IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 5/2019**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E EN:

NALISA SIKOTA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Mulongoti, JJA
On 23rd April, 2019 and 23rd May, 2019

For the Appellant : Mr. Makinka Legal Aid Counsel – Legal Aid Board
For the Respondent : Ms. G. Nalugwe Deputy Chief State Advocate
National Prosecution Authority

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Mbinga Nyambe Vs. The People (2011) 246**
2. **Jonas Nkumbwa Vs. The People (1983) ZR 103 (SC)**
3. **Chansa Vs. The People (1975) ZR 136 (SC)**
4. **Kalebu Banda Vs. The People (1977) ZR 169 (SC)**
5. **Saidi Banda Vs. The People Selected Judgment No. 30 of 2015**
6. **David Zulu Vs. The People (1977) ZR 151**
7. **Wilson Masauso Zulu Vs. Avondale Housing Project (1972) ZR 172**
8. **The People Vs. Chimbala (1973) ZR 118**
9. **George Nswana v The people (1988/89) ZR 174**
10. **Mwape Kasongo Vs. The People CAZ Appeal No. 36 of 2016**
11. **Ezious Munkombwe and Others Vs. The People CAZ Appeal No. 7,8,9 of 2017**
12. **Boniface Chanda Chola v The People 1989/89 ZR 163**
13. **George Musupi v The People (1978) ZR271.**
14. **Attorney General v Kakoma (1975) ZR 212 (SC)**

15. **John Timothy and Feston Mwamba v. The People (1977) Z.R. 394 (S.C.)**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**

The Appellant was charged under **Section 294(1)** and convicted of the offence of aggravated robbery under **Section 294(2) of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence alleged that on the 20th April, 2016, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, and whilst armed with an offensive weapon, namely AK47 the Appellant did steal from Susan Clayton Carruthers 1 Samsung phone, 1 Samsung charger, 2 cameras, 2 Nikon lens, 1 Apple MacBook, 1 laptop computer, 1 iPod Touch and charger, 1 jam box classic wireless speaker, 1 leather Man pen knive, car keys, and alarm, 4 bunches of keys, 2 Irish passports, 2 British passports, 2 diamond earrings and diamond pendants and chains, 2 pairs of earrings, 1 pair of Solomon boots, 2 rack sacks, 1 handbag, 4 purses, 1 makeup bag, 1USB flash drive, 2 NRCs, 1 Zambian driver's licence and 1 certificate (University of Pretoria),

documents for Toyota Etios registration CCG 35 ZT GP and cash money of ZMK 3,000.00; 1000.00 south African Rands; 1,000 united states dollars altogether valued at K 228,600.00, and at or immediately before or immediately after stealing, did threaten or used actual violence to the said Susan Clayton Carruthers in order to overcome resistance to the property being stolen.

At trial the prosecution called 7 witnesses. Their evidence, in brief, was as follows; PW1 testified that on 19th April, 2016, she and her daughter, PW2, lodged at Maramba River Lodge in Livingstone. Around 01:15 hours, PW1 was awaken by her Daughter's screams. PW1 saw two men clad in black clothes and masks, entering their chalet. One of the assailants who was in possession of a gun switched on the light and demanded for money. She told the assailants that the money was in the bag which they had already picked up together with her cell phone, PW2 showed them where her money was.

PW1 testified that the two assailants later pointed the gun at her and demanded for her laptop. PW2 informed them that the laptop was in the bag they had already taken. Later, the assailants ransacked their suitcases and took some items. PW1 stated that as

assailants were leaving, she heard them threaten to shoot the people outside the chalet.

Shortly after the robbery, the Manager and some workers at Maramba River Lodge entered the Chalet and informed her that the robbery had been reported to the police. Further, that shortly after the incident, the Manager at the lodge gave her some of her belongings that had been recovered within the premises and at the next property.

Sometime in June, 2016 police officers at Livingstone police station called both PW1 and PW2 to go and identify some items that had been recovered. PW1 was able to identify some of her items including a Samsung galaxy phone, a Green Rack Sack and a Twist E-Cigarette.

PW2 was PW1's daughter. Her testimony was substantially similar to that of her mother, PW1.

Albert Phiri (PW3), one of the guards at the Lodge, testified that on the material day, between 23:00 hours and 01:00 hours, he was informed by a fellow guard that thieves had entered Maramba River Lodge. Shortly after he was informed of the intrusion, he heard two

gun shots. The sound came from the direction of the chalet occupied by PW1 and PW2. Thereafter, he met one of the drivers who told them that he had been injured as he tried to see what was happening at the chalet.

It was PW3's testimony that whilst in the company of Mainza, a driver at the lodge, he rushed towards the area where he thought the robbers had entered from. He saw two of the robbers. He described one as being tall and was armed. The other was short and unarmed. He was unable to see their faces. PW3 later ran towards the manager, who in turn called the security company and the police. PW3 testified that when the police officers arrived, they picked up an empty cartridge, a catapult and a razor blade at the crime scene.

Pretoria Simukunda (PW4), testified that sometime in May 2016, as she disembarked from a bus, the appellant approached her and told her that he was selling a phone at ZMW 1,500.00. The next day the Appellant approached her again. Upon informing him that she did not have that amount of money, the Appellant accepted her phone and an extra ZMW 350.00 in exchange for the Samsung phone that the Appellant sold her. A week after she bought the

phone, around 20:00 hours, police officers came to her house in the company of the Appellant. She handed over the said phone to the police officers.

PW5, Detective Inspector Kunda Mulenga, of Livingstone Central Police Station (PW5) testified that on 20th April, 2016 in the company of Detective Sergeant Mwendabai, he visited the crime scene where he recovered an empty cartridge, from an AK47 rifle, by the stairs leading to the chalet, a catapult and a razor blade. It was his testimony that he also took photographs of the crime scene and compiled a photographic album which was later admitted into evidence.

Detective Sergeant Ilitongo Mwendabai (PW6) testified that on the material day, he received a report of an aggravated robbery made by one of the employees at Maramba River Lodge. When he got to the crime scene he found PW1 and PW2 in a state of shock. Subsequently, he interviewed them. At the scene of the crime, an empty cartridge of an AK47 rifle was recovered.

On 7th June 2016, Sergeant Mwendabai received information that the Appellant had been spotted at Mbita Market. The Appellant was apprehended after he attempted to escape in a car.

PW6 testified that, following a warn and caution statement, the Appellant denied any involvement in a robbery at the lodge in question. Further, that the following items were recovered from the Appellant's house namely; an AK47 rifle with 9 rounds of ammunition, green rack sack, an apple laptop, Nikon camera with two lenses and an electric cigarette. Further, that the Appellant led them to PW4's house where the phone was recovered.

Busiku Matilda (PW7), a ballistics and forensic expert, testified that on 29th June 2016 she received, for forensic examination, a firearm bearing serial No. 8880518, nine cartridges and one exhibit cartridge picked from the crime scene. After the examination she concluded that the firearm was capable of loading and discharging cartridge of calibre 7.6 intermediary or 7.62 mm by 39. According to her expert opinion, the cartridge found on the scene was capable of being loaded and ejected from the exhibited firearm.

The Appellant, in his defence, gave evidence on oath and called no witnesses. In a nutshell, he denied any involvement in the offence in question. He testified that he was arrested as he was coming from Shoprite and believed that his arrest was in connection with an earlier assault. He denied knowledge of PW4 or leading the police to a house where items where recovered.

The trial court found that the prosecution had successfully proved its case against the Appellant and convicted him for the offence of aggravated robbery under **Section 294 (2) of the Penal Code** because a fire arm had been used. The trial court noted that the conviction was based on circumstantial evidence.

The lower court held that PW4 was not a witness with an interest of her own to serve and found her demeanour, as opposed to that of the Appellant, to be consistent with a witness telling the truth. Having been found with part of the stolen property, the trial judge considered whether PW4 was an accomplice but ruled out this possibility after finding that she was not one of the robbers. The trial Court accepted PW4's evidence, which she found credible. Consequently she found that her explanation that she bought the phone from the appellant was credible. There was no reason why

she could have falsely implicated the appellant, a person she did not previously know The trial court also considered several odd coincidences that supported the fact that the Appellant committed the offence in question.

Being dissatisfied with the decision of the lower court the Appellant raise 4 grounds of appeal couched in the following terms namely;

1. ***The learned trial Court erred in law and in fact when it failed to appreciate that other alternative inferences than that of guilty existed from the facts of the case before it.***
2. ***The trial Court erred in law and fact when it relied on the evidence of PW4 and the purported odd coincidences outlined in its judgment.***
3. ***The trial Court erred in law and in fact when it accepted and relied on the ballistic expert's opinion that the firearm recovered was the one that that was used in the robbery.***
4. ***The trial Court erred in law and in fact when it convicted the Appellant for the offence of aggravated robbery in the absence of proof that he stole the alleged items in issue.***

The Appellant filed into court heads of argument dated 9th April, 2019. It was submited that because a period of about two months had elapsed between the occurrence of the offence and the capture of the Appellant, it was possible that he merely came in to possession of stolen property. We were referred to the case of

Mbinga Nyambe Vs. The People [1] on circumstantial evidence. We were also referred to the case of ***Jonas Nkumbwa Vs. The People*** [2] where the Supreme Court held that possession of stolen goods does not always lead to an inference that the appellant participated in the robbery, unless possession is very recent such that there could have been no opportunity to pass to another person.

The Appellant contended that a period of two months having elapsed before the Appellant was apprehended, it was possible that the property would have changed hands and the Appellant could have been in innocent possession. The Appellant maintained that other inferences were possible other than that he is the one that committed the offence.

In ground 2, the Appellant contended that the fact that PW4 stated that the phone was sold to her supports the argument that it was possible for the stolen items to have changed hands. Further, that PW4 having been once in custody in connection with the robbery in issue, she had a motive to falsely implicate the Appellant. It is the Appellant's contention that PW4 did not indicate to the police officers that had been sold a Sumsung S5 but merely stated that the Appellant sold to her a Sumsung Galaxy Phone.

The Appellant submited that the holding by the court that it was odd that he did not know where the lodge in question was despite having lived in Livingstone for 4 years was unfounded as it is possible for a person living in an area not to know all the places.

It was further submited that the Defence, in the court below, challenged the fact that the Appellant had produced the key that opened the house where the stolen items where recovered from. Further, that the said key was never produced in Court. In addition, that the assertion that the key was given back to the landlord was a mere afterthought as the landlord was never called as a witness, neither was any tenancy agreement produced before court to show that the Appellant lived at the said house. Therefore there was a dereliction of duty by the police officers as they failed to investigate whether the Appellant indeed lived on a Farm or in Linda Area.

In ground 3, the Appellant argued that the ballistic expert's evidence was not reliable as there was no raw material brought before court to show how the expert came to her conclusions. None of the photographs used to analyse the pin impressions were produced at trial. We were referred to the case of ***Chansa Vs. The People*** [3] where the Supreme Court held that failure to produce test

materials by an expert witness before court is fatal. We were also referred to the case of ***Kalebu Banda Vs. The People*** [4] where the court stated that where evidence only available to the police is not brought before court it must be assumed that had that evidence been brought it would have been in favour of the accused.

The Appellant contended that the ballistic expert having testified that she had skipped some steps in her investigations, her evidence was not verifiable by independent experts. Further, that no fingerprints were lifted from the firearm.

In ground 4, it is contended that the trial court erroneously convicted the Appellant in the absence of evidence supporting the fact that he stole as stealing is one of the ingredients of the offence of aggravated robbery. Further, that there was no proof that the Appellant was one of the assailants spotted at Maramba River Lodge as the description given did not match that of the Appellant. The court was urged to allow the appeal.

The Respondent filed into court heads of argument dated 16th April, 2019. In response to ground 1, the Respondent submits that the lower court properly relied on the circumstantial evidence before

it which only pointed to an inference of guilt of the Appellant. We were referred to cases of ***Saidi Banda Vs. The People*** [5] and ***David Zulu Vs. The People*** [6] where the court discussed the nature of circumstantial evidence.

The Respondent contended that there are compelling grounds and odd coincidences supporting the conviction of the Appellant. The Respondent referred us to several odd coincidences on record which point to the fact that it was improbable that the stolen items could have possibly changed hands from the time of the robbery to the time when the items were found in the ceiling of the Appellant's house. In support of this argument we were referred to the cited case of ***Jonas Nkumbwa Vs. The People*** [2].

In regard to PW4 being a witness with interest to serve, the Respondent argued that there was no evidence that PW4 was involved in the robbery and that at trial, PW4 denied falsely implicating the Appellant. Further, that the trial court was on firm ground when it found that PW4 could not have possibly been part of the robbery as the evidence of PW1 and PW2 indicated that the assailants where both male. In addition, that the trial court rightly noted and observed that as opposed to the Appellant, PW4 struck

her as a truthful witness. The Respondent submits that the trial court rightly found that the Appellant in his defence merely made bare denials. We were referred to the case of ***Wilson Masauso Zulu Vs. Avondale Housing Project*** [7] on the issue of findings of fact made by the trial court and under what circumstances the appellate court can interfere with them.

In respect of the evidence of the ballistic expert, the Respondent argued that the findings of the expert witness as reflected in the ballistic report were conclusive. The Respondent highlighted, from the evidence on the record, that the ballistic expert had adopted the correct procedure in arriving at the findings. The Respondent submitted that the findings of the ballistic expert cannot be faulted despite not producing, at trial, the machine or photographs used in her findings. We were referred to the case of ***Kalebu Banda Vs. The People*** [4] in support of this argument.

The Respondent contended that PW7, during cross examination, stated that all steps where followed when conducting her forensic investigations. Further, that the machine she used during her examination developed a fault and that she could not obtain the photographs at the time of her examination.

It was argued that the in light of the other evidence on record the Appellant could not have been prejudiced by the failure to produce the raw materials of the analysis by PW7.

Regarding the elements of the subject offence, the Respondent stated that the same as contained in **Section 294(1) and (2) of the Penal Code** and highlighted in the case of ***The People Vs. Chimbala*** [8], were proved by the prosecution at trial. PW4 testified that the Appellant sold her the phone which PW1 and PW2 identified coupled with the fact that the Appellant led PW6 to his house where the stolen items were recovered. That this shows that the Appellant did not intend to return the stolen items. In addition, that an empty cartridge was recovered at the scene which matched the rifle recovered from the Appellant. Gunshots, on the material day were heard by PW1, 2 and 3.

The Respondent submitted that the sum total of the evidence on record coupled with the fact that the Appellant offered no reasonable explanation pointed to the fact that it was him who committed the subject offence. The court was urged to dismiss the appeal.

We have considered the appeal, the written heads of arguments, the Judgment subject of appeal and the evidence on the record. We will first determine ground two before dealing with ground one.

In ground 2, the Appellant raises the issue that PW4 was a witness with an interest to serve as she had been detained in connection with the subject offence. Further, that the trial court should not have relied on odd coincidences namely; that the Appellant was the only one that was picked up in connection with the offence and that the Appellant did not know where Maramba River Lodge was located.

The Respondent argued that the trial court found as a fact that PW4 was a credible witness as compared to the Appellant. Further, that this finding of fact ought not to be interfered with by this court. It was argued that in any event, PW1 and PW2 testified that the assailants where both male, therefore PW4 could not have been involved in the commission of the subject offence.

We have considered the evidence tendered by PW4 in the trial court. We must hasten to point out that a witness is not considered

a witness with an interest to serve merely because that witness was detained in connection with the subject offence. There must be other evidence on record to suggest that, indeed, such a witness has an interest of their own to serve.

It is trite that the evidence of a witness with a possible interest of his own to serve ought to be treated with caution by the court warning itself against the dangers of false implication etc. See the case of ***Boniface Chanda Chola v The People*** [12] and ***George Musupi v The People*** [13].

The court below did make a finding of fact as to credibility of PW4 after analysing the conflicting evidence by the Appellant and PW4 as to the Samsung phone. The court below which had the opportunity of observing the demeanor of the witnesses concluded that PW4 was more credible. In the case of ***Attorney General v Kakoma*** [14], the Supreme Court stated that;

> ***"A court is entitled to make a finding of fact where the parties advanced directly conflicting stories and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence".***

As we indicated earlier on, the trial judge did consider the fact that PW4, who was found with the stolen phone, could have an

interest of her own to serve. The Court ruled out that possibility after, among other things, finding that she was credible and had no motive to falsely implicate the appellant. The Court also found that her testimony was confirmed by the Appellant who was found with the other stolen property.

We find no basis for overturning this finding. We cannot overturn a finding on credibility because we did not have the opportunity of hearing the witness testify, which the trial judge had. We agree with the trial judge that the Appellant was found with the other stolen property supported PW4's testimony that he sold her the phone. We find no merit in this ground of appeal.

The Appellant in ground 1 argued, in a nutshell, that there were other discernible inferences to be drawn from the evidence on the record in favour of the Appellant such as the fact that the Appellant merely came into possession of stolen goods. According to the Learned Counsel, this inference is even more probable because the robbery took place two (2) months before the items were recovered.

The Respondent on the other hand contended that the circumstantial evidence on record pointed only to an inference of guilt on the part of the Appellant. Further, that there were too many odd coincidences which showed that the items could not have changed hands.

The Supreme Court in the case of ***George Nswana v The people*** [9] in discussing the issue of possession of property recently stolen or retaining as a possible inference to be drawn stated as follows;

> ***"the inference of quilt based on recent possession, particularly where no explanation is offered which might be 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 appellant cannot reasonably claim to have been in innocent possession, the question remain whether the appellant not being in innocent possession, was the thief or a guilty receiver or retainer"***

Though the Appellant argues that he might have merely come into possession of the stolen goods, in his evidence, no reasonable explanation was offered which might reasonably be true. The Appellant outrightly denied having sold the Samsung phone to PW4 or that the other stolen goods were recovered from his house. On

the above basis, we reject the argument that he merely came into possession of the stolen goods.

The law on circumstantial evidence is well entrenched in our laws and there are a plethora of authorities in our jurisdiction that give guidance as to when a trial court may convict on circumstantial evidence. See the cited cases of ***David Zulu Vs. The People and*** [6] and ***Mbinga Nyambe Vs. The People*** [5]. We have also had occasion to guide on when a court may convict on circumstantial evidence. In the case of ***Mwape Kasongo Vs. The People*** [10] we stated as follows;

> ***"...a Court may only rely and consequently convict based on circumstantial evidence if it is overwhelming such that the only probable inference is the guilt of the accused person."***

The record will show that there was evidence by PW4 that the Appellant sold her a Sumsung phone which turned out to be the one that was stolen from PW1 and PW2. Further, PW6 testified that a gun and several items that had been stolen from PW1 and PW2 were recovered from the Appellant's house. In our view, these pieces of evidence raise only one inference, that the Appellant was one of the robbers who robbed PW1 and PW2. We refer to our decision in

the case of ***Ezious Munkombwe and Others Vs. The People*** [11] where we stated that;

> ***"...when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individually."***

We are of the view that when considered as a whole, the evidence before the trial court was sufficient to convict the Appellant on circumstantial evidence. We agree with the trial court, that the only inference that could have been drawn from the evidence was that it was the Appellant that committed the offence. We find no merit in ground one.

We will consider grounds 3 and 4 together as they are interrelated. The appellant essentially argued that the ballistic report should not have been relied on by the trial Judge as PW7, the ballistic expert, did not present before court material that she used to reach her conclusions; specifically photographs that PW7 stated she used to analyse the firing pin impressions. Further, that the Appellant should not have been convicted of the offence of aggravated robbery there being no proof that he stole the items in question.

The Respondent argued that the failure to produce the raw materials before the trial court was not fatal as the findings as indicated in the ballistic report were conclusive and cannot be faulted. Further, that PW7 told the court that she followed all procedures when conducting her ballistic examination. The prosecution had proved all the elements of the offence at trial.

We have considered the arguments by the Learned Counsel under grounds 3 and 4. We are of the view that even if the ballistic report is excluded and not relied upon, there was sufficient evidence on record to prove that the appellant had committed the subject offence. There was evidence that a gun had been used in the robbery, a spent cartridge was recovered at the crime scene and PW1 and PW2 testified that they heard gunshots on the material day including the workers at the Lodge.

We are of the view that this evidence alone is sufficient for a conclusion that, indeed, a gun had been used in the commission of the offence. We are of the further view that even where no gun is found or no ballistic examination is conducted, a court may properly find that a gun had been used from other evidence available on record. We refer to the Supreme Court decision in ***John***

Timothy and Feston Mwamba v. The People [15] where the Court, in concluding that a gun capable of firing was used in the commission of an aggravated robbery, held 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 can be proved by a number of circumstances even if no gun is ever found."***

The Supreme Court further held that;

> ***"The finding of a magazine with two live rounds on the path taken by the robbers when they ran away must lead to the irresistible conclusion that the automatic weapon seen by the complainants in the hands of one of the robbers was capable of firing the live rounds found in the magazine."***

We are the view that there was sufficient evidence on record to prove that a gun was used in the robbery namely that; PW1, PW2 saw one of the assailants with a gun. PW1, PW2 and PW3 all heard gunshots, an empty cartridge of an Ak 47 rifle was recovered at the scene. In our view, this evidence was sufficient beyond reasonable doubt to sustain a conviction under **Section 294 (2) of the Penal Code, Chapter 87 of the Laws of Zambia**. We find no merit in grounds 3 and 4.

Having found no merit in all the grounds of appeal, the appeal is accordingly dismissed. The conviction and sentence by the trial court is upheld.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

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F.M. Chishimba
COURT OF APPEAL JUDGE

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J. Z. Mulongoti
COURT OF APPEAL JUDGE