APPEAL NOs. 56, 57, 58/2021

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN

JAMES KAIRA (DECEASED)	**1ST APPELLANT**
ANDREW NJOBVU	**2ND APPELLANT**
LACKSON MUKUKA	**3RD APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

Coram: Malila CJ, Kaoma and Chinyama, JJS.

On 13th July, 2021 and on 10th May, 2022.

For the Appellants:	*Mr. I. Yambwa, Senior Legal Aid Counsel, Legal Aid Board.*
For the Respondent:	*Mrs. M. Hakasenke-Simuchimba, Senior State Advocate, National Prosecutions Authority.*

JUDGMENT

CHINYAMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. Nyambe v The People (1973) ZR 228
2. Love Chipulu v The People (1986) ZR 73

3. Muvuma Kambanja Situna v The People (1982) ZR 115
4. Saluwema v The People (1965) ZR 4.
5. Chimbini v The People (1973) ZR 119
6. Kenneth Mtonga and Victor Kaonga v The People, SCZ Judgment No. 5 of 2000
7. Toko v The People (1975) ZR 196

1. The three appellants, namely: James Kaira, Andrew Njobvu and Lackson Mukuka (the 1st, 2nd and 3rd appellant respectively), were jointly charged with three counts of the offence of Aggravated Robbery contrary to Section 294 (2) of the Penal Code, Chapter 87, Laws of Zambia (hereafter, "the Penal Code"), involving the use of a firearm. They appeared in the High Court at Lusaka and were tried before Hamaundu J, as he then was.

2. In the first count, only the 3rd appellant was convicted of the offence of Aggravated Robbery contrary to Section 294 (2) of the Penal Code in that he, with others (the 1st and 2nd appellants who were acquitted of the charge) on 28th October, 2009 at Lusaka, whilst armed with an AK47 rifle, stole from Grace Mwanza a 14-inch Sharp television set and used or threatened to use violence against her, to aid the stealing of the property.

3. In the second count, again only the 3rd appellant was convicted but for the lesser charge of Aggravated Robbery contrary to Section 294 (1) of the Penal Code in that on 20th January, 2010 at Lusaka, he together with others (again the 1st and 2nd appellants who were acquitted of that charge) stole from Kenani Phiri a cell phone, a blanket, a chicken, K189,000 cash (unrebased) and used or threatened to use violence against him, to aid the stealing of the property. The reason for the lesser charge was that the Court below did not find any evidence to support the allegation that a firearm was used.

4. In the third and last count, all three appellants were convicted of the offence of Aggravated Robbery contrary to Section 294 (2) of the Penal Code. They were found to have, on 20th February, 2010 at Lusaka, whilst armed with an AK47 rifle, stolen from Davison Chama Sikazwe a pistol, 5 rounds of ammunition, a cell phone and K5 million cash (unrebased) and used or threatened to use violence against him, to aid the stealing of the property.

5. At the hearing of the appeal on 13th July, 2021, Mrs. Hakasenke-Simuchimba informed us that the 1st appellant, James Kaira died on 7th September, 2014. A medical certificate showing the cause of

death was produced. Being satisfied that the 1st appellant had died, we determined that his appeal against conviction (for the offence of Aggravated Robbery in the third count) had abated. This appeal is, therefore, in respect of the 2nd appellant for his conviction for the offence in count three and the 3rd appellant for his conviction for the offences in all the three counts. Consequently, we will restrict our consideration of the appeal to the two surviving appellants.

6. In relation to the offence in count one, the factual evidence was that on 28th October, 2009 around 01.00 hours, PW6, Victor Mwanza who had retired to bed with his family heard a knock on the door and voices of people saying they were police officers. They told him to open the door. The witness peeped outside through the window and saw six people, one of whom was wearing a police uniform and had a firearm. Another was breaking the door. He asked why they were breaking the door and they responded that it was because he was cheeky. PW6 got scared and ran to the bedroom. The witness managed to escape from the house after the intruders had gained entry, by pushing his way out and running past the man with a gun who was outside the house. He ran

towards a neighbouring house where there was a funeral wake. Two gun shots were fired as he ran away.

7. When PW6 later went back to the house, he learnt that his wife had been beaten and the men had taken a colour television set and K500,000 (unrebased) cash. In the morning, the witness and his wife found two spent cartridges and one live bullet. The matter was reported to police to whom the two empty cartridges and live ammunition were handed. PW6 told the police that he would recognise the man that had broken the door. After about four months, he was requested to attend an identification parade at Emmasdale Police Station where he identified the 3rd appellant (as the person that broke the door). He stated that the attack lasted fifteen minutes, ten minutes of which was spent breaking the door. PW6 was the only witness who gave evidence of identification in connection with the first count.

8. In relation to the offence in the second count, the material evidence came from two witnesses, PW3, Kenani Phiri and his son, PW4, Davison Phiri. Their evidence was that on 19th January, 2010 they arrived home after 00.30 hours from their business of selling roasted goat meat. Before they could enter the house, a man

dressed in police uniform and had a gun emerged from a maize field. The man ordered them to stop and to lie down and two other men joined him. One had a whip. The second man went into the house and started removing household goods. The man with the whip searched and took the witnesses' cell phones and money amounting to K189,000 (unrebased). The men then told father and son to go into the house and lock the door before departing with the feloniously acquired bounty. PW3 was able to observe the man who had a whip because there was light at the house and from a shop opposite the house and also from a neighbouring house. PW3 was able to observe the man who had a whip. Later, the witnesses reported the matter to the police. In due time the police invited the two witnesses to an identification parade at Emmasdale Police Station where they both identified the 3rd appellant as the person that had wielded the whip and searched them. PW4 testified that he had looked at the 3rd appellant for a few seconds as he searched him.

9. In relation to the offence in the third count, the evidence of PW1, Davis Chama Sikazwe and his son, PW2, Boniface Chama was that on 6th February, 2010 the pair arrived home around 23.30 hours from their business place. They were in a Toyota Corolla driven by

PW1. PW2 alighted from the vehicle to open the gate. As PW1 drove the vehicle into the yard, four people appeared around the vehicle. One of the men wore a police uniform and had a gun. Another was carrying a whip. Both witnesses thought the men were police officers on patrol. PW1 stated that one of the men told him to put his hands up. PW2 stated that he asked the men what the problem was. The man with the gun fired a shot in the air. PW1 dived to the floor of the car. Another shot was fired through the windscreen of the car. PW1 heard one of the robbers tell the others to take the witness' pistol. At that point PW1 recognised one of the robbers as the person he had spoken with earlier in the day at the witness' place of work and had even given him a lift in his car. That person had told him that he worked for the Office of the President.

10. According to PW1, the person he had recognized told his colleagues to take money and they took K5 million from him which they said was not enough. The man told his friends to take the witness into the house so that his wife could add some more money. As they dragged him towards the house, he looked at his assailants. He told them that there was no money in the house and they started to beat him.

11. Meanwhile, PW2 had realized, when the gunshot was fired, that the men were not police officers. He ran into the house and got a shotgun from his mother. He fired a shot in the air. The robbers let go of PW1 and ran away. The attack had lasted about thirty minutes. Contact was made with ZESCO police who responded and went to PW1's home where two spent cartridges were retrieved. The matter was eventually reported to the Zambia police. PW1 told the police that he knew the people that had attacked him although he did not know where they lived.

12. Days later, the police invited PW1 and PW2 to an identification parade at Emmasdale Police Station where PW1 identified the 2nd appellant as the person he had spoken to and gave a lift before the robbery. He was the man he had recognized during the robbery. He also identified the 3rd appellant as the person that had entered the front passenger side of the car and had searched him.

13. PW2 testified that there were lights at the gate to the house and he observed the robbers for about three minutes. At the time, he had not been afraid because he thought that the men were police officers. He identified the 2nd appellant as the one that ordered his

father to lie down and had told his friends to shoot him. He identified the 3rd appellant as the one that had carried the whip.

14. In cross-examination, PW1 denied that between 2004 and 2005 he and the 3rd appellant had signed as witnesses to a land transaction. He denied that the 2nd and 3rd appellants used to drink from his bar or that he too used to drink at the third appellant's bar. PW2 also denied that the 2nd and 3rd appellants used to frequent their bar.

15. PW9, Spider Chola, who was the arresting officer and PW8, Ernest Kalusa, a Police Officer testified that they, together with other Police Officers apprehended the appellant at a tavern in Chiapta Compound on 9th February, 2010. This was following information received about the presence of criminals suspected to have been terrorizing the Chipata/Chazanga/Kabanana compounds area.

16. In cross examination, the two witnesses denied picking up a photograph of the 2nd and 3rd appellants during searches at the appellants' homes.

17. PW5, Jeremiah Lungu, a scenes of crime officer, who conducted the identification parade at Emmasdale Police Station which PW1,

PW2, PW3, PW4 and PW6 attended, stated that he explained the suspect's rights and no one raised any complaint about the conduct of the parade.

18. When put on their defence, the two appellants did not allude to the events that gave rise to the offences they were charged with. Rather, they gave evidence of how they were apprehended. They, testified that they were apprehended together at Blessings Bar where they were drinking beer on 7th February, 2010 on an allegation that they were telling people that they worked for the Office of the President.

19. The 2nd appellant confirmed that at one time PW1 had given him a lift. According to the 2nd appellant, it was PW1 who told him that his son had gotten a job at Cabinet Office. He stated that, at his home, the police collected a photograph of the 2nd and 3rd appellants. He accused PW1 of harboring a grievance against the 3rd appellant relating to a plot which PW1 had bought from the 3rd appellant but which the 3rd appellant sold to somebody else. He stated that PW1 used to complain about this to him.

20. In cross-examination, the 2nd appellant denied telling PW1 that he worked for the Office of the President.

21. The 3rd appellant elaborated that after being apprehended, he and the 2nd appellant were taken to a police post where they were beaten. He got injured in the process and his clothes became soaked in blood. He stated that prior to the identification parade, he was given a black shirt and black trousers to wear. He repeated 2nd appellant's allegation that PW1's relationship with him (the 3rd appellant) was sour on account of a plot of land which PW1 bought from him and paid in part only. The 3rd appellant stated that he sold the plot to someone else and refunded PW1 his part payment.

22. The 3rd appellant called a witness, his elder sister, Jenipher Kamushitu, whose evidence was that when the 3rd appellant was apprehended she went to Chipata police post where he was initially detained. There, in the office of the Officer-in-charge, she found a photograph of the 3rd appellant. She was told that it had been brought by the officers who had apprehended him. The witness testified that she had been living with the 3rd appellant and that PW1 was their neighbor.

23. In his judgment, the learned trial Judge found, in relation to the offence in count one, the identification evidence of PW6, Victor Mwanza, husband to the complainant Grace Mwanza, to be

satisfactory. According to the learned trial Judge, the witness had given a satisfactory reason to support his recognition of the third appellant. The learned Judge stated that PW6 was consistent in his claim that he told the police at the time of giving his statement that he would be able to recognize the person that had broken the door. Therefore, that the witness' evidence was strong. He relied on it and found as a fact that the third appellant was one of the assailants that attacked and robbed Grace Mwanza on 28th October, 2009.

24. Coming to the offence in the second count, the Judge accepted the identification evidence of PW3, Kenani Phiri and his son Davis Phiri, PW4. He noted that the two witnesses' evidence was strengthened by the fact that they were both able to identify the 3rd appellant at the identification parade from among several other people.

25. For the offence in count three, the learned trial Judge was satisfied with the identification of the two appellants by the complainant, Davison Chama Sikazwe (PW1) and his son Boniface Chama (PW2). The learned Judge noted that not only were the two witnesses able to assign an activity which each appellant

performed during the robbery, they were also able to identify the same appellants at the identification parade. The Judge rejected the 3rd appellant's complaint over the clothing he was given to wear at the parade noting that from his own testimony, his clothes had been soiled.

26. Consequently, the learned Judge convicted the 2nd appellant for aggravated robbery in count three. He also convicted the 3rd appellant for the aggravated robberies in all three counts.

27. The appellants cited one ground of appeal, namely that--

> **The learned trial Court erred in law and in fact when it convicted the appellant on evidence of identification which was not satisfactory.**

28. Heads of Argument elaborating the ground of appeal and on which Mr. Yambwa entirely relied were filed. The substance of the arguments was that the evidence of identification was too questionable and weak to link the two appellants to the commission of the offences. It was submitted that the circumstances in which the identifying witnesses, viz: PW6 (in count 1), PW3 and PW4 (in count 2) and PW1 and PW2 (in count 3) observed the assailants reveal stress in the moments

exacerbated by the trauma (in the case of the first and third counts) of gunshots. That these impeded a proper opportunity for observation. It was, accordingly, submitted that the possibility of honest mistake in the identification of the appellants cannot be ruled out.

29. The cases of **Nyambe v The People**[1]; **Love Chipulu v The People**[2] and **Muvuma Kambanja Situna v The People**[3] were cited on the need to rule out the possibility of honest mistake before a Court could rely on the identification evidence. It was also contended that the manner in which the identification parade was conducted was unfair citing a complaint by the 2nd appellant during his defence that police had picked a photograph of him and the 3rd appellant while the 3rd appellant also complained during defence that he was given clothes to wear at the identification parade. Therefore, that the trial Judge should not have found that the evidence of identification was strengthened by the identification parade but should have rejected it.

30. It was submitted instead, citing the case of **Saluwema v The People**[4], that the appellants' explanations regarding their case and situation (i.e. the circumstances in which they were apprehended)

were reasonably possible even though not probable. We were urged to allow the appeal, quash the convictions and acquit the appellants.

31. Heads of Argument in response to the appeal on which Mrs. Hakasenke-Simuchimba entirely relied were filed on behalf of the State. It was submitted, acknowledging the need for caution expressed in the cases of **Nyambe**[1] and **Muvuma Kambanja Situna**[3] also cited on behalf of the appellants as well as the case of **Chimbini v The People**[5] that the witnesses, in this case, had proper opportunity for observation.

32. In relation to the offence in count one, Counsel's view was that PW6 identified the 3rd appellant because he saw him breaking the door which took about ten minutes. With respect to count two, Counsel stated that although PW3 and PW4 were attacked around 00.30 hours, there was light at the house; that PW3 had looked at the 3rd appellant when he was being searched and PW4 corroborated his father on the identity of this appellant whom both witnesses identified at the identification parade. Turning to the robbery in the third count in which the offence occurred around 23.30 hours, Learned Counsel submitted to the effect that PW1

had interacted with the 2nd appellant earlier in the day on the basis of which the witness recognized him during the attack and later at the identification parade; that he saw the 3rd appellant when he got into the front seat of the car to search for items; that PW1's opportunity to observe the assailants was not discredited in cross-examination; instead, the evidence was corroborated by PW2.

33. It was submitted, based on the foregoing, that the prosecution had proved its case beyond all reasonable doubt and that the appeal should be dismissed and the convictions upheld.

34. We are grateful for the submissions by both Counsel. The issue to resolve is whether the identification evidence on which each appellant was convicted was satisfactory to the point of establishing their guilt beyond all reasonable doubt.

35. As demonstrated in the several cases cited by the respective Counsel, in order for identification evidence to be acceptable, it must not leave any room or the possibility that the identifying witness was, in light of adverse conditions attendant at the time of the crime, such as poor visibility, lack of or inadequate opportunity to observe the assailant and the stress of the moment, unable to

make a reliable identification so as to rule out the possibility of an honest mistake.

36. From the judgment of the Court below, we are in no doubt that the learned trial Judge was aware of the need to rule out the possibility of honest mistake in the identification evidence put up on behalf of the State before he could rely on it, even if he did not say so in as many words. This is evident in the manner he approached the evidence, looking for support in each case.

37. In count one, the learned judge was of the view that PW6 put forward a satisfactory reason for his ability to recognize the 3rd appellant at the identification parade by telling Police that he would recognize a person he had seen breaking the door. It is obvious that the learned Judge who had the advantage of seeing the witness and assessing his credibility based on his demeanor chose to believe the witness. We are, however, unable to agree with the learned Judge. Merely telling police or any other person that a witness would be able to recognize the robber who was breaking the door does not, rule out the possibility of honest mistake. The authorities on the issue are clear. In the case of **Nyambe**[1] cited by both Counsel, for instance, it was held by this Court that-

> **The question is not one of credibility in the sense of truthfulness but of reliability ... it is not enough for the witness to simply say that the accused is the person who committed the offence; ... the greatest care must be taken to test the identification. The witness should be asked, for instance, by what features or unusual marks, if any, he alleges to recognize 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.**

PW6's statement to the police that he would be able to recognize the person that he had seen was not sufficient. He should have explained how he was able to later recognize the person in order to make his subsequent identification of that person reliable. The judgment does not show that any effort was made by the prosecution, upon whom the obligation rested, to test PW6's identification evidence to establish how the witness was later able to recognize the 3rd appellant as one of the robbers.

38. In the circumstance, we are not able to find that the danger of honest mistake had been ruled out, especially bearing in mind that there was no explanation as to whether there was any light at the scene; that as the witness himself testified, he was scared; and the identification parade was conducted some four months after the robbery. The witness cannot, therefore, be said to have made a

reliable observation of any of the assailants on the basis of which he could purport to have later identified the appellant. In sum, we do not agree that the identification evidence pertaining to the 3rd appellant was satisfactory. On the foregoing basis, we find merit in the appeal by the 3rd appellant in the first count. We, therefore, quash the conviction and set aside the sentence. We acquit the 3rd appellant in this count.

39. In relation to counts two and three, Mr. Yambwa railed against the learned Judge relying on the identification of the appellants by the two pairs of witnesses in the two counts. Counsel was of the same position that the circumstance in which PW1 and PW2, PW3 and PW4, as we understood the argument, observed the robbers reveal stress of the moment and no proper opportunity for observation. It was also traumatic because of the gunshots that were fired (in count three). Counsel further referred to the complaints that police picked a photograph of the appellants and that the 3rd appellant was given clothing to wear at the identification parade. Therefore, that the identification evidence was not reliable.

40. It cannot be denied that stress and trauma attended both robberies bearing in mind the violence that was perpetuated. In

count two, PW3 and PW4 were made to lie down and remained prostrate under threat of what the witnesses believed to be a firearm held by the robber in police uniform while another stood over them with what the trial Judge referred to as a "*sjambok*". In count three, PW1 and PW2 experienced the trauma of shooting by the robbers who had attacked them. PW1 was physically dragged.

41. In spite of all the foregoing, however, the learned trial Judge was satisfied with the identification evidence supported by the fact that in the two cases the witnesses were later able to identify the same two appellants as the robbers that had attacked them on the fateful dates. Specifically, in count two, the evidence was that there was light at the house and from the shop opposite the house and the neighboring house. In count three, the evidence was also that there were lights at the gate, that the attack lasted for some time. Both sets of witnesses testified that they had opportunities to look at the men of whom they later identified the 2nd and 3rd appellants at the identification parade. Mr. Yambwa endeavored to displace this evidence by attacking the integrity of the identification parade.

42. As we had pointed out when dealing with the identification of PW6 in count one, it is not enough for a witness to simply claim that

the person seen committing the crime was the accused. That evidence is weak. The witness must point out the features by which he is able to identify the accused to strengthen the evidence and rule out the possibility of a mistaken identification, albeit even a honest one. Where, however, more than one witness identifies the same person as the one who committed the crime, the weak evidence is strengthened. In the case of **Kenneth Mtonga and Victor Kaonga v The People[6],** this Court made the following observations-

> **The second appellant and his co-accused were identified not by one but by three eyewitnesses. Obviously when more than one witness identifies and even if it can be said that two or more witnesses can make the same mistake, the case is nonetheless taken out of the realm of single witness identification and is on a better footing.**

The matter does not, however, end here. The allegation was that the 3rd appellant was given clothes to wear for the identification parade and that police picked up a photo showing the appellants. The implication of this is that the identification parade should be deemed to have been irregular and the purported identification nullified on the basis that the witnesses had prior knowledge of whom to identify based on the clothing and the photographs. It was held in the case of **Toko v The People**[7] cited in the **Kenneth Mtonga and Victor Kaonga**[6] case that-

The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.

43. From our reading of the evidence summarized in the judgment of the Court below, we found no allegation that any of the witnesses' attention was drawn to the clothes worn by the 3rd appellant or that they were in fact shown the picture of the two appellants prior to attending the parade. As the learned trial judge found, the 3rd appellant had to be given clothing because the ones he had, had by his own evidence, become bloodied. The effect of this is that the witnesses were indeed able to identify the appellants based on the observations which the witnesses had of the robbers, two of whom turned out to be the appellants in the two counts. There is nothing, therefore, to show that the parade was conducted in an improper or unfair manner. We are satisfied that there is no merit in the appeal by the 3rd appellant with respect to the offence in count two as well as the appeals by both appellants with respect to the offence in count three. We, accordingly, dismiss the appeals and uphold the convictions. For the avoidance of doubt the sentences

meted out for the convictions which we have upheld will not be disturbed.

.....

M. MALILA
CHIEF JUSTICE

.....

R.M.C. KAOMA
SUPREME COURT JUDGE

.....

J. CHINYAMA
SUPREME COURT JUDGE