

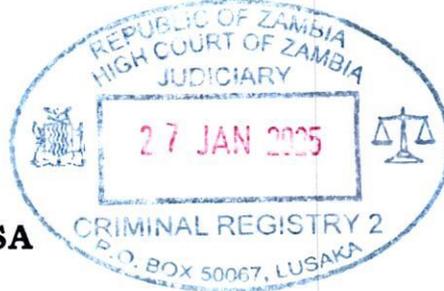
**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**

HP/104/2023

BETWEEN:

THE PEOPLE

VS



BRIGHT KAPUKESA

1ST ACCUSED

DOMINIC JERE

2ND ACCUSED

ROBERT CHILAMBE

3RD ACCUSED

COSMAS KAMPWALI

4TH ACCUSED

**BEFORE THE HONOURABLE MR. JUSTICE S. V. SILOKA IN
OPEN COURT ON THE 27TH DAY OF JANUARY, 2025**

For the State: Mr. Voster Munsaka – NPA

For the Defence: Mr. F. Mwauluka – Messrs. Legal Aid Board

J U D G M E N T

CASES REFERRED TO:

1. *Mandavu Vs R (NRLR No. 66/1961) Page 298; and*
2. *The People Vs Chimbola (1973) ZR 118.*

LEGISLATION REFERRED TO:

1. *Section 294 Subsection 1 of the Penal Code, Chapter 87 of the Laws of Zambia.*

1.0 INTRODUCTION

- 1.1 The Accused herein stand charged with the offence of Aggravated Robbery contrary to **Section 294 Subsection 1** of the **Penal Code, Chapter 87** of the **Laws of Zambia**.
- 1.2 The particulars of offence are that Bright Kapukesa, Dominic Jere, Robert Chilambe and Cosmas Kapwali on the 22nd day of June, 2022 at Lusaka in the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did steal a Toyota Hiace, Techno Cell Phone and cash money amounting to K20,000.00 the property of **Onesphere Ndayotwayeko**, and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence on Onesphere Ndayotwayeko in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.
- 1.3 I warn myself at outset that the onus is upon the prosecution to prove its case beyond all reasonable doubt and there is no onus on the Accuseds to prove their innocence. The Accuseds are entitled to give and call evidence or say nothing at all and if they elect to say nothing this does not affect the

burden on the prosecution. If, after considering all of the evidence in this case, there is any doubt in my mind as to the guilt of the Accuseds, then the Accuseds, must be given the benefit of that doubt.

1.4 In order to establish the guilt of the Accuseds, the Prosecution must satisfy me upon each and every ingredient of the offence charged. The following are the ingredients:

- (i) That the assailants were armed with an offensive weapon;*
- (ii) That something was stolen; or*
- (iii) At or immediately before or immediately after the time of stealing, violence must have been used or threatened to be used to the victim or his property to prevent or overcome resistance to the property being stolen or retained.*

2.0 THE PROSECUTION'S EVIDENCE

2.1 The State called 6 witnesses.

2.2 The first Prosecution Witness was **Banda Dalitso** aged 43 years, employed as a Police Officer stationed at Mumbwa Police Station; hereinafter called **PW1**.

- 2.3 In his evidence in chief, **PW1** told the Court that on 6th of September, 2022, he reported for work at Mumbwa Police Station where he was allocated a docket of Aggravated Robbery.
- 2.4 According to **PW1**, the same case was reported by male Smart Jadava an Indian National who complained that he was attacked and several of his items stolen from him.
- 2.5 It was **PW1**'s further evidence that while investigating the matter, he received information from an informer, which information led to the apprehension of a suspect Dominic Jere (**A2**) in Lusaka.
- 2.6 It was **PW1**'s further evidence that when **A2** was apprehended he was found with a Pistol and Magazine (**P5**), Police Uniform (**P1**), Police Coat (**P2**), Knee Guard (**P3**), Police Boot (**P4**).
- 2.7 It was **PW1**'s further testimony that after apprehending **A2**, **A2** was transferred to Lusaka where he was wanted by Lusaka Police for another criminal offence.
- 2.8 It was **PW1**'s further testimony that while investigating the matter, he came to learn that **A2** was a Police Reserve.
- 2.9 In cross-examination, **PW1** informed the Court that in the present case, he did not know what **A2** is alleged to have

stolen but that he was connected to this case because of the Police Uniform and Pistol he was found with.

2.10 In further cross-examination, **PW1** informed the Court that during investigations he learnt that **A2** was a Police Reserve but that he could not confirm since he did not see the Identification Card.

2.11 The second prosecution witness was **Irangunda Joselyne** aged 39 years hereinafter called **PW2**.

2.12 The evidence of **PW2** was to the effect that on the 22nd June, 2022 at about 21 hours she knocked off from the shop with her husband, Ndayotwayeko Onesphere.

2.13 It was **PW2**'s evidence that while driving home, they were trailed by a 4 x 4 Toyota Hilux, whose registration number she could not recall.

2.14 It was **PW2**'s evidence that upon reaching the gate of their house, **PW2**'s husband hooted at the gate to be opened. While waiting for the gate to be opened, men dressed in black and armed with guns came out.

2.15 It was **PW2**'s further testimony that one of the attackers then came into their motor vehicle and grabbed her and that when this happened her husband run away.

- 2.16 It was **PW2**'s further testimony that while she was in the motor vehicle, one of the attackers came into the motor vehicle and drove the motor vehicle away.
- 2.17 It was **PW2**'s further testimony that the attackers went away with the motor vehicle and the sum of K20,000.00 and various other items.
- 2.18 It was **PW2**'s further testimony that although there was plenty light she did not see any of the attackers.
- 2.19 It was **PW2**'s further testimony that when the attackers came into the motor vehicle, they had a Pistol (**P5**) which she clearly saw.
- 2.20 **PW2** further informed the Court that the motor vehicle stolen (**P6**) was a Toyota Hiace ABR 4583, with Chassis No. 112 – 0003487.
- 2.21 In cross-examination, **PW2** informed the Court that the Registration No. which was on **P6** was different from the one she gave in her evidence in chief.
- 2.22 The third Prosecution Witness was **Ndayotwayeko Onesphere** aged 55 years hereinafter called **PW5**.
- 2.23 The evidence of **PW3** is similar to that of **PW2**, hence it will not be reported here. Save to add that the Toyota Hiace

Registration No. ABL 4583, with Chassis No. 112 – 0003487; belonged to Nkwozori General Dealers; a company owned by himself.

2.24 Further that when he went to identify the motor vehicle at the Police Station, he found that the bus had a different number plate which was ABK 9697.

2.25 Further **PW3** emphasized that the motor vehicle was in his company name, Nkwozori General Dealers Limited.

2.26 Further **PW3** told the Court that he was attacked by three men who disembarked from a Toyota Hilux but that he did not see them because he was very scared.

2.27 In conclusion, **PW3** told the Court that the motor vehicle in question was his as per the White Book which is **P7**.

2.28 The fourth Prosecution witness was **Evans Mwamba** aged 51 years, employed as Principal Registration Officer in charge of Motor Vehicle Registration, RTSA.

2.29 It was the evidence of **PW4** that between May and June 2024 RTSA did receive a request from Zambia Police in which they requested to know the owner of a Toyota Haice Registration No. ABK 9697. It was **PW4**'s testimony that upon entering

into the system using his access code, the owner of the motor vehicle was found to be Kennedy Gondwe.

2.30 In his further testimony, **PW4** informed the Court that he then checked in the system using his access code to check for the owner of the motor vehicle with Registration BAL 4583 and according to the system, the motor vehicle belonged to Nkwozori General Dealers.

2.31 It was **PW4**'s further evidence that after verifying the owners of the motor vehicle in question, he went on to print **P9 (a)** and **(b)** which was then sent to the Police.

2.32 In his further evidence, **PW4** informed the Court that according to the RTSA Print Out (**P10 (a)** and **(b)**), the motor vehicle with Registration No. ABK 9697, with Chassis No. LH172 - 00144242 (Toyota Haice) belonged to Kennedy Gondwe, while Toyota Haice with Registration No. Registration No. ABL 4583 and Chassis No. TRH 112 - 0003487 belonged to Nkwozori General Dealers.

2.33 The fifth Prosecution Witness was Isaac Kalimanshila aged 32 years, employed as a Police Officer and attached to Forensic, Department of Biometric, a Ballistic Expert.

- 2.34 Briefly the evidence of **PW5** was to the effect that on the 14th of May, 2024, he received a Fire Arm, Taurus by make (**P5**) for Ballistic Examination. The same Fire Arm (**P5**) was accompanied by Test Cartridges (**P11**).
- 2.35 It was **PW5**'s further testimony that after carrying a Ballistic Examination, he produced a Ballistic Report (**P12**).
- 2.36 It was **PW5**'s further testimony that after concluding his report, he formed the opinion that the Fire Arm was a dangerous commercial weapon capable of causing damage to property and death to animals or human target.
- 2.37 In cross-examination, **PW5** informed the Court that he did not uplift finger prints on the Fire Arm as he was only requested to conduct Fire Arm examination.
- 2.38 Further under cross-examination, **PW5** informed the Court that it was possible to trace the owner of the Fire Arm but that the said task fell under a different department.
- 2.39 The seventh Prosecution Witness was **Gunda Njole Phiri** aged 55 years employed as a Security Guard at Nkoma Car Park; hereinafter called **PW6**.

- 2.40 It was **PW6**'s testimony that on the 16th of August, 2022, during the night at about 22:14 hours, he received a customer who came to park a motor vehicle.
- 2.41 It was **PW6**'s testimony that the said customer came to park a Toyota Haice Mini Bus Registration No. BAK 9697.
- 2.42 It was **PW6**'s further testimony that he did not check the number plate of the motor vehicle but just entered the details as given to him by the customer in his Register (**P13**).
- 2.43 It was the further testimony of **PW6** that after Mr. Chilambe (now **A3**) parked his motor vehicle, his names and phone number were entered into the Register (**P13**) after which Mr. Chilambe signed.
- 2.44 It was also the further evidence of **PW6** that after parking the motor vehicle, **A3** informed him that the motor vehicle had problems and that he was to pick it after three weeks.
- 2.45 Further, **PW6** told the Court that after three weeks, he received Police Officers who came with Mr. Chilambe. When the Police arrived, he was asked to identify the Bus which Mr. Chilambe came to park. **PW6** identified the Bus (**P6**). After identifying the Bus, he was asked not to release it and that

the Police were going to come and pick it. The Bus was accordingly picked.

2.46 The seventh Prosecution witness was **Michelo Konoko** aged 46 years and employed as a Police Officer hereinafter called **PW7**.

2.47 The gist of **PW7**'s evidence was to the effect that he opened up a docket, carried out investigations and arrested the now Accused for the current offence. **PW7** further tendered into Court **P13**.

2.48 In cross-examination, **PW7** informed the Court that it was the four Accuseds who led the Police to the house of the complainant but that he did not have proof to show that it was the Accuseds who led the Police to the house of the complainant.

2.49 In further cross-examination, **PW7** told the Court that none of the witnesses he interviewed saw the Accuseds attacking the complainant.

2.50 In further cross-examination, **PW7** informed the Court that none of the recovered items were found with **A1**, **A2** and **A4**.

2.51 In further cross-examination. **PW7** informed the Court that it was not sinister to find Police Regalia with Reserve Police

Officer. That since Mr. Jere was a Reserve Police Officer, he could be found with Police Regalia.

2.52 In further cross-examination, **PW7** informed the Court that a seizure form is prepared when seizing items from a suspect but that in this case there was no Seizure Form.

2.53 In further cross-examination, **PW7** admitted to have seen the Fire Arm Licence in Court, with Serial Number TRM 80810, which is also a Taurus Pistol, that the details are the same with the Pistol produced in Court apart from the Serial Number.

2.54 In further cross-examination, **PW7** told the Court that he was in possession of the White Book which was in the name of Kennedy Gondwe but that it was not necessary to interview him.

2.55 In further cross-examination, **PW7** informed the Court that when he interviewed Mr. Jere, he never told him of Mr. Chitele Matondo. Further that Mr. Jere never told him of the letter of sale.

2.56 In further cross-examination, **PW7** informed the Court that according to the letter of sale presented to him in Court, the Toyota Haice ABK 9697 was sold to Mr. Chilambe by Rody

Chiteta; which motor vehicle had the same number plate but different from the motor vehicle recovered.

2.57 In further cross-examination, **PW7** informed the Court that he was not aware of the letter of sale and as such he never made a follow up on the letter.

2.58 In re-examination, **PW7** told the Court that he was investigating a Toyota Haice, ABK 9697, which was recovered from Kabanana and later on brought to Lusaka Central Police Station.

2.59 In further re-examination, **PW7** informed the Court that he submitted Registration No. ABK 9697 to RTSA, with Chassis No. LH 172 - 0014424 where it was established that, the motor vehicle in question belonged to Kennedy Gondwe while the Toyota Hiace Registration No. BAL 4583zm, with Chassis No. TRH112-0003487 belonged to Nkwozori Dealers Limited.

2.60 In further re-examination, **PW7** informed the Court that he established that Chassis No. for ABK 9697 was not for the same Toyota Haice recovered.

2.61 In further re-examination, **PW7** informed the Court that the complainant and his wife never identified the people who attacked them.

- 2.62 That was the close of the Prosecution case.
- 2.63 At the close of the Prosecution's case **A1**, **A2** and **A4** were acquitted at no case to answer. A3 was accordingly put on his defence.
- 2.64 In his evidence in chief, DW3 informed that Court that he purchased a motor vehicle Registration No. ABK 9697 at K85,000.00 from Mr. Lloyd Chitele Mutondo on the 3rd of August, 2022.
- 2.65 It was the further testimony of **DW3** that after the sale, a letter of sale was generated accompanied by a White Book and National Registration Card (NRC). According to **DW3**, the NRC was in the names of Kennedy Gondwe.
- 2.66 It was **DW3**'s further evidence that after being apprehended by the Police in relation to this matter, Police Officers took him to his home where keys to his mini bus were collected. From his home, DW3 informed the Court that he led them to the car park where the bus was parked. The bus was identified but not collected by the Police.
- 2.67 It was DW3's further evidence that the bus in issue was his as confirmed by the letter of sale (**ID1**) and the NRC for the seller, Chitete Mutondo (**ID2**).

- 2.68 In his further evidence, **DW2** told the Court that the White Book that was given to him had the names of Kennedy Gondwe as the first owner of the motor vehicle.
- 2.69 In his further evidence, **DW1** told the Court that the motor vehicle he bought had the Registration No. ABK 9697, Toyota Haice by make.
- 2.70 It was the further evidence of **DW3** that he bought the motor vehicle the way it was and never changed anything. Further that the Chassis No. which is in the letter of sale is the very one which is on the motor vehicle. **DW3** denied stealing the motor vehicle in question.
- 2.71 In cross-examination, **DW3** informed the Court that **PW2** and **PW3** informed the Court that their bus was stolen with cash money.
- 2.72 In further cross-examination, **DW3** informed the Court that the Chassis No. given by **PW2** and **PW3** was the very one which was on the bus in issue which belonged to Nkwozori General Dealers.
- 2.73 In further cross-examination **DW3** confirmed that it was him who went to park the bus as confirmed by the guard (**PW7**).

- 2.74 In further cross-examination, **DW3** informed the Court that on his letter of sale (**IP1**) the Chassis No. is 112-003487 while the Registration No. is ABK 9697.
- 2.75 In further cross-examination. **DW3** informed the Court that according to **P9 (a)** the Registration No. of the motor vehicle is ABK 9697 while the Chassis No. is LH172-0014424, while the owner of the motor vehicle is Kennedy Gondwe.
- 2.76 In further cross-examination **DW3** informed the Court that the Chassis No. on **IP1** is different from the one from RTSA.
- 2.77 **DW3** further told the Court the Registration No. for Mr. Kennedy Gondwe is 23435043/1 while the Registration No. on the document from RTSA is 234350/443/1.
- 2.78 According to **DW3**, the Registration No. on the letter of sale is different from the one from RTSA.
- 2.79 In further cross-examination **DW3**, informed the Court that he never went to RTSA to verify ownership of the motor vehicle.
- 2.80 That was the close of the case for the Defence.

3.0 SUBMISSIONS

- 3.1 When the Matter was adjourned for Judgment, Counsel promised to file in Written Submissions. However, at the time

of writing the Judgment no submissions were received. This failure was not fatal to both Parties since Written Submissions are not binding on the Court.

4.0 FACTS NOT IN DISPUTE

4.1 In this matter, I have found the following facts established:

- 1) That PW1 and PW2 were attacked by men wielding guns but did not identify the attackers;***
- 2) That the attackers went away with a Mini Bus Registration No. ABL 4583, with Chassis No. 112-0003487;***
- 3) That when the motor vehicle was recovered it had the Registration No. ABK 9697;***
- 4) That the motor vehicle ABK 9697 with Chassis No. LH172-00144242, Toyota Haice belonged to Kennedy Gondwe;***
- 5) That motor vehicle Registration No. ABL 4583, Toyota Haice with Chassis No. TRH 112-0003487 belonged to Nkwozori General Dealers.***

6) That Mr. Chilambe (DW3) on the 18th of August, 2022 went to park his Mini Bus Registration No. BAK 9697; and

7) That after three weeks, Mr. Chilambe (DW3) came with Police Officers to identify the motor vehicle.

5.0 FACTS IN DISPUTE

- i. Whether it was DW3 with others unknown who attacked PW2 and PW3 and robbed them of their bus?**
- ii. Whether at or immediately before or immediately after the time of stealing, violence was used.**
- iii. Whether any property was stolen.**

6.0 ANALYSIS AND DECISION

6.1 The offence pursuant to which the Accused has been charged is Aggravated Robbery contrary to **Section 294 subsection (1) of the Penal Code, Chapter 87** of the **Laws of Zambia**.

This **Section** provides:

“Any person who, being with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it,

uses or threatens 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, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for a period of not less than fifteen years.”

6.2 Therefore, from the said Section, the State to sustain a conviction must prove that:

- i. The now Accused, with other unknown were the assailants armed with an offensive weapon or instrument or there must be two or more assailants;*
- ii. At or immediately before or immediately after the time of stealing, violence must have been used or threatened to be used to the victim or his property; and*
- iii. Whether it is the now Accused together with other unknown who were the assailants.*

6.3 From the evidence on record, it has been established that **PW2** and **PW3** were robbed of their bus Registration No. ABL 4585, with Chassis No. 112-0003487.

- 6.4 Further, it has been established that the said motor vehicle was found in possession of **DW3** now Accused as confirmed by **PW7**.
- 6.5 Having considered the evidence in totality, I have found that it is the now Accused together with others unknown who stole the motor vehicle in question.
- 6.6 I have arrived at that conclusion because it is **DW3** who was found with the stolen property.
- 6.7 In **Mandavu Vs R**⁽¹⁾, it was held that:

“On the question of onus of proof, the proper intention to be placed upon Section 287 was that it was for the Prosecution initially to prove two matters beyond reasonable doubt. Firstly, that the Accused was either in possession of or conveying the article, and secondly, that there was reasonable suspicion that the article was unlawfully obtained.

(v) The Accused could not be called upon to give an account to the Court as to how he came by the goods in question until the requirements in (iv) had been satisfied.

(vi) In regard to the words, “be reasonably suspected of having been stolen or unlawfully obtained, it was for the Prosecution to establish beyond a reasonable doubt, and induce a reasonable

suspicion in the mind of the Court. The burden shifted to the Accused to ally this suspicion in the mind of the Court by giving an account of his possession to the satisfaction of the Court”.

(Emphasis, mine)

- 6.8 In *casu*, the State has proved beyond reasonable doubt that **PW2** and **PW3**'s Mini Bus was stolen, which Mini Bus was found in possession of the now Accused.
- 6.9 Therefore at this position, it is now incumbent upon the Accused to give a proper explanation of where he got the mini bus from.
- 6.10 Looking at the evidence on record, it is my humble view that the now Accused has not discharged this burden.
- 6.11 I am saying so because it has been established that the motor vehicle Registration No. ABL 4585 with Chassis No. 112-0003487 was found in possession of the now Accused, bearing Registration No. ABK 9697, with Chassis No. 112-00034, while Motor Vehicle Registration No. ABK 9697 belonging to Kennedy had Chassis No. LH172-00144242.
- 6.12 Having analyzed the Registration No. and Chassis No., it has been established that when the Toyota Haice Mini Bus Registration No. ABL 4585 was stolen, the motor vehicle was

given a new Registration No. ABK 9697 as a way of disguising its identity.

6.13 Although an attempt was made to disguise the Mini Bus, the scheme could not be effective because the Chassis No. remained the same though with a different number plate which had a different Chassis No.

6.14 Looking at the way the Registration Numbers were changed, my considered view is that the Registration Numbers were changed to conceal the real identity of the Toyota Haice Registration No. ABL 4583, this was because the bus in question was stolen.

6.15 My findings in 6.14 are corroborated by the fact that the sales agreement entered between the now Accused and Kennedy Gondwe is also defective because it has a wrong Chassis No. different from the one the now Accused claims to have purchased.

6.16 Further, I find that the motor vehicle in question was stolen because even after alleging to have bought the motor vehicle in question, no attempt was made to change ownership of the motor vehicle. Further no Interpol clearance was sought after

the alleged purchase. Further no property transfer tax was paid to ZRA after the alleged sale.

6.17 Further, when leaving the motor vehicle with **PW6**, the now Accused informed **PW6** that he was going to pick the motor vehicle after three weeks because the vehicle had a problem, yet the motor vehicle had no problems. The motor vehicle was simply hidden at **PW6**'s Car Park because it was a stolen motor vehicle.

6.18 When those pieces of evidence are put together, it is clear in my mind that it was now Accused with others unknown who used force to steal the Mini Bus from **PW2** and **PW3** and that is why no formal step was undertaken to change ownership.

ii. Whether or immediately before or immediately after the time of stealing, violence was used?

6.19 In the case of *The People Vs Chimbola*⁽²⁾, it was held that:

“It is necessary, under a charge of robbery or aggravated robbery, to prove that the taking and force used or threatened contemporaneously with the taking accompanied by an intent to deprive the owner permanently of the thing taken”.

6.20 Looking at the facts before Court, it is very clear that force was used to steal the bus and other properties from **PW2** and

PW3. Further I believe **PW2** and **PW3** because there was no motive for them to have implicated **A3**. **A3** was simply found with stolen property.

iii. Whether the property was stolen?

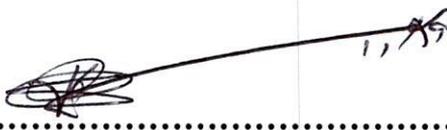
6.21 From the evidence on record, it has been established that a Toyota Mini Bus belonging to Nkwozori General Limited was stolen.

6.22 After stealing the same Mini Bus, its original number plate was changed as a way of disguising the true identity of the Mini Bus. This was a confirmation that the bus was indeed stolen.

7.0 CONCLUSION

7.1 Having considered the evidence in totality, I have found that the State has discharged its burden beyond any reasonable doubt and I find **A3** GUILTY of the offence of Aggravated Robbery and I CONVICT him accordingly.

**DELIVERED AT LUSAKA IN OPEN COURT THIS 27TH DAY OF
JANUARY, 2025.**



.....

**S. V. SILOKA
HIGH COURT JUDGE**