

HP/173/2016

IN THE HIGH COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal jurisdiction)



THE PEOPLE

V

ALEX MWENDA

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN OPEN COURT
THIS 30th DAY OF DECEMBER, 2016**

For the State : Ms. P. Nyangu and Ms. Hakasenke, State
Advocates

For the accused person : Mrs. M. K. Liswaniso, Legal Aid Counsel

J U D G M E N T

CASES REFERRED TO:

1. *Timothy Daka V The People* 1977 ZR 394
2. *Jonas Nkumbwa V The People* 1983 ZR 103
3. *Humphrey Daka V The People* SCZ NO 19 of 2016

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Firearms Act, Chapter 110 of the Laws of Zambia*

The accused person in this matter stands charged with one count of aggravated robbery, contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Alex Mwenda on 7th January 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, whilst armed with a pistol did steal from Victor Mweene, one motor vehicle, namely Toyota Corolla registration number BAC 736, valued at K43, 000.00, the property of Charles Phiri, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Victor Mweene, in order to obtain, retain or prevent or overcome resistance to its being stolen or obtained.

The accused person denied the charge. The onus is upon the State to prove beyond all reasonable doubt that the accused person did commit the offence. The State called four witnesses, while the accused person gave his defence on oath, and called one witnesses.

The first witness was Victor Mweene. He testified that he used to work for Mr. Phiri as a taxi driver. That on 6th January 2016, he was working at Intercity around 22:00 hours, when he was approached by a person who asked him how much he would charge to book him to Kafue. PW1 told the Court that he told the person that he would charge him K300.00 to go to Kafue.

Further in his testimony PW1 stated that the person told him that he would give him the money in Kafue, and that he should refuel, and he would refund him. He testified that he refueled and they proceeded to Kafue, and they reached there around 23:00 hours. There the person said he was going to look for air time, and he then called PW1 to go and eat nshima. That PW1 remained in the restaurant when the person went to look for air time, and he got a Yes drink, which the person came and paid for.

He told the Court that thereafter they went to Kafue Estates, where the person disembarked from the vehicle leaving the small bag he had, and went to look for his friend. After that the person said that they go to Zambia Compound, and returned to Kafue Estates. From there they proceeded to Kafue Town and then to Lusaka, after the person said that there were no keys to the shop that he went to.

It was PW1's evidence that when they reached Lusaka the person said he needed to go to an ATM to get money, and that is how they proceeded to Protea Hotel on Cairo Road between 03:30 and 04:00 hours. He testified that the person did not find the money, and he had asked him where he lived. When PW1 stated that he lived in John Howard, the person asked that he be dropped at Makeni, and he would find his way to Kafue.

That is how they had proceeded, and at a lay bye after Embassy Police PW1 demanded to be paid the hire charges but the person said that he would so if he took him to where he was going. Then as

they proceeded past the lay by the person told him to pull up, and as PW1 was looking for a place where to stop, the person pulled the hand brake, and the vehicle slid. He then pulled a gun from the bag that was in between his legs.

PW1 testified that it was a short gun, and he did not pay attention to see how it looked, as it was around 05:00 hours, and a bit dark. PW1 left the vehicle and that is how the person drove off with his vehicle. He then called the owner of the vehicle, and informed him of what had transpired. When his boss came, the matter was reported to the police, and they proceeded with the police to the scene at ZNS in Makeni.

With regard to his capacity to observe the person, PW1 testified that there were spot lights at Intercity, so he was able to see him. Further that the person had come out of the Casino and had asked him for his phone number, stating that he was waiting for someone who was coming on a Power Tools bus. They had spoken for about ten minutes.

It was stated that even in Kafue where they had stopped at the restaurant there was light, and they were together there for about eight minutes. He identified the accused as the said person. PW1 identified the vehicle and it was marked 'ID1'. In conclusion he testified that the vehicle was a Toyota Corolla registration number BAC 736, pearl in colour.

In cross-examination PW1 stated that he met the accused person for the first time on 6th January 2016, at Intercity bus terminus. He denied having known the accused person before that date. He further denied that the accused person used to book his taxi, when he would come from Mongu where he worked for Avic.

It was his evidence that he used to drive a white vehicle before Mr Phiri employed him, and not a grey one. He denied having agreed with the accused person that he would sell him the vehicle, or that the accused person had paid him K15, 000.00, as part payment for the vehicle, and he had then given the accused person the keys for the vehicle.

He agreed that he had not identified the gun used during the robbery in court. He also agreed that it was his word against the accused person as to what had happened.

Diana Chikotesha was PW2. Her evidence was that her husband Charles Phiri had ordered the vehicle around September, 2015, being a Toyota Corolla registration number BAC 736. She confirmed that after the vehicle was registered they had given it to PW1 to drive as a taxi.

She also testified that on 7th January 2016 her husband had called her around 06:00 hours, and had told her that the vehicle had been stolen. After the matter was reported to the police they started looking out for the vehicle, and on 5th February 2016 they were on

Chibolya Road in town heading towards Comesa Market at the robots on Lumumba Road, when her husband saw a vehicle that looked like the one that had been stolen.

PW2 stated that she had suggested that she disembarks from the car to go and take a closer look at the vehicle, as it had a mark on the left side of the passenger's seat at the door, and she did. Her evidence was that she had knocked at the window of the driver's seat, and had asked for a lift up to Misisi Compound. After a few seconds the driver had responded and as the traffic was moving slowing she got inside.

She had then asked the driver if it was his vehicle, and he agreed. After that she asked to get off the vehicle stating that the person she wanted to see was behind them, and that is how she had disembarked from the vehicle. She explained that whilst she was in the vehicle she had observed that there were three discs on the windscreen, but that the vehicle had no number plate. She had taken over the driving from her husband, as her husband followed the vehicle on foot, and the vehicle turned heading towards Kafue. She followed the vehicle up to Chilanga but it disappeared, and PW2 turned back and went home.

Her testimony was that she had been with the person who drove the vehicle for fifteen minutes and she had observed him as being dark in complexion with a bit of pimples. He was of medium height and

with a slightly long beard. She identified the accused person as the said person.

PW2 testified that the vehicle was recovered on 8th February 2016. Her husband had called her and had informed her of the recovery. Later they went to the police station with the white book, and the details on the white book were compared with what was on the vehicle. The number plates for the vehicle were inside it. She identified 'ID1' as the said vehicle.

PW2 in cross examination agreed that at the time the vehicle was stolen, PW1 had not worked for them for a long time. She stated that the accused person had only allowed her into the car, after she had repeated her request to be given a lift. She also stated that she had met the accused person for the first time when she got into the vehicle. She denied that the accused person had told her that he knocking off from work, and that he had shown her his identity card.

The third witness was Charles Phiri. He is the owner of the vehicle that was stolen. He testified that the vehicle had arrived in Zambia in November 2015, after he had bought it from Japan in September 2015, at K43, 000.00. He stated that after it was registered at the Road Transport and Safety Agency (RTSA) and was given the registration number BAC 736 on 13th November, 2015, they gave it

to PW1 to start driving as a taxi, as they had known him for five years.

Then on 7th January 2016, PW1 had called him around 05:00 hours and had informed him that the vehicle had been stolen from him at ZNS in Makeni. That is how PW3 went to Makeni and found PW1 standing by the road. From there they went to Central Police and reported the matter to officer Mbao. He stated that thereafter they started looking for the vehicle. That on 5th February 2016 he was with his wife PW2 when they saw a vehicle similar to the one that had been stolen, and it had a dent on the left side of the passenger seat. Like PW2, he testified that PW2 left the vehicle and she went to that vehicle. He saw her get into the vehicle, and disembark shortly after that.

It was his evidence that she came back into the vehicle and told him that the dent was there and he should go and see it. That is how PW3 left the vehicle and went and saw the dent on the left hand side for himself. When he wanted to go and check the one on the right hand side, the vehicle was given chance to pass and it went. He stated that he chased it up to Chilanga but lost it.

Further in his evidence PW3 testified that on 8th February 2016, he was looking for the vehicle with PW1 when they saw a similar vehicle but with no number plate, on Kafue Road near the Universal church. He saw the indicator light for the vehicle indicate that the vehicle was turning to go into Downtown, and he followed it. He saw

accused person had suggested that they go to the police, after he had stopped the vehicle, and removed the keys from the ignition.

The last state witness was Joseph Mbao the arresting officer. He stated that he was on duty on 7th January 2016 between 07:00 and 08:00 hours when he received a report of aggravated robbery in which PW1 complained that he was booked from Intercity market to Kafue by a person he did not know on 6th January 2016, whilst driving a Toyota corolla vehicle registration number BAC 736. Upon their return to Lusaka in the early hours of 7th January 2016, around Makeni ZNS area, the person he had booked had produced a gun, pointed it at him, and forced him out the vehicle. The person had then sped off with the vehicle.

PW4 stated that investigations were launched and on 8th February 2016 around 19:40 hours, he was on duty when PW3 had called him and informed him that he had impounded a vehicle at Downtown shopping complex, and he was there with the person he had found driving it. It was stated that PW4 and the crew rushed there and the suspect, and the vehicle were rushed to Central police. PW4 testified that he searched the vehicle and found the two number plates, BAC 736 in the boot of the car, and the fitness and road tax discs bearing the same number plates BAC 736 in the front compartment of the car.

He then interviewed the suspect over the matter who told him that he had bought the vehicle, but he failed to provide documentation

to that effect. The suspect was charged with the offence of aggravated robbery, and under warn and caution in English language, he gave a free and voluntary reply denying the charge. He produced the exhibits in evidence and they were marked 'P1' to 'P6'. He also identified the accused person as the person that he charged and arrested.

PW4 when cross-examined stated that he went with PW1 to the crime scene. However he could not get any information from people around that area. He denied that the accused person had told him that he had bought the vehicle. He testified that he did not recover any firearm from the accused person, but agreed that the accused person told him that technical operator/ driver.

It was his testimony that no medical report was issued to PW1, and that a search of the bag that the accused person had did not reveal that he had any offensive weapons. It however had his grade 9 and 12 school results, references from ZESCO and Avic, two handwritten letters, his national registration card and ATM card. He stated that there were no payslips in the bag.

The accused person in his defence testified that sometime in November 2015 he had arrived at Intercity bus terminus from Ndola when he met Victor Hamusonde Mweene, a taxi driver and booked his vehicle. Victor was driving a grey Toyota corolla, and he dropped him at City market, so that he could board a bus to Kafue.

He stated that some weeks later he returned to his workplace in Mongu and was asked to take a two tonne crane to Ndola for service. As he was told that the service would take time, he asked for permission to go and visit his family in Kafue, and it was granted.

It was his testimony that he reached Intercity bus terminus at around 20:00 hours and he found Victor driving a different Toyota Corolla, which was pearl in colour, and was unregistered. Victor had told him that the vehicle was his and he was selling it. He stated that Victor showed him the clearance papers for the vehicle, and the accused person had told him that they would conclude the deal when he returned after two weeks. That is how the accused person had left for Mongu and returned during the industrial break and did some piecework.

On 6th January 2016 he had arrived at Intercity bus terminus and met Victor around 16:00 hours. They went together to Kafue after refueling and accused drove the vehicle to test drive it. He stated that they reached Kafue at about 20:00 hours and there at a restaurant Victor offered him to buy the vehicle at K30, 000.00. He however negotiated the price down to K25, 000.00, and said that he would make a down payment of K15, 000.00.

Further in his defence, the accused person stated that he had only K10, 000.00, and he suggested that he looks for the balance. That is how they went to Zambia Compound to look for his friend around

Then on 8th February 2016, a man had approached him when he was at Downtown shopping complex with the vehicle. The man had opened the window and removed the keys from the ignition, stating that the vehicle was his, and that it was stolen a month earlier. He testified that he had explained that he had bought the vehicle, and when the tension mounted, he had suggested that they go to the nearest police station. The person had refused, and he had called the police who arrived five minutes later. The accused person was kicked by a police officer on his chest and he fell down. He was asked to raise up his hands and open his mouth. A gun was put in his mouth, and his tooth was broken in the process.

From there he was taken to the police station, and was asked where he got the vehicle from. The police officers also asked to give them the gun he had used in the robbery. That Victor came and was asked if he knew the accused person, and vice versa. Then Victor was asked to go out when he agreed. It was the accused person's testimony that he denied having stolen the vehicle or owning a gun. He testified that he had explained that the sale agreement was in the bag he had, and that PW5 had read it.

He made reference to a sale agreement for a Toyota Spacio vehicle being typed, and he also stated that the sale agreement between himself and Victor was handwritten. That Victor had denied knowing him. He stated that he did not tell PW5 that he had bought the vehicle from Victor.

The accused person in cross examination testified that he knew Victor prior to the 6th of January 2016, but that he did not have proof to that effect. He agreed that most taxi drivers drive vehicles that they do not own. He told the Court that the vehicle was unregistered at the time. He agreed that he was found with the number plate, and the road tax and fitness discs for the vehicle on 8th February 2016, which show that the vehicle was registered on 13th November, 2015. He however maintained that Victor had told him that they were documents for the vehicle that was involved in an accident.

With regard to the documentation that Victor had showed him for the vehicle, the accused person in cross examination stated that they were in Victor's name, but that Victor had kept them pending him paying the balance. He also told the Court that he first met Victor in November, 2015.

He also testified that the evidence that he had K10, 000.00 which he paid Victor was on the petty cash vouchers that he signed after his employer paid him for ferrying the truck and for ration, and that they were in his bag that PW5 had searched.

DW2 was James Maona. He told the Court that on 6th January 2016, he had received a phone call from the accused person around 22:00 hours and he asked him to lend him K5, 000.00, so that he pays it as a deposit for the vehicle he wanted to buy. DW2 testified that the accused person had gone to the house driving the vehicle

and he was with a friend. That after DW2 gave the accused person the K5, 000.00, and he left saying that he was coming to Lusaka.

He stated in cross examination that he does freelance IT work and he and the accused person lend each other money. He agreed that the accused person is his very good friend, and that he would not be happy to see him go to jail.

I have considered the evidence. It is a fact that PW3 is the owner of the Toyota corolla registration number BAC 736. It is also a fact that after the vehicle was registered on 13th November 2015, PW3 gave it to PW1 as drive as a taxi. It is further a fact that PW1 reported that the vehicle was stolen from him on 7th January, 2016. It is a fact that the accused person was found with PW3's stolen vehicle on 8th February, 2016.

The question is whether it has been proved beyond all reasonable doubt that the accused person did commit the offence of aggravated robbery?

Aggravated robbery is defined in Section 294 (1) of the Penal Code, Chapter 87 of the laws of Zambia as;

“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”.

Section 4 of the Penal Code defines an offensive weapon as

“any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article.

In terms of the penalty on a conviction for aggravated robbery, Sections 294 (2) (a) and 294 (3) of the Penal Code provide as follows:

“(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.”

(3) In this section “Firearm” has the meaning assigned to it in section two of the Firearm Act.”

Section 2 (a) of the Firearm Act, cap. 110 defines a firearm as follows:

“(a) 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.”

Therefore in order for the accused person to be convicted, it must be proved that the accused was either armed with an offensive weapon or instrument, or that whilst he was together with one or more persons stole the vehicle from PW1, and at or immediately before or immediately after the time of such stealing did threaten to use violence or did use actual violence in order to obtain or retain or prevent or overcome resistance from its being stolen or retained.

The evidence of PW1 was that the accused person took out a gun and threatened him with it, and thereafter forced him out of the vehicle, then he drove off with it.

The accused person denied stealing the vehicle stating that PW1 had in fact sold him the vehicle. His evidence was that PW1 offered to sell him the vehicle on 6th January 2016, and he was handed over the vehicle the next morning on 7th January 2016, after the two returned from Kafue. That PW1 told him to keep the vehicle until 10th February 2016, when he would pay the balance.

He also testified that PW2 asked for a lift on 5th February 2016, and he was apprehended with the vehicle on 8th February 2016. Where an accused person raises a defence the onus is upon the prosecution to disprove that defence. PW5 testified that PW1 made a report of the theft of the motor vehicle on 7th January 2016 between 07:00 and 08:00 hours, and that thereafter he had visited the scene with PW1.

PW2 and PW3 testified that they saw the accused person driving the vehicle on 5th February 2016, and PW2 had actually asked the accused person for a lift. The evidence of PW5 was that on 8th February 2016, PW3 had detained the accused person with the vehicle at Downtown shopping complex until PW4 went and apprehended him.

The evidence regarding the occurrence of the events as stated by the prosecution witnesses is basically the same as what the accused person stated in his defence. The only difference is that PW1 reported that the vehicle was stolen on 7th January 2016, while the accused person testified that PW1 sold him the vehicle. PW5 testified that when the accused person was apprehended with the vehicle, it had no number plate at the time. He had searched it and found the number plates for the vehicle, as well as the road tax and fitness certificate bearing the same number BAC 736, as on the number plates.

The accused person's explanation for possessing the number plates and the discs was that PW1 had given them to him to keep until he paid the balance. PW1 had told him that they were for the vehicle that had been involved in an accident. The question that arises is whether this defence by the accused person raises reasonable doubt so that it can be said that he did not steal the vehicle, but bought it, and is therefore not guilty of the offence?

In my view this explanation does not raise any reasonable doubt, for to begin with, if indeed PW1 had sold the vehicle to the accused person, the accused person would not have been found with the number plates and discs for the vehicle, not displayed but inside the vehicle. The explanation that they were for the vehicle that was involved in the accident is without merit, for if they were for the said vehicle that was involved in an accident, they had nothing to do with the vehicle that the accused person was allegedly sold, and consequently there was no basis for keeping them.

What the accused person should have been found with were documents pertaining to the sale of the vehicle to himself, as the vehicle had no number plate and tax and fitness certificates, and such documents would have pointed to his legitimate possession of the said vehicle, in the event that he was asked how he came to possess it, as was the case in this matter.

Further when PW1 was cross examined he was not asked on the sale agreement that he is alleged to have authored and signed with the accused person. He was also not cross examined on whether indeed he had given the number plates and the discs for the vehicle to the accused person to keep until he was paid the K10, 000.00 balance. PW1 was further not cross examined on the allegation that he was paid K15, 000.00 as part payment for the vehicle.

If truly PW1 had sold him the vehicle, all these issues would have been raised in cross examination. It was not sufficient to just merely allege that the accused person had bought the vehicle but demonstrate so, in order for the defence to stand.

The accused person in his cross examination of the state witnesses, and in his defence had alleged that he had known PW1 prior to the incident. Evidence of his knowing PW1 on its own is not sufficient to prove that he bought the vehicle from him, as it is possible that one can steal from someone that they know.

It is therefore my finding that the defence that the accused person had bought the vehicle has not been successfully raised, and that it was just an afterthought. The evidence shows that the accused person was found with PW3's vehicle after PW1 reported it stolen. In fact the accused person did not deny that he was found with it. His defence which has failed, was that he bought it from PW1.

PW1 testified that the accused person had pointed a gun at him and had told him to get out of the vehicle. That is how the accused person stole the vehicle. The allegation by PW1 reveals that the accused was armed with an offensive weapon when he threatened PW1 in order to steal the vehicle. This amounts to aggravated robbery. The evidence shows that the said firearm was not used. The accused person denies having used a firearm to commit the offence. It is PW1's word against the accused person, and the question is one that will be resolved on the basis of credibility.

In the case of **HUMPHREY DAKA V THE PEOPLE SCZ NO 19 of 2016** the Supreme Court held that a conviction for armed aggravated robbery cannot stand in the absence of evidence to show that the gun used during the robbery was a firearm within the meaning of the Firearms Act. Reference was made in that case to the cases of **TIMOTHY DAKA V THE PEOPLE 1977 ZR 394** and **JONAS NKUMBWA V THE PEOPLE 1983 ZR 103** where the said principle was stated.

In the case of **JONAS NKUMBWA V THE PEOPLE 1983 ZR 103** it was stated that;

“there was no direct evidence of the use of firearms as they had not been fired nor were they subsequently found and tested to be firearms within the meaning of the Firearms Act. As Mr. Mwanachongo properly observes, they may have been imitations. In the premises we find

that it would be unsafe to uphold a conviction on charge of armed aggravated robbery. We quash the conviction for that offence and in its place we substitute a conviction for ordinary aggravated robbery”.

In this case the only evidence to the effect that the accused person was armed with the gun when he stole the vehicle from PW1 came from PW1 himself. As already seen, there is no evidence to the effect that the gun was fired, so that it can be said that it was a firearm, within the definition in the Firearms Act. Further no gun was recovered that would have enabled the police test it, and establish that it was indeed a firearm as defined in the Firearms Act.

Therefore it is PW1's word against the accused persons. The evidence on record shows that PW1 was alright with no injuries when PW3 found him. This is consistent with PW1's testimony that the accused person just pointed the gun at him, and forced him out of the vehicle. Thus it would not be expected that PW1 would present with any injuries, as there was no physical violence exerted on him.

There is nothing about the demeanour of PW1 to doubt his testimony, and his evidence was not shaken in cross examination. On that basis, I believe his evidence that the accused person threatened him with a gun, and then drove off with the vehicle. The

offence of aggravated robbery is complete, as the accused was armed with an offensive weapon when he stole the vehicle.

However the gun used by the accused person to threaten PW1 could have been an imitation gun, and as such there is no proof that the gun used was a firearm within the meaning of the Firearms Act.

I accordingly find that the offence of armed aggravated robbery has not been proved but what has been proved is aggravated robbery and I accordingly find that the State has proved their case beyond all reasonable doubt and I find the accused person **GUILTY** as charged and I **CONVICT** him accordingly.

DATED THE 30th DAY OF DECEMBER, 2016

Kaunda

**S. KAUNDA NEWA
JUDGE**