

KABUKALA ABU TAMBWE & SHAFIKO HACHI v THE PEOPLE (1987) Z.R. 15
(S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND SAKALA, J.J.S.
9TH DECEMBER, 1986 AND 11TH MARCH, 1987
(S.C.Z. JUDGMENT NO. 3 OF 1987)

Flynote

Criminal Law and Procedure - conviction - Particulars - Substitution of by Supreme Court.

Headnote

The appellant was convicted of aggravated robbery on his own on the ground that he was armed with a gun. There was no proof that the weapon was a gun within the meaning of the Firearms Act. However, there was ample evidence that a number of people took part in the robbery. The appellant appealed against conviction of robbery.

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Held:

- (i) The Supreme Court has power under section 15 (3) of the Supreme Court Act to substitute a judgment of guilty of such offence as the trial court could have entered under section 273 (2) of the criminal procedure code .
- (ii) Judgment of guilty of aggravated robbery substituted by guilty of aggravated robbery whilst acting together with persons unknown .

Case cited:

- (1) Kangaza v The people (1971) Z.R. 90

Legislation referred to:

Supreme Court Act, s. 15 (3)

Criminal Procedure Code, Cap. 160 s. 273(2)

For the 1st Appellant: M.Chitabo, Mwanawasa & Co.

For the 2nd appellant: K.Lwali, Legal Aid Counsel,

For the respondent: J.M.Mwanachongo, Senior State Advocate .

Judgment

GARDNER, J.S.: delivered the judgment of the court and, after dealing with matters which are not the subject of this report, continued.

In respect of the second count it is noted that, although the Statement of Offence refers to aggravated robbery contrary to section 294 of the Penal Code, the particulars refer to robbery by the first appellant on his own. Robbery by a person on his own is not aggravated robbery unless he is armed with an offensive weapon or instrument and, although in this case there was an allegation

in the evidence that the appellant was armed with a gun, there was no proof that the weapon was a gun within the definition of the Firearms Act. In consequence the appellant can only be convicted of aggravated robbery if he was in the company of another person or persons. There is ample evidence that a number of people took part in the robbery referred to in the second count and a conviction for aggravated robbery is justifiable in law. This court, in *Kanagaza v The People* (2), said that this court had, under section 15(2) of the Court of Appeal for Zambia Act, power to amend the particulars in that case to read:

"Whilst acting together with persons unknown."

In that case the accused person was originally charged with aggravated robbery whilst acting together with certain named persons. Those named persons were found not guilty and it was necessary to amend the particulars as we have indicated, having found that the accused person was not prejudiced by the amendment. The Court of Appeal for Zambia Act has been replaced by the Supreme Court of Zambia Act, under which section 15(3) provides that this court may substitute a judgment of guilty of such other offence as the trial court could have entered. Accordingly, as a trial court can, under section 273(2) of the Criminal Procedure Code, amend the information at any stage of the trial, unless, having regard to the merits of the case, the required amendment cannot be made without injustice, this court has power to substitute a judgment of guilty of the offence of aggravated robbery whilst acting together with persons unknown. As in the *Kangaza* case, this appellant's defence was that he was not at the scene of the crime, and the question of his acting together with other persons was immaterial to that defence. For that reason we are quite satisfied that there is no prejudice to the appellant by the proposed amendment.

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On the first count we dismiss the appeal against conviction. On the second count we dismiss the appeal against conviction and substitute a judgment of guilty of the offence of aggravated robbery whilst acting together with persons unknown.

Appeal dismissed on both counts
