

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

Appeal No. 212/2020

(Criminal Jurisdiction)

BETWEEN:

NASIBU KIBONA

VS

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 26th August 2021 and 19th November, 2021

For the Appellant : Mr. H.M. Mweemba— Acting Director, Legal Aid Board
Mrs. S.C. Lukwesa— Acting Deputy Director, Legal Aid Board

For the Respondent : Mr. C.K. Sakala — Senior State Advocate — National Prosecution Authority

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Mushemi Mushemi vs The People* (1982) ZR 71.
2. *Saluwema vs The People* (1965) ZR 4.
3. *Ilunga Kabala & Another vs The People* (1981) ZR 102

Legislation referred to:

The Penal Code, Chapter 87 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 The appellant herein was charged with aggravated robbery contrary to section 294(1) of the Penal Code chapter 87 of the laws of Zambia. The particulars of the offence were that on the 4th day of October 2015 at Nakonde in the Nakonde District of the Muchinga Province of the Republic of Zambia jointly and whilst acting together with others unknown and whilst armed with a machete did steal from Doreen Nachilima one cellphone valued at K1,500. Actual violence was alleged to have been used in order to obtain or overcome resistance to the property being stolen.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 In support of their case, the prosecution lined up 4 witnesses. Doreen Nachilima (PW1) was the star witness in this matter whose sad story was that on 4th October 2018 around 20.00 hours whilst she was at home at Tolatola village, she took some water and went to take a bath. The bathroom did not have any lighting, so she took her phone to use the lighting function.
- 2.2 After she had finished bathing and was headed back to her house with a phone in hand to light her pathway, she saw two

men coming towards her. One approached her and one remained by the side of the road. At this point, she thought that the man had wanted to answer the call of nature. To her shock and horror, he pulled out his hands from a pocket and removed a panga. His colleague who had remained by the roadside drew closer and ordered her to keep quiet. She was told to shut up and he grabbed the phone from her hands. The phone was described as a Techno K7 black in colour. The assailant then ran away whilst the other one with a panga put it back and also followed suit. She shouted for her husband Boniface Simfukwe (PW2).

2.3 Upon hearing her cry, PW2 rushed out and gave chase. According to this witness the one with a panga wore an orange hooded shirt while the other assailant was clad in a black T-shirt and blue jean trousers. In terms of the visibility, there were some lights from the house. It was PW1 and PW2's evidence that the one who had a panga was apprehended by the community when he hid behind the bathroom. In the meantime, the other criminal fled from the scene and was not apprehended.

2.4 PW3, Pyias Mulenga is the person who apprehended the appellant. His narration of what transpired on that particular night was that as he was coming from Tolatola bar heading home, he heard someone screaming that their phone had been grabbed. As he drew nearer to the place, he saw someone

hiding by the bathroom and when this person saw him, he started pretending that he was innocently walking. He called out repeatedly asking him to stop but he did not do so. PW3 then decided to confront him by standing in front of him and grabbing his T-shirt.

2.5 A struggle ensued and this person whom he later came to know as the appellant, hit him by the side of the eye. Afraid that he would be killed, he also retaliated. When he did so, the appellant removed a machete from inside his trousers on the side of the hip and hit him on his fingers. As this was going on, people approached them and the appellant was apprehended and taken to the police. The machete which had dropped to the ground was then picked up and handed over to the police. PW1, PW2 and PW3, all described the attire the appellant was wearing as an orange hoodie.

2.6 In cross examination, PW3 did admit that whilst he was having a conversation with the appellant he was responding in Swahili while he spoke in Bemba. He denied that he found the appellant urinating but insisted that he found him hiding behind the bathroom. He also testified that the community had started beating the appellant and accusing him of being a thief. He denied that the machete was found near the bathroom the following morning. He went on to state that he was not present when the hoodie was found.

- 2.7 In concluding the testimony of the prosecution witnesses, Detective Constable Chilambo was called as PW4. He received a report of aggravated robbery on 12th August 2019, whilst he was on duty. A suspect who had been apprehended by a mob was brought to the station together with a machete and an orange jersey. After conducting investigations into the matter, he charged and arrested the appellant. He did state that the phone was not recovered.

3.0 DEFENCE

- 3.1 The appellant Nasibu Kibona, a Tanzanian national aged 28 years gave sworn evidence. It was his evidence that on the material date 12th October 2018, as he was coming from a bar at Tolatola village, on his way back home, he stopped and started urinating. Whilst he was in the process of passing water, a man appeared who grabbed him by his T-shirt. This man was questioning him in Bemba as the appellant was using Swahili. They were unable to communicate effectively. He was pulling him and he asked him to stop what he was doing. According to the appellant, he didn't know where this person was dragging him to.
- 3.2 The appellant was disturbed by the behavior of this person as he did not know why he was being pulled in that manner. Shortly thereafter, he saw a mob of people who approached them and started beating him. He strongly refuted the assertion that PW3 found him hiding behind the bathroom.

He said that he was standing about 3 houses away from the bar and relieving himself when he was caught.

- 3.3 After a thorough beating, he was taken to Nakonde Police station where he was detained. The following day he was taken to the hospital for treatment and then placed back in cells. He denied wearing a hoodie and said he was wearing a blue T-shirt and black jeans. He also refuted the allegation that the hoodie and machete were taken to the police on the day he was detained.
- 3.4 His explanation of being found in that area was that he had gone on a drinking spree and decided to use that route as it was a shortcut to where he was going when he stopped to answer the call of nature. He denied the allegation of having committed aggravated robbery. It was his first time using this particular road.
- 3.5 He also explained that he did not know the people who had apprehended him and had never differed with them before as he did not know them. The long and short of his defence was that it was an unfortunate event of being in a wrong place at a wrong time. That it was a drinking spree gone bad as he was found urinating and then accused of having committed a crime which he feigned ignorance.

4.0 FINDINGS OF THE LOWER COURT

4.1 The first finding by the lower court was that PW1 was attacked on the material night and her cell phone was stolen. He also found that the appellant used a path near PW1's house. He found it an odd coincidence that the appellant was found hiding behind the bathroom shortly after PW1's phone had been stolen. He accepted PW2, PW3 and PW4's evidence that the appellant was found with a machete which was taken to the police. In the final analysis, he found that the circumstantial evidence had taken the case out of the realm of conjecture. He rejected the appellant's explanation of events as being an afterthought and that the evidence pointed to him having committed the offence. He found the prosecution had discharged its burden and found him guilty of the offence of aggravated robbery. The appellant was subsequently sentenced to 15 years imprisonment with hard labour.

5.0 GROUND OF APPEAL

5.1 Aggrieved by this decision, the appellant now appeals to this court against his conviction. The sole ground of appeal was couched as follows:

"The trial court erred in law and fact when it found that there was no mistaken identity as the finding was arrived at upon a misapprehension of facts."

6.0 APPELLANT'S ARGUMENTS

- 6.1 In the appellant's written heads of argument, counsel submitted that the appellant was mistaken to be one of the assailants when in fact not. Counsel pointed out that PW4 the arresting officer initially testified that the appellant, a machete and a hoodie were handed over to the police on the same day. He however later changed his statement to say that the hoodie was taken to the police the following day.
- 6.2 It was further argued that there is conflicting evidence on whether the appellant wore a hoodie and also on the link of the hoodie to the appellant. This was in view of the fact that the appellant denied ownership of the hoodie. Counsel urged us to adopt what is favourable to the appellant which is that it did not belong to him. It was contended that the trial court believed the evidence of PW2 and PW3 on the evidence of the hoodie without giving tangible reasons for arriving at this decision as required in ***Mushemi Mushemi vs The People*¹**.
- 6.3 Counsel further pointed out that no one continually chased the thieves without losing sight of them in order to ascertain that the appellant was one of the assailants. Counsel submitted that the trial court misapplied the facts when it found that there was no mistaken identity in identifying the appellant as one of the assailants. It was argued that the trial court erred when it dismissed the appellant's explanation which was reasonable. For this proposition, the case of ***Saluwema vs The People*²** was cited where it was held that if

the accused's case is 'reasonably possible', although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.

- 6.4 Counsel argued that the facts, in this case, have not removed the possibility of an honest mistake rendering the conviction unsafe. It was counsel's prayer that the appeal be allowed and the appellant be set at liberty.

7.0 RESPONDENT'S ARGUMENTS

- 7.1 In opposing the appeal, learned counsel for the State filed heads of arguments on 19th August 2021. The gist of his submission is that the appellant was properly convicted by the lower court on the circumstantial evidence that was before it. Counsel argued that the court below initially warned itself of the dangers of convicting on circumstantial evidence and also reminded itself that the onus was on the prosecution to prove the case beyond reasonable doubt. Having done so, the trial Judge went on to analyze the evidence and the defence and thereafter made findings of fact.

- 7.2 It was therefore contended that the lower court should not be faulted for arriving at the decision that it did. We were called upon to dismiss the appeal.

8.0 CONSIDERATION AND DECISION OF THE COURT

- 8.1 We have examined chapter and verse the record of appeal, the arguments by both parties and authorities relied on. At the

heart of the appeal is the contention by the counsel for the appellant that the finding by the court below that there was no mistaken identity of the appellant was arrived upon by a misapprehension of facts. It has been argued that there were discrepancies as regards the orange hoodie that the assailant had worn.

- 8.3 The evidence on record is that PW1 was attacked by two men on her way from taking a bath and her phone was grabbed. After screaming for help, her husband who heard her cry gave chase after the person who had her phone but unfortunately was unable to apprehend him. This witness indicated that when the appellant was apprehended, he was not wearing an orange hoodie.
- 8.4 PW3 who is the witness that apprehended the appellant indicated that there was a tussle between the two of them and the appellant attacked him with a machete and he stated that the later was wearing an orange hoodie but when he was taken to the police, he was not clad in that.
- 8.5 The appellant has argued that PW3 contradicted himself in this regard. On the one hand he said he wore an orange hoodie and then in cross examination he said he was not wearing an orange hoodie. It has been strenuously argued that there is a conflict of evidence as to what the appellant wore and also on the linkage of the hoodie to the appellant. The argument being that doubts have been raised as regards

the appellant's ownership of the hoodie and the possibility that the appellant was mistaken to be the thief. Further that the explanation that was tendered by the appellant could reasonably have been true thus warranting an acquittal.

8.6 An examination of the record reveals that on the conflicting evidence regarding the hoodie, the trial court who had the opportunity of seeing the witnesses and assessing their demeanors believed the evidence of PW2 and PW3. The court found that PW2 and PW3's position regarding the appellant being taken to the police with a machete and hoodie was confirmed by PW4. He rejected the evidence of PW1 who had stated that the machete was recovered the following day after the appellant's apprehension. The judge was of the view that her testimony in this regard was not the correct position. In other words, he found that PW2 and PW3's testimony was corroborated by PW4 on the aspect of the machete and the hoodie.

8.7 Our stand point is that the trial judge could not be faulted for having believed the evidence of PW2 and PW3 regarding the hoodie and the machete. The finding was neither perverse nor arrived at after a misapprehension of facts. In addition, the trial court did interrogate the explanation by the appellant which was to the effect that he had used the path near PW1's house for the first time and had stopped to urinate and that's how he met his fate of being apprehended. He contrasted this


with the evidence of PW4 who testified that there was a clear road that was used by people going to Tanzania and the path that the appellant used to urinate was near PW1's house which placed him at the scene of the attack and theft. Furthermore the judge found that:

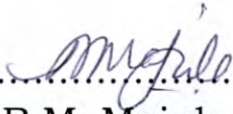
“it was a strange coincidence that the appellant was found hiding by a bathroom after PW1's shout that her cell phone had been stolen and two attackers run away, one holding the cell phone while the other had a machete and was wearing a hoodie.”

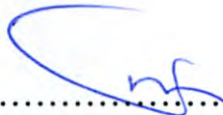
8.8 The court placed great store on the case of ***Illunga Kabala and Masefu vs The People***³ regarding odd coincidences. It is our considered view that there is no basis upon which we can assail the findings of the trial court as it ably explained the basis upon which it resolved the conflict of the hoodie and the machete.

8.9 Having believed the evidence of PW2, PW3 and PW4, and having applied the doctrine of circumstantial evidence as well as odd coincidences, the court came to the inescapable finding, which we uphold, that the possibility of honest mistake was removed and that the explanation tendered by the appellant could not reasonably be true.

8.10 In light of what we have stated in the preceding paragraphs, we find no merit in the sole ground of appeal and accordingly dismiss it. We uphold the conviction and sentence.


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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