

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE**
(Criminal Jurisdiction)

Appeal No. 176,177,178/2020

BETWEEN:

**GILBERT NKHATA
MICHAEL MUKOMBOLA
LASTONE SIMPASA**



**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

AND

THE PEOPLE

RESPONDENT

**CORAM: Mchenga DJP, Majula and Muzenga JJA
On 19th May, 2021 and 19th November, 2021.**

For the Appellant: Mrs. L. T. Tindi, Legal Aid Counsel, Legal Aid Board

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

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Muvuma v The People (1982) ZR 115**
- 2. Charles Lukolongo and Others v The People (1986) ZR 115**
- 3. Ilunga Kabala and Another v The People (1981) ZR 102**
- 4. Peter Yotamu Hamenda v The People (1977) ZR 184**

5. **Kalebu Banda v The People (1977) ZR 169**
6. **Mwewa Murolo v The People (2004) ZR 207**
7. **Yaoni Manongo v The People – SCZ Judgment No. 26 of 1980**
8. **William Muzala Chipango and Others v The People (1978) ZR 304**
9. **Bwalya v The People (1975) ZR 227**
10. **Kabala Ilunga and John Musefu (1980) ZR 102**
11. **John Mkandawire and Others v The People (1978) ZR 46**
12. **Isaac Mwasumbe v The People (1978) ZR 354**
13. **Jonas Nkumbwa v The People (1983) ZR 103**
14. **Raymond Kosamu Zulu and Another v The People – CAZ Appeal No. 158, 159 of 2020.**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Firearms Act, Chapter 110 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 Gilbert Nkhata, Michael Mukombola and Lastone Simpasa (the appellants herein) were charged with the offence of aggravated robbery contrary to **section 294(2)(a) of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence allege that the appellants, on 2nd June, 2017 jointly whilst acting together with other persons unknown, and whilst armed with a pistol, did steal 1 LG Nexus Phone, 1 Samsung phone, 80 United States Dollars and K985,000.00 cash the property of Wesley

Ngalamulume and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Wesley Ngalamulume in order to obtain, retain, prevent or overcome resistance from it being stolen. The trio were subsequently convicted and sentenced to death by the High Court (before Mr. Justice C. Chanda).

2.0 PROSECUTION EVIDENCE

2.1 The prosecution's evidence was presented through five witnesses; namely, Kande Ngalamulume Wesley PW1, Mary Chirwa PW2, Anthony Sichilima PW3, Jack Singogo PW4, and Gift Kaacha PW5. PW1 told the court that on 31st May, 2017 he and Lastone Simpasa the third appellant herein travelled together from Kasumbalesa to Nakonde using his motor vehicle a Toyota Allion. Before their departure a total sum of K960, 000.00 was put together by five people namely, Mary Chirwa PW2 – K270,000.00, Bernard Chibesa – K 200,000.00, King Joe – K180,000.00, Chanda Ngalula – K160,000.00 and PW1 contributed K150,000.00. He put the said money underneath the driver's and passengers' seats without the knowledge of the third appellant who he employed as a driver.

2.2 The two arrived in Nakonde in the wee hours of 1st June, 2017.

Around 7am PW1 called his supplier of goods from Tunduma by the name of Muze to come and collect the money. The two were unable to conclude their business as the exchange rate had gone up. Following the advice of the other four people who had contributed the money, PW1 returned to Kasumbalesa with the money. Before starting off and while on their way, the third appellant continuously received phone calls from a private number he claimed not to know.

2.3 The two made a brief stopover at Mkushi where the third appellant went to use the toilet. Continuing their journey, a Toyota Mark X vehicle overtook them at high speed and the third appellant asked PW1 if he knew the said car. PW1 was astonished by the third appellant's question and ask him why he had asked such a question. In his response the third appellant said that the car was moving at high speed and had been flashing lights.

2.4 A few kilometres on the Ndola road, the third appellant asked PW1 for a bottle of water and went on to park the vehicle on the side of the road. As soon as he parked the vehicle the same Toyota Mark X came and parked in front of them. The third

appellant immediately got out of the car and put his hands up. Three men emerged out of the Toyota Mark X, went where PW1 was seated, searched his pockets, got his phone, beat him and dragged him out of the car. At the time PW1 was being pulled out of the vehicle, another car arrived flashing lights.

- 2.5 It was his testimony that he carefully looked at his assailants, and was able describe the person with a pistol as being tall, slim and dark in complexion and that he was wearing jeans trousers and a blue jean shirt. The person with handcuffs was described to be of a medium build, a bit light in complexion and wore a replica jersey, green in colour. The third person was said to be fat, tall and dark in complexion and wore a black jacket and head sock.
- 2.6 It was his further testimony that after being pulled out of the car, and while he was being handcuffed, another Toyota Corolla vehicle arrived on the scene and parked near where the third appellant was. A fat person with a big stomach came out of the car wearing a South African replica jersey green in colour. This fat man then dragged them to the Toyota Corolla and all of them were put in the back seat. When they entered the car, they found a driver in the car and the fat

man was then given a pistol. They were driven off the scene to a nearby bush in the said Toyota corolla leaving behind their car and the Mark X.

2.7 When they reached in the middle of the bush they were ordered to get out of the car and start walking. After a short walk the handcuffs they had were removed and PW1 noticed the other two vehicles they had left behind had arrived. The said two vehicles had lights on and PW1 was able to clearly see his assailants again. At this point, PW1's pair trousers were then torn by one of his assailants. His hands were tied together with that of the third appellant and they were told to run. As they were running, they heard the cars driving off. PW1 then asked the third appellant why he had stopped the car and the third appellant responded that the Mark X which overtook them at high speed had exchanged its number plate with that of Zambia Police.

2.8 When they reached PW1's car, they noticed that the money had been stolen and they couldn't find the keys. The third appellant cut the ignition cables and managed to start the vehicle. They continued with their journey. At Kafulafuta Toll Gate, the third appellant

reported the incident to the police and they proceeded to Kasumbalesa. Later PW1 and PW2 reported the incidence to Chililabombwe Police Station and the third appellant was apprehended. PW1 was later referred to Ndola Central Police as the crime took place in Ndola. A few days later PW1 received a phone call from Ndola Police asking him to go and identify his attackers.

2.9 The evidence of PW2 a business lady of Chililabombwe and a member of the Local Traders Association was that on 30th June, 2017 five of the members put resources together and gave the money to PW1 to go and order beans, rice and onions from Nakonde. The business in Nakonde was unable to proceed as the exchange rate had gone up. It was her testimony that days later she came to learn from King Joe one of the five people who had contributed the money that PW1 had been robbed. She immediately contacted PW1 who confirmed the story and later escorted him to Chililabombwe Central Police. The matter was later referred to Ndola Central Police.

2.10 Anthony Sichilima, a scene of crime officer with Zambia Police based at Ndola CID Headquarters testified as PW3. His testimony was to the effect that on 25th July, 2017 he was assigned to photograph an

identification parade which was formed up by 13 suspects. At the parade a witness identified 3 people who were at positions number 2, 6 and 12. He then compiled a photographic album which was admitted into evidence. He testified that he later came to learn that the person at position 6 was wrongly identified and hence he did not print the photo.

2.11 Detective Inspector Jack Singogo, the identification Parade Commander testified as PW4. He told the court that on 25th July, 2017, he was assigned to conduct an identification parade in which the Anti-Robbery Squad had three suspects in cells. He explained to them the charges they were facing and informed them of their rights on the parade. It was PW4's evidence that he formed an identification parade of 13 people, 10 of whom were drawn from the cells while 3 were from the general public. He told the court that at the time of the parade the three suspects had no complaint with respect to how the parade was conducted.

2.12 The last witness of the prosecution was Detective Sergeant Gift Kaacha. His testimony was to the effect that on 19th August, 2017 he was assigned a docket of aggravated robbery taking over the

investigations from where the late Detective Sergeant Kunda had left. He told the court that the complaint was that PW1 had been robbed by unknown people of K960,000.00 cash, an LG cell phone and a Samsung phone between Kapiri Mposhi and Ndola on 2nd July, 2017. The complainant indicated that he was able to identify the unknown persons who had robbed him and that PW1's driver repeatedly received phone calls on a private number within the area of Serenje but did not disclose who was calling him.

2.13 It was PW5's evidence that on 2nd July, 2017, the late Detective Sergeant Kunda received information that the suspected robbers were Lusaka based and that is how they travelled to Lusaka. He told the court that with the help of their informant they managed to apprehend one suspect named Gilbert Nkhata the first appellant herein. Gilbert Nkhata was later warned and cautioned at Matero Police Station and he later led the two investigative police to Kanyama Compound where they picked up Michael Mukombola the second appellant herein. Michael Mukombola was taken to Matero Police where he was warned and cautioned. After further interviews the two led the police officers to Kanyama Compound where the

police picked up another person by the name of Dickson Chitayi. After interviewing Dickson, the Police came to learn that a day before the robbery took place, the 1st and the 2nd appellant went to Dickson's office to ask for money for fuel to go to Kapiri Mposhi.

2.14 It was PW5's further testimony that during the course of investigating the matter, it came to light that two police officers of Chawama Police Station namely Nkwaze and Siwale were also involved in the robbery but their whereabouts were unknown. It was his testimony that to ensure that he had the right suspects, he proceeded to have an identification parade conducted. After the parade was done, he interviewed the 1st and 2nd appellant who accepted having met Dickson by the road side to borrow money to help two police officers who had a break down. Dickson then noticed two suspects who had been handcuffed and he proceeded to Kitwe. According to PW5, the third appellant denied involvement in the robbery and that he made up his mind to charge him with the subject offence because of the phone calls he continuously received as he drove the car despite there being no evidence of such calls from the third appellant's Zamtel line. It was also his evidence that after finding no evidence

linking Dickson to the offence, he released him after obtaining a statement from him. This was the close of the prosecution's evidence.

3.0 DEFENCE EVIDENCE

3.1 The defence called four witnesses. In his defense, the second appellant, a former DEC officer denied having committed the offence. He told the court that the time the crime is said to have been committed, he was mourning his wife. The second witness for the defence was Gertrude Mpesuka, mother to the 2nd appellant. Her testimony was to the effect that on 28th June, 2017 her son lost his wife and they buried on 1st July, 2017. She told the court that on 2nd July, 2017, she picked up the second appellant to stay with her. The third witness for the defence was the 1st appellant. He denied having committed the offence and only led evidence of how he was apprehended and later charged with aggravated robbery. The third appellant who was with PW1 when the robbery occurred denied having any connection with the commission of the offence. His evidence leading to their fate is similar to that of PW1 except that when he stopped the car, a man who introduced himself as a police

officer accused them of having drugs in the car. He told the court that the Toyota Mark X car which blocked them had a Zambia Police number plate and that he could not identify their perpetrators as it was in the night.

4.0 DECISION OF THE LOWER COURT

4.1 After considering the evidence before court and the law relating to the offence of aggravated robbery, the trial court found that the prosecution had proved their case beyond reasonable doubt. The court reasoned that PW1 had a good opportunity to observe the attackers as there was enough lighting from the other two vehicles. With regards to the third appellant, the court found that he was connected to the robbery because of the phone calls he repeatedly received during their journey. The court also found that the third appellant's conduct of parking the car off the road was an odd coincidence which was not reasonably explained but instead provided something more connecting him to the offence. The court went on to convict the trio and sentenced them to death.

5.0 GROUNDS OF APPEAL

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

- 1. The learned trial court erred in law and in fact when the court convicted the 1st and 2nd appellants on weak evidence of identification in the absence of corroborative evidence or evidence of something more.**
- 2. The learned trial court erred in law and in fact when the court convicted the 3rd appellant based on circumstantial evidence which did not take the case out of the realm of conjecture.**

6.0 THE HEARING

6.1 At the hearing of this appeal, learned counsel for the appellants Mrs. Tindi sought leave to file grounds of appeal and heads of argument out of time, which application we granted. She further informed us that she would rely on the filed arguments. Ms. Nyangu on behalf of the respondent equally applied for leave to file the respondent's arguments. We granted the application, after which she informed us that she would equally place reliance on the same.

7.0 APPELLANTS' ARGUMENTS

7.1 In support of ground one, counsel for the appellant Mrs. Tindi argued that the evidence against the 1st and 2nd appellant rested on single

identifying witness, PW1. It was argued that the moment the vehicle in which PW1 was travelling in stopped, they were blocked by a Toyota Mark X. His assailants went to where he was, searched him and started beating him. It was argued further that PW1 testified that he was scared and confused at the time the incident was happening. Counsel contended that in the circumstances of this case, PW1 cannot be said to have properly observed his assailants. Counsel also attacked the conduct of the identification parade stating that the 1st appellant was the only two people who was distinctively dressed and the 2nd appellant was the only light person on the parade. It was counsel's contention that the possibility of an honest mistake was not eliminated. We referred to the case of **Muvuma v The People**¹ where the Supreme Court held 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 recognise 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."

7.2 We were also referred to the case of **Charles Lukolongo and Others v The People**² where the Supreme Court held that:

"At identification parades, accused persons should not be dressed conspicuously differently from the others taking part in the parade."

7.3 It was contended that the 1st and 2nd appellants were the only persons on the parade who met the description given by PW1. As a result thereof, the identification parade was flawed and they were greatly prejudiced. Counsel contended that this was compounded by the fact that PW1 had seen the 1st and 2nd appellant prior to the parade.

7.4 Mrs. Tindi further argued that during the identification parade at the 1st and 2nd appellants were identified, a third person was equally identified by PW1. According to counsel, PW5 testified that the third person who was identified was not charged because he was a member of the public picked from the street to help form up the parade, adding that he was wrongly identified. Counsel contended that if PW1 made a mistake with regard to the identity of the other third person who was not charged, then the possibility of an honest

mistake is evidently present and PW1 could have made the same mistake in identifying the 1st and 2nd appellants. We were referred to the case of **Ilunga Kabala & Another v The People**³ where the Supreme Court held that:

“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. To achieve that object, those charged with the duty of conducting identification parades must ensure that such parades are free from unfairness.”

7.5 We were also referred to the case of **Peter Yotamu Hamenda v The People**⁴ where the Supreme Court stated as follows:

“Where the quality of identification is good and remains so at the close of the defence case the danger of mistaken identification is lessened; the poorer the quality the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. Odd coincidences can provide corroboration.”

7.6 Mrs. Tindi finally argued that other than the flawed identification parade, there is no other evidence linking the 1st and 2nd appellants to the offence of aggravated robbery. Counsel argued that none of the stolen items were recovered from any of the appellants.

7.7 In respect to ground two, Mrs. Tindi argued that the circumstantial evidence against the 3rd appellant did not take the case out of the realm of conjecture. It was argued that there is no evidence linking the 3rd appellant to the commission of the offence except for baseless suspicions of PW1 regarding the 3rd appellant's conduct on their way back. It was counsel's submission that the 3rd appellant was equally not found with any stolen items and that the record of a search which was conducted in respect of his mobile phone by PW5 was not presented before court. This, it was submitted, amounted to a dereliction of duty. We were referred to the case of **Peter Yotamu Hamenda** *supra* where the Supreme Court 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 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 derelictions of duty."

7.8 We were also referred to the case of **Kalebu Banda v The People**⁵

where the Supreme Court held that:

"Where evidence available only to the police is not placed before the court it must be assumed that, had it been produced, it would have been favourable to the accused. In this context "available" means "obtainable", whether or not actually obtained. The first question is whether the failure to obtain the evidence was a dereliction of duty on the part of the police which may have prejudiced the accused. When evidence has not been obtained in circumstances where there was a duty to do so – and a fortiori when it was obtained and not laid before the court – and possible prejudice has resulted, then an assumption favourable to the accused must be made."

7.9 It was further argued that the burden of proof lies on the prosecution to establish that the accused committed the offence and the standard is beyond all reasonable doubt. Reliance for this argument was placed on the cases of **Mwewa Muroño v The People**⁶ and **Yaoni Manongo v The People**⁷.

7.10 It was counsel's final contention that PW1 was a witness with a possible interest to serve because after the robbery he never reported to the police and only did so after the owners of the money took him to task and implicate the 3rd appellant. We were referred to

the case of **William Muzala Chipango and Others v The People**⁸

where the Supreme Court held that:

“Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded.”

7.11 It was contended that there is thus no evidence to support the convictions of the appellants and we urged to allow the appeals and set them at liberty.

8.0 RESPONDENT’S ARGUMENTS

8.1 In response to ground one, Ms. Nyangu, learned counsel for the respondent argued that the learned trial court was on firm ground when it convicted the 1st and 2nd appellant on the evidence of identification. It was contended that PW1 gave accurately fitting descriptions of the two appellants and that it was safe to rely on the evidence of identification. Reliance was placed on the case of **Bwalya v The People**⁹ where the Supreme Court held that:

- “(i) In single witness identification cases the honesty of the witness is not issue; the court must be satisfied that he is reliable in his observation and the possibility of honest mistakes has been ruled out.**
- (ii) 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 and the 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.”**

8.2 It was learned counsel’s contention that PW1’s error in identifying the third person on the parade did not relate to the 1st and 2nd appellant. Counsel submitted that the danger of an honest mistake was eliminated by the description PW1 gave of the 1st and 2nd appellant coupled with their identification on the parade. She urged us dismiss ground one for want of merit.

8.3 In respect to ground two, Ms. Nyangu argued that the circumstantial evidence on which the 3rd appellant was convicted had taken the case out of the realm of conjecture. She argued that the only inference which could be drawn from the 3rd appellant’s conduct, consisting of a series of odd coincidences, was that he was one of

the perpetrators of the subject offence. We were referred to the case of **Kabala Ilunga and John Musefu**¹⁰ where the Supreme Court held that:

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”

8.4 It was counsel’s contention that the 3rd appellant’s explanation could not be reasonably true. We were thus urged to dismiss the entire appeal.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by both parties and the judgment sought to be assailed.

9.2 The issue raised by ground one relates to the adequacy of the single identification evidence given by PW1. The Supreme Court has in a plethora of cases guided on the treatment of single identifying witnesses. It is trite that a court can properly convict on the evidence of a single identifying witness. The requirement is that the identification evidence must be reliable having regard to the circumstances of the case.

9.3 It is important that when dealing with evidence of a single identifying witness, care must be taken because there exists dangers of an honest but mistaken identification. Where the circumstances in which the observation is made are not reliable, such danger is never ruled out unless there is a connecting link. A connecting link could be anything which makes the possibility of mistaken identification too much of a coincidence. There is thus no hard and fast rule. Each case must be determined on its facts.

9.4 The Supreme Court in the case of **John Mkandawire and Others v The People**¹¹ following the decision in the case of **Bwalya** *supra*, a case cited by learned counsel for the respondent, held *inter alia* 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."

9.5 Further in the case of **Isaac Mwasumbe v The People**¹² the Supreme Court held *inter alia* that:

"Usually in the case of an identification by a single witness the possibility of an honest mistake 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, 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 (Bwalya v The People (3)); but where there is good quality identification evidence from a reliable single identifying witness it is competent for a court to convict even in the absence of other evidence to support it."

- 9.6 PW1 when giving evidence in chief described the circumstances in which he observed his assailants during the robbery. We shall reproduce the relevant portion:

Question: And this ordeal witness you mentioned when your motor vehicle stopped there was a motor vehicle that stopped in front of you a Mark X and another motor vehicle a corolla came. You were taken to the bush are you able to tell the court for how long this ordeal took place?

Answer: it was in the length of 2 minutes.

Question: I need you to clarify witness. You mentioned that the other vehicle stopped for two minutes and another came from the time you saw the Mark X stop. From that time when you were beaten and taken to the bush and told to run how long did it take?

Witness: My lord there was nothing like wasting time it was something fast fast.

Mr. Kayuni: interpreter please take your time when you interpret.

Interpreter: Obliged my lord.

Answer: they were very fast there was nothing like taking 10 minutes. It was less than getting out from our vehicle and handcuffed me taken to the bush. I could say it was in the length of say less than 10 minutes.

- 9.7 PW1 also gave evidence in chief to the effect that the time his assailants came, they immediately started beating him. When cross examined, PW1 stated that the actions of his assailants were very fast and that they used a taser on him. He confirmed that he was afraid for his life and he was shivering.
- 9.8 These were basically the circumstances in which PW1 observed his assailants.
- 9.9 It is clear in this case that the circumstances in which the offence was committed were not conducive for one to make a reliable observation. We are of the considered view that the danger of honest mistaken identification has not been ruled out. In our view, it follows that such evidence must be treated with caution as the danger of mistaken identity as already shown is high.
- 9.10 We are aware that the learned trial court found the identification evidence given by PW1 to be reliable and anchored the convictions of the 1st and 2nd appellants on it. We are of the considered view that

had the learned trial court properly evaluated the evidence of PW1, he could have found the evidence not to be reliable. We therefore hold that the learned trial judge fell in grave error when he failed to properly evaluate the identification evidence of PW1.

9.11 Having found the single identification evidence not to be reliable to support a conviction, we now turn to see if there is any supporting evidence on the record which could make the convictions of the 1st and 2nd appellants safe.

9.12 The relevant evidence is that given by PW5 the investigating officer. He told the trial court that he apprehended the 1st appellant in Lusaka after a tip off from an informer after which he apprehended the 2nd appellant and another person by the name of Dickson Chitaiyi, who was later released for lack of evidence. None of the appellants were found with any of the stolen items, neither were they found with any of the vehicles which were involved in the robbery nor a gun that was allegedly used. We therefore find that there is no connecting link, which could possibly rule out the danger of an honest but mistaken identification.

9.13 We agree with the submission by learned counsel for the appellants that the convictions are not safe. We therefore find merit in ground one of the appeal. We allow it, set aside the convictions and the sentences of death. We set the 1st and 2nd appellants at liberty.

9.14 Ground two relates to the conviction of the 3rd appellant. The 3rd appellant a driver with whom PW1 embarked on a journey to Nakonde. It is clear from the record, that on their way back from Nakonde, the 3rd appellant was behaving quite strange. He kept receiving phone calls. According to PW1, when they were nearing Kapiri turn off, a vehicle passed them and the 3rd appellant asked if he had seen the vehicle that passed them. PW1 asked the 3rd appellant why he asked about that vehicle when there were many other vehicles which passed them. His response was that it moved fast and flashed lights. The vehicle was a Mark X. Later, the 3rd appellant decided to stop along the Ndola Kapiri road, upon which they were blocked by two vehicles, one of them being the Mark X. The 3rd appellant immediately came out and started shouting **"Bwana Bwana Bwana"** whilst raising his hands.

- 9.15 The 3rd appellant in his defence stated that he did not voluntarily stop the vehicle but was forced to do so by being blocked by the attackers. He disputed having voluntarily come out of the vehicle and raising his hands. He instead said he was forced out of the vehicle.
- 9.16 The learned trial court accepted the evidence of PW1 after finding him to be more credible than the 3rd appellant. The learned trial court was perfectly entitled to make this finding and we see no reason to interfere with the same.
- 9.17 The question therefore is whether the conduct of the 3rd appellant could invariably lead to a conclusion that he colluded, aided or abetted the commission of the offence herein.
- 9.18 The learned trial court found that the conduct of the 3rd appellant was that he was an accomplice who aided the attackers and not one of a person who was innocent. We are inclined to agree with the finding of the trial court. The trial court was entitled to make such a finding as it is supported by the evidence on the record. We find no reason to interfere with the same. The conduct of the 3rd appellant

shows that he knew the assailants prior to the attack. It would appear they were the ones who kept calling him that night. When he stopped the vehicle in order to facilitate the robbery, he quickly came out, raised his hands and was addressing them as "**Bwana.**"

9.19 Further from the narration of PW1, it is clear that PW1 is the one who received severe beatings from the assailants. All these factors put together only lead to an irresistible conclusion that the 3rd appellant was party to the commission of the offence, hence a principal offender.

9.20 The argument by counsel for the appellant that PW1 is a witness with an interest to serve, whose evidence requires corroboration is devoid of merit. On the contrary, PW1 is a victim who was traumatised by the attack and the loss of huge amount of money. This explained his conduct thereafter. We see nothing on the record which could warrant the treatment of PW1 as a witness with a possible interest.

9.21 We find force in the arguments by counsel for the respondent that an inference of guilt is the only inference which could reasonably be drawn from the 3rd appellant's conduct.

9.22 We find ground two to be devoid of merit and we dismiss it.

9.23 We note the appellants were charged with armed aggravated robbery, upon which the trial court relied in imposing a death penalty. PW1 told the trial court that the assailants had a pistol. We note that the said pistol was never fired, neither was it recovered nor presented before the trial court. The Supreme Court in the case of **Jonas Nkumbwa v The People**¹³, held that:

"It is unsafe to uphold a conviction on the charge of armed Aggravated Robbery where there is no direct evidence of use of firearms."

9.24 The Supreme Court further observed at page 105 that:

"As we have already stated, there is an allegation that two of the robbers were armed with firearms. There was no direct evidence of the use of firearms as they had not been fired nor were they subsequently found and tested to be firearms within the meaning of the Firearms Act. As Mr. Mwanachongo properly observes, they may have been imitations. In the premises we find that it would be unsafe to uphold a conviction on charge of armed aggravated robbery."

9.25 We recently guided in the case of **Raymond Kosamu Zulu and Another v The People**¹⁴ at J19 to 20 that:


".....there must be direct use of a firearm. It is not enough that the witnesses saw a gun. The firearm so seen must be a firearm under the Firearms Act, Cap 110 of the Laws of Zambia. In simple terms, if the firearm is recovered, it must be examined in order to establish whether it is capable of loading and discharging a projectile. In the event that the firearm is not recovered, it is sufficient that the witnesses heard and or saw it being discharged in the course of the robbery and a spent cartridge is picked. It has also being held previously that it is also sufficient if the witnesses see a firearm during the attack and live ammunition is picked....."

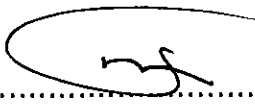
9.26 We therefore find that the conviction for armed aggravated robbery is flawed as there is no evidence on the record to support it. We therefore set it aside together with the sentence of death. We find the 3rd appellant guilty of ordinary aggravated robbery.

9.27 In considering the sentence to impose on the 3rd appellant, we take note of the fact that he worked with persons who held themselves out as police officers during the robbery, the amount of money stolen which was not recovered and the trauma that was occasioned on PW1. These circumstances take this case outside the realm of the minimum mandatory sentence.

9.28 We therefore impose on the 3rd appellant a sentence of 25 years imprisonment with hard labour with effect from the date of arrest.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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B. M. MAJULA
COURT OF APPEAL JUDGE


.....
K. MUZENGA
COURT OF APPEAL JUDGE