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IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO.10,11/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E EN:

KELVIN MWINGA	**1ST APPELLANT**
APHIAS MUCHINDU	**2ND APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

CORAM : Mchenga DJP, Chashi and Chishimba, JJA
On 7th March, 2017, 9th March, 2017 and 16th March, 2017

For the Appellant : Mr. Chavula – Senior Legal Aid Counsel – Legal Aid Board
For the Respondent: Ms. Nyangu – State Advocate - NPA

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Chabala Vs. The People (1975) ZR 98**
2. **Saluwema Vs. The People (1965) ZR 4 (CA)**
3. **The Minister of Home Affairs ,The Attorney General Vs. Lee Habasonda Suing on His Own Behalf And On Behalf Of The Southern African Centre For The Constructive Resolution Of Disputes(S.C.Z Judgment Number 23 of 2007)**
4. **Muyunda Muziba and Ilutumbi Sitali Appeal number 212 /2012**
5. **Muvuma Kambanja Situna Vs. The People (1982) ZR 115**
6. **Ahamed Ali DharamsiSumar Vs. R (1964) E.A. 481**
7. **Sikota Wina and Princess Nakatindi Wina Vs. The People (1996) S.J. (S.C.)**
8. **Kenmuir Vs. Hattingh (1974) Z.R. 162 (S.C.)**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
3. **The Court of Appeal Act No. 7 of 2016**

This is an appeal against the judgment of the High Court convicting the Appellants on 4 counts of the offence of Aggravated Robbery contrary to **Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia.**

The particulars of the offence are that, on the 29th of March 2011 at Livingstone the appellants being armed with an offensive weapon namely a pistol did rob George Katapazi and Maureen Hamainza at Vuma Filling station,

The brief facts of the prosecution's evidence by PW1, PW2, PW3 and PW4, employees of Vuma Filling Station, was that the 1st and 2ndAppellants whilst armed with a pistol robbed the filling station on 29th March, 2011 in Livingstone. The Appellants stole two cell phones and cash in excess of ZMW 5, 000.00. The Appellants threatened to use actual violence in order to overcome resistance.

The witnesses stated that the Appellants were armed with a gun, which they had threatened them with by pointing the firearm at them and shooting through the glass door. This forced the

employees inside the station office to open the door. In addition, the witnesses were forced under the table and one of the intruders got the key and opened the safe.

We will not recite the entire evidence of PW5, 6, 7, 8 and 9 for reasons that will become obvious later.

In their defence the 1st and 2nd Appellants denied being involved in the robbery.

The trial Court, found that the prosecution had proved its case beyond reasonable doubt and convicted the Appellants.

Being dissatisfied with the Judgment of the trial Court the Appellants appealed against conviction and advanced three grounds of appeal namely;

1. **The learned trial judge erred and misdirected herself both in law and fact when she failed to fully analyze and evaluate the evidence on the record before convicting the Appellants.**
2. **The learned trial Judge erred and misdirected herself in both law and fact when she found that the Appellants are the ones who attacked Vuma Filling Station armed with a**

firearm when in fact the identification of the assailants at Vuma Filling Station was not safe and unsatisfactory.

3. **The learned trial judge erred and misdirected herself both in law and fact when she neglected to either consider or comment on the explanations given by the Appellants in their defence when such explanations were reasonably possible.**

The Appellants filed into Court heads of arguments dated 7th March, 2017. We will only address grounds one and two. In ground one, the gist of the Appellants' argument is that the Judgment of the lower Court was scanty and did not reveal the trial Court's reasoning in arriving at the decision to convict the Appellants. Further, that the learned trial judge did not sufficiently evaluate or analyse the evidence before her.

The arguments advanced by the Appellants in ground three are similar, in substance, to those advanced in support of ground one. It was contended that the Court misdirected itself when it failed to generally consider the explanations given by the Appellants. Our attention was drawn to the decision of the Court in ***Chabala Vs. The People*** [1], where the Supreme Court held that there is no onus for an accused person to prove his explanation. We were

further referred to the case of ***Saluwema Vs. The People*** [2] where the Court stated that where an accused person's explanation is reasonably possible then a reasonable doubt exits.

Mr. Chavula, Counsel for the Appellants, advanced additional *viva voce* submissions at the hearing of the appeal which in substance were a repetition of the written heads of arguments on record. The learned Counsel submitted that this is not a proper case for the Court to order a retrial owing to the irregularities inherent in the trial Court's Judgment. We were urged to allow the appeal, quash the conviction and set the Appellants at liberty.

The Respondent filed heads of arguments dated 9th March, 2017. In response to ground one, the Respondent conceded that the trial Court's judgment was indeed scanty and did not show the reasoning of the Court in arriving at its decision.

However, the Respondent was of the view that there was overwhelming evidence against the Appellants proving beyond reasonable doubt that the Appellants committed the subject offences. The Respondent urged the Court to consider the evidence of all the prosecution witnesses in determining the appeal as the Appellants would not be prejudiced.

The Respondent urged the Court to dismiss the Appellants' appeal for lack merit.

We have considered the appeal before us, the Judgment of the lower Court, the evidence adduced as well as the authorities cited and the submissions by the Learned Counsel.

The Appellants have raised a number of issues in the grounds of appeal namely, the judgment of the court below, the issue of identification, credibility of witnesses and corroboration. We are of the firm view that the cardinal issue relates to the actual judgment of the learned Judge.

The appellant contends that the judgment of the lower court was scanty and devoid of any analysis as to how the court below had arrived at the conviction as there were no findings of fact made.

We have perused the judgment of the learned Judge in the court below. We find it imperative to reproduce the three paragraphs of the analysis made by the trial Court. The trial Court in its judgment stated as follows and we quote;

> ***"I have carefully considered the evidence on record given by the prosecution witnesses and the Defendants. I found that the evidence of the witnesses was clear and consistent and that it met the required standard. Recognising the danger of wrongful conviction and the need not to fill in any gaps whatsoever in***

favour of the prosecution, I still find that A1 and A2 did commit the offences charged.

I believe that A1 and A2 are the same persons who attacked Vuma Filling Station armed with a firearm on the night in question and that their apprehension by the police was not a mere coincidence.

I therefore find them guilty as charged and convict them accordingly."

It is trite that a Judgment of a trial court must contain points for determination, the decision and the reasons for the decision. We refer to **Section 169 (1) of the Criminal Procedure Code** which stipulates as follows;

"(1) The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."[Our Emphasis]

In the case of ***The Minister of Home Affairs ,The Attorney General Vs. Lee Habasonda Suing on His Own Behalf And On Behalf Of The Southern African Centre For The Constructive Resolution Of Disputes*** [3] the Supreme Court held that;

"Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made,

findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts".

The cardinal issue in our view is whether the judgment of the learned trial Court met the criteria of a judgment as stipulated in **Section 169(1) of the Criminal Procedure Code**.

We are of the firm view that the judgment subject of the appeal did not meet the criteria of what a judgment must contain. We find that there was no review of the evidence adduced in the court below by the Judge, no findings of fact were made and there was no reasoning of the court on the facts. There was equally no application of the law to the facts. In addition, the court below did not make any findings as to the issues of credibility of witnesses apparent in the conflicting evidence of the witnesses. An appellate court cannot be turned into a fact finder. We would be unable to tell whether there were any findings of fact made on the demeanor of witnesses, including the accused persons.

We refer to the case of ***Muyunda Muziba and Ilutumbi Sitali*** [(4)] where the judgment of the court below was missing from the record of appeal, the Supreme Court stated that;

"There are a number of previous decisions that this Court has made which clearly show how important a judgment of a trial Court is to the entire life of a criminal case.

They went on to refer to the earlier Supreme Court decision of ***Muvuma Kambanja Situna vs. The People*** [5] where it was stated that;

> ***"A Judgment of the trial Court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited".***

Having found that there was no review and findings made by the court below, the next issue to be considered is whether the conviction was safe or whether the interest of justice requires that the matter be sent back for trial?

Counsel for the appellant contended that we quash the conviction and set the appellants at liberty. Whilst the Respondent contended that despite the judgment not having made proper findings and review of evidence, there was ample evidence beyond reasonable doubt proving the appellants had committed the offences.

The principles for ordering a retrial were considered in the case of ***Ahamed Ali Dharamsi Sumar Vs. R*** [6] in which the appellant challenged a retrial order issued by the High Court. The Court of Appeal of East Africa held:

> ***"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be***

made when the interests of justice require it and where it is likely not to cause injustice to an accused."

We further refer to the Supreme Court case of ***Sikota Wina and Princess Nakatindi Wina Vs. The People*** [7] where the issue of a retrial was considered and it was held that;

"A re-trial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interests of justice..."

It is trite that in general a retrial will be ordered by the appellate court in certain circumstances such as when the original trial was defective or it is in the interest of justice. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial. Whether or not a retrial should be ordered depends on the facts and circumstances of each case and such an order should only be made where the interests of justice require it.

The power to order a retrial is conferred on this Court by **Section 16 of the Court of Appeal Act** which provides that;

"The Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered or, if the interest of justice so require, order a new trial."
[Our emphasis]

In the case of ***Kenmuir Vs. Hattingh*** [8] the Supreme Court stated that;

> ***"An appellate court will normally be reluctant to order a new trial where it appears from the record that there was sufficient evidence before the trial court to make the necessary findings of fact. In such circumstances the normal course will be to send the matter back to the trial judge for these findings to be made."***

We are of the view that in the circumstances of this case it would be in the interest of justice that the matter be sent back for retrial. Further it is our view that a retrial would not cause injustice to the appellants.

For the forgoing reasons we accordingly set aside the conviction and Order a retrial in the matter. The matter is hereby sent back for retrial before another Judge of the High Court.

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C. F. R. Mchenga, SC
DEPUTY JUDGE PRESIDENT

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J. Chashi
COURT OF APPEAL JUDGE

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F.M. Chishimba
COURT OF APPEAL JUDGE