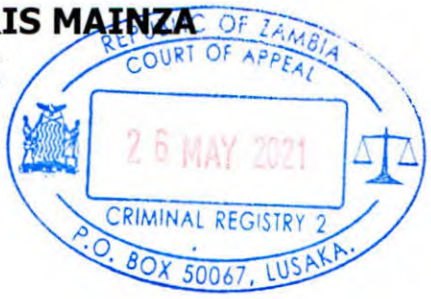
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 150A, 150B, 150C/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

HONEST MUNENE MAINZA	**1ST APPELLANT**
EMMANUEL CHRIS MAINZA	**2ND APPELLANT**
HASSAN HASIKI	**3RD APPELLANT**



AND

THE PEOPLE	**RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th May, 2021 and 26th May, 2021.

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

For the Respondent: P.Nyangu, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Nyambe v The People (1973) ZR 288 (CA)**
2. **Mwansa Mushala and Others v The People (1973) ZR58 (SC)**
3. **John Mkandawire and Others v The People (1978) ZR46 (SC)**
4. **Bwalya v The People (1975) ZR227 (SC)**
5. **Muvuma Kambanja Situna v The People (1982) ZR115**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**

We wish to note on the onset that at the hearing of this appeal, Hassan Hasiki who was the third appellant abandoned his appeal and we dismissed it.

The appellants were convicted 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 offence alleged that the appellants on the 6th day of July, 2019 at Choma in the Choma District of the Southern Province of the Republic of Zambia, jointly and whilst acting together, did steal, a bicycle valued at K750.00 and K195.00 cash altogether valued at K945.00 from Victor Mweetwa and at or immediately before or immediately after the time of stealing, did use or threaten to use actual violence to Victor Mweetwa in order to obtain or retain the thing stolen or prevent or overcome resistance to its being stolen.

The prosecution called a total of five witnesses. PW1 told the trial court that he was sent to Choma town to sell mutton on the 6th July, 2019. He managed to do so and started off back. When he reached the forest area, he was attacked by 6 people. According to PW1, the men came out of the bush, rushed to him, grabbed him and he fell down. They searched his pockets, got the K195.00 and the bicycle. He

managed to recognize three of his assailants as people he had known previously. He subsequently reported to the police. He told the trial court that the attack took about 20 minutes. The neighborhood watch members together with PW1 apprehended the 1st and 2nd appellants. They asked where the other person was and that is how Hassan was arrested. He told the trial court that the bicycle was subsequently brought by a lady to the police. When cross examined, PW1 told the trial court that he was frightened during the attack and that he was not able to give the description of the clothes his assailants were wearing because he had no proper opportunity to observe the assailants. PW1's statement to the police was produced and marked **"P1."** He later conceded that he told the police that he only recognized two of his attackers.

PW2 was the person who sent PW1 to go and sell his sheep in Choma town on a Saturday. He told the trial court that when he noticed that the appellant never returned, he made a follow-up on Monday. He found PW1 in town and that is when PW1 told him that he was attacked and that the money and bicycle were stolen from him.

PW3 was the owner of the bicycle which was stolen from PW1. He had lent the bicycle to PW2.

PW4 was a neighbourhood watch member. He received a report from PW1 and he apprehended the now appellants and took them to the police. He asked them why they attacked PW1 and got the bicycle. Their response was that they knew nothing about the issue of the bicycle but only the money which Hassan gave them. On his way from looking for Hassan, some people informed him that a bicycle had been seen at a certain lady's house. He went to the lady's house and retrieved the bicycle. The lady gave a statement to the police. He subsequently apprehended Hassan who denied knowing about the bicycle but only the money which he picked at the bar.

PW5 was the arresting officer. He gave evidence of arrest and also told the trial court that PW1 told him that he was only able to identify 2 of his attackers, the appellants herein. When cross examined, he told the trial court that the appellants told him that at the time the offence is alleged to have been committed, they were drinking beer at Chilombo Bar.

That generally marked the close of the prosecution case. The appellants were found with a case to answer and placed on their defence. They each opted to give evidence on oath and not to call any witness.

The 1st appellant told the trial court that he was at Chilombo Bar drinking on 6th July, 2019 with his sister Carol and Hassan. He used to pick bottles at the bar. They were later joined by his young brother, 2nd appellant. Hassan subsequently picked K45.00 of which he gave K5.00 to each of the appellants and K20.00 to Carol. The following morning around 05:00 hours the appellants were apprehended and taken to Shampande Police Post where he was severely tortured asking him where he had taken the bicycle and the money, which allegations he denied. When the officers saw that he was not providing them with the information which they wanted, they indicated that they would subject his young brother to the same treatment. According to the 1st appellant, the young brother (2nd appellant) who witnessed his ordeal upon hearing that, told the officers that he only knew about the money which Hassan had picked. That is how the officers went to search for Hassan and brought him to the cell. He denied committing the offence.

The 2nd appellant's defence was materially the same as that given by the 1st appellant. He also denied committing the offence.

The learned trial court found that the evidence against the appellants was that of recognition by PW1. The trial court found that there was sufficient evidence and the encounter with the appellants took some considerable time which provided the opportunity for a reliable

observation by PW1. She was therefore satisfied that the appellants are the ones who attacked PW1 and stole from him a bicycle and cash money amounting to K195.00. The learned trial court convicted the appellants, sentenced each one of them to 15 years imprisonment with hard labour.

Dissatisfied with the conviction, the appellants appealed to this court on two grounds of appeal as follows:

1. **The trial Court erred in law and fact when the Court found that the possibility of an honest mistake in recognizing the Appellants was eliminated as the circumstances under which the Appellants were recognized were convincing and therefore satisfactory.**

2. **The trial Court erred in law and fact when the Court found that it was the three Appellants who attacked PW1 and stole from him a bicycle and cash money amounting to K195.00.**

At the hearing of this appeal, Counsel for the appellants, Mrs. Liswaniso informed the court that she would rely on the grounds and arguments filed herein.

In support of ground one, Mrs. Liswaniso contended that though PW1 said the attack took about 20 minutes, he told the trial court that he did not have sufficient opportunity to observe his assailants hence his failure to give a description of the type of clothes each of the assailants were wearing. Counsel contended that PW5 during cross examination

conceded that PW1 told him at first that he only recognized two people from the six attackers.

We were referred to the case of **Nyambe v The People**[1] where the Court of Appeal as it then was held that:

> **"The greatest care should be taken to test the identification. The witness should be asked, for instance, by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed – the state of the light, the opportunity for observation, the stress of the moment – should be carefully canvassed."**

We were further referred to the case of **Mwansa Mushala and Others v The People**[2] where it was held that:

> **"Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognise someone whom he knows the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation the greater that possibility becomes. The momentary glance at the inmates of the Fiat car when the car was in motion cannot be described as good opportunity for observation.**
>
> **R. v Turnbull (1) followed."**

It was learned Counsel's submission that the possibility of an honest mistake was not excluded. It was argued that the first time that PW1 was interviewed by PW5, he stated that he was only able to recognize

two people from the six attackers. It was further argued that the stress of the moment coupled with the lack of physical description of the assailants and the clothes they were wearing leaves room for doubt on PW1's accuracy in identifying the appellants as the people that attacked him.

Counsel contended that even though PW1 claimed to have recognized the three of the appellants, mistakes are still made in recognition of close relatives and friends. It was Counsel's argument that PW1's alleged recognition of the appellants as being among the six assailants that attacked him was unreliable and the possibility that he made an honest mistake in his identification of the appellants was not excluded. We were urged to allow the appeals on this ground.

On behalf of the respondent, learned Counsel Ms. Nyangu, submitted that the trial court was on firm ground when it found that the possibility of an honest mistake was ruled out in recognizing the appellants as perpetrators of the subject offence was eliminated as the circumstances under which the appellants were recognized were convincing and therefore satisfactory. Learned Counsel contended that the trial court warned itself of the possibility of an honest mistake and ruled out such possibility. We were thus urged to dismiss ground one for want of merit.

In respect to ground two, Mrs. Liswaniso argued that none of the stolen items were recovered from any of the appellants. It was contended that it is unsafe to rely on the lone identifying evidence in the absence of a connecting link. We were referred to the case of **John Mkandawire and Others v The People**[3] where it was held that:

> **"(iii)The evidence of a single identifying witness must be treated with the greatest caution because of the danger of an honest mistake being made.**
> **(iv) Usually, this possibility cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence."**

We were further referred to the case of **Bwalya v The People**[4] where it was held that:

> **"Usually in the case of an identification by a single witness the possibility of honest mistake cannot be ruled out unless there is some connecting link between the accused andthe offence which would render a mistaken identification too much of a coincidence, or evidence such as distinctive features or an accurately fitting description on which a court might properly decide that it is safe to rely on the identification."**

It was Counsel's submission that other than PW1's evidence of identification, there is no connecting link between the appellants and the offence which would render a mistaken identification too much of a coincidence. We were urged to allow the appeal on this ground.

Ms. Nyangu on behalf of the respondent argued in response to ground two that the trial court was on firm ground when it found that the appellants attacked PW1 and stole from him a bicycle and K195.00. She submitted that as stated in the appellants' heads argument that in matter of evidence of identification, such as the instant case, there must be a connecting link between the offence and the appellants to render a mistaken identification too much of a coincidence. It was Counsel's submission that notwithstanding that the bicycle was not recovered from any of the appellants and the fact that the amount of K195.00 that was stolen from PW1 was not recovered, the circumstances in which the appellants were identified and the quick apprehension of the appellants following a report to the police were too much of a coincidence and thus a connecting link, in accordance with the **John Mkandawire** case *supra.* We were urged to dismiss the appeal on this ground for want of merit.

We have carefully considered the evidence on the record, the judgment of the trial court and the arguments by Counsel for the parties.

The major issue as we see it hinges on the adequacy of the identification evidence provided by PW1. It is common cause that the

only evidence upon which the conviction was based is the identification evidence given by PW1. PW1 told the trial court that he was able to identify three of his assailants and he led to the apprehension of the appellants herein. The trial court accepted the identification evidence as being reliable especially that the appellants were previously known to PW1.

The Supreme Court in the case of **Muvuma Kambanja Situna v The People**[5] held *inter alia* that:

> **"The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognize the accused.**
>
> **If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence."**

It is trite that identification evidence must be carefully evaluated and if the opportunity for positive identification is poor, then the danger of an honest mistake has not been excluded. Therefore a connecting link would be required in order for a conviction to be safe. We are alive to the fact that this was a case of recognition which is ordinarily considered to be better than identifying a total stranger. Even in recognition cases

caution must be taken as people have been known to mistake even close relatives (see the case of **Mwansa Mushala** *supra*).

PW1 at the time of reporting the crime said PW5 was only able to recognize two of the six assailants. When he gave evidence in the court below, he said that he was able to recognize three of his attackers. When pressed during cross examination after his statement to the police **("P2")** was produced into evidence, he admitted that he never mentioned the third person Hassan. According to P2, the attack took place around 18:00 hours as opposed to what he stated in court that it took place around 17:00 hours. According to PW5's evidence in court, the attack took place in the forest where there are gum trees and other trees. During cross examination, PW1 told the trial court that he did not have sufficient opportunity to observe his assailants.

We find that the circumstances of the case was not conducive as admitted by PW1 himself. We therefore find that even though the case is one of recognition, the danger of an honest but mistaken recognition has not been ruled. Had the learned trial court properly evaluated the evidence, she would not have found it safe to convict on the evidence of PW1 in the absence of a connecting link. We note that none of the stolen properties were found with any of the appellants. The previous inconsistent statement given by PW1 does not help matters as it waters

down his credibility, which the trial court was properly entitled to comment on. However, for unknown reasons, the trial court did not address its mind to it. This was a serious misdirection.

Learned Counsel for the respondent argued that the manner n which the identification of the appellants was done and the swift arrest of the appellants provided the connecting link.

We must hasten to state that the manner in which the appellants were identified in the circumstances of this case cannot provide connecting link, neither can the swift manner in which the arrests were made. A connecting link is basically some other evidence which effectively rules out the danger of an honest but yet mistaken identification. We thus reject the argument by Ms. Nyangu.

We therefore find merit in both grounds of appeal. We allow the appeals, quash the convictions, set aside the sentences and acquit the 1st and 2nd appellants.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE