

IN THE HIGH COURT FOR ZAMBIA

HP/66/2023

HOLDEN AT LUSAKA

{Criminal Jurisdiction}

BETWEEN:

THE PEOPLE

VS

PAUL TEMBO



Before Hon. Lady Justice M. M. Wina in Open Court on the 27th day of June, 2024.

For the Prosecution: Mr. S. Banda- National Prosecution Authority

For the Accused: Mr. J. Milambo -Dove Chambers

J U D G M E N T

Case Referred:

1. *Mwape v The People {1976} Z.R 16*
2. *Phiri and Others vs The People {1973} Z.R 47*
3. *Dorothy Mutale and Another vs the People {1997} S.J {SC}*
4. *Sensenta vs The People {1976} Z.R 184*
5. *Nyambe vs The People {1973} Z.R 228*
6. *Love Chipili vs The People {1986} Z.R 115*
7. *Fawaz and Another vs The People {1995-1997} Z.R 365*
8. *John Mkandwawire and Others vs The People {1978} Z.R 46*
9. *Mavuma Kabanja Situna vs The People {1982} Z.R 115*
10. *Yotamu Hamenda vs The People {1977}*
11. *Haonga and Others vs The People {1976} Z.R 200*
12. *Chimbini vs The People {1972} Z.R 191*

13. *Mwape v The People {1976} Z.R 16*

Legislation referred to:

1. Penal Code Chapter 87 of the Laws of Zambia

1. Introduction

- 1.1 The accused person stands charged with one count of Aggravated Robbery contrary to Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.
- 1.2 The particulars of the offence allege that Paul Tembo on the 2nd day of August, 2022 at Lusaka in the Lusaka Province of the Republic of Zambia, jointly and whilst armed with an offensive weapon namely a knife, did steal one cellphone valued at K990.00 the property of Rose Makasa and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence on the said Rose Makasa in order to obtain or retain the things stolen or to prevent or overcome resistance to its being stolen or retained.
- 1.3 The accused denied the charge.

2. Standard of Proof

- 2.1 I warn myself from the outset, that the burden to prove the accused's guilt lies solely with the prosecution. In a criminal matter, the standard of proof is beyond reasonable doubt.
- 2.2 The accused has no onus to prove his innocence, any doubt in my mind upon considering all the evidence, will be treated in his favour.

3. Ingredients of the Offence

- 3.1 The offence of Aggravated Robbery for which the accused stands charged as provided for in Section 294{1} of the Penal Code Chapter 87 of the Laws of Zambia states that:

"294 {1} Any person, who being armed with any offence 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."

3.2 To prove a case of aggravated robbery, the Prosecution must prove the following elements of the offence beyond a reasonable doubt:

- 1) The item alleged was stolen by the accused;
- 2) That the accused person was either armed or that there was more than one person who participated in stealing the stolen item;
- 3) That there was actual violence or a threat of violence used immediately before or immediately after the stealing in order to obtain the property stolen or to overcome it being stolen;

3.3 The thing stolen must fall within the definition of things capable of being stolen as defined in section 264 of the Penal Code. Further, the identity of the accused person should also be proved beyond a reasonable doubt.

3.4 In the case of **Mwape v The People {1976} Z.R 16¹** it was held inter alia that:

"Violence to property alone without inducing fear in the mind of the person having charge of or in any way connected with such property cannot amount to robbery. If a person in charge or responsible for the property connected is put in fear by an attacker that injury would be caused to such property and he conceded to demands made to him by the attacker, that would be robbery and if there is more than one attacker or if the attacker is armed with an offensive weapon or instrument or is in

the company of one or more person the offence becomes aggravated robbery,"

- 3.5 The authority above demonstrates the importance of also proving that there was fear instilled in the victim of a theft for it to amount to proof that the theft/robbery was aggravated in nature.
- 3.6 It is also clear that it is not only important that there is proof of the theft but equally that the identity of the Accused person is proved beyond reasonable doubt.
- 3.7 The proof of the identity of the accused person may be either by direct evidence such as identification of an accused by a victim or witness to the robbery or it may be by circumstantial evidence such as the possession of recently stolen goods. In order for the court to rely on identification evidence the circumstances under which the accused was made should be such that a person had a good opportunity to see the accused.

4. Prosecution Evidence

- 4.1 In support of its case, the prosecution led evidence from two {2} witnesses.
- 4.2 **Examination in Chief PW1**
- 4.3 **PW1**, was Mary Makasa, the alleged victim, a 37-year-old saleslady. It was her evidence that on the 2nd August 2022 at approximately 20:00 hours on her way home from work in Obama area, using the tarred road leading to NRDC, so that she could

- pass through Esther compound. She suddenly heard a man calling her from behind as she entered Esther compound.
- 4.4 Ignoring his calls, she continued walking. Unperturbed, the man apparently pounced on her, attacked her, slapping her on the face, hit her on the legs causing her to fall into a drainage. Thereupon he dragged her and took her to a nearby bush.
 - 4.5 It was **PW1**'s evidence that her attacker lay on top of her and held her neck and demanded for her phone. She asked him which phone she should give him, a question that earned her another slap and a punch to her chest.
 - 4.6 That her attacker grabbed her neck and repeated his demand for her phone. She in turn once again asked him which phone. It was her further evidence that at this point her attacker produced a small black knife and threatened to stab her in the eyes, and told her he would kill her if she did not comply. **PW1** told the court that she refused to hand over her phone, a defiant stance that resulted in her attacker punching her in the face and grabbing her phone.
 - 4.7 That the said attacker put his hand in her bra, ripping her top in the process and fled.
 - 4.8 When asked to describe the phone, she told the court that it is an MTN beige phone which was housed in a red pouch with flowers. It had the words Mobi Cell inscribed on the phone.

- 4.9 **PW1**, told the Court that following the attack, she went to a friend's house in Esther compound, to whom she narrated her ordeal and spent the night there. **PW1** did not tell the court the name of this friend she allegedly spent the night with following the attack, nor did this friend give evidence before this court.
- 4.10 It was her further evidence, that the following morning she went to Muzaleka Police Station in Chelston, and reported the attack. She gave a statement and left the station.
- 4.11 She told the court that after leaving the station she proceeded to the scene of the alleged crime, where she found a lot of people. She testified that her friend's son is the one who apprehended her attacker. It is not clear whether this was the same friend where **PW1** had spent the night following the attack.
- 4.12 However, she later informed the court that her friend's name was Mwansa and name of her friend's son was Kaumba.
- 4.13 When asked how Kaumba managed to apprehend her attacker, she told the court that she had described her attacker to him. The description of her attacker was that he was short and was light in complexion.
- 4.14 **PW1**, testified that she was able to see her attacker's face when she fell into the ditch and also that he had a hoarse voice. Therefore, that she was able to give Kaumba the attacker's description, who based on that description, apprehended the attacker. That upon her return from the police station, she found

that Kaumba had already apprehended the attacker. Kaumba was not called to give evidence to corroborate **PW1's** testimony, a fact that this court will address further on in this judgment.

4.15 It was **PW1's** further evidence that the attacker was asked by Kaumba whether he knew **PW1**, and that he responded in the affirmative by stating that she was the one from whom he got the phone.

4.16 According to **PW1**, the attacker pleaded not to be taken to the police, stating that he had not sold the phone and that it was at his home. **PW1** further told the court, that the said attacker led them to his house in Kamanga where the phone was retrieved.

4.17 That he was then taken to the police by Kaumba and **PW1** and the phone remained with the police as evidence.

4.18 **PW1** proceeded to identify the phone and pointed out the accused in the dock as her attacker.

4.19 **Cross Examination of PW1**

4.20 In cross examination, **PW1** testified that she recalled going to see the accused in police cells in May 2023. She confirmed that the accused was apprehended and detained at Chelston police and was detained there for 6 months.

4.21 She denied that the accused's number would be found in her phone and further denied that the accused was her boyfriend or

that she ever knew him. **PW1** confirmed her phone number as being **0973971823**.

4.22 **PW1** denied knowing Patrick or Peter, both of whom were the accused's friends. **PW1** testified that she was able to see her attacker's face because the drainage where she fell into when she was attacked, was near the tarred road and the lights from the passing vehicles aided her in seeing the attacker's face.

4.23 **PW1** said she was attacked at Kabwiku shopping mall, thereafter her attacker dragged her to the bush. That the accused produced the knife in the bush.

4.24 **PW1** confirmed going to Chelston police station in June 2023 to tell the accused to stop calling her. That the accused had been calling her, asking him if she was going to forgive him. **PW1** testified that it was Kaumba alone who went to apprehend the accused from his home and that she was not present at the time the accused was apprehended.

4.25 That the place where she arrived at is where the accused previously lived, but that he had since re-located and that Kaumba knew his new address.

4.26 **Examination in Chief of PW2**

4.27 **PW2**, was Detective Chief Inspector Eugene Lukonde, who was the investigating officer. His testimony was that on the 16th December 2022, he received a docket for a case of aggravated robbery, which occurred on 2nd August 2022 at around 20:00

- hours, in Esther compound. That Rose Makasa, **PW1** reported to having been attacked by an unknown person on her way home.
- 4.28 That the alleged attacker who had been armed with a knife, had robbed **PWI** of a cell phone, Mobi cell by make, valued at K990.99 and a chain.
- 4.29 That upon receipt of the docket, **PW2** interviewed a suspect who was already in custody, namely Paul Tembo, the accused person.
- 4.30 He proceeded to charge and arrest the accused with the subject offence, following his failure to provide satisfactory answers. That the phone in question was recovered from the accused, but the knife and chain were never recovered.
- 4.31 **PW2** subsequently identified the accused in the dock.
- 4.32 It was **PW2's** further testimony that the accused was apprehended by Kaumba Mwanza with the assistance of members of the public.
- 4.33 **PW2**, identified the alleged stolen phone following a brief description of the phone. He testified that though the said phone had initially been in the police's possession, it had been subsequently released back to **PW1** on a temporal basis.
- 4.34 Following the prosecution's application to produce the subject phone into evidence, the application was vehemently objected to by the defence. The basis of the objection was that the chain of custody had clearly been broken when the phone was returned

back to **PW1** and then subsequently handed back to the police in readiness for the trial.

4.35 This Court overruled the objection by the defence and the same was admitted into evidence as "**P1**".

4.36 I must at this stage, state that the importance of preserving exhibit evidence and therefore the practice of returning exhibits to complainants is one that should be strongly discouraged. As the possibility of such vital evidence being tampered with cannot be ruled out. I shall return to this point later on in my judgment.

4.37 **PW2**, testified that his investigations led him to learn how the accused person had been apprehended, namely by Kaumba Mwanza who was given the description of the accused by **PW1** following her attack.

4.38 **Cross Examination of PW2**

4.39 In cross examination, **PW2** told the court that the accused was apprehended on 3rd August 2022, following the alleged attack that occurred on 2nd August 2022.

4.40 **PW2** conceded to not visiting the alleged crime scene. He further confirmed that he did not receive the alleged stolen phone on 3rd August 2022.

4.41 **PW2**, also claimed ignorance of the assertion that on 3rd August 2022, a day after her attack, **PW1** was actively using the alleged stolen phone.

- 4.42 **PW2** testified that he only came to know and communicate with **PW1**, after the 16th September 2022, which is when he was allocated the docket.
- 4.43 **PW2**, told the court that he did not recall receiving a report of assault of **PW1** and further that to his knowledge, there was no medical report form issued to **PW1** by the police in respect of an assault on **PW1**.
- 4.44 **PW2**, told the court that he did not have any evidence to confirm that a knife was used in the alleged attack.
- 4.45 In addition, **PW2** told the court he did not have independent evidence aside from **PW1**'s statement, to corroborate that the alleged attack had taken place.
- 4.46 That was the end of the prosecution's case. At the close of the prosecution's case, this court found the accused with a prima facie case to answer and subsequently placed him on his defence.

5. The Defence

5.1 The accused elected to give evidence on oath and called one witness.

5.2 Examination in Chief DW1

5.3 The accused gave his evidence as **DWI**. He gave the court his names as Paul Tembo. His date of birth as 26th October 1994. He worked at a car cash and washed cars for a living.

- 5.4 He told the court that on 24th May 2022 he received a call from his friends and arranged to meet them at Lukundo Lite which is a drinking place. On arrival there, he called his girlfriend whose name is Eliza Tembo to join them at the bar.
- 5.5 **DW1** testified that shortly after, he received a phone call from **PW1**, who demanded to know where he was. He told the court that **PW1**, was his former girlfriend.
- 5.6 That 30 minutes later, **PW1** called him to inform him that she was across the road from the bar where he was with his friends and girlfriend, Eliza Tembo.
- 5.7 **DW1** told the court that he told **PW1** over the phone, he wanted nothing to do with her, for fear of being thrown into police cells by the officer in charge from Chelston police station, who was allegedly **PW1**'s boyfriend.
- 5.8 That a while later **PW1** called Eliza Tembo, and the two went to the ladies' bathroom. That it was not long after that **DW1** was alerted that there was an altercation between the two ladies in the ladies' toilet.
- 5.9 **DW1** testified that he rushed to the ladies' bathroom and was confronted by a full-blown fight between Eliza Tembo his current girlfriend and **PW1**. That he got in between the duo in an attempt to stop the fight.
- 5.10 He further told the court that after he had told **PW1** that he was no longer interested in her and following an exchange of angry

words between him and **PW1**. It was his testimony that **PW1** went on to tell him that he would see.

5.11 **DW1** testified that he and his girlfriend moved to another location. That the next day on 25th May 2022, he received a phone call from the police, telling him that they had been to his house looking for him.

5.12 That he was told to go to Chelston police. **DW1** testified that upon arrival at the police station, he was told by someone from the inquiries desk to wait and he did so. That he waited for two hours, from 08:00 to 10:00 hours.

5.13 He was ushered into the office of the officer in charge's where he was asked whether he knew **PW1**, to which he responded that she was his former girlfriend.

5.14 He was asked what happened on 24th May 2022 and after he had explained, the officer in charge phoned **PW1** who upon being told that **DW1** was there at the office, stated that if Paul Tembo was there, she would not come to the station.

5.15 **DW1** stated that at that moment they were interrupted by an emergency phone call which came for the officer in charge.

5.16 That **DW1** was placed in police cells despite his protests of not having committed any offence.

- 5.17 The Court heard that **DW1** was kept in police custody from 25th June 2022 up to the time he began appearing in Court. That he was charged with aggravated robbery for attacking **PW1**.
- 5.18 Further that he requested for a phone and called **PW1** and she expressed surprised that he was still in police custody. That **PW1** came to see him at Chelston police post where he had been moved and that despite her requesting for his release, he was not released but remained in police custody.
- 5.19 That on 9th December 2022, he was brought to the Subordinate Court where he continued to appear for mention until his case was committed to the High court.
- 5.20 **DW1** told the court that he could not have attacked **PW1** on 2nd August 2022 as he had been in police custody all the while, from 30th June 2022, when he was charged with the offence of aggravated robbery to date. I take note at this stage to indicate that in his earlier testimony, **DW1** is on record as stating that on 25th May 2022 he received a phone call from Chelston police requesting him to come into the station where he was probed about the events of 24th May 2022.
- 5.21 It was therefore, his testimony that he could not have attacked **PW1** on the 2nd August 2022, as he has been in police custody all along.
- 5.22 **DW1** denied having said anything in a warn and caution statement and said he did not sign on any document and that

everything that was written in the warn and caution statement was not said by him. That he did not say anything to the police, and further, that he did not sign on any document.

5.23 **Cross -Examination DW1**

5.24 In cross examination, **DW1** confirmed that he was charged with aggravated robbery. That however, he did not know the reason why he was in cells from 25th May 2022 to 30th June 2022. He did nevertheless agree to knowing the reason as to why he was in police custody thereafter.

5.25 He further confirmed his evidence in chief that on 24th May 2022 he received a phone call from his workmates inviting him for an outing at Lukundo with a friend, only known as Patrick. That he was at Lukundo bar drinking with Patrick and five other friends, including his girlfriend Elizabeth Tembo, from 15:00 hours up and till 16:00 hours when the quarrel with **PW1** erupted and then he left. When challenged as to whether he had any evidence to substantiate what he was telling the Court, he responded in the negative.

5.26 **DW1**, despite mentioning the names of the people that knew of his three {3} months relationship Rose Makasa **PW1**, responded in the negative when asked whether he was going to call any of the people who supposedly knew of his alleged relationship with **PW1**.

5.27 **DW1** also confirmed his earlier testimony that following his confrontation with **PW1** at Lukundo, the following day he was apprehended and placed in police cells. And that from that day till to date, he has been in custody, charged with aggravated robbery.

5.28 **DW1** told the Court that despite his friends, witnessing the alleged fight between Eliza and Rose, he would not be calling the said friends to corroborate his testimony. **DWI**, also confirmed to not telling the Court where he was at 20:00 hours the day prior to his apprehension. He also told the Court that he had no evidence to substantiate his claim that the Officer in Charge at Chelston police was flirting with Rose Makasa **PW1**.

5.29 **Re-Examination -DW1**

5.30 In re-examination, **DW1** confirmed that following the confrontation at Lukundo, the following day he received a call from the police and upon arrival there, he was placed in custody.

5.31 **Examination in Chief -DW2**

5.32 **DW2** was Dickson Mvula, officer in charge Chelston police. He told the Court that he was not the officer in charge during the relevant period as he only took over on 1st November 2023.

5.33 He had been subpoenaed by the defence to produce the Occurrence Books that were relevant to the material period. After describing the salient features of the books, the same were

produced into evidence following no objection from the State, as "D1 a, b and c" collectively.

5.34 **DW2** was referred to the 30th July 2022 at 06:00 hours in the Occurrence Book "D1{a}" and it was his testimony that the accused was in police custody on the stipulated date and time. **DW2** equally testified that according to the Occurrence Book on 31st July 2022 at 16:40 hours the accused was in police custody.

5.35 In Occurrence Book "D1{b}", **DW2**, confirmed to the Court that on 29th June 2022 the accused's name was not appearing, but that on 30th June 2022, the accused's name was appearing. Equally on 1st August 2022, the accused's name was appearing on item number 17 and housed in cell number one. On 2nd August 2022 at 17:50 hours, the accused's name was appearing in the book.

5.36 **DW2**, went on to stipulate that on 2nd August 2022 there was no indication of a Release Note in respect of the accused, which meant that the accused was still in police custody. That equally, on 3rd August 2022, the accused was appearing at item number 2 in the Occurrence book and was in cell number 1.

5.37 It was **DW2's** further testimony that the duty handover notes on Wednesday 3rd August 2022 indicated that the accused was in cell 1 on item number 6 in the occurrence book.

5.38 **DW2** went on to confirm that this meant that on the night between 2nd August 2022 at 17:00 hours and 3rd August 2022 at 08:00 hours, the accused was still in their custody. **DW2's**

testimony took the Court through the occurrence book right until the 8th August 2022, with the accused indicated as still being in police custody.

5.39 That furthermore, in respect of the occurrence books he was given namely from 22nd May 2022 to December 2022, there was no indication of the accused being charged with an offence.

5.40 **Cross -Examination -DW2**

5.41 When asked what an APPB was, **DW2** testified that it is a book where personal belongings of suspects that are taken into custody, are recorded. He further informed the Court that the details of the accused would be entered in the same book.

5.42 **DW2**, informed the Court that he did not come with the APPB, as that was not included in the request that was presented to him. He confirmed that had the APPB been brought before Court, it was going to indicate when the accused was placed in custody. **DW2** also confirmed that the occurrence book is a book that shows daily happenings at the police station.

5.43 **DW2** conceded that in other books the offence for which the accused stood charged with, would be indicated.

5.44 **DW2** told the Court that he was not aware that the accused was apprehended and placed into custody a day after the alleged offence of aggravated robbery. He further conceded that the

occurrence book was meant to indicate the report that the victim gave to the police but that no such report was in any of the occurrence books that he had brought before court.

5.45 **DW2** was not able to show the Court the day that the accused was brought to the police station as it was not indicating in any of the books he had brought before the Court.

5.46 In re-examination, **DW2** told the Court that an Occurrence Book has to show all the events, namely the time and date a suspect is brought in and the time he was charged with the offence before being placed into custody. **DW2** also stated that the offence should be recorded in the Occurrence Book on the first day it is reported.

5.47 The defence made an application for the production of the APP2 book and the matter was adjourned to 23rd February 2024.

5.48 On the 23rd February 2024, **DW2** who was still on the witness stand, produced the APP book after pointing out its salient features. When the question was put to **DW2** as to what was his response to the assertion that the accused committed an offence of aggravated robbery on the 2nd August 2022, and was subsequently charged with the said offence on 8th August 2022. **DW2** responded that he would adhere to what was written in the book, namely that he did not have that information.

5.49 By way of clarification, **DW2** testified that their records indicate that the accused was in their custody from 30th June 2022.

- 5.50 In cross examination **DW2** conceded that according to all the records at Chelston police station, the only offence that the accused was charged with is aggravated robbery. It was **DW2's** further testimony that on 2nd August 2022, the accused was in police custody.
- 5.51 **DW2** stated that he was not aware that it is on record, that the accused was apprehended a day after the alleged robbery that was the subject of the current court proceedings. **DW2** further denied being aware of the accused's admission of being with the **PW1** on the day of the incident, which was a day prior to him being placed in custody.
- 5.52 In conclusion, **DW2** confirmed that from the day that the accused was placed in custody up until he was taken to court, he has never been released. Further that all the police records, indicate no other offence that the accused had been charged with, aside from that of aggravated robbery.
- 5.53 That was the close of the defence's case.
- 5.54 Despite the prosecution indicating that they would require 30 days within which to file their submissions, at the time of writing this judgment none were filed.
- 5.55 The defence filed in written submissions on 6th March 2024.

6. Final Submissions by the Defence

- 6.1 The defence in their submissions submit that the court needs to establish as to whether the State has proved its case against the accused beyond reasonable doubt. The defence posed the question whether the state has adduced sufficient evidence to establish whether a knife was used in the alleged robbery and if indeed the victim **PW1** was robbed of her phone.
- 6.2 The defence contended that if indeed the phone was seized from the accused, was there a seizure notice presented to the court to indicate that indeed the stolen phone was found on the accused.
- 6.3 The case of **Phiri and Others vs The People {1973} Z.R 47²** was referred to as having held that;

"The Courts are required to act on evidence placed before them. If there are gaps in the evidence, the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction, the courts have no alternative but to acquit the accused and when such an acquittal takes place because evidence which could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the court, but by the investigating officer."

- 6.4 It was further submitted by the defence that the arresting officer's failure to bring the relevant Occurrence Book to court was a dereliction of duty. The case of **Yotamu Hamenda vs The People**

{1977}³ was cited in support of the principle of the prejudice that an accused suffers owing to the failure of the investigating agency to adequately investigate a matter. Therefore, resulting in evidence that might well be in favour of accused not been adduced.

6.5 The defence contended that there was indeed a possibility that the accused could have committed a different offence but that the police instead had maliciously given the accused aggravated robbery or that the accused was already in custody on the alleged date, and so could not have committed the said offence.

6.6 It was the defence's submission therefore that this court is bound by law to acquit the accused as more than one inference arises in this case.

6.7 The case of **Dorothy Mutale and Another vs the People {1997} S.J {SC}**⁴ was cited in support of this principle of law. Where the Court stated;

"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."

6.8 It was the defence's assertion that from the evidence on record, several reasonable doubts had been created. The defence further alluded to the prosecution witness's failure to tell the truth. The Court was referred to case of **Sensenta vs The People {1976} Z.R**

184⁵ to espouse the principle of the fatal effect of fabricated prosecution evidence.

6.9 To further fortify this point, this Court was referred to the case of **Haonga and Others vs The People {1976} Z.R 200**⁶, which espouses the principle that a court will reduce the weight it attaches to the remainder of a witness's evidence who has been untruthful on a material, point.

6.10 Further, that this case involves evidence from a single identifying witness, namely **PW1**, the complainant. To this end, the case of **Chimbini vs The People {1972} Z.R 191**⁷ was cited to buttress the principle of law that where the case against an accused person rests entirely on the evidence of the complainant, such evidence must be clear and unambiguous. And that the Court is not to solely rely on the honesty of the witness, but upon their reliability of such witness's evidence.

6.11 This Court was urged to acquit the accused person, based on the contention that the accused person had a solid alibi, namely that on the date of that the complainant is alleged to have been committed, he was in police custody and in addition, that the single witness on which the prosecution's entire case was hinged, was a witness with an interest to serve.

7. Court's Analysis and Determination

7.1 I have considered the evidence as presented by both sides. As previously alluded to earlier in this judgment, the onus of proving

the guilt of the accused, lies squarely upon the prosecution and the standard of proof is that of beyond reasonable doubt.

- 7.2 Any doubt that arises in my mind regarding the accused's guilt, such doubt must be to the benefit of the accused.
- 7.3 In criminal law, evidence is adduced one of two ways. Either through direct evidence as witnessed by an eye witness or circumstantial evidence.
- 7.4 The prosecution alleges that on 2nd August 2022, the victim **PW1** was attacked by the accused, and robbed of a phone. That a knife was used in the said robbery, therefore constituting aggravated robbery. The prosecution evidence is therefore based on direct evidence.
- 7.5 **PW1** testified that on the night in question, around 20:00 hours, on her way home from work she was assailed by a person who had initially called out to her and when she ignored him, he jumped on her side, slapped and swiped her legs, causing her to fall in the drainage. That her attacker then dragged her to a nearby bush. It was her testimony that as he was dragging her she asked him where he was taking her, to which he simply responded that she should just follow him where he was taking her.
- 7.6 That when they reached the bush, her attacker lay on top of her, holding her neck. That he then asked for her phone and she asked him which phone she should give him.

- 7.7 That this question earned her another slap from her attacker, and a punch on her chest, and that he then removed a small knife, threatening to stab and kill her if she did not give him the phone. All the while, still holding her neck. That despite him having produced a knife, she told him that she would not give him her phone, at which point, **PW1** told the Court that he then punched her in the face, grabbed her phone, put his hand in her bra, tore her top and leaving her in a disheveled state.
- 7.8 **PW1**, testified that she then got up and went to a certain house in Esther compound and the following morning she went to Muzaleka police station in Chelston. **PW1** did not tell the Court as to why she did not immediately bring the attention of the attack to the police or indeed flag a passerby. She had earlier testified that she used a tarred road, Obama road which at 20:00 hours, the time she alleges the attack took place, would have been full of passing vehicles.

8. Identification of the Attacker

- 8.1 **PW1** had testified that immediately following the attack she went to a friend's house in Esther compound where she spent the night after she had informed her that she had been attacked. Thereafter they slept. The friend where **PW1** is said to spent the night, was not called as a witness to corroborate her testimony. In my view that friend's testimony would have been useful, not only to corroborate **PW1**'s evidence, but also to describe the state that

PW1 was when she knocked on her door saying she was attacked.

8.2 According to **PW1**, her attacker was apprehended by her friend's son, by the name of Kaumba, yet this witness who is my view is a crucial witness was not called to substantiate **PW1's** testimony. **PW1** rather than proceed to immediately report the matter to the police whilst the description of her alleged attacker was still fresh in her mind, instead went and spent the night at her friend's house, who was only referred to as simply Mwansa.

8.3 One would have thought at the very least, upon seeking refuge at her friend's house, they would then have immediately thereafter proceeded to the police to report the attack.

8.4 **PW1** had further told the court under cross-examination, she knew where the accused lived previously but that then he re-located and that Kaumba Mwanza her friend's son is the one who knew where the accused lived. From this evidence it can be concluded that the accused was known to **PW1**. How else would one explain her having known the accused's previous address unless she knew him? Furthermore, how would Kaumba know where the accused had moved to, unless the accused was someone whom **PW1** had known prior to the alleged attack. Yet it was **PW1's** testimony that the accused person was not known to her. **PW1's** exact words when she was challenged by defence counsel whether the accused was her boyfriend were, *'I never knew him.'*

- 8.5 All this tends to lend credence to the defence's assertion that **PW1** and the accused had in fact known each other prior to the attack.
- 8.6 Having said that, assuming that the accused was not known to **PW1**, there is nothing on record to show that an identification parade was conducted in this matter. In order to rule out mistaken identification.
- 8.7 In the case of **Nyambe vs The People {1973} Z.R 228⁸**, the Supreme Court stated as follows:

"the witness should specify by what features or unusual marks if any, he alleges to recognise the accused and the circumstances in which the accused was observed, the state of light, the opportunity for observation, the stress of the moment should be carefully canvassed." {underlined for emphasis.

- 8.8 In the case in casu, **PW1**, testified that her attacker, in this case the accused, swiped her legs causing her to fall in the drainage and dragged her to a nearby bush, thereafter slapped and punched her and held a knife to her face and before grabbing her phone had punched her in the face. This to me would be a moment filled with stress and fear as described in the Nyambe case cited above. Therefore, I have to consider all these factors before I can determine with certainty that indeed **PW1** positively identified her attacker to the satisfaction of this Court.

8.9 Equally in the case of **Love Chipili vs The People {1986} Z.R 115⁹** the Supreme Court observed that"

"Where the circumstances of the attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had previously been seen by the identifier does not render an identification safe."

8.10 The only feature that **PW1** gave in describing her attacker was simply to say he was light in complexion. Such a vague description does little to assist this Court.

8.11 The fact that **PW1** was a single identifying witness, the more reason why there is need to have some other evidence supporting the identification of her attacker. The cases of **Fawaz and Another vs The People {1995-1997} Z.R 365¹⁰** and **John Mkandwawire and Others vs The People {1978} Z.R 46¹¹** are authority for this principle of law.

8.12 To further buttress this point, in **Mavuma Kabanja Situna vs The People {1982} Z.R 115⁽¹²⁾**, the court stated thus:

"There is need for the to have some other connecting link between the accused and the offence where the identification is by a single witness."

8.13 That other connecting link is strikingly absent in the case in casu.

8.14 I therefore, find as a fact that **PW1** did not in my view positively identify the accused person to eliminate the possibility of an honest mistake.

9. Use of a weapon and Violence

9.1 I now turn to the issue of the use of a weapon and violence. **PW1** testified that her attacker pulled out a knife and threatened to kill her. A knife was never recovered. According to **PW1**, when the accused pulled out a knife and demanded for her phone, she defiantly responded that she would not give him her phone, and her supposed defiance according to her testimony, earned her a punch in the face. Section 294{i} of the Penal Code refers to the use or threat of violence to obtain or retain the thing stolen or prevent or overcome resistance to it being stolen or retained. In the case of **Mwape v The People** it was held inter alia that:

"Violence to property alone without inducing fear in the mind of the person having charge of or in any way connected with such property cannot amount to robbery. If a person in charge or responsible for the property concerned is put in fear by an attacker that injury would be caused to such property and he concedes to demands made to him by the attacker, that would be robbery and if there is more than one attacker or if the attacker is armed with an offensive weapon or

instrument or is in the company of one or more persons, the offence becomes aggravated robbery. "

- 9.2 The authority above demonstrates the importance of proving also that there was fear instilled in the victim of a theft for it to amount to prove that the theft/robbery was aggravated in nature. In the case in casu, according to **PW1** despite her alleged attacker producing a knife and threatening to kill her. She responded that she would not give him her phone. Such supposed defiance and bravery if it can be called that, simply goes to demonstrate a lack of fear in **PW1** as a victim.
- 9.3 I must equally mention at this point that there was no mention of **PW1** having sustained any injury or the production of a medical report. I would have thought a fist punch in **PW1**'s face would leave its mark in one way or another.
- 9.4 As stated above, there was no evidence adduced to indicate that **PW1** had sustained any injuries following the said attack. I therefore find as a fact that there was no evidence of violence used in the obtaining of the said phone.

10. Phone

- 10.1 The recovery of **PW1**'s phone is rife with controversy. As an exhibit and an important one at that, it was said to have been found with the accused. However, as rightly pointed out by

defence counsel, there was no seizure form to show that the phone was seized from the accused nor was there any photographic evidence depicting that it was recovered from the accused's premises.

10.2 Furthermore, at some point during the police investigations for reasons best known to the investigating officer, it was subsequently released to **PW1** and therefore there was a clear break in the chain of custody. To the effect that when the accused contended that the accused and **PW1** knew each other, it would have been easy for the prosecution to have disproved such an assertion by simply going through the contents of the phone. I therefore find as a fact, that in the absence of evidence indicating that **PW1's** phone was found in the accused's possession. That the same was not stolen by the accused.

11. Accused' Alibi

11.1 I now turn to the accused's raising of an alibi. Namely that he could not have committed the subject offence as at the time of the alleged offence he was actually in police custody.

11.2 I must say, it is rather rare to put forward an alibi of having being behind bars when one has been accused of committing a crime. The defence went to great lengths to establish that the accused was in actual fact behind bars at the time of the alleged offence. Even going as far as producing several Occurrence Books to prove such alibi.

11.3 However, the defence appeared to be elusive when it came to indicating precisely what offence the accused was behind bars for at the material time. Suffice to mention that there was no other offence that the accused had been charged with aside from the subject offence of aggravated robbery. Which leads me to the conclusion there was some sort of clerical error as regards the entry of the dates in the occurrence book.

11.4 Having said that, the issue of the alibi is of little consequence in the light of my findings.

12. Conclusion

12.1 I find that **PW1** was inconsistent in her evidence and did little to impress me in her testimony. Her testimony as regards the identification of her attacker being a single identification witness, needed to be corroborated. Her failure to confirm that indeed she was attacked on the material night, by calling Kaumba whom she alleges was the one who apprehended the accused, has made me conclude that her testimony was unreliable.

12.2 The offence of aggravated robbery requires proof that the item was stolen from somebody. In the case in casu, the prosecution has failed to adduce evidence that the said phone was stolen by the accused for reasons already stated.

12.3 Secondly the prosecution must prove that the accused person was either armed with an offensive weapon or was with another person at the time of the attack. I have already stated that there

was no knife that was recovered and even if it was to be assumed that the accused took the knife with him. **PW1**'s testimony alone was thwart with inconsistencies. And furthermore, the absence of corroborative testimony to corroborate **PW1**'s testimony of what transpired that night has raised doubt in the mind of the court.

12.4 Thirdly, the prosecution must prove that there was actual violence or threat of violence. There was no medical report to show the court that **PW1** sustained injury following the attack. This was despite her testimony that her attacker swiped her legs causing her to fall into the drainage, then slapped her and finally used his fist to punch her twice in the face.

12.5 On the totality of the evidence, I find that the prosecution has failed to prove beyond reasonable doubt that the accused, **Paul Tembo** did commit the offence of aggravated robbery and I accordingly find him not guilty and acquit him and set him at liberty forthwith.

Delivered at Lusaka this 27th day of June, 2024.

M.M WINA
HIGH COURT JUDGE