IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 39 OF 2011

HOLDEN AT KABWE

(Criminal Jurisdiction)

B E T W E E N:

**LAMECK TEMBO** APPELLANT

-VS-

**THE PEOPLE** RESPONDENT

CORAM: **MWANAMWAMBWA, WANKI AND MUSONDA, JJS**

 On 9th August, 2011 and 7th February, 2012

For the Appellant: Mr. S. Imasiku of Messrs. Imasiku and Company

For the Respondent: Mr. C.F.R. Mchenga, SC, Director of Public Prosecutions

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:

1. **Nelson Banda -Vs- The People, (1978) ZR 30.**
2. **Green Nikutisha and Another -Vs- The People, (1979) ZR 261.**
3. **Kambarange Mpundu Kaunda -Vs- The People, (1990/1992) ZR 215.**
4. **Barrow and Young -Vs- The People, (1966) ZR 43.**
5. **Dorothy Mutale and Richard Phiri -VS- The People, (1995/1997) ZR 227.**
6. **Felix Silungwe and Shadreck Banda -Vs- The People, (1981) ZR 286.**
7. **Mulenga -Vs- The People, (1966) ZR 118.**
8. **The People -Vs- Elisha M. Tembo, (1978) ZR 406.**
9. **Benwa -Vs- The People, (1975) ZR 31.**

STATUTES REFERRED TO:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of**

 **Zambia.**

 The appellant was sentenced to 18 years Imprisonment with hard labour, following his conviction by the High Court, Livingstone, on one count of Attempted Murder, contrary to **Section 215 of the Penal Code, Chapter 87 of the Laws** **of Zambia**. The particulars of the offence were that on the 22nd of June, 2009 at Livingstone, in the Livingstone District of the Southern Province in the Republic of Zambia, he did attempt to murder Aggrey NASILELE.

 In support of the case, the Prosecution called eight witnesses.

 The evidence adduced by the Prosecution was that, on 22nd of June, 2009, PW1, PW5, PW6 and PW7 were at Eatrite, also known as Masaka. Around 02.00 hours, they received a complaint from a person whom they did not know, to the effect that he had fought with a room mate in room 404, at Eastern Mansions.

 The complainant further, said he had gone to Livingstone Central Police Station for assistance. The Police, however, told him that they did not have sufficient man power. Instead, he was advised to seek the assistance of Security Officers where he had been drinking, to apprehend his room mate.

 The four Security Guards, acting on the complaint and accompanied by the complainant, went to Eastern Mansion. They went to room 404 where they knocked. As they were knocking, the appellant came out of room 403 briefly and returned into the room. Shortly later, the appellant came out and shot PW1 who fell. Thereafter, PW1 was taken to the Hospital where he was admitted. Subsequently the shooting was reported to the Police at Livingstone Central Police Station. Acting on the report, PW8 investigated the shooting and later arrested the appellant for the subject offence.

 The appellant in his evidence stated that on 20th June, 2009 he was on official duty guarding and escorting cash for Zambia Electricity Supply Corporation in Livingstone.

 They were booked at North Western Mansion, in room 403 together with another Constable. The money that he was guarding was kept in room 403A. Between 02.00 hours and 03.00 hours, he heard a hard knock on their door and someone shouting and calling the name of MULENGA and ordering him to open. Thereafter, he heard conversation between MULENGA and the person who was knocking.

 Shortly later, he heard MULENGA screaming, “thief, officer I am attacked by criminals.” He told JERE to stay alert, while he went outside to see what was happening. Along the passage, he bypassed MULENGA who was crawling. He went straight to a man who was standing in the passage outside room 403 and who had a mask on his heard and grabbed the mask from him. He asked the man what he wanted.

 They were about six of them. The man said they were officers from within and wanted to search the room. As they were discussing, one of the other people threw a bottle, aiming at him. However, the bottle missed him and went to hit in the passage. A piece of the bottle hit him on the arm. It was then that he realized that they were under attack. He rushed back in his room to go and withdraw the weapon.

After withdrawing his weapon, he started advancing so that he could disperse them by firing a warning shot. It was then that one of the people jumped over and wanted to grab the firearm. They started struggling for the firearm. In the process, the firearm went off, after which the man released the firearm and sat down. The struggle was between the passage leading into room 403 and the main corridor. There were two gun shots. Thereafter, he returned to his room where he reported to his Supervisors what had happened. After that, they went to report to the Police Station. They found one of the suspects, reporting. He was then disarmed and detained.

The trial Court after analyzing the evidence before it, found that the appellant first came out without a firearm and then returned in the room; when he came out shortly later he started shooting; that PW1, PW5, PW6 and PW7 were not armed; that a bottle was not flung at the appellant and injured him; that it believed the story of PW1 and his friends as against that of PW2, PW3, PW4 and the appellant; that the appellant was not attacked; that the appellant confronted PW1 and his friends and opened fire at close range and seriously injured PW1; that PW1 and his friends were not a group of thieves; that appellant cannot avail himself the protection provided under **Section 24(1) of the Zambia** **Police Act or indeed Section 9 of the Penal Code**; that the actions of appellant cannot be justified under the circumstances; and that the appellant cannot avail himself the defences of accident, self defence, provocation, intoxication and insanity; that the evidence against the appellant was overwhelming. The trial Court then found the appellant guilty and convicted him as charged. He was then sentenced to 18 years Imprisonment with hard labour.

The appellant dissatisfied with his conviction and sentence has appealed to the Supreme Court against the said conviction and sentence.

He has advanced five grounds of appeal, namely:-

**GROUND ONE:**

**The learned trial Judge misdirected herself by disregarding the failure on the part of the prosecution to call other witnesses who were present at the time of the alleged attempted murder.**

**GROUND TWO:**

**That the learned trial Judge erred in law and in fact by finding the appellant guilty despite the conflicting evidence of the prosecution witnesses.**

**GROUND THREE:**

**The learned Court below erred in law and in fact when it received evidence of a witness without plea being taken.**

**GROUND FOUR:**

**The learned Judge erred in law and fact by handing a sentence without according the appellant lenience as first offender.**

**GROUND FIVE:**

**The learned Judge erred in law and in fact when she did not consider the defence of self defence and/or another, and/or defence of property on the facts of the case.**

The appellant filed Heads of Argument on which he entirely relied.

In support of ground one, it was submitted that, the onus on the prosecution to prove its case beyond reasonable doubt had not been discharged in the Lower Court, because the prosecution omitted to call other witnesses whose evidence was essential in proving the guilt of the appellant.

It was contended that, the prosecution should have called the Security Guards who were on duty the night of the alleged offence as well as the persons who were in the corridor at the material time.

The failure by the prosecution to do so raises the doubt as to whether the prosecution had proved the actual intent necessary in a charge of attempted murder.

The appellant relied on the authority of ***NELSON BANDA -VS- THE PEOPLE*** (1) where it was stated that:-

**“In any given set of circumstances where there is evidence that more than one person witnessed a particular event, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the Court will no doubt take into account in the decision as to whether the onus on the prosecution has been discharged.”**

Further, in the case of ***GREEN NIKUTISHA AND ANOTHER -VS- THE PEOPLE*** (2) the Court stated:-

**“The need for calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt. If there is no doubt about a witness, there is no need for supporting evidence nor is there any need for comment by the Court on the absence of such evidence.”**

It was further contended that most of the prosecution witnesses, particularly, PW5, PW6 and PW7 were friends of PW1 and that, as such, they were witnesses with a possible interest of their own to serve. Therefore, evidence was required to corroborate their evidence. In aid, the Court was referred to the case of ***KAMBARANGE MPUNDU KAUNDA -VS- THE PEOPLE*** (3) where it was held that:-

**“As the prosecution eye witnesses were relatives or friends of the deceased and could, therefore, will have had a possible bias against the appellant; and as they were the subject of the initial complaint by the appellant as having attacked him and his friends and therefore, had a possible interest of their own to serve, failure by the learned trial Judge to warn himself and specifically to deal with this issue was a misdirection.**

It was submitted that the learned trial Judge did not sufficiently deal with this issue. Finally, it has been prayed that this ground be allowed.

In support of ground two of appeal, it was submitted that, the evidence for the prosecution was full of discrepancies that it did not warrant a conviction. In aid, the appellant relied on the case of ***BARROW AND YOUNG -VS- THE PEOPLE*** (4) which held that:-

**“Where one prosecution witness gives evidence in favour of the defence, and one against, the Court should resolve the doubt in favour of the accused in the absence of any good reason for preferring one witness’s testimony.”**

The conflicting evidence of PW1, PW5, PW6 and PW7 on one hand and that of PW2 and PW3, raises doubt as to whether the appellant acted with the requisite intent, to establish the offence of attempted murder.

In light of the conflicting evidence, the prosecution cannot be said to have proved its case beyond reasonable doubt. It has been submitted that, the Court resolves these issues in favour of the appellant. Counsel for the appellant relied on the case of ***DOROTHY MUTALE*** ***AND RICHARD PHIRI -VS- THE PEOPLE*** (5) which, is on the point regarding this issue; and

**“--- the case rested on the drawing of inferences. Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference. The circumstantial case in this appeal did not exclude the more favourable inferences. The factors urged by Mr. Malama were valid. It is, of course, quite possible and the suspicion in this regard is very strong that – as Mr. Mukelabai suggested – the incidents at the market and on Bombesheni Road were related.**

**However, there is that lingering doubt on account of the various matters herein, discussed and we are required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory.”**

It was submitted that, more than one inference was possible from the circumstances surrounding the incident of that night. The inference that should have been taken should have been that favourable to the appellant. It finally been prayed that, this ground be allowed.

In support of ground three of appeal, it was pointed out that, perusal of the record will show that PW1 gave his evidence before the appellant’s plea was taken. Therefore, his evidence should not have formed part of the record. **The Criminal Procedure** **Code** does not give any exception to the reception of evidence in such manner.

The appellant relied on the provisions of **Sections 280 and 285** **of the Criminal Procedure Code** which provides:-

**“280. If the accused pleads “not guilty,” or if a plea of not guilty” is entered in accordance with the provisions of Section Two Hundred and Seventy-Eight, the Court shall proceed to choose assessors, as hereinafter directed (if the trial is to be held with assessors), and to try the case ---.”**

**“285. When the assessors have been chosen (if the trial is before a Judge with the aid of assessors), the advocate for the prosecution shall open the case against the accused person, and shall call witnesses and adduce evidence in support of the charge.”**

It was argued that, the witnesses in support of the charge in pursuance of the foregoing provision could only be called after the appellant’s plea of not guilty. The evidence of PW1, therefore, fell outside the scope of the foregoing provisions. As such, the Court below ought not to have considered his evidence.

It was submitted in the alternative, that, the Court ought to have informed him of his right to demand that the witnesses, be recalled and give his evidence afresh or be further cross-examined by the appellant or his advocate, after the charge was amended as provided in **Section 213 of the Criminal Procedure** **Code** which provides that:-

**“(1) Where at any stage of a trial before the accused is required to make his defence, it appears to the Court that the charge is defective either in substance or inform, the Court may, save as in Section Two Hundred and Six otherwise provided, make such order for alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case:**

Provided that, where a charge is altered under this Subsection –

1. The Court shall thereupon call upon the accused person to plead to the altered charge;
2. The accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event.”

It was contended that, from the record of appeal PW1 gave evidence prior to the appellant taking plea in the Court below, where upon the charge was amended. The appellant was called upon to take plea at that point, but was not asked nor informed of his right to recall PW1.

It was finally submitted that, this ground be allowed.

In support of ground four of appeal, it was submitted in the alternative, that, the Court below erred in law by handing as sentence on the appellant that is excessive as the sentence does not reflect the lenience accorded to a first offender such as the appellant. With the exception of prescribed minimum or mandatory sentences, a trial Court has discretion to select a sentence that seems appropriate in the circumstances of each individual case. In sentencing, the appellant to eighteen years imprisonment with hard labour it did not use its discretion. As a first offender, he ought to have been shown lenience by the Court below in its passing of its sentence. The appellant has relied on the case of ***FELIX SILUNGWE AND SHADRECK BANDA -VS- THE PEOPLE*** (6) where it was held that:-

**“It is trite that a bad record must not be the basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is a proper sentence for the offence itself does the Court proceed to consider to what degree that sentence may properly be reduced because of the absence of mitigating factors.”**

It was finally submitted that, the Court interferes with the sentence in the alternative and that, this ground be allowed.

In support of ground five of appeal, it was submitted in the alternative that, the culmination of the evidence of PW1 and the appellant left the Lower Court with the option of considering the defences of self defence, defence of other and/or defence of property. The evidence of PW2 also lends credence to an attempt by the appellant to defend not only themselves, but also the large sums of money he was guarding.

In aid, the Court was referred to the case of ***MULENGA -VS-*** ***THE PEOPLE*** (7) where it was held that:-

**“The initial requirement for a defence of provocation is that, the act causing death must be done ‘in the heat of passion.’ In cases of self defence, this is not at all necessary. Leaving aside the cases where there is real and imminent danger of death to the accused, it may be perfectly reasonable in some cases for him to cause, and intend to cause, injury sufficiently severe to come within the category of grievous harm.”**

It was submitted that, it was wrong to draw an inference of guilt on the part of the appellant based on him returning into the room and thereafter gun shots being fired. It was not necessary for the appellant to have instantaneously reacted to any attack on him or PW2 so as to have done so in the heat of passion. Further,it wasalso accepted in the case of ***THE PEOPLE -VS- ELISHA M. TEMBO*** (8) that:-

**“If there is a threat to the safety of the property so that defensive action is reasonably necessary, the person defending his property cannot be expected to weigh to a nicety the exact measure of his necessary defensive action. The defence of defence to one’s property will only fail if the prosecution show beyond reasonable doubt that what the accused did was not by way of defence of his property; should there be doubt, the accused should be acquitted.”**

It has been conceded and acknowledged that, the authority cited is not binding on this Court. It has however been pointed out that, the principle of law cited is applicable to this matter. As such an extension to the principle on defence of one’s property can be made to also refer to property left under one’s guard like the case of the appellant on the day of the incident.

On behalf of the Respondent, Mr. MCHENGA, the Director of Public Prosecutions submitted that, in his view, the issue is whether conviction for attempted murder was correct. He supported conviction but not for attempted murder. In aid of the foregoing submission, he referred the Court to the case of ***BENWA AND*** ***ANOTHER -VS- THE PEOPLE*** (9) in which the Court held that:-

**“For one to be convicted of attempted murder there must be evidence of intention…”**

He contended that, his scrutiny of the record of appeal, left him with the view that actual intent was not proved. The Court below therefore, ought to have convicted for causing grievous bodily harm. He would therefore, support a conviction for that offence.

He finally submitted that, the trial Court considered the evidence before her in her judgment and came up with findings of fact. She found the evidence adduced on behalf of the prosecution to be more credible. It is difficult to believe that robbers could go to where armed officers were guarding money.

In reply, Mr. IMASIKU submitted that, from the record of appeal, at pages 64 to 69, the Court below said it believed the complainant and his friends. That shows that, there were two versions. The Court did not say why it believed one version and not the other version.

We have considered the grounds of appeal; the appellant’s heads of arguments; the submissions on behalf of the parties. We have also considered the Judgment of the Court below.

In ground one of appeal, the appellant has challenged the Court below, for disregarding the failure on the part of the prosecution, to call other witnesses who were present at the time of the alleged attempted murder.

From the record, it appears that there was evidence by PW5, PW6 and PW7 that they found a lady and a man in the corridor at Eastern Mansion. There is further evidence that before PW1, PW5, PW6 and PW7 went to the rooms at the Eastern Mansion, they spoke to the Security Guard there. However, the lady, the man and the Security Guard were not called as witnesses, and no explanation was made as to why they were not called. Since PW5, PW6 and PW7 were friends of PW1, whose evidence required to be supported, the lady, and the man would have been summoned in support of the evidence of PW5, PW6 and PW7, as to what transpired outside the rooms. Further, the Security Guard at Eastern Mansion would have told the Court as to whether PW1, PW5, PW6 and PW7, being outsiders saw him. The said people would have assisted the Court to remove the doubt as to what really transpired at the rooms, as was held in the ***NIKUTISHA AND ANOTHER*** (2) case.

In the circumstances, we would agree with the appellant that the failure by the prosecution to call the man and the lady who were in the corridor, and any of the Security Guards at Eastern Mansion, raised a doubt as to whether the prosecution had proved the actual intent necessary in a charge of attempted murder.

In the circumstances, we have found that, there is merit in ground one of appeal. It is, accordingly, allowed.

In ground two of appeal, the appellant has challenged his conviction despite the conflicting evidence of the prosecution witnesses.

We have noted from the record of appeal at page 63, that the trial Court found that the prosecution witnesses were divided into two groups, the group composed of PW1 and his friends, PW5, PW6 and PW7 and the group of witnesses who were with the accused, PW2, PW3 and PW4.

The trial Court further recognized that, the defence had alluded to the conflicting evidence in the prosecution evidence. The trial Court at page 65 identified the conflicting evidence in the first group of the prosecution witnesses. In answering the defence’s concern in relation to the conflict in the prosecution evidence, the trial Court at page 65, last paragraph stated that:-

**“I must state that simply because the two groups of prosecution witnesses contradicted each other does, not mean that their evidence must be discarded or that the Court should simply find in favour of the accused. As I have noted, the witnesses are in two groups and in my view, their evidence has to be considered without losing sight of this fact ………”**

That in our view is a misdirection and not in line with the guidelines in the case of ***BARROW AND YOUNG -VS- THE PEOPLE*** (4) where it was held that:-

**“Where one prosecution witness gives evidence in favour of the defence, and one against, the Court should resolve the doubt in favour of the accused in the absence of any** **good reason for preferring one witness’s testimony.”**

In line with the foregoing holding, the trial Court was supposed to resolve the conflict in the prosecution evidence in favour of the appellant. However, the trial Court went on to justify its decision not to follow the holding in the ***BARROW*** (4) case and stated at page 66 that:-

**“In a case of this nature, where we have two groups of prosecution witnesses, it is important to realize that although each witness can witness an incident all the witnesses cannot give evidence which is exactly the same verbatim. In this, it is inevitable that we have 2 groups within the prosecution case and each group giving a different story. The evidence by each group of witnesses must be considered as a whole. Indeed, as I have stated, the contradictions in the evidence of PW1 and his friends do not call for the discarding of all their evidence and keeping in mind *BARROW AND YOUNG -VS- THE* *PEOPLE*.** (4) **I find that I would be creating an injustice if I trash the evidence of PW1 and his friends, on the basis of the conflicting evidence. It is also important to bear in mind that there were contradictions in the evidence of PW2, PW3 and PW4 ….”**

As would be noted from the foregoing reproduction, the trial Court went to pains to justify its decision not to adopt the guidelines in the ***BARROW*** (4) case. However, in doing so, it has shown contradictions in the evidence of the second group.

In the circumstances, we have found merit in ground two of appeal. It is, accordingly, allowed.

In ground three of appeal, the appellant is challenging the trial Court for receiving the evidence of a witness, PW1 before plea was taken.

From the record of appeal, there is no doubt that PW1 gave his evidence before the appellant was called upon to plead. The witness gave his evidence in chief in the presence of the appellant and his two Counsels and was cross-examined. We do not therefore see any prejudice that was done to the appellant. In fact, at page 17 of the record of appeal, one of the appellant’s Counsel Mr. MUMBA submitted that:-

**“It is the position of the defence that there will be no prejudice to our client if the evidence of PW1 Aggrey NASILELE is adopted as part of the record in spite having** **been taken prior to plea.”**

On behalf of the State, Mr. MASEMPELA submitted that:-

**“The State is comfortable with the position.”**

The Court in its ruling stated that:-

**“Having heard the defence on the question of whether it is necessary for the complainant to give fresh evidence, I agree that the position taken will not prejudice the accused person. Therefore Aggrey NASILELE will remain PW1 and the numbering will change accordingly.”**

In the circumstances, we have found no merit in ground three of appeal. It is accordingly, dismissed.

In view of the decision that we intend to adopt, we feel it is not necessary to deal with ground four and ground five of appeal.

The appellant having succeeded in ground one and ground two of the appeal we would allow the appeal and accordingly, set aside the conviction and the sentence. We order the appellant’s release from Prison forthwith.

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M. S. Mwanamwambwa,

**SUPREME COURT JUDGE**

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 M. E. Wanki, P. Musonda,

**SUPREME COURT JUDGE SUPREME COURT JUDGE**