IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 126 OF 2011

HOLDEN AT NDOLA

(Criminal Jurisdiction)

B E T W E E N:

**TITUS MAKUNGU** APPELLANT

 -VS-

**THE PEOPLE** RESPONDENT

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

 On 20th March, 2012 and 6th June, 2012

For the Appellant: Mr. K. Muzenga, Principal Legal Aid Counsel

For the Respondent: Mr. P. Mutale, Deputy Chief State Advocate

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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. **Haonga -Vs- The People, (1976) ZR 200.**
2. **Nelson Banda -Vs- The People, (1978) ZR 200.**

LEGISLATION REFERRED TO:-

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

When we heard this appeal, Mr. Justice Musonda sat with us. However, because of the current events, this judgment is therefore by majority.

The appellant was sentenced to suffer death following upon his conviction for **AGGRAVATED ROBBERY Contrary to Section 294(1)** and **294(2)** of the **Penal Code Chapter 87** of the Laws of Zambia. The particulars of the offence were that Titus MAKUNGU, on 2nd May, 2008 at Nakonde in the Nakonde District of the Northern Province in the Republic of Zambia, being armed with an M63 rifle Serial Number 783780 and AK rifle Serial Number 10300285 respectively, jointly and whilst acting together with other persons unknown did steal a motor vehicle namely, Toyota Corolla Registration Number ABM 2297, one mobile phone and K150,000.00 cash money from JUSTINE SIKAZWE and at or immediately before or immediately after the time of stealing it did use or threaten to use actual violence to the said JUSTINE SIKAZWE, in order to obtain or retain the property stolen or to prevent or overcome resistance to its being stolen or retained.

The appellant’s conviction was based on the evidence of five witnesses; Justine SIKAZWE, PW1; Simon SIMPAMBA, PW2, Ketson MUNKONDIA, PW3; Inspector Simple MVULA, PW4; and Greshom SIWALWA, PW5.

The evidence of PW1 was that on 2nd May, 2008 while at Nakonde Taxi Rank driving a Toyota Corolla Registration Number ABM 2279 he was paged by the appellant who told him that he had some customers who wanted to be taken to Kazembe on the Malawi Road. When he went to Simuchimba Guest House where the customers were, he found the appellant, an old man and a young man. After agreeing on the price of K180,000.00 they started off and reached their destination at Kazembe Village at 17.00 hours.

However, he was told to proceed up to the corner. He drove on and was told by the old man to stop. When he stopped, the appellant and the two others came out of the vehicle. The old man then went to his side and produced a gun before ordering him to raise his hands and come out of the vehicle. The appellant then asked the old man what he was doing and what about the gun that he had and whether they had come for that business.

Before they finished talking, the old man shot him in his right side. Thereafter, the old man grabbed and threw him in the ditch. The appellant then got in the driver’s seat and reversed the vehicle and advised the two others that they had forgotten the money and the cell phone. They then went where he was and got his Nokia phone and K150,000.00 cash. After that, they took and threw him some distance from the road where the old man shot him again before he got in the vehicle which drove off. He was later assisted by members of the public and was taken to Nakonde Police Station before being taken to the Hospital.

The evidence of PW2 was that on 2nd May, 2008 around 17.00 hours, as he was going to Nakonde High School, he heard a gun shot. After that, he saw a car and later he saw a person who was lying and bleeding from his right side. Thereafter, he mobilized other people and assisted the person who was bleeding.

The evidence of PW3 was that on 2nd May, 2008, while at his grinding mill two people who had come from a Corolla vehicle who included the appellant approached him and asked him whether there were shops. After telling them the two returned in the vehicle and drove away. Later, he saw the same vehicle driving at a high speed and the appellant was driving.

The evidence of PW4 was that after receiving a report from PW1, he carried out investigations which led to the apprehension of the appellant who had locked himself in a house. Later, he arrested the appellant for the subject offence; he warned and cautioned him and he denied the charge. After that, the appellant gave him information that led to the recovery of the stolen vehicle.

The evidence of PW5 was that, on 22nd May, 2008 his mother-in- law Iren NAKAONGA told him that his father-in-law, the appellant had bought a vehicle which she requested him to drive to Lupiya. Later, at 20.00 hours, the appellant went to his house and took him to Ameco where he showed him a vehicle which he later drove to Fina from where the vehicle was taken by the Police.

The appellant in his unsworn evidence stated that on 2nd May, 2008 as he was at the Station his friend PW1 who was driving asked him to escort him to take two people who had booked him to Nakonde. When they reached a certain village, one of the two, the old man told his friend to turn. After driving for a short distance the old man instructed PW1 to stop. The old man then came out with a bag from which he removed a gun and pointed it at them who were seated in front through the driver’s window and demanded for the keys. Since PW1 took some time to give him the keys, the old man shot him. As he was confused he came out of the vehicle. The old man then rushed to where he was and pointed the gun at him. That was how the old man made him to return in the vehicle and sit. Thereafter, both his hands were tied with ropes.

The old man then went to the driver’s seat and drove to the main road. He was then ordered to lie down between the seats and the young man stepped on him. Thereafter, he felt the vehicle speeding. Later, they told him to get up. When he got up, he saw lights. It was then that he realized that they were in Nakonde. They then stopped the vehicle before they reached Simuchimba Guest House where they had started. They left the vehicle and started walking. The young man went to a certain house behind the Station and returned with another old man to whom they handed the car keys. This man drove away and they remained there. A short while later, the man returned with a different vehicle. They got into that vehicle and he was told to lies down between the seats up to the point where they told him to get up before they crossed the river. After crossing the river, the three of them got out of the vehicle and the vehicle drove away.

They then started walking until they reached a place where he escaped. After escaping he went to a friend’s house. The following morning Police found him in the house and was taken to the Police Station.

After analyzing the evidence, the Court below found that the appellant was part of the robbers and that they were together and acting in concert; that PW1 was shot using a firearm which clearly fitted in the definition of a firearm as defined in the **Firearms Act, Chapter 111** of the Laws of Zambia.

The Court below then found that, the prosecution had proved the case beyond any reasonable doubt and found the appellant guilty of robbing PW1 using a firearm as charged, contrary to **Section 292(2) of the Penal Code Chapter 87** of the Laws of Zambia. The appellant was then sentenced to death.

The appellant has appealed against his conviction and sentence. He has advanced one ground of appeal, namely:-

**“The learned trial Judge erred in law and fact when he convicted the appellant of armed robbery in the light of the evidence of the appellant not having known that his accomplice had a firearm.”**

Other than the ground of appeal, the appellant filed heads of argument on which, Mr. MUZENGA relied at the hearing. It was submitted that, it is clear from the evidence of PW1, at page 9 in lines 23 to 27 of the record that the appellant did not know that the accomplice was armed with a firearm and immediately protested.

It was pointed out that, the provisions of **Section 294(2) (a)** of the **Penal Code Chapter 87** of the Laws of Zambia provides that:-

“Notwithstanding the provisions of Sub-Section:-

1. The penalty for the felony of Aggravated Robbery under **Sub-Section (1)** shall be death -
2. Where the offensive weapon or instrument is a firearm, unless the Court is satisfied by the evidence in the case that the accused person was not armed with a firearm and -
3. That he was not aware that any of the other persons involved in committing the offence was so armed, or
4. That he disassociated himself from the offence immediately on becoming so aware.”

It was submitted that, the failure by the trial Court to so satisfy itself herein was a misdirection.

It was contended that, the appellant was not armed himself and upon seeing the firearm, he got surprised and quarried his accomplice and before any further conversation the accomplice shot PW1. It was submitted that, his conduct established clearly that conduct was not part of the common design.

It was prayed that, the Court allows the appeal, quash the conviction under **Section 294(2)** and in its place find that the appellant was guilty of aggravated robbery under **Section 294(1)** and impose an appropriate sentence on him.

On behalf of the respondent Mr. MUTALE, Deputy Chief State Advocate submitted that, having read the record and read the heads of argument they are inclined to concede that there was evidence to prove that the appellant was not aware that his co-accused was armed. He referred the Court to page 9 of the Record of Appeal. Reliance was placed on the case of ***HAONGA -VS- THE PEOPLE***. (1)

The Deputy Chief State Advocate contended that, the evidence shows that, the common design was to steal and not the use of a gun.

In reply, Mr. MUZENGA submitted that, they have relied and have been relying on **Section 292(2**) (i) of the **Penal Code**. (3)

He pointed out that, the first part of that Section provides that; if the accused was not armed or was not aware. Counsel contended that, according to PW1, the appellant was surprised on seeing the old man produce a gun. He implored the Court that this case be considered.

We have considered the sole ground of appeal; the appellant’s heads of argument; the submissions on behalf of the parties; and the Judgment of the Court below that has been appealed against.

In his sole ground of appeal, the appellant has challenged the Court below when it convicted him of armed aggravated robbery in the light of the evidence of the appellant not having known that his accomplice had a firearm.

It was argued on his behalf that, it is clear from the evidence of PW1 at page 9 in lines 23 to 27 of the record that, the appellant did not know that the accomplice was armed with a firearm and immediately protested.

The said evidence of PW1 at page 9 is that:-

**“ - then Titus Makungu said ‘old man what are you doing’ what about that gun you have produced, did we come here for that business“-.**

 In his unsworn evidence at pages 65 to 66 of the record, the appellant stated that:

**“– he pointed that gun to us through the driver’s window. I said is this what we followed here?”**

In the case of **NELSON BANDA -VS- THE PEOPLE** (2), we held that:

“In terms of **Section 294(2)** of the **Penal Code** where an aggravated robbery is committed by a number of persons one of whom is proved to have carried a firearm that one must be sentenced to death, and the others must also be sentenceed to death unless they can bring themselves within Sub-paras (i) or (ii) of para (a) of the Sub-Section.

1. The onus is on the appellant to satisfy the Court as the matters set out in **Section 294(2)**.”

According to the evidence it was proved that, the appellant was not the one who was armed with the firearm. The issue that we have to determine is whether the appellant satisfied the Court below, as to the matters set out in **Section 294(2)**. From the evidence on record we have found that the appellant did not satisfy the Court below that, he was not aware that any of the other persons involved in committing the offence was so armed and there was no evidence that he disassociated himself from the offence immediately on becoming aware. The evidence has in fact shown that after shooting PW1, the appellant jumped into the driver’s seat and drove the vehicle together with the others.

In the circumstances, we find no merit in the sole ground of appeal, it is, accordingly dismissed.

In the light of the foregoing, the appeal against the conviction for armed robbery is dismissed as it lacks merit. It follows that the Conviction and the Sentence are confirmed.

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L.P. Chibesakunda

**SUPREME COURT JUDGE**

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 M. E. Wanki P. Musonda

**SUPREME COURT JUDGE SUPREME COURT JUDGE**