

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA, KABWE, NDOLA
(Criminal Jurisdiction)

Appeal No. 37/2019

B E T W E E N:

MOSES MUTALE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Kondolo and Mulongoti, JJA

On 25th June 2019 and 19th November 2019

For the Appellant: K. Tembo, Legal Aid Counsel, Legal Aid Board
For the Respondent: K. Sitali, Acting Senior State Advocate,
National Prosecutions Authority.

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. John Mkandawire and others v The People [1978] Z.R. 46
2. Chimbini v The People [1973] Z.R. 191
3. Fawaz and Chelelwa v The People [1995-1997] Z.R. 3
4. Bwalya v The People [1975] Z.R. 227
5. Shamwana and 7 Others v The People [1985] Z.R. 41
6. Television Chibuye v The People [1978] Z.R. 48
7. Roberson Kalonga v The People [1988-1989] Z.R. 90
8. James Kunda v The People Appeal No. 235 of 2017

Legislation referred to:

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

Introduction

1. The appellant, appeared before the High Court (Mulanda J.), jointly charged with two others, with the offence of aggravated robbery, contrary to **section 294 (1) of the Penal Code**. At the end of the trial, he was convicted, while his co-accused, were acquitted. He was then condemned to suffer capital punishment.
2. He has appealed against both his conviction and the sentence imposed on him.

Background

3. The particulars of the offence alleged that on 21st August 2016, whilst acting together with others, the appellant robbed Matthews Bwalya of twelve desktop computers and one television set, the property of St. Barnabas School and at or immediately before stealing, they used or threatened to use violence to Mathews Bwalya.
4. According to the prosecution evidence, on 21st August 2016, at about 03:15 am, Mathews Bwalya who was guarding St. Barnabas Christian School, in Ndola's Pamodzi

Township, heard a noise. When he made a follow up, a medium built man, suddenly emerged and attacked him. He was hit with an iron bar and he lost consciousness. When he came around, he discovered that he had suffered cuts. He also discovered that ten computer units and one television set had been stolen.

5. He was subsequently taken to the hospital, where he received medical treatment. The doctor who treated him reported that he had suffered "cuts on head, headache and neckache".
6. The evidence of Joseph Mulenga, was that in August 2016, the appellant sold him two desktop computers. Later, in November of the same year, the appellant, in the company of police officers, retrieved the computers. There was also evidence from Fatson Chirwa, that in October 2016, the appellant's co-accused, in the court below, sold him a television set. Mathews Bwalya identified the computers Joseph Mulenga bought and the television set, as part of the property stolen, when he was attacked.
7. In his defence, the appellant denied being one of the robbers or leading the police to the recovery of the two

computers from Joseph Mulenga. He also denied selling the television set to his co-accused. He said he was in detention at the time of the robbery. Chris Boniface Mwewa, the appellant's co-accused, told the court that sometime in September 2016, the appellant sold him a television set, which he in turn sold to Fatson Chirwa.

Trial judge's findings

8. The trial judge found that the prosecution evidence proved, beyond all reasonable doubt, that there was an aggravated robbery, in which computers and a television set, were stolen. She accepted Mathews Bwalya's evidence, identifying the appellant, as one of the robbers. The trial judge also found that Mathews Bwalya's identification evidence, was corroborated by Joseph Mulenga, who bought the stolen computers from him. It was also corroborated by his co-accused's evidence, that he bought the stolen television set, from the appellant.
9. She considered the appellant's alibi, that he was in custody at the time of the robbery, and found it to be an afterthought. She reasoned that had it been the case, he would have raised it on his arrest. She also opined that

it would be an odd coincidence for him to be wrongly identified as one of the robbers, when he had sold the television set and computers, that were stolen during the robbery.

10. Following his conviction, the trial judge invoked **section 294 (2) of the Penal Code**, and imposed capital punishment. This was after finding that Mathews Bwalya, suffered grievous bodily harm, when he was assaulted with a metal bar, during the robbery.

Grounds of appeal

11. Two grounds, which are in the alternative, have been advanced, in support of this appeal. They are couched as follows:

11.1. *The lower court erred in law and fact when it convicted the appellant for the offence of aggravated robbery when the single identifying witness failed to positively identify him; and*

11.2. *In the alternative, the trial court erred in law and in fact by sentencing the appellant to death even when the court did not properly establish grievous bodily harm.*

The first ground of appeal

12. In support of the first ground of appeal, Mr. Tembo referred to the cases of **John Mkandawire and Others v The People¹**, **Chimbini v The People²** and **Fawaz and Chelelwa v The People³** and submitted that properly directing herself, the trial judge would not have convicted the appellant on the evidence of Mathews Bwalya, a single identifying witness, in the absence of corroborative evidence. The witness did not describe the appellant's features when he made the report to the police and he was exposed to the appellant at the police station.
13. Further, the testimony of Joseph Mulenga and Fatson Chirwa, could not have corroborated Mathews Bwalya's testimony, because they were witnesses with a possible interest of their own to serve. They were accomplices, having been found with stolen property.
14. In response to this ground of appeal, Mr. Sitali conceded that the identification evidence was poor, but argued that it was corroborated by the evidence of Fatson Chirwa and the appellant's co-accused. Counsel pointed

out, that there was no evidence, that these witnesses, had any reason, to falsely implicate the appellant.

Was Mathews Bwalya's testimony corroborated

15. In the case of **Bwalya v The People**⁴, the Supreme Court, held, *inter alia*, that:

"Usually in the case of an identification by a single witness the possibility of honest mistake cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence, or evidence such as distinctive features or an accurately fitting description on which a court might) properly decide that it is safe to rely on the identification."

Further, in the case of **John Mkandawire and Others v The People**¹, the same court held that:

"Usually this possibility cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence."

16. In this case, the trial judge found that the identification evidence, which was that of a single witness, was of poor quality and required supporting evidence. She found that the corroborative evidence was provided by Joseph Mulenga and Fatson Chirwa.

17. While we agree with Mr. Tembo, that these witnesses may have had a possible interest of their own to serve, their testimony can still corroborate or support Mathews Bwalya's identification of the appellant.

18. The same can be said about the evidence of the appellant's co-accused. In the case of **Shamwana and 7 Others v The People**⁵, the Supreme Court held, *inter alia*, that:

"The evidence of an accused person who testifies on oath in his own defence which is against the co-accused should only be taken into account as against the co-accused if it is corroborated or supported by something more."

19. The evidence of the appellant's co-accused, that he bought the television set from the appellant gets credence from the fact that the appellant also sold some other property stolen in the same robbery. It would be an odd coincidence, that the appellant was wrongly identified and yet he sold property stolen in the robbery, to two different people.

20. We are satisfied that the trial judge rightly found that the testimony of Mathews Bwalya, the sole identifying witness, was corroborated by the sell of property stolen

during the robbery. We find no merit in the first ground of appeal, and we dismiss it.

The second ground of appeal

21. In support of the second ground of appeal, Mr. Tembo referred to the definition of "grievous" in **Black's law Dictionary** and the case of **Television Chibuye v The People**⁶. He submitted that the injuries set out in the medical report, fell short of what would amount to "grievous harm", for the purposes of **section 294 (2) of Penal Code**.

22. In response to this ground of appeal, Mr. Sitali submitted that the injuries set out in the medical report, met the definition of "grievous harm", as is set out in **section 4 of the Penal Code**. Mathews Bwalya was hit with an iron bar, which caused injuries that were life threatening.

Was grievous bodily harm proved?

23. The Penal Code, in **section 4**, defines "grievous harm" as:

"any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely so to injure health, or which extends to

permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;"

The medical doctor who treated Mathews Bwalya, observed that he had suffered "cuts on head, headache and neckache".

24. As was pointed out in the case of **Television Chibuye v The People**⁶, which we endorse, for injury to amount to grievous harm, it must be serious injury. It must be injury to any part of the body, that either threatens health, permanently injures health, or permanently disfigures. It is the nature of the injury inflicted that matters and not the object or weapon used to inflict such injury.

25. In this case, there is no evidence of the extent of the cuts, all we know is that he suffered cuts. We therefore agree with Mr. Tembo that the evidence on record, does not support the finding that Mathews Bwalya suffered grievous harm during the robbery, the finding, is therefore set aside.



26. Further, in the case of **Roberson Kalonga v The People**⁷, the appellant was convicted of the offence of aggravated

robbery and was sentenced to death. He was not charged with the offence of armed robbery in accordance with **section 294(2) of the Penal Code**, neither did the particulars of the charge allege the use of a gun. Allowing the appeal against sentence, the Supreme Court held that it is essential, when there is an allegation of armed robbery, that an accused person is notified that he stands charged with an offence. Where such notice is not given, the accused person cannot be subjected to the death sentence. This position was reaffirmed in the case of **James Kunda v The People**⁸.

27. In this case, the appellant was charged under **subsection (1) of section 294 of the Penal Code** and the particulars of offence made no mention of the use of offensive weapon or the nature of injuries suffered by the guard. Since the subsection under which he was charged and the particulars of the offence did not alert him of the possibility of him being liable to the death penalty, the trial judge was not at liberty to impose the death penalty. This being the case, the second ground of appeal succeeds.

Verdict

28. The appeal against conviction is dismissed but the appeal against sentence is allowed. We set aside the capital punishment and, in its place, we impose a sentence of 30 years imprisonment with hard labour. It will run from 1st November 2016.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
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M.M. Kondolo SC
COURT OF APPEAL JUDGE
.....
J.Z. Mulongoti
COURT OF APPEAL JUDGE