**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 171/2015**
**HOLDEN AT LUSAKA**
(Criminal Jurisdiction)



**BETWEEN:**

**JAMES MWANGO PHIRI** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**Coram: Phiri, Muyovwe, and Hamaundu, JJS**
**On the 2nd February, 2016 and 11th September, 2017**

For the Appellant: Ms. G.N. Mukulwamutiyo, Senior Legal Aid Counsel and Mr. P. Chavula, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C. Bako, Deputy Chief State Advocate, National Prosecutions Authority

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# JUDGMENT

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**MUYOVWE, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **Nyambe vs. The People (1973) Z.R. 228**
2. **John Mkandawire vs. The People (1978) Z.R. 46**
3. **Dorothy Mutale and Another vs. The People (1997) 51**
4. **Chabala vs. The People (1976) Z.R. 14**
5. **Jonas Nkumbwa vs. The People (1983) Z.R. 103**

6. **Yotam Manda vs. The People (1988-1989) Z.R. 129**
7. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
8. **Peter Yotam Haamenda vs. The People (1977) Z.R. 184**
9. **Sydney Zonde, Aaron Sakala, Edward Chikumbi vs. The People (1980) Z.R. 337**
10. **George Nswana vs. The People (1988 - 1989) Z.R. 174**

This is an appeal against conviction and sentence. The appellant together with one Sweto Kwiimba were convicted of the offence of aggravated robbery contrary to Section 294(1) of the Penal Code. The particulars are that the appellant and Sweto Kwiimba on the 14th December, 2013, at Kafue jointly and whilst acting together and while armed with a hammer stole various items from a hardware shop worth K8,758.00 the property of Saukani Mbewe and that at or immediately before or immediately after did use actual violence to Morgan Namangolwa and Mike Mbewe who were in the shop in order to obtain or overcome resistance to the said properties being stolen. The learned trial judge sentenced each appellant to 20 years imprisonment with hard labour.

At the hearing of the appeal, Sweto Kwiimba who was the first appellant (and first accused in the court below) withdrew his appeal.

The facts were that PW1 (Morgan Namangolwa) and PW2 (Mike Mbewe) boys aged 15 years and 13 years respectively spent a night in the hardware shop belonging to Saukani Mbewe who was PW5 and the father to Mike Mbewe. On the material night around 01:00 hours two robbers staged a break-in into the shop. At the time, the light in the shop was on. According to the boys, one of the robbers assaulted them and demanded money from them. Since they had no money, they were ordered to pack items of interest to the robbers in a green sack bag which was taken away by the robber who had stood on guard at the entrance to the shop and who quickly left with the bag in hand. Meanwhile the robber who remained behind tied the boys' legs and arms using a sloan rope and he attempted to electrocute them but the electricity tripped twice.

While the robbery was in progress PW3 (Martin Mulenga), a neighbour heard noises outside and saw two persons with metal bars breaking locks to Saukani's hardware shop and the police were alerted. The police responded quickly and managed to apprehend Sweto Kwiimba within the shop.

The morning after the break-in, Saukani saw the appellant whom he knew before and who had been described by his son Mike carrying a red and white umbrella which he identified as one of the items stolen from his shop. When the appellant saw Saukani, he ran into a nearby shop and Saukani waited for him outside. The appellant eventually emerged from the shop and he was apprehended and handed over to the police.

In his defence, the appellant stated that in the morning of 14th December, 2013 around 07:00 hours while at his home he was approached by Morgan, his neighbour who wanted to borrow K300 from him. According to the appellant, Morgan had a bag containing some items which he left with him as surety for the borrowed money. He peeped inside the bag and saw that it contained an umbrella and some hardware articles. That very afternoon it was showering and he decided to use the umbrella from the bag. He was, however, confronted by Saukani who claimed that the umbrella was among the items stolen from his shop in the early hours of the morning. The appellant admitted that he led the police to his home where the bag with its contents was recovered.

He stated that he could identify Morgan although he did not know Morgan's residence but knew that Morgan was in the business of selling clothes and plates at Friday market. The appellant did not avail Morgan's phone number to the police.

In her judgment, the learned trial Judge found that Mike ably described the appellant as one of the attackers and coupled with the stolen umbrella found in his possession, this strengthened Mike's evidence. The learned trial judge found that it was an odd coincidence that the stolen items packed in a green sack bag at the scene were recovered that very day in the appellant's home in the very bag thereby removing every doubt that the said items belonged to Saukani. The learned trial judge rejected as an afterthought the defence by the appellant that he was given the bag with its contents by Morgan because no such evidence was raised in cross examination of the prosecution witnesses and the appellant did not provide the police with details of Morgan to enable them trace him. The learned trial judge took the view that the items in the bag were worth more than the paltry K300.00 that was allegedly borrowed and that a prudent businessman would not have given all the items

as surety. The learned trial Judge convicted the appellant of the subject offence and sentenced him to 20 years imprisonment with hard labour.

The appellant has appealed to this Court advancing three grounds of appeal namely:

1. **The learned trial judge misdirected herself in both law and fact by failing to test the identification of the appellant by PW1 and PW2 with the greatest care.**

2. **The learned trial Court misdirected itself in law and in fact in convicting the appellant on circumstantial evidence when the inference of guilt was not the only reasonable inference that could be drawn from the facts.**

3. **In the alternative to the above grounds, the learned trial Court misdirected itself when it failed to consider a less serious finding other than that of guilty for the major offence of aggravated robbery.**

At the hearing of this appeal, Ms. Mukulwamutiyo relied on the appellant's heads of argument filed herein. Mr. Chavula dealt with ground one while Ms. Mukulwamutiyo dealt with grounds two and three.

In support of ground one, it was submitted that in identifying the appellant, Mike's description was unsatisfactory in that he did

not give a distinctive description to rule out the possibility of mistaken identity. We were referred to the case of **Nyambe vs. The People**[1] on the principle that greatest care should be taken to test the identification taking into account the state of the light, the opportunity for observation and the stress of the moment. It was contended that the case in *casu* is one of a single identifying witness and the lower court should have followed the guidance in **John Mkandawire vs. The People**[2] in which we stated that the evidence of a single identifying witness must be treated with the greatest caution because of the danger of an honest mistake being made.

In his brief augmentation, Mr. Chavula contended that the appeal be allowed because the identification of the appellant was unsatisfactory and the remainder of the evidence was circumstantial and weak.

In support of ground two, Ms. Mukulwamutiyo submitted, *inter alia*, that the learned trial judge essentially relied on the evidence of Saukani to the effect that he saw the appellant carrying an umbrella which belonged to him. However, the appellant

explained that the umbrella found in his possession was part of the consignment in the green sack bag given to him by Morgan as collateral in the morning of that very day for the sum borrowed. It was submitted that the learned trial judge rejected the appellant's explanation and concluded that he came into possession of the stolen articles through participation in the robbery on the basis that a prudent businessman cannot give as surety, property worth more than the money borrowed. Counsel argued that the conclusion arrived at by the learned trial judge was erroneous as there were other inferences that could reasonably be drawn from the appellant's explanation; such as, that the appellant being unaware of the peculiar circumstances surrounding the articles in his possession took the umbrella from among the articles left by Morgan and innocently took it into the public domain. It was submitted that it is trite that where two or more inferences are reasonably possible the court should adopt the one which is more favourable or less disadvantageous to the accused. Counsel relied, *inter alia*, on the cases of **Dorothy Mutale and Another vs. The People**[3]; **Chabala vs. The People**[4] and **Jonas Nkumbwa vs. The People.**[5]

In augmenting ground two, Ms. Mukulwamutiyo conceded that throughout the prosecution case, the name Morgan did not feature in cross examination except in the appellant's defence. Counsel invited us to pronounce ourselves on the practice by trial courts of treating evidence introduced in defence by an accused person as an afterthought when the actual trial begins with the first prosecution witness through to the close of the trial. It was submitted that the circumstantial evidence was weak and had not taken the case out of the realm of conjecture so that it attains the level of cogency to permit only an inference of guilt. She prayed that the appeal be allowed, the conviction and sentence be quashed and the appellant be set at liberty.

In support of ground three, Ms. Mukulwamutiyo submitted that in the alternative, going by the appellant's explanation, the appellant should have been found guilty of a less serious offence of receiving stolen property. To buttress her argument on this ground Counsel referred us to the case of **Yotam Manda vs. The People.**[6]

Mr. Bako, on behalf of the State, submitted that he supported the conviction. Counsel submitted that the nature of the evidence

presented before the trial court was such that it needed to be considered in its totality. Responding specifically to ground one, counsel contended that Mike was able on the night in question to identify his assailant to an extent where he was able to describe the appellant to his father Saukani. It was submitted that Saukani was able to apprehend the appellant who fitted the description given by Mike, one of the victims of the assault. Notably, the appellant was found in possession of the umbrella which was part of the stolen property. Counsel contended that the two events cannot be isolated in that after the appellant was identified, the stolen umbrella was recovered as well as other stolen items.

In respect of ground two, Mr. Bako argued that the learned trial judge addressed her mind to the circumstantial evidence of recent possession of stolen items which led to the only inference - that of guilty. It was contended that the learned trial judge rightly dismissed the explanation by the appellant that it was not reasonably true. Counsel argued that the mere fact that the exact green bag stolen from Saukani's shop was found in the custody of the appellant and the appellant referred to Morgan without

providing details of the said Morgan, the appellant's story was fabricated. It was submitted, in addition, that according to the appellant, Morgan was a marketeer at Friday Market selling clothes and plates, yet the items allegedly taken to the appellant by Morgan were completely of a different nature. According to counsel, this further strengthens the finding by the trial court that the appellant's explanation cannot reasonably be true. It was also submitted that the time frame between the break-in and the time the appellant was found with the stolen items as early as 07:00 hours which was admitted by the appellant was significantly short for the court to consider Morgan's version of events to be reasonably true. Counsel contended that an inference of guilt was the only reasonable inference to be drawn from the facts.

In ground three, Counsel for the State submitted that there being no other inference other than that of guilt, the court was not obliged to consider a lesser finding other than the offence of aggravated robbery that was proved.

In reply, with respect to ground one, Mr. Chavula submitted that the main contention was on identification and that the

identifying witness was Mike and, therefore, Saukani's evidence of identification should have been disregarded. It was contended that, an identification parade should have been conducted to rule out the possibility of mistaken identity.

In relation to ground two, in reply, Ms. Mukulwamutiyo conceded that possession of the stolen goods was remarkably recent. However, she contended that there was reasonable likelihood of the goods changing hands. Considering that the nature of the goods which the appellant was found with were not the kind that Morgan was dealing in, Counsel submitted that the appellant explained that he did not bother to ask Morgan where he got the goods from as the appellant's focus was on the interest chargeable on the amount of K300.00 which Morgan borrowed.

We have considered the evidence on record, the judgment of the court below, the grounds of appeal and the arguments by Counsel.

It is clear to us that the issues raised for our determination are interrelated and we will deal with grounds one and two of the appeal together. The issues in these grounds are whether the

appellant was sufficiently identified by the witnesses to the crime; whether an identification parade should have been conducted by the police after the appellant was apprehended and whether the learned judge was correct to invoke the doctrine of recent possession. According to the evidence on record, it was Mike, the son to Saukani who placed the appellant at the scene of crime. In his evidence, Mike had this to say:

> **"Around 01:00 hours, we were surprised to see the door opened and light switched on by thieves. I saw two thieves enter the shop. I saw two people, I can describe them. The light one is the one who wanted to electrocute us and was beating us, he is A1**(Sweto Kwiimba). **Then A2** (the appellant) **was wearing a black jumper and covered his mouth with it. A2 stood by the doorway, keeping watch to see if people were coming. We were looking at their faces when they were talking to us my lady, I looked at their faces on the night of the attack. ... The light one A1 was the one found in the shop, the short one who is dark took the sack bag outside. ... My lady, I saw the accused persons on the night of attack and the other one I saw him before the attack."**

From Mike's evidence it is clear that he saw his assailants as the light in the shop was on; the assailants were talking to him during the robbery and he gave a description of the role that each assailant played during the robbery. He described the appellant as short and dark in complexion and that at the time he was wearing a

black jumper. And Mike said he had seen one of the attackers prior to the incident.

We now turn to the evidence of Saukani, the father to Mike and owner of the stolen goods, the subject of this offence. In his evidence, he stated, *inter alia*, that:

> **"After I was told who the suspect was I knew him, my son said the suspect came to the shop on Friday. ... Whilst walking, I saw a suspect my child had told me about with an umbrella, red and white in colour when I met this person, he saw me and ran into a shop my lady I waited until he came out of the shop. ... I suspected him because I was told about him. So I knew it was my umbrella. ... James Mwango** (appellant) **I live with him in the same compound. I only came to know Sweto when the incident happened."**

The above passage reveals that Saukani set out to look for the man who his son Mike had described to him. There is no evidence on record to show that Saukani and Mike were together at the time the appellant was apprehended. This is the basis of the argument by Counsel for the appellant that the identifying witness in this case was Mike and not his father and we agree with Counsel for the appellant. The person who was the victim and who is even mentioned in the particulars of the offence is Mike and not his father. Granted that the father to Mike used the description his son

gave him to look for the perpetrator of the crime and that he actually succeeded in apprehending him, did not take away the responsibility of the police to conduct an identification parade to enable Mike (and Morgan Namangolwa) to identify their assailants. In the case of **Ilunga Kabala and John Masefu vs. The People**[7] we held, *inter alia*, that:

> **iii. The sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion.**

In this case, the effect of the failure by the police to conduct an identification parade meant that there was no cogent evidence of identification from the victims of the crime. We take the view that the failure to conduct an identification parade amounted to a dereliction of duty on the part of the police. In the case of **Peter Yotam Haamenda vs. The People**[8] we held that:

> **Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty, and in consequence of that dereliction of duty, the appellant is seriously prejudiced because the evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming**

**as to offset the prejudice which might have arisen from the dereliction of duty."**

The question now is whether there is sufficient evidence to sustain the appellant's conviction in view of the failure by the police to conduct an identification parade. Although the learned trial judge overlooked the fact that the evidence of identification should have come from one of the victims of the crime, she was alive to the existence of the circumstantial evidence of the appellant's recent possession of the stolen property. In his defence, the appellant admitted being in possession of the stolen property as early as 07:00 hours in the morning when the shop was broken into at 01:00 hours in the night. His explanation for being found in possession of goods stolen in the early hours of that day was that the goods were given to him by Morgan as collateral for a debt. The appellant gave conflicting evidence, in one breath, the appellant said Morgan was his neighbour and later stated that he did not know where Morgan resided except that he was a marketeer at Friday market. This explanation or defence was not raised in cross-examination of the prosecution witnesses. Ms. Mukulwamutiyo invited us to pronounce ourselves on what she perceives to be the

practice by trial courts of treating an issue raised by an accused in his/her defence as an afterthought. Our position is that, it goes without saying that a person accused of an offence and on trial begins to build his/her defence right from the time of apprehension and from the first prosecution witness by asking questions in cross-examination. When an issue or defence is only raised when the accused is on the stand, the court cannot be faulted for treating it as an afterthought and an explanation which cannot reasonably be true. In this case, the appellant was represented by Counsel and had the opportunity to instruct his Counsel regarding his defence which he should have raised right from his apprehension or at the earliest time during trial. We cannot fault the learned judge for treating the appellant's defence as an afterthought.

With regard to the doctrine of recent possession invoked by the learned trial judge we guided as follows in the case of **Sydney Zonde and Others vs. The People**[9] that:

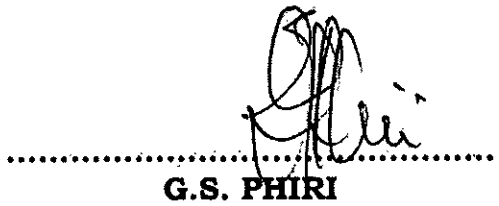
> **"(ii) The doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery."**

Further, in the case of **George Nswana vs. The People**[10] we held, *inter alia*, that:

> **(i) The inference of guilt based on recent possession, particularly where no explanation is offered which might 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 applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.**

In this case, even going by the appellant's own story, the stolen goods came into his possession in the early hours of the morning after the robbery; he went into hiding upon seeing Saukani whose shop was broken into which was strange for a man who claimed innocence and he only raised the issue of having the goods in his possession as collateral in his defence thereby bringing his credibility into question. The learned trial judge cannot be faulted for arriving at the irresistible conclusion that the only reasonable inference was that the appellant was one of the perpetrators of the crime and the verdict of guilt was inevitable. Grounds one and two fail.

Considering the position that we have taken on the first and second grounds of appeal, it follows that ground three automatically fails. In a nutshell, the appeal has failed and it is dismissed.



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**G.S. PHIRI**
**SUPREME COURT JUDGE**

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**E.N.C. MUYOVWE**
**SUPREME COURT JUDGE**

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**E.M. HAMAUNDU**
**SUPREME COURT JUDGE**