

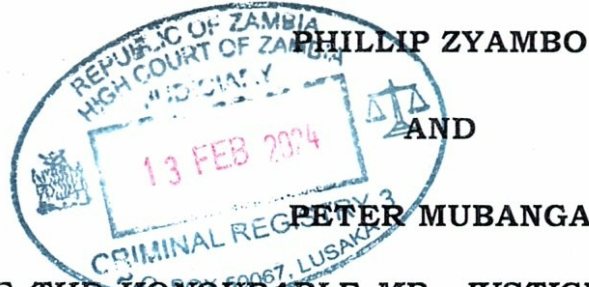
**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

HP/208/2023

BETWEEN:

THE PEOPLE

VS



PHILLIP ZYAMBO

AND

PETER MUBANGA

BEFORE THE HONOURABLE MR. JUSTICE V. S. SILOKA IN OPEN COURT ON THE 13TH DAY OF FEBRUARY, 2024

For the State: Ms. Susan Mwaba and Mr. Voster Munsaka, State Advocates – National Prosecution Authority

For the Accused: Ms. Ms. M. M. Banda and K. K. Kombe, Legal Aid Counsel – Messrs Legal Aid Board

J U D G M E N T

CASES REFERRED TO:

1. *Bright Katontoka Vs The People* (SCZ No. 8 of 2014).
2. *The People Vs Chimbala* (1973) Z. R. 118.
3. *Woolmington Vs The Director of Public Prosecutions* (1935) A. C.
4. *Mwewa Murono Vs The People* (2004) Z. R. 207.

LEGISLTATION REFERRED TO:

1. Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

OTHER MATERIAL REFERRED TO:

1. *Black's Law Dictionary, Ninth Edition, Braynan A. Garner 2009, Thompson Reuter*

1.0 INTRODUCTION

1.1 In this case, the two Accuseds stand charged with the offence of aggravated robbery Contrary to **Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia.**

1.2 The particulars of offence are that Phillip Zyambo and Peter Mubanga, on the 3rd day of June, 2022 at Lusaka in the Lusaka District, of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown did steal K500.00 cash the property of Mary Liswaniso and at or immediately before or immediately after the time of such stealing, did use or threatened to use actual violence to the said Mary Liswaniso in order to retain or obtain or prevent or overcome such resistance to the property from being stolen.

1.3 I warn myself at the outset, that the onus is upon the prosecution, to prove its case beyond all reasonable doubt and there is no onus on the Accuseds to prove their innocence. The Accuseds are entitled to give and call evidence or say nothing at all and if they elect to say nothing, this does not affect the burden on the prosecution. If, after considering all of the evidence in this case there is any doubt on my mind as to the guilt of the Accuseds then, the Accuseds must be given the benefit of that doubt.

1.4 In order to establish the guilt of the two Accuseds, the Prosecution must satisfy me upon each and every ingredient of the offence charged. The prosecution, therefore, must establish:

(i) That there were assailants armed with an offensive weapon or instrument, or there were two or more assailants;

(ii) Something was stolen; and

(iii) At or immediately before or immediately after the time of stealing, violence was used or threatened

***to be used to the victim or his property being
stolen or retained.***

1.5 I will now consider the evidence in this case.

2.0 THE PROSECUTION'S EVIDENCE

2.1 The first prosecution witness was Chutu Rosa aged 38 years, employed as a Scenes of Crime Officer by Zambia Police, herein after called **PW1**.

2.2 **PW1**'s evidence was to the effect that on the 14th of June 2022, she was assigned to conduct a scene reconstruction of a case of Aggravated Robbery within Chelstone.

2.3 It was **PW1**'s testimony that following that assignment she learnt that the complainant was Mary Liswaniso who complained that she was robbed of the sum of K500.00 after which she was stabbed.

2.4 **PW1** also told the Court that before initiating the scene reconstruction, the two suspects were removed from custody so that their rights could be explained to them.

2.5 As the scene was reconstructed, **PW1**, informed the Court that the suspects namely **A1** and **A2**, first led her to the bar where the Accuseds and complainant bought beer.

2.6 From the bar, the two Accuseds led **PW1** to a shop where Chappati was bought. After the Chappati was bought, the two Accuseds then demanded for their share but that the complainant refused. It was that refusal that resulted into a fight.

2.7 According to **PW1** when the quarreling subsided the complainant started going home but that on her way home, she again met the two Accuseds who dragged her into an unfinished building where she was beaten up.

2.8 **PW1** finally told the Court that after reconstructing the scene, photos were not developed because the memory card got

- destroyed. **PW1** identified **A1** and **A2** as the two Accuseds who led the Police in reconstructing the scene.
- 2.9 The second prosecution witness was Mary Liswaniso aged 31 years, herein after called **PW2**.
- 2.10 **PW2**'s evidence was to the effect that on the 3rd of June, 2023 at about 19:00 hours after an exciting day punctuated by drinks of beer and numerous rounds of the game of pool, she decided to quench the hunger that was rambling her stomach.
- 2.11 According to **PW2**, she was not able to eat the Chappati because Peter and Phillip grabbed it from her and that when she tried to resist she was beaten.
- 2.13 After being hit on the face, **PW1** then decided to go home and rest but that on her way home, she met Phillip and Peter who dragged her into the building where they beat her up and, in the process, stabbed her in the knee after which money which was in the bra was stolen.
- 2.14 It was **PW2**'s testimony that as Phillip and Peter were beating her, Winza (**PW3**) came to try and rescue her but Winza was also beaten after which he ran away.
- 2.15 As Winza was being beaten, **PW2** told the Court that she managed to sneak away and ran into a neighbour's house.
- 2.16 While in the neighbour's house, Peter and Phillip came and threatened to break the house but that she sneaked through the back door into the house.
- 2.17 Following the fight, **PW2** told the Court that Winza came early in the morning to check on her and during that visitation, she informed Winza that she was stabbed in the knee after which her money in the sum of K500.00 was stolen.
- 2.18 It was **PW2**'s further evidence that after Winza's visit, the matter was then reported to the Police at Chelstone.

- 2.19 After reporting the matter, **PW2** informed the Court that she was then given a Medical Report which she took to Chelstone Clinic for medical attention. **PW2** identified the Medical Report as **P1**.
- 2.20 After reporting the matter to the Police, the two assailants, namely Peter and Phillip now **A1** and **A2** were then apprehended by the Police.
- 2.21 In cross-examination, **PW2** told the Court that she did not get Peter's phone and that she did not throw it down.
- 2.22 In further cross-examination, **PW2** told the Court that she never fell down while in the bar but that it was Phillip who stabbed her in the knee using a knife.
- 2.23 **PW2** also under cross-examination told the Court that Peter and Phillip came to see her in the morning to ask for forgiveness and not to ask about their phone.
- 2.24 The third prosecution witness was Winza Sichali aged 28 years old, herein after called **PW3**. The gist of **PW3**'s evidence was to confirm that it was Phillip and Peter now (**A1** and **A2**) who beat up **PW2** and that his attempts to stop the fight yielded no results as the duo also went on to beat him up.
- 2.25 Further, **PW3** informed the Court that he saw them clearly because there was plenty light and that he has known them for over 5 years. **PW3** identified Peter and Phillip as **A1** and **A2**.
- 2.26 In cross-examination, **PW3** informed the Court that when he went to visit Mary in the morning, he found **A1** and **A2** apologizing.
- 2.27 In further cross-examination, **PW3** informed the Court that he heard about the issue of the phone but that the fight that erupted among the three was not about the phone.
- 2.28 The fourth prosecution witness was Siamatenda Mapenzi aged 48 years, Arresting Officer in this matter, herein after called **PW4**.

- 2.29 The gist of **PW4**'s evidence was to the effect that he opened up a docket, carried out investigations and arrested the now Accuseds for the current offence.
- 2.40 **PW4** also tendered into Court the Medical Report (**P1**) and identified **A1** and **A2** as the Accuseds he charged for the current offence.
- 2.41 In cross-examination, **PW4** informed the Court he did not go into the bar to find out what really happened.
- 2.42 Further under cross-examination, **PW4** told the Court that he was not aware that Mary got injured while being ejected from Chila's Bar.
- 2.43 In further cross-examination, **PW4** told the Court that **PW2** never disclosed the issue of the phone but that **PW3** informed him that she was attacked in an unfinished building.

2.44 That was the case for the State.

3.0 THE CASE FOR THE DEFENCE

- 3.1 Coming to the case for the Defence, the two Accuseds elected to give sworn evidence and called two witnesses.
- 3.2 The first Defence witness was Phillip Zyambo herein after called **DW1**.
- 3.3 **DW1** in his evidence informed the Court that on the 3rd of June, 2022 about 09:00 hours he went to join his friend at Chila's Bar who was drinking beer and playing music.
- 3.4 While drinking, at about 10:00 hours, Mary Liswaniso, (**PW2**) also joined and the three together with others drank beer up to 20:00 hours.
- 3.5 It was **DW1**'s testimony that at 20:00 hours, Mary Liswaniso (**PW2**) started making a lot of noise. In an attempt to restrain her, **PW2** went on to bump into someone's beer, an act which then prompted the owner of the bar to have Mary Liswaniso ejected from the bar.

- 3.6 According to **DW1**, as **PW2** was being ejected by **A2**, **PW2** went on to damage Peter's phone (**A2**).
- 3.7 It was **DW1**'s testimony that after **PW2** was ejected from the bar, she started insulting and that as she attempted to re-enter the bar, she stepped on a bottle after which she slipped and fell down on broken glass and injured herself.
- 3.8 It was **DW1**'s further evidence that after the fracas, he decided to go home. On his way home, he then met Peter talking to Mary but that upon seeing him, Mary started insulting after which a fight ensued.
- 3.9 According to **DW1**, during the fight, Mary ran away but that it was decided that she be followed so that she explains the whereabouts of the phone.
- 3.10 **DW1** also informed the Court that as they were looking for Mary Liswaniso, Winza (**PW3**) came and advised **PW2** and **DW1** to go home and sleep and have the matter resolved the following day.
- 3.11 It was **DW1**'s further testimony that the following morning himself and **DW2** went to see Mary Liswaniso to have the matter resolved. However, in spite of the agreement with Liswaniso, he was later picked up by the Police and charged with the current offence.
- 3.12 **DW1** also told the Court that **PW2** was not stabbed but that she injured herself when she fell on broken glass.
- 3.13 In his further evidence, **DW1** also explained that he didn't know anything about the money that Mary had but that it was Mary who was supposed to pay Peter for the damaged phone.
- 3.14 In cross-examination, **DW1** told the Court that it was the owner of the bar who ordered that **PW2** be ejected from the bar.
- 3.15 **DW1** also in cross-examination told the Court that when Winza arrived, he found them quarreling with **PW2**; and that when he arrived they turned against him and beat him up.

- 3.16 In further cross-examination, **DW2** told the Court that the damaged phone was a Techno Pop; but that it was not repaired because it was in the hands of Mary Liswaniso.
- 3.17 In further cross-examination **DW1** told the Court that Mary Liswano got the Medical Report after being injured and losing her money.
- 3.18 **DW1** also in cross-examination admitted that they fought with **PW2**.
- 3.19 The second Defence Witness was Peter Mubanga, hereinafter called **DW2**. **DW2**'s evidence is to a large extent is the same with **DW1**, therefore it will not be repeated here save to add that it was **DW2** who ejected Mary Liswaniso from the bar and during the ejection, his phone was damaged by Mary Liswano.
- 3.20 Further it was the testimony of **DW2** that Mary injured herself when she fell down on broken glass. **DW2** denied attacking Mary Liswaniso and stealing her money.
- 3.21 In cross-examination, **DW2** told the Court that he was drunk just like Mary Liswaniso was and that he cannot recall the names of the people whose beer Mary Liswaniso bumped into.
- 3.22 In further cross-examination, **DW2** told the Court that **PW2** injured herself after she fell on broken glass but that the said broken glass was not tendered into Court.
- 3.23 **DW2** also in cross-examination told the Court that Winza confirmed that he was also beaten when he tried to stop the fight.
- 3.24 Further, **DW2** admitted in cross-examination that, after the quarrel he followed Mary Liswaniso home for Winza to see the phone and that he bought the phone from someone but that he could not recall his name.
- 3.25 That was the close of the Defence's case.

4.0 SUBMISSIONS

4.1 The State filed in submissions while the Defence did not. I am greatly indebted to the State for the submissions filed. Submissions of the State will not be recited but will be referred to in the analysis where necessary. The failure by the Defence to submit submissions will not be prejudicial to their case.

5.0 ISSUES FOR DETERMINATION

5.1 The following issues falls for determination:

- (i) Whether it was the now Accuseds who attacked the complainant.
- (ii) Whether the elements of the offence of aggravated robbery have been proved as against the Accused Persons.

6.0 FINDINGS, DECISION AND CONCLUSION

6.1 In this Matter, I have found the following facts established:

- (i) That the Complainant, **A1** and **A2** are friends and drank beer together on the said material date.
- (ii) That the Complainant, **A1** and **A2** had a fight on the material date.
- (iii) That the Complainant had a cut on the knee.
- (iv) That the Complainant was robbed of her money on the material date.

6.2 I have found the following issue to be in dispute:

- (i) Whether the Complainant injured herself as a result of falling on broken glass.

7.0 THE LAW

7.1 The offence pursuant to which the Accused has been charged is **Aggravated Robbery contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia**. This section provides:

“Any person who, being 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 26 shall be sentenced to imprisonment for a period of not less than fifteen years.”

- 7.2 Therefore, from the said Section, the State to sustain a conviction must prove that:
- (i) The now Accuseds were the assailants armed with an offensive weapon or instrument or there must be two or more assailants.
 - (ii) At or immediately before or immediately after the time of stealing, violence must have been used or threatened to be used to the victim or his property to prevent or overcome resistance to the property.
- 7.3 From the said Section, the question that needs to be answered is whether it is the now Accused who were the Assailants?
- 7.4 From the evidence on record, it has been established through the evidence of **PW2** and **PW3** that it is the now Accuseds, who attacked **PW2**. **P1** which is a Medical Report also confirms that **PW2** was injured.
- 7.5 Further, the two Accuseds also did not deny that there was a fight between themselves and **PW2**.
- 7.6 The evidence tendered by **PW2** and **PW3** is direct evidence of what they saw and did. Direct evidence according to **Black’s Law Dictionary, Ninth Edition, Bryan A. Garner 2009, Thompson Reuter** is:

“Evidence that is based on personal knowledge or observation and that if true proves a fact without inference or presumption.”

- 7.7 In view of the said position, I am aware that the Defence argued that **PW2** injured herself when she fell on broken glass. In my view, that position is an afterthought and does not apply herein. Even if, she fell on glass, that does not take away the fact that it is **A1** and **A2** who beat her up as per the evidence of **PW3**.
- (ii) Whether the elements of the offence of aggravated robbery have been proved as against the Accused Persons.
- 7.8 To aggravate the offence, the Prosecution must firstly prove that the two Accuseds either had an offensive weapon or that the Accused acted with other persons to steal from the victim, and immediately before or immediately after such stealing did use or threaten to use actual violence to retain the stolen property or to prevent resistance.
- 7.9 From the evidence on record, I have found that this element has been proved. **PW2** testified in Court that **A1** and **A2** beat her up and stabbed her with a knife, after which her money amounting to K500.00 was stolen from her. **PW3** also confirmed in Court that it is **A1** and **A2** who beat up **PW2** and that when he tried to stop the fight, he was also beaten.
- 7.10 Further, the two Accuseds also did not deny this fact, no wonder they went to ask for forgiveness from **PW2** in the morning after the attack.
- 7.11 The other element that needs to be proved under this head is that the Accuseds did steal something from the victim.
- 7.12 From the evidence, **PW2** informed the Court that her money amounting to K500.00 was stolen by **A1** and **A2**.

7.13 On the basis of the foregoing uncontroverted evidence, I find as a fact that **PW2**'s money in the sum of K500.00 was stolen by **A1** and **A2**.

7.14 The last element that needs to be proved under this head is that actual violence was used or threatened to be used by the assailants to retain the stolen property or to prevent resistance from the victim.

7.15 In the case of **Bright Katontoka Vs The People**⁽¹⁾ the Supreme Court stated as follows:

“It must be established that a person stole something capable of being stolen whilst armed with offensive weapon or instrument or being together with one or more using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

7.16 In my considered view, this element has been proved through the testimony of **PW2** and **PW3**. Further **P1** which is a Medical Report also confirms that **PW2** sustained injuries as result of the attack of **A1** and **A2**.

7.17 Further, I find that it is clear that all the elements of aggravated robbery have been established in that there were two assailants who together attacked **PW2** with intention of stealing from her and did in fact steal and in so doing they used actual violence. Though the knife was not recovered, the beating, knifing and robbery corroborate the offence of aggravated robbery as per the guidance of the **The People Vs Chimbala**⁽²⁾ where the Court held that:

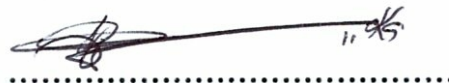
“It is necessary, under a charge of aggravated robbery, to prove that the taking and force used or threatened contemporaneously with the taking was accompanied

by an intent to deprive the owner permanently of the thing taken.”

8.0 CONCLUSION

8.1 In conclusion and following the guidance in *Woolmington Vs The Director of Public Prosecutions*⁽³⁾ and *Mwewa Murono Vs The People*,⁽⁴⁾ I have found that the State has discharged its burden beyond any reasonable doubt that it is the two Accuseds who committed the offence and as such I find the two Accuseds **GUILTY** as charged and I convict them accordingly.

**DELIVERED AT LUSAKA IN OPEN COURT THIS 13TH DAY OF
FEBRUARY, 2024.**

A handwritten signature in black ink, appearing to read 'S. V. SILOKA', is written over a horizontal dotted line. The signature is stylized and includes a small flourish at the end.

**S. V. SILOKA
HIGH COURT JUDGE**