

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/11/2016

BETWEEN:

THE PEOPLE

V

DAVIES KABILA



**BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 14TH DAY OF
NOVEMBER, 2017.**

APPEARANCES

FOR THE PEOPLE : MR C.NGOMA
OF NATIONAL PROSECUTION AUTHORITY

FOR THE ACCUSED : MR L. SABOI NYANGULU & COMPANY AND
MR G. MHANGO OF GANJE MHANGO &
COMPANY

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA
2. CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAW OF ZAMBIA
3. FIREARMS ACT CHAPTER 110 OF THE LAWS OF ZAMBIA

CASES REFERRED TO:

1. CHAMPION MANEX MUKWAKWA V THE PEOPLE 1978 ZR 348
2. LOVE CHIPULU V THE PEOPLE SCJ NO. 19 OF 1986
3. DAVID ZULU V THE PEOPLE 1971 ZR 151
4. DOROTHY MUTALE AND RICHARD PHIRI V THE PEOPLE (1995-1997) ZR 227
5. CHIMBINI V THE PEOPLE (1973) ZR 192
6. PETER YOTAMU HAAMENDA V THE PEOPLE 1977 ZR 184

Davies Kabila hereinafter referred to as the accused 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 the accused on 10th June, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons unknown and while armed with unknown firearm, did steal one motor vehicle namely **Toyota Sedan** unregistered valued at K60, 040 the property of **Dominic Twinjika** and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Dominic Twinjika in order to obtain or retain or prevent or overcome resistance to its being stolen or returned. When called upon to plead, the accused denied the charge.

I will now consider the evidence in this case. The prosecution called five witnesses in a bid to prove the case against the accused.

The first prosecution witness (**PW1**) was **Elvis Musimuko** a businessman who basically confirmed before Court that he sold the Toyota Corolla Sedan 2001 model on 4th May, 2015 to the complainant herein at K52, 000. PW1 informed the Court that upon selling the vehicle he handed over all the relevant documentation to the complainant so as to facilitate change of ownership.

In cross examination PW1 stated that the rear mirror of the vehicle was not broken at the time he sold it off.

The second prosecution witness (**PW2**) was **Dominic Twinjika**, the complainant herein. He testified that on 9th June, 2015 he retired to bed at 21:00 hours. He stated that around 02:30 hours his house was broken into by four intruders who demanded to be given the car keys. PW2 narrated that one of the intruders was armed with a gun and when he declined to give them the keys he was hit with the gun. PW2 went on to explain that when he fell down two of the robbers fettered his hands and legs with a cable. The witness testified that the robbers took him outside and managed to open the car by breaking the rear door triangle glass. PW2 stated that after the robbers drove off in his vehicle he managed to free himself and called his brother. He stated that he was able to see the intruders because the passage light was lit.

It was PW2's further evidence that on 12th June, 2015 as they were proceeding to Chililabombwe to attend a funeral with his brother (PW3) and three others, they spotted his stolen vehicle near the police check point just before Ndola. PW2 testified that they trailed the car up to the filing station and as PW3 was about to confront the driver he was alerted that the person in the front passenger's seat was armed with a gun. PW2 further testified that the car was being driven by the accused and he immediately sped off. The witness said they only managed to stop the vehicle after they hit into it twice from behind. PW2 informed the Court

that they apprehended the accused but the other person who had a firearm fled. The accused was taken to Kansenshi Police Post where he disclosed that the vehicle was being taken to Congo where a buyer had already been secured. The witness told the Court that the accused was the one who had shackled his hands and legs with cables during the robbery.

In cross examination PW2 testified that the vehicle had no ignition when it was recovered but that prior to the robbery the ignition was intact.

The witness stated that the vehicle they were using on their way to Chililabombwe was being driven by PW3 while he occupied the back seat of the car. He also informed the Court that the other person who was with the accused was not arrested because he threatened them with the gun he had.

In further cross examination PW2 told the Court that the police in Ndola did not record a statement from the accused because they were informed that the matter had already been reported in Lusaka. The witness also stated that he was able to see that his stolen vehicle was being driven by the accused because the filling station where he made a stopover was well lit and the front windows of the car were down.

Shadrick Kapasa the complainant's young brother was the third prosecution witness (**PW3**). PW3's evidence with regard to the recovery of the stolen car and the apprehension of the accused

was similar to that of PW2, as such it shall not be reproduced. PW3 also confirmed that his stolen vehicle was being driven by the accused.

In cross examination the witness testified that PW2 informed him of the robbery at his home on 10th June, 2015 and that the police recorded a statement from him after he came back from the funeral.

PW4 was Inspector **Ackson Phiri** based at Lusaka Division Headquarters. The witness basically confirmed that when he inspected the vehicle in question at Lusaka Central Police it had two discs on the windscreen bearing registration numbers ALV 6437 and ALH 2493. PW4 further stated that the vehicle bore a number plate registration of ALV 9025 and its ignition was damaged. He testified that he accordingly handed over a report to PW5 for further investigation.

Detective Inspector **Mwiya Mutakatala** was the last prosecution witness (**PW5**). He testified that on 10th June, 2015 he was assigned to investigate a case of aggravated robbery which was reported by PW2.

PW5 further testified that on 12th June, 2015 he received a telephone call from PW2 and PW3 to the effect that they had recovered the stolen vehicle in Ndola and apprehended one suspect. The witness went on to testify that the vehicle and the

suspect were retrieved from Ndola. PW5 stated that the accused denied the charge of aggravated robbery under warn and caution.

In cross-examination PW5 stated that all the three witnesses he interviewed told him that the accused was the one driving the vehicle. He also informed the Court that all the police check points along the Ndola road did not notice that the vehicle had been stolen.

In further cross-examination PW5 stated that the accused mentioned that the vehicle was being driven by Rabi Zulu. He further stated that the accused refused to lead him to the scene of crime.

After the close of the prosecution's case I found that the state had established a *prima facie* case against the accused person and I found him with a case to answer. When put on his defence in compliance with *Section 291(2) of the Criminal Procedure Code*, the accused elected to give sworn evidence and called two witnesses.

The accused was the first witness for the defence (DW1). In his evidence, he told the Court that he left for Nakonde on 8th June, 2015 to buy various goods for sale. It was the accused's assertion that whilst in Nankonde, he was called by his sister (DW3) on 11th June, 2015 and informed that his other sister Ivy Siatwinda was critically ill in Chingola.

He stated that the following day 12th June, 2015 at 09:00 hours he boarded a bus from Nakonde to Lusaka. The accused narrated that while he was in transit he made arrangements on phone with his former boss **Joseph Cubert** to give some money to a man named **Rabi Zulu**. He said that he disembarked at Kapiri Mposhi and asked the bus crew to deliver his merchandise to Lusaka. The accused testified that he eventually linked up with Rabi Zulu at Kapiri weigh bridge around 22:30 hours.

He went on to testify that after he gave Rabi K1, 500 as requested by his former boss, he asked for a lift to Chingola as Rabi was enroute to Solwezi. He stated that when they reached Ndola near Itawa flats a vehicle suddenly hit their car from behind. The accused informed the Court that Rabi sped off but the other vehicle caught up with them and hit into them for the second time. The car lost control and went into a ditch. He further stated that when PW2 and PW3 apprehended him they got his phone, shoes and cash amounting to K16, 000. He was later transferred to Lusaka Central Police from Ndola Central Police and was charged with aggravated robbery. The accused denied being in Lusaka on 10th June, 2015.

In cross-examination the accused stated that he was not the one driving the vehicle but merely a passenger.

He also stated that PW2 and PW3 fabricated the story so that they could falsely implicate him.

The accused testified further that he told the police officer that he was in Nakonde when they asked him but he did not know whether that piece of information was recorded by the police. He also told the Court that he had worked with Mr Cubert for five years as a plumber but that he did not know his whereabouts.

When asked whether he had receipts from Power Tools bus services to support his testimony, he responded that the people who apprehended him took everything he had. He further explained that he did not make any follow up on getting the duplicates of the receipts from the bus company because he was in prison.

The second witness for the defence (DW2) was **Jeff Kande** the accused's nephew. In his evidence in chief DW2 testified that on 12th June, 2015 he received a call from the accused around 19:00 hours. He stated that the accused asked him to collect the goods he had sent on a C.V bus from Nakonde the next day. DW2 confirmed that he collected the goods on 13th June, 2015 but he later learnt that the accused had been apprehended and detained at a police station in Ndola.

Under cross-examination the witness stated that he was given a receipt when he collected the goods that were sent by the accused from Nakonde. When asked where the receipt was, DW2 responded that he had left it at home because he did not know that it would be required at Court.

In further cross examination the witness indicated that he was not able to avail the call record from his telephone service provider to substantiate his assertions that he had been communicating with the accused. The witness conceded that he needed to present tangible proof to show that his story was not a mere fabrication.

The last defence witness was **Alice Kabila** the accused's elder sister. The evidence as led by DW3 was to the effect that in the morning of 7th June, 2015 she notified the accused and other family members that their sister Ivy Siatwinda had been hospitalized in Chingola. The witness stated that the accused told her that he needed to go to Nakonde to order some goods for sale. She testified further that the accused accordingly left for Nakonde on 8th June, 2015. DW3 asserted that she arrived in Chingola on 10th June, 2015 and found her sister in a critical condition.

She stated that the accused was informed of their sister's condition on 11th June, 2015. The accused confirmed that he would put his merchandise on a Lusaka bound bus and travel to Chingola on 12th June, 2015. The witness asserted that she last communicated with the accused when he disembarked at Kapiri around 22:00 hours. DW3 informed the Court that she later learnt of the accused's detention from officer Nkhata based at Ndola Central Police.

In cross examination DW3 confirmed that she had been in constant touch with the accused throughout his life. She stated that the accused had served for five years as a permanent employee with the mines in Chingola.

In further cross examination the witness confirmed that while in remand the accused informed him that on his way to Chingola he had been communicating with somebody. The witness further confirmed that the accused explained to her the nature of the communication that passed between him and the other person but that she could not recall the information due to the passage of time. DW3 equally explained that the accused narrated to her how he got involved in the offence in question. When pressed to confirm the accused's version of how he found himself in his predicament, the witness was evasive and gave conflicting responses.

In further cross examination the witness reiterated that she believed that the accused had been in Nakonde because she saw the goods that DW2 collected on his behalf.

After the close of the case, only defence Counsel filed written submission. I shall not restate the submissions but will only refer to them as may be necessary

In arriving at my decision I have taken into account the evidence presented by both the prosecution and the defence. I have also taken into account the submissions by defence Counsel.

The offence of aggravated robbery is provided for in *Section 294(1) and (2) of the Penal Code* which stipulates the following:-

“(1) 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

(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”

From the foregoing, it is clear that to prove a charge of aggravated robbery under *Section 294(1) of the Penal Code*, there must be evidence that a theft took place and violence or the threat of it, was used to facilitate the theft.

In the matter before me it is common cause that the complainant (PW2) was on 10th June, 2015 between 02:30 and 03:00 hours robbed of a beige unregistered Toyota Corolla Sedan by four men, one of whom was armed. It is also common cause that prior to the robbery the assailants beat and tied up the complainant with

a cable. I find that the assailants ransacked the complainant's house in search of the car keys before they broke into his car and drove it off. I also find that the complainant was with his attackers for a period of about 10 minutes.

Further I find that two days after the robbery, the accused and another were spotted by the complainant and PW3 in the stolen vehicle near Kafulafuta police check point just before Ndola. At the time the accused and another were found with the motor vehicle, it bore the registration number ALZ 9025.

It is also my finding that when the police inquired about the vehicle the accused did not mention that he was proceeding to Chingola from Nakonde.

Having found that the complainant was robbed of his motor vehicle, the issue for determination is whether the accused person was one of the robbers. The evidence tending to implicate the accused person is twofold: he was recognized by the complainant upon being apprehended as the one who had tied him up during the robbery and he was also found with the stolen motor vehicle.

The identification evidence has been attacked on the ground that the circumstances under which the robbery was committed were traumatic as the complainant had no opportunity to observe his assailants more so that it was night time. The defence has submitted that the complainant failed to describe the actual

person who beat him in the ribs as he had no opportunity to observe him. Counsel has further contended that the attack having been sudden, the complainant only had a flitting glimpse of his assailants. The defence cited the cases of **Champion Manex Mukwakwa v The People**¹ and **Love Chipulu v The People**² to buttress their proposition.

Under cross-examination the complainant admitted that he saw the accused person for the first time during the robbery, he however stated in his evidence in chief that he was able to see his four assailants who went into his house because the passage light was on. This being the case, Counsel's submission that the complainant had no opportunity to observe his assailants due to the fact that it was during the night, is not supported by the evidence on record.

I am satisfied that even though no description of the attackers was given at the police station when the matter was reported, the complainant had ample opportunity in conditions of perfectly adequate light to observe the assailants. According to the complainant the whole affair lasted approximately 10 minutes and he had occasion to talk to them. In my view this gave the complainant enough opportunity to identify the robbers.

I have also given due consideration to the submission by the defence that the evidence advanced by the prosecution to link the accused to the offence of aggravated robbery is premised on circumstantial evidence. It is my affirmation that the authorities

of **David Zulu v The People**³, **Dorothy Mutale and Richard Phiri v The People**⁴ and **Chimbini v The People**⁵ cited by the defence on circumstantial evidence are not applicable to the matter before me. This is so because the case against the accused is not just based on being found in a stolen car but also on his being identified upon apprehension as the one who tied the complainant during the robbery.

The accused has vehemently refuted being the driver of the car at the time he was nabbed. According to him the car was driven by Rabi Zulu who gave him a lift. As against the accused's credit, there is evidence on record that the complainant and PW3 trailed the vehicle to Mount Meru filing station which was well lit and they observed that the accused was the driver, while the other person in the passenger's seat was armed with a gun. I am therefore convinced that the quality of identification is solid as there is no evidence suggesting that the accused or the person in the passenger's seat appeared disguised in any way so as to raise a possibility of mistaking or confusing their identities.

In this case, I am satisfied that the accused was not merely found in the stolen vehicle, he was actually driving it. In light of the foregoing, it is apparent that the accused's possession of the stolen car gives support and further credence to the complainant's identification evidence.

In the case of **Peter Yotamu Haamenda v The People**⁶ it was held that where the quality of identification is good and remains

so at the close of the defence case the danger of mistaken identification is lessened. But in cases where the quality is poor the danger of mistaken identification is greater and in such cases the Court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. On the evidence before me, though the complainant's identification evidence would stand on its own, the recovery of the stolen vehicle from the accused person gives further credence to the witness' identification of the accused.

It was also submitted by the defence that there was dereliction of duty on the part of the investigating officer when he failed to investigate the claim relating to the communication between the accused and his former boss, Joseph Cubert. It was contended that the police ought to have obtained a call record from the phone service providers to verify the accused's claims that he only boarded the stolen motor vehicle through the request of his boss. The Court's attention was drawn to the case of **Peter Yotamu Haamwenda v The People** where the Supreme Court had this to say:-

"Where the nature of a given criminal case necessitate that 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 accused is seriously prejudiced because 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."

PW5 confirmed in cross examination that the accused mentioned about a Mr Joseph Tibeti a Congolese national but did not avail his phone number to the police. Quite clearly I do not see how merely obtaining the accused's phone print out would have been conclusive evidence to verify whether or not his presence on the stolen vehicle was indeed instigated by his so called former boss. It is evident that at the very outset of the investigation the accused did not provide the police with the phone number for his former boss to enable them make calls and attempt to verify or disprove his claims. In light of the foregoing it cannot be said that this part of evidence for the defence has been prejudiced by a dereliction of duty on the part of the investigation officers. On this score I therefore find the cited case of **Peter Yotamu Haamwenda v The People** not to be helpful to the accused's case.

Coming to the defence advanced before Court of an *alibi*, it is my immediate observation that there is no decisive evidence adduced on record to ascertain that when the robbery occurred on 10th June, 2015 the accused was indeed on a business venture in Nakonde. The accused has endeavoured to call DW2 and DW3 to buttress his defence of an *alibi*. I must outrightly indicate that the testimony of the two witnesses is nothing to go by in terms of corroborating the *alibi* set up by the accused.

DW2 failed to furnish the Court with the receipt he was given by C.V Bus Company to confirm that he had indeed collected the merchandise purported to have been sent by the accused on 12th June, 2015. DW3 did not produce any tangible evidence in form of call records to confirm the alleged phone communication that was exchanged between her and the accused from 7th to 12th June, 2015. It is material to note here that even though the onus of proof in criminal matters rests on the prosecution, where the defence elect to adduce evidence in aid of their case they are obliged to substantiate their assertions. In *casu* it is apparent that the validity of the evidence of the two defence witnesses in support of the accused's *alibi* has not been established.

It is also worthy of a mention that when DW3 was closely cross examined on the essential aspects that led to the arrest of the accused, she became very evasive and shifted ground in the manner characteristic of an untruthful witness. All in all I find the evidence given by DW2 and DW3 to be manifestly unreliable, suspect and uncorroborated, and I am convinced that it would be unsafe to rely on it.

Having carefully considered the entire evidence I am left with no doubt whatsoever that the evidence of the complainant and PW3 has succeeded in negating the accused's claim of an *alibi*. I therefore hold the accused's exculpatory story in Court to be an afterthought aimed at misleading the Court.

Finally it is my finding that the prosecution have proved the charge against the accused beyond all reasonable doubt. I find the accused guilty as charged and I convict him of the offence of aggravated robbery contrary to *Section 294(1) of the Penal Code*. He is convicted under subsection 1 because the particulars of the offence mention that an unknown firearm was used during the robbery but no evidence has been led to establish that the gun the robbers were carrying was a firearm within the meaning assigned to it by *Section 2 of the Firearms Act Chapter 110 of the laws of Zambia*.

Delivered in open Court at Lusaka this 14th day of November, 2017.


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M. CHANDA
JUDGE