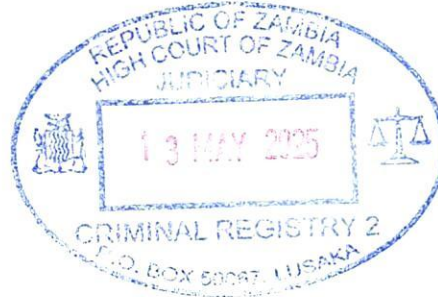


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/105/2025



BETWEEN:

THE PEOPLE

AND

COSMAS MWALE

**BEFORE THE HONOURABLE MR. JUSTICE S.V SILOKA IN OPEN
COURT ON THE 13TH DAY OF MAY 2025.**

For the State: Mr.M. Sitali – National Prosecution Authority

For the Accused: Mr. Nicholas Okware – Messrs Okware
Associates.

JUDGMENT

CASES REFERRED TO:

1. *The People Vs. Chimbola (1973) Z.R 118;*
2. *Maxwell Nyambe Masuku Vs. the People.*

1.0 INTRODUCTION

- 1.1 In this Case the Accused stands charged with 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 of the offence are that Cosmas Mwale on the 1st day of August, 2023 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, Jointly and whilst armed with knives and other offensive weapons, did steal cash amounting to K70,500=00, 1 Oppo Mobile Phone Valued at K850.00 and 2 Itel Mobile Phones Valued at K600.00 all Valued at K71,950.00 the property of Mukosiku Sinyinda and at or Immediately before or Immediately after the time of such Stealing, did use or threaten to use actual Violence to the said Mukosiku Sinyinda in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.
- 1.3 I warn myself at the outset that the onus is upon the Prosecution to prove its Case beyond all reasonable doubt and there is no onus on the accused to prove his Innocence. The accused is entitled to give and call evidence or say nothing at all and if he elects 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 accused then the accused must be given the benefit of that doubt.
- 1.4 In order to establish the guilt of the accused, the Prosecution must satisfy me upon each and every Ingredient of the offence charged.
- 1.5 The Prosecution therefore must establish: -
- (i) That the assailant was armed with an offensive weapon;
 - (ii) That something was stolen;

- (iii) At or immediately before or Immediately after the time of such 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 CASE**

- 2.1 The State called 6(six) witnesses.
- 2.2 The first Prosecution Witness was Mukosiku Sinyinda aged 53 years, hereinafter called **PW1** a businessman in Garden House Compound.
- 2.3 It was **PW1**'s testimony that on 31st July, 2023 at about 01 hours, his house was broken into by thieves wielding knives and pangas.
- 2.4 It was **PW1**'s further testimony that upon gaining entry into his house the attackers who were about Ten in number demanded to be given money that was realized from the sale of their house in Workman area, within Garden house compound.
- 2.5 It was **PW1**'s further testimony that after denying possessing any money, two of the attackers then started hitting him together with the wife using kicks and a metal bar.
- 2.6 After a frantic search, **PW1** Informed the Court that one of the attackers checked under the bed where a Black Trunk containing cash was found. The sum of K70,500=00 contained therein and three Phones were all taken by the attackers.

- 2.7 It was the further testimony of **PW1** that after stealing the money, the attackers left the two Knives but went away with the Axe and Panga.
- 2.8 It was **PW1** further testimony that two of the attackers came with Torches but that he could not see any of them properly because one was putting on a face mask while the other attacker was putting on a Hood. According to **PW1** the attack took about 30 – 45 minutes.
- 2.9 Further, it was the testimony of **PW1** that the following Morning a report was made to Plain View Police Post where a docket was opened.
- 2.10 After a week, **PW1** was invited by the Police at Plain View to visit the Police Station.
- 2.11 While at the Police Station, **PW1** informed the Court that the Police informed him that his Oppo phone was recovered from a young lady who bought the phone.
- 2.12 It was **PW1**'s further testimony that after a while, the Police at Plain View called to inform him that the Seller of the phone was apprehended. **PW1** identified the recovered phone as **P1**. The knives dropped by the attackers were identified as **P2**.
- 2.13 In cross-examination, **PW1** told the Court that he Informed the Police about the knives but that the said knives remained in his custody.
- 2.14 The Second Prosecution Witness was Susan Nakanga herein after called **PW2**, wife of **PW1**.

- 2.15 The evidence of **PW2** is a rehash of that of **PW1**, therefore it will not be reported here.
- 2.16 The Third Prosecution Witness was Kelvin Kamanula aged 27 years herein after called **PW3**. The gist of PW3's evidence was to the effect that on the 1st of August, 2023, Cosmas Mwale now Accused, who is a friend to his young brother brought a phone for sale and requested him to find a customer. The phone was Opoo by make.
- 2.17 Following that request, **PW3** told the Court that he went on to find a customer by the name of Amanda and the phone was sold at K500=00.
- 2.18 It was the further evidence of **PW3** that before the phone was sold Cosmas was asked to see the Customer but that Cosmas declined.
- 2.19 **PW3** further confirmed that after the sale, he handed the K500=00 to Cosmas after which he was given a K50=00 for appreciation.
- 2.20 It was **PW3**'s further evidence that after five (5) days, he was Visited by the Police who were in the Company of Amanda.
- 2.21 Following the visit by the Police, **PW3** Informed the Court that he was then taken to the Police for an interview. During the Interview, **PW3** Informed the Court that he explained to the Police that the phone was given to him by Cosmas Mwale, now Accused so that he could sale it and that it was sold to Amanda. After the Interview **PW3** told the Court that he was then was remanded in Custody.

- 2.22 It was **PW3**'s further testimony that in 2024, Cosmas who was on the run appeared after which he was apprehended and later on handed over to the Police
- 2.23 It was **PW3**'s testimony that when Cosmas Mwale resurfaced, he agreed to reimburse him all the Expenses spent in connection to the phone sold to Amanda.
- 2.24 **PW3** further went on to identify the now Accused as the one who asked him to sale the phone to Amanda at K500=00. He Identified the Phone sold as **P1**.
- 2.25 In cross-examination, **PW3** told the Court that it was the now accused who asked him to sale the Phone on his behalf and that the now Accused refused to meet the Customer.
- 2.26 In further cross-examination **PW3** told the Court that he sold the phone to Amanda after the now Accused asked him to find a customer.
- 2.27 The fourth Prosecution Witness was Amanda Jones Mwenya aged 19 years herein after called **PW4**.
- 2.28 It was **PW4**' evidence that on a date she could not recall she bought a Phone (**ID1**) from Kelvin (**PW3**) at K650=00.
- 2.29 It was **PW4**'s further evidence that after using the Phone for a week, she received a message from the Police informing her that the Phone she was using was stolen.
- 2.30 It was **PW4**'s further testimony that the following day she went to the Police Station in the presence of his uncle. At the Police

Station, **PW4** informed the Court that the Phone (**ID1**) was bought from Kelvin (**PW3**). The said Kelvin was later on taken to the Police for further Investigations.

- 2.31 In Cross-Examination, **PW4** told the Court that she bought the Phone from Kelvin on 19th August, 2023.
- 2.32 Further in Cross-Examination **PW4** informed the Court that she got the Phone from Kelvin but that Kelvin was not a Phone dealer.
- 2.33 The 5th Prosecution Witness was Evaristo Simasiku aged 43 years, investigations officer in this matter, herein after called **PW5**.
- 2.34 It was **PW5**'s evidence that following a complaint received from **PW1** a Search Warrant was prepared and later on a print out from Airtel was received, which print out led to the recovery of (ID1) from Amanda (**PW4**).
- 2.35 It **PW5**'s further testimony that when **PW4** was Interviewed she Informed the Police that the Phone was given to Kelvin Kamanula (**PW3**) to sale by Cosmas Mwale and Desaka. Kelvin Kamanula (**PW3**) was accordingly apprehended and Interviewed in relation to the Phone recovered from Amanda (**PW4**). According to **PW5**, **PW3** informed him that the Phone was given to him by Cosmas Mwale.
- 2.36 Upon receipt of that information, a man hunt for Cosmas Mwale and Deska was triggered and after 8 months Cosmas Mwale was apprehended and handed over to the Police at Plain View for investigations

- 2.37 It was **PW5**'s further evidence that after apprehending Cosmas Mwale the matter was then handed over to Mr. Michelo Kanoko who was the Arresting Officer in the matter.
- 2.37 **PW5** identified the Phone recovered as **ID1**.
- 2.38 The 6th Prosecution Witness in this matter was Michelo Kanoko aged 47 years, Arresting Officer in the matter herein after called **PW6**.
- 2.39 The brief Evidence of **PW6** was to the effect that he opened a docket, carried out Investigations and arrested the now Accused for the current offence. **PW6** further tendered P1 into evidence.
- 2.40 That was the close of the Prosecution case.

3.0 THE CASE FOR THE DEFENCE.

- 3.1 In his Defence, the Accused elected to give sworn evidence and called no witnesses.
- 3.2 In his Defence, **DW1** denied committing the offence by stating that **P1** came into his possession after he bought it from Lolo.
- 3.3 It was **DW1**'s evidence that after buying **P1** from Lolo he gave it to Kelvin (**PW3**) to sale it on his behalf and that Kelvin sold it to **PW4**.
- 3.4 According to **DW1**, while **PW4** was using the Phone, she was picked up by the Police and informed that the phone she was using was stolen. Investigations Instituted revealed that Kelvin was tasked to sale the Phone by the now Accused, a discovery that led to the apprehension of the now Accused.

- 3.5 **DW1** denied having participated in the Aggravated Robbery claiming that the Phone was bought from Lolo.
- 3.6 In Cross-Examination, **DW1** admitted that it was him who gave **P1** to **PW3** so that he could sale the Phone on his behalf.
- 3.7 In further Cross-Examination, **DW1** admitted that he told the Police that the Phone was brought from Lolo but that the Police refused to follow Lolo.
- 3.8 In further Cross-Examination, **DW1** admitted that the Phone was at one time in his possession and that it was him who gave it to **PW3**.
- 3.9 That was the close of the case for the Defence.

4.0 **SUBMISSIONS**

- 4.1 Both parties did not submit any written Submissions and relied on the evidence on record.

5.0 **FACTS NOT IN DISPUTE**

- 5.1 In this matter, I have found the following facts established.
- i. **PW1** was attacked and robbed of his Money and Phone by unknown people.
 - ii. That **PW1**' s stolen Phone was found with **PW4**.
 - iii. That **PW4** bought the Phone from **PW3**.
 - iv. That **PW3** got the Phone from the now Accused.
 - v. That the now Accused ran away for over 8 months.

6.0 FACTS IN DISPUTE

- i. Whether it is the now Accused who acting together with others attacked **PW1** and robbed him of his property.

7.0 ISSUES FOR DETERMINATION

- (i) Whether property of **PW1** was stolen
- (ii) Whether at or immediately before or immediately after the time of stealing, Violence was used.
- (iii) Whether it is the now Accused's who was the Assailant.

8.0 ANALYSIS AND DECISION

- 8.1 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 prevent or overcome resistance to its being stolen or retained, is guilty of the felony of Aggravated Robbery is liable on conviction to Imprisonment for life, notwithstanding subsection (2) of Section 26 shall be Sentenced to Imprisonment for a period of not less than fifteen years.”

8.2 Therefore, from the said section, the state to sustain a conviction must prove that:

- (i) The now Accused was the Assailant armed with an offensive weapon or Instrument.
- (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.

8.3 Having discussed the law, I now turn to answer the question for determination.

- (i) Whether PW1's property was stolen.

8.4 From the evidence on record, it is not in dispute that PW1's property among them an Opoo phone (**P1**) was stolen. **PW1, PW2** and **PW5** all confirmed that their property was stolen.

- (ii) Whether at or Immediately before or Immediately after the time of Stealing, Violence was used.

8.5 In the Case of The People V Chimbola (1973) Z.R 118, 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.”

8.6 From the evidence on record, it is not in dispute that the Property of **PW1** and **PW2** that their property was taken after they were threatened with knives and Metal bars.

(iii) whether it is the now Accused who was the Assailant?

8.7 From the evidence, it has been established that it is the now Accused who gave the phone(**P1**) to Kelvin (**PW3**) to sale the Phone and **PW3** sold the phone to **PW4**. Further, it was **PW4** who was found with the stolen Phone as Per the evidence of **PW5**.

8.8 In the case of Maxwell Nyambe Masuku Vs the People (selected Judgment of Zambia) No 60 of 1971, It was held that:

“The burden of proving possession and reasonable suspicion that the property was stolen or unlawfully obtained rests upon the prosecution. Thereafter, a statutory burden based on a balance of probabilities lies upon the Accused to give the court a satisfactory Account as to how he came by the property.” (Emphasis mine).

8.9 Following that guidance, it is my considered opinion that the prosecution in *casu* has discharged its burden because the prosecution has shown that **P1** which was for **PW1**, which phone was stolen was found with the now Accused after he gave it to **PW3** to sale on his behalf.

8.10 On the other hand, the accused herein has not discharged his statutory burden on a balance of probabilities because he did not call Lolo, the one he claims to have bought the Phone from. It is

in sufficient for the accused to claim that he bought the phone from Lolo without calling Lolo to come and confirm that it was him who sold the phone to him.

8.11 Further, it is my considered opinion that the statement about Lolo is a mere after thought because it was brought during his defence. There is no evidence on record to show that the claim of Lolo having sold the phone to the now Accused was brought to the arresting officer for him to investigate. The statement about Lolo was only brought during his defence, which confirms that it was an Afterthought. With that failure, I have found that the state has established that it is the now Accused who acted with other unknown to attack and rob PW1 and PW2 of their property.

9.0 CONCLUSION

9.1 Having considered the evidence in totality, I have found that the state has discharged its burden beyond any reasonable doubt and I find the Accused GUILTY as charged and I CONVICT him accordingly.

DELIVERED IN OPEN COURT THE 13TH DAY OF MAY 2025

S.V. SILOKA
HIGH COURT JUDGE

