

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

**Appeal No. 72, 73, 74,  
75/2021**

**BETWEEN:**

**KELVIN BANDA**

**KENNEDY CHOMBELA**

**BOYD MWANAMBABA**

**RICHARD NYENDWA**

**AND**

**THE PEOPLE**



**1<sup>ST</sup> APPELLANT**

**2<sup>ND</sup> APPELLANT**

**3<sup>RD</sup> APPELLANT**

**4<sup>TH</sup> APPELLANT**

**RESPONDENT**

***CORAM: Mchenga DJP, Sichinga and Muzenga JJA***  
***On 19<sup>th</sup> January, 2022 and 25<sup>th</sup> July, 2022***

*For the Appellants: Mrs. K.C. Bwalya, Legal Aid Counsel of Legal Aid Board*

*For the Respondent: Mrs. M. Kapambwe-Chitundu, Deputy Chief State  
Advocate of National Prosecutions Authority*

---

## **JUDGMENT**

---

Sichinga, JA delivered the Judgment of the Court.

**Cases referred to:**

- 1. Mwiya Muleya v The People CAZ Appeal No. 6, 7 of 2016*
- 2. Jackson Kamanga v The People SCZ Appeal No. 30-34 of 2020*
- 3. Esaya Mumpasah and two others v The People SCZ Appeal No. 12-14 of 2021*

4. *Maketo v The People* (1979) ZR 23
5. *Kalebu Banda v The People* (1977) Z.R. 3
6. *Peter Yotamu Hamenda v The People* (1977) Z.R. 184
7. *Dorothy Mutale v The People* (1997) SCZ Selected Judgment No. 51

**Legislation referred to:**

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

**1.0 Introduction**

1.1 The appellants were convicted of the offence of aggravated robbery, contrary to **section 294(2) of the Penal Code**<sup>1</sup>. The particulars of the offence were that the appellants, on 18<sup>th</sup> November, 2015 at Lusaka, jointly and whist acting together with persons unknown and whilst armed with a firearm did steal a Blackberry cell phone and an iPhone both valued at ZMW40,000=00 from Wang Xiaocua and ZMW798 cash, 43 litres of petrol altogether valued at ZMW50,000=00, the property of Zamproud Limited, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Mate Nyambe in order to obtain, retain or prevent or overcome resistance from its being stolen or retained.

**2.0 Evidence in the court below**

2.1 The prosecution's first witness was 43 year old Wang Xiaocua (PW1) who stated that on 18<sup>th</sup> November, 2015 at around 17:00 hours, he was being driven by his driver, Richard



Nyendwa, from town to his company's premises. When they reached the company's main gate and as they waited for the security guard to open the gate, someone knocked at the driver's window. When the driver opened the window slightly, the person tried to grab him. PW1 tried to go and help the driver and he was confronted by two people, one of whom had a small gun. These two forced themselves into the vehicle, grabbed the bag containing the day's cashing together with his two phones- an iPhone and a Blackberry, and drove away in a gray Toyota vehicle, leaving PW1 terribly scared.

2.2 After the robbery, PW1 sent the driver to report the incident to their boss, Mr. Lie. They later reported the matter to Makeni Police Post, where they gave statements. After a few days, he was called to the police station, upon being told that some thieves had been arrested. At the police station, he identified the hand bag which contained the money, two phones, a bunch of keys and a Nikula binoculars. These were also positively identified in court.

2.3 PW2 was Detective Constable Fredrick Handson Phiri of Makeni Police Station, who testified that in November, 2015, he and other police officers accompanied a suspect he came to know as Richard Nyendwa to a filling station along Los Angeles Road in Kanyama where the said suspect agreed to meet with his friends, who he had spoken to on his phone in the

presence of the police officers while the phone was on loudspeaker. The suspect was taken to the said filling station and surrounded by police officers clad in civilian clothes. The people with whom Richard had spoken to on the phone then arrived in a Toyota Corolla and Richard went to speak to them. His companions were then ambushed and apprehended.

2.4 PW2 stated further that Kelvin Banda, the driver of the Toyota Corolla, led them to his house in Garden Compound where they recovered K33,000=00 cash and pellets for an air gun. Kelvin Banda also led the officers to another house in Matero where Wilson Tembo was apprehended and a silver Toyota Corolla registration number BAB 4903 was recovered, which was allegedly used in the robbery. They were further led to Garden Chilulu Compound by Boyd Mwanambaba and Kelvin Banda, where they found one Prudence Mpalanga, who told them that Kelvin Banda had left behind a bag. It is in that bag that they recovered a vehicle number plate ALR 2922, and air gun with pellets in the magazine and a star pistol without a magazine. Other items recovered were a bunch of keys and two Blackberry cellphones. Mwanambaba further led them to a house in Chawama Compound where they recovered K2,000=00 cash.

2.5 PW3 was Kafula Kawila, a 31 year old phone repairer in Kuku Compound, employed by the 3<sup>rd</sup> appellant. His testimony was that on 17<sup>th</sup> November, 2015, the 3<sup>rd</sup> appellant went to collect



some money at the shop. PW3 had not seen the 3<sup>rd</sup> appellant at the shop since then, and next saw him at Chawama Police Station on 24<sup>th</sup> November 2015.

2.6 PW4 testified that on 19<sup>th</sup> November, 2015 he received a call from Justine Mwanza asking him to accompany him to a funeral of the late wife of one Steven. He was later picked up in the Toyota Corolla driven by Kelvin Banda and they went to the funeral in the company of Justine Mwanza, Boyd Mwanambaba and Lubasi. On their way, Kelvin received a call but said *'I will meet you after I come back from the funeral.'* After the funeral, PW4 heard Kelvin speak on the phone and he agreed to meet the other person at Mobil Filling Station in Kanyama, where they were ambushed by police officers and taken into custody, where he saw the 4<sup>th</sup> appellant for the first time.

2.7 PW5 was a Police officer whose testimony was that he received information of aggravated robbery from Makeni School of Nursing. His testimony in so far as the details of the robbery was substantially the same as that of PW2, save to add that PW5 detained the 4<sup>th</sup> appellant. When the 4<sup>th</sup> appellant's wife visited him, she said someone wanted to speak with him on the phone and PW5 put it on loudspeaker and heard the other person telling the 4<sup>th</sup> appellant that they had worked well the previous night- they shared K8,000=00, gave the boys in Chawama K7,000=00 and kept K5,000=00 for him.

2.8 PW5 stated further that the 4<sup>th</sup> appellant and the person on the phone agreed to meet at Mobil Filling Station in Chawama to give him his share. They came to the agreed location in a Toyota Corolla driven by Kelvin Banda, who the 4<sup>th</sup> appellant identified as the person he had been speaking with on the phone, and were ambushed. PW5's evidence relating to the recoveries made was substantially the same as that of PW2.

2.9 PW6 was Superintendent Steven Mvula Lungu, a ballistics expert whose testimony was that on 10<sup>th</sup> February, 2016, Sergeant Phiri of Mateo presented to him two firearms, in working condition but no firing pin, meaning they could not fire. They could, however, be improvised using a wire. He said the firearms were capable of causing death or injury to a human being, or induce fear once one is challenged with it. He also confirmed that the pellets he was given were compatible with the pistols presented for examination. He identified the report he submitted with regards to his findings.

### 3.1 **Defence**

3.1 In his defence, the 1<sup>st</sup> appellant testified that on 19<sup>th</sup> November, 2015, he went to a funeral in the company of the 3<sup>rd</sup> appellant, who was driving a white Toyota Corolla. On their way to the funeral, the 3<sup>rd</sup> appellant told them he needed to put fuel in the car and as they were about to leave the filling station, he heard gun shots and they were surrounded by the



Police, who grabbed K2,000=00 from him and ordered him to take them to his house, where they collected K3,000=00 from his wife. DW1 denied having heard the 3<sup>rd</sup> appellant communicating with someone on the phone while he drove.

- 3.2 DW2 told the court that he was employed by Wilson Tembo of Matero as a taxi driver of a Toyota Corolla registration number BAB 4309 and on 21<sup>st</sup> November 2015, he was apprehended from his home by five people, who had been looking for a person named Benard. He was ordered to take them to Wilson Tembo's house and the latter was equally apprehended and the duo subsequently appeared in court on a charge of aggravated robbery with other people he had found in police cells at Makeni Konga Police Post, whom he did not know.
- 3.3 DW3 told the court that on 20<sup>th</sup> October, 2015, his customer by the name of Mainza called him and asked to be taken for a funeral in Makeni, but they first picked other people in Chibolya Compound. On their way back, he went to put fuel in his vehicle when he heard two gun shots and he was ordered to lie down and all the occupants of the vehicle were apprehended and taken to Konga Police Post and detained. He was then charged with aggravated robbery.
- 3.4 DW4, Wilson Tembo, testified that on 21<sup>st</sup> October, 2015 when his driver did not show up for work, he went to his house and

was told by his driver's wife that her husband had been apprehended by the Police. DW4 then made a fruitless attempt to search for him at various police stations. He then went home and was visited by police officers, who searched the house, beat him up, cuffed him and took him to the police station together with his driver DW2. He was then charged with aggravated robbery with four others, but he only knew DW2, his driver.

#### **4.0 Findings and decision of the lower court**

4.1 The learned trial Judge considered the evidence led by both the prosecution and defence and made the following findings:

- i) The appellants were connected by the evidence of PW2, PW4 and PW5. Their apprehension was as a result of the evidence of the 4<sup>th</sup> appellant, as a result of which some phones and bags were recovered, which were confirmed to have been stolen from PW1.
- ii) The vehicle used in the robbery was recovered as a result of the testimony of the 2<sup>nd</sup> appellant.
- iii) The court did not believe the evidence of the appellants and found their demeanor to have been incredible as they were trying to put up their innocence by misleading the court with lies.
- iv) The evidence of all the police officers was unshaken and they had no reason to fabricate evidence against the appellants.



- v) The prosecution proved its case against the appellants beyond reasonable doubt and found them guilty as part of the people who staged the robbery.

## **5.0 The appeal**

5.1 The appellants advanced three grounds of appeal as follows:

- i) *The learned trial Court erred in law and fact by relying on the alleged leading and confession to the arresting officers by the appellants without ascertaining whether the appellants had an objection and in the absence of evidence of a warn and caution before the leading;*
- ii) *The trial Judge erred in law and fact in convicting and sentencing the appellants without due and proper investigations by the arresting officer;*
- iii) *The trial Judge erred in law and fact when the court convicted the appellants based on circumstantial evidence which did not take the case out of the realm of conjecture.*

## **6.0 Appellant's heads of argument**

6.1 In support the first ground of appeal, counsel submitted on behalf of the appellants that the judgment of the lower court shows that the appellants' convictions were premised on the evidence relating to the appellants leading the police to the apprehension of their co-accused, and the recoveries made from the appellants, in the absence of warn and caution statements.

6.2 Counsel relied on the case of ***Mwiya Muleya v The People***<sup>1</sup> and cited the following passage:

***“Leading and demonstrating in our view, is self-incrimination and carries the same weight as a confession and as such, the police were obliged to administer a warn and caution statement before leading. As was held by the Supreme Court in the case of Chilufya v The People as a general rule in this country, a confession made by a defendant to a person in authority, such as a police officer in the absence of any warning, is prima facie inadmissible.”***

6.3 That *in casu*, the arresting officer, PW5, introduced the appellants’ verbal admissions and he did not in his evidence mention having administered warn and caution statements, nor did the court inquire as to the voluntariness of the alleged admissions, contrary to ***Jackson Kamanga v The People***<sup>2</sup> and ***Esaya Mumpasah and two others v The People***<sup>3</sup>.

6.4 Counsel argued on this premise that it was a misdirection for the trial court to admit the alleged confession, especially in the absence of corroboration. It was argued further that the alleged implication by the 4<sup>th</sup> appellant of his co-accused at the police station was evidence against himself and not them. The case of ***Maketo v The People***<sup>4</sup> was cited in this regard, where it was held that an ex-curial confession by an accused person incriminating a co-accused is evidence against himself



and no other persons, unless the others adopt the confession and make it their own.

6.5 The appellants' argument in support of the second ground of appeal is essentially that PW5 failed in his duties when he omitted to record a warn and caution statement from Mary Chileshe, when he failed to obtain or produce a printout from the mobile provider to show communication between the 1<sup>st</sup> and 4<sup>th</sup> appellants and by not lifting fingerprints off the firearm. That these omissions amount to a dereliction of duty which must work in favour of the appellants. ***Kalebu Banda v The People***<sup>5</sup> and ***Peter Yotamu Hamenda v The People***<sup>6</sup> were cited in this regard.

6.6 The third ground of appeal raises the question of cogency of circumstantial evidence upon which the conviction was premised. It was argued herein that it is not sufficient that the appellants allegedly lead to the apprehension of one another and admitted having committed the offence, according to PW5. Counsel stated further that there was no evidence linking the firearm that was found with Prudence Mashinga to the commission of the crime, nor was there evidence of identification of the appellants as the perpetrators. As such, an inference of guilt is not the only one that can be drawn in the circumstances and we must adopt an inference favourable to the appellants, that is; an inference of guilt as stated in ***Dorothy Mutale v The People***<sup>7</sup>.

## **7.0 Respondent's heads of argument**

- 7.1 The state responded to all three grounds of appeal simultaneously. As regards circumstantial evidence, counsel submitted that the trial court properly weighed all the evidence, considered other possible inferences and arrived at one of guilt. Various cases were cited relating to the nature and application of circumstantial evidence in this jurisdiction, of which we have taken note.
- 7.2 Some pieces of circumstantial evidence highlighted by the respondent include the evidence relating to the retrieval of two cellphones and a bunch of keys belonging to PW1, which were recovered and positively identified in court. In addition, the robbers were identified by circumstantial evidence through PW2, PW4 and PW5, whose evidence corroborates each other. Further, counsel pointed out that the items that were recently stolen from PW1, which were recovered from the 1<sup>st</sup> appellant's house could not have been recovered in the absence of his evidence leading PW5 to his house.
- 7.3 That in the wake of this evidence of recently stolen items found in their possessions, the appellants made bare denials totally distancing themselves from knowledge of the items, without giving an explanation of how the items came into their possession, which is a good indication of guilt.



## **8.0 Our decision**

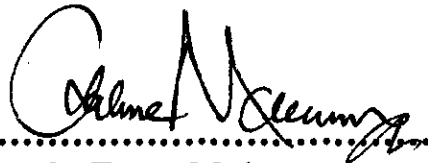
- 8.1 We have considered the evidence on record, the judgment of the lower court and submissions by counsel for all the parties.
- 8.2 At the hearing of the appeal, it came to our attention that A1 and A3 were pardoned while the 4<sup>th</sup> appellant escaped from prison. The appeal as against these three appellants is therefore deemed to be abandoned and we accordingly dismiss it. As such, this appeal is only in respect to the 2<sup>nd</sup> appellant and we shall proceed on this basis.
- 8.3 We will now proceed to determine the propriety of the conviction as against the 2<sup>nd</sup> appellant. The record shows that the appellants were apprehended as a result of the information given to the police by their co-accused, the 4<sup>th</sup> appellant, who as stated earlier, is no longer a party to this appeal. According to the record, the 1<sup>st</sup> appellant was in the vehicle that PW5 and his colleagues pounced on after laying a trap using the 4<sup>th</sup> appellant as bait, while the 2<sup>nd</sup> appellant was the one who led the police to the apprehension of one Wilson Tembo, the owner of the vehicle allegedly used in the commission of the offence. The 1<sup>st</sup> appellant denied knowing the 2<sup>nd</sup> appellant, having said that the vehicle they were in when ambushed belonged to the 3<sup>rd</sup> appellant.

8.4 As regards the 2<sup>nd</sup> appellant, the evidence against him was mainly adduced by PW5, who stated that 1<sup>st</sup> appellant mentioned the 2<sup>nd</sup> appellant as the owner of the motor vehicle allegedly used in the commission of the offence. The 2<sup>nd</sup> appellant was apprehended on that basis, and stated that he was merely employed as a taxi driver by one Wilson Tembo, who was the owner of the vehicle. He led the police to Wilson Tembo, who admitted ownership, stating that he had hired out the vehicle to the 3<sup>rd</sup> appellant, who paid him K4,000=00 upon returning it, but did not tell him the purpose for which he borrowed the vehicle. Wilson Tembo was acquitted in the lower court.

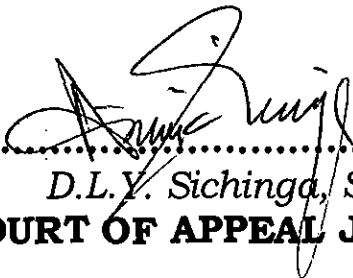
8.5 Our analysis of the evidence against the 2<sup>nd</sup> appellant is that he was implicated on the premise that he was the owner of the subject vehicle, when he in fact was merely an employee. He led the police to the owner of the vehicle, in whose custody the vehicle was found. The testimony of Wilson Tembo confirms this evidence. As such, we are of the view that the trial court should have applied the same reasoning it did in acquitting Wilson Tembo to the 2<sup>nd</sup> appellant, as the only thing seemingly connecting him to the offence was the question of ownership of the vehicle, which he qualified. We find this to be a reasonable explanation and on this premise, we do not support the conviction of the 2<sup>nd</sup> appellant. (see **Jackson Kamanga and 4 others v The People** *supra*)



8.6 We therefore allow the appeal as against the 2<sup>nd</sup> appellant, quash his conviction and acquit him forthwith.



.....  
C. F. R. Mchenga  
**DEPUTY JUDGE PRESIDENT**



.....  
D.L.Y. Sichinga, SC  
**COURT OF APPEAL JUDGE**



.....  
K. Muzenga  
**COURT OF APPEAL JUDGE**