IN THE SUPREME COURT OF ZAMBIA APPEAL NO.148/2012
HOLDEN AT NDOLA
(CRIMINAL JURISDICTION)

BETWEEN:

EMMANUEL MUNKONDYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Muyovwe, Hamaundu and Chinyama, JJS
On 4th September, 2018 and 7th September, 2018

For the Appellant: Mrs S.C. Lukwesa, Senior Legal Aid Counsel

For the State: Mrs R.N. Khuzwayo Chief State Advocate

JUDGMENT

Hamaundu, JS, delivered the Judgment of the court.

Cases referred to:

1. **Mugala v The People (1975) ZR 282**
2. **Inambao v The People (1969) ZR 84**
3. **Nyambe v The People (1973) ZR 228**

The appellant appeals against his conviction by the High Court of the offence of aggravated robbery. In the alternative, he appeals

against the sentence of 25 years imprisonment that the High Court ordered him to serve.

The appellant was charged in the court below of the said offence. It was alleged that on 30th January, 2012 at Nakonde the appellant, in the company of other persons unknown, stole from the complainant, Andrew Silwamba, a sum of K280 in cash, another sum of 30,000 Tanzanian Shillings in cash and a cell phone. It was further alleged that the appellant and his colleagues used violence on the complainant in order to steal the above items from him. The prosecution's case in the court below was presented through four witnesses. However, the conviction turned on the testimonies of only three of those witnesses. It is the testimony of those three witnesses that we shall briefly highlight.

The complainant's testimony was that, on the fateful day, around 18:30 hours, he was riding his motorbike within the compound (or township) where he resides, when he came upon an ambush laid by a group of five men and a woman. The group set upon him, beating him severely in the process. He shouted for help. This attracted a lot of people who came to rescue him. The bystanders decided to take both him and his attackers to the police.

It was at that point that the appellant checked his pockets and found that the money and cell phone were missing. He asked his assailants about the items but they denied having taken them. As the complainant and the assailants were going to the police they passed by the village headman's house, who asked what the matter was. It was then that the assailants said that they had beaten the complainant because he had bought sewing machines that had been stolen from them. The complainant agreed that he had bought the sewing machines but that he did not know that they were stolen. The complainant also complained to the headman that, in the process of beating him, the assailants had taken from his pockets the money and cell phone. He asked the headman to help him retrieve them. The headman, together with the village secretary, demanded the return of the items to the complainant. That is when one of the assailants took out the phone from his pocket. According to the complainant, that person was the appellant.

Continuing with his testimony, the complainant said that the village headman then advised them to proceed to the police. Along the way, the assailants ran away. The complainant, however,

proceeded to the police where he laid his complaint for the stolen items. Some people who had accompanied him then said that they knew where the person who had taken the phone lived. They offered to take him there. They went to that house and apprehended the appellant, whom they took to the police.

The village secretary also gave testimony as PW2. His initial testimony was that, indeed, he and the village headman did ask the complainant and the assailants what the matter was. That the assailants accused the complainant of having bought sewing machines which had been stolen from them, while the complainant complained that the assailants had taken his phone and money. When the village secretary and the headman insisted that the assailants should give back the items, only one of them took out the phone from his pocket. According to the village secretary, he was unable to identify that person. The village headman and secretary then told the group to proceed to the police.

In cross-examination, however, the witness was shown the statement that he had made to the police, whereupon he admitted that infact the matter was resolved at the headman's house, with the complainant providing his house as security should he fail to

return the sewing machines by 10th February, 2012. He also admitted that, from there, the parties just left for their respective homes; and did not proceed to the police station.

There was also the testimony of the arresting officer, PW4. This witness gave the usual account of events leading to the arrest and charge of the appellant for the subject offence. However, the highlight of the arresting officer's testimony was in cross-examination. In what appeared to be notice of what the appellant's defence would be, his counsel elicited from the arresting officer, in cross-examination, evidence of what the appellant had said during the recording of the warn and caution statement. Counsel was able to show that the appellant had told the police the following; that the complainant had bought sewing machines which had been stolen from him and his colleagues; that he, the appellant, and his colleagues, had confronted the appellant regarding the return of the sewing machines; but that the only person, among their group, who had beaten the complainant and taken the phone was a Tanzanian named Vumi.

However the defence which the appellant put forward on oath was a complete departure from what his counsel had laid as

preparatory ground. He completely distanced himself from participation in the assault; or being present where the assault took place, for that matter.

Because of the evidence which was introduced during cross-examination of the arresting officer, which evidence placed the appellant as being among the six people that confronted the complainant, the court below found that the appellant was indeed part of the group of assailants. As regards the question whether it was the appellant who surrendered the complainant's cell phone, the court below relied on the complainant's testimony that he had been standing very close to the appellant. The court also noted that the complainant had told the police, at the time of presenting his complaint, that he would be able to identify his assailants if he saw them. The court further relied on the complainant's testimony that, when his sympathizers apprehended the appellant, he immediately recognized him as one of the people who had attacked him and also as the one who had given back the phone. The court finally observed that the appellant was apprehended within about six hours. For those reasons, the court below felt satisfied that there

could not have been any mistake as to the identity of the person that was apprehended.

Having found that the appellant was part of the group that attacked the complainant; and took cash and a cell phone, the court convicted him of the subject offence and sentenced him to 25 years imprisonment.

The appellant has filed two grounds of appeal as follows:

1. **The trial court erred when it convicted the appellant without taking due consideration of the totality of the witness testimonies before him which did not prove the case beyond all reasonable doubt**
2. **The learned trial court erred in law and fact when it sentenced the appellant to 25 years imprisonment with hard labour without consideration of the circumstances of the case.**

On behalf of the appellant, learned counsel, Mrs Lukwesa, raised questions as to whether the ingredients for the offence of aggravated robbery were fully proved. In this regard, she submitted that the evidence clearly established that the assailants beat the complainant because he had bought sewing machines which had been stolen from them. She argued that the beating was not for the purpose of stealing from the complainant; and that whoever took the money and cell phone from the complainant merely took

advantage of the confusion that prevailed in order to steal. Counsel submitted therefore that the stealing in this case was mere theft.

Mrs Khuzwayo, the learned Deputy Chief State Advocate did not support the conviction for aggravated robbery, either.

We agree with both the appellant and the State that the conviction for aggravated robbery was flawed in this case. Indeed in **Mugala v The People**[1] we held:

> **"To prove a charge of aggravated robbery in terms of section 294(1) of the Penal Code, Cap. 146, it is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen".**

In that case, the appellant, who was aggrieved by his former employer's failure to pay him half a month's wages, went to the former employer's farm where he beat the night watchman and also smashed some windows to the farm house. He then took six curtains and two mattresses. We set aside the conviction for aggravated robbery because, in our view, the violence to the watchman and the farmhouse was not for the purpose of obtaining or retaining the things that he took.

In this case, it was clear from the evidence that the reason why the group of six people set upon the complainant was because

he had bought sewing machines that had been stolen from them. Therefore, whoever, would be identified to have been among those six people could be charged for the assault on the complainant; because that was the common design of that group of people. However, during the assault, one or some of them took an opportunistic step and decided to steal from the complainant in the confusion that prevailed. The theft was not the group's common design; and could not even be said to have been within the contemplation of the group's common design, as was held by the predecessor to this court, the Court of Appeal, in **Inambao v The People**[2]. Clearly, the theft and the violence were not connected; so that any person, among the group, who would be identified to be the one who had gone beyond the group's common design and stole from the complainant would only be liable to a separate charge of theft, in addition to that of assault. It is for the above reason that we concur with both sides that the conviction for aggravated robbery in this case was an error on the part of the trial court.

Now, the common position that both the appellant and the State took at the hearing of this appeal is that only a charge of assault can stand against the appellant. They both argued that a

charge of theft cannot stand against him because, in their view, the quality of the evidence identifying him as the one who returned the phone was poor.

According to the appellant, the weakness in the identification by the complainant lay in the following facts; that the complainant himself testified that the attack took place when it was a bit dark and that he was in a confused state of mind; that the complainant at the police station reported that he was attacked by a group of people whom he could identify and yet he gave no description of the clothes, stature or any general appearance of any of the persons that attacked him; that even though the complainant was said to have been taken to the home of the appellant by some people whom he even named, none of those people was called to testify. To support the foregoing argument we were referred to the case of **Nyambe v The People**[3] where we held that greatest care should be taken to test evidence of identification.

We have considered the argument.

During his testimony on oath the complainant said that, when the appellant was apprehended, he immediately recognized him as the person who had returned the phone. The complainant went on

to say that he was able to recognize the appellant because, at the time that the latter was returning the phone, he was standing next to the complainant, while the village headman and the secretary were standing in front of the appellant. In our view this is a very strong point that adds considerable weight to the complainant's evidence on this issue. It is a test that goes to the reliability of the identification. To reduce the strength or weight of that piece of testimony, there must be other evidence which seriously challenges its veracity. We do not think that the complainant's testimony that the incident took place when, in terms of daylight, it was a bit dark is sufficient to weaken it because, under those conditions, one can still see another person quite clearly, especially a person that is standing so close. Neither do we accept that the complainant's testimony that he was in a confused state weakens his evidence because that part of his testimony was in response to a question that had no bearing on the evidence of identification. We must further note that no line of questioning on this issue was pursued during cross-examination of the complainant. We also note that although that piece of testimony was nearly brought into question during cross-examination of the arresting officer, when it was

shown that the appellant had said in his statement to the police that it was a person named Vumi who had beaten and taken the phone from the complainant, the appellant's defence on oath took a different direction altogether; a direction which left the complainant's testimony on the issue unchallenged. In the end, there was no evidence on record that could cast doubt on the veracity of the complainant's testimony that he recognized the appellant as the one who had returned the phone because at that moment the appellant was standing next to him. Therefore, that identification was good and reliable. In the circumstances, we hold that the appellant was the one who returned the phone.

In view of the fact that the state does not support a charge of theft against the appellant, we have taken the liberty to examine the appellant's actions and determine whether they amounted to theft.

The ingredients for the offence of theft are set out in section 265 of the **Penal Code**, Chapter 87 of the Laws of Zambia. Subsection (1) thereof states that a person who fraudulently and without claim of right takes anything capable of being stolen is said to steal that thing. Subsection (2) states that a person who takes such thing is deemed to do so fraudulently if he takes it with the

intention to permanently deprive the owner of it. So the offence of theft is committed when a person takes a thing, coupled with the intention to permanently deprive the owner of it. In other words, the commission of the offence is complete when the *actus reas* (i.e the taking) and the *mens rea* (i.e. the intention to permanently deprive) converge, or merge. It then becomes immaterial that subsequent events compel that person to return the thing. Whether or not a person intends to deprive the owner of a thing permanently can only be deduced from the facts and circumstances in each particular case.

In this case, it was not in dispute that the appellant took the complainant's cell phone and that he subsequently handed it back. The circumstances of this case lead to the conclusion that the appellant took the complainant's cell phone with the intention of not returning it: First, the appellant took the phone secretly. Secondly, despite pleas by the complainant for anyone who had taken his items to return them, the appellant did not disclose that he had taken the phone. Thirdly, it was only after the intervention by the village headman and secretary who applied some persistent coercion that the appellant came forward and revealed that he was

the one who had taken the phone It is clear then that, at the time that he took the phone, the appellant's intention was never to return it. At that point, the offence was committed. The fact that subsequent events compelled him to surrender the phone can perhaps only go to mitigation. It is, therefore, our conclusion that the appellant was liable to be charged for theft.

All in all, we allow the appeal. We set aside the conviction for aggravated robbery and the sentence of 25 years imprisonment thereof. Instead, we substitute convictions for

(i) Theft contrary to section 272 of the Penal Code and

(ii) Assault occasioning actual bodily harm contrary to section 248 of the Penal Code

For the offence of theft, we substitute a sentence of 2 years imprisonment with hard labour. For the offence of assault we substitute a sentence of 18 months imprisonment with hard labour. Both sentences shall run concurrently, with effect from the appellant's date of arrest.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE