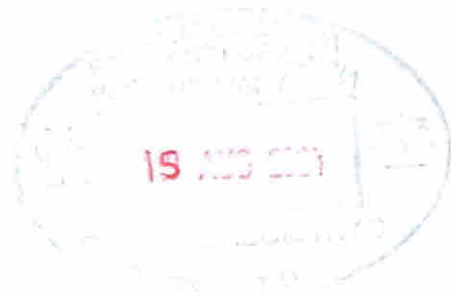


IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/314/2023

**BETWEEN:****THE PEOPLE****VS**

CHRISTOPHER SIMUKWASA
PESULANI NYIRENDA

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE STATE: MR. F.M. SIKAZWE WITH MR. C. NYAMBE OF NPA
FOR THE ACCUSED: MRS. K. BANDA AND MRS. H. BOWA OF LEGAL AID

JUDGMENT

Cases Referred To:

1. *Mwewa Murolo v The People* (2004) ZR 207
2. *Mugala v The People* (1975) ZR. 282
3. *The People v Chimbala* (1973) ZR. 118
4. *Khupe Kafunda v The People* (2005) ZR. 31
5. *David Zulu v The People* (1977) ZR 151 (SC)
6. *Saidi Banda v the People* Appeal No. 114 of 2015
7. *Ezious Munkombwe and Others v The People* CAZ Appeal No. 7, 8,9 of 2017

8. *Ilunga Kabala and John Masefu v The People (1981) ZR 102*

Legislation Referred To:

1. The Penal Code, Chapter 87 of the Laws of Zambia

1. INTRODUCTION

1.1. The Accused persons herein namely; **Christopher Simukwasa and Pesulani Nyirenda** (the 1st and 2nd Accused respectively) stand charged with two counts of the offence of Aggravated Robbery contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.

1.2. COUNT 1

The particulars of the offence are that **Christopher Simukwasa and Pesulani Nyirenda** on the 4th day of August, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and while acting together with others unknown and whilst armed with pistols, iron bars and plunks, did steal one (1) laptop valued at K10,00[0].00, a D.V.R for CCTV valued at K4,800.00 and cash money of USD 1450, UK Pound 4085, Botswana Pula

16,820 and K500,000.00, altogether valued at K920,000.00 the property of **Africa Cargo Carriers** and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence on **Godfrey Mananguso** in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.

1.3 COUNT 2

The particulars of the offence are that **Christopher Simukwasa and Pesulani Nyirenda** on the 4th day of August, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and while acting together with others unknown and whilst armed with pistols, iron bars and plunks, did steal from **Godfrey Munanguso** one shot gun valued at K10,500.00 and an Itel cellphone valued at K1,500.00 altogether valued at K12,000.00 the property of **Pre-Secure Limited** and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence on **Godrey Munanguso**

in order to obtain or retain, or prevent or overcome resistance to its being stolen or retained.

2. PROSECUTION'S CASE

8.1 At trial, the prosecution's case was led by eleven witnesses.

PW1, testified that he is a gunman employed by Pre-Secure Limited. That on 3rd August, 2023, he was working from African Cargo Carriers in the Industrial Area. PW1 testified that his shift started at 17:00 hours and when he got to the premises, he inspected them and ensured everything was fine. He went on to narrate that around 01:00 hours on 4th August, 2023, he heard an alarm go off at Mount Meru, which was neighbouring Africa Cargo Carriers. That he patrolled the premises again and everything seemed ok until he went back to the guard room when he heard two shots on the premises. PW1 testified that when he went outside he found six people who started beating him up. He testified that the six people were wearing masks and so he could not recognise them. He told the Court that after he was beaten up, his hands and legs were tied up.

8.2 PW1 testified that the robbers got his phone and then carried him to their boss' office. That he did not know what the robbers were doing in his boss' office but that he noticed that the robbers carried a metal box and laptops before they left the premises. PW1 testified that when the Director of Africa Cargo Carriers and other employees of the same eventually got to the scene of crime in the morning, he was untied and they started inspecting the place. That they followed footprints that led them to a drainage where the robbers are suspected to have entered and exited from. The witness testified that he was taken to the Police Station and gave his statement. PW1 testified that his firearm was also taken by the robbers but that he discovered that it was recovered the same day.

8.3 Under cross-examination, PW1 testified that Africa Cargo Carriers is monitored by CCTV and that the whole incident took about 30 minutes. That although he saw 6 people, he did not describe what they were wearing nor has he given a description of the type of shoes they were wearing. PW1 testified that he was not aware that the 2nd Accused was paralysed on one side of the body.

8.4 PW2 gave evidence that on 4th August, 2023, at 03:30 hours, he received a call from Pre-Secure informing him that they had received a call from one of its clients; Africa Cargo Carriers, informing them that there was a break in at their premises. PW2 testified that when he got to the scene of crime, he found one of their guards, PW1, and their truck driver. Whilst there, PW1 stated that Police Officers from Mumbwa Police Post also arrived.

8.5 PW2 testified that when carrying out the inspection at the premises in the presence of police officers and PW1, they noticed that most office doors were broken. That they also realised that a D.V.R and meter were missing from the server room. That they further discovered that the robbers entered and exited from the drainage. It was his testimony that when they watched the CCTV footage, he saw 6 men wearing masks walking along the wall fence to the main offices. That the pictures were not very visible because the D.V.R was disturbed. PW2 stated that of the 6 men, one was carrying a safe, another was carrying a monitor screen and the other a bag. PW2 testified that all the 6 were wearing masks but that

one was limping. That in the footage, they saw the men go to the drainage and exit the premises.

8.6 PW2 testified further that around 07:00 hours, he received another call informing him that they had discovered some shoeprints and that he should go and help trace the said shoeprints. That they followed the said shoeprints which led to an empty shop where they found the safe that was stolen. PW2 went on to testify that him and the people he was with continued following the shoeprints which then led to the 1st Accused's house. PW2 testified that he informed a Police officer that they found shoeprints leading to a house. That when the said Police officer knocked on the door of the house where the shoeprints led, there was no answer. He testified that they later discovered that the owner of the house was taking a bath when they had knocked the first time. PW2 testified that the young man was informed that shoeprints from Africa Cargo Carriers led them straight to his door step. That the officers then searched the young man's house and found black canvas which were wet with some mud on them. That they got the said shoes and compared its print to the one

they had followed from African Cargo Carriers and discovered that they matched. It was testified that the young man denied ownership of the shoes stating that they belonged to his nephew who had passed through his house earlier that morning to change his shoes. That the nephew then went to the barbershop. PW2 testified that they went to look for the nephew at the said barbershop but found it locked. PW2 testified further that the young man went to the police with PW2 to give a statement and that later, his mother followed with his nephew. PW2 told the Court that when the nephew was shown the pair of shoes that was recovered at the young man's house, he admitted as being the owner of the said shoes. PW2 identified the 1st and 2nd Accused persons, the shoes referred to herein as well as the Safe.

8.7 When cross-examined, PW2 admitted that the ground at Africa Cargo is covered with concrete but that there was dust on the said concrete and that shoeprints were therefore visible. PW2 testified that they followed the said shoeprints to the Accused's house. PW2 admitted that a lot of people follow the said route and that he did not know how busy the route was. PW2 also

acknowledged that there was no wall fence at the same house making it possible for other people to pass through the said yard. PW2 also testified that he did not know that the said shoe was common. Further that on the day they recovered the shoe, they were wet and had mud underneath them. PW2 conceded that the shoes had no mud when presented to him in court. PW2 also admitted that nothing else was recovered from that house apart from the shoes.

8.8 PW3, the Operations Manager at Africa Cargo Carriers Limited testified that on 3rd August, 2023, around 17:30 hours, the premises were locked and handed over to Pre-Secure as Africa Cargo Carriers employees knocked off. He went on to tell the Court that he received a call from their Director around 03:00 hours on 4th August, 2023, informing him of a break-in at the office. PW3 testified that he rushed to the offices and found the Director, Police Officers as well as the security personnel from Pre-Secure.

8.9 The witness gave evidence that when they entered his office, they discovered that the safe was open, and that the DVR had been taken out since they have CCTV at the premises. PW3

then went to the Police Station to give a report on what was missing at the office which included a laptop, a cell phone, a DVR, a monitor and some money and a safe where the money was kept.

8.10 PW3 went on to testify that he received another phone call informing him that the safe and a firearm that was gotten from the security guard were found near the office premises. He stated that he rushed to the said place and when he got there he found the two safes open and empty.

8.11 PW3 testified that when they went back to the office, they found one DVR intact and that when they watched the footage, they saw six people who broke the wall fence from the bottom corner allowing them to gain access into the yard. That after about an hour, the footage shows the six men leaving with a safe, a laptop and monitor exiting from the same place they entered from. PW3 identified A1 as having been apprehended by the Police as a suspect and the two safes. He testified that he could not identify anyone from the footage because the six men wore masks but that one of them was limping. PW3 testified that the person he saw at the Police Station had a

disability as one of his hands was not fully functional but that the one he saw in the footage was limping.

8.12 Under cross-examination, PW3 confirmed that the six criminals broke the wall and that he saw six men on the CCTV footage. Further that the one person out of the six with the peculiar stature was able to use both hands as per the CCTV footage but that the person he saw at the Police Station was unable to use both hands freely like an able-bodied person.

8.13 PW4, a Police Officer, testified that on 4th August, 2023, he was preparing to knock off from night shift when he received a call from Detective Sergeant Simasiku around 07:00 hours informing him of a safe and firearm that had been dumped by unknown criminals near Mushe Milling Company in Garden House. PW4 told the Court that Detective Segeant Simasiku sent him a phone number of a lady who was at the scene. He testified that he went to the scene in the company of two neighbourhood personnel. That he found a safe in the middle of the road when he reached the said lady's house which was along the said road. That when he asked her questions concerning the said safe which was found along the road, she

refused to answer any questions. Further that he found two men at the scene who took him to a house opposite the lady's house where he recovered a firearm. PW4 testified that he deposited the firearm and the safe at the Station and knocked off. PW4 identified the firearm and Safe. He testified that the owners of the house where he found the firearm declined to say anything.

8.14 Under cross-examination, PW4 testified that Detective Sergeant Simasiku gave him a number of a certain lady but that he did not get any of her details because she refused to give him her name. Further PW4 admitted that he found two men at the scene who took him to the house where the firearm was recovered. When asked whether he inquired from the two men how they knew about the place where they found the firearm, PW4 testified that he supposed that the two men were the owners of the house. PW4 stated that he did not get the names of the two men. PW4 testified that his role ended at the point where he recovered the firearm.

8.15 PW5, a Detective Constable, told the Court that he is a crime technician with a Certificate in scene management and

evidence collection. He also stated that he is trained in photography, handwriting and fingerprint collection.

8.16 PW5 testified that on 4th August, 2023, whilst on duty, he was informed that there was a report that criminals broke into Africa Cargo Carriers Limited company premises and stole a number of items which included a monitor, one HP laptop, one iPhone 13, a DVR CCTV system and money all valued at K920,000. That the incident happened around 03:00 hours on 4th August, 2023.

8.17 The witness testified that as a scenes of crime officer, he went to the scene of crime with a Panasonic camera 1920x1080 model full HD, 1 memory card 32 GB property of the Police. PW5 testified that the purpose of the crime scene visit was to manage the scene and identify physical evidence and clues right at the scene.

8.18 PW5 testified that he discovered that the criminals broke into the administrative offices using metallic or iron bars. He stated that he also discovered an open window in the administrative block where iron bars were cut off to gain access to the offices through the windows. PW5 testified that

doors were also damaged in the process. Further that he saw a shoeprint which was pressed at the door of the accounts office of the same building. That the said shoeprint was also seen at different doors and also outside the offices within the company premises and that there were several shoe prints of the same type of shoe being spotted within the company premises. PW5 told the Court that he trailed the shoeprint which was leading to a drainage.

8.19 PW5 gave evidence that he was informed by Constable Mwamba of Mumbwa Road Police Station and other security officers who were the first responders to the scene that they followed the trail which led them to a secondary scene where a safe and gun were recovered. He testified that he was availed black canvas shoes which were discovered by the said officers. That the print he had earlier seen at the initial scene of crimes matched the print on the shoe he was given. That it was the print on the shoe that led them to the house where they managed to recover the shoe and apprehended the owner of the house. PW5 testified that he took photos of the scene and also followed the trail of the same shoe to the drainage to the

secondary crime scene which was about 50 metres apart. PW5 went further to testify that there was a distance of about 100 metres between the place where the firearm and Safe were recovered and the house where the shoes were found.

8.20 PW5 testified further that after analysing the shoe and comparing it with the footprints he had earlier seen, he handed it over to Detective Kosamu who was the arresting officer in the case. The witness testified that he developed the photos and that he was the only one with access to them. PW5 produced the photographic album as part of his evidence. PW5 also identified the shoes in question.

8.21 Under cross-examination, PW5 testified that he did not know whether or not the said shoes were common. That the similarities of the shapes and marks on the shoe made him believe that they belonged to the Accused. PW5 testified that he did not find the suspects at the scene of crime. PW5 conceded that the shoeprints at the secondary scene could not easily be seen and that he was unable to see the shoe prints 100 metres from the secondary scene. He also stated that the first responders were the ones who recovered the shoe and

that he was not there at the time of recovery. That he was part of the group that went to the scene of crime the second time. PW5 told the Court that there was no possibility of planting the shoes at the scene of crime as there was a team of police officers and security guards at the material time. PW5 also testified that one of his duties was to collect fingerprints and that he did collect fingerprints but that they were only scratches and so they were discarded.

8.22 PW5 went further to testify that although there were 6 criminals that broke in, only one shoeprint was very visible. He further stated that the terrain of the road leading to the secondary scene and eventually to the house of the Accused persons was very sandy and that he only went to the scene of crime 7 hours after the crime was committed. PW5 admitted that several other people used the same route as it was a public road. When referred to page 19 of the photographic album he produced, PW5 conceded that there are no shoeprints there and that there is nothing to show shoeprints at the Accused house in his photographic album. Further that there was no other shoeprint leading to the Accused's house.

8.23 PW7, a Police Constable, testified that on 4th August, 2023, whilst on duty, he received a report of aggravated robbery that was committed at Africa Cargo Carriers Limited company premises. He testified that around 07:00 hours, he received a call from a security officer to inform him that a safe and firearm were recovered in a nearby compound. That when he got to the scene of crime, he discovered shoeprints and that the same shoeprint had mud from a drainage where the criminals had accessed the premises. PW7 testified that he decided to follow the shoeprint which led them to the house of the 1st Accused person. The witness testified that he cautioned the 1st Accused and asked him about the shoe which he denied knowledge of until PW7 asked to search the house and found it. That the shoe was found in the cupboard with the same mask found at the scene of crime. PW7 testified that it was at that point that he picked the shoes and took the 1st Accused to the police station. PW7 identified the 1st Accused person and the shoes in question. He testified that the shoes had traces of mud on them.

8.24 Under cross-examination, PW7 testified that he was aware that the scenes of crimes officer had already testified and conceded that the scenes of crime officer was better placed to report about the shoeprints. He also testified that he was informed that the scenes of crimes officer could not clearly see the shoeprints. PW7, however, maintained that he saw the shoeprints up to the door step of the 1st Accused's house. That there was wind on that particular day but that he was not sure whether or not there was soil erosion. PW7 told the Court that he did not go to the scene of crime with the scenes of crime officer but that he was amongst the 1st responders. He conceded that he did not have a search warrant and that the only evidence that he had against the 1st Accused was the shoeprint. He admitted that the shoe in question was common.

8.25 PW8, a student at Makeni Islamic Trust testified that on 4th August, 2023, he woke up early at around 05:00 hours to prepare for school, he went outside the house to draw water and to visit the toilet when he saw two things that looked like boxes. That after using the toilet, he decided to take a closer look at the items and discovered that they were two open safes.

He stated that there was nothing in the smaller safe and a firearm in the bigger safe. He testified that he removed the firearm from the bigger safe and took it to his house then notified the owners of the shops on whose ground the items were discovered. That the shop owners advised that the safes be moved to the road side which he did. PW8 also testified that he called his father for guidance and that his father then called the police who later went to the scene. PW8 testified that two officers went to the scene and he showed them where he had kept the firearm and that they got the safes too. PW8 testified further that one of the officers started following shoeprints in the company of PW8 as the first witness. That the said shoeprints led them to the 1st Accused's house which was a distance of about 200 metres from where the safes and firearms were found.

8.26 PW8 gave further testimony that the officer did not find anyone at the said house but went in to search for the shoe which they found and got from the house. That the officers then asked neighbours where the owner of the house was and they were informed he was taking a bath. PW8 testified that at

the time the officers found the shoe, the owner of the house emerged from the back of the house where he was drawing water. That there were about four to six officers when they found the pair of shoes. PW8 told the Court that the 1st Accused was then apprehended and questioned. He testified that the officers, himself and the 1st Accused were then taken to the police station where he and the 1st Accused gave statements. PW8 was allowed to go home after he gave his statement. PW8 identified the safes, firearm and shoes. He also identified the 1st Accused person.

8.27 Under cross-examination, PW8 testified that he has not done any course in firearms and that he was scared of handling the firearm even though he took it inside his house. That he took the firearm inside the house for security reasons and for the safety of the community. He testified that he did not know whether the firearm had bullets or not. When asked whether he is in fact the one that committed the offence, PW8 testified that he had no reason to accuse the Accused persons. He testified that the police searched his house as the Police Officers suspected him of being one of the robbers. PW8

testified that he did not know whether he entered the 1st Accused's house with the police or not.

8.28 PW9, an Inspector, testified that when he reported for work on 4th August, 2023, he was briefed by the officer who was in night shift of the incident and was handed over items that were recovered from the scene. He testified that one suspect, the 1st Accused, was handed over to him and that later in the day members of the public brought in another suspect, the 2nd Accused herein. That he then transferred the docket to Kanyama Police Station and handed over the exhibits as well as the suspects to the Detective Chief Inspector at Kanyama Police Station for further investigations. PW9 identified both Accused persons.

8.29 PW10, an I.T. consultant testified that on 4th August, 2023, he was called in by the Director of Africa Cargo Carriers to extract a video surveillance footage from the system of the same date. He stated that he extracted the video footage from the digital camera recorded at the workshop which he saved on a flash drive and handed over to the investigating officer under the instructions of the Director. PW10 gave evidence

that the video showed men wearing masks gaining access to the premises through a drainage. That the men were in hoodies and gloves and the video also shows them exiting the premises through the same drainage. The flush containing the footage was produced as part of the prosecution evidence.

8.30 Under cross examination, PW10 testified that all the people he saw in the footage were wearing masks and so he could not identify any of them. He stated that he did not know the Accused persons and admitted that he was able to edit the videos.

8.31 PW11, a Detective Chief Inspector, stated that he is a Criminal Investigations Officer based at Kanyama Police Station. He testified that on 4th August, 2023, around 08:00 hours he received a report of an aggravated robbery reported from Plainview Police Post under Kanyama Police Station. PW11 told the Court that he carried out investigations into the matter together with other officers. That when they went to the scene of crime, they confirmed that the drainage was open and that the pipes that were there were damaged and removed. PW11 testified that he then observed shoeprints all over the

scene and going towards a compound called Garden Park. He stated that he learnt that a team of officers from Mumbwa Road Police Post and Plainview Police Post and some security guards from Pre-Secure where the first to visit the scene of crime and that they had already recovered the safes, black canvas and a firearm which had five bullets. That the shoes recovered had the same print as the one at the scene of crime. Further that the same shoeprint led the officers to the 1st Accused's house. PW11 further testified that since he discovered that there were three scenes which included the company premises, the unfinished building in the compound where the safes were found and the house occupied by the suspects, he decided, together with his team, to follow the shoeprints which were very visible from the main scene to the unfinished building where the safe and firearm were recovered. He testified that the shoeprints were, however, not visible from the unfinished building to the house of the 1st Accused as they were being blown away by the wind and that a lot of people had used that route at the time.

8.32 PW11 testified that PW9 transferred all the exhibits and the two suspects to his station for further investigations. He testified that since the two suspects did not give him satisfactory responses, he charged and arrested them for two counts of aggravated robbery. That the accused persons denied the charges.

8.33 PW11 testified that he kept all the exhibits as part of his evidence and also received a CCTV video footage which he watched but could not identify anyone as the people in the footage were wearing masks and covered their heads. PW11 identified the two accused persons.

8.34 Under cross-examination, PW11 testified that there were several shoeprints from the main scene to the second scene and that the shoeprint from the second scene to the 1st Accused's house was not clear. He testified that the shoeprint in question had special marks and that he had never seen them before making it rare. PW11 told the Court that he arrested the accused persons herein based on the evidence presented to him by people that had visited the scene before he did and the shoeprint that led to the 1st Accused's house

even though the said shoeprint was unclear from the second scene to the accused's house. He admitted that he did not have a search warrant as there was no time to ask for one.

8.35 Under further cross-examination, PW11 testified that his duty was to carry out investigations and that he did not know that the owner of the incomplete building where the safe and firearm were found was a Mrs Daka. PW11, however, maintained that even if he did not know this, his investigations were conclusive. That it was not necessary to know Mrs Daka unless she was connected to the crime. That he interviewed people around that area including PW8 who found the safes and firearm but that he did not search PW8's house. P11 also testified that he did not produce any finger-print evidence. The witness also testified that he ruled out the 2nd Accused's alibi. That the shoes in question presented to him as evidence were dry and had no mud on them. PW11 also admitted that extract of call records do show the whereabouts of a person and that he investigated with network providers but did not see anything worth presenting to court.

8.36 Under re-examination, PW11 testified that he interviewed the owner of the house where the 2nd Accused person is alleged to have slept but that the said person did not know whether the 2nd Accused slept at his house as he just left him with the house keys. That there was therefore nothing else to clarify on whether or not the 2nd Accused slept at his (DW3's) house.

9. CASE FOR THE DEFENCE

3.1. At the close of the Prosecution's case, the Court found the 1st and 2nd Accused with a case to answer and put them on their defence. The 1st and 2nd Accused elected to give evidence on oath. DW1, the 1st Accused herein, told the Court that he is a 43-year-old businessman who sells car spares. He testified that on 4th August, 2023, he was getting out of his bathroom, around 07:30 hours, when he saw five people standing on his veranda. That as he was about to enter his house, he saw three police officers whom he did not know. DW1 testified that he was apprehended and taken inside the house where he was beaten and asked where the money was and where he was the previous night. He responded stating that he was asleep at his house and was wondering which money they

were asking about. He testified further that the Police beat him up and searched his house until they found a shoe belonging to his nephew, the 2nd Accused herein. He testified that he informed the Police that he lived with the 2nd Accused and that he was handcuffed and asked to take them to where the 2nd Accused was. That when they got to the 2nd Accused's barbershop, they found it closed and the 1st Accused was first taken to the Lumumba Police Post where he was whipped before being transferred to Plainview Police Post. That the 2nd Accused went to the Police Post on his own and the two were then transferred to Kanyama Police Station.

3.2. DW1 testified that when the Police officers searched his house, they only picked his phone and black canvas with a white heel. He testified that the day he was picked up, he knew that the 2nd Accused had gone to spend a night at one David Chipango's house. The witness told the Court that he did not know anything about this case. He testified that he heard the prosecution witnesses say the robbers passed through a drainage but that the shoes found at his house had no mud at all.

3.3. Under cross-examination, DW1 testified that he slept at his house alone. He testified that he never wore the shoes in question as they belonged to his nephew, the 2nd Accused who did not sleep at his (the 1st Accused) house on the night in question. Further that it was not true that the shoes were wet. He told the court that he did not know Africa Cargo Carriers Company and therefore did not know whether or not it was near his house. He conceded that since he was alone that night, there was no one to attest to his whereabouts that night. DW1 denied having worn the shoes in question.

3.4. DW2, the 2nd Accused herein, told the Court that he was a barber man and that on 4th August, 2023, he went to his barbershop early morning but found a power outage. That he remained in his shop and started watching a movie using his phone when he received a call from his sister informing him that police officers were looking for him. DW2 testified that he asked his sister and a church member to accompany him to the Police Station where he was detained. That him and his uncle, DW1, were later taken to Kanyama Police Station where he was beaten. He stated that when asked where he

was the previous night, he told the Police that he was at his friend's house.

3.5. That the following day, he was asked to pick up a phone and that when he wanted to use the left hand that he uses, he was instructed to use his right one instead. DW2 testified that he informed the Police officers that his right hand was paralysed and that he had never used it. DW2 denied having committed the offence charged as he was at his friend's house. DW2 admitted that the shoes in court were his shoes. DW2 testified further that he was not the one carrying the laptop in the video as he was not there.

3.6. Under cross-examination, DW2 denied being part of the criminals that stole at Africa Cargo Carriers offices. He denied being the one seen limping in the said CCTV footage. He went further to state that on the night in question he was at his friend's house and was alone as his friend was not there. He admitted that no one could attest to the fact that he spent a night at his friend's house. That he was shown the shoes in question at the police station and that they had no mud on them. DW2 admitted that the Police tried to ascertain

whether or not his right hand works. He conceded that he swore on the bible using his right hand and stated that he can do a few things with it but not carry items using it.

3.7. DW3, testified that on 3rd August, 2023, he received a call from his client requesting him to go fit tiles. He stated that he called the 2nd Accused to go spend a night at his house since he would not be around and the 2nd Accused agreed. DW3 told the Court that the 2nd Accused is a deacon and elder at Jesus Church International. DW3 testified that he asked the 2nd Accused to go spend a night at his place because he has stayed with him before and has known him for a long time.

3.8. DW3 testified that around 20:00 hours the 2nd Accused called him on his cell phone and as they were talking DW3 informed the 2nd Accused that he had left some food for him as he knew that he could not cook. That the two spoke for about an hour. DW3 testified that the following morning, he received a call from the 2nd Accused who told him that he had left the house as he was informed that police officers had picked up his uncle, the 1st Accused herein. DW3 testified that he had to

go collect his house keys from the Police Station as the 2nd Accused had been arrested.

3.9. Under cross-examination, DW3 testified that he was in Chilanga on the night that the 2nd Accused slept at his house. That he knew that the 2nd Accused slept at his house because they spoke on the phone for about an hour but conceded that he was not with the 2nd Accused on the night in question. That he therefore could not dispute the assumption that the 2nd Accused could have gone to steal later that night.

3.10. Under further cross-examination, DW3 testified that he did not sign for his house keys when he went to get them from the police station and that he was not aware that he had to sign for them since he got them from a suspect. Further that he did not have any evidence to show that he went to get keys from the 2nd Accused when he was detained. DW3 testified that he knew that PW11 was the arresting officer but that he was not aware that the said arresting officer did not testify on the issue of keys. DW3 disputed having fabricated the story.

4. SUBMISSIONS

No written submissions were filed by both parties.

5. CONSIDERATION AND DECISION

5.1 It is trite law that the prosecution must prove its case beyond all reasonable doubt. The Supreme Court in the case of **Mwewa Murolo v The People (2004) ZR 207¹** held as follows:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.”

5.2 I have carefully considered the evidence on record. The Accused persons herein stand jointly charged with two counts of the offence of Aggravated Robbery contrary to Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia, which provides that:

“294. (1) 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.

5.3 I am guided by the Supreme Court decision of **Mugala v The People (1975) ZR. 282²**, where it was held as follows:

“To prove a charge of aggravated robbery in terms of section 294(1) of the Penal Code, Cap 146, it is necessary for the prosecution to show that the violence was used in order to obtain or retain the thing stolen”.

5.4 I have also addressed my mind to the case of **The People v Chimbala (1973) ZR. 118³**, where the Supreme Court held

obiter as follows:

“It is necessary under a charge of Aggravated Robbery to prove that the taking and force used or threatened contemporaneous with the taking was accompanied by an intent to deprive the owner permanently of the thing stolen”.

5.5 In the present case, the evidence before me is that on 4th August, 2023, around 01:00 hours, 6 masked robbers broke into the premises of African Cargo Carriers in Industrial area of Lusaka. According to P6, a CCTV footage, the robbers were seen gaining access to the said premises through a hole

drilled in the bottom corner of the wall fence. The evidence shows that at the said premises, the robbers beat up and tied the hands and legs of PW1, the security guard on duty and stole his phone. The evidence on record goes on to show that the items stolen by the said robbers on the premises that night included a monitor, one HP laptop, one iPhone 13, a DVR CCTV system and money all valued at K920,000. In view of the foregoing, I am satisfied that the offence of aggravated robbery was committed.

5.6 The issue that I have to resolve is whether or not there is sufficient evidence on record to prove that the two accused persons herein, were among the 6 masked robbers who played a role in the commission of the offence. The prosecution evidence shows that shoe prints were trailed from the Africa Cargo Carriers premises to the two accused person's residence. In fact, the shoe trail first led PW1, PW2, PW3 and others to a secondary scene where a safe and a gun that was stolen from PW1 was recovered. From there, it led them to the two accused person's residence. At the said residence, a shoe (P2) that matched the shoe prints trailed

from the crime scene was found, wet and with mud. P5 shows the presence of the said shoe prints both on the premises and outside the premises where the robbers exited from. I am quick to mention here that PW1, did not describe the kind of shoes that the robbers were wearing. The CCTV footage is also not helpful in this regard. That notwithstanding, an examination of P2 shows that it matches the shoe print captured at the crime scene.

5.7 It is uncontested that the said shoe, P2, belongs to the 2nd Accused, who is the 1st Accused's nephew. I must, however, stress here that there is no evidence to show that attempts were made to find out if the 2nd Accused could fit in the said shoes. Both accused persons deny that P2 had mud on it.

5.8 From the above evidence, it is clear that the evidence connecting the 1st accused person to the subject offence is partly circumstantial evidence. I say so because no one saw the accused persons at the crime scene neither have they been identified as the ones who wore masks in the CCTV Footage. There is however, evidence of a disabled person who was limping in the said CCTV footage, from which in my view,

an inference can be made that it was the 2nd Accused, who is also disabled and limping, coupled with other evidence of the shoe print at the crime scene leading to A1's house where A2 was also staying. The Supreme Court of Zambia has provided sufficient guidance on when a Court can competently convict a person based on circumstantial evidence. In the case of **Khupe Kafunda v The People (2005) ZR. 31⁴**, it was held as follows:

“There was no direct evidence and no eye witness to the incident that led to the death of the deceased. However, the circumstantial evidence was so overwhelming and strongly connected the appellant to the commission of the offence”

5.9 Further, in the case of **Ezious Munkombwe and Others v The People CAZ Appeal No. 7, 8,9 of 2017⁷**, the Court of Appeal guided that when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the Appellant must be looked at in their totality and not individually. In this particular case, there was more than just circumstantial evidence.

5.10 I propose to start with the 2nd accused person. The evidence connecting him to the subject offence is that he is the owner of the shoe which matched the shoe prints that were trailed from the crime scene to his uncle's residence (1st accused's residence). I already found earlier in this Judgement that the 2nd accused's shoe (P2) matched the shoe prints at the crime scene. The defence in its cross examination suggested that the said shoe was common.

5.11 This Court finds it as an odd coincidence that the 2nd accused had a shoe which matched the shoe prints that were trailed from the crime scene to the house where the 2nd Accused used to reside with his uncle, the 1st accused. There is no evidence of any other person having such shoes at that particular house. The prosecution evidence shows that the robbers could be seen passing through a drainage and that (P2) shoes was found wet and had mud underneath it. Both accused persons denied that P2 shoes had mud. PW11 also testified, during cross examination, that the shoes (P2) he produced in court, as part of his evidence were dry and had no mud on them. As regards the absence of mud on P2, at

the time it was produced in Court, I am cognizant of the time frame that passed from the time the said shoe was collected and produced in Court. My view is that it is not inconceivable that traces of mud underneath P2 shoes could have fallen off due to time. In addition, I find no motive on the part of the prosecution witnesses to concoct their version. I am therefore inclined to agree with the prosecution witnesses that P2 shoes was found wet and with mud underneath. This therefore means that P2 shoes had been worn that night.

5.12 It is trite law that odd coincidences can amount to corroboration if unexplained, as held by the Supreme Court in the case of **Ilunga Kabala and John Masefu v The People (1981) ZR 102⁸**. In the present case no explanation has been proffered by the 2nd accused person regarding how his shoes, which was wet and had mud underneath, had its prints trailed from the crime scene to his residence. In the absence of an explanation, this will be taken as corroborating evidence. Additionally, the condition of P2 shoes at the material time and the absence of any other similar shoe

prints, rules out the possibility of any other shoes, other than P2. It follows therefore that P2 was the shoe whose prints were trailed from the crime scene to the residence of both accused persons.

5.13 The 2nd Accused claimed that unlike one of the robbers seen in the CCTV Footage who was limping, he was paralysed one side and that his right hand cannot function properly. He conceded that he was able to lift the bible in Court using his right hand. No form of medical evidence was adduced to support this claim. As per the case of **Mwewa Muroho v the People (Supra)**, the 2nd Accused bore the burden to adduce evidence to support his claim that his right hand does not function properly but he failed to do so. This Court finds it as another odd coincidence that while the CCTV footage shows that one of the robbers could be seen limping, the 2nd accused person whose shoeprints were trailed from the crime scene, also has a form of physical disability which translates into some sort of limp.

5.14 When all the strands forming part of the circumstantial are put together, they point to one thing, the guilt of the 2nd

accused herein. I therefore find that there is sufficient and cogent circumstantial evidence pointing to the guilt of the 2nd accused person. I thus find that the prosecution has successfully proved a charge of aggravated robbery against the 2nd accused.

5.15 The 2nd accused in his defence raised an alibi claiming that on the material night, he had gone to spend a night at his friend's house, DW3. DW3 confirmed the same but conceded that the 2nd Accused person spent a night alone and he therefore could not tell if the 2nd accused went out that night. My view is that this alibi does not help the 2nd accused as he had both the time and the opportunity to commit the subject offence. He has not shown how far DW3's place was from the crime scene nor shown that it was impossible for him to commit the subject offence on the material night. As rightfully conceded by DW3, the 2nd accused was alone that night and no one could speak to what he could have done that night. The alibi therefore fails.

5.16 Reverting to the 1st accused, I am of the considered view that the only evidence connecting him (the 1st accused) to the

present case is that P2, whose prints were trailed from the crime scene were found in his house. In his response he explained that the shoe belonged to his nephew, the 2nd accused, who also confirmed the same. There is nothing else such as evidence of any recoveries made from his house. It is this Court's view that there is no sufficient evidence pointing to the guilt of the 1st accused person. I therefore find that the circumstantial evidence in this case has taken the case out of the realm of conjecture and attained a degree of cogency that only permits an inference of guilt. It is my finding that the prosecution has not proved the charge of aggravated robbery against the 1st Accused person beyond all reasonable doubt.

5.17 In view of the foregoing, I find the 1st accused person not guilty and I acquit and set him at liberty forthwith. I however, find the 2nd accused guilty of two counts 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 him accordingly.

5.18 Parties are informed of the right to appeal to the Court of Appeal within 14 days of this Judgement.

Delivered at Lusaka this ^{15th}.....day of August....., 2024.



.....
ELITA P. MWIKISA
HIGH COURT JUDGE