

**IN THE HIGH COURT FOR ZAMBIA**  
**THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
(*CRIMINAL JURISDICTION*)

**HP/90/2025**



**BETWEEN:**

**THE PEOPLE**

**AND**

**AMOS SAMSON PHIRI**  
**NAMAKANDO SONGISO**

**1<sup>ST</sup> ACCUSED**

**2<sup>ND</sup> ACCUSED**

**BEFORE THE HONOURABLE MR. JUSTICE I. M. MABBOLOBBOLO IN OPEN COURT ON THE 5<sup>TH</sup> DAY OF MAY, 2025.**

**For the State:** *Ms. Sikota Mumbula - National Prosecutions Authority*

**For the Defence:** *Mr. C. Bwalya – Messrs Chikafya and Associates*

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**JUDGMENT**

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**A. CASES REFERRED TO:**

1. *Mwewa Murolo v The People (2004) 207*
2. *Attorney General v Kakoma (2008) ZR1 SC*
3. *Kapowezya v The People (1967) ZR 35 (CA)*
4. *Abraham Sinkamba v The People Appeal No.70/ 2023.*

**B. LEGISLATION REFERRED TO:**

5. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
6. *The Penal Code Chapter 87 of the Laws of Zambia.*

1.0. **BACKGROUND**

1.1. The Accused Persons stand charged with the offence of **Aggravated Robbery** contrary to **section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.**

1.2. Particulars of the offence are that Amos Samson Phiri and Namakando Songiso, on the 11<sup>th</sup> day of November, 2023 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst being armed with an offensive instrument, namely machete, did steal a cell phone and assorted clothes altogether valued at K6,000.00, the property of Rocky Kateule and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to Rocky Kateule in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.

1.3. The Accused Persons pleaded not guilty to the charge whereupon the matter proceeded to trial.

1.4. I have, through out trial and indeed at the time of writing this Judgment warned myself that the burden of proving the charge against the Accused Persons lies from beginning to end on the prosecution to prove every element of the offence beyond all

reasonable doubt. If at the end I harbour any doubt as to the guilt of the Accused Persons. I am obliged to acquit. The Accused Persons have no obligation whatsoever to prove their innocence as settled in the case of **Mwewa Murono v The People**<sup>1</sup>.

- 1.5. The offence of **Aggravated Robbery** is found in **Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia**<sup>6</sup> and couched as:

*“Any person who being armed with any offensive weapon or instrument, or being together with one 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.”*

1.6. It is evident from the Section provided above that the State in order to establish the guilt of the Accused Persons must prove the following elements:

- i. That the Accused persons were either working together to commit the offence or were armed with an offensive weapon*
- ii. That something was stolen*
- iii. That at or immediately before or immediately after the time of stealing, violence was used or threatened to be used on the victim or property to prevent it from being retained.*

## 2.0. **PROSECUTIONS CASE**

2.1. In support of the charge against the Accused Persons, the Prosecution called four (4) witnesses. **PW1** was Humphrey Musonda, 24 years old of George Compound in the District and Province of Lusaka. His testimony was that on 11<sup>th</sup> November, 2023, he was at Danny Chishimba's place and whilst there in the boys' bedroom, he heard someone shouting 'Danny, Danny, they will kill me.' That when he came out from the house, he saw two (2) gentlemen and one was holding a machete in his hand.

- 2.2. **PW1** averred that when he looked he saw that Rocky Kateule was being beaten and was looking dirty with soil like he had fallen down. That at that moment Mr. Danny Chishimba came by where he was and that he was running. Further, that before Mr. Chishimba reached where Rocky Kateule was, the one who had a panga (machete) wanted to hit Rocky Kateule with the machete but he ducked. Furthermore, that after the ducking of the machete by Rocky Kateule, that the one who was closer started running away.
- 2.3. It was **PW1's** testimony that he chased the gentleman who was running away until he apprehended him. That after he apprehended him, a lot of people came from their homes. That when the people came out, he held him as they struggled so that he could not run away. Further that at that point, Mr. Rocky came and said that these people had attacked him and got money from him so they needed to be taken to the Police.
- 2.4. It was stated that, that is how Rocky held the man and told **PW1** to go to the road to look for a vehicle. That he found a vehicle and that is how the person who had been apprehended was taken to Matero Police Station.

- 2.5. **PW1** testified that he went back into the house where he was in the boys' bedroom, so that he could collect his phone and follow them to Matero Police Station.
- 2.6. **PW1** then proceeded to identify the first Accused Person as the person he had apprehended and the Second Accused Person as the person who had the Machete in his hand.
- 2.7. In Cross- Examination, **PW1** was asked if he remembered the statement that he gave at the Police Station to which he answered that he did. The Defence further inquired if it was his testimony that two people attacked Rocky, to which he answered in the affirmative. The witness was also referred to his written statement that he gave at the police and that in that statement he said that he saw five (5) people.
- 2.8. **PW1**, reiterated that he told the Court what he saw, further that when he gave his testimony at the Police Station, the written statement was not read back to him. When told that his statement at the Police indicated that he saw five (5) people, the witness maintained that he saw only two people.
- 2.9. The witness was further asked if he was at Danny Chishimba's house and further how many people were in the said house,

**PW1** answered in the affirmative and stated that seven (7) people are known to live in that house that being a couple and five (5) children. He further stated that he was not included in the number of children but was only at the said house in the boy's bedroom waiting for his friend who was taking a bath. The witness when asked how many people were in the house at that time stated that he could not confirm because the boys' bedroom is outside and that is where he was. **PW1** also gave evidence that he was in the same bedroom when he heard someone shout out and bravely ran out. The Defence put it to **PW1** that it was pitch black when the incident happened and in response, **PW1** confirmed that it was in the evening but it was not dark as there was light at the time.

2.10. **PW1**, was asked how many meters away the house he was from the scene of the incident to which he answered that it was about five (5) meters. The witness was asked again to confirm that he saw two (2) people in a scuffle with Rocky, to which he answered in the affirmative. He was further asked if he had an unobstructed view, to which he confirmed that his view was not obstructed at all and he could clearly see Rocky.

2.11. **PW1**, was also asked if he had told Court about the clothing, appearance, built and complexion of the Accused, to which he answered in the affirmative. The witness was asked if he saw

the First Accused swinging a machete, to which he answered in the affirmative. He was also asked to confirm that he saw Rocky on the ground, to which he answered that Rocky was not on the ground but that he was just stooping and being held by the Second Accused Person who did not have a machete.

2.12. He also confirmed that he pursued one of them and left the scene. That he pursued the Accused Person for about 40 seconds and he estimated the distance to be about eight (8) metres. **PW1** conceded that he did not find the phone and money on the Accused Person whom he was holding down until people came. The witness confirmed that he did not witness the First Accused Person being apprehended. **PW1** was sure that other people were not apprehended in place of the attackers because he pursued and caught one and the other was apprehended when Mr. Danny Chishimba came on the scene.

2.13. There was no Re- Examination by the Prosecution.

2.14. **PW2** is the victim named Rocky Kateule, 30 years old, a Machine Operator at Bata Shoe Company of George Compound in the District and Province of Lusaka. His testimony is that on 11<sup>th</sup> November, 2023 he knocked off from work, but that he also runs an online boutique where he sells clothes. That on that very day, he came from collecting money for clothes in town and was going home to Lilanda. That as he passed by the (bus)

station going home, he saw three (3) men following him behind and that the time was around 19:00 hours. That because of the time he did not pay much attention as he thought they were just passing by.

2.15. **PW2** testified that he was stopped by the said men who started asking him for money and when talking whilst walking, the two that were in front of him, held him and started searching him. That because of this he became powerless and could not do anything whilst he was being searched. That in the process, one of the men removed a machete, at which point **PW2** started shouting. Further, that he was heading to Danny's home, so he started calling out Danny's name.

2.16. It was averred by **PW2** that the assailants continued beating him as he was running away. That when he reached Danny's home, there were lights and fearing that they would injure him, he turned at which point Humphrey (**PW1**) and Mr. Danny Chishimba came out.

2.17. It was stated that when Amos, the First Accused Person, missed the victim (**PW2**) with a machete and in fear that he would be injured, **PW2** held the First Accused Person, who got his machete and inserted it in front of his trousers. Further that,

that is how the other three attackers, ran away with a phone; Infinix Note 4 Pro which he had purchased at a cash sum of K3,500.00 and they got money amounting to K2,500.00

2.18. It was averred by **PW2** that when they had apprehended Amos (First Accused) and put him on the ground, Danny Chishimba removed the machete from where Amos had inserted it. That the accomplice whom **PW2** did not know, wanted to go and attack **PW1** about 5 meters from where they were. Further, that the man who wanted to attack **PW1** attempted to run away, but that at about 8 meters, **PW1** managed to apprehend him.

2.19. **PW2** testified that the two persons who were apprehended were put together and a vehicle was searched for so that they could be taken to the Police. That a vehicle was found and **PW1** being the person who found the vehicle and was instructed to keep watch of the vehicle that was parked at the road side.

2.20. It was **PW2's** testimony that the persons who had been apprehended were taken to the vehicle. That at that point **PW1** returned home and was told to follow them to the Police Station because when he returned he found that they had gone.

2.21. It was stated that when they arrived at Matero Police Station, the two persons who had been apprehended were taken inside and they gave out their statements and **PW2** was issued with a Medical Report and that he was told to go to the clinic. He further stated that he was issued with a Medical Report because he had been beaten and his body was aching. Furthermore, that when they reached Matero level one hospital, they gave the Medical Report issued at Matero Police Station to the Doctor. That the Doctor then proceeded to give **PW2** some pain killers and told him that he only had tissue damages.

2.22. **PW2** then proceeded out of the witness box and identified the First Accused Person as Amos and said that he was the one who missed him with a machete and also as the person he had apprehended until Danny came. **PW2** also identified the Second Accused Person as the one who wanted to attack **PW1** and was apprehended by **PW1**.

2.23. **PW2** also positively identified the Medical report that he was issued with at Matero Police Station and the machete he referred to in his testimony.

2.24. It was also testified by **PW2** that he lost in the whole ordeal a sum total of K6000.00 being a cash sum of K2,500.00 and an Infinix phone valued at K3.500.00.

2.25. In Cross- Examination **PW2** was asked to confirm that he suspected three (3) people were following him when he alighted from the bus and to further confirm that it was around 19:00 hours to which he answered in the affirmative. The witness was also asked to confirm that he told Court that when he approached Danny's place there was light and that it was somewhat dark to which he answered in the affirmative and said that there was not much light.

2.26. The witness conceded that he had given a statement at the Police Station in which he told the Police that the persons who were following him were five (5). The witness confirmed that the statement at the Police Station was read to him and he signed it. He however maintained that his testimony in Court was not different from his statement at the Police.

2.27. **PW2**, in further Cross- Examination explained that he told the Police that he knew one person when he disembarked from the bus and that he did not tell the Court in his testimony of this fact. It was also his testimony that he became powerless when he was being searched, this led to a question by the Defence as

to why he had told the Police that he actually resisted, also as to why the two statements were different. To this the witness stated that when the person had removed the machete, he realised that he could be killed or hurt and so he started running. It was then put to the witness that his statement was an afterthought and that the reason he told Court that he had no energy is because he was shown the machete, to which he responded that, when they were searching him at first, they had not removed a machete.

2.28. **PW2** was also questioned how he was able to identify the first Accused person by name, to which he responded that he had known the said Accused Person for three (3) months before the incident of the alleged commission of the crime of the matter before Court. The witness also confirmed that he shouted Danny's name and did not shout Amos's name, the person who was attacking him as he did not think it was prudent to do so.

2.29. It was averred by **PW2** that according to him, a machete can fit in someone's trousers. It was also his testimony that three (3) men followed him and two (2) came in front of him and started searching him. **PW2** was asked if he knew that **PW1** had told Court that he only saw two people because he had told him, to which he answered in the negative. He however agreed that

there was a difference between what he had said and what **PW1** had said.

2.30. **PW2** during Cross- Examination stated that he told Court that three (3) people ran away and they were only able to apprehend two (2) people, he also told court that money was stolen from him. He also gave evidence that when the First and Second Accused Persons were apprehended, he witnessed them being beaten but that he did not take part in the beating. He agreed that it would have been prudent to tell the Court that they had been beaten but that he did not deliberately leave out everything that happened on that day.

2.31. The victim confirmed that he went to the Matero Level One (1) Hospital on the same night of the attack being 11<sup>th</sup> November, 2023, with someone called Mwanza where he was given pain killers and that he went there again the following day on 12<sup>th</sup> November, 2023. **PW2** when referred to the Medical Report conceded that it contained the date of 24<sup>th</sup> January, 2024.

2.32. During Re-Examination the Prosecution asked the victim to clarify the date of 24<sup>th</sup> January, 2024 to which he responded that on 12<sup>th</sup> November, 2023 when they went to the hospital, they were issued with the first Medical Report which did not

have the diagrams/features now contained in the Medical Report and that he was informed that the Court requires these features and that is how he was given the Medical Report bearing that date. Further that, that is the reason why there is a discrepancy between those dates.

2.33. **PW3** is Danny Chishimba, 49 years old, a driver of George Compound in the District and Province of Lusaka. His testimony is that on 11<sup>th</sup> November, 2023 he was in his house when he heard a young man by the name of Rocky (**PW2**) calling out his name. That he peeped through the window and he saw the said young man being attacked. That seeing this, he came out and went to apprehend what he called a “junkie” who was attacking **PW2**. That the said “junkie” that was apprehended by **PW3** had inserted a machete inside his trousers.

2.34. It was testified by **PW3** that when he apprehended the man and tossed him on the ground as he held him, people came. That afterwards a vehicle came and that is how they took him to the Police Station. He also stated that his concentration was on the person he had apprehended, that the person so apprehended was with other friends but his focus was on the one he had apprehended. It was also **PW3**'s testimony that when he threw him down, he got the panga (machete) from him. Further that when people came and a vehicle was found, they took him to

Matero Police together with another person who had also been apprehended.

2.35. **PW3** identified the First Accused Person as the person he had caught and the 2<sup>nd</sup> Accused person as the person who was apprehended by others. The witness then proceeded to positively identify the machete that he had referred to in his testimony.

2.36. During Cross- Examination, **PW3** confirmed that he gave a statement at the Police and also confirmed that he told the Police and Court that he saw people attack **PW2**. He conceded that he did not inform the Court the number of people that attacked **PW2** but that however he saw two people.

2.37. When the witness was asked if he had been informed by **PW2** that he knew one of his attackers, he stated that he was indeed told by **PW2** that he knew one of his attackers but that he was just focussed on the person he had apprehended and that he did not bother to find out which of the two was known to **PW2**. **PW3** also conceded that he did not see the second Accused Person being apprehended because his concentration was on the person he had apprehended.

2.38. **PW3** however, did not agree that the Second Accused Person was just passing by because he went to his home. He denied having beaten the person he apprehended and further stated that he did not see any other person beating up the Accused Persons. He also alluded to the fact that he was with the victim when he apprehended the attacker and other people only came after.

2.39. **PW3** during Cross-Examination informed court that he was told by **PW2** that he had money and a phone that had been stolen but that these items were not found on the First Accused Person and that the only item he found on the aforementioned Accused Person was a machete. The witness further stated that he did not see the Second Accused Person attacking the victim, that however, he does not believe that the Second Accused Person was just passing by because when he was placed in the vehicle that took him to the Police Station he did not say anything.

2.40. **PW3** conceded that he did not tell the Court about the appearance or clothing of the First Accused Person. He also stated that he found the machete in the First Accused Persons trousers and that he saw him attack the victim.

2.41. There was no Re-Examination.

2.42. **PW4** is the Arresting Officer, Silvester Chanda, 36 years old, from Matero Police Station. His testimony is that on 12<sup>th</sup> November, 2023, at around 10:30 hours whilst on duty at Matero Police Station, C.I.D Department, he received a docket of Aggravated Robbery in which male Rocky Kateule aged 29 years at the time (**PW2**), of George Compound was the complainant, who complained to the police that he was attacked, assaulted and his property namely a cell phone being Infinix Note 4 valued at K3,500.00 and cash money in the sum of K2,500.00 were allegedly stolen from him by a group of about five (5) people whom he alleged that one of them was armed with a machete. That at that particular time he contacted **PW2** who informed him that the two suspects were already in police custody and a machete was brought to the police.

2.43. **PW4** testified that he requested **PW2** to go to his office and when he did, the complainant explained to him that he had been attacked in George Compound by a group of people and that he, with the help of other community members, managed to apprehend two people.

2.44. It was averred by **PW4** that investigations were instituted and he proceeded to the scene of the crime where the complainant

alleged to have been attacked from. That in that place **PW4** managed to interview some witnesses among them was Mr. Danny Chishimba (**PW3**).

2.45. Further, that he proceeded to search for the phone that was alleged to have been stolen through Airtel, but he did not receive positive feedback as the phone was constantly off. It was also stated that **PW4** found in the same docket a Medical Report that had been signed by a Doctor.

2.46. An averment was made by **PW4** that he thereafter proceeded to interview the two (2) Suspects who were already in Police custody in connection with the alleged offence of Aggravated Robbery. That he came to know the two (2) males as Amos Samson Phiri and Namakando Songiso.

2.47. It was also stated that when **PW4** interviewed them under a Warn and Caution, they gave a free and voluntary reply denying the allegation as they claimed that they were coming from Buseko Market going to their house at the time they were apprehended.

2.48. Further that, male Amos Samson Phiri (First Accused Person) explained to **PW4** that the two were in the business of making

brooms and that the machete they were found with was used to cut grass. That **PW4** made up his mind to jointly charge the two Accused and arrested them for the subject offence of Aggravated Robbery.

2.49. **PW4** was able to identify the two Accused Persons by their names. The witness further stated that the file was allocated to him on 11<sup>th</sup> November, 2023 and that he was able to identify the Medical Report as it has the names of the victim, Rocky Kateule, a date stamp from Matero Police Station issued on 11<sup>th</sup> November, 2023 and a date stamp from Matero Level one (1) Hospital.

2.50. Furthermore, that the Medical Report had been in his custody and he produced it and has admitted the said Medical Report into evidence as exhibit marked **P1**.

2.51. **PW4** was also able to positively identify the machete which had been in his custody and tendered it into evidence as exhibit marked **P2**.

2.52. During Cross-Examination **PW4** stated that he was told by the **PW2** that he knew one of the Accused Persons before the incident and that he had described the details of that person.

Further, that the victim **PW2** was able to identify his attackers. The witness also stated that he was informed by **PW2** that he was attacked around 19:00 hours. That however **PW4** did not visit the crime scene at night and therefore could not confirm its conditions at night.

2.53. **PW4** also informed Court that the victim informed him that he had been beaten and that he however did not think that the vision of **PW2** was distracted because of the beating. He also stated that none of the stolen items were found on the Accused Persons. It was also his testimony that he did not personally recover the machete from the Accused person as it was brought to the Police Station by the victim, nor did he check for finger prints as the machete had been brought in by the **PW2** and it had been handled by a lot of people.

2.54. **PW4** was asked about the alibi of the First Accused person that he sells brooms at Buseko market and he stated that he carried out an investigation at Buseko Market where the Accused Persons claimed to be well known but that during the investigation he did not take the Accused Persons to the said market. He also stated that the reason he did not take the Accused Persons to the said Market was because they were instances in the past where Accused Persons escaped and he also

stated that usually people who sell brooms come and go and they knew each other. That he however interviewed people at the said market and the people he interviewed said that they did not know the Accused Persons and it was his opinion that the two Accused Persons were not in the business of selling brooms. The witness however conceded that he did not visit the Accused Persons' houses which they said was in George Compound nor did he visit their relatives and that doing so would have shed light on the alibi of selling brooms.

2.55. The witness was asked to confirm that the victim was attacked by five (5) people and not three (3) people to which he stated that the victim told him that he was attacked by five (5) people but that he however only managed to apprehend two. When further asked if he was aware that **PW1** only saw two attackers, he answered that he did not know and he was informed that it was five (5) people. Further that, the statement was recorded by someone else and only given to him as the Investigating Officer and that he contacted **PW2** the same day the docket was handed to him. Lastly the witness stated that he could not confirm whether **PW1**, **PW2** and **PW3** knew each other, nor could he confirm that **PW1** was at the residence of **PW3** on the night of the incident. Further, he was not told by **PW2** that he shouted for **PW3**.

2.56. There was no Re-Examination conducted by the Prosecution.

2.57. At the close of the Prosecution case, I found the Accused Persons with a case to answer and placed them on their defence in accordance with **Section 291(2) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia**<sup>5</sup>.

### 3.0. **DEFENCE CASE**

3.1. The first Accused Person, Amos Samson Phiri, aged 24 years of George Compound (hereinafter referred to as **DW1**) testified that on 11<sup>th</sup> November, 2023, he woke up in the morning and went to Buseko Market to look for piece work for cutting grass and making brooms. That when he got to the said market, he found something to do and he worked until evening when he knocked off.

3.2. It was stated that when he knocked off he started heading back and that as he got to Lilanda market, using a shorter route, he found people were fighting, and when he got closer to see what was happening, those people ran away. That it was at this point that he saw one person hold him and dropped him down and that they started beating him as he heard them say that he was together with friends who had gotten the phone and bag.

- 3.3. It was **DW1's** testimony that he lost consciousness, fainted and only woke up when he was at Matero Police Station. That when he got up, he realised that his hands were handcuffed and his legs were tied together with the other Accused Person's herein. **DW1** stated that from there both were put into Police cells.
- 3.4. It was averred by **DW1** that after two days they were taken to the C.I.D offices where they were beaten with machetes so that they could reveal where the phone and money was. **DW1** stated that he told them that he did not know anything because he just saw those people fighting when he was coming from Buseko Market. Further that, that is how they (Police) wanted him to reveal things that he did not know. That from there they were taken back to the cells.
- 3.5. An averment was made by **DW1** that he saw the machete that was exhibited in Court and that he was able to identify that it has a black handle that is broken and that the blade has rust. Further that, the said machete was his. **DW1** also stated that he heard what **PW1** had said, and that it was not true that he wanted to hit **PW2** with the machete as he did not have the machete in his hands. That he had put it on his hip because when one holds it in the hands, people can think that it was being used for rioting reasons.

- 3.6. Furthermore, that he was using it for cutting straws. He also stated that he only came to know the Second Accused Person when he found himself tied to him.
- 3.7. During Cross-Examination **DW1** was referred to the machete and he was able to confirm that it was his. He also stated that at the time he was being apprehended, he informed the people and Arresting Officer that he had been wrongly apprehended. **DW1** conceded that the issue of being wrongfully apprehended was coming up for the first time but that however it was true and not an afterthought. He further stated that it was not true that he missed the victim **PW2** with the machete.
- 3.8. There no Re-Examination conducted.
- 3.9. The Second Accused person (hereinafter called **DW2**) Namakando Songiso, 22 years old of George Compound in the District and Province of Lusaka. His testimony was that on 11<sup>th</sup> November, 2023 he was at a make shift store that belonged to Blackwell Junior. That he was sent to go and order some cigarettes from Petroda. That when he got to Petroda, he did not find the cigarettes in the shop.

3.10. **DW2** testified that after the foregoing he started going back using the road for George Central. That he saw two gentlemen running behind him, whom he identified as Philly and his friend. **DW2** stated that Philly came and grabbed him and told him to give him the phone as his friend had already been caught. That at this point Philly's friend started searching his pocket he found money in the sum of K280.00 that he was supposed to use to buy cigarettes with.

3.11. An averment was made by **DW2** that it was at that point that he was taken to the house of the person whose phone was stolen. That when they got there, he was taken into the house and whilst in the house, the lady of the house called Emmasdale Police.

3.12. It was stated that when Emmasdale Police came, they handcuffed them together with the First Accused Person. That after they were handcuffed, they were put in the vehicle and taken to Emmasdale Police. That whilst at Emmasdale Police, the Police rejected them saying that the offence was committed in Lilanda and suggested that they be taken to Matero Police Station.

3.13. **DW2** also testified that, that is how they were taken to Matero Police and that when they got there the Police asked the person who took them to Matero Police Station if the two Accused Persons were together, to which it is said he responded that, that is why they had been taken together.

3.14. It was **DW2**'s testimony that one of them (Police Officers) said that the reason they took one of the Accused Persons there is that he was a problem in the compound for stealing pots, that they wanted him kept and not to be released anytime soon. Further, that, **DW2** only knew Philly and that he only saw the other person but did not know him.

3.15. During Cross-Examination **DW2** denied being apprehended together with the First Accused Person. He however admitted being apprehended around 19:00 hours and stated that he was apprehended along George Central. He denied that at that time he and Samson Phiri were with a group of friends.

3.16. It was put to **DW2** that it is not possible to apprehend him and later refuse to place him in their (Police) cells to which he answered that they found the C.I.D who asked the Police Officer who had apprehended them the reason they were taken to Emmasdale and not Matero Police when the crime had occurred in Lilanda. That **DW2** testified that Philly is a person he knew

and he used to be friends with his younger brother. That he is also the person who got the sum of K280.00 from him. Further that he told this information to the Police. He was asked to confirm that the Arresting Officer was not questioned on the aspect of the sum of K280.00 to which he answered in the positive. He however denied being arrested together with the First Accused Person at the scene of the crime and stated that at the time they handcuffed them, the First Accused person was unconscious.

3.17. There was no Re-Examination.

#### 4.0. **CONSIDERATION AND DECISION OF THE COURT**

4.1. I have considered the information, the Prosecution and Defence testimonies. I will proceed to address the elements set out in paragraph 1.6. which the State ought to prove to establish the guilt of the Accused Persons, in the context of the evidence.

4.2. ***(i) Whether the Accused was with one or more other assailants or was armed with an offensive weapon.***

The Prosecution evidence from **PW1**, **PW2** and **PW3** is consistent that **PW2** was attacked by two (2) men outside **PW3**'s house, one of whom was armed with a machete. The First Accused Person also stated that he had the machete with him when he was apprehended and further that, the machete was his. It is clear from the forgoing that this ingredient of the offence of Aggravated Robbery has been satisfied.

4.3. *(ii) Whether something was stolen*

It was **PW2**'s testimony that money amounting to K2,500.00 and a phone valued at K3,500.00 was stolen from him by a group of men. **PW1**, **PW3** and **PW4** also informed this Court that they were told by **PW2** that the aforementioned items were stolen from him. I however note from the evidence that the Accused Persons were apprehended shortly after the incident and did not have an opportunity to dispose of the said items. Further, it is also clear from the evidence of **PW1**, **PW2**, **PW3** and **PW4** that neither the money nor the phone was recovered from either of the Accused Persons. This leads me to conclude that the State has not proved that these items were stolen and indeed stolen by the two Accused Persons herein. This means that the second element of the offence of Aggravated Robbery has not been satisfied.

4.4. ***(iii) Whether violence was used on the victim immediately before or immediately after the time of stealing.***

The Victim, **PW2** testified that when his phone and money were gotten from him, the assailants were beating him and continued to do so until he reached **PW3**'s house where he started shouting **PW3**'s name and he was also threatened with a machete. **PW1** in his testimony informed the Court that he saw one of the assailants with a machete raised against **PW2** and he appeared dirty with soil like he had fallen down whilst being held by the other assailant. **PW3** testified that he was in the house when he heard his name being called by **PW2** who was being attacked by two people and when he came out he apprehended one of them who had a machete.

4.5. **PW4** also produced before this Court a Medical Report being exhibit marked **P1** that was given at Matero Police and taken to Matero Level one (1) Hospital. The said Medical Report revealed that **PW2** had sustained tissue damage from the beating. The third ingredient of the offence of Aggravated Robbery has therefore been satisfied.

4.6. From the evidence it is clear that the assailants were apprehended shortly after the incident and did not have an opportunity to get very far from the crime scene.

4.7. I have also considered the alibis of the Accused Persons. The First Accused Person said that he was a broom maker from Buseko Market and he on the day of the incident saw some people fighting and he intervened. The evidence of **PW4** was that the First Accused Person had told him that he was well known as a broom maker in Buseko Market and that when he investigated, he found that no one knew them in Buseko Market. I find the alibi of the First Accused Person to be an afterthought.

4.8. The Second Accused Person on the other hand gave evidence that he was coming from Petroda where he had gone to buy cigarettes and not finding the said Cigarettes he was going back when he was approached by Philly and his friend who told him that his friend had been apprehended and he should give back the phone. He also stated that the said Philly took the money that was meant for cigarettes in the sum of K280.00 and took him to the victim's house where a lady called the Police who came and took him to the Police Station. Further, that he did not know the First Accused Person and met him for the first time when they were being taken to the Police Station. I equally find the alibi of the Second Accused Person to be unbelievable in that it cannot reasonably be argued that he willingly went to the house of the victim for a crime he did not commit waited for the Police to come to take him to the Police Station. Nowhere in

his testimony did he tell the Court of how he tried to explain his innocence to the lady he alleged called the Police or that he knew nothing about the alleged offence herein. At best his alibi is an afterthought.

4.9. I take comfort with this finding from the case of **Attorney General v Kakoma**<sup>2</sup> where the Supreme Court held that:

***“A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make these findings on the evidence before it and having seen and heard the witnesses giving that evidence.”***

4.10. It is also clear from my findings that the State did not successfully prove the element of theft in the ingredients of the crime of aggravated robbery. The net result of my findings in totality is that the State has not proved the charge of Aggravated Robbery as set out in **Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.**<sup>6</sup>

4.11. The matter does not end there. I opine that this is a fit and proper matter for me to invoke the provisions of **Section 181(2)**

**of the Criminal Procedure Code Chapter 88 of the Laws of Zambia<sup>5</sup>.** For avoidance of doubt the Section provides that:

*“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of a lesser offence although he was not charged with it.”*

4.12.I am further fortified by the case of **Kapowezya v The People<sup>3</sup>** where the **Court of Appeal** stated that:

**“ on the other hand, if it is clear on the evidence that the gist of the principal charge has been proved but that some element is lacking which obviously makes the charge a lesser one, or that there is evidence of some lesser offence which is clearly cognate to the offence charged, it is clearly in the interests of justice that the accused person should not be acquitted but should be convicted upon the lesser charge which is thus clearly proved”.**

In this case as guided by the finding of the Court of Appeal and Section cited above, the Accused Persons are liable for conviction for a lesser offence that is cognate with the offence of Aggravated Robbery for the elements that have been proved.

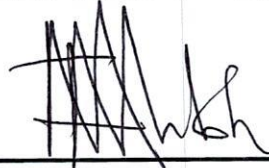
4.13. Further in the case of **Abraham Sinkamba v The People**<sup>4</sup> the Court of Appeal held that:

*“In this case, there is no doubt that the victim was attacked as evidenced by the medical report and the testimony of PW3. There is however, no evidence of a theft. This is because PW3 did not see anything being taken from the victim neither did PW2 recover anything to confirm that the attack on the victim was to facilitate a theft. The Complainant did not come before court to testify to the property stolen. Therefore, we find that there was no evidence to support the charge of aggravated robbery. We instead find that the evidence on record discloses the offence of assault occasioning actual bodily harm contrary to section 248 of the penal code. This is evidenced by the medical report and the testimony of PW1 and PW3”.*

4.14. Following the guidance of the Court of Appeal in the cases above and having found the element of theft was not successfully proved by the state, I find the Accused Persons guilty of the lesser offence of **Assault Occasioning Actual Bodily Harm**

contrary to **section 248 of the Penal Code**<sup>6</sup> based on the evidence before me and I convict them accordingly.

**DELIVERED AT LUSAKA THIS 5<sup>TH</sup> DAY OF MAY, 2025.**

A handwritten signature in black ink, appearing to read 'I.M. Mabbolobolo', is written over a solid horizontal line.

**I.M. MABBOLOBOLO**

**HIGH COURT JUDGE**