

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

APP. No. 70/2022

BETWEEN:

ABRAHAM SINKAMBA

AND

THE PEOPLE



APPELLANT

RESPONDENT

**CORAM : Mchenga DJP, Chishimba and Muzenga JJAs
On 16th November, 2022 and 23rd February, 2023**

For the Appellant : Mr. B.M. Kapukutula Legal Aid Counsel of
Legal Aid Board

For the Respondent : Ms. M.I. Mwala – Senior State Advocate,
National prosecution Authority

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Champion Mannex Makwakwa v The People (1973) ZR 347
2. Chimbini v The People (1973) ZR 191
3. Mutambo & Five Others v The People (1965) Z.R. 15
4. Simon Miyoba v The People (1977) Z.R. 218
5. Mugala v The People (1975) Z.R. 282

LEGISLATION CITED:

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

1.0 **INTRODUCTION**

1.1 The appellant was charged and convicted of the offence of aggravated robbery contrary to section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.

1.2 The particulars alleged that Abraham Sinkamba on 21st February, 2021, at Nakonde in the Nakonde District of the Muchinga Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown, did rob Clarence Chingindi of 1x Infinix Hot 6 Cell Phone and cash money US\$1,600.00 altogether valued at USD\$1,705.00 and at, or immediately before or immediately after such robbery, did use or threatened to use actual violence to the said Clarence Chingindi in order to obtain or retain the said property.

2.0 **FACTS**

2.1 The Prosecution evidence in the court below was adduced by PW1, Chawana Ulemu Chilengi, PW2, Sergeant Charlton Malambo and PW3, Fridah Lungu Chansa as hereinunder.

2.2 On 21st February, 2021 around 19:00 hours, PW3 and her husband were enroute to the residential premises of her supervisor. As they reached the said residential area, she heard

some noise emanating from the road. She drew closer and shouted at persons to stop the fracas. Though some of the attackers ran away, the person being attacked managed to get hold of one of the assailants.

2.3 The victim, a Zimbabwean national, called for help as he dragged the apprehended assailant to where PW3 was standing. The assailant, who is the appellant, in an attempt to escape removed his shirt and was restrained by the victim. PW3 and the victim managed to restrain the appellant. Thereafter, she phoned PW1 a police officer to come with handcuffs to assist them apprehend the appellant.

2.4 PW1 arrived within a few minutes and handcuffed the appellant. The victim, a Zimbabwean national by the name of Clarence Chingindi, explained that he had been waylaid by the appellant and his colleagues after he got off the bus. That in the process, he was robbed of US\$1,600.00 cash money and an Infinix Cell Phone. A search on the appellant yielded nothing.

2.5 While waiting for the police to arrive, PW1 and Chingindi searched the crime scene. They only recovered the victim's passport and bag. During the search, the appellant fled and hid

in a ditch. The appellant was discovered after a search was mounted and handed over to the police. PW2 investigated the matter, charged and arrested the appellant for the offence of aggravated robbery.

2.6 In his defence, the appellant gave an unsworn evidence in which he stated that he was apprehended by Chingindi on his way from his business. He denied robbing the appellant, attempting to escape and being recaptured.

3.0 **DECISION OF THE COURT BELOW**

3.1 The court below accepted the testimony of PW1 and PW3 as to what transpired on the night in issue. Further the court found their testimonies credible. The court below accepted the version of events as by PW1 and PW3 and dismissed the appellant's unsworn statement as merely containing denials of real issues and an afterthought.

3.2 There was no mistaken identity because the appellant was apprehended by the victim at the scene and dragged to PW3. He was among the group that attacked and robbed the victim.

3.3 The court convicted the appellant of the offence and sentenced him to 15 years imprisonment with hard labour.

4.0 **GROUND OF APPEAL**

4.1 One ground of appeal couched as follows has been advanced:

The learned trial court erred in law and in fact by convicting the appellant of the offence of aggravated robbery in the absence of proof beyond reasonable doubt.

5.0 **ARGUMENTS BY THE APPELLANT**

5.1 The appellant filed heads of argument dated 28th October, 2022 whose thrust is that the prosecution failed to establish a case against the appellant beyond all reasonable doubt. It was submitted that PW1 was not present when the complainant was allegedly robbed but was only told of what happened. Further, nothing of interest was found on the appellant when he was searched. Therefore, the testimony of PW1 was hearsay and inadmissible.

5.2 Counsel further submitted that the evidence of PW3 was also defective in that she conceded under cross examination that the alleged scene of crime is a public road and that she could not identify the appellant or the assailants because it was dark. Further that the assailants scampered when she shouted at them.

- 5.3 The cases of **Champion Mannex Makwakwa v The People** ⁽¹⁾ and **Chimbini v The People** ⁽²⁾, were cited to show that the circumstances of the incident were traumatic and that the alleged identification was manifestly unreliable as no details were given by the complainant to substantiate its authenticity. No evidence was produced in court to prove the features commensurate with those of the alleged assailants.
- 5.4 Further, the evidence of PW3 was attacked as being suspect and not credible because she had given testimony that was different from her recorded statement to the police. This showed that she had a propensity to tell lies.
- 5.5 It was further contended that there was no evidence that the appellant actually stole from the complainant or participated in the robbery as nothing was recovered from him after a search. The incidence of the appellant fleeing after he was apprehended does not denote guilty conduct as any person can flee from restraint from freedom of movement.

6.0 **ARGUMENTS BY THE RESPONDENT**

- 6.1 In heads of argument dated 4th November, 2022, it was argued on behalf of the respondent that the victim, a Zimbabwean

national, was not called to testify as to who attacked and robbed him of the cell phone and cash money. That none of the witnesses called by the prosecution was present at the time of the attack. Therefore, the evidence presented was purely circumstantial in nature.

6.2 It was submitted that there was no dispute that the appellant was apprehended by the victim and that PW3 came to the aid of the victim who was dragging the appellant while crying. At that time, the appellant had taken off his shirt in an attempt to escape and had to be overpowered.

6.3 The learned State Advocate contended that the evidence of what PW3 was told by the victim cannot be hearsay and is admissible because it sought to merely establish that it was made, and not to establish the truth. For this, we were referred to the case of **Mutambo & Others v The People** ⁽³⁾.

6.4 We were further referred to the medical report as proof that violence was used against the victim during the attack. When all these facts are put together, it is possible to arrive at one reasonable inference that the appellant was among the people who attacked the victim and stole from him. Therefore, the

ingredients of the offence of aggravated robbery were proved by the circumstantial evidence and that the issue of mistaken identity does not arise.

6.5 We were urged to dismiss the appeal for lack of merit and uphold the conviction and sentence of the trial court.

7.0 **DECISION OF THIS COURT**

7.1 We have considered the appeal, the evidence adduced in the court below as well as the authorities cited and arguments filed herein. The appellant contends that he was convicted of the offence of aggravated robbery in the absence of proof beyond reasonable doubt.

7.2 The evidence of PW1 has been attacked as being hearsay because he was not present when the offence occurred but was called to the scene by PW3. In our view, PW1 did not give evidence of the actual robbery but testified that he was called by PW3. When he arrived at the house, he found the appellant had already been apprehended and he proceeded to have him handcuffed.

7.3 The victim, Clarence Chingindi, explained to PW1 that he had been waylaid by the appellant and his colleagues after he got off

the bus, and in the process, was robbed of US\$1,600.00 cash money and an Infinix Cell Phone. When PW1 and Chingindi searched the crime scene, they only recovered the victim's passport and bag.

7.4 Therefore, the testimony of PW1 cannot be said to be hearsay as he was merely stating what he perceived. It is in this regard, that in **Mutambo & Five Others v The People** ⁽³⁾, we held that:

“Evidence of (a) statement made in the presence of a court witness is inadmissible hearsay if offered to prove the truth of what is contained in the statement but not if offered to prove the fact that the statement was made.”

In our view, all that PW1 was doing when he stated what the complainant told him was to prove or show that a statement was made to him by the complainant.

7.5 As regards PW3, she heard the commotion in the road as the complainant was being attacked and moved closer. She shouted at the people attacking the complainant who subsequently fled while the appellant was immediately apprehended by the complainant and dragged to where PW3 was.

7.6 The complainant, explained to PW3 what transpired and she assisted him in securing the appellant. Therefore, PW3 did

perceive what was happening and her testimony cannot amount to hearsay. In our considered view, her testimony supports or confirms that of PW1 as to what he was told by the complainant.

7.7 As for the discrepancies in her testimony in court and her statement to the police, it was held in **Simon Miyoba v The People** ⁽⁴⁾ that:

1) The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.

2) It is necessary for the trial court to have before it formally the previous statement so that it can compare it with the evidence given in court and assess for itself the seriousness of the alleged discrepancies.

7.8 Therefore, the statement PW3 made to the police earlier was ammunition in challenging her testimony, and not the truth of what is contained therein. The trial court having found PW3 to be a credible witness in the light of the discrepancies. This court, which was not privileged to hear and observe her demeanour, cannot fault the finding. We therefore find no reason to interfere with the finding of the trial court in this regard.

7.9 We note that the appellant elected to give an unsworn statement in his defence. Therefore, the trial court cannot be faulted for finding the unsworn statement to be an afterthought of what transpired. In any case, there was no other evidence to support the statement of the appellant as to what he says transpired.

7.10 We have observed that while the attack on the victim was not in issue, there was no evidence of the ingredient of theft. There was evidence that the victim was attacked. PW3 found him in a distressed manner and the medical report confirms that he sustained ***“general body pains, right small finger bruised plus a human bite on the left arm.”***

7.11 As regards the offence of aggravated robbery pursuant to **section 294(1) of the Penal Code**, the prosecution must prove that the accused person, while armed with any offensive weapon or instrument, or being together with one person or more, stole something from the complainant. That at or immediately before or immediately after the time of stealing, the accused used or threatened to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

7.12 With respect to the taking of the property, it was held in **Mugala v The People** ⁽⁵⁾ that:

“To prove a charge of aggravated robbery in terms of section 294 (1) of the Penal Code, Cap. 146, it is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen.”

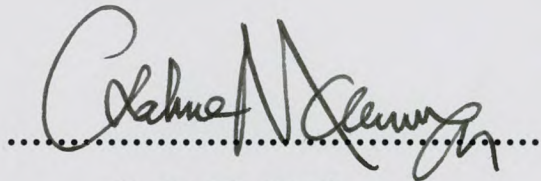
In other words, the prosecution must establish that the attack on the complainant was connected with the theft.

7.13 In this case, there is no doubt that the victim was attacked as evidenced by the medical report and the testimony of PW3. There is however, no evidence of a theft. This is because PW3 did not see anything being taken from the victim neither did PW2 recover anything to confirm that the attack on the victim was to facilitate a theft. The complainant did not come before court to testify to the property stolen.

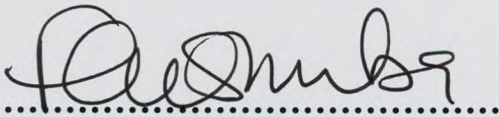
7.14 Therefore, we find that there was no evidence to support the charge of aggravated robbery. We instead find that the evidence on record discloses the offence of assault occasioning actual bodily harm contrary to **section 248 of the Penal Code**. This is evidenced by the medical report and the testimony of PW1 and PW3.

8.0 **CONCLUSION**

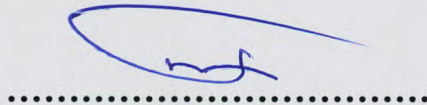
8.1 Consequently, we hereby set aside the conviction and sentence imposed by the lower court for the offence of aggravated robbery. We accordingly substitute it with that of assault occasioning actual bodily harm contrary to section 248 of the Penal Code. We further sentence the appellant to a term of two years imprisonment with hard labour with effect from the 21st of February 2021, the date of his arrest. The appeal is accordingly upheld to the extent stated.



C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT



F. M. Chishimba
COURT OF APPEAL JUDGE



K. Muzenga
COURT OF APPEAL JUDGE