IN THE HIGH COURT FOR ZAMBIA **HPA/42/2017**

HOLDEN AT LUSAKA

(Criminal Appellate Jurisdiction)

KAMBWILI JUMBE

VS.

THE PEOPLE

BEFORE: THE HON. MR. JUSTICE M. K. CHISUNKA

For the Appellant: Mr. C. Siatwinda – Legal Aid Board.

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

JUDGMENT ON APPEAL

Cases Referred to:

1. ***Muvuma Kambaja Situna vs. The People (1982) ZR 115 (SC).***
2. ***The People vs. Kaambo (1976) ZR 122.***

This is an appeal against conviction and sentence. The appellant was convicted of Assault Occasioning Actual Bodily Harm contrary to section 248 of the Penal Code by the Subordinate Court

at Chirundu and was sentenced to eighteen months (18) months imprisonment with hard labour with effect from 19th May, 2017.

The appellant advances three grounds of appeal, namely:

(a) The trial Court erred in law and fact in convicting the appellant on insufficient evidence linking him to the offence in issue.

(b) The trial Court misdirected itself when it found that the appellant had assaulted the Complainant merely on the basis of a medical report without taking into account the pertinent fact that, the Complainant in the company of various unknown people, had launched an ambush against the appellant as a result of which the appellant was assaulted and had a medical report to that effect.

(c) The trial Court erred in law and fact when it sentenced the appellant 18 months imprisonment with hard labour, when the Appellant was a first offender who deserved maximum leniency coupled with the fact that the Complainant and Appellant intended to reconcile.

The background facts to the case are that the Complainant who resided in Kafue, was tipped by an informer that his wife, Angela Mulenga (PW4), who resided in Chirundu, was having an affair with the appellant. On 15th July, 2016 the Complainant (PW1) decided to go to Chirundu unannounced with a view to catch his wife in the act. He booked a taxi to Chirundu and arrived at his wife's house telling the taxi driver to park at a vantage point near the house so that he could observe what was going on. At about 18.00 hours, he heard a man's voice in the house. After about an hour he saw his wife and a man (the Appellant) come out of the

house holding hands. He recognized his wife. She kissed the man and went back in the house. The Complainant intercepted the man and asked him what he was doing with his wife. The man wanted to run away but he grabbed him by his belt and the man attacked him with a stone on his ankle. Good Samaritans came and identified the man as the appellant then he let him go. Matter was reported to the police.

The Appellant was charged in the Magistrates Court. He denied the charge and after trial the Magistrate proceeded to find the Appellant guilty as charged and proceeded to sentence him to eighteen months imprisonment.

The parties filed written submissions in this appeal. The Appellant argued grounds one and two together.

In respect of ground one and two, it was argued by Counsel that the Complainant (PW1), who had an interest to serve, was the only witness who identified the appellant as having assaulted him. Relying on the case of ***Muvuma Kambaja Situna vs. The People (1982) ZR 115 (SC),*** which held that the evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude dangers of an honest mistake, it was submitted that the evidence of PW1 needed to be corroborated. It was argued that such corroboration from a witness who had an interest to serve needed to be present because the Appellant was seemingly having an affair with the Complainant's wife and as such PW1's evidence could not be relied upon. Counsel further submitted that the Court

below did not rule out the possibility of PW1 falsely implicating the appellant arising from his belief that his wife was having an affair with the appellant.

It was further argued that none of the other witnesses called to testify saw the Appellant assault PW1. The fact that the appellant was found with PW1 screaming and injured did not in any way suggest that the appellant injured PW1. It was suggested that PW1 could have injured himself as he was trying to apprehend the appellant after seeing him coming from his wife's house. That the appellant's explanation was so logical and reasonable and had not been rebutted and it was therefore wrong for the trial Court to draw the inference of guilty as the only inference.

Regarding ground three, it was argued that it was clear from the record that the appellant was a first offender, who was in the process of reconciling with PW1, the Complainant, and this showed remorse on the part of the appellant which the Court ought to have taken into account before meting out the sentence.

It was submitted further that the evidence of the appellant was that PW1 was the aggressor in the situation and the Court ought to have exercised maximum leniency and give a lighter sentence or allow the Complainant and the appellant to reconcile as provided for under section 8 of the Criminal Procedure Code.

In response, the Respondent argued that there was sufficient evidence linking the appellant to the offence. *Firstly,* that the

appellant did not dispute the fact that he was at the Complainant's wife's house and upon leaving, he was confronted by the Complainant and as a result of the confrontation the appellant injured the Complainant in a bid to free himself. *Secondly,* that the evidence of PW1, PW3 and PW4 confirmed the presence of the Appellant at the crime scene where the Complainant was injured. The medical report also confirmed the injury.

It was further submitted that, on the strength of the above, and notwithstanding that the evidence was circumstantial, the appellate Court should find that the lower Court rightly made a finding of guilt.

Regarding the sentence of 18 months with hard labour, the State submitted that it could not be said to be excessive with due regard to the gravity of the case. Relying on the authority of the ***The People vs. Kaambo (1976) ZR 122*** where it was stated that *"for an appellant Court to substitute its own view as to an appropriate sentence for that of the trial Court is an error of principle",* it was submitted that the sentence imposed was appropriate in the circumstances of this case.

The foregoing are the arguments advanced by the parties herein.

I have considered the reasoned judgment of the Court below. In the judgment, the Court warned itself that the burden of proof lay on the prosecution to prove that:

1. the Complainant was assaulted and occasioned actual bodily harm.

2. he did not consent to the assault.

3. it is the accused who actually committed the assault.

The Court below described these as the ingredients of the offence which the Appellant had been charged with under section 248 of the Penal Code which states as follows:

> *"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years."*

And at page **J5** of the judgment the Court below observed as follows:

> *"...it is not disputed that PW4 Angela Mulenga is wife of the Complainant herein, and that on the evening of 15th day of July, 2016, the Complainant herein visited his wife herein abruptly or unannounced and met now accused coming out of his house. It is also true and a fact that as a result of the said meeting between PW1 the Complainant and accused, there was a quarrel that ensued which led to Complainant getting injured and was occasioned actual bodily harm against Complainant's consent"*

On the same page the Court went on to say:

> *"The above stated findings of facts proves two (2) ingredients of the offence charged out of the three (3) namely that, Complainant was occasioned actual bodily harm and that he*

did not consent to the assault leaving only one issue for this court's determination, namely that, is it the accused who inflicted the injury on the Complainant or not?

The Court than made a finding that the Appellant, in a bid to escape beat and assaulted the Complainant with a stone in the manner that he did and concluded that the prosecution had proved the charge beyond reasonable doubt.

I have considered the record of appeal and the submissions in this case. I am satisfied that the court below properly directed itself on what should be proved in terms of the *actus reus* of the offence. It is, however, a general principle of our criminal law that there must be as an essential ingredient in a criminal offence, some blameworthy condition of mind which is ordinarily referred to as *mens rea*. This is what is missing from the ingredients that were outlined by the lower court. The offence which the Appellant was charged with is *"assault occasioning actual bodily harm."* This begs the question what is assault?

The Digest Annoted British, Commonwealth and European cases vol.14 (2) 1993 2nd reissue on Criminal Law, Evidence and Procedure at page 137 describes 'assault' in the following terms:

"An assault is any act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal injury... today "assault" is generally synonymous with the term "battery", ...for an assault to be committed, both the elements of actus reus and mens rea should be present at the inception of the actus reus..."

In the present case, it is on record that there was a struggle of some kind between the Complainant and the Appellant. The struggle ensued when the Complainant confronted the Appellant and held him against his will, the Appellant struggled to free himself and in the process PW1 got injured.

It is clear from the record that no other witness, apart from the Complainant, saw the Appellant hit the Complainant with a stone. The Taxi driver who was present during this time and could have witnessed the struggle that ensued between Appellant and PW1 was not brought to Court to testify as to exactly what happened. Therefore, the lower court's conclusion on page **J2** of the judgment that *"Accused wanted to run away but was held by the Complainant, this prompted accused to pick up a stone and hit Complainant on his leg (right ankle) instantly shuttering the bone..."* must be treated with caution. The court's conclusion is not supported by the evidence on record and therefore wrong.

I am minded to suggest that when the Appellant was held against his will by the Complainant he tried to free himself. The attempt to escape by the Appellant must be considered to be the natural consequence of being held without consent.

It is apparent from the evidence therefore that the appellant did not intentionally assault the Complainant. The submission that there was insufficient evidence linking the appellant to the offence in issue must be qualified. Intention *(mens rea)* is a critical ingredient in a criminal offence because it underpins one of the

fundamental rule of criminal justice which requires that both elements of the offence must be present at the same time. What was insufficient is the evidence to prove intention on the part of the appellant. The Court below should have taken into account the circumstances of the case.

For the aforementioned reasons, I accept the submission that the Court below erred in concluding that the appellant used a stone to assault the Complainant. It is clear that the appellant was at the crime scene but I am minded to state that an essential element of *mens rea* on the part of the Appellant was not established. The fact that the Complainant was injured in the struggle or fracas does not establish *mens rea* or intention on the part of the Appellant to cause harm to the Complainant.

This appeal succeeds on these grounds, the conviction is quashed and sentence set aside. The Appellant is hereby set at liberty.

Delivered at Lusaka this.....day of August 2018.

REPUBLIC OF ZAMBIA
HIGH COURT FOR ZAMBIA
14 AUG 2018
JUDGE
INDUSTRIAL RELATIONS DIVISION
P.O. BOX 34009, LUSAKA

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HON. JUDGE M. K. CHISUNKA