

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Appellate Jurisdiction)**

Appeal No. 48/2016

BETWEEN:

GEORGE MULAYE

AND

THE PEOPLE

RESPONDENT



**Coram: Muyovwe, Kabuka and Chinyama, JJS
on 10th January, 2017; 16th February and 7th March
2017**

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

For the Respondent: Mrs. M. Bah-Matandala, Deputy Chief
State Advocate

JUDGMENT

Muyovwe, JS delivered the judgment of the court.

Cases referred to:

1. Phiri (Charles) vs. The People (1973) Z.R. 168
2. Mwape vs. The People (1976) Z.R. 160
3. The People vs. Chimbala (1973) Z.R. 118
4. Mwewa Murono vs. The People (2004) Z.R. 207

The appellant was tried and convicted by the High Court sitting at Mansa of two counts of aggravated robbery contrary to Section 294 of the Penal Code. The particulars of the first count alleged that the appellant on the 9th day of January, 2008 at Mansa in the Mansa District of the Luapula Province of the Republic of Zambia, jointly and whilst acting together with his brother Besa Morgan Mulaye, with others Richard Kunda and Allan Hazambo and whilst being armed with a machete stole 2 wheel barrows, 4 tents, 1 roll of mesh wire, 1 metal tank, 1 pair of gum boots, 1 rifle porch, 1 plastic crate, 2 picks, 2 spades, 1 rifle (0.375mm), 2 metal dishes, 2 bags of gemstones and 1 pressure mattress altogether valued at K34,556.00 the property of Emmanuel Chanda and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to the said Emmanuel Chanda in order to obtain or retain the things stolen or to overcome resistance to its being stolen or retained.

The lower court acquitted Richard Kunda and Allan Hazambo and convicted the appellant and his brother Besa Morgan Mulaye and sentenced them to 20 years imprisonment with hard labour.

In the second count, it was alleged that the appellant robbed Peter Chisala of a bicycle valued at K400. He was sentenced to 18 years imprisonment with hard labour.

This case involves a dispute over ownership of a mine. The brief summary of this case is that Emmanuel Jaggery Chanda, with the consent of the appellant's father began operating a gemstone mine within Mulaye farm in 2004. The agreement was that the appellant's father would benefit from the proceeds of the mine. Unfortunately, Emmanuel Chanda abandoned the mine a year later and took off with the gemstones he had mined. Emmanuel Chanda only surfaced in 2007 with Alfred Kaira, his new partner. According to Emmanuel Chanda the gemstones he had mined earlier had been stolen. The appellant's father ordered Emmanuel Chanda and his group to stop mining until the family made a decision on the way forward but Emmanuel Chanda and his group continued mining. The parties appeared before the Subordinate Court over the mine dispute and they were advised to settle the matter ex-curia. Before the matter could be resolved, the appellant's father passed on. It is not clear when the appellant's

father passed on but what happened next is that Emmanuel Chanda and his group proceeded to demarcate for themselves 10 hectares of the farm, claiming that they had bought the land from the police and the State. The demarcation also blocked the road to the appellant's family farmhouse. The relationship between the two camps was extremely fragile as the appellant and his family felt that they were not enjoying any benefit from the mine as intended by their late father; that Emmanuel Chanda and his group were now behaving as if they owned the property and yet it was situated inside the appellant's family farm.

On the material day, the appellant and his brother Besa and others challenged Emmanuel Chanda and his group in an attempt to evict them from the farm using machetes and other tools. Emmanuel Chanda together with his business partner and their workers escaped in a Tata Truck. Behind, their property was destroyed.

With regard to count two, the facts are that the following day, the complainant, Peter Chisala, who was working for Emmanuel Chanda and his group arrived at the mine only to find that there

was no one at the mine but observed that everything was in disarray. He decided to go back home but on the way, he met the appellant and his brother in the company of another person. According to Peter Chisala, the appellant said to him "you are going to be surprised and you are not going to stay here". He said the appellant tried to stab him with a screw driver while the other person had a knife. Peter Chisala got off his bicycle and started running away as the appellant gave chase together with the other person. The appellant took his bicycle. This is how the appellant was apprehended for aggravated robbery in the second count.

The appellant and his brother denied the charges.

In his judgment, the learned judge while acknowledging that there had been "a simmering discontent on the part of the Mulaye brothers against Emmanuel Chanda and his group over the operations of the mine which is at their farm" he nevertheless convicted them as charged and sentenced them to 20 years in the 1st count. On the second count, the appellant was sentenced to 18 years imprisonment.

On the 28th January, 2009 the appellant filed a Notice of appeal against both conviction and sentence. At the hearing of the appeal, Mrs. Liswaniso indicated that the appeal was against sentence. She submitted that the sentence was excessive having regard to the circumstances of the case and the fact that her client was a first offender.

Although Mrs. Liswaniso indicated that the appeal was against sentence only, we were compelled in the interest of justice, looking at the facts of the case to inquire from Mrs. Bah-Matandala, the learned Deputy Chief State Advocate, whether she supported the conviction. She rightly conceded that she did not support the conviction on both counts.

It is not in dispute that the appellant, his brother Besa and their workers confronted Emmanuel Chanda and his group over the continued occupation of their land. That Emmanuel Chanda and his group had to flee from the mine and that property was destroyed at the hands of the appellant and his group is not disputed. The question is whether the offence of aggravated robbery was committed in the circumstances of the case. In a

charge of aggravated robbery, theft coupled with violence using an offensive weapon is an essential ingredient. In the case of **Phiri (Charles) vs. The People**,¹ the Court of Appeal, the forerunner to this court, stated that:

"...the essence of the offence of robbery is theft, the violence being merely something employed for the purpose of effecting such theft;..."

And in the case of **Mwape vs. The People**² we held, inter alia, that:

(iv) Violence to property alone without inducing fear in the mind of the person having charge of or in any way connected with such property cannot amount to robbery. If a person in charge or responsible for the property concerned is put in fear by an attacker that injury would be caused to such property and he concedes to demands made to him by the attacker, that would be robbery and if there is more than one attacker or if the attacker is armed with an offensive weapon or instrument or is in the company of one or more persons the offence becomes aggravated robbery.

Further, in the case of **The People vs. Chimbala**³ Chomba J in obiter aptly stated as follows:

"..... section 294 of the Penal Code, Cap. 146, has "stealing" as an essential ingredient of the offence under consideration. It is elementary knowledge that to steal is to take *animo*

furandi which connotes an intent permanently to deprive the owner of the thing so taken..... Our law..... would not, in my judgment, consider it to be robbery or even aggravated robbery, if the taking and force used or threatened contemporaneously with the taking was not accompanied by an intent to deprive permanently. Perhaps a person taking in such a manner but without such an intent would according to our law be guilty only of some kind of assault."

In this case, Mrs. Bah-Matandala on behalf of the State, conceded that aggravated robbery was the wrong charge looking at the circumstances of the case. We agree with her. A perusal of the judgment shows that the learned trial judge had difficulty in justifying the conviction of the appellant and his brother. The evidence on record reveals that there was no robbery. In his judgment, the learned trial judge found as a fact that the appellant and his group went to the mine with the sole purpose of driving away the people who had occupied the mine to their detriment. The appellant and his family wanted to enforce their claim of right by all means since dialogue had failed. Although it is clear that the appellant and his group took the law in their hands in their quest to evict Emmanuel Chanda and his group from the mine, the

ingredients for the offence of aggravated robbery were not satisfied in this case. In **Mwewa Muroho vs. The People**⁴ we stated that:


"In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused, lies from beginning to end, on the prosecution. The standard of proof is high. The case must be proved beyond all reasonable doubt."

In this case, the prosecution failed to discharge its burden. Therefore, the conviction in count one cannot be sustained.

Turning to count two, the evidence clearly shows that the appellant and the person he was with, chased Peter Chisala, a mine employee from the mine area following the eviction of his boss Emmanuel Chanda and his group the previous day. There is no evidence that the appellant intended to rob Peter Chisala of his bicycle. The prosecution again failed to discharge its burden. The conviction in count two has no leg to stand on either.

As we observed earlier, the learned trial judge had difficulty in justifying the convictions on both counts showing that he had lingering doubts as regards the guilt of the appellant and his


brother Besa Morgan Mulaye. In the circumstances, the appeal is allowed. The conviction and sentence of the court below are set aside and the appellant is acquitted on both counts.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE