

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

APP. No. 036/2022

BETWEEN:

MUTALE KABULO

AND

THE PEOPLE



APPELLANT

RESPONDENT

**CORAM : Mchenga DJP, Chishimba and Muzenga JJAs
On 11th October, 2022 and 23rd February, 2023**

For the Appellant : Mr. E. Mazyopa, Senior Legal Aid Counsel –
Messrs Legal Aid Board.

For the Respondent : Mrs. M. P. Lungu, Deputy Chief State Advocate
National Prosecution Authority

J U D G M E N T

Chishimba JA, delivered the Judgment of the Court.

CASE AUTHORITIES CITED:

1. David Zulu v The People (1977) Z.R. 151
2. Yotam Manda v The People (1988 - 1989) Z.R. 129
3. Elias Kunda v The People (1980) Z.R. 100
4. James Kunda v The People SCZ Appeal No. 235 of 2017
5. George Nswana v The People (1988 - 1989) Z.R. 174
6. Ilunga Kabala & John Masefu v The People (1981) ZR 102
7. Green Museke Kuyewa v The People (1996) ZR 8
8. Mugala v The People (1975) Z.R. 282
9. James Kunda v The People SCZ 235/2017

LEGISLATION REFERRED TO:

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

1.0 INTRODUCTION

1.1 The appellant was charged with the offence of aggravated robbery contrary to section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia. The particulars alleged that Mutale Kabulo, on 24th May, 2021, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, being armed with an offensive weapon, namely screw driver, jointly and whilst acting together with other persons unknown, did rob Joseph Lungu of one cell phone, one laptop and a power bank altogether valued at K12, 500.00, and at or immediately before or immediately after such robbery did or threatened to use actual violence to the said Joseph Lungu in order to overcome resistance to the property being stolen.

1.2 He was convicted of the offence and sentenced to 25 years imprisonment with hard labour.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence against the appellant came from four witnesses, namely PW1, Joseph Lungu, the victim, PW2, Clement Mwanza,

PW3, Charles Manyando Lutangu and PW4, Detective Inspector Patrick Chiwala Mwansa.

2.2 The summary of the evidence was that at around 23:00 hours on 24th May, 2021, PW1, Joseph Lungu arrived at his home. As he was unlocking the main entrance door to enter the house, a man pushed him from behind. As he fell down, he hit into the door thereby pushing it open and fell in the door way. A fight ensued between him and the assailant who sat on him. The attacker, whose head was covered with a mask, stabbed PW1 in the neck and chest using a screw driver. However, owing to the two jerseys he was wearing, the injury to the chest was not deep because of the fact that PW1 had worn two jerseys due to cold weather.

2.3 The attacker then began strangling PW1. As this was happening, PW1 saw three other men enter the house. PW1 passed out but soon after regained consciousness and managed to flee to his neighbor, Clement Mwanza's, (PW2) house. Upon seeing the blood on PW1, Mwanza refused to let him into his house and advised him to go to the police. At the police, PW1

was issued with a medical report before seeking treatment at the hospital.

- 2.4 On his return home that same evening, PW1 discovered that his cell phone and power bank were missing. A lap top that was in the living room had also gone missing.
- 2.5 At 17:00 hours on 25th May, 2021, Chisanga Chishimba, PW3 was approached by the appellant who was selling a power bank at K50.00. As PW3 did not have enough money on him, he bought it at K20.00. The following day at around 09:00 hours, police officers came and recovered the power bank from PW3.
- 2.6 In cross-examination, PW3 denied owing the appellant K50.00 for plastics that were delivered to his wife (PW3) or that the K20.00 he paid was part of the K50.00 debt. He also stated that when the appellant approached him, he had an I-phone in addition to the power bank.
- 2.7 On 28th May, 2021, the appellant led the police to the home of PW4, Charles Manyando Lutangu in search of a laptop that the appellant alleged had been given to Lutangu. PW4 denied any knowledge of the laptop but was detained by the police together with the appellant and a person named David. PW4 and David

were only released after investigations. In cross-examination, Lutangu testified that the appellant told him that he only implicated him because he was beaten and had no choice to think of any other name other than Lutangu.

2.8 PW5, Detective Inspector Patrick Chiwala Mwansa received a docket of aggravated robbery to investigate on 25th May, 2021. He conducted investigations into the matter in which PW1 alleged that he was attacked by four men armed with knives and a screw driver. The victim had also been stabbed twice in the neck and chest.

2.9 Inspector Mwansa testified that PW1 had reported that the persons that had been digging sand around his home were no longer seen following the robbery. Investigations led to the apprehending of the appellant and the recovery of a cell phone from his home. The appellant told Inspector Mwansa that the laptop was with Lutangu and Davies who were said to have travelled to the Copperbelt Province. It was later discovered that Lutangu and Davies were around and the two were apprehended. Later on, the appellant recanted and told the

police that the two were not the people with the laptop.

Thereafter, the said persons were released.

2.10 Later, the appellant told PW5 that he picked the I-phone, power bank and screw driver from PW1's house in the grass in different places around the premises.

2.11 A week later, PW1 was summoned to the police station where he identified the cell phone and power bank. The lap top was never recovered. When shown the person from whom the property was recovered, PW1 recognised him as the person who used to dig river sand from the drainage near his home.

2.12 In his defence, the appellant denied stealing from PW1 stating that he found the screw driver, cell phone and power bank in the grass at the place where he digs river sand. He stated that he took the cell phone to DW2 who warned him that he could be arrested for the items. Further that he proceeded to PW3's garage to collect a debt of K50.00 but was only given K20.00. PW2 then grabbed the power bank from the appellant. The next day while at his place of work, he was picked by the police. He led them to his home and handed them the screw driver and

cell phone. He led them to PW3 where they recovered the power bank.

2.13 DW2, Passmore Mumba testified that on a date he could not recall, the appellant came to his home in a happy mood. When asked as to the source of his happiness, the appellant told Mumba that he had picked a cell phone from the place he works from. After seeing the phone, Mumba told the appellant to take the phone to the police because such phones are dangerous. Two days later, Mumba learnt that the appellant had been apprehended by the police over the cell phone.

3.0 DECISION OF THE COURT BELOW

3.1 In its judgment, the trial court accepted that PW1 could not identify his attackers as they wore masks. On whether or not the appellant sold the power bank to PW3, the court below found the version of the appellant to be devoid of logic that it was gotten from him by force after a two hour struggle. She dismissed the story that the K20.00 paid by PW3 was for plastics.

3.2 The appellant having freely led the police to his home from where the cell phone and screw driver was recovered, and the

appellant being familiar with PW1, the court found that the offence had been proved. The trial court considered the available circumstantial evidence in light of the appellant being in possession of recently stolen goods. It also considered his explanation as to how he came into possession of the goods and held that it could not reasonably be true that the fleeing thieves would have dropped the stolen property in a systematic sequence. She was of the view that PW1 having been overpowered, the thieves had all the time to ransack the house and could not have left in such a manner as to drop the items in the way the appellant claims to have found them.

3.3 The lower court also found the conduct of the appellant in selling the property as opposed to reporting to the police not to support his assertions that he innocently picked the items. It was also too much of a coincidence that he would pick the property near PW1's house while digging sand.

3.4 The court below convicted the appellant of the offence and sentenced him to 25 years imprisonment with hard labour.

4.0 GROUND OF APPEAL

4.1 Two grounds of appeal have been advanced as follows:

- 1) *The learned trial judge erred in both law and fact when she convicted the appellant based purely on circumstantial evidence; and*
- 2) *The learned trial judge erred both in law and fact when she convicted the appellant for aggravated robbery on insufficient evidence which fell below the required standard by law.*

5.0 ARGUMENTS BY THE APPELLANT

5.1 Heads of argument dated 3rd October, 2022 were filed on behalf of the appellant in which it was submitted that the case against the appellant is based on circumstantial evidence. The assailants wore masks and were for that reason unidentified. Circumstantial evidence has its own challenges as observed in **David Zulu v The People** ⁽¹⁾ that:

- (i) *It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.*
- (ii) *It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.*

5.2 Counsel submitted that the appellant explained himself to the police when he was apprehended, which explanation he

maintained throughout the proceedings, that the reason he never handed over the cell phone and power bank to the police in spite of advice from PW3 and DW2, was because he was waiting for the owner of the property to call him. This explanation by the appellant is reasonable. Therefore, it cannot be inferred that the appellant is the one that attacked and robbed PW1. The inference of guilt was not the only inference that could be drawn by the court below.

5.3 To fortify this argument, reliance was placed on the case of **Yotam Manda v The People** ⁽²⁾ where the Supreme Court guided that:

“The trial court is under a duty to consider various alternative inferences which can be drawn when the only evidence against an accused person is that he was in possession of stolen property. Unless there is something in the evidence which positively excludes the less severe inferences against the accused person (such as that of receiving stolen property rather than guilt of a major case such as aggravated robbery or murder) the court is bound to return a verdict on the less severe case.”

The court went on to state that:

“... it is a general principle that a court can only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts.”

5.4 We were further referred to the case of **Elias Kunda v The People** ⁽³⁾ where it was held that:

“(ii) In cases where guilt is found by inference, as for instance, where the doctrine of recent possession is applied, there cannot be (a) conviction if an explanation given by the accused, either at an earlier stage (such as to the Police) or during the trial, might reasonably be true.

(iii) Where an accused person is in possession of property recently stolen, the court may infer guilty knowledge if he gives no explanation to account for his possession or if the court is satisfied that the explanation offered is untrue.”

5.5 In ground two, counsel submitted that the evidence *in casu* does not go to show that the offence of aggravated robbery as provided for in **section 294(1) of the Penal Code** was committed. This is because it was not proved that someone was robbed of something, and immediately before or during or immediately after being robbed, the robber employed violence to prevent resistance to the property being stolen.

5.6 In support of this view, we were referred to the case of **James Kunda v The People** ⁽⁴⁾ where the court guided that:

“The offence of aggravated robbery requires proof that actual violence or threats of it was used immediately before, during or immediately after the robbery to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained.”

5.7 Counsel contended that this elaborate requirement of aggravated robbery eluded the trial judge because the evidence shows that during the struggle that PW1 had with the assailant, he neither had anything with him that was grabbed, nor did he see any of the three or four figures that entered the house picking anything from him or from the house. When he regained consciousness, PW1 simply ran away without appearing to be trying to prevent anything from being stolen. He only discovered that his property was missing when he returned home.

5.8 It was further contended that PW1 was not home when the property was stolen and he never attempted to prevent anyone from taking the property. PW1 wore a leather jacket in which was the cell phone. The said jacket was never stolen. Therefore, when he fled the scene, he should have discovered that the cell phone had been taken away from him.

5.9 Counsel contended that *in casu*, there is no contemporaneity between the attack of PW1 and the taking away of his property by the assailants. The person being attacked must be aware that his property has been taken away during the attack and not merely that he has been attacked.

5.10 Counsel urged us to set aside the conviction and acquit the appellant.

6.0 RESPONDENT'S ARGUMENTS

6.1 In opposing the appeal, the learned Deputy Chief State Advocate filed heads of argument in which she contended that the evidence of PW3 shows that the appellant was in possession of the property that was stolen a few hours after the theft and the police recovered them a few days thereafter.

6.2 It was submitted that the explanation tendered by the appellant that he picked the property on his way to the place he used to work from near PW1's residence around 07:00 hours was unreasonable considering that PW1 was attacked and the appellant and his colleagues stopped going to work at the area they work from.

6.3 In support of the above, the case of **George Nswana v The People** ⁽⁵⁾ was cited where it was held that:

"The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround

the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.”

6.4 Counsel contended that there is a high degree of probability that the appellant committed the offence as his explanation as to how he came to be in possession of the property cannot reasonably be true. That it is also an odd coincidence that the appellant was not seen working at the place he was working from after the complainant was attacked. Further, the appellant had the cell phone and power bank in this possession. In addition a screw driver in light of the evidence of PW1 that he was attacked with a screw driver.

6.5 In support of this, the case of **Ilunga Kabala & John Masefu v The People** ⁽⁶⁾ was cited to show that odd coincidences can be supporting evidence if unexplained, and where the given explanation cannot reasonably be true, such explanation is no explanation at all. The fact that the appellant was actually selling the power bank and cell phone, his claims that he innocently picked them and intended to wait for the owner to call him, cannot reasonably be true. Therefore, the lower court

cannot be faulted for rejecting his explanation on the basis that it could not reasonably be true.

6.6 It was further submitted that though the case against the appellant was based on circumstantial evidence, the evidence was overwhelming, took the case out of the realm of conjecture and attained a degree of cogency such that the inference could not be resisted that the appellant committed the case. (see **Green Museke Kuyewa v The People** ⁽⁷⁾)

6.7 In ground two, the learned Deputy Chief State Advocate contended that the evidence adduced before the trial court does support the conviction for aggravated robbery. Counsel contended that it is not in dispute that the complainant was attacked and sustained injuries during the attack in which he lost consciousness. That he later discovered that his laptop, cell phone and power bank were stolen. She was of the view that it is immaterial that the stolen property were not on the person of the complainant and that he did not see the property being stolen.

6.8 Counsel submitted that from the occurrence of events, it is reasonable to conclude that the property was stolen at or

immediately after the said attack, and that the persons who attacked the complainant are the ones who stole the property. There were concerted efforts between the one who physically attacked the complainant and those who entered the house. Therefore, the appellant was rightly charged and convicted for the offence of aggravated robbery.

6.9 The state prayed that the appeal be dismissed and that the conviction and sentence be upheld.

7.0 ORAL ARGUMENTS

7.1 At the hearing, in response to the arguments raised in ground two, the learned Deputy Chief State Advocate, Mrs. Lungu conceded that at the time of the attack, no property was taken from the complainant but that it was only taken afterwards. She argued that even if the complainant did not see the property being taken away having lost consciousness and later fled the scene, there was continuity. Counsel wondered how else the complainant could have been attacked if it was not to take property from him. She contended that it can be inferred that the attack on the complainant was meant to rob him of his property.

7.2 In response, the learned Senior Legal Aid Counsel, Mr. Mazyopa submitted that while the court may infer from the circumstances, it must be appreciated that the complainant only realised the theft after he returned to the house. It was argued that to constitute robbery, the person being attacked must know that something is being taken away from him. Otherwise, the circumstances only disclose the offence of assault and breaking into a building with intent to commit a felony.

8.0 DECISION OF THIS COURT

8.1 We have considered the appeal, the authorities cited, as well as the oral and written arguments advanced by the learned counsel. We shall deal with each ground of appeal separately.

8.2 In ground one, the appellant contends that the case against the appellant is based on circumstantial evidence because PW1 could not identify the appellant as the attacker and that the evidence linking the appellant to the case is the fact that he was found with the stolen property. It was argued that the appellant gave a reasonable explanation both to the police and the trial court as to how he came into possession of the cell phone, power

bank and screw driver that were stolen from the complainant. Therefore, an inference of guilt cannot be the only reasonable inference to be drawn from the circumstances.

8.3 According to the appellant, he found the cell phone and power bank in the grass near the home of the complainant where he digs sand. He denied selling the power bank to PW3 stating that PW3 owed him a debt of K50.00 towards which K20.00 was paid. DW2 told the court that the appellant showed him a cell phone that he was selling and that he warned him to report the discovery to the police.

8.4 With respect to how the appellant discovered the stolen cell phone and power bank, we find the explanation not to be reasonable. The person who stole the cell phone from the jacket the complainant was wearing must have gone further to steal the power bank which was in the bedroom. Therefore, we do not see how the two items could have been dumped or dropped in separate places whether on the complainant's premises as per PW5, or off the premises in the grass.

8.5 Secondly, the explanation that the complainant was paying a debt owed by his wife to the appellant when the complainant

gave him K20.00 and grabbed the power bank from him, cannot reasonably be true. A person who has found high value lost property does not go round showing it off but reports the find to the police. DW2 did advise the appellant to report the find to the police but he neglected to do so until he was apprehended about three days after the robbery.

8.6 Therefore, in light of the guidance in the case of **Yotam Manda v The People** ⁽²⁾ we are of the view that the appellant's failure to report the find to the police and his selling of the stolen property, positively excludes the less severe inference that the appellant may have either been a guilty receiver of stolen property or a retainer thereof. Having been found in possession of the stolen property a few days after the robbery, and his explanation not being reasonably true, an inference of guilt applies against the appellant. Therefore, the conviction based on circumstantial evidence was sound at law.

8.7 In ground two, the appellant contends that there was insufficient evidence to convict the appellant of aggravated robbery because the complainant did not see anyone stealing

the property from him. That the theft only took place after the attack on the complainant in his absence.

8.8 In a charge of aggravated robbery contrary 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 anything 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.

8.9 With respect to the taking of the property in a charge of aggravated robbery, it was held in **Mugala v The People** ⁽⁸⁾ 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 prove beyond doubt that the attack on the complainant was connected with the theft.

8.10 More recently, in **James Kunda v The People** ⁽⁹⁾, the Supreme Court considered the relationship between the violence inflicted

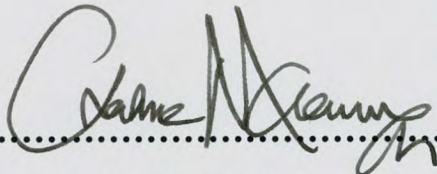
on the victim or complainant and the robbery. The court guided that:

“The offence of aggravated robbery requires proof that actual violence or threats of it was used immediately before, during or immediately after the robbery to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained as was held in the case of Mugala v The People.”

8.11 We agree with the learned Deputy Chief State Advocate that the taking of the property took place soon after the attack on the complainant and was the very reason that the complainant was attacked. Further, the complainant testified that the cell phone was in his jacket at the time of the attack and so it can be inferred that it was taken away from him when he became unconscious or may have fallen off during the attack.

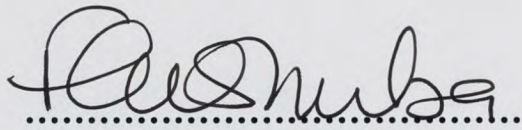
8.12 Therefore, we find that immediately after the attack on PW1, he was robbed of his property, actual violence having been used against him in order to overcome resistance to the property in issue being stolen. The circumstantial evidence leads to the conclusion that the purpose of the violence inflicted on PW1 was to overcome any resistance to the property being stolen.

8.13 In conclusion, we find no merit in the appeal, and dismiss it accordingly. We uphold the conviction and sentence imposed against the appellant by the court below.



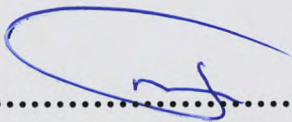
.....

C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT



.....

F. M. Chishimba
COURT OF APPEAL JUDGE



.....

K. Muzenga
COURT OF APPEAL JUDGE