

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

HP/04/2020

04 APR 2020

BETWEEN:**THE PEOPLE****AND**

**MICHEAL NKHOMA
DERRICK MBEWE
GEORGE SHUMBA**

Before : **R. Chibbabbuka J.**

For the State : **Mr. S. Phiri State Advocate, National Prosecution Authority**

For Accused : **Mr. B. Banda, Senior Legal Aid Counsel, Legal Aid Board**

JUDGEMENT

Cases referred to

1. *Toko vs The People* (1975) ZR 196 (SC)
2. *Mtonga & Another vs The People* SCZ Judgment No. 5 of 2000
3. *Ilunga Kabala & John Masefu vs The People* (1981) ZR 102

INTRODUCTION

The accused persons stand charged with eight counts of aggravated robbery contrary to *Section 294 (2) of the Penal Code, Chapter 87 of the Laws of Zambia.*

In count one, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbeve (A2) jointly and whilst acting together with other persons unknown and whilst armed

with an AK47 rifle did steal K4,600.00 at M & C minimart, the property of Moses Zulu and immediately before or after the time of such stealing did use or threaten to use actual violence to Anabell Kennedy in order to prevent or overcome resistance to its being stolen.

In count two, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbewe (A2) jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle did steal 1x tablet phone valued at K1,000.00 the property of Elvis Masambo and immediately before or after the time of such stealing did use or threaten to use actual violence to Elvis Masambo in order to prevent or overcome resistance to its being stolen.

In count three, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbewe (A2) jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle did steal K1,500.00 cash the property of Chilufya Mubanga and immediately before or after the time of such stealing did use or threaten to use actual violence to Chilufya Mubanga in order to prevent or overcome resistance to its being stolen.

In count four, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbewe (A2) jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle did steal an Itel phone valued at K1,500.00 the property of Everisto Chitendwe and immediately before or after the time of such stealing did use or threaten to use actual violence to Everisto Chitendwe in order to prevent or overcome resistance to its being stolen.

In count five, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbewe (A2) jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle did steal a handbag and 1x Samsung Phone altogether valued at K600.00 the property of Mwansa Mwale and immediately before or after the

time of such stealing did use or threaten to use actual violence to Mwansa Mwale in order to prevent or overcome resistance to its being stolen.

In count six, it is alleged that on 1st August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, Michael Nkhoma (A1) and Derrick Mbewe (A2) jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle did steal a handbag valued at K85.00 the property of Anabell Kennedy and immediately before or after the time of such stealing did use or threaten to use actual violence to Anabell Kennedy in order to prevent or overcome resistance to its being stolen.

In count seven, it is alleged that on 29th August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, the accused persons jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle, three machetes and one taser gun did steal K46,000.00 cash, 1 Samsung Phone and 1 Itel Phone altogether valued at K48,500.00 the property of Bahat Theogene and immediately before or after the time of such stealing did use or threaten to use actual violence to Bahat Theogene in order to prevent or overcome resistance to its being stolen.

In count eight, it is alleged that on 29th August, 2019, at Lusaka in the Lusaka District of the Lusaka Province, the accused persons jointly and whilst acting together with other persons unknown and whilst armed with an AK47 rifle, three machetes and one taser gun did steal a cell phone valued at K1,500.00 the property of Rosemary Neymah and at or immediately before or after the time of such stealing did use or threaten to use actual violence to Rosemary Neymah in order to prevent or overcome resistance to its being stolen.

1.0 PROSECUTION'S CASE

The prosecution called 11 witnesses.

2.1 PW1's Testimony

PW1 was Bahati Theogene. His evidence was that on 29th August, 2019, he was at his shop, which is called Theos Shop, in Mtendere at around 20:30 hours. It

was the time to knock off and he and Rose Neymah, his sister in law, were counting the money when five people entered the shop and locked them inside. The said people had found the door to the shop open at the time that they came. The person with the gun ordered PW1 and Rose to lie down and immediately mentioned the name Kabila which is the name PW1 commonly goes by in the community. PW1 pleaded with the men not to shoot him and offered them money but one of the men pointed the gun at the back of PW1's back. He had been made to lie down by two of the men, one had a machete while the other had a gun. PW1 told the men that the money was by the counter, which they went to collect. PW1 was lying down whilst peeping to see what was happening and the other one went to the counter. The man with the machete put it on the counter and began to get the money from the drawer and started putting it in his pockets and some other change in the plastic. The money PW1 had counted was K40,000.00 and some change.

Of the stolen money, K25,000.00 was the money he was to pay someone while K15,000 was the cash realized from the sales. Despite it being at night, the lights inside the shop were on. After the money was stolen, PW1 thought his assailants would kill him, but they started going out of the shop one after the other and when the one with the gun was about to go out, PW1 held him. PW1 and the man started struggling at the door. At that point the others had left while the man he was struggling with had remained. PW1 shouted for help, prompting one of the men to return and grab the gun. The man who grabbed the gun ran away whilst shouting thief!. The person he struggled with was tall, slim and light in complexion but did not appear very strong. At the time he grabbed the gun, the man was heading towards the door with the gun held in his hands across his chest. PW1 had managed to relieve the magazine as well as the butt while the gun was still in the said man's hands. Because a number of people had gathered, PW1 left the man he had captured and gave chase to the one who had grabbed the gun. When he caught up with the man, the man dropped the gun

and ran away. The assailants had forgotten the machete and taser gun after getting the money.

People who had gathered beat up the apprehended assailant and suggested that he be burnt using tyres but PW1 stopped them. A police officer who resides in the same compound assisted with transporting the robber to Kalikiliki police station. PW1 does not know how the other robbers got away as he was in the shop struggling with the apprehended robber when they got away. PW1 positively identified the gun and machete. The police issued him with a medical report form because the robbers had beaten him. He was attended to at the Levy Mwanawasa Hospital and given medication. He misplaced the medical report form. The case was transferred to Central Police Station where he later gave his statement and identified his assailants at a police lineup. One of the people he identified was someone he knew, as that person's shop in town was next to PW1's shop. PW1 identified A1 as the person who held the gun and threatened to kill him, A2 as the person who held the machete and collected the money from the counter and A3 as the person who was at the door and the person who was known to him.

Cross examination of PW1

When cross examined on behalf of A1 and A2, PW1 replied as follows:

At the time of the robbery, he was with his sister-in-law and they were about to close the shop. He got hold of A1 at the door of the shop and the two fought from the veranda of the shop. When ordered to lie down by the robbers, he lay down facing the counter. His sister in law was at the counter and she only lay down after A2 collected the money. His sister in law gave a statement at the police station but he does not know who she identified from the lineup as he was not present when she was asked to identify the robbers. He assumed that his sister in law could identify the person who collected the money. He identified three people at the identification parade and not four. There were many people of different height, complexion and stature paraded at the identification parade but they were all dressed in black. The gun used by the robbers was metal with a

plank and when he handed it over to the police, they said it was an AK47. PW1 held the gun for approximately 10 minutes on the material night, but does not know its serial number. He is not aware that there are several AK 47 guns in the world. A2 was among the robbers at the shop.

When cross examined on behalf of A3, PW1 replied that:

His statement to the police is not different from the testimony given in court. He did not talk to A3 after the identification parade. His shop is situated at the bus station. PW1 saw A3's vehicle drive past the front of PW1's shop which in itself is not an offence. A3 did not enter the shop and was not the one with the gun and machete. A3 was not the one who collected the money from the counter. Kabila is his nickname. There was no problem between PW1 and A3. The assailants were four but he only identified three at the identification parade. Three people entered the shop and closed the doors though he had seen about five people. He had not seen A3 in town after the robbery. He could not recall the date of the robbery though he remembered what happened. A3 was not one of the people he took to the police station on the night of the robbery. PW1 was sure the vehicle belonged to A3 because he knew it even though he had not seen the white book. PW1 has never attended school. He owns a vehicle and has a white book but he has never seen the whitebook for the vehicle in question. A3 was not the one who threatened him with death if he did not comply, and did not collect cash or phones from the shop. PW1 did not see A3 get the phone from his sister in law. He was struggling with one of the robbers inside the shop and when he got outside, he saw A3 get into the vehicle but PW1 did not pay much attention to A3 because of the person he was struggling with. His shop is a public place and it is not an offence for a person to be found outside his place. PW1 is not incriminating A3 for simply being found outside his shop but that his friends incriminated him by mentioning his name when apprehended. The person PW1 apprehended, A1, informed the police of his accomplices. PW1 was not present when A1 named his accomplices but a police officer informed him. PW1 does not restrict people from entering his shop.

Re-examination of PW1

PW1 was not re-examined.

2.2 PW2's Testimony

PW2 was Rose Neymah, PW1's sister in law and a Sales lady at Theo's shop. Her testimony was that on the 29th August, 2019 she and PW1 were about to knock off at around 20:30 hours when people entered the shop. The person who entered first had a gun and he ordered them to lie down on the ground. He demanded for money and threatened to kill them if they did not comply. The robbers got the money and as they were heading to the door, PW1 followed them and started struggling with one at the door at which point PW2 ran outside and shouted for help. At that point some of the robbers ran away while one returned to see what was happening to his friend.

A lot of people started coming thereafter a person who identified himself as a police officer took the apprehended man to Kalikiliki Police Station. PW2 was at the counter when the robbers entered the shop. She saw them entering the shop. At the time they were taking money, she was lying down beneath the counter as she was scared after being threatened. She and PW1 had counted the money as they were about to knock off. The money stolen amounted to K40,000.00. They had sold goods worth K15,000.00, while the K25,000.00 was payment to be made to someone. Nothing else was stolen from the shop but the robbers left a machete on the counter and a piece that dropped from the gun. PW2 identified A1 as the person who held the gun and A2 as the one who had the machete and collected the money from the counter. She positively identified the machete.

Cross examination of PW2

When crossed examined by counsel for A1 and A2, PW2 replied as follows:

She gave and signed a statement at the police station where she told the police officers that she was able to identify two of the robbers whose faces were

uncovered. Her testimony in court is not different from the one she gave to the police, if it is then the police made a mistake when recording. In her statement to the police, she described one of the robbers as being tall and light skinned, while the other was a little dark in complexion and slim. The features she gave the police are general as most people are slim and dark. She did attend the identification parade. It is not true that she was just informed that the person that was apprehended revealed the identities of the others. She saw and was able to identify two of the robbers whose faces were not covered so the police made a mistake when they recorded that she could only identify one of the men. Her statement had been read back to her by the police after recording.

When cross examined on behalf of A3, PW2 replied that:

The person PW1 apprehended and who was later taken to the police station was the one with the gun. PW2 pointed to A1 as the person who was armed and apprehended by PW1, and she pointed to A2 as the person that PW1 chased after apprehending A1 and the one with the Machete. In her statement to the police, she alleged that phones were stolen but forgot to inform the court of the same. She saw two people enter the shop while the others were outside. She does not know why her statement to the police indicates that she saw four people. The two people she saw were the ones with a gun, taser and machete. She did not see A3 in the shop and he was not amongst the people who entered the shop. She does not know whether A3 was involved in the robbery. She witnessed the struggle between one of the robbers and PW1 as she ran outside. PW1 grabbed the gun from A1 which he gave to the police officers and if any person says otherwise that person would be lying. She did not see A2 with the gun at any point, and she did not see A3 after she ran outside. There were a lot of vehicles parked outside as there is a car park.

Re-examination of PW2

PW2 was not re-examined.

2.3 PW3's Testimony

PW3 was Annabel Kennedy who testified that she used to work as a cashier at M & C Mini Mart, which is owned by Mr. Moses Zulu and located in Ngwerere area. That on 1st August, 2019, at around 19:20 hours, she was working with her colleagues, Mr. Everisto Chitendwe, Mr. Elvis Masambo and Ms. Mwansa Mwale when a man entered the shop with a gun and ordered everyone to lie down. PW3 crawled to the back of the till where she heard some people packing some money. One of the men told the others to hurry up. After about 5 minutes, it was quiet and that was when she heard the Manager, Mr. Elvis Masambo, say the robbers had gone so everyone could stand up.

The till is positioned in such a way that it directly faces the door such that she could see whoever enters and they would equally see her. There was proper lighting outside on the verandah and inside the shop. The supermarket had three tills, one for groceries, another for money transactions like MTN and Airtel Money and ZANACO, and the third counter was for the butchery. PW3 was at the grocery till. After the robbers left, everyone exited the shop and the manager locked it. The police later went to the supermarket, after some days, the C5 unit of the police went and took statements and informed them that suspects had been apprehended. PW3 later attended an identification parade where she identified A1 as one of the robbers. PW3 positively identified the gun. From the till she was operating, about K1,500.00 was stolen, and from her handbag, K10.00 and some cosmetics.

Cross examination of PW3

When cross examined on behalf of A1 and A2, PW3 replied that:

The gun was not fired at any point, and the robbery happened in approximately 5-10 minutes. The experience traumatized her. One of the robbers ordered her to kneel down immediately he entered the minimart. She only took a short glance at the robber. She did not give a description of the robber to the police, and she

did not know A1 prior to the robbery. She was not shown any picture nor was A1 shown to her prior to the identification parade.

Re-examination of PW3

PW3 was not re-examined.

2.4 PW4's Testimony

PW4 was Everisto Chitendwe whose testimony was that on 1st August, 2019 between 19:00 and 20:00 hours he was working from the Airtel Money and Zanaco Express section of M & C Mini mart where he was paying salaries to the Tata Farms employees. PW4 stepped away from the counter to assist a customer who did not know how to open a fridge. Whilst at the fridge area, he heard noise in the shop and when he turned, his eyes met the eyes of a man cocking a gun. The man shouted, "You lie down, lie down!" PW4 turned and laid behind the fridge. He saw the robbers head to the Zanaco, grocery and butchery tills. After about 5 to 7 minutes, he heard the men say, "let's go."

The last customer whose salary he paid was Chilufya. PW4 and the Manager reported the matter to the police station and they locked the mini mart on the police's instructions. Later after calculations, he came to learn that the robbers had stolen from the Zanaco Express and main tills. From his till, the sum of K1,300.00 was missing.

PW4 could not recall the features of the gun but he was able to tell that it was an AK-47 firearm. The C5 department of the Zambia Police Service later informed the owner of the Mini mart and the manager, that suspects had been apprehended. He later attended an identification parade at central police station where he identified A1 as the person, he had locked eyes with who had a gun. There were many suspects lined up on the parade. The shop was well lit as the shops has many lights.

Cross examination of PW4

In cross examination, PW4 replied as follows: he saw someone enter the shop on 1st August, 2019, and yes there was commotion which caused him to get confused. Despite the confusion, he was still able to see properly. In his statement, he described the person he saw as brown and tall. PW4 is not tall. The person pointed an AK47 rifle at him, he recalls giving a statement to the police, which was produced as D2. He told the police that the robbers had an AK47 rifle although the same was not recorded in his statement.

The robbers ordered them to lie down, facing the floor. He could hear things being moved. The robbers left within 5 minutes. He had seen the face of the person who was holding the gun before he was made to lie down, which is what he told the police. He was not aware that the police did not record that part of his statement. He told the police that the man with the gun, was tall and brown although it was not recorded in the statement.

He attended an identification parade where he identified the man who had entered the shop. There were many people on the parade whom he did not know. He could only identify the man from the shop, whom he had only seen once. He did not pay attention to the clothes the man was wearing at the parade. He does know who picked K1,300.00 from the office.

At that time, he did not see the person who picked the phone. He has never been trained as a police officer but he has seen an AK47 rifle being carried by the police. Not every gun the police officers carry is an AK47 rifle. The person with the gun coked the gun when he entered the shop.

Re-examination of PW4

PW4 was not re-examined.

2.5 PW5's Testimony

PW5 was Lyson Sinkololwe who testified that he gave his uncle, A3, a Toyota Prado vehicle to use, in transporting PW5's mother to the hospital. He gave the vehicle to his uncle so that he should be taking his mother to the hospital. After 2 weeks they went and stole using that vehicle. He bought the car from Christina Kapopo in whose names the white book appears. The vehicle number plate is ALM 4427. PW5 identified A3 and the vehicle.

Cross examination of PW5

In cross examination PW5 conceded that he had not furnished the court with any proof that he is indeed the owner of the vehicle. He gave A3 the vehicle on 9th October, 2019. PW5 further conceded that A3 was in police custody on 9th October, 2019. He gave A3 the vehicle sometime in June.

Re-examination of PW5

PW5 was not re-examined.

2.6 PW6's Testimony

PW6 was Chilufya Bernard Mubanga whose testimony was that on the 1st August, 2019, he was at M & C Mini Mart, which is owned by Mr. Zulu, where he went to purchase electricity tokens. There was a network failure so he was advised to wait until the network had been restored. While waiting, PW6 stood at the entrance to the Mini Mart. He saw a black vehicle a BMW with no number plate approach. It was at night, so he could not see unique features on it. The vehicle parked behind the Mini Mart. He later saw three men alongside the wall, with one wearing a cap which he pulled down to cover over his face. The man was also wearing a head dress made of wool which when pulled down turns into a mask. Thinking the men were part of the C5 squad as they were carrying guns, PW6 greeted them and attempted to walk out of the Mini Mart, but one of them said "This one should go back". The man slapped PW6 on the back of his head,

pushed him back into the shop and ordered him to lie down. The one holding the gun threatened to kill PW6 if he stood up, and he ordered his friends to go to the counters. The man also ordered his friends to get the phones but PW6 managed to hide his phone by covering it with his palm. One of the men searched PW6's back pocket and got K1,500.00.

The men only had one gun, an AK74. PW6 positively identified A1 as the person who pushed him into the shop and was carrying a gun. He also identified the gun. The incident occurred around 19:00 hours but he was able to see as there were lights on.

Cross examination of PW6

In cross examination, PW6 replied as follows:

The man did not fire the gun, and the robbery took approximately 30 minutes. He was on the ground the entire time of the robbery. He was not aware that there are two witnesses who were in the shop who said the attack did not take more than 10 minutes. He made a statement to the police concerning the attack while his memory was still fresh. He told the police that he could identify A1. He frequents the mini mart often but was not sure whether there are cameras installed at the mini mart. The vehicle he identified at the police station is the one he had seen at the mini mart. He had seen a number of BMW vehicles without number plates. He had no proof that the vehicle he identified belongs to the accused persons, neither did he see the person driving the vehicle.

Re-examination of PW6

In re-examination, PW6 maintained that the robbery took approximately 30 minutes.

2.7 PW7's Testimony

PW7 was Kelly Banda, a Detective Inspector in the anti-robbery squad. His testimony was that on 30th September, 2019, he conducted an identification

parade in two cases of aggravated robbery. Before the parade could start, he arranged a parade comprising of 10 men of similar height, similar complexion and also of similar body structures. He explained the parade rules to the three suspects that is, that they could have a representative present, they could stand in a position of their choice or that they could change clothes. PW7 also explained the rules to PW1, which is that if PW1 identified someone from the lineup, he should touch such a person and a picture would be taken in that respect. PW1 walked through the parade and he identified one person who was standing on position number 2 from the left, whom PW7 later came to know as George Shumba. PW1 went away from the parade and the suspects were asked to change clothes and position but they opted not to. PW1 was called to walk through the parade and he identified one suspect who was standing on position number 9 from left to right, whom PW7 came to know him as Micheal Nkhoma, A1. Pictures of the identification were taken.

As regards the other robbery, PW7 had PW4 walk through the identification parade. PW4 identified a person PW7, who he later came to know as Michael Nkhoma. The witnesses were moving from left to right. PW7 called PW3 who also identified Michael Nkhoma as one of the robbers. The suspects were then asked if they had any issue with how the identification parade was conducted to which they said they had none. The rules of identification were explained to all the witnesses. PW7 positively identified the accused persons.

Cross examination of PW7

In cross examination, PW7 replied that on conducting the identification parade, police officers carry note books where they record the proceedings, but that he did not have one that day. He recorded the proceedings in the report which was before the court although he did not refer to it in his testimony. He was not aware that there were 8 counts, he knew only of the robberies in Mtendere and Ngwerere. In Ngwerere the complainant was Moses Zulu, and two witnesses for that count, PW4 and Anabella, identified the suspect. The two witnesses are not

police informants. He followed all the police rules when conducting the identification parade.

Re-examination of PW7

PW7 was not re-examined.

2.8 PW8's Testimony

PW8 was Detective Sergeant Micheal Walawala whose testimony was that on 30th September, 2019, he was assigned to take photos at an identification parade which parade consisted of 10 people. Three witnesses came to identify the people that attacked them. The first witness was PW1 who identified A1 who was on position 2 on the parade. PW1 then identified A2 on position 7 and A3 on position 9. After taking photos, PW8 compiled two photographic albums which were handed over to the National Prosecution Authority together with the docket. He was later informed that the photographic albums were missing. He could not prepare another album, because the information no longer existed on the camera. He has been a scenes of crime officer for 14 years, having been trained at Lilayi police college for a duration of three months. PW8 positively identified the accused persons.

Cross examination of PW8

In cross examination PW8 replied that there was a computer laboratory at the Police Headquarters where the photos he takes are printed from. The computer he used is a network computer and he has access to it. A3 was identified at position 9. The identification was only done once. The suspects refused to change clothes at the identification process. His duty was limited to taking photos.

Re-examination of PW8

PW8 was not re-examined.

2.9 PW9's Testimony

PW9 was Assistant Superintendent Joseph Simuchemba, who at the material time was an Inspector. His testimony was that on the 19th August, 2019 between 19:00 to 20:00 hours, he received information through the information room, that there was an aggravated robbery taking place in Mtendere East, and that one suspect had been apprehended at the scene with an AK47 while the other four suspects had run away. PW9 mobilized officers and proceeded to the scene where he found a huge crowd of people surrounding the suspect. He also found an AK47 being held by the owner of the shop, a machete and a pistol grip and a taser gun. He interviewed the complainant, PW1, who informed him that 5 men, armed with an AK47, taser and machete had robbed his shop and made away with the sum of K48,000.00. PW1 informed him that he managed to apprehend one of the men as he was about to leave the shop, but that when his friends saw that their friend had been apprehended, they turned back and started beating PW1 who sustained injuries on his head. PW9 checked PW1 and confirmed that he had injuries on his head. PW9 interviewed the suspect whilst at the scene whom he came to know as Micheal Nkhoma. Since the suspect had equally been beaten by the mob, PW9 picked the suspect and the complainant and went to Kalikiliki Police Post where they were both issued with medical report forms. PW9 took the suspect to UTH where he was attended to.

PW9 later took the suspect to Central Police Station where he continued interviewing the suspect with the help of colleagues. A1 stated that he had been in the company of four men but that he could only identify two. The other one was brought in the same group by Mr. George Shumba (A3). A1 volunteered to lead the police to the two suspects. At the scene A1 had been issued with a verbal caution whereby A1 was advised of what the police needed and what they are supposed to do. The final caution is supposed to be done after exhausting all the investigations.

A1 led the police officers to Soweto Market where they found a suspect wearing a verandah cap and a black muscle T-shirt, whom A1 identified as George Shumba (A3). Since the complainant had indicated that he saw a white Toyota Parado that had been used at the scene, PW9 picked the motor vehicle and drove it to the police station. PW9 summoned PW1 to the police station where PW1 positively identified the vehicle. PW9 explained to A3 why he had been detained.

PW9 later managed to apprehend Derrick Mbewe (A2) as he had received information that Derrick Mbewe (A2) had been spotted at the industrial area in a black BMW vehicle. During the course of investigation, of the Mtendere East robbery, he received information that the same people who had committed that offence had also robbed M & C Mini Mart in Ngwerere area. PW9 went to Ngwerere Police Station where he picked up the file so as to continue the investigation. On perusal of the file, he noted the testimony of PW6 that he had seen the vehicle the robbers had used in the Ngwerere robbery. On further investigations, a witness by the name of Singolongo, whose first name PW9 could not recall, gave him the white book for the vehicle, which white book had the corresponding number plate being ALM 4427. That the vehicle was purchased by Singolongo from Mr. Kapopo. That because his mother was sick and he was busy working, Singolongo opted to give the vehicle to his uncle, A3, so that he could be taking his mother to the clinic.

As regards the vehicle that A2 was driving, PW9 submitted the disc found on the vehicle containing the registration number to the Road Safety and Transport Agency (RTSA) for more information on the vehicle. RTSA informed him that the BMW vehicle is registered as BAK 9512, a BMW in the names of Derrick Mbewe, A2.

PW3 warned and cautioned the three accused persons who gave him free and voluntarily replies denying the allegations of six aggravated robberies. PW9 charged the accused persons with six counts of aggravated robbery and subjected them to an identification parade. He also subjected the AK47 to

identification. He was not present at the identification parade and so he could not clearly recall its outcome, plus the photographic album was missing. He subjected the AK47 bearing serial number 1954 RNN7608 to ballistic experts for examination. The firearm was accompanied by ammunitions, a pistol grip which was plucked out of the gun during the struggle in Mtendere East. He prepared the matter and pushed it to Court.

PW9 positively identified the gun P1 and the machete P2. He further positively identified the white books for vehicles with registration numbers BAK 9512 in the name of Derrick Mbewe P6 and ALM 4427, which is still in Mr. Kapopo's name as per the letter received from RTSA, P3. That both these motor vehicles P4 and P5 are parked at Lusaka Central Police as because of time the tyres are deflated and worn out. PW9 also identified the taser gun P 7 which he said belonged to the Zambia Police as it had the writing, 'Zambia Police' on it. That the taser gun is very strong which if it is fully charged can transmit an electric shock about 2 to 3 meters away, such that if someone has high blood pressure or even if they don't have high blood pressure, they can still end up falling down. PW9 also identified the medical report form P8, that was issued to PW1. Lastly, PW9 positively identified the accused persons.

Cross examination of PW9

In cross examination, PW9 replied as follows: as far as he could recall, he arrested and charged the three accused persons of maybe 6 counts of aggravated robbery pursuant to *section 294* of the *Penal Code*. There were two robberies, the first on 1st August, 2019 and the second on 29th August, 2019. He charged and arrested all the accused persons for the first offence and the complainant for that offence was Mr. Zulu whose workers were attacked. It was his role to organize witnesses for the case. PW1 was the complainant for the offence that occurred on 29th August, 2019 for which he charged and arrested all three accused persons.

A gun, taser gun and machete were recovered from PW1 who had apprehended a suspect. A seizure notice is only used for goods and not firearms. The accused persons were not asked to sign for the recovered items because they illegally possessed those items. He could not comment on the assertion of PW1's testimony, that he took the firearm to the police station. He apprehended A1 from the scene but did not take pictures. The taser had the writing 'Zambia Police' on it. At the time of his testimony there were no taser guns missing in the Zambia Police. The machete had blood stains on it but it was not subjected to forensic examination.

He does not know who Joseph Mbao is. The assertion that he and his colleagues on 30th August, 2019 shot Sydney Sakala in A2's presence was news to him and hence he could not comment on the same. At both scenes A1 was the one brandishing the firearm and was the one who slapped PW6. To the best of his knowledge, A1 did not, while at the scene in Mtendere East, explain why he was found in that area. A1 was apprehended from the shop and not the bus stop. It would not have been unusual for A1 to be found at the place he was apprehended from if he was not armed and threatening people. He does not handle ballistic reports as he is not an expert. Fingerprints are not lifted from the surface of the guns as its is rough. The gun and taser are both made of steel and so fingerprints could not be lifted.

The accused persons were subjected to an identification parade because it is part of police procedure during investigations. He could not comment on the assertion that PW1 and A3 are rivals in business because he was investigating an offence and not a business. He did not know that PW1 and A3 are neighbours. He did not find out from PW1 how he and A3 were living. The investigations were not thorough. He is aware that there are many black BMW vehicles. An investigation revealed that A3 was the one at the scene. He was not aware that A3 parked the vehicle that was identified near PW1's shop in Soweto market. A1 was injured and that was why PW6 took him to the hospital. It was difficult to single out the

people who beat A1 as some could have been passers-by and, moreover it was in the night.

Re-examination of PW9

In re-examination, PW9 stated that his investigations were thorough. That usually guns and taser guns are handled by military personnel so they are still investigating and the accused persons can still be arrested for being in possession of stolen property.

2.10 PW10's Testimony

PW10 was Elvis Masambo, the manager at M & C mini mart whose evidence was on 1st August, 2019, he was working at around 19:20 hours. The shop has three tills being the main, mobile money and Zanaco, and butchery tills. The main till was being manned by Annabella Phiri, the mobile money and Zanaco Express tills were manned by Mr. Everisto Chitengwe and the butchery till was manned by Mr. Mwansa Mwale. PW10 heard a loud noise and immediately saw someone with a gun. The people in the shop were all ordered to lie on the floor, which order PW10 complied with. He made sure that the money he had on him, being K95.00, was in his hands so that the robbers could see it. The man with the gun was telling his friends to move fast. PW10 realised the gun was real when the man cocked it and threatened to shoot whoever attempted to get up. The gun was an AK47 firearm which he had seen before with his brother who is a police officer.

As PW10 was lying on the floor, he could hear the robbers getting money from all the tills. Once they were done collecting from the till, they moved to where he was and searched him but did not find anything in his pockets. They equally did not see the K95.00 in his hand. While the robbery was ongoing, the people outside the shop, which is located near a compound, sensed what was happening inside the shop and they started shouting "thief! thief!". After about 5 minutes, PW10 heard footsteps going out and once he and the other people in the shop

were sure that the assailants had gone, they rose up and closed the shop. PW6 informed him that he had been robbed of some money and that one of the robbers had slapped him. PW10 checked the place where he had left his tablet but he did not find it. The tablet's value is K1,000.00. The total amount stolen was K6,500.00 which is the figure they gave the police officers. The people outside informed him that just after leaving the shop, the men got in a BMW vehicle and sped off. He did not attend the identification parade because he could not identify the man who had the gun.

Cross examination of PW10

In cross examination, PW10 stated that he is not an expert on guns. That the man did not fire the gun. The people he says who saw the robbers get in to a BMW vehicle have not been called to testify to that assertion.

2.11 PW11's Testimony

PW11 was Daniel Banda, a Superintendent in the Zambia Police Service. He is a ballistic expert. On 9th October, 2019 the ballistic laboratory was in receipt of one firearm with serial number 7608, three cartridges or rounds of ammunition and one cartridge casing. That the exhibited firearm, is an AK47 assault rifle. Its calibre is 7.62 Russian short meaning that it was designed to load and discharge cartridges or rounds of ammunition of calibre 7.62 Russian short. PW11 tested the firearm by discharging two cartridges which he picked from the three exhibit cartridges that were submitted. After firing the gun, PW11 kept the two cartridge test cases for comparison analysis with the exhibit cartridge casing. He concluded that the exhibit firearm was functional.

PW11 also examined three cartridges that was before the testing, and they were all in calibre 7.62 Russian short meaning that they were designed to be loaded and discharged from the exhibit fire arm, and any other fire arm of the same calibre. On examination of the exhibit cartridge casing, PW11 observed that there was a pin hole or a crater on the primer and the opening of the flash holes. These

two characteristics indicate that it was loaded and discharged from the firearm of its calibre which is 7.62 Russian short.

Having obtained the two test cartridge casings, he marked them as T1 and T2, and the exhibit cartridge casing was marked EX. The three cartridge casings were scanned on the automated ballistics identification systems and analysis between the exhibit cartridge casings and the two test cartridge casings. After a systematic and thorough comparison analysis PW11 observed some distinct and identical matching of the firing pin impression mark on their primers. This is an indication that the three cartridge casings were actually discharged from one and the same firearm.

The exhibit AK47 firearm is a lethal weapon capable of causing damage to property, injury or death to any animal or human target once it is loaded and discharged upon. It is also capable of causing terror to any persons of a reasonable state of mind when they are challenged or threatened with it. Therefore, it is restricted to the defence and state personnel in their official duties here in Zambia. PW11 compiled a report and also prepared a photographic album showing the matching of the exhibit cartridge casing and the two test cartridge casings. PW11 positively identified the report and photo album. PW11 also identified the two tests, and cartridge casings P11 and P12 respectively.

PW11 testified further that the department has a total of seven officers, three senior and four junior officers. He was assigned the case by Mr. Nguni the head of Ballistics. The forensic ballistic laboratory is based at the Police Service Headquarters which is a well-secured place. All the equipment used in the laboratory are well secured. The computers used have passwords and only senior officers have access to these computers.

Cross examination of PW11

In cross-examination, PW11 stated that he could not recall when P11 and P12 were received as the date of receipt was recorded by junior officers. The 1st

February, 2022, was the date he examined P11 and P12. P11 and P12 were handed to him by Detective Sergeant Nsamwa of the flying squad. He does not know where the gun had come from. Lifting of fingerprints is not within his jurisdiction. The lifting of fingerprints is a necessary act but is not done from the ballistic unit.

Re-examination of PW11

PW11 was not re-examined.

That was the case for the prosecution.

3.0 CASE TO ANSWER

At the close of the prosecution's case, I found the accused persons with a case to answer and consequently placed them on their defence.

4.0 THE DEFENCE'S CASE

The defence called 6 witnesses.

4.1 DW1's Testimony

DW1 was Michael Nkhoma, the first accused person. His evidence is that on 29th August, 2019 he was on a job within Chawama Compound when his grandmother, Elida Mvula, called him at around 09:00 hours to inform him that she was unwell. DW1 used to reside in Chawama. He advised her to go to the clinic and promised to see her later. Around 15:00 hours, he went to Kalikiliki to see his now deceased grandmother.

At around 19:30 hours he was at a bus stop waiting for a bus heading to Chawama when he saw three people, two male and a female, who shouted that the thief is here. He informed them that he was not a thief and asked what the problem was, but the trio started beating him. Suddenly the number of people beating him increased. They apprehended him and took him to Kalikiliki Police Post. Contrary to PW2's testimony, he never entered any shop nor did he have a

firearm. He never struggled with PW1. He does not know where the shop is located, but just heard from a witness' testimony that it is near a bus stop.

At the police station he was interviewed by a police officer, whose name he could not recall. He informed the police officer that he was waiting for a bus at the bus stop when he was apprehended. The police officer informed him of the complaint that he had robbed a shop. DW1 offered to lead the police officer to his grandmother's house to verify his assertion, but the officers refused and asked him to lead them to his co-accused. The police officers later called his grandmother who came and confirmed DW1's version of events but the police officers just asked her to leave. At the time his grandmother was speaking to the police officers, he was at Kalikiliki Police Post reception and he could hear what she was saying. Before his grandmother left, he fainted and lost consciousness. When he regained consciousness, he found himself on a bed with a drip. When he inquired as to where he was, he was told that he was at the University teaching Hospital (UTH). He was in the presence of police officers, namely Kelly Banda, Newton Hamukamba, Joseph Simuchembo (PW9) and others.

When they took him to Central Police, they started interviewing him over the robbery that happened in Kalikiliki on 29th August, 2019 but he told them he knew nothing of the robbery. The officers did not believe him but instead put him on a swing and started beating him. They beat him severely such that he lost consciousness. They poured water on him whilst he was on the ground and when he regained consciousness, they continued interviewing him. They threatened to take him to the abattoir.

After being detained for some days, PW9 removed him from the cells and took him to the offices of the Flying Squad where he found a lot of people, both male and female. He was interrogated further by PW9 and asked if he was denying the charge, to which DW1 replied that he did not know anything of what he was

being accused of. He came to know his co-accused persons while in custody. PW1's testimony that he grabbed the gun from him was a lie.

The identification parade was unfairly conducted as the people who identified him were the ones he had found in the CID office, these being PW1, PW2, PW3, PW4 and PW6. At the identification parade, he observed that Kelly Banda was telling the witnesses to point at DW1. The people on the parade all had different body structures, height, skin complexion and body size. DW1 at the time had a fresh cut just above his left eye. After the parade, DW1 made a complaint to Kelly Banda on how the identification parade was conducted but his complaint was not considered. He was taken back to the police cells and detained for about four weeks without being charged.

He knows nothing of the Ngwerere robbery and all the witnesses who testified told lies. On the date the Ngwerere robbery occurred, he was at home and not with his co-accused persons as alleged. He saw the vehicles alleged to have been used in the robberies for the first time at Central Police Station.

Cross examination of DW1

In cross examination, DW1 replied that: his grandmother was not the biological parent to any of his parents but was the young sister to his grandmother. His grandmother was 76 years old and was living with DW1's cousins, James and John Mwale, who were home at the time of his visit. His cousins were young boys and still attending primary school at the time. He does not know their whereabouts. He learnt of his grandmother's death from his wife. There is no one who can confirm that he was visiting his grandmother the day he was apprehended. PW1 and PW2 were not cross examined on whether DW1 was a passerby. He does not know PW1. PW1 had reason to lie that DW1 was the one who stole from his shop.

An identification parade was conducted. He could not recall if A2 and A3 were at the identification parade but there were other people of different structures and

skin colour tones. PW1, PW3, PW4 and PW6 all pointed at him at the identification parade. He recalls PW10's testimony that he was unable to identify anyone at the identification parade as he did not get a good look during the incident. PW10 was invited to the identification parade. He cannot speak to the assertion that those who identified him did so because they could. He did not know the people who identified him prior to the identification parade and hence his complaint that the parade was unfair and that the person conducting the parade told them who to point at. PW7 did not in his testimony state that he instructed people to point to DW1. DW1 could not recall whether questions were posed in cross examination to suggest that PW7 had instructed the persons who identified DW1 to do so. His testimony that the identification parade was unfair is not an afterthought, he complained to PW7 but PW7 failed to produce the book where the complaint was recorded.

Re-examination of DW1

In re-examination, DW1 stated that the court should believe his testimony which would have been confirmed by his grandmother had she not died. Some people on the identification parade were light while others were dark.

4.2 DW2's Testimony

DW2 was Derrick Mbewe (A2), whose testimony was that on the 29th August, 2019 he was at his shop in Chunga from 15:00 hours to 22:00 hours when he closed. On 30th August, 2019, he dropped off his wife at her place of work in town at around 08:00 hours when he received a phone call from officer Mbao who resides in Chunga and works from Central Police Station. Officer Mbao informed DW2 that he was at DW2's shop and wanted to meet. When DW2 met with Officer Mbao, the officer requested for his help in finding a person by the name of Sydney Sakala which DW2 did.

Sydney Sakala was picked up from his place by officer Mbao and PW9. DW2 and Sydney Sakala were taken to Chunga cemetery where Sydney was queried as to

his whereabouts the day before. He mentioned the name of Brian and another called Londo. They got the contacts of the said persons from Sydney and got DW2's two phones so they could compare but they found nothing in DW2's phones. Sydney told PW9 that he was bothering and pestering him too much and so he was going to reveal everything. Sydney then revealed that it was in fact PW9 that was supplying him with bullets. PW9 then said Sydney would cause problems for him at his place of work and so he instructed another officer by the name of Wezi Chiwale, who goes by the nickname barbed wire, to "delete" Sydney. The instruction was to kill Sydney, which officer Wezi Chiwale did by shooting Sydney in the chest. PW9 ordered that DW2 be shot too, but officer Newton Hamakomba, questioned the order when DW2 had assisted them in finding Sydney. PW9 answered that DW2 too could bring problems. Newton asked as to how they would write the report as they just called DW2 on the phone, to which Wezi Chiwale proposed they arrange the scene, to make it appear as if there was an exchange of gunshots.

Sydney was thrown in the trailer of the Land cruiser, while DW2 was placed in his BMW vehicle and taken to Central Police Station where some officers remained. The Land cruiser drove past the said police station. DW2 was taken to Kabwata Police Station by PW9, Newton Hamakomba and Davy Mwaya. Before they went to Kabwata Police Station, Newton Hamakomba asked for a number of any of DW2's relatives so that that person could be informed of where DW2 was, because Newton believed the police officers had bad intentions for DW2 since he had witnessed them kill his friend. The police officers left him at Kabwata Police Station without any charge.

After two days, some residents of Chunga visited him at the police station where they accused him of having caused the death of Sydney Sakala and threatened to vandalise his shop. Five days later, PW9 removed him from the police cells and took him to an office where he offered to release him, if he surrendered his vehicle. DW2 refused, which upset PW9 who said he was going to charge DW2 before taking him back to detention.

A few months later, DW2 was taken to Central Police Station, where he was again asked if he was still refusing to surrender his vehicle and white book. There were a number of people in the office. He was taken back to the cells and after about 30 minutes, he was taken for an identification parade where he was shocked to have been identified by PW1, who was one of the people he had seen in the office. He inquired from Kelly Banda why a person he had seen in the office identified him.

Two weeks later, he was taken to court jointly charged with A1 and A3, whom he doesn't know. His vehicle could not have been used in a robbery, as he was with it at his shop from 15:00 to 22:00 hours. Before 15:00 hours, he was with his vehicle at home. He did not commit a robbery in Kalikiliki as alleged, and he was seeing the gun, taser and machete for the first time in court.

Sydney Sakala died two days after he was shot. DW1 positively identified the burial permit for Sydney Sakala, which was produced as P13. To the best of his knowledge, Sydney Sakala died as a result of a gunshot wound. He was charged with aggravated robbery because he witnessed the shooting of Sydney Sakala.

Cross examination of DW2

In cross examination, DW2 stated that: his shop was not vandalized in spite of the threat from the people who visited him in prison. He was with his friend, George Musele on 29th August, 2019 who could confirm that DW2 was at his shop. George Musele could be called as a witness. He writes his orders in a book but he could not bring the book to show his orders for the 29th August, 2019 because he could not order as he was in custody. He was in detention at the time of Sydney Sakala's death although he had brought the burial permit. He instructed his relatives to obtain a copy of Sydney Sakala's death permit after PW9 lied during his testimony that no one died. He did not bring the book where orders are recorded because his shop was broken into later and is now closed. The burial permit does not disclose the cause of Sydney's death. Sydney was a neighbour and a childhood friend. Officer Mbaio is DW2's neighbour in Chunga

and was in the flying squad. PW9 did not mention Sydney Sakala in his testimony. PW9 was cross examined on whether he killed Sydney and that was what led DW2 to produce the burial permit.

He is the owner of the BMW vehicle. PW6 pointed at his vehicle, which has a number plate, as the vehicle used in the robbery, when his testimony was that the BMW vehicle used in the robbery had no number plate. PW1 pointed at him at the identification parade. The other men paraded were not of similar complexions and body size. He could not recall whether his co-accused were on the parade. Others on the parade were light and fat. The accused persons are of different body sizes. The identification parade was not fair because the person who identified him, had seen him earlier in the office 30 minutes before the parade. He knew PW7 prior to the arrest as PW7 used to frequent DW2's place where he would flirt with the bar lady which led to a quarrel between PW7 and DW2. He could not call the bar lady as a witness as he does not know where to find her since his shop is closed. He did not cross examine PW7 as to their alleged previous encounters, which led to PW7 not recording DW2's complaint that the identification parade was not fair.

Re-examination of DW2

DW2 was not re-examined.

4.3 DW3's Testimony

DW3 was George Shumba (A3) whose testimony was that on 12th September, 2019 he was at his shop around 18:30 hours when someone called him to go and switch on a genset because power had cut. DW3 went to PW1 where he switched on the genset. He saw three people standing behind him with PW1 as he was switching on the genset. DW3 went back to his shop which is about 15 meters from PW1's shop. Within a minute of reaching his shop, the men he had seen came and apprehended him. They asked him to show them where his vehicle, a Toyota Prado was, and asked for the car keys. The car was parked

between PW1 and DW3's shops. He cannot recall the vehicle registration number but it is the same vehicle parked at Central police. DW3 was put in the men's vehicle, while two of the men got in his Toyota Prado which they drove to the Lusaka Central Police Station.

At the police station, DW3 was taken directly to the C5 officer in charge where he was asked to explain the Kalikilki issue, and that if he explained well, they would not beat him. He did not know the issue the police officers were referring to at that time and only came to know of the robbery after the identification parade. The police officers beat him badly that one of his eyes could not see properly. After beating him, he was detained in a cell for three days.

At the identification parade, DW3 was identified by an officer who was behind him. The officer was signaling to the witnesses who they should point at. DW3 complained that the identification parade was not conducted in a fair manner but his complaint was ignored. PW1 and PW2's testimonies that his vehicle was seen at PW1's shop is a lie. He did not know his co accused persons prior to this case. He met his co-accused persons in police cells.

On the 29th August, 2019 he was at the shop in City Market and that was where his vehicle was parked. PW1 accused him of aggravated robbery because he was jealous of DW3. PW1 and DW3 had a falling out in 2019, two months before DW3 was apprehended, and hence are no longer friends. He denied the charge of aggravated robbery on being charged and did not say anything else. He did not give a statement to the police. The allegation that he and his co accused persons robbed a shop in Ngwerere is a lie. He is wrongly accused. On the day of the Ngwerere robbery, he was at his shop from 05:00 to 22:00 hours. The evidence of PW9 is a lie, relating to him and the accused persons carrying out a robbery where K40,000.00 was stolen and offensive weapons used. He knows nothing about the offensive weapons or who they belong to.

Cross examination of DW3

In cross examination, DW3 replied as follows: he stays in Mtendere, but far from Kalikiliki. He resides near the hospital. Kalikiliki and Mtendere are not in the same area. He has lived in Mtendere for about 15 years, and that at the time of his testimony, he had known PW1 for about 2 years. He and PW1 were friends and PW1 told him of his shop in Kalikiliki. PW1 alleged that DW3's vehicle was used in a robbery because he is jealous. DW3 could not rob PW1 out of jealousy despite the fact that he and PW1 deal in the same business.

PW1 had removed the genset outside for DW3 to switch on. DW3 initially refused since he and PW1 were not friends, but PW1 had sent someone else so DW3 ignored the fact that he and PW1 had a bad relationship and went to switch on the genset. PW1 was cross examined on the assertion that he led the officers to DW3's arrest. He was taken to the identification parade alone at around 14:00 hours. He was detained alone and the only time he was removed from the cells was when he was taken to the identification parade where PW1 identified him. The officer at the parade who was showing the witnesses who they should point at, was not directly behind him but was beside him. He did not pay attention to whether his co accused persons were at the identification parade or not. Sinkololwe helped him look for the vehicle on his behalf when DW3 was looking to buy a car. It is true that Sinkololwe bought the vehicle for DW3 to be taking Sinkololwe's mother to the clinic. He did not take Sinkololwe's mother to the clinic every day. He did not lie in his statement to the court. There were people of different body structures at the identification parade.

Re-examination of DW3

DW3 was not re-examined.

4.4 DW4's Testimony

DW4 was Newton Hamakamba, whose testimony was that on 29th August, 2019, he was working the 08:00-18:00 hours shift. Working the same shift were

Detective Sergeant Daniel Mwenya as a shift driver, Detective Sergeant Wezi Raymond Chibale as a shift personnel, Detective Banda Yotam, also as shift personnel, Detective Constable Michael Waluwala, Detective Inspector Joseph Mbao who was head of operations who was head of investigations at the Anti Robbery Squad Unit. On that day, the squad worked overtime due to heavy workload. Sometime between 19:00 and 19:30 hours, the squad received a call of a robbery in Kalikiliki area. The squad immediately rushed to Kalikiliki Police Post where they found three police officers, two male and one female. They also found a badly beaten suspect at the inquiries area with blood oozing from his face, and other civilians who claimed to be victims of the said robbery. DW4 on PW9's instructions interviewed PW1 and PW2. PW1 informed him that he and PW2 were victims of a robbery where the sum of over K40,000.00 and a mobile phone were stolen. PW1 failed to give a description of the robbers as he was in a confused state, but he informed DW4 that after the incident at Kalikiliki main bus stop, a male person was mistakenly identified as one of the robbers and apprehended. PW1 identified the man the police squad had found at the inquires area as the man who was mistakenly apprehended.

DW1 interviewed the said suspect who identified himself as Micheal Nkhoma, A1. DW4 did not believe A1 at the time as he had been identified as a suspect in a robbery. A1 informed him that he was in Kalikiliki visiting his sick grandmother who he had brought drugs for. A1 availed DW4 with his grandmother's details and phone number. PW9 called the number and placed the call on loudspeaker as was normal practice, when conducting investigations. A woman picked up the call and she was summoned to Kalikiliki Police Post. After a few minutes, an elderly woman reported to the police post where she identified A1 as her grandson who resides in Chawama and who had visited her on that day. The woman who became emotional on seeing her injured grandson was comforted and escorted outside by the female police officer the squad had found at the police post. A1 lost consciousness and was rushed to UTH where he was attended to by medical practitioners. DW4 recalls that A1's face was sutured. A1

was later taken to Central Police Station where he was left to rest pending the continuation of investigations.

On 30th August, 2019, the following day, DW4 and the entire squad that had gone to Kalikiliki started interrogating A1 who maintained that he was in the area visiting his grandmother. The anti-robbery squad did not believe A1 and so PW9 ordered that A1 be tortured on a torture chamber popularly known as 'Kampelo'. A1 was tortured but he maintained his statement and denied any involvement in an armed robbery. A1 was tortured until he soiled himself in his pants and collapsed. DW4 was ordered to take A1 to his cells which he did.

Back at the office, Detective Inspector Joseph Mbao received a call, from an informant from Matero, which he placed on loudspeaker. The informant informed him that a suspect by the name of Sydney Sakala, who was believed to be extracting mafula which is found in the exhaust motor vehicles especially diesel-powered engines, was spotted in Matero Chunga area drinking alone at Derrico club and he was drinking alone. The police squad decided to speak to the owner of the club, Derrick Mbewe, A2. Detective Inspector Mbao called A2 and arranged to meet him at Tazama, Industrial Area where he was. The police squad found A2 seated in his Anaconda shaped black BMW, bearing registration number BAK 9512. A2 was requested to help the police investigate Sydney Sakala to which he agreed.

A2 assisted in the apprehension of Sydney Sakala who was apprehended from a place near Nelson Mandela School in Chunga. When Sydney Sakala was put in the police vehicle, he identified PW9 and said "Mr. Simuchembo if it is that issue of money we concluded it already." There was confusion in the vehicle because of what Sydney Sakala had said. PW9 ordered everyone out of the vehicle and ordered Detective Sergeant Wezi Chibale who was armed with an AK47 assault rifle and Detective Banda Yetu who was armed with a Germain made pistol to shoot Sydney Sakala. Sydney Sakala begged for his life but he was shot 7 times in the chest and stomach. DW4 and A2 watched all this from a distance. PW9

realised that A2 had witnessed the extra judicial killing of Sydney Sakala and so he ordered that A2 be killed too. A2 was an unarmed suspect, who was complying and not a danger to the police. When DW4 asked PW9 what kind of report they would write for the killings, PW9 said he would write the report himself. That he would do a gun fixing on Sydney Sakala and A2 to make it look as if they were armed criminals. When DW4 resisted, A2 was bundled and taken to Kabwata Police Station where he was detained without access to members of the public for fear that he might disclose what he witnessed. DW4 suspected that A2 would be killed so he secretly requested A2 to share a relative's phone number. A2 gave him his wife's number whom DW4 secretly called and advised to inquire into A2's detention.

Later, after DW4 had returned to Central Police Station, PW9 received a call from Kabwata Police Station informing him that A2's relatives were at the police station inquiring as to why he was detained and that they had access to him. PW9 panicked and decided that A2 would not be killed but would be charged with aggravated robbery so as to keep him from disclosing what he had witnessed. PW9 further decided to frame A1 for aggravated robbery to prevent him from suing the police for torturing him. A few days later PW9 called PW1 and PW2 to the police station where he informed them that he was arranging an identification parade at which they should point at A1 and A2. That PW1 was asked if he had any suspect in mind whom they could pin the robbery on to which PW1 suggested a fellow businessman whom he had issues with. He gave a description of the man who was later apprehended. The man that was apprehended goes by the nickname Mr. Kabila. A few days later, an identification parade was arranged at which the writings were put. The writings meant the case was built and docket opened. PW9 started driving A2's BMW vehicle until he was stopped from doing so. He does not recall the accused persons leading the police anywhere.

Cross examination of DW4

In cross examination, DW4 replied as follows; prior to being framed and convicted of aggravated robbery, he was working at Lusaka Central Police Station. He worked as a police officer for more than 11 years. The anti -robbery department of the police investigated his case and the arresting officer was Detective Investigator Spider Chola. At the time he was working with PW9, Detective Inspector Spider Chola was there. At the time of his arrest, PW9 was working at the Police Service Headquarters. His supervisor in 2019 was Mr. Gershom Mwila and the Divisional Criminal Investigation Officer was Mr. E Tembo. In terms of hierarchy, CIO Urban was not before DCIO. The officer in charge and deputy officer are based on the same floor, while DCIO is based on the floor above the second floor. The offices of the head of investigations, operations and officer in charge could receive complaints from police officers on administrative issues. If an officer has a complaint, the hierarchy was that the officer must first go to the office of the deputy officer in charge. If his complaint is not addressed, he should go to the officer in charge and finally the DCIO.

With regards his concerns regarding the extra judicial killing of Sydney Sakala, he had an opportunity to raise his concerns with his supervisors but he did not do so. His testimony before court is not an afterthought despite the fact that he did not think of telling his supervisors from 2019 to the date of his testimony.

He was arrested in 2022 and remanded at Lusaka correctional facility before his conviction. After his conviction he was taken to Kabwe. When he came to testify, he was remanded at Lusaka Correctional Facility which is where the three accused persons are also remanded. He used to frequent A2's bar and A2 is well known to him as a businessowner. He had never done business with A2 but frequented A2's bar because that is where one of his colleagues would be dropped off and picked from. DW4 also used to drink from A2's bar. While in remand, he interacted with A2 but not A1 and A3. He spent 98 days in custody before appearing before court and more than a year before being convicted. It is up to

the court to believe or disbelieve his statement that he never spoke to the accused persons during his detention. It hurts that he was framed and convicted of robbery. Being convicted is wasting his time and money. His testimony is not an afterthought and it is not true that his testimony is rehearsed as a result of his friendship with the accused persons.

PW1 apprehended A1 from the bus stop. He was concerned when PW1 told him that he had made a mistake apprehending A1, but DW4 did not tell his supervisors of his concerns. He was junior and hence he failed to raise his concern as it is not easy. A1 was not taken to the hospital immediately after the police squad's arrival at Kalikiliki Police Post, because they needed to assess whether he needed medical attention immediately or undergo partial investigations. A1 was not in custody but at the inquiries. He does not know that when a police officer holds a person, that person is in that officer's custody. A1 was taken to the police post by PW1 and PW2.

Both he and PW9 are eye witnesses to what happened at Kalikiliki Police Post but the court should believe his version of events. He never tried to stop the killing of Sydney Sakala but he tried to stop A2's killing. He was threatened with removal from the anti-robbery squad if he kept causing confusion. He could not stop the instruction to kill Sydney but he managed to stop the killing of A2. He was part of the team that investigated the Sydney Sakala case. He had an opportunity to raise his concerns but he was a junior officer who could not do anything.

He was not aware that PW7 was the one who conducted the identification parade, and was not aware of the proceedings of the identification parade because he was not at the parade. The person in charge of the parade gives the rules. An identification parade is conducted by an independent person and not the arresting officer. He was not at the scenes of crime for both the Kalikiliki and Ngwerere robberies. It is up to the court to either believe him or the people who were at the scenes of crime. DW4 agreed that the best people to tell the story of

what happened are PW1, PW2, PW3 and all those who were at the scenes of crime.

Re-examination of DW4

In re-examination, DW4 stated that it hurts if one knows that he committed the crime and is now paying the price, but it does not hurt if one did not commit the offence. It only makes the person stronger and gives him courage that one day he will be out.

4.5 DW5's Testimony

DW5 was Winnie Shumba Phiri, A3's daughter. Her testimony is that on 28 and 29th August, 2019, she was with her father, and the vehicle in question was parked outside the shop from 06:00 to about 18:00 or 19:00 hours. On 12th September, she was at the shop which is behind city market with A3 who was not too well and so he slept outside the shop where people put their sacks. The father to Kay called A3 to help switch on the generator, and said that he had not been sent by Kabila. A3 went and switched on the generator and when he returned, he sat on the sacks where he had earlier sat. A few minutes later, police pushed him to the ground and stepped on his chest. One of the officers fired a gun causing a bullet to go through the iron sheets. A3 was picked up and put in the police vehicle and a police officer got into A3's vehicle, a white prado.

Cross examination of DW5

In cross examination DW5 replied that: she was 23 years old at the time of her testimony and prior to A3's arrest, she was staying with him. A3 was the one providing for her and hence there has been a change in provision since he has been remanded which has not sat well with her. She loves A3 very much and she would do anything to ensure he is released and back home. Her testimony was the truth and it was intended to help A3 be released. A child will not always know the father's movements.

The car was parked at the shop from 06:00 to 19:00 hours every day. The vehicle would be parked until they knocked off from the shop. The vehicle was used in transporting her grandmother to and from the hospital when she was sick. On the dates given being the 28th, 29th August until 12th September, the vehicle was parked because her grandmother was better and hence was not being taken to the hospital. A3 used to drive the vehicle and it was possible for him to drive it to another place other than city market. Kabila is not her father's name but A3's neighbour at the shop, PW1.

On 29th August, 2019, she went to the shop at 08:00 and returned at 19:00 hours. She had a separate bedroom from A3 and would not know what transpired after 19:00 hours when she was not with him.

Re-examination of DW5

DW5 was not re-examined.

4.6 DW6's Testimony

DW6 was Heaveness Mwiinga Nkhoma, A1's wife. Her testimony was that on 29th August, 2019 A1 left home for work at around 08:00 hours. At around 15:00 hours, he called to inform her that he would delay going home as he was going to Kalikiliki to see his grandmother, Mrs. Mvula, who was sick. At around 20:00 hours when A1 did not return, she called his grandmother who informed her that A1 was apprehended while waiting for a bus at Kalikiliki bus stop. That he had been accused of being a thief. The bus station is near the police station in Kalikilki. A1's grandmother died. She felt sad to hear that he was arrested and charged with aggravated robbery. She got married to A1 in the year 2007. A1 has been a law-abiding person.

Cross examination of DW6

In cross examination, DW6 replied that: A1 was the one providing for her and their children. Their lives have changed following A1's incarceration. If A1

committed the crime, he will be convicted, if not then he will be released. It is not her wish that he should go back. She visits A1 who was arrested in 2019. Sometime she visits him twice in a week, other times a period of three weeks can pass without her visiting. She last visited him the previous week on Tuesday. She visited with other relatives so she was talking to A1 with relatives nearby. They were given about 10 to 15 minutes to talk to A1 but they did not discuss her testimony. She asked A1 to tell her the truth of what happened. She did not see A1 while he was detained at Kalikiliki Police Post but was merely informed by A1's grandmother.

While he was at Central Police Station, she visited him but she was not allowed to see him. She only had an opportunity to speak to A1 when he was taken to Lusaka correctional facility. She does not know exactly what happened when A1 was apprehended as she was not there. A1's grandmother died in 2020 but she could not recall the month. A1's grandmother used to live with John and James, A1's cousins. She does not know how old A1's cousins were but James could be above 20 years old while John was below 20 years old. They are now in the village. She did not inquire as to whether James and John were present when A1 went to visit his grandmother. It is only A1 who really knows what happened because she was not there. She cannot confirm or deny that A1 was involved in a case.

Re-examination of DW6

DW6 was not re-examined.

That was the case for the defence.

5.0 SUBMISSIONS

The defence was given up to 30th November, 2023 to file written submissions while the prosecution was given up to 29th December, 2023 to do the same. At the time of writing this judgment, there were no submissions filed from either side on the court's record.

6.0 THE DECISION OF THIS COURT

The accused persons in this case stand charged with aggravated robbery contrary to *section 294 subsection (1) of the Penal Code, Chapter 87 of the Laws of Zambia*. This section provides as follows:

“Any person who being, armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years.”

To prove the offence of aggravated robbery as against the accused persons in this matter, the prosecution must prove that:

- i. the accused persons were armed with an offensive weapon or instrument, or that they acted jointly;
- ii. they stole the property;
- iii. at or immediately before or immediately after the time of stealing they used or threatened to use actual violence to any person or property;
- iv. they had an intention to retain the things stolen, or prevent or overcome resistance to the things stolen or retained.

Findings of fact

The following are the facts not in dispute:

- i. An aggravated robbery occurred at M & C Minimart in Ngwerere on the 1st August, 2019.
- ii. An aggravated robbery occurred at Theos shop in Mtendere on the 29th August, 2019.

Disputed facts

In issue is the following:

- i. Whether the accused persons are the ones who committed the robberies in Mtendere and Ngwerere.

Whether the accused persons are the ones who committed the robberies.

As pointed out above, it is not in dispute that the shops in Mtendere and Ngwerere were robbed by persons using offensive weapons these being an AK47, Machete and Tasers which were produced as P1, P2 and P9. Additionally, PW11 the Ballistics Officer tested the said AK47 and found that it was discharged, thereby meeting the guidance of the Supreme Court and the Court of Appeal in the cases of **Jonas Nkumbwa Vs The People (1983) Z.R 103** and **Gilbert Nkhata, Micheal Mukombola, Lastone Simpasa Vs The People Appeal No. 176,177,178/2020** respectively. What is contention in this matter is the identity of the robbers.

For the accused persons to be criminally liable, the prosecution bears the burden of proving beyond all reasonable doubt that it was the accused persons who committed the robberies. The prosecution's evidence as to the identity of the robbers was provided by PW1, PW2, PW3, PW4 and PW6 who attended an identification parade at which they identified the accused persons. In relation to the Mtendere robbery, PW1 identified all three accused persons while PW2 identified A1 and A2. In relation to the Ngwerere robbery, PW3, PW4 and PW6 all identified A1 as one of the robbers. These identifications were confirmed by PW7 who was the officer who conducted the identification parade.

To counter the identifications made at the parade, DW1, DW2 and DW3 all testified that the identification parade was unfair as the prosecution witnesses had seen them prior to the parade and they had also been instructed on who to point at. The prosecution witnesses vehemently denied the foregoing assertions by the defence. It is settled law that an identification parade must be conducted

in a fair manner for it to be valid. The Supreme Court in the case of **Toko vs The People**¹ held that:

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

The Supreme Court reaffirmed the above position in the case of **Mtonga vs The People**² and further held that nullification of the identification can only occur in a proper case. The courts will not nullify identifications simply because the defence alleges that it was conducted in an unfair manner, the courts must interrogate the evidence to determine whether indeed an identification should be nullified for being unfair.

I have carefully examined the evidence of the prosecution witnesses and note that following their testimonies in examination in chief, they were not cross examined on the allegations that the accused persons had been shown to them prior to the identification parade, and that the police had instructed them on who to pick out from the parade. The closest the defence came in trying to establish prior contact was when PW3 was cross examined on whether she had been shown A1's picture prior to the identification. She was not cross examined on whether she had seen A1 in an office as testified by A1.

While the defence has no onus to prove the case, the evidence of DW4 that PW9 instructed PW1 and PW2 to point at the accused at the identification parade is unreliable and it did not puncture the prosecution witnesses' testimonies thus this court will attach very little weight to it. This is especially in light of DW4's evidence in cross examination that he did not attend the identification parade and thus was unaware of what transpired there. I am convinced that DW4's evidence consists largely, if not entirely of afterthoughts. Further there is an odd coincidence of the prosecution witnesses who do not know each other and who

witnessed two different robberies identifying the same person, A1, as one of the robbers. It is trite law that unexplained odd coincidences constitute evidence of something more. In the case of **Ilunga Kabala & John Masefu vs The People**³ the court held that:

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”

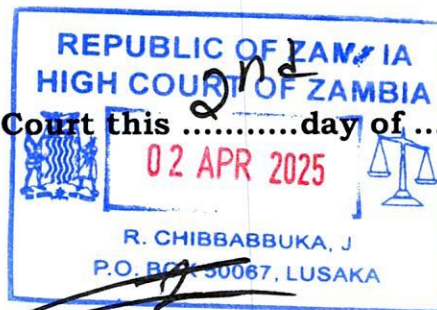
The evidence of the witnesses in the Mtendere case corroborates that of the witnesses in the Ngwerere case as to the fact that A1 is an armed robber and is the one who carried the gun during the two robberies this matter relates to. Further, A1 did not cross examine PW1 and PW2 on the assertion that he was mistakenly apprehended from a bus stop when he was coming from visiting his grandmother. As regards A2 and A3 apart from being identified by PW1 and PW2, PW9 testified that it was A1 who led to the apprehension of A2 and A3 whom he identified as his accomplices, which piece of evidence was not interrogated at all in cross examination. On the totality of the foregoing, I find that there was no irregularity in the identification of the accused persons and thus there exists no plausible reason for the nullification of the same.

The identification having been properly conducted, I accept PW1, PW2, PW3, PW4 and PW6's identification of A1 as the robber who was holding the gun during the two robberies, A1, who has been established as one of the robbers at the Ngwerere robbery where PW4 spotted a black BMW vehicle used in the commission of the offence. A1 led the police to A2 who has a black BMW vehicle. It is an odd coincidence that the person identified by A1 as his accomplice also has a black BMW vehicle, which odd coincidence I find as supporting evidence that it was A2's BMW vehicle that was used and seen by A1 at the scene of the robbery. As regard the issue that the BMW vehicle had no number plate while A2's vehicle has one, I take judicial notice of the fact that a number plate can be unscrewed and screwed back on a vehicle. Similarly, A1 led the police to A3 and

A1 testified that although there were four of them that participated in the robberies, he did not know the fourth man, as this man was introduced to them by A3 who A1 knew. This piece of evidence equally was not shaken in cross examination. A vast amount of the defence's evidence consists largely of afterthoughts that the prosecution witnesses were not cross examined on, and only came out in their defence. Additionally, the Court noted inconsistencies amongst the defence witnesses themselves, between DW4 and DW2's evidence particularly on the date of death of Sydney Sakala. While DW4 testified that DW2 witnessed the external judicial killing of Sydney Sakala, DW2 testified that Sydney Sakala died after two days.

Therefore, on the strength of the prosecution evidence, I find that the offence of aggravated robbery has been proved as against the accused persons, beyond reasonable doubt and, I convict them accordingly.

Delivered at Lusaka in Open Court this day of , 2025.



**R CHIBBABBUKA
HIGH COURT JUDGE**