IN THE COURT OF APPEAL OF ZAMBIA Appeal No 187,188,189/2020
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

REPUBLIC OF ZAMBIA COURT OF APPEAL CRIMINAL REGISTRY P.O. BOX 50067, LUSAKA

BETWEEN:

TAPIWA CHIKULU **1st APPELLANT**
BRIAN LUPIYA **2nd APPELLANT**
GEORGE NGOMA **3rd APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 15th June, 2021 and 19th November, 2021

For the Appellant : Ms. M. Marebesa, Legal Aid Counsel, Legal Aid Board

For the Respondent: M.K. Chitundu, Deputy Chief State Advocate, National Prosecution Authority

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JUDGMENT

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Lajabu v the People Supreme Court appeal No 3 of 2019**
2. **Peter Yotamu Haamenda v The People (1977) Z.R. 184 (SC)**
3. **Dorothy Mutale and Richard Phiri v The People (1997) S.J 51 (SC)**
4. **Mwewa Munoro v The People (2004) ZR 207.**
5. **Andrew Lungu vs People CAZ/108/2019**
6. **Douglas Mpofu and Washington Magura v. The People (1988 – 1989) ZR 24**

Legislation referred to:

1. The Penal Code Chapter 87 of the laws of Zambia.

1.0. **INTRODUCTION**

1.1. The appellants were charged with one count of the offence of aggravated robbery contrary to **Section 294 (1)** of the **Penal Code**[1]. The particulars of the offence allege that the appellants on the 20th May, 2017 at Lusaka, jointly and whilst armed with machetes, crowbars, knives and stones did steal, 1 sandwish maker, 1 pair of curtains, 1 pressing iron, 2 cell phones, 1 printer, 1 wall clock, 1 set of tea towels and K160.00 cash altogether valued at K10, 410.00 the property of Tania Liswaniso, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to Tania Liswaniso in order to obtain or retain, or prevent or overcome resistance to it being stolen or retained.

1.2. They were subsequently convicted and were each sentenced to Eighteen (18) years imprisonment to be served with hard labour by the High Court (before Lady Justice M. Chanda).

2.0. **PROSECUTION EVIDENCE IN THE COURT BELOW**

2.1. The appellants' conviction was secured by the evidence of four witnesses. A summary of the evidence of PW1 was that in the early hours of 20th May, 2017, she was awakened by a loud bang at the gate. When she peeped through the window to see what was going on, she saw seven people who were trying to force the gate open. She went out of her bedroom to sound the alarm and on her way, she met her sister in law (PW2) in the passage. She narrated that she went into the kitchen turned on the electric fence and immediately shouted for help in the hope that her next-door neighbours would come to their aid.

2.2. It was her testimony that while the intruders were breaking the grill and the front door to gain access into the house, she rushed to lock herself in the master bedroom leaving her sister in law in the passage. She went on to tell the trial court that five robbers armed with iron bars, machetes, stones and crowbars broke her bedroom door and turned the lights on. PW1 stated that she was able to see the intruders clearly as they were not wearing masks. she testified that one of the robbers demanded for her phone but she declined

to give him, thereupon she was slapped and pushed against the wall which resulted in her falling on the floor

2.3. She stated further that the robbers ransacked her bedroom in search of money and eventually got away with a lot of things which included her phone, laptop, set of branded towels and her shoes. She narrated that the intruders later took her to the bedroom where her sister in-law was and locked the door. When the intruders left the room, the alarm went on. They managed to open the door and that in the morning when her neighbour came to check what had happened, they established that the robbers went away with an iron, sandwich maker, clock, suitcase, Samsung printer and linen curtains.

2.4. She told the trial court that around 06:00 am, she was alerted by her neighbour that some people had been caught by the police. When they went outside the gate, they found a police vehicle and some men in the vehicle. PW1 told the court that she was able to identify three men in the police vehicle as the ones that robbed them. In her further evidence, she stated that she identified some of her items among the items the police officers recovered.

2.5. When crossed examined, PW1 stated that her neighbour is the one who informed them that some thieves had been caught and she

did not give details of how they were caught. She further told the court that other than recognising the robbers, she was able to remember what they were wearing.

2.6. The second prosecution witness was **Pumulo Liswaniso**, sister in law to PW1. In her testimony, she recounted how the gang of armed thieves stormed their house on 20th May 2017. Her evidence was substantially similar to that of PW1. She added that one of the robbers grabbed her by the neck and dragged her into the bedroom where they got away with a Samsung galaxy ace phone, a laptop and a travelling bag. She was also able to identify their assailants when the police brought them later.

2.7. In cross examination, she told the trial court that the incidence lasted close to 30 minutes and that she recalled the clothes which the accused persons wore on the material date.

2.8. Detective Constable **Isaac Kangelesa** of Lusaka Division, Anti Robbery Squard C5 was the third prosecution witness. He told the trial court that on 19th May, 2017 as they were on night patrol with Detective Sergeant **Musa** they noticed a motor vehicle, a Toyota Spacio grey in colour, registration number ADD 2935 heading towards Chibolya Compound at high speed. They gave a chase and managed to intercept the said motor vehicle. Upon searching the

motor vehicle, they found a white and black Samsung printer, a green pair of curtains and some break-in instruments. He stated that there were five occupants in the vehicle but they only managed to apprehend three while the rest escaped.

2.9. The appellants were then taken to the police station for interrogations after which the appellants led them to Obama extension in Chelstone at house No 25/73 where a demonstration of how they broke into the premises was made. PW3 stated that they found two ladies (PW1 and PW2) who confirmed that they had been attacked by seven unknown men and who stole some goods. He told the trial court that the said two ladies managed to identify the appellants as being part of the gang of robbers that broke into their house. PW3 asserted that PW1 and PW2 later identified the Samsung printer and a pair of green curtains as part of some of their stolen items.

2.10. When cross examined, PW3 confirmed that he interrogated the appellants before they led them to the scene of the crime. He also told the trial court that the appellants were warned and cautioned on 22nd May, 2017 after they provided incriminating evidence. He told the trial court that two of the appellants wanted to run away but they managed to apprehend them while the other two

managed to escape. He confirmed that the complainants saw the appellants after they led the police to their house. He also stated that the 1st appellant in his warn and caution statement mentioned that he was a taxi driver who had been booked by a person named Kelvin.

2.11. It was his testimony that they did not enquire who Kelvin was as they were only interested in the appellants. He denied having been led to a bar in Chelstone by the appellants.

2.12. The last prosecution witness was **Peter Musa** a detective Sergeant at Lusaka Division Flying Squard. His evidence was essentially similar to that of PW3. He added that he warned and cautioned the appellants at Lusaka Central Police Station before being led to the crime scene.

2.13. When cross examined, PW4 stated that he did not obtain any phone call printout to ascertain whether the first appellant did indeed receive a call from Kelvin.

3.0. **THE DEFENCE**

3.1. In his defence, the first appellant **Tapiwa Chikulu** told the trial court that he was a taxi driver who operated from Matero Popes night club. He informed the trial court that on 19th May, 2017, he started work at 17:00 hours in the company of the third appellant

who was his co-driver. According to him, around 23:00 hours he was requested by his friend, the second appellant a fellow taxi driver, who did not have a vehicle, to pick up his customer by the name of Kelvin from Chelstone. He explained that he contacted Kelvin on the number the second appellant had given him and he requested to be picked up from a tavern in chelstone. He stated that he proceeded to chelstone in the company of the second and third appellant. He told the trial court that when they arrived, Kelvin and two of his friends loaded their bags on the taxi and asked to be taken to John Laing compound.

3.2. He narrated that, when they reached Chibolya, he saw a land cruiser which flashed lights on them and intercepted his vehicle. He stated that when he stopped the vehicle, Kelvin opened the door and ran away with two others whilst the appellants were arrested and taken to Central Police. It was his further testimony that in the morning, the police officers requested to be led to the tavern where he had picked the three people who escaped and he obliged. He explained that the goods recovered in his taxi belonged to Kelvin and his two friends. He also told the trial court that the police officers subjected them to severe beatings and declined to listen to the explanation given.

3.3. The first appellant further stated that eventually the police were led to the crime scene by a lady who lived next to the complainants' house. He stated that when they arrived at the complainants' house, the police told the ladies that the appellants were the thieves that had stolen from their house. That the ladies denied knowing them and were shown the curtain and the printer in the vehicle which they identified as their property. He told the police that after this, they were taken back to central police.

3.4. In cross examination, the first appellant acknowledged that the statement recorded by the police was read to him before appending his signature. He clarified that the printer and curtains found in his car were left by Kelvin and his friends.

3.5. In his defence, **Brian Lupiya,** the second appellant told the trial court at on 19th May, 2017 around 16:00 hours, he went to his employer's house in Lilanda to get a vehicle so that he could start working. He did not find his employer and was advised to wait for him at Popes taxi rank. It was his testimony that as he was waiting for his boss, he received a call from a client by the name of Kelvin who wanted to hire him. At this time he did not have a car, Kelvin thus asked him to find an alternative taxi for him. He told the trial court that the first appellant accepted to pick up Kelvin and called

the third appellant his co-driver. He testified that the trio proceeded to Chelstone and picked up Kelvin who was in the company of two other people.

3.6. It was his evidence that the third appellant assisted Kelvin and his friends to load their luggage in the taxi while the first appellant negotiated with Kelvin on the fare to John Laing. Soon after agreeing on the fare they started off. The rest of his evidence on how they were intercepted, taken to the police and later went to Chelstone is similar to that of the first appellant.

3.7. In crossed examination, the second appellant told the trial court that he opted to remain silent when the police recorded his warn and caution statement. He testified that he met the first appellant after Kelvin phoned him at 23:00 hours. The second appellant confirmed that at 02:30 hours they were in Chelstone with the first and third appellants.

3.8. The third appellant **George Ngoma** testified as DW3. He confirmed that he was with the first appellant at Popes taxi rank and that the second appellant approached the first appellant and informed him that he had a client who wanted to be picked up from Chelstone. For the rest of his testimony, he opted to adopt the evidence adduced by the second appellant.

4.0. FINDINGS AND DECISION OF THE LOWER COURT

4.1. The trial court considered the evidence and written submissions presented before it by both parties. The trial court found that indeed the complainants were on 20th May, 2017 around 02:30 robbed of assorted household items which included a Samsung printer, a laptop as well as one Hundred-Sixty-Kwacha cash (K 160.00) by a group of armed men who broke into their home. The court below also found that during the robbery the assailants strangled and assaulted the complainants. The trial court also found that an hour after that the incidence, the police intercepted a motor vehicle that was being driven by the first appellant. Upon searching the car, the police found a printer and some curtains which belonged to the complainants as well as break in instruments.

4.2. The court below concluded that there was overwhelming evidence implicating the appellants. The court reasoned that, the cumulative effect of the evidence in particular, the satisfactory identification of the appellants which is supported by the recovered property, displaced the presumption resulting from any dereliction of duty on the part of the prosecution. The court stated that there was no doubt that the appellants were part of the gang of robbers who

had the common design of stealing from the complainants. Accordingly, the each of the appellants were found guilty and convicted of the offence aggravated robbery.

5.0. **GROUND OF APPEAL**

5.1. Disconsolate with the convictions, the appellants filed one ground of appeal couched as follows:

(i) The lower court erred in law and in fact when it sentenced the appellants to a colossal term of 18 years imprisonment with hard labour based on poor identification evidence.

6.0. **APPELLANTS' ARGUMENTS**

6.1. In supporting the sole ground of appeal, the learned counsel for the appellant submitted that the court below relied on the identification evidence of PW1 and PW2 which was not sufficient. Counsel pointed out that during trial, PW1 and PW2 failed to tell the court any unique features relating to the three appellants that assisted them to recognise or identify the appellants. We were referred to the case of **Lajabu v the People**[1] where it was held that:

> **Whenever identification of an accused person is in issue the witness purporting to identify the accused must be required to give detailed evidence as to the**

physical appearance of the person who committed the offence. It is not sufficient for the witness to claim that he identifies the accused as the one who committed the offence. In a case where identification is at issue those witnesses who purport to give evidence identifying an accused as the perpetrator of the offence the subject of the trial, must be required to give detailed evidence as to the physical appearance of the man who allegedly committed the offence, this should include the facial appearance any physical peculiarities, clothing and so on of the alleged culprit. It is not enough for the witness merely to claim that he identified the accused as the man who committed the offence"

6.2. It was contended that the failure by **PW4** to enquire into the explanation given by the appellants amounted to serious dereliction of duty. It was Counsel's submission that the failure by PW4 to obtain phone call records to ascertain whether the appellants received a call from one Kelvin should be resolved in favour of the appellants. We were referred to the case of **Peter Yotamu Haamenda v The People**[2] where it was 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 dereliction of duty."

6.3. It was counsel's submission that the prosecution evidence is deficient of the required standard of proof of beyond reasonable doubt as it is marred with poor identification evidence by **PW1** and **PW2.** He contended that the said evidence cannot justify a conviction as it is not overwhelming but creates a lot of doubt. Counsel went on to submit that the evidence on record merely invites two or more inferences that can be drawn. On this argument, we were referred to the case of **Dorothy Mutale**

and Richard Phiri v The People[3] where in the Supreme Court held that-

> **"where two or more inferences are possible the Court will adopt one that is more favourable to the accused if there is nothing to exclude that inference".**

6.4. Counsel contended that in this case, the inference favourable to the accused is that they are not the ones that attacked **PW1** and **PW2** more so that there is nothing on record to exclude this inference favourable to the accused. He contended further that with these lingering issues, the prosecution cannot be said to have discharged its burden of proof beyond all reasonable doubt. We were referred to the case of **Mwewa Munoro v The People**[4] where it was held that:

> **"In criminal cases, the rule is that 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"**

6.5. In summation, we were urged to allow the appeal, set aside the convictions and sentences and acquit the appellants.

7.0. RESPONDENT'S ARGUMENTS

7.1. On behalf of the State, the learned state advocate, supported the convictions and sentences. In responding to the ground of appeal, it was contended that the trial court was on firm ground when it found the appellants guilty of committing the offence of aggravated robbery as there was overwhelming evidence against the appellants which safely warranted the court below to convict.

7.2. It was submitted that the evidence implicating the appellants is twofold. Namely, the identification evidence by the complainants and the recoveries of some of the stolen articles in the first appellant's car. Counsel submitted that owing to the circumstances of the case, holding an identification parade was going to be a mockery of justice and a mere academic exercise. In support of this argument we were referred to the case of **Andrew Lungu v. People**[5] where it was held that:

> **"Going by the circumstances of that case where the witness had already interacted with the accused persons at their house prior to holding an identification parade, holding an identification parade would have been a mockery and a mere academic exercise."**

7.3. It was contended that from the evidence on record, PW2 interacted with the assailants for some good minutes and therefore it is not questionable that she was able to identify the appellants. That from the evidence which was produced before the trial court, though PW1 and PW2's identification evidence would stand on its own, the recovery of the stolen items from the appellant's vehicle gives further credence to the complainant's identification evidence. In summation, counsel submitted that the effect of the evidence in particular, the satisfactory identification of the appellants which is supported by the recovered property, has displaced the presumption resulting from any dereliction of duty on the part of the investigators. We were urged to uphold the conviction of the learned lower court.

8.0. HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1. At the hearing of the appeal, learned counsel for the appellants Ms. Marebesa and learned Counsel for the respondent Mrs. Chitundu placed full reliance on their respective arguments. We are grateful for their submissions.

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 of the court below.

9.2. The thrust of the appellants' first part of the argument is that the identification evidence was weak.

9.3. We wish to state that after the appellants were apprehended, they led to the house where the robbery took place. They were thus exposed to the potential witnesses. The police should have ordinarily avoided this situation by ensuring that potential witnesses do not see the suspects in order to facilitate for them being identified through a parade. We must state that identification of suspects by witnesses at an identification parade is more reliable.

9.4. Notwithstanding the foregoing, the circumstances of this case render the identification evidence more reliable. This is because the appellants were identified as the ones who attacked PW1 and PW2 a few hours after the attack. Immediately they were seen in the police van, each of the two witnesses recognised the appellants as people who were part of the gang which attacked them. The learned trial court found the identification evidence to be reliable. Additionally, the learned trial court considered the fact that the

appellants being found with stolen items rendered credence to the identification evidence.

9.5. The learned trial judge was entitled to make that finding and we find no reason to interfere with the same. This is because first appellant was driving a motor vehicle at a high speed which prompted a police patrol vehicle to pursue it. Upon being intercepted, occupants scampered from the vehicle save for the appellants who were apprehended before they could bolt. After the vehicle is searched, stolen items are found barely an hour after the items were stolen. To put a nail on the evidence, the appellants led to the house which turned out to be the place where the robbery too place. And they are identified by the victims. The police had no idea of the house and the robbery. Surely all these circumstances, can the trial Judge be faulted? The answer is certainly not.

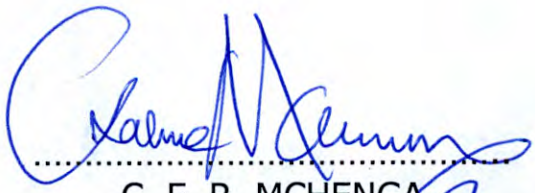
9.6. Learned counsel for the appellants has argued lastly that failure by the police to thoroughly investigate the account given by the first appellant on how he was booked by a person named Kelvin amounted to a dereliction of duty. The learned trial court considered this issue and found that the dereliction was offset by the overwhelming evidence against the appellants.

We find no reason to interfere with this finding as it is in

line with the holding in the case of **Peter Yotamu Haamenda** *supra.* A dereliction of duty only raises a presumption in favour of the accused person, which presumption is rebuttable by strong evidence. We are satisfied that the evidence in this matter is overwhelming and no prejudice was occasioned by the failure investigate the account given by the first appellant.

9.7. We agree with the arguments by counsel for respondent. The evidence of identification was reliable. The circumstances of the case proffered sufficient support to make the convictions of the appellants safe.

9.8. We find no merit in the lone ground of appeal and we accordingly dismiss it. We convictions and sentences are confirmed.



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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