimonies by Sinkala, Catherine Musonda, Mwiinde and Jane Musonda that they saw the two appellants at the scene with firearms. According to counsel, the only conclusion from the evidence is

that the 3rd, 5th, 6th and 7th appellants were at the crime scene and committed the subject offence.

3.7. The learned Counsel contended that Richards was able to identify items stolen from the recovered items. Further, that Chola identified the 3rd and 4th appellants as the ones that had raped her. According to Counsel, there was evidence that the two appellants used a torch when stealing items from the farm. Chola also saw them when they raped her and she recognised them at the scene reconstruction.

3.8. In Mr. Sikazwe's view, the identification evidence and the recoveries from the appellants shows that the appellants committed the offences. He argued that the possibility of an honest mistake by a single identifying witness had been eliminated. He pointed us to the case of **Sammy Kambilima and Others v. The People**⁽¹¹⁾ where we stated that it is settled law that a court can competently convict on a single identifying witness provided the possibility of an honest mistaken identity has been eliminated.

3.9. Mr. Sikazwe referred us to an extract from the trial Court's judgment appearing at page J47. There, in making his finding of fact, the trial Judge states that:

in the instant case, I find as a fact that PW6 had sufficient time with her assailants. Whilst she was scared as her life was threatened with a gun, she had the opportunity with the solar lamp to see their faces as they demanded items as she was raped.

3.10. The learned Counsel urged us not to tamper with this finding of fact as it is supported by evidence. He argued that there was evidence that stolen items were recovered from the 2nd appellant and that the 2nd appellant also demonstrated the role that he played in the robberies. Counsel also called in aid the doctrine of recent possession adumbrated in **Chabala v. The People**⁽¹²⁾ where it was held that:

If a person is in possession of property recently stolen and gives no explanation the proper inference from all the circumstances of the case may be that he was the thief, or broke in to steal and stole, or was a receiver, or even, despite no explanation, cannot be said beyond reasonable doubt to be guilty...If an explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.

3.11. With regard to the inference drawn on account of recent possession, we were referred to the case of **George Nswana v.**

The People⁽¹³⁾ where the Court held that:

The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.

3.12. Mr. Sikazwe argued that the doctrine of recent possession provided something more and was sufficient to link the appellants to the commission of the offence.

3.13. With regard to ground two, Mr. Sikazwe argued that all the elements for the offence of aggravated robbery were proved to the required standard. He argued that there was evidence from Sinkala, Catherine Musonda, Mwiinde and Musonda, under count two, that the appellants were armed with guns and shots were fired at the scene. Further, that the appellants

were also identified by witnesses and stolen items recovered from some of them.

3.14. Counsel contended that some of the items recovered were guns one of which was subjected to ballistic examination by Stephen Mvula who found that the gun was in good working condition and could cause harm when fired. It fell within the meaning of a firearm as ascribed in the Firearms Act. The examined firearm was recovered from the 3rd appellant.

3.15. With regard to count three, Mr. Sikazwe contended that there was evidence that the assailants pointed a gun at Richards and hit him with it. Chola who was raped had a gun pointed at her. She identified the 3rd appellant as having been one of the robbers.

3.16. The learned Counsel submitted that what is required under section 294(2) of the Penal Code is that the offensive weapon was a firearm. He argued that there is evidence on record showing that the robbers were armed. To drive his point home, Mr. Sikazwe referred us to the case of **John Timothy v. The People**⁽¹⁴⁾ where the court held that:

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 barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot...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 eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.

3.17. In concluding his arguments, Mr. Sikazwe submitted that there was evidence of shots having been fired therefore the gun seen was capable of being fired. He urged us not to upset the findings of the trial Court.

4.0. OUR ANALYSIS AND DECISION

4.1. We have painstakingly examined the documents on the record of appeal and the submissions by counsel for the opposing sides and are grateful for their efforts.

4.2. Our perusal of the two grounds of appeal reveals that the same can be condensed in a solitary question namely: whether or not there was sufficient evidence on record to justify the conviction of the appellants for the subject offences.

4.3. We must state from the outset that the appellants, at least in the manner in which the grounds of appeal are couched and if the submission on their behalf are anything to go by, are calling upon us to exercise our very delicate jurisdiction to interfere with findings of fact made by a trial court. The cases in which we have explained how appellate courts must treat findings of fact on appeal are legion.

4.4. For example, in **Attorney General v. Marcus Kampumba Achiume**⁽¹⁵⁾ we stated that we cannot reverse finding of fact made by a trier of fact unless we are:

...satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make.

4.5. For emphasis, we must restate here that interfering with findings of fact by an appellate court is a delicate matter that requires a careful balance between respecting the trial court's role as the finder of fact. Appellate courts typically apply different standards of review to questions of law and questions of fact. While they generally give substantial deference to the trial court's factual findings, they may

exercise a less deferential standard of review for questions of law. This is because trial courts are better positioned to assess the credibility of witnesses, weigh evidence, and evaluate the nuances of each particular case.

- 4.6. While this is the case, if an appellate court finds that there is no evidence to support certain factual findings or that the findings are clearly erroneous, it may intervene to correct the error. Appellate courts have the authority to set aside factual findings that are not supported by the evidence presented during the trial.
- 4.7. For convenience, we shall consider the evidence supporting the robberies in sequence, by date. In count one, the trial Court found the 1st, 2nd and 3rd appellants guilty for the offence of aggravated robbery. The first appellant withdrew his appeal. Therefore, under count one, we shall only consider the evidence proffered against the 2nd and 3rd appellants.
- 4.8. A perusal of the judgment reveals that the trial Judge found that items stolen from Cocker were found with the 2nd and 3rd appellants. He found that a wallet and some t-shirts and a

phone belonging to Cocker had been recovered from the 2nd and 3rd appellants.

- 4.9.** We have perused the record and note that these findings are consistent with the evidence appearing at pages 23, 24 and 37 of the record of appeal. Constable Nakaona and Deputy Constable Sikazwe testified that items stolen from Cocker were recovered from the 2nd and 3rd appellants. Deputy Constable Sikazwe also confirmed that the 1st, 2nd and 3rd appellants led the police to the crime scene and demonstrated the various roles they played in the commission of the offence.
- 4.10.** We note from the record that this evidence was not challenged under cross examination. The evidence by Deputy Constable Sikazwe was supported by Leonard Chola who testified that he had seen the 2nd and 3rd appellants demonstrating the roles they played in the robbery.
- 4.11.** From the unchallenged evidence on record, we cannot fault the trial judge for concluding that the 2nd and 3rd appellants were involved in the robbery of 27th September, 2014. As rightly noted by the trial Judge, no explanation was offered

regarding how the items stolen from Crocker were found with the appellants.

4.12. Even though the 1st appellant withdrew his appeal, we note that the trial judge had found it odd that the 1st appellant had previously worked for Cocker and he was friends with the 2nd and 3rd appellants. In **Machipisha Kombe v. The People**⁽¹⁶⁾ we held that odd coincidences constitute evidence of something more and represent additional evidence the Court is entitled to take into account.

4.13. On a wholistic review of the evidence that was before the trial Court we hold that the trial Court cannot be faulted for finding that the 2nd and 3rd appellants committed the subject offence. We, therefore, find no reason to tamper with his findings under the first count.

4.14. We now turn to the robbery of October, 2014 (Count 3) involving Richards in which the 2nd, 3rd and the 4th appellants were convicted. The 2nd appellant was linked to the robbery because he was found with a file used for sharpening, a screw driver, a 15 mm spanner and a clipper. These items were identified by Richards as having belonged to him. There was

also evidence that he led the police and demonstrated his role in the robbery.

4.15. With regard to the 3rd and 4th appellants, there is evidence from Chola who told the Court that she had seen the appellants as they had demanded to be given money. She told the Court that the place was well lit as the appellants had used a torch. She later testified that both appellants raped her. At an identification parade, she would later identify the appellants as the ones that raped her.

4.16. The trial Judge justified the reliance on Chola's evidence as the only identifying witness on account that she had spent sufficient time with the assailants as they tried to look for money in the house and they had later raped her. At page J48 of his judgment, the trial Court noted that Gertrude Chola was a credible and reliable witness.

4.17. We have carefully perused the record and note that the findings by the trial Court under this count were equally supported by the evidence on the record. Detective Constable Masuwa confirmed, at pages 33 and 34 of the record the

items recovered from the appellants. These were equally identified by the victims.

4.18. Gertrude Chola whom the trial Court described as having been a credible and reliable witness also confirmed that she had seen the 3rd and 4th appellant at the farm and she had time to see them when they later raped her.

4.19. With this evidence before the trial Court, we cannot equally fault him for finding that the 2nd, 3rd and 4th appellants took part in the robbery under count three. We, therefore, find no reason to interfere with those findings.

4.20. With regard to the robbery of November, 2014 (Count 2), the trial Court found the 3rd, 5th, 6th and 7th appellants culpable. Since the 5th appellant is deceased, we will consider the evidence on record against the 3rd, 6th and 7th appellants.

4.21. The evidence on record shows that when the robbery took place under this count, the farm was well lit. This was confirmed by the witnesses that testified at trial. Sinkala testified that he had confronted five of the assailants when they attacked the farm. He even had the opportunity to speak

to one of them. Catherine Musonda also testified that she had seen the 3rd appellant and that he had raped her. Rose Mwiinde testified that she had seen the 3rd, 6th and 7th appellants on the fateful day. She too had been raped during the robbery.


4.22. The record will show that the evidence by the witnesses remained unchallenged. The witnesses had seen the appellants clearly as several of them testified that there was sufficient lighting to observe the assailants.


4.23. The second ground of appeal essentially alleges that the evidence on record was insufficient to sustain the convictions for aggravated robbery in all the three counts. In our narration of the evidence that is on record, we pointed out that under count one, the witnesses testified that they only abandoned their pursuit of the assailants when guns were fired. In ground two we noted that several witnesses saw the assailants brandishing a gun and one of the witnesses testified that a shot was fired. Under count three, we noted that Simon Richards was threatened at gun point.

4.24. In our view, the evidence of use of firearms during the robberies in each of the three counts was simply overwhelming. The witnesses at trial testified either having heard gunshots or seen the appellants wielding guns.

4.25. As we noted earlier in our judgment, our Court is extremely reluctant to tamper with findings of fact made by a trial judge. Moreso, if the findings of fact we are being asked to assail have firm rooting in the evidence before the trial Court. We think that this is not an appropriate case for this Court to upset the findings of fact made by the trial court.

4.26. The net result is that we find no merit in this appeal and we dismiss it in its entirety.


.....
Mumba Malila
CHIEF JUSTICE


.....
J. K. Kabuka
SUPREME COURT JUDGE