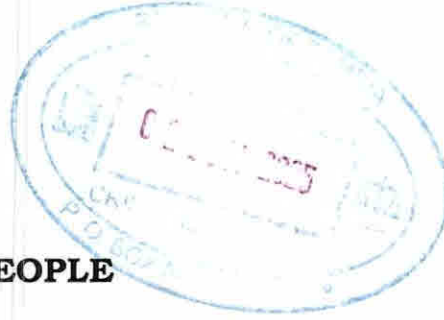


J7
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/115/2018

BETWEEN:



THE PEOPLE

V

TAPIWA MUNEMO
TIRINANHU KUZAWENHAMO

BEFORE THE HON. MRS. JUSTICE M.C. KOMBE IN OPEN COURT

THIS 2nd DAY OF JUNE, 2025

For the State: Mr. F.M. Sikazwe – Principle State Advocate and
Mr. S. Phiri – State Advocate- National
Prosecution Authority.

For the Accused: Mr. M. Simubula and Mr. L. Kasuba - Messrs.
Lennard Lane Partners, Mr. B. Banda – Senior
Legal Aid Counsel and Mrs. K.M. Nyimbili- Legal
Aid Counsel- Legal Aid Board.

J U D G M E N T

Cases referred to:

1. *The People v. Njovu* (1968) Z.R. 132.
 2. *Mbundi Nyambe v. The People* (C.A.Z. No. 4573).
 3. *Muvuma Kambanje Situna v. The People* (1982) Z.R 115
 4. *Issa Mwasumbe v The People* (1978) Z.R. 354.
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5. James Mwango Phiri v. The People (Appeal No. 171/2015).
6. Nzala v. The People (1976) Z.R. 221.
7. Katebe v. The People (1975) Z.R.13.
8. Bwalya v. The People (1975) Z.R. 164
9. Kenneth Mtonga and Victor Kaonga v. The People (2000) Z.R. 33.
10. Joseph Mulenga v. The People (Appeal No. 128/2017)
11. Mbinga Nyambe v. The People (2011) Z.R. 246.
12. P.L. Taylor and others v. R (21 Cr. App. R. 20).
13. David Zulu v. The People (1980) Z.R. 205.
14. Saidi Banda v. The People (Selected Judgment No. 30 of 2015).
15. Donald Fumbelo v. The People (SCZ No. 51 of 1997)
16. Kambarange Kaunda v. The People (1992) Z.R. 1.
17. George Masupi v. The People (1978) Z.R 271.
18. Yokoniya Mwale v. The People (SCZ Appeal No.285 of 2014).
19. Machipisa Kombe v. The People (SCZ Judgment No. 27 of 2007).
20. Ezious Munkombwe and others v. The People (CAZ No. 7, 8, 9 of 2017).

Legislation and other material referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia.
2. The Firearms Act, Chapter, 110 of the Laws of Zambia.
3. Malik H, Auburn J, Bagshaw R (Ed) Phipson on Evidence
4. (Elliot D.W. (1980) Phipson and Elliot – Manual of Evidence, 11th Edition.

1. INTRODUCTION

- 1.1 The two accused persons stand charged with one count of Aggravated Robbery contrary to Section 294 (2) of the Penal Code Chapter 87 of the Laws of Zambia.
- 1.2 The particulars of the offence allege that **TAPIWA MUNEMO**

and **TIRINANHU KUZAENHAMO** on the 16th day of December, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together and armed with a pistol did steal from **SADIK PATEL**, K600,000.00 the property of **NERIA INVESTMENTS** and at or immediately before or after the time of such stealing, did use or threatened to use actual violence to the said **SADIK PATEL** in order to obtain or retain the said property or prevent or overcome resistance from it being stolen.

1.3 The accused persons pleaded not guilty

2 PROSECUTION'S EVIDENCE

2.1 In support of their case, the prosecution called six (6) witnesses.

PW1 was **CHARLES MALAWO KAMBOLE** a businessman who buys and sells vehicles. It was testimony that he sold a Silver Runx motor vehicle ACX 6538 to a gentleman who introduced himself as Tiri, (A2) a truck driver. He stated that he did his business at Levy Junction Mall. A2 approached him and informed him that he wanted a vehicle that he could purchase. A2 was shown three vehicles and he chose the Runx and they agreed on the price of K42, 000.00. Then A2 paid K37, 000.00 and the balance of K5,000.00 was to be paid in two weeks' time.

2.2 Prior to the date when the balance of K5000.00 was to be paid, A2 went back to PW1 to inform him that the motor vehicle had a mechanical fault and that he wanted to exchange with a Toyota Allion. A2 had used the vehicle for a period of eight weeks before registering his complaint to PW1.

- 2.3 PW1 agreed to exchange the vehicle but asked A2 to top up K10, 000.00 towards the exchange. The Runx was advertised and five days after it was brought back it was sold to another customer.
- 2.4 After a while, PW1 was called at Lusaka Central Police Anti Robbery Squad for questioning over the Runx. He gave a statement under C5 concerning the same vehicle that was resold through an agent. The police asked for the whereabouts of the vehicle and PW1 informed them that it was sold along Mumbwa Road.
- 2.5 In January 2018, PW1 was called back to Central Police to go and identify the person who he sold the vehicle to through an identification parade. PW1 identified the person that he transacted with in relation to the motor vehicle that is A2.
- 2.6 In Court, the witness also identified A2 whom he had seen on two occasions. The first time was when he bought the motor vehicle and the second time was when A2 went back to him to exchange the motor vehicle. The interaction with A2 on both occasions lasted about forty (40) minutes.
- 2.7 PW1 was informed that the Police were looking for the Runx because it was used in a crime.
- 2.8 Under **cross examination** PW1 clarified that the transaction occurred between August and November 2016. PW1 further clarified that the vehicle was exchanged after eight weeks and was resold five days later. PW1 denied having met the person who subsequently purchased the vehicle as it was sold through an agent.

- 2.9 PW1 confirmed that on the two occasions that he dealt with A2 he was alone.
- 2.10 PW1 revealed that the police had told him that the motor vehicle was used in the commission of the crime in December 2016. PW1 asserted that he transacted with A2 between August and November of 2016.
- 2.11 There was no re-examination.
- 2.12 **PW2** was **PETER SICHILIMA** a security guard with Pre-Secure. PW2 stated that he was currently employed at Saturnia House under a company called Neria Investments. He had worked there for two years. His responsibility was to take care of Neria Investment workers and visitors.
- 2.13 PW2 recalled that on 15th June, 2017, The Director Mr. Malik Patel arrived at Neria Investment in a Lexus vehicle between 15.00 and 16.00 hours. Shortly thereafter, there was a Toyota Corona ABX 3466 that followed Mr. Malik Patel's vehicle.
- 2.14 He went to the occupants of this second vehicle and informed them where to park. They heard and obliged. There was another third vehicle which entered almost at the same time with the other two vehicles. That the occupants of this third vehicle were foreigners. When he approached the third vehicle, the occupants did not open the windows and just sat in the vehicle. He could not see the occupants in the vehicle as the vehicle had tinted windows. PW2 went to the second vehicle and alerted them that the people behind them were thieves and that they had followed Mr. Malik Patel's vehicle.
- 2.15 PW2 then instructed them to block their way. They complied

as instructed. PW2 further stated that the people in the third vehicle went to Mr. Patel's vehicle and opened his vehicle. He saw them as he stood near the vehicles. When these people opened Mr. Patel's doors, he shouted "thieves, thieves, come and help me!" PW2 saw three people but only two disembarked from the vehicle when he screamed for help. A number of people went to his rescue. When those people heard the shouts, they went back to the vehicle and attempted to drive off but they were blocked by the second vehicle.

- 2.16 PW2 explained that the third vehicle parked behind Mr. Patel's vehicle and he stood about 8-10 meters from where the vehicle was. The occupants of the third vehicle were barricaded in and they locked themselves in the vehicle and didn't come out. PW2 had to forcibly remove them from the vehicle. At that time, Mr. Malik had already called C5.
- 2.17 When police officers from C5 arrived, they found that they had tied the legs and hands of three men who were in the third vehicle. They were apprehended and taken to the police. He remained at the scene and continued working. That the whole incident lasted about twenty (20) minutes.
- 2.18 PW2 further stated that he was called to Central Police station for an Identification Parade. He identified two of the suspects, A1 and A2 at the parade. He identified them in Court as well as the vehicle that was used by the accused persons as a grey Toyota Corona ABX 3499 that had tinted windows. It was marked as "**ID1**" for identification purposes.
- 2.19 Under **cross examination** PW2 stated that he was able to tell

that the people in the third vehicle were foreigners because they found them with identification cards in their bags. They discovered that they had Zimbabwean names.

- 2.20 PW2 confirmed that he had been stationed at Saturnia House for four months because he had started work on 1st March 2017. PW2 further confirmed that from 1st March, 2017 to 15th June, 2017 he used to see Mr. Patel's vehicle every day. PW2 gave Mr. Patel's license number as ALX 1570. PW2 stated that he was able to recall the suspect's registration number because there was a book where they wrote down all the registration numbers on a particular day. However, he did not have the notebook in his possession.
- 2.21 PW2 stated that he worked in the parking area at Saturnia. He confirmed that Saturnia had security guards that worked during the day and at night. He further confirmed that the security allowed the vehicle in question to go inside.
- 2.22 PW2 stated that there were four companies that operated from Saturnia with two companies being of the same group and the other two were from different companies.
- 2.23 When asked if he suspected the occupants of the third vehicle to be criminals because they didn't open the vehicle, PW2 stated that he suspected them because they opened the door to Mr. Patel's vehicle. He also stated that he mentioned that they had come to attack Mr. Patel because they didn't open the windows, and because of their appearance, he knew that they were criminals. He added that the other reason was that the occupants didn't comply with his instructions.

- 2.24 Asked if he could remember the registration number for the second vehicle, he stated that he could not but mentioned that it was a vehicle from Zambia National Farmers Union.
- 2.25 PW2 clarified that he went into the Police Station on 17th January, 2018, for the identification parade and that he gave a statement at Neria Investment. PW2 stated that he failed to identify the third suspect at the identification parade because he failed to master his face as he was facing downwards when he tied his hands.
- 2.26 PW2 maintained that the accused persons attempted to steal but failed to do so because they were intercepted.
- 2.27 There was no re-examination.
- 2.28 **PW3** was **CHARLES TEMBO** an Inspector based at Lusaka Division Head Quarters Anti Robbery Squad.
- 2.29 PW3 testified that on 17th January, 2018, he conducted an identification parade at the Zambia Police Headquarters where there were three witnesses namely Munaf Patel, Charles Malawo and Peter Sichilima. The parade had three suspects namely Tapiwa Munemo, Tirinanthu Kuzawenhamo and Dzingani Bariri.
- 2.30 Munaf Patel identified Tapiwa Munemo on position 7 from the left and 5 on the right. Charles Malawo identified Tirinanthu Kuzawenhamo on position 3 from the left and 9 from the right. Peter Sichilima identified Tapiwa Munemo on position 7 from the left and 5 on the right. Dzingai Bariri was not identified by anyone.
- 2.31 The identification parade commenced at 10.45 and ended at

- 10.55 hours. PW3 confirmed that there were eleven (11) suspects on the identification parade. He stated that after the identification parade there was a scenes of crimes officer who took photos of the parade whilst the parade was on going.
- 2.32 PW3 described the procedure of the identification parade. That he first explained the rights to the suspects and he informed them that they had the right to change positions. He also stated that the suspects didn't react to what he had explained to them.
- 2.33 The witness identified Tapiwa Munemo as A1 and Tirinanhuz Kuzawenhamo as A2. PW3 confirmed that the parade was conducted properly and that there were no complaints.
- 2.34 Under **cross examination** PW3 stated that as officer in charge he was in charge of the identification parade. PW3 could not confirm that the identification parade was conducted after the accused had appeared in Court because his role was to conduct the parade.
- 2.35 PW3 reiterated that Peter Sichilima identified one suspect from the identification parade.
- 2.36 There was no re-examination.
- 2.37 **PW4** was **LIYAMBA KAKWISA**, a Detective Sergeant based at Lusaka Division.
- 2.38 PW4 recalled that on 15th June, 2017, he was on duty at Anti Robbery Section, in a crew of two other officers. Whilst on duty around 14.30 hours, he was raised through the police radio that some suspects had been apprehended at Saturnia House, Neria Investments.

- 2.39 In responding to that call, they rushed to Neria Investment which was in Longacres. When they arrived at Saturnia House, they found scores of people and workers who worked at Saturnia House. They were informed by the Manager of Neria Investments Mr. Chaikatisha that they had apprehended three persons who wanted to steal from a motor vehicle a Lexus. The three suspects were handed over with a motor vehicle a Toyota Primo Registration number ABX3499, grey in colour. He was further handed three blockers and a T-bar for further investigations. These were used for opening and closing the gates.
- 2.40 He apprehended the suspects and took them to his office at Lusaka Division. Later, he was informed by D/Sgt. Chola that the suspects were the ones they had been looking for the offence of Aggravated Robbery.
- 2.41 PW4 positively identified the accused persons as the ones he apprehended from Neria Investments. He also identified the motor vehicle **"ID1"**.
- 2.42 **Cross examined**, PW4 stated that he was not in possession of the T-bar and 3 blockers at that time as the aforementioned items were in the custody of the Manager. PW4 confirmed that he did not search the accused persons and that he did not find anything in **"ID1"** after he conducted a search.
- 2.43 In **re-examination** PW4 reiterated that the T-bar and three blockers which were found with the accused persons were handed to him by the General Manager.
- 2.44 **PW5** was **MUNAF PATEL**, a thirty- five (35) year old Finance

Manager for Neria Investment. PW5 recalled that on 16th December, 2016, he was in his office around 16.00 hours at Longacres. His colleagues by the name of Sadik and Gopal (who had since left the company) had gone to the Stanbic Bank, Arcades Branch to withdraw cash and went back to the office. PW5 stated that they came back with K600, 000.00 in the bag which was money for Neria Investment.

- 2.45 When they arrived, he heard someone shouting for help and he was being chased. He stated that he was able to see because his office had glass on one side and it faced the car park. He noticed a man pointing a gun at Sadik while the other man went and broke the glass on the driver's side and removed a bag of cash. The man who had the gun and the man who grabbed the bag went inside a motor vehicle and drove off.
- 2.46 PW5 identified the motor vehicle used by the two men as a silver Toyota Runx Registration number ACX 6538. He wrote the number on a paper and gave it to the police officers when they arrived. However, PW5 could not identify the person who broke the glass as he had given him his back but that he remembered the face of the person who had the gun in his hand. He recalled that this was the first incident.
- 2.47 PW5 stated that the whole episode lasted for about twenty seconds. PW5 explained that one of the suspects pointed the gun at Sadik and Gopal. PW5 clarified that the man with the gun stood about 5 meters from the window while the motor vehicle was about 7-8 meters from the window. He stated that the visibility was clear.

- 2.48 PW5 narrated that the second event occurred on 15th June, 2017, around 15.00 hours when one of their Directors came from Stanbic Bank Kabulonga branch. The Director was Mr. Malik Nadeem. When he arrived, he went straight to his office. Mr. Nadeem was driving a Lexus. He noticed that his vehicle had been opened by someone despite being locked. They did not know how it was opened but they shouted for help.
- 2.49 PW5 further explained that he also saw someone opening the doors for the Mr. Nadeem's vehicle. They realized that they were thieves who wanted to get something. They shouted for help saying thieves, thieves and the watchman closed the gate. Three suspects attempted to flee in a grey Corolla. A man blocked the Toyota Corolla with his vehicle.
- 2.50 PW5 realized that the person who was trying to open the door of the Lexus was the gunman who had gone to their office on 16th December, 2016. Thereafter, they gathered at the scene and the police arrived ten minutes after being called.
- 2.51 PW5 further stated that there were three people in the vehicle and that he was able to identify the gunman that had gone there on 16th December, 2016, and pointed a gun at Mr. Nadeem. PW5 identified A1 as the person he had seen on 16th December, 2016 armed with a gun. He stated that he identified him because he had not forgotten his face and he could identify him even from the witness box.
- 2.52 PW5 explained that he was called for an identification parade at the police station where he identified A1. PW5 revealed that Mr. Sadik was handling logistics as it was farming season and

was out of town. Mr. Nadeem was out of the country.

- 2.53 In **cross examination**, PW5 stated that his office was located in Longacres at Saturnia House. He explained that when he sat in his office, Lusaka Golf club was opposite his office on the left. That it was not possible to see the golf course because there were other offices in between. On the right hand side of his office was completely glass and that was where the car park was. He stated that the office was slightly opposite Ndeke Hotel and that there was only one entrance and exit to the premises. That his office was about 50-60 meters from the gate. PW5 explained that the front parking space was reserved for Directors though staff also parked there. That Mr. Nadeem parked right in front of his office.
- 2.54 PW5 maintained that he was able to identify A1 although the incident lasted for 20 seconds as he paid close attention to him. That an incident involving a gunman which happened on the 16th December remained in his memory such that he would not fail to identify A1 even after five years. That was the reason he was able to record the Registration number of the RUNX.
- 2.55 PW5 also gave the registration number for the Lexus as ALX1570. He stated that he had written down that number many times. Asked if he was in the habit of writing numbers, he stated that he was Finance Manager and that he 'thinks and writes numbers'.
- 2.56 PW5 stated that he gave statements to the police on both occasions: in December 2016 when the incident happened and also in June, 2017. He also told the Court that he had a

- discussion with Mr. Patel after the incident of 16th December, 2016 but denied that there was no robbery. He stated that they didn't want to live in fear and that was why they never discussed the robbery all the time. PW5 when cross examined again on the issue maintained his position that there was a robbery and what he had told the Court was what he had seen.
- 2.57 PW5 denied knowing who owned the Runx registration number ACX6538 and when asked how he knew that it belonged to A2, he stated that he didn't know anything about that. He just gave the registration number to the police.
- 2.58 PW5 stated that when the police went on 15th June, 2017, three people were apprehended but that he was only able to identify A1 because he had seen him at the last incident.
- 2.59 PW5 admitted that he was scared during the incident of 16th December, but that he was not confused and was able to see the gunman and identify that he had a black hand gun or pistol. That he heard a shout for help from outside and he saw his colleagues running away and the gunman pointing a gun at them. The money at that time was in the bag in the vehicle. That he saw one man remove the money from the vehicle and he ran away with it. However, he didn't see the face of the second man. He denied that A1 and his colleagues went to their premises on the material day to ask where Longacres Lodge was because he wondered why they opened the vehicle.
- 2.60 PW5 also denied that he saw A1 prior to the identification parade. He maintained that he saw A1 on the 16th of December, 2016 and thereafter on 15th June, 2017. He only saw him

twice. That when A1 opened the door, he recognized him as the person he had seen on 16th December, 2016, he didn't have to go and look at him again when he saw him on 15th June, 2017. He also stated that he gave a general description to the police of A1 that he wore a red t- shirt, had no hair, that one eye had a different eye colour.

- 2.61 PW5 narrated that the people at the identification parade were of similar heights and sizes. PW5 stated that he identified A1 but denied that he was the only one with a different eye colour. He added that he also identified A1 because he had a mark on his stomach which he saw when he t-shirt went up while he was pointing a gun at Sadik. However, he denied that that was the only focus.
- 2.62 PW5 stated that he took note of the number plate of the car because the vehicle parked opposite where he sat in reverse. That he could not have failed to notice the registration number because it was parked immediately behind the vehicle they had broken into which was seven meters from the window of his office.
- 2.63 PW5 admitted that he gave two statements to the police. He denied that the statement he signed at the police was made five months after the attack. PW5 added that the money that was stolen was not recovered.
- 2.64 In **re-examination** PW5 stated that there was cash in the black bag in the amount of K600, 000.00. That he was able to know that there was K600, 000.00 because it was routine for Mr. Gopal and Mr. Sadik to withdraw that amount.

- 2.65 **PW6** was **ALBERT CHOLA** a forty-three (43) year old Detective Sergeant stationed at Chawama Police Station. PW6 recollected that on 16th December, 2016, through 15th June, 2017, he reported for work at about 08.00 hours in the day shift which ran from 08.00 hours to 17.00 hours.
- 2.66 Whilst he was on duty, he was assigned a case of Aggravated Robbery to investigate. The complainant was Sadik Patel an accountant at Neria Investment who reported that he was in the company of his logistics officer Mr. Krishna Gopal. He was driving a vehicle from Stanbic Bank, a Toyota Corolla bearing Registration number BAC5241 silver in colour. Mr. Gopal had withdrawn K600, 000.00 from the bank and they were driving headed back to the office in Longacres. Whilst on their way and upon reaching the company premises, they were trailed by armed criminals who were armed with a pistol and a metal object. The criminals were driving a private motor vehicle Toyota Runx bearing registration number ACX 6538 that was gold in colour.
- 2.67 Upon arrival at the company premises, the same criminals produced a firearm and threatened the complainant who later ran away for his safety. In the process the company vehicle was damaged, a bag containing K600, 000.00 was snatched and they sped out of the premises. The incident occurred on 16th December, 2026, at 16.00 hours at Neria Investments offices at Saturnia house in Longacres.
- 2.68 Acting on the same report, he instructed some investigators and during his investigations he learnt that the three suspects

were apprehended whom he came to know as Tapiwa Munemo, Trinanhu Kuzawenhamo and Dzingai Bariri who were in custody. The suspects were apprehended on the second incident in which the same suspects on 15th June, 2017, went to the same company where the first incident occurred and this time they were driving a private motor vehicle Primal Corona Registration No. ABX 3499 that was grey in colour.

- 2.69 At the time of this incident, the complainant managed to recognize the suspect and he alerted the security guard and the other people who were present. They confronted the three men and upon searching the men they were found with breaking implements, a metal object (T-bar) and three sensory gadgets.
- 2.70 Immediately the police were contacted who rushed to the scene. The suspects were handed over to the officers including the motor vehicle which was impounded and the breaking implements recovered.
- 2.71 PW6 interviewed the three accused persons and discovered that among them was Tirnanhu Kuzawenhamo who had once owned a Toyota Runx motor vehicle which was used in the first incident. After the incident, he went and swapped the motor vehicle for another vehicle at one of the car dealers based at Levy Business Park. The vehicle was swapped with a Toyota Allion.
- 2.72 An identification parade was conducted at Lusaka Central Police by Detective Inspector Tembo and the complainants were summoned to identify the suspects. A report was

submitted and the parade officer informed PW6 that two suspects were identified at the parade.

- 2.73 PW6 interviewed the suspects in relation to the offences of aggravated robbery. Under warn and caution administered in English the language they appeared to understand better, they could not give satisfactory answers. PW6 made up his mind to charge the three suspects with Aggravated Robbery contrary to section 294 of the Penal Code Chapter 87 of the Laws of Zambia. They gave a free and voluntary response denying the charge. They were placed in custody pending court proceedings.
- 2.74 PW6 stated that the items found on the accused persons were given to him by Constable Mwanza who rushed to the scene of the crime. PW6 identified the three sensory remotes that were blue in colour and the T-bar which was sharp at the end and silver in color. The three sensory remotes were marked as **"ID2"** and the T-bar was marked as **"ID3"**. PW6 further identified **"ID1"** the motor vehicle. The suspects were positively identified as Tapiwa A1, Tirinanhhu A2 and Dzingai A3. PW6 confirmed that **"ID1"** **ID2"** and **"ID3"** were under his custody and prayed that they be admitted into evidence. The same were admitted into evidence as **"P1"** **"P2"** and **"P3"** respectively.
- 2.75 Under **cross examination** PW6 denied taking possession of the accused persons travel documents as they were not found with any documentation on them. PW6 could not confirm if the accused persons were in Zambia on 16th December, 2016, and

could further not confirm if the accused persons were in Zambia on 15th June, 2017.

- 2.76 However, when he was shown the typed warn and caution statement by defence counsel, he stated that A1 stated that he was in Zimbabwe. PW6 denied that he was present when investigating the offence as he only took over the case as the arresting officer.
- 2.77 PW6 was again shown a document by defence counsel relating to A2. He identified it as an admission of guilt form in the name of A2. The document showed that it was issued at the Traffic Department Zambia Police in Ndola and the date it was issued was on 16th December, 2016. PW6 asserted that admission of guilt forms were issued personally and not through third persons.
- 2.78 In relation to the identification parade, PW6 stated that the scenes crime officer should have taken photos as per procedure. The officer who conducted the identification parade was summoned and gave evidence. PW6 affirmed that Mr. Charles Malawo went to the parade as a suspect who the police apprehended as having committed the offence. PW6 claimed that Mr. Malawo swapped vehicles with A2. The Toyota Runx was swapped with a Toyota Allion. However, the Toyota Runx ACX 6538 was the vehicle that was used during the attack.
- 2.79 PW6 stated that he observed that the accused persons were Zimbabwean nationals but that he was not in possession of their passports. PW6 confirmed their nationalities when he interviewed them, but he did not conduct any investigations to

confirm their nationalities.

- 2.80 PW6 alleged that Mr. Charles Malawo owned the Toyota Runx on 16th December, 2016. PW6 was not certain but claimed that Charles Malawo showed him a white book and letter of sale to confirm ownership. PW6 however disputed that Charles Malawo owned the vehicle at the date of the offence. PW6 stated that the Toyota Runx was allegedly used in commission of the offence on 16th December, 2016.
- 2.81 It was PW6's evidence that he charged the accused persons of aggravated robbery which occurred when two or more persons armed with an offensive weapon threatened to use violence on a person. PW6 alleged that the complainant said that he was threatened with a gun that was not recovered. PW6 also stated that the accused persons were found with instruments that constituted a T-bar and sensor remotes. PW6 could not confirm whether a T-bar was a tool.
- 2.82 PW6 asserted that the accused persons were at the scene of the crime when the crime occurred.
- 2.83 PW6 reiterated that the offence was aggravated robbery of K600, 000.00 and that the company had a bank account at Stanbic Arcades Branch. PW6 explained that it was Gopal and Sadik who withdrew the money however they did not present any bank statements to him. PW6 claimed that the basis of his arrest were that the three accused persons were apprehended by concerned members of the public at the scene of the crime. The accused were found with offensive weapons that were used in the commission of the offences.

- 2.84 PW6 confirmed that no one was apprehended in the 2016 incidence. PW6 recalled recording a statement from Sadik and Gopal on 22nd June, 2017.
- 2.85 PW6 denied investigating who the vehicle belonged to in 2016 at RATSA. PW6 disclosed that there were two other officers who dealt with the matter but that he was the dealing officer. PW6 could not ascertain whether the photos from the identification parade were produced.
- 2.86 PW6 denied writing to immigration to ascertain if the accused person were in Zambia at the commission of the offence.
- 2.87 PW6 maintained that the suspects were found with the instruments on their person but that he did not have the names of the persons that found the instruments as there was no seizure form. PW6 denied that the accused persons told him that they were looking for Ndeke Hotel.
- 2.88 In **re-examination**, PW6 stated that he became aware of the admission of guilt form in court. PW6 refuted that he got documents from the accused persons to determine their nationality.
- 2.89 That marked the close of the prosecution's case.

3. RULING ON A CASE TO ANSWER

- 3.1 At case to answer stage, I found that the prosecution had established a *prima facie* case against A1 and A2 and they were put on their defence. A3 was acquitted.

4. DEFENCE EVIDENCE

- 4.1 **TAPIWA MUNEMO** spoke in his defence and will hereinafter be referred to as **DW1**. DW1 stated that he was a businessman.

DW2 denied being privy to anything that happened in 2016 during the robbery at Neria Investment. DW1 narrated that he was arrested on 15th June, 2017 on allegations that he wanted to steal from Neria Investment.

- 4.2 On the material date, DW1 averred that he had just arrived at Neria Investment as they wanted to lodge at Ndeke Hotel as it was the first day that he arrived in Zambia at Inter City Bus Terminus with Dzingai Bariri. He called A2 to inform him that they had arrived at intercity. A2 was aware of his arrival as he was supposed to help him ferry the merchandise that he had come to buy. A2 was a truck driver who usually secured bales of second hand clothes for him. He had come into the country to purchase bulk cooking oil as there was a crisis in Zimbabwe.
- 4.3 A2 informed him that there was a motor vehicle that did not have a spare tyre as he had left it at a certain shopping center. A2 told them that before they proceed to do business they should go and pick up the tyre. They went to a tyre mending stand at the shopping mall which he came to know as Longacres. They picked the tyre and conferred with a bystander who told them that there was a bureau de change nearby. DW1 managed to change his currency.
- 4.4 Thereafter they inquired where they could find accommodation and were told that there was Ndeke Hotel. DW1 asked for directions for Ndeke hotel and they came across a building that looked like Ndeke Hotel. They drove through. He disembarked from the vehicle and went to the reception and inquired if it was Ndeke Hotel he was looking for. A2 and Tirinahu had

remained in the motor vehicle.

- 4.5 DW1 was advised that it was not the place that he was looking for and that Ndeke Hotel was in the next road. DW1 went back to the vehicle to inform A2 that the Hotel was in the next road. A2 reversed trying to go out and there was a motor vehicle in front and a security guard who stood right where they parked. He disembarked from the motor vehicle being the person who had earlier disembarked. As he was going to engage the security guard, he could not understand the language that the security guard was using.
- 4.6 A2 disembarked and explained to the guards how they ended up in that place. Amidst the confrontation as they were trying to explain, four Indians came and pointed at him saying that he was the person who tried to open the door. DW1 attempted to explain saying that he was looking for a certain place but they could not understand. They started to beat them.
- 4.7 DW1 alleged that the Indian man tried to step on his back and wanted to kick him on his belly but he showed him the operation that he had. DW1 showed them the big operation on his stomach. They were made to lie down and they tied them with shoe laces that they were wearing. The Indians ordered the security guards to conduct a search on them and they managed to take out his passport and money that he had in his possession. He had USD 9000 and K4500.00.
- 4.8 The Police Officers came and also conducted a search on them. They also extended a search on the black bag which had his clothes for changing. They were taken to Lusaka Central Police

and placed under police custody. The following morning, he was picked and taken to the office where he was asked what he was looking for at the time of apprehension. DW1 explained what had transpired but they alleged that he was lying and said that he wanted to steal from the motor vehicle.

- 4.9 DW1 was placed back in the cells and after two weeks in detention Sergeant Chola went and took him to the office where he was questioned in line with the robbery and asked who he was with in the motor vehicle the Runx. DW1 responded by saying that the motor vehicle was owned by A2.
- 4.10 DW1 maintained that he never knew anything about it and that the day he was arrested was the first time to be in Zambia. He was taken back to the police cells where he was kept from August to October. He was thereafter committed to the High Court.
- 4.11 In January, 2018, while at remand prison, Sergeant Chola took the three accused persons to Lusaka Central Police Station where they found two other people who had been in detention and they were put together with them. They informed them that they wanted to conduct a parade and that they needed a lawyer. The accused persons obliged and went on the parade. What surprised DW1 was that he was the only person who had special marks or features like appearance. He stated that he had a visible growth on his head and if one looked at his left eye it was not functional as he only used one eye.
- 4.12 An Indian called Munaf Patel came and checked for the person who had a scar on his belly until he reached him and held on

- his belly. There was no one else with a scar.
- 4.13 DW1 asserted that he first saw Mr. Munaf Patel at Neria investment, when he wanted to kick him on his belly. He showed him the scar that he had.
- 4.14 DW1 alleged that his USD 9000 was with PW4 as it was not brought to Court. He also assumed that his passport would be surrendered to the Court and did not challenge PW4 on this information.
- 4.15 DW1 disputed having a pistol and asserted that it was alleged that a pistol was used in the 2016 incidence. DW1 maintained that the USD 9000, K4000 and passport that were in his possession were taken by police officers who went to pick him up at Neria Investments. DW1 denied ever being shown footage from CCTV cameras that he had attempted to tamper with a motor vehicle. DW1 stated that it was his first time in Zambia and that his passport could confirm this.
- 4.16 Under **cross examination** DW1 maintained that he was in Harare on 16th December, 2016. However, he could not show that he was in Harare on the material day because his passport was taken from him by PW4. He admitted that he did not challenge PW4 about the whereabouts of his possessions as he assumed that the items would be brought before Court.
- 4.17 **DW2** was **TIRINANHU KUZAWENHAMO** who spoke in his defence. DW2 asserted that he was apprehended while searching for accommodation for his friends on 15th June, 2017.
- 4.18 DW2 recalled that on 15th June, 2017, he was at COMESA

market when he received a call from his business colleagues, DW1 and Dzingai who informed him that they had arrived at COMESA. He picked them up and they proceeded to Longacres shopping center to collect a spare tyre which was flat. When they arrived at the garage at Longacres, DW1 and Dzingai went into the shopping center in search of a bureau de change. When they came back they told him that they wanted a place where they could book a room. They asked people who were nearby who directed them to Ndeke Hotel.

4.19 DW2 saw a building that looked like a hotel and drove through. He parked the car in the parking lot and he disembarked from the car to go to inquire from the reception. When he got back to the car, he informed him that they were at the wrong place and they pulled out of the car and drove off. As he was about to drive off, a white Hilux blocked his way. Initially, he assumed that the Hilux was attempting to park properly and he sent DW1 to assist him. He observed the security guard and the man in the Hilux were arguing with DW1. They were accusing DW1 of tampering with someone's motor vehicle. Dzingai at this point was in the car.

4.20 Some Indian nationals came and they became violent. This prompted people who were nearby to them to attack them. They were beaten, ordered to lie down on the ground and tied up. After a while, some police officers arrived and took his passport, his phone, his wallet and inside the car he had a laptop bag which contained a variety of documents. They were taken to Central Police station and detained.

- 4.21 The following morning, they picked him from the cell and took him to the office where they asked him about his business. DW2 explained that he was apprehended when he was looking for accommodation and denied going to Neria Investments to steal from some motor vehicles. DW2 disclosed that he resided with his cousin Daisy Chiwala in Kalingalinga. He clarified that he stayed there when he was in Zambia but that his permanent residence was in Zimbabwe. DW2 stated that the police had gone to search Daisy's house and found nothing.
- 4.22 That while he was in detention, he was taken by Sergeant Chola for questioning over the offence of aggravated robbery and he denied the allegations. DW2 informed the police that he was in Ndola during the first incidence. DW2 explained that he no longer had the Toyota Runx as he had swapped it for a Toyota Allion between the month end of October 2016 and the first week of November, 2016, with Charles the car dealer.
- 4.23 DW2 narrated how he met Charles the person who sold him the Toyota Runx. He also stated that on 18th October, 2016, he acquired a travel document and on 19th October, 2016, he entered through Livingstone boarder post. After some days, he went and met Charles who had a Toyota Allion which was up for sale. He topped up K5000.00 on the balance that he owed and exchanged the Runx with the Toyota Allion.
- 4.24 Mr. Chola wanted to meet Charles and he directed him to Levy Mall where he had met Charles from. After sometime they picked him up and took him to an office where he found Charles seated. DW1 confirmed knowing Charles and

- confirmed buying a Silver Toyota Runx ACX6538 from him.
- 4.25 On 17th January, 2018, the police picked him up and took him for an identification parade, and put with several people. Three witnesses were called and an Indian man and security guard did not identify him. Only Charles identified him.
- 4.26 DW2 reiterated that on 16th December, 2016, he was in detention in Ndola. What led to his detention was that he had overstayed in the country while using a temporary travel document. On 7th December, 2016, he went to Ndola Immigration Department to go and do his extension for his days in Ndola. On 8th December, 2016, he was involved in an accident and detained at Central Police Station for several days. On 16th December, he was ordered to pay admission of guilty fine and on the 18th December, 2016, he went to collect his cargo from Kasumbalesa. DW2 stated that he was driving a Mazda T35 Trucker that was Zimbabwean registered.
- 4.27 On 24th December, 2016, he went back to Zimbabwe. DW2 asserted that all this information was given to Sergeant Chola.
- 4.28 DW2 asserted that Sergeant Kakwisa got his passport and that his travel document was at home in Zimbabwe. DW2 positively identified his Temporary Travel Document and the Admission of guilt form which was marked as **“ID4”** and **“ID5”** respectively. The travel documents were in Zimbabwe and DW2 summoned his wife to bring the documents to his lawyer Mr. Simubala. The documents were admitted into evidence and marked as **“D1”** and **“D2”** respectively.
- 4.29 DW2 explained using **“D1”** that he entered Zambia on the 19th

of October, 2016, and came out of Zambia on 12th November, 2016. He came back to Zamia on 23rd November, 2016, and on 7th December, 2016, his dates had expired. He did an extension on 7th December, 2016 and traveled back on 24th December, 2016 through Chirundu boarder post. DW2 asserted that he paid for the admission of guilt on 16th December, 2016 as per “D2”.

- 4.30 DW2 refuted that the officers that apprehended him at Longacres were present during his interrogations.
- 4.31 DW2 maintained that 15th June, 2017, was the first time that he met DW1 in Zambia. He denied being found in possession of gadgets used to open cars when he was apprehended.
- 4.32 In **cross examination** DW2 confirmed that he was in Ndola but denied that “D2” disclosed the time when the admission form was issued. DW2 affirmed that the distance between Lusaka and Ndola could be covered in less than four hours by car. DW2 denied that he could have been in Lusaka at around 16.00 hours.
- 4.33 DW2 denied signing any document to show that he swapped the Runx for the Allion. DW2 alleged that he owned the Runx car from August to November and that he did not inform the Court when he was released from custody when he was in Ndola.
- 4.34 DW2 restated that his phone was retrieved by Detective Sergeant Chola which had two sim cards in it. A Zambian sim and a Zimbabwean sim.

5. SUBMISSIONS

5.1 Both parties filed their submissions as directed by the Court. I will not replicate the contents of the submissions but I shall be making reference to them as and when it is necessary in this judgment.

6. CONSIDERATION AND DECISION OF THE COURT

6.1 I have carefully considered the prosecution evidence, the defence evidence and submissions herein.

6.2 It ought to be stated right at the outset that the prosecution in criminal matters bears the burden of proof to establish the guilt of an accused person. This is because our criminal justice system is anchored on the Constitutional tenet that an accused person is presumed innocent until proven guilty.

6.3 It is cardinal to mention that the standard of proof which must be attained before a court can convict is such standard as satisfies the court of the accused's guilt beyond reasonable doubt as was stated in the case of **The People v. Njobvu** ⁽¹⁾.

6.4 The offence of Aggravated Robbery is provided for under **Section 294(1) of the Penal Code Chapter 87 of the laws of Zambia**. It reads as follows:

“Any person who, being armed 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 life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.

6.5 To constitute the offence of aggravated robbery the person must:

- 1) *Be armed with any offensive weapon or being together with one or more persons;*
- 2) *Steal anything; and*
- 3) *At or immediately before or immediately after the time of stealing it, use or threaten to use actual violence to any person or property; and*
- 4) *With intent to obtain or retain the thing stolen, or prevent or overcome resistance to its being stolen or retained.*

6.6 From the evidence that has been adduced, the following facts are not in dispute:

- (i) That on 15th June, 2017, the two accused persons who were in a Toyota Primo registration number ABX 3499 grey in colour where apprehended at Saturnia House in Longacres by members of the public including employees from Neria Investments.
- (ii) The accused persons and the said motor vehicle where later handed over to the police officers from Lusaka Division Anti-Robbery squad and detained at Lusaka Central Police Station.

- (iii) On 17th January, 2018, the two accused persons were part of an identification parade which was conducted at Zambia Police Service Headquarters by D/Inspector Tembo based at Lusaka Division Headquarters Anti Robbery squad.
- (iv) That A2 once owned a motor vehicle RUNX registration number 6538.
- (v) The accused persons were charged with the offence of Aggravated Robbery, contrary to section 294 (2) of the Penal Code, Chapter 87 of the Laws of Zambia, alleging they stole K600,000.00 from Sadik Patel.
- (vi) Sadik Patel did not testify in Court.
- (vii) The accused persons denied the charge.

6.7 What is contentious however is whether the accused persons are the ones who attacked Sadik Patel and stole K600,000.00 from him.

6.8 The prosecution contends that the accused persons were the ones who committed the offence of aggravated robbery as they stole K600,000. 00 from Sadik Patel, the property of Neria Investments. They also contend that A1 Tapiwa Munemo is linked to the offence as he was identified by PW5 who placed him at the scene of crime which occurred on 16th December, 2016. That A2 is linked to the offence by association with A1. That there are odd coincidences in that A2 was found in the company of A1 at the premises where A1 was identified as one of the robbers who stole K600,000.00 from Sadik Patel in

December, 2016.

- 6.9 It is also contended that A2 once owned a motor vehicle RUNX ACX 6538 which is alleged to have been used in the robbery as a get-away vehicle.
- 6.10 A review of the evidence relied upon by the prosecution shows that the rely on direct evidence of identification by PW5 and on circumstantial evidence. Circumstantial evidence as opposed to direct evidence means that other facts are proved from which the existence of the fact in issue may be logically inferred.
- 6.11 I will begin by considering the evidence of identification of A1. Before that, I wish to state that the Defence filed two sets of submissions. In one, it is contended that there was no evidence that K600,000.00 was stolen because there was no record or bank statement adduced by the prosecution to support the assertion that Sadik Patel withdrew K600,000.00 from the Bank.
- 6.12 In the other submissions, it is contended that the issue that K600,000.00 was stolen from Sadik Patel is not in dispute. What is in dispute is who robbed Sadik of the said money.
- 6.13 That notwithstanding, I wish to state that it is important that the victim of the offence testifies to prove the offence. However, it is not in all offences that the victim will be required to testify as proof of the offence may be provided through other evidence.
- 6.14 In the present case, the victim Sadik Patel did not testify but the evidence of the robbery was adduced through PW5. In analyzing the evidence of identification, I will also consider whether the ingredients of the offence have been proved.

- 6.15 There is a string of cases which sets out the correct approach to the evidence of identification including single identifying witness. These cases relate to identification of suspects by the victims or complainants. However, they would apply with equal force in relation to the identification by a third party.
- 6.16 The Supreme Court in the case of **Mbundi Nyambe v. The People** (2) had this to say when considering the evidence of identification:

“There is perhaps no area in which there is a greater danger of honest mistake than in the area of identification, particularly where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability, and the greatest care should therefore be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence; the witness should be asked to specify by what features or unusual marks, if any, he alleges to recognize the accused, what was his build, what clothes he was wearing, and so on; and the circumstances in which the accused was observed; the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed. The foregoing, considerations are not, of course, exhaustive, but are intended merely to illustrate; the adequacy of evidence of personal

identification will depend on all the surrounding circumstances and case must be decided on its merits. The danger of honest mistake in identification is even greater where there is only a single identifying witness.”

6.17 Furthermore, in the case of Muvuma Kambanje Situna v. The People ⁽³⁾ the Supreme Court held that:

“The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognize the accused.

If the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.”

6.18 It is clear that the above cases lay down the requirements that a trial Court should show in its judgment that it is alive to the dangers of an honest mistaken identification.

6.19 However, it is important to note further the holding of the Supreme Court in the case of Issa Mwasumbe v. The People

(4). It was held *inter alia* that:

“...but where there is good quality identification evidence from a reliable single identifying witness it is competent for a court to convict even in the absence of other evidence to support it.”

- 6.20 I am guided by these authorities and I am therefore alive to the dangers of convicting on the evidence of a single identifying witness. This evidence can be believed or rejected as the case may be depending on whether I am satisfied that the possibility of an honest mistake has been ruled out or that it has not been so ruled out.
- 6.21 It is contended by the prosecution that the possibility of honest mistake had been excluded because PW5 had ample time to observe and it was during broad day light when he observed the commission of the offence from the comfort of his office.
- 6.22 Learned counsel for the Defence submitted that not only was the identification poor, but that the prosecution failed to adduce evidence to support or buttress the weak identification of A1. It is contended that the possibility of honest mistake was not ruled out due to shortness of time and the prolonged period from the time of the attack to the time the accused persons were apprehended.
- 6.23 That since PW5 stated that the incidence lasted for a period of 20 seconds, this period was short for him to have had time to identify someone and focus on the scar on the stomach, take note of the registration number of the vehicle, observe the make and colour of gun and observe the bag being stolen.

- 6.24 It is very clear from the foregoing that the evidence of identification by PW5 has been attacked by the Defence as it is contended that it was unreliable. Since the evidence of identification by PW5 is in issue, it is important to analyze his evidence and the circumstances under which he identified A1 in order to establish if there was an opportunity for a positive and reliable identification.
- 6.25 The evidence of PW5 is that on 16th December, 2016 at 16.00 hours, he was working in his office in which one of the sides of the office was all glass and facing the parking lot. PW5 observed his colleagues Sadik and Gopal return from Stanbic Bank, Arcades branch where they had gone to withdraw money and also heard them shout for help and they were running. PW5 noticed a man pointing a gun at Sadik and Gopal and another man went and broke the glass on the driver's side and removed a bag of cash. The men went into the car and drove off.
- 6.26 PW5 identified the getaway car that was a silver Toyota Runx Registration number ACX 6538. That the vehicle had parked in reverse as he saw the back side of the vehicle. That's how he managed to write the number on a paper and gave it to the police officers when they arrived. PW5 could not identify the person who broke the window of the vehicle as he had given him his back but that he could remember the face of the person who had the gun in his hand.
- 6.27 On the second incident on 15th June, 2017, PW5 stated that when Malik Nadeem came back from the Stanbic Bank,

Kabulonga branch around 15:00 hours, he went straight to his office. Whilst in the office, he noticed someone opening Nadeem's Lexus vehicle to get something and they shouted for help and the watchmen closed the gate to prevent the people who were in the Corona Premium motor vehicle from driving off.

- 6.28 When he saw the person who opened the door of the Lexus, he knew that it was the same person who was holding the gun during the incidence of 16th December, 2016 as A1. PW5 stated in cross examination that the person he saw had no hair, wore a red t- shirt and one eye had a different colour and he also saw that he had a bulge on his stomach which he saw when he was pointing the gun because his t- shirt went up. A1 and A2 were apprehended at Saturnia House by police officers and where taken to the police station and remanded in police custody.
- 6.29 In Court he identified A1 as the person he had seen on 16th December, 2016 and on 15th June, 2017.
- 6.30 I have carefully analyzed the evidence of PW5 in order to ascertain the quality of identification. It is not in dispute that A1 was not known to PW5 prior to the 16th December, 2016 and that the incident happened during the day around 16:00 hours. I therefore find that the issue of visibility does not arise.
- 6.31 Furthermore, it is clear from the evidence given by PW5 during examination in chief and cross examination that he was asked searching questions to test the quality of identification. For instance, PW5 told the Court during cross examination that he

was able to identify A1 and he gave the physical features of how he was able to identify him by stating that the person he saw had no hair and one eye had a different colour and a bulge on his stomach which he saw when he was pointing the gun. He also stated that he wore a red t-shirt which went up when he was pointing a gun at Sadik. PW5 also stated that he was able to see that A1 drove off in a RUNX motor vehicle registration number ACX 3568.

- 6.32 I have also noted that the Defence in their submissions contend that the period of 20 seconds which PW5 indicated the incident lasted was too short for him to have made all these observations about A1.
- 6.33 In general, a period of 20 seconds is a relatively a short period. However, whether a positive identification can be done within this period depends on the circumstances in which an accused person was identified.
- 6.34 It is on record that PW5 was cross examined extensively by three Defence counsel on various aspects of his evidence. It was thus a lengthy and vigorous cross examination all aimed at testing the quality of his identification. Apart from asking PW5 whether he gave a description of the people he saw on the 16th December, 2016, it was also suggested to him that it was not possible for him to have been able to identify A1 because he was scared and confused.
- 6.35 While PW5 admitted that he was scared, he also stated that he was not confused and that he saw A1 who had a gun as he was less than five (5) meters away from the window of his office and

the vehicle was parked seven (7) to eight (8) meters from the window. He therefore stated that A1 and the vehicle were close to him that is why he was able to take note of the number plate for the vehicle.

- 6.36 Given the foregoing, I cannot say that the observation was a fleeting glimpse because it was not brief like under 5 seconds. Furthermore, although it lasted for only 20 seconds, it was not done under stressful and traumatic conditions because PW5 was not under attack but he was observing the events from his office window which is directly opposite the car park. And there was no evidence of any objects that could have obstructed his view.
- 6.37 In addition, PW5 was very consistent and maintained his position during the lengthy cross examination that he could not fail to identify A1 as an incident like that had remained in his memory and he would be able to identify him even after a long time. Even when he was asked to go out of the witness box to show the Court the person he saw on 16th December, 2016, he stated that he could not forget the face of A1 and that he could identify him even from the witness box. That it was because of this, that was why even when he came back on the second incident, he identified him as the one he had seen on 16th December, 2016.
- 6.38 Be that as it may, I am alive to the fact that PW5 was a single identifying witness. Can it be said that there was a possibility of honest mistake since A1 stated that he was not at Saturnia House on 16th December, 2016 as he was in Zimbabwe?

- 6.39 In his defence, A1 stated that he mistakenly found himself at Saturnia house while looking for accommodation at Ndeke Hotel on 15th June, 2017. A1 alleged that he and Dingi (the accused who was acquitted) had just arrived in Zambia from Zimbabwe where he came to conduct some business on that day and that he didn't know anything that happened on 16th December, 2016.
- 6.40 Upon arrival, he called A2 and he picked them up from intercity bus terminus as he was supposed to be helping them ferry the items that they came to purchase. He was apprehended with A2 and Dzingai at Saturnia house because people there claimed that he was attempting to open a vehicle which was parked there.
- 6.41 That a security guard was ordered by the three Indians who came out to search him and the security guard got his passport, US\$ 9,000 and K4,500 and the police officers who picked them from Saturnia house got all their possessions. That he informed the police officers that he was in Harare Zimbabwe at the time when the offence is alleged to have occurred and it was the first time to be in Zambia when he arrived on 15th June, 2017.
- 6.42 Given this evidence by A1, it is clear that he has denied to have been at the scene of crime on the material day and the evidence from the prosecution witnesses conflicts with that given by the accused. I have therefore carefully analyzed the evidence in order to determine who was telling the truth. In doing so, I am guided by what was stated by the Supreme Court in the case

of James Mwango Phiri v. The People ⁽⁵⁾ that:

“Our position is that it goes without saying that a person accused of an offence and on trial begins to build his/her defence right from the time of apprehension and from the first prosecution witness by asking questions in cross-examination. When an issue or defence is only raised when the accused is on the stand, the court cannot be faulted for treating it as an afterthought and an explanation which cannot reasonably be true.

- 6.43 The significance of this case is that a person accused of an offence and on trial builds his/her defence from the time of apprehension and from the first prosecution witness by asking questions in cross examination.
- 6.44 Guided by the foregoing, it is very clear from the evidence of A1 that he made certain allegations against PW2, Peter Sichilima the security guard and PW 4 D/Sgt. Kakwisa regarding what happened after he was apprehended together with A2 at Saturnia House. He stated that after being searched, PW2 got his passport and US\$ 9,000 and also K4,600.00. That all these items and other possessions were taken by PW4.
- 6.45 Now the record is very clear that when these witnesses testified, the issue that they took the mentioned items from did not arise. In short, these witnesses were not challenged to show the Court that they were untruthful witnesses.

- 6.46 More significantly, if it is true that PW4 Kakwisa took A1's passport, specific questions should have been asked focusing on this in view of the defence that A1 raised of alibi that he was not in Zambia on 16th December, 2016. I say this because PW4 was the first police officer to come into contact with the accused persons herein and if the defence of alibi was to succeed, the passport was vital evidence which would have shown whether he was in Zimbabwe at the material time as contended.
- 6.47 There is nothing on record to show that PW4 was questioned regarding the passport. PW6 the arresting officer who was not present at the time of apprehension was the one who was cross examined at length regarding the passport but he refused having taken possession of A1's passport.
- 6.48 Therefore, I do not accept the argument by the Defence that A1 maintained his consistency from the time of apprehension and throughout the trial regarding the whereabouts of his passport that it had been taken away by the police.
- 6.49 Furthermore, on the defence of alibi, the benchmark of this defence has been settled in a plethora of cases to the effect that where an accused person on apprehension or an arrest puts forward an *alibi* and gives the police detailed information as to the witnesses who could support that *alibi*, it is the duty of the police to investigate. See the case of **Nzala v. The People** ⁽⁶⁾ and also **Katebe v. The People** ⁽⁷⁾.
- 6.50 In the present case, the arresting officer confirmed that he was informed by A1 that he was in Zimbabwe on the material day

of 16th December, 2016 when the offence is alleged to have been committed. While that is the position, detailed information to enable the police discharge the onus to negative the alibi was not provided to the police.

6.51 I will pause here and make reference to a very significant case of **Bwalya v. The People** ⁽⁸⁾. In that case the Supreme Court held that:

“Simply to say “I was in Kabwe at the time” does not place a duty on the police to investigate; this is tantamount to saying that every time an accused person says “I was not there” he puts forward an alibi which it is the duty of the police to investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question, it would have been the duty of the police to investigate but the appellant not having done so, there was no dereliction of duty on the part of the police.”

6.52 On the above authority, if A1 sought to rely on the defence of alibi, he should have given detailed information regarding the witnesses who would support his alibi. It was not sufficient for him to have just stated that he was in Zimbabwe and to expect the police to start making inquiries with immigration office. This is why A1 was cross examined at length in relation to who he was with on the particular day on 16th December, 2016. However, as the record shows, A1 did not tell any police officer

information regarding the witnesses who would support his alibi and that is why even in Court he could not substantiate his assertions.

6.53 On the authority of ***Bwalya v. The People***, I find that A1 did not properly raise the defence of alibi and as a result, there was no onus on the prosecution to negative an alibi which he did not properly raise.

6.54 The net effect of this finding is that A1 cannot be availed the defence of alibi and it is discounted.

6.55 Having made this finding, I shall revert to the issue of identification of A1.

6.56 To further support the contention that A1 was positively identified by PW5, the prosecution relied on the evidence of PW3 who conducted the identification parade.

6.57 However, the Defence have attacked the identification parade alleging that it was not fairly conducted as A1 was not placed among persons of similar general appearances. It is also contended that a parade conducted six months after the accused persons were apprehended was long enough for the witnesses to have seen the suspect during court appearance at the Subordinate Court.

6.58 It is further contended that A1 was the only one with a growth on his head and that witnesses were asking him to lift his shirt to reveal his special identifying mark which is the scar on his stomach.

6.59 I will state from the outset that at common law, it is recognized that an identification parade is the most reliable mechanism available for identification of suspects. Therefore, the purpose of conducting an identification parade by the police is to enable the witnesses identify the persons who they allege committed the offence. To the prosecutor, it may serve as an important evidential purpose since it provides the prosecution with more persuasive evidence than identification in court.

6.60 The Supreme Court in the case of **Kenneth Mtonga and Victor Kaonga v. The People** ⁽⁹⁾ therefore stated that:

“The police or any one responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent then the failure to observe this principle may, in a proper case, nullify the identification.”

6.61 It is very clear from the foregoing that a person in charge of the parade should not do anything that might directly or indirectly prevent the identification from being proper, fair and independent.

6.62 In the present case, there were two witnesses who identified A1 on the parade. PW2 identified him as the person he had seen on 15th June, 2017 at Saturnia House and was apprehended from there. While PW5 identified A1 as the person he had seen on 16th December, 2016 and also on 15th June, 2017. PW3 confirmed the evidence of identification and also stated that he

explained the rights of the suspects: that they could change the positions. He stated that there were no complaints raised after he explained the rights to them and after the identification.

- 6.63 During cross examination of PW2 and PW5 there were no questions that were asked to suggest that they were assisted in identifying A1 because he was asked to remove his shirt so that the scar on his stomach was exposed.
- 6.64 In the submissions, it is contended that the accused were not placed among persons with similar general appearance. It is important to note that PW3 who was the officer in charge of the parade was not asked any questions on how he went about to the form the parade. The only witness who was asked a question on this issue was PW5 suggesting that the people on the parade were of varying heights and sizes but he refused and stated that they were all similar height.
- 6.65 In addition, the contention that there is a possibility that the witnesses could have seen the accused persons when they were appearing in the Subordinate Court is inviting this Court delve in the realm of conjecture as there is no evidence to that effect. In point of fact, during examination in chief of A2 (DW2) he was asked by the lawyer whether during the time they were appearing in Subordinate Court he noticed anyone familiar during the proceedings and he refused.
- 6.66 PW5 was also asked in cross examination that he had seen A1 prior to the identification parade but he denied that. He was very clear in his testimony because he stated that he only saw

A1 twice. The first one was during the robbery on 16th December, 2016 when he was armed with a gun and the second time was on 15th June, 2017 when he opened Malik Nadeem's vehicle.

6.67 Having considered the foregoing, I cannot therefore accept such a bold argument by the Defence which is highly speculative that it is possible that the accused persons were seen by the witnesses when they were appearing in the Subordinate Court.

6.68 Furthermore, PW3 who told the Court that the parade was properly conducted was not asked any questions to show that the parade was not fairly or properly conducted in that A1 was the only one witness with a growth on his head and that he was being asked to remove his t-shirt so that the scar on his stomach could be seen. His evidence was that none of the suspects raised any objection after the parade on how the parade was conducted. The Defence did not ask any questions to challenge that evidence. As the record shows, PW3 was asked very few questions in cross examination.

6.69 It is for this reason that I find no merit in the argument by the Defence that the parade indirectly or directly was not properly conducted as the evidence of PW2, PW5 and PW3 was uncontroverted.

6.70 In saying this, I am fortified by what the Supreme Court stated in the case of **Joseph Mulenga v. The People** ⁽¹⁰⁾ that:

“The case in casu, the appellant cross-examined the aunt to the prosecutrix but left the mother’s evidence unchallenged...Surely, the trial court or indeed this court cannot be expected to ignore the uncontroverted evidence which without doubt gave support to the prosecution’s evidence...”

6.71 Similarly, on the above authority, I cannot ignore the unchallenged evidence of PW3 regarding the manner the parade was conducted and the evidence of PW2 and PW5 that they managed to identify A1 at the parade.

6.72 For the reasons that I have taken time to highlight, I find that the identification parade was properly conducted by PW3 as there was nothing improper, unfair or irregular in the manner it was conducted.

6.73 Given these circumstances, I have concluded having tested with the greatest care the evidence of identification in the light of where A1 alleges he was on the material day. I found PW5 to be a credible witness and I find as follows:

- (i) He had the opportunity to observe the A1 whom he was seeing for the first time as he gave a description that he had no hair, one eye was different, had a scar on his stomach and he wore a red t-shirt.
- (ii) PW5 was stated the role that A1 played during the attack in that he was the one who was armed with a black gun and he had threatened Sadik with the gun by pointing at him. The

other person broke the window of the vehicle and took the black bag which had money.

- (iii) The quality of identification was good because PW5 saw A1 during the day and the circumstances under which the identification was conducted were not stressful and traumatic as he was not under any attack when he made the identification.
- (iv) PW5 identified the getaway vehicle which the attackers used as being a RUNX ACX 6538. This vehicle was once owned by A2.
- (v) It is not true that PW2 and PW4 got A1's passport, USD 9,000 and K4,500.00 from A1 and that PW4 went away with the money and the passport.
- (vi) The evidence by A1 is dismissed as an afterthought since PW2 and PW4 were not challenged.
- (vii) PW5 immediately identified A1 on 15th June, 2017 when he went to Saturnia House as the person he had seen on 16th December, 2016 during the robbery.
- (viii) PW5 unerringly picked A1 from the identification parade with no help or prompting.
- (ix) A1 was not in Zimbabwe on the material day but in Zambia as the defence of alibi cannot be availed to him.
- (x) PW5 saw that Sadik was threatened by A1 who was armed with a gun and who was acting with another person.

- (xi) PW5 heard Sadik shouting for help while running away from A1.
- (xii) PW5 saw the other person who broke the window of the vehicle and went away with a black bag which had K600,000.00.
- (xiii) PW5 knew that it was K600,000.00 because he also used to work at Neria Investments and that was the money which was routinely withdrawn.

6.74 The net effect of these findings is that there was an Aggravated Robbery on 16th December, 2016 which took place at Neria Investments- Saturnia House.

6.75 A1 was positively identified by PW5 as the person he saw on 16th December, 2016 during the robbery and the possibility of honest mistake is ruled out and the defence of alibi has been negated by the positive identification.

6.76 In relation to A2, the Defence has argued that there is no evidence that links A2 to the offence.

6.77 The prosecution contends that A2 is linked to the offence of Aggravated Robbery by association with A1. That it is an odd coincidence that A2 was found in the company of A1 at the premises where he was identified as one of the robbers. That A2 also once owned a motor vehicle RUNX ACX 6538 which was a getaway vehicle at the time of the robbery.

6.78 The Defence on the other hand contend that although there is no dispute that A2 once owned the motor vehicle RUNX ACX 6538, the said vehicle was swapped with another vehicle before

the robbery took place. That PW1 who sold the vehicle to A2 later sold the said vehicle after it was swapped to a known person who was apparently in possession at the time of the alleged crime was committed. That to date the person is known to the police but nothing had been done to interrogate him.

6.79 As I have already alluded to in this judgment, there is no direct evidence linking A2 to the offence of Aggravated Robbery but that the case against him is circumstantial evidence.

6.80 According to Phipson on Evidence, circumstantial evidence means proof of other facts from which the existence of the given fact in issue may be logically inferred.

6.81 Thus in the case of Mbinga Nyambe v. The People ⁽¹¹⁾ the Supreme Court held *inter alia* that:

Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.'

6.82 Lord Heward, Chief Justice of England in P. L. Taylor and others v. R ⁽¹²⁾ also stated that circumstantial evidence is very often the best. It is evidence of surrounding circumstances which by undersigned coincidences is capable of proving a proposition with accuracy of mathematics.

6.83 However, in the celebrated case of David Zulu v. The People ⁽¹³⁾ Supreme Court pointed out the weakness of circumstantial evidence when it stated that:

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.

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.

6.84 Furthermore, in the case of Saidi Banda v. The People ⁽¹⁴⁾ the Supreme Court guided as follows:

“Where the prosecution’s case depends wholly or in part or circumstantial evidence, the court is in effect called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond all reasonable doubt. Taken by themselves, those facts cannot therefore prove the guilt of the accused person. The court should infer or conclude from a combination of those established facts that a further fact or facts exist. The court then must be satisfied that those

further facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of the circumstantial evidence adduced before it.”

- 6.85 It is apparent that where the evidence against the accused is circumstantial, and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts. In such instances, the judge must therefore 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.
- 6.86 In addition, it is clear upon a fair reading of the case of **Saidi Banda** that the court must use a staged approach in assessing whether the prosecution has established basic facts. And secondly, from the established facts the court must ascertain what further acts can be inferred.
- 6.87 It is on the basis of the above authorities that I approach the evidence in this case to determine whether there is evidence from the prosecution from which it can be inferred that the A2 committed the offence together with A1 as alleged.

- 6.88 To begin with, the evidence of PW5 is that on 16th December, 2016, Sadik and Gopal who had come back from the Bank to withdraw money were robbed of K600,000.00 which was in a black bag at Saturnia House and the robbers who included A1 sped off in a RUNX vehicle registration No. ACX 6538.
- 6.89 I have made a finding of fact that PW5 identified that the getaway vehicle used by A1 was a RUNX ACX 6538.
- 6.90 It is also not in dispute that A2 at one point in the year 2016 owned a RUNX ACX 6538 as PW1 stated in his evidence that he sold a RUNX ACX 6538 to A2 in the year 2016 and A2 in his evidence also confirmed that he once owned the said vehicle in 2016.
- 6.91 The only conflict in the evidence of the prosecution and the defence is that the defence contends that A2 owned the vehicle before the alleged commission of the offence in December, 2016 as he took back the vehicle in November, 2016 which was before the offence was committed. It is thus contended that A2 was not in possession of the vehicle and therefore he had no opportunity to use the car at the time when the offence was committed.
- 6.92 On the other hand, the prosecution contends that A2 was the owner of the vehicle at the time of the commission of the offence.
- 6.93 The evidence that A2 bought the vehicle in question was given by PW1, Charles Malawo who stated that he sold motor vehicle RUNX Reg. No. ACX 6538 to A2 who introduced himself as a

truck driver. And he stated that he sold the vehicle to A2 between August and November, 2016 and that A2 kept the vehicle for about two months before he took it back because of a fault. In cross examination, he further stated that he sold the vehicle between August and October, 2016.

6.94 It is very clear from the foregoing that PW1 was not certain regarding the period when he sold the RUNX to A2. However, it is clear and I therefore find that:

- (i) A2 kept the RUNX ACB 3568 for two months from the time that he bought it and before he swapped it for a Toyota Allion.
- (ii) PW1 sold the RUNX to another person five days after it was swapped with Toyota Allion.
- (iii) The contention by the Defence that the police knew who the RUNX was sold to is unsupported by any evidence on record.

6.95 In view of the foregoing, is there any evidence to show that A2 had an opportunity to commit the offence by the mere fact that he once owned the RUNX motor vehicle which was placed at the scene of the crime by PW5?

6.96 In answering this question, it is important to consider the evidence of apprehension.

6.97 As I have alluded to when dealing with the evidence against A1, the evidence given by PW2 and PW5 is that A1 and A2 were apprehended together at Saturnia House on 15th June, 2017 when A1 was seen opening the vehicle for Malik Needem, a workmate to PW5 and Director at Neria Investment. I have

made a finding that PW5 immediately identified A1 as the one who had stolen the K600,000.00 on 16th December, 2016 which was in a black bag of the vehicle used by Sadik.

- 6.98 Both A1 and A2 in their evidence refuted this evidence by stating that they mistakenly went to Saturnia House while looking for accommodation at Ndeke Hotel. And therefore contend that they were apprehended as they looked suspicious in the eyes of the complainants.
- 6.99 Furthermore, both A1 and A2 denied having been in Lusaka on the day the offence is alleged to have been committed. I have already dealt with the defence of alibi raised by A1 which I have dismissed.
- 6.100 I shall pause here and consider the defence of alibi raised by A2. In his defence, A2 stated that he was not in Lusaka on 16th December, 2016 as he was in police custody after being detained by the police for a traffic offence. That he was only released from custody after paying Admission of Guilt Form. To this effect, he produced the Admission of Guilt Form which was admitted in evidence and marked as **D2**.
- 6.101 I have considered at length the principles regarding the defence of alibi and all the parties submitted on the issue citing similar authorities. The theme that runs through all the case authorities is that when an accused person on apprehension or arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support the alibi, it is the duty of the police to negative it.
- 6.102 PW6 the arresting officer was cross examined at length on this

aspect that he failed to investigate the alibi that was raised by A2. The crucial question to answer is whether or not A2 at apprehension or arrest informed the police that he was in Ndola and not Lusaka as contended by the prosecution. I say this because a duty is only placed on the police to investigate an alibi if it is properly raised at apprehension or arrest.

- 6.103 During cross examination of the arresting officer PW6, in relation to A1, he was asked specific questions that A1 told him that he was in Zimbabwe and reference was made to the typed statement that he recorded from him. The arresting officer upon being shown the statement admitted that A1 stated that he was in Zimbabwe.
- 6.104 However, when it came to A2, the arresting officer was not asked a specific question that A2 told him that he was in Ndola by making reference to his typed statement. Rather, the arresting officer was asked a specific question by making reference to D2, the Admission of Guilty Form. And in doing so, the question which was asked was to confirm that A2 was in Ndola on that particular day in question and could not have been involved in the commission of the offence in Lusaka.
- 6.105 Furthermore, no question was asked to establish whether or not A2 availed D2, that is the Admission of Guilt Form to the police informing them that he was in Ndola. If indeed A2 told the arresting officer that he was in custody in Ndola on the date in question, it was important for him to have provided the details to the arresting officer by availing the document to him.
- 6.106 It was only in re-examination that PW6 told the Court that he

had only become aware of the existence of D2 in Court.

- 6.107 If it is true that A2 was in possession of D2 at the time of apprehension and time of arrest, D2 should have been given to the police and PW6 should have been cross examined on the same.
- 6.108 This was not done and the cross examination focused on confirming the contents of the form and not if PW6 was aware of the existence of the document because if he was given the form, that would have been the basis of arguing that the police were supposed to investigate the alibi.
- 6.109 Furthermore, while the Defence have argued that the document speaks for itself that A2 was in Ndola and not Lusaka, I do not hold the same view because it does not state that A2 was in custody and it does not include the time when the form was issued to A2.
- 6.110 In view of the foregoing, I find that D2 does not assist A2 for the following reasons:
- (i) A2 did not avail D2 to the police at the time of apprehension and arrest.
 - (ii) If he did, he would have cross examined the police officers PW4 and PW6 on the same document that he had shown them document.
 - (iii) It does not indicate that A2 was in police custody as contended and does not specify the time when it was issued to A2 and A2 in his evidence did not indicate the time he was released from custody.
 - (iv) The explanation given that he had no phone to ascertain

what the time was an explanation with no substance. I say this because it does not make any logical sense that on the day in question, he did not establish what the time was at any given point.

6.111 In view of the foregoing, I find that:

- (a) A2 didn't inform the police about his whereabouts on the 16th December, 2016 because if he had done that, the arresting officer would have been challenged by making reference to A2's statement just like it was done for A1.
- (b) PW6 was not given the Admission of Guilty Form at the time of arrest for him to investigate that A2 was indeed in Ndola as alleged.
- (c) The Admission of Guilty Form was not in existence at the time of apprehension and arrest of A2 and that is the reason it was not given to the police and not that it was at his home in Zimbabwe.
- (d) If it was in Zimbabwe as alleged, A2 had all the time to avail it to the police rather than produce it in Court during the proceedings.
- (e) There was no duty placed on PW6 to investigate an alibi at the time of arrest as A2 did not raise the alibi at that stage and only raised in Court.

6.112 The net effect of these findings is that the defence of alibi cannot be availed to A2 as it was not properly raised in accordance with

the case authorities already cited and it is dismissed as an afterthought. Further, A2 was not in Ndola as alleged.

- 6.113 This brings me back to the earlier question whether A2 had the opportunity to commit the offence since he once owned the RUNX which was identified at the scene of crime on 16th December, 2016.
- 6.114 If A1 who was identified by PW5 to have been one of the robbers on 16th December, 2016 and who had used a getaway vehicle which belonged to A2 at one point towards the end of 2016 was alone at the time of apprehension, then it would have possible that A2 was not part of the robbery that occurred on 16th December, 2016.
- 6.115 However, the prosecution's evidence on record is that when A1 went to Saturnia House, he was immediately identified by PW5 as one of the robbers who had stolen money. And upon apprehension, he was found to be with A2. The evidence of A1 regarding apprehension is the same as that given by A2.
- 6.116 In terms of their explanation as to how they found themselves at Saturnia House, they both contend that they mistakenly found themselves there as they were looking for Ndeke Hotel and that A1 went to inquire from the reception. A1 also contends that upon apprehension, PW2 removed US\$ 9,000 and K4,500 from his pocket and that PW4 officer Kakwisa is the one who collected all these items. A2 also contends that his laptop and other personal belongings were taken from him by PW4.

6.117 There are two conflicting versions propounded by the prosecution and the defence and it is important to determine who was telling the truth.

6.118 I have already dismissed the evidence that PW2 removed US\$ 9,000 and K4,500 from his pocket and that PW4 officer Kakwisa is the one who collected all these items from A1 including his passport. A2 made a similar allegation against these witness that PW4 took his passport, laptop and other personal belongings. This evidence was only heard during the defence of A2 and not through the prosecution witnesses. In short, the witnesses were not challenged on this aspect which was very crucial and I therefore dismiss the account given by A2 as an afterthought.

6.119 I am fortified in taking this position based on what was stated by the Supreme Court in the case of Donald Fumbelo v. The People ⁽¹⁵⁾ that:

“Where an accused person does not contradict prosecution witnesses during cross examination he is likely to be disbelieved when he brings up his own version of the story for the first time during his defence.”

6.120 Furthermore, PW2 also witnessed the incident that A1 while in the company of A2 opened Malik Needem’s vehicle and this led to their apprehension. PW2 was not asked any questions to discount his evidence that actually A1 went to the reception to inquire whether the premises were Ndeke Hotel or not.

- 6.121 In addition, the evidence given by PW2 is that when the accused persons drove into Saturnia House, he gave them instructions where to park but they didn't heed his instructions and did not bother to open the windows.
- 6.122 That even after they attempted to drive away after being blocked by another vehicle which was in the premises, the accused persons did not come out. PW2 with the help of others had to use force to open the doors.
- 6.123 While A1 and A2 both stated that when the employees at Saturnia House started shouting they both tried to explain how they found themselves at the premises, PW2 was not challenged regarding what happened that he had to force them out of the vehicle.
- 6.124 In this regard, I dismiss the accused's version of what happened as an afterthought and I accept the evidence of PW2.
- 6.125 To me, the conduct of A1 and A2 shows that they were not innocent persons because if they were innocent, they should have followed instructions that were given to them by PW2 regarding where to park and they should have explained themselves when they were blocked rather than allow themselves to be forcefully removed from the vehicle.
- 6.126 Given the foregoing, I find PW2 and PW5 to be credible witnesses and not the accused persons who failed to challenge the witnesses on key aspects of their evidence.

6.127 In addition, the defence contends that PW2 and PW5 were witnesses with a possible interest to serve as they falsely implicated the accused to have stolen the K600,000.00. That this was an attempt to balance losses in the company by framing losses on the accused persons.

6.128 The position of the law on such witnesses was considered in the case of **Kambarange Kaunda v. The People** ⁽¹⁶⁾ where the Supreme Court held that:

“That as the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, would have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant as having attacked him and his friends and, therefore, had a possible interest of their own to serve, failure by the learned trial judge to warn himself and specifically to deal with this issue was a misdirection.”

6.129 However, as was pointed out by the Supreme Court in the case of **George Musupi v. The People** ⁽¹⁷⁾ the critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls, or because of the particular circumstances of the case, may have a motive to give false evidence.

6.130 More recently, the Supreme Court gave further guidance in

the case of **Yokoniya Mwale v. The People**⁽¹⁸⁾ on this subject and more importantly in reference to its earlier decisions like the cases referred to above. It stated that:

“We ought however to stress that these authorities did not establish nor were they intended to cast in stone a general proposition that friends and relatives of the deceased or the victim are always to be treated as witnesses with an interest to serve and whose evidence thereby routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends present would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This in our view would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may in particular circumstances, ascertainable on the evidence have a bias or an interest of their own to serve or a motive to falsely implicate the accused. Once this was discernable and only in those circumstances should the court treat those witnesses in the manner we suggested in the

Kambarange case. A conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or victim provided the court satisfies itself that on the evidence before it those witnesses could not be said to have had a bias or a motive to falsely implicate the accused or any other interest of their own to serve. What is key in our view is for the court to satisfy itself that there is no danger of false implication.”

- 6.131 What comes out from the above cases is that it is not a general proposition that friends and relatives of the deceased or victim are always to be treated as witnesses with an interest to serve and whose evidence routinely required corroboration. A friend or a relative can only be treated as a witness with possible interest to serve if in particular circumstances it is ascertainable on the evidence that the witness has a bias or a motive to falsely implicate the accused person.
- 6.132 In the present case, there is no evidence that PW2 and PW5 had any motive to falsely implicate the accused persons as they both gave an account of what happened on 15th June, 2017 and PW5 also gave an account of what happened on 16th December, 2016 regarding the robbery. He was very categorical in that he stated that he was only able to identify one person as he didn't see the other person who had given him his back.

- 6.133 In my view, if PW5's intention was to falsely implicate the accused persons, he would have gone to the extent of implicating A2 but he didn't because he stated that he didn't see the other person clearly.
- 6.134 Furthermore, it was never suggested to these witnesses that they had falsely implicated the accused as the issue of covering for losses in the money was only brought out in the submissions and not during trial.
- 6.135 In this regard, I find that it cannot be ascertainable from the evidence that these witnesses had a reason to falsely implicate the accused persons. That line of argument is misconceived and I dismiss it.
- 6.136 Having closing analysed this evidence and for the reasons I have given I find that:
- (i) A1 while in the company of A2 was seen by PW2 and PW5 as the one who opened the vehicle for Malik Nadeem which was locked.
 - (ii) A1 and A2 were acting together when A1 opened Malik Nadeem's vehicle because when PW2 and the others shouted for help, A1 and A2 attempted to drive away but were blocked by another vehicle.
 - (iii) A1 and A2 were found in possession of T-bar metal bar and three remote controls upon apprehension.

(iv) The explanation that A1 and A2 mistakenly found themselves at Saturnia house when they were looking for Ndeke Hotel cannot reasonably be true.

6.137 The significance of these findings is that they provide the incriminating basic facts which are incompatible with the innocence of A2. They also reveal a pattern of conduct of the accused persons.

6.138 I say this because it is an odd coincidence that A1 who was identified by PW5 as one of the robbers who stole K600,000.00 on 16th December, 2016 was apprehended on 15th June, 2016 while opening the vehicle to Needem at the same place where the first offence occurred. And that at the time of apprehension, he was in the company of A2 who once owned a RUNX vehicle around the same time when the offence occurred. The said vehicle was a getaway vehicle which PW5 mentioned that he had seen on 16th December, 2016.

6.139 It is also an odd coincidence that the manner in which the offence was committed on 16th December, 2016 by trailing the employees from Neria Investment who were coming from the bank around 15:00 hours showed a similar pattern to what happened on 15th June, 2017. This is because A1 and A2 drove into Saturnia House immediately after Malik Nadeem who was coming from the bank drove into Saturnia House.

6.140 Furthermore, it is an odd coincidence a metal T-bar with a sharp end and 3 remote controls were found with A1 and A2

upon apprehension after A1 who was in the company of A2 was seen opening the vehicle for Malik Nadeem which was locked.

6.141 As I have already alluded to, circumstantial evidence is evidence of surrounding circumstances which by undersigned coincidences is capable of proving a proposition with accuracy. In the celebrated case of **Machipisa Kombe v. The People** ⁽¹⁹⁾ which was cited by both parties it was stated that evidence of odd coincidences constitute evidence of something more, they represent an additional piece of evidence which the court is entitled to take into account.

6.142 Furthermore, in the case of The Court of Appeal in the case of **Eziouis Munkombwe and others v. The People** ⁽²⁰⁾ also gave guidance on circumstantial evidence when it stated that:

“When considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individually.”

6.143 On the authority of this case, I am entitled to take into account these odd coincidences which are an aspect of circumstantial evidence. I have looked at them in their totality and not individually and I find that they provide overwhelming circumstantial evidence against A2. They exclude another inference that the person who subsequently bought the RUNX after it was swapped was the one who was involved in the robbery.

- 6.144 This is because the RUNX vehicle which A2 once owned towards the end of 2016 was placed at the scene of crime by PW5 who witnessed the robbery and identified A1 to be one of the robbers. It is not in dispute that A1 and A2 were not strangers but knew each other and were together when A1 was seen opening the Lexus vehicle at Saturnia House where the first offence of Aggravated robbery was committed. And when the employees shouted for help, the two accused persons attempted to drive away until they were blocked by another vehicle.
- 6.145 I therefore find that although there is no direct evidence in terms of A2 being identified at the scene of crime on 16th December, 2016, the incriminating facts I have referred to are cogent and have taken the case out of the realm of conjecture which permits me to draw only one inference that A1 and A2 were together on 16th December, 2016 when they stole the K600,000.00 and that A2 was the one with the RUNX at the material time.
- 6.146 In addition, these odd coincidences which I have highlighted above also supports the evidence in a material particular of the evidence of identification of A1 by PW5 especially that A1 was apprehended while in the company of A2 who owned the RUNX, the getaway vehicle which was seen at the scene of the robbery on 16th December, 2016.
- 6.147 On the totality of the evidence adduced by the prosecution which I have analyzed in sufficient detail, I find that there is overwhelming evidence against the two accused persons that

they are the ones who robbed Sadik Patel of the K600,000.00. Although PW5 was not the victim of the robbery, he provided the evidence of the robbery as he witnessed the robbery from the confines of his office. I have made a finding that Sadik was heard shouting for help whilst being chased by A1 who was in company of another person who ran away with the bag which had the money.

6.148 However, although PW5 stated that he saw a gun, no recovery of a firearm was made and there is no proof that the firearm was used as defined in Firearms Act.

6.149 In this regard, I find that the prosecution has not proved that the two accused persons armed with a firearm as defined in the Firearms Act for the offence to fall under section 294(2) of the Penal Code.

6.150 However, I find that the prosecution has proved aggravated robbery under section 294 (1) as the accused persons were two at the time of the robbery and threatened Sadik and Gopal as they were heard shouting for help whilst being chased by A1. He did that in order to retain or prevent or overcome resistance from the property being stolen.

6.151 I also find that the two accused persons jointly acted together in the execution of a common purpose. Thus the fact that they were apprehended together was not an innocent association or a mere coincidence but that they acted together to commit this atrocious crime.

6.152 On the whole, I hold that the prosecution has discharged its burden as it has proved the case beyond all reasonable doubt against the two accused persons. I therefore find **TAPIWA MUNEMO AND TIRINANHU KUZAWENHAMO GUILTY** of the offence of Aggravated Robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia and I **CONVICT** each one of them as charged.

6.153 Leave to appeal granted.

DELIVERED AT LUSAKA THIS 2ND DAY OF JUNE, 2025


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M.C. KOMBE
JUDGE

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
02 JUN 2025
U.S. MARK HIRSH, LUSAKA