

HOLDEN AT KABWE and LUSAKA

(Criminal Jurisdiction)

BETWEEN:

TULANI MWANZA



1st APPELLANT

SYDNEY CHANDUKE

2nd APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Kondolo SC and Banda-Bobo, JJA

On 20th October 2021 and 23rd March 2022

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

For the Respondent: M. Chipanta-Mwansa, Deputy Chief State Advocate, National Prosecutions Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. David Zulu v The People [1977] Z.R 151
2. Winfred Sakala v The People [1987] Z.R. 23
3. Chabala v The People [1976] Z.R. 14
4. Kalonga v The People [1972] Z.R. 124
5. Saluwema v The People [1965] Z.R. 4

6. Timothy Fumbelo SCZ Appeal No. 476 of 2013
7. John Timothy and Festus Mwamba v The People [1977] Z.R. 394

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. INTRODUCTION

- 1.1 This appeal, arises from the judgment of the High Court (Limbani, J.), delivered in Kabwe, on 4th February 2021.
- 1.2 The appellants, appeared before that court on a charge of aggravated robbery, contrary to **section 294(2) of The Penal Code**. The allegation was that between 14th and 15th July 2019, in Chisamba, whilst armed with a firearm, they robbed Selemani Yapusha of 37,000 litres of fuel and a tanker truck, the property of Saudi Industries Limited.
- 1.3 They denied the charge, and the matter proceeded to trial. At the end of the trial, they were both convicted of the offence and condemned to suffer capital punishment.
- 1.4 They have both appealed against their convictions, and in the alternative, the sentences imposed on them.

2 CASE BEFORE THE TRIAL COURT

- 2.1 On 14th July 2019, at around 19:00 hours, the 2nd appellant drove to Endorene Petroleum, in Lusaka, in a red car, and instructed Lawrence Phiri to follow him to Landless Corner, with a fuel tanker, he had earlier hired from there.
- 2.2 The same night, the red car the 2nd appellant had driven that evening, pulled up at Hope Truck Park in Chisamba. Two armed persons who claimed to be police officers, disembarked from the car, and approached Seleman Yapusha, a Tanzanian truck driver who was sleeping in a fuel tanker.
- 2.3 They demanded to see his documents, and despite him producing the documents, they bundled him into the red car where there were 2 other persons. They drove him into the bush, where they dumped him.
- 2.4 Seleman Yapusha, did not manage to identify any of his abductors.
- 2.5 Later that night, Lawrence Phiri, who had travelled to Chisamba, on the 2nd appellant's instruction, arrived at Landless Corner. He found the 2nd appellant, who was in the company of the 1st appellant.

- 2.6 The 2nd appellant got a Honda pump from the red car and handed it over to him. The 1st appellant got onto his truck and the 2nd appellant left.
- 2.7 Not long thereafter, the 2nd appellant returned with a person who was armed and they proceeded to Hope Truck Stop. The 1st appellant got on to the truck the Tanzanian driver had been sleeping in, (a Tanzanian registered truck), and it was driven away from the truck stop, with Lawrence Phiri following them, in his truck.
- 2.8 When they got to a lay-by on Old Mumbwa Road, the armed man threatened to harm the 1st appellant, if Lawrence Phiri became uncooperative. The armed man and the 1st appellant, started transshipping fuel from the Tanzanian truck on to the truck Lawrence Phiri was driving.
- 2.9 As they were doing so, police officers, who had been tipped off about the transshipment of fuel arrived, and fired shots. The armed man fled, and Lawrence Phiri drove his truck from that place, to Farm Store Truck Park. He was in the company of the 1st appellant.

2.10 In the early hours of the 15th of July 2019, police officers, apprehended Lawrence Phiri and the 1st appellant from Farm Store Truck Park. The 2nd appellant was only apprehended a month later. On his apprehension, he was interviewed, but opted to remain silent.

2.11 In his defence, the 1st appellant denied having attacked any person and claimed that he drove the Tanzanian truck after being threatened by the armed man. He said he found himself in that area after asking the 2nd appellant for a lift to Six Miles and the 2nd appellant, asked him to escort him up to the toll gate.

2.12 Similarly, the 2nd appellant denied committing the offence. He claimed that one Talanti Mamudi invited him to sell some petroleum products, which he was expecting from Tanzania on his behalf. As a result, he approached Endrone Petroleum, where he hired a tanker.

2.13 On the fateful night, he was directed to the Tanzanian truck to collect the fuel. He went there with Lawrence Phiri, who was driving the tanker he hired from Endrone Petroleum.

- 2.14 After introducing Lawrence Phiri to the Tanzanian truck driver, he left the place to go and organise money for the Tanzanian driver to return to his country.
- 2.15 Later that night, Lawrence Phiri called him and informed him of the gunshots. He advised him to park at the truck stop.

3 GROUND OF APPEAL

- 3.1 Three grounds have been advanced in support of this appeal. The first two grounds of appeal are concerned with the convictions, while the third ground of appeal, which is in the alternative, relates to sentence.
- 3.2 The first ground of appeal is that the finding by the trial judge that the appellants, and other persons, robbed Seleman Yapusha of a fuel tanker and fuel, is not supported by the evidence.
- 3.3 The second ground of appeal is that the trial judge erred in law and fact, when he concluded that the defences advanced by the appellants, were afterthoughts.
- 3.4 The third ground of appeal is that the trial judge erred when he convicted the appellants of armed aggravated robbery and condemned them to suffer capital punishment.

4 ARGUMENTS IN SUPPORT OF 1ST AND 2ND GROUNDS OF APPEAL

- 4.1 We will deal with the 1st and 2nd grounds of appeal, which relate to the appellants' convictions, at the same time, because they are founded on the same issues.
- 4.2 Noting that the case against the appellants is anchored on circumstantial evidence, Mrs. Liswaniso referred to the cases of **David Zulu v The People**¹ and **Winfred Sakala v The People**², and submitted that a conviction can only be anchored on circumstantial evidence, if an inference of guilt, is the only one that can be drawn on the evidence that is before a trial court.
- 4.3 She argued that the truck driver was unable to identify his assailants and there is no evidence that the appellants were working in concert with the persons who robbed him. That in the circumstances, there is no basis on which an inference that two appellants are guilty of committing the robbery, can be drawn.
- 4.4 Regarding the trial judge's finding that the appellant's defences were an afterthought, Mrs Liswaniso referred to the cases of **Chabala v The People**³, **Kalonga v The People**⁴ and **Saluwema v The People**⁵, and submitted that in the face of evidence from

Lawrence Phiri, that the armed man threatened to shoot the 1st appellant if they did not cooperate, the appellants' claim that they were not part of the robbers, could reasonably have been true.

5 ARGUMENTS IN RESPONSE TO THE 1ST AND 2ND GROUNDS OF APPEAL

5.1 In response to the 1st and 2nd grounds of appeal, Mrs. Chipanta-Mwansa submitted that on the circumstantial evidence before the trial judge, the inference that appellants were guilty of committing the offence, was correctly drawn.

5.2 She pointed out that the Tanzanian truck driver, told the court that he was abducted in a red car, by 4 armed men, who claimed that they were police officers, before his truck was stolen. At about the same time, the two appellants and two others, one of whom was armed, turned up in a red car and led Lawrence Phiri to the stolen truck.

5.3 As to their defences being an afterthought, Mrs. Chipanta-Mwansa pointed out, that the 1st appellant's claim that he had bought the fuel could not reasonably be true, given that he did not bring any

documentation and the fuel was being decanted from a truck at a roadside.

6 COURT'S CONSIDERATION OF THE 1ST AND 2ND GROUNDS OF APPEAL

6.1 The first issue we will deal with is the trial judge's treatment of the appellants' defences. He did not find them to be credible and rejected them for being an afterthought.

6.2 In the case of **David Fumbelo v The People**⁶, the Supreme Court, pointed out that consistency is one of the factors that can be used to assess the credibility of a witness' testimony. It was also pointed out that a trial judge is entitled to treat an account that is raised for the first time, during the trial, as an afterthought and attach little credibility to it.

6.3 When the 2nd appellant was apprehended and interviewed, on the 29th of September 2019, he opted to remain silent. His claim that he was contacted to buy the fuel, was only brought up for the first time, on 30th July 2020, when he gave his defence.

6.4 Although it was within his right to remain silent, when the police attempted to interview him soon after the robbery, the trial judge

was equally entitled to treat his account of what transpired, which he raised for the first time, in court, with scepticism.

- 6.5 We have examined the evidence that was before the trial judge, and are satisfied that he cannot be faulted for concluding that the 2nd appellant's claim, that he bought the fuel was an afterthought, because it was only raised in court during the trial. In any case, the trial judge rejected the 2nd appellant's claim that he genuinely purchased the fuel, noting that that he had been in the business of dealing in fuel, and was aware that fuel tankers did not move at night.
- 6.6 In the case of the 1st appellant, he claimed that the 2nd appellant drove him up to the toll gate and that he was forced to drive the truck.
- 6.7 The trial judge found that he was in the red car, in which the Tanzanian truck driver was bundled into before being dumped in the bush. At that point, had he not been part of the scheme, he could have disassociated himself from the transaction and left. But, he went with the others to collect the truck and proceeded to a layby where they transhipped the stolen fuel.

- 6.8 It is our view that the trial judge cannot be faulted for finding that the appellants' defences were afterthoughts. The evidence that they were actively involved in the abduction of the truck driver, is overwhelming. The red car that the 2nd appellant was driving, is the same car that the Tanzanian driver was abducted in.
- 6.9 The case against the appellants was said to be circumstantial in the sense that the truck driver did not see the person who robbed him. The 1st appellant was incriminated by evidence that he was found transshipping fuel within a few hours of the tanker being stolen. There was also evidence that he was in the car, together with the 2nd appellant, in which the truck driver was bundled, after being threatened at gun point.
- 6.10 Having rejected their defences, and rightly so in our view, we find that an inference that both appellants were involved in the robbery, is the only inference that the trial judge could have drawn on the evidence before him.
- 6.11 This being the case, we find no merits in the 1st and 2nd grounds of appeal. It is our view that the trial judge was entitled to find that their defences were an afterthought and that an inference that they

were guilty of the robbery is the only one that could be drawn on the evidence that was before him.

7 ARGUMENT IN SUPPORT OF THE 3RD GROUND OF APPEAL

7.1 In support of the 3rd ground of appeal, Mrs. Liswaniso referred to the case of **John Timothy and Feston Mwamba v The People**⁷, and submitted that in the absence of evidence that the pistols used to threaten the Tanzanian truck driver were firearms, within the meaning of the **Firearms Act**, the appellants should not have been convicted under **section 294(2) of The Penal Code**.

8 ARGUMENT IN RESPONSE TO THE 3RD GROUND OF APPEAL

8.1 In response to the 3rd ground of appeal, Mrs. Chipanta-Mwansa conceded that there was no evidence that the pistols used to threaten the Tanzanian truck driver, were firearms.

9 CONSIDERATION OF THE 3RD GROUND OF APPEAL

9.1 It is common cause that no firearm was discharged during the robbery. Neither were the pistols used by the robbers to threaten the truck driver, recovered and tested to confirm that they were firearms.

- 9.2 This being the case, an essential ingredient of the charge of “armed aggravated robbery” , which is the use of a firearm to commit a robbery, was not proved.
- 9.3 Consequently, we set aside both appellants convictions for the offence of aggravated robbery contrary to **section 294(2) of The Penal Code**, and the capital punishments imposed on them.
- 9.4 However, since we are satisfied that the charge of aggravated robbery was proved, be it without a firearm, we substitute the conviction with that of aggravated robbery contrary to **section 294(1) of the Penal Code**.

10 VERDICT

- 10.1 Although the Tanzanian truck driver did not suffer any injury during the robbery, we note that the time the appellant’s were committing the offence, they pretended to be police officers. In addition, after the robbery, they also bundled him into a car and went and threw him in the bush, in a place he was unfamiliar with, given that he is a none resident. These where aggravating factors.
- 10.2 We impose sentences of 25 years imprisonment, with hard labour, on each of the appellants. The sentences will run from 15th of July

2019, with respect to the 1st appellant, and the 29th of September 2019, for the 2nd appellant.



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C.F.R. Mchenga

DEPUTY JUDGE PRESIDENT



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M. M. Kondolo

COURT OF APPEAL JUDGE



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A.M. Banda-Bobo

COURT OF APPEAL JUDGE