IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 237 OF 2011

HOLDEN AT KABWE

(Criminal Jurisdiction)

B E T W E E N:

**SHAFT CHIINGA KANYANGA** APPELLANT

-VS-

**THE PEOPLE** RESPONDENT

CORAM: **SAKALA, C.J, MWANAMWAMBWA AND WANKI, JJS.**

 On 1st November, 2011 and 7th February, 2012

For the Appellant: Mr. K. Phiri

For the Respondent: Mrs. R.N. Khuzwayo, Deputy Chief State Advocate

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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

CASES REFERRED TO:

1. **Nikutisha and Another -Vs- The People, (1979) ZR. 262.**
2. **Mwansa Mushala and Others -Vs- The People, (1978) ZR. 58.**
3. **Haonga and Others -Vs- The People, (1976) ZR. 200.**
4. **Jonas Nkumbwa -Vs- The People, (1983) ZR. 103.**

The Appellant, Shaft Chiinga KANYANGA, was sentenced to death following upon his conviction by the High Court sitting in Mongu on one count of AGGRAVATED ROBBERY, contrary to **Section 294(2) of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence were thatReubenMABETO and Chiinga KANYANGA, on the 7th day of September, 1997, at Nandumba Village in the Mongu District of the Western Province of the Republic of Zambia, jointly and whilst acting together and whilst armed with an AK47 Rifle, did rob Lewin Sililo MWAKAMUI of K40.2 Million cash and at or immediately after the time of such stealing did use actual violence to the said Lewin Sililo MWAKAMUI in order to overcome resistance to its being stolen.

The prosecution called four witnesses in support of the case.

The case for the prosecution was that PW1, PW2 and PW3 were travelling to Kalabo on 7th September, 1997 by road. They were carrying K40.2 million meant for Teachers salaries in Kalabo. On reaching a place known as Mukakani; they were attacked by an armed man; who was standing in front of them. They were then going up a slope. The witnesses heard gun shots; and this forced the occupants of the vehicle to flee for their lives. The driver lost control of the vehicle and it veered off the road.

The man who was standing in front was firing at random. PW3 recognized the man with a firearm as SHAFT, the Appellant, whom she knew from the market where she used to sell bed spreads, while the Appellant used to sell reed mats.

When the scene was visited, it was discovered that the front tyres and one rear tyre of the vehicle were deflated. The goods were scattered and the K40.2 was missing.

PW4 apprehended some suspects, who included the Appellant. The officer recovered K940,000.00 from the Appellant’s pocket; and K140,000.00 from the Appellant’s mother. Later, PW4 was led by the Appellant into the bush about a kilometer off the Kaoma/Lusaka road where K17.5 million was recovered. PW4 also recovered K7.8 million, K301,000.00 and K460,000.00 from the other suspects. In all, a total of K26,795,000.00 was recovered. The money was, however, not produced in Court as exhibit. The Appellant was, subsequently, arrested for the subject offence.

In his evidence, the Appellant told the Court that on the 7th September, 1997 he was out to Lusaka to sell timber, straw hats and mats. The Police found him at his home village, where they took a number of his personal effects, which included his money amounting to K18,400,000.00, which he raised from his business ventures.

The Court below, after reviewing the evidence, found that PW1 and his companions were attacked by armed men and that they were in fact armed with a firearm; that the firearm was used for the purpose of scaring the witnesses so as to enable their assailants to steal the said money; which was the main target; and that the Appellant was one of the assailants. The Court below then found the Appellant guilty and convicted him as charged. Thereafter, the Court below sentenced the Appellant to death.

The Appellant has appealed to the Supreme Court against his conviction and sentence. He has advanced two grounds of the appeal:-

**GROUND ONE:**

**The learned trial Court erred both in law and in fact when it convicted the Appellant on the poor evidence of identification without proper corroboration.**

**GROUND TWO:**

**The learned trial Court erred in convicting the Appellant for Armed Aggravated Robbery in the absence of direct evidence of the use of a gun.**

 The Appellant filed heads of argument on which he entirely relied.

 In support of ground one of appeal, it was pointed out that the case boarders on the identification of the Appellant; that the evidence of recognition or identification was from PW3, who claimed to have known the Appellant prior to the incident as they used to trade at the same place.

It was contended that the nature of the events, that is, the accident and the threats of a gun did not provide good observation.

In support of the contention, the Court was referred to the case of ***NIKUTISHA AND ANOTER -VS- THE PEOPLE*** (1) where it was held that:-

**“There is need for caution in identification cases, and where the quality of evidence is not good, there is need for supporting evidence to rule out the possibility of an honest mistake.”**

Further, the Court was referred to the case of ***MWANSA MUSHALA AND OTHERS -VS- THE PEOPLE*** (2) where it was held that:-

**“Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognize someone who he knows the trial Judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake; the poorer the opportunity for observation the greater that possibility becomes. The momentary glance at the inmates of the Fiat car when the car was in motion cannot be described as good opportunity for observation.”**

It was submitted that although the amount of money found on the Appellant suggested an odd coincidence and connecting link; there was an explanation given to the effect that the Appellant was keeping the monies realized from his business.

It was also submitted that the way the money issue was handled left much to be desired and created high levels of false implication as the arresting officer gave conflicting evidence in the reasons given for not producing the money.

The Court was referred to the case of ***HAONGA AND OTHERS*** -***VS- THE PEOPLE*** (3) where it was held that:-

**“Where the accused has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced.”**

It was finally pointed out that the arresting Officer mentioned a number of people discovered with some money; but were not, brought before the Court.

On ground two, it was contended that it was a misdirection for the trial Court to have convicted Appellant for Armed Aggravated Robbery as the gun was not recovered; and no empty cartridges found at the scene and that what caused the tyres to deflate could have been the effect of an accident.

The Court was referred to the case of ***JONAS NKUMBWA -VS-*** ***THE PEOPLE*** (4), where it was held that:-

**“It is unsafe to uphold a conviction on a charge of armed aggravated robbery where there is no direct evidence of use of firearms.”**

On behalf of the Respondent, Mrs. KHUZWAYO, the Deputy Chief State Advocate, informed the Court that, she supported the Appellant’s conviction.

She submitted that the Appellant was connected to the offence by identification and the recovery of property, but conceding that the identification was poor. She contended that, PW3 knew the Appellant before as they used to trade together at the market.

The learned Deputy Chief State Advocate further submitted that PW4 recovered K940,000.00 from the Appellant’s pocket and was led by the Appellant to the recovery of K17 million and various goods.

She argued that it cannot be a mere coincidence that one, who is identified at the scene should be found with a lot of money. She submitted that the Appellant must have been one of those involved in the Robbery.

On ground two, Mrs. KHUZWAYO conceded that the prosecution did not prove the use of firearm, but that the conviction for armed robbery be substituted for that of ordinary aggravated robbery.

We have considered the grounds of appeal; the heads of argument in support, and the submissions in response. We have also examined the judgment of the Court below that has been appealed against.

In ground one, the Appellant challenged his conviction based on the poor evidence of identification which was not corroborated.

We have examined the evidence on record. According to the case for the prosecution, PW1, PW2 and PW3 identified the Appellant at an identification parade, as the person, who was firing the gun. Although PW1 and PW2 did not say they knew the Appellant before; PW3 said she had known the Appellant before as they used to sell at the market. The incident happened in broad day light and the Appellant had not covered his face. We cannot fault the trial Court for holding that there was no mistake of identity. In addition, there was evidence that over K18 million was recovered from the Appellant for which the Appellant failed to give any reasonable explanation as to how he came to possess such an amount of money. Indeed, it was unusual for a person to burry money realized from his genuine business in the bush. It was too much of an odd coincidence.

In our view, the finding of the money on the Appellant, particularly the burying of K17.5 million in the bush about a kilometer, corroborated the weak or poor evidence of identification.

In the circumstances, the trial Court did not err in law and in fact when it convicted the Appellant. We find no merit in ground one of the appeal. It is, accordingly, dismissed.

In relation to ground two, the Appellant has challenged his conviction for armed aggravated robbery in the absence of direct evidence of the use of a gun.

The evidence that was adduced before the trial Court was to the effect that, as the vehicle in which the witnesses were, was descending, they saw the Appellant in front, who was armed with what appeared to be a gun after they heard what some of them thought was a tyre burst. A man then started firing at random, while telling the occupants of the vehicle to run away.

But when the scene was later visited, it was found that the vehicle had its three tyres deflated. There was evidence that the vehicle did not stop because of tyre puncture. In any case, as the vehicle was descending, it was being driven at a slow speed. There was, therefore, no possibility of a tyre burst.

We cannot also fault the trial Court on the foregoing evidence for holding that the occupants of the vehicle were attacked by men who were armed with a firearm. Above all, the incident happened in broad day light and the witnesses did not only see the Appellant armed with what appeared to be a firearm, but saw him firing at random while telling them to run away. Later, the vehicle was found with its tyres deflated. We are satisfied that, there was direct evidence of the use of a gun.

The trial Court, therefore, did not err when it convicted the Appellant for armed robbery.

We also find no merit in ground two of appeal. It is, accordingly, dismissed.

In the light of the foregoing, we have found no merit in the whole appeal and it is dismissed. It follows that the Appellant’s conviction and the sentence are confirmed.

……………………………………….

E. L. Sakala,

**CHIEF JUSTICE**

…………………………………... …………………………………….

 M. S. Mwanamwambwa, M. E. Wanki,

 **SUPREME COURT JUDGE SUPREME COURT JUDGE**