**SELECTED JUDGMENT NO. 29 (657)**

**IN THE SUPREME COURT OF ZAMBIA Appeal No. 212/2012**

**HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**MUYUNDA MUZIBA 1ST APPELLANT**

**ILUTUMBI SITALI 2ND APPELLANT**

 **-V-**

**THE PEOPLE RESPONDENT**

Coram: Mumba, Phiri and Wanki JJS

 On 8th August, 2010 and 5th December, 2012

**For the Appellants: Mr. K. Muzenga Acting Principal Legal Aid Counsel**

**For the Respondent: Mrs. C. Soko, State Advocate**

**­­­­­­­­­­­­­­JUDGMENT**

**Phiri, JS, delivered the Judgment of the Court**

***Cases referred to*:**

**1. Nyirongo vs. The People (1972) ZR 290 (C.A.)**

**2. DPP vs. Risbey (1977) ZR 28**

**3. Muvuma Kambanja Situna vs. The People (1982) ZR 115.**

**4. Malachi and Mabuye vs. Council of Legal Education (1985) ZR 10.**

**5. Wasamunu vs. The People (1978) ZR 143.**

**6. Benmax vs. Austin Motor Company Limited (1955) 1 All ER 328.**

**7. Wina and Wina vs. The People (1995-97) ZR 137 (SC).**

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This is an appeal against the Judgment of the High Court, holden at Mongu, in which the two Appellants were convicted of the offence of ***Aggravated Robbery contrary to Section 294 (1) (2) of the Penal Code, Chapter 87 of the Laws of Zambia.*** Both Appellants were sentenced to suffer the ultimate sentence of death.

Particulars of the offence are that the two appellants on the 23rd day of September, 1999 at Lukona Secondary School in the Mongu District of the Western Province of the Republic of Zambia, jointly and whilst acting together with another person unknown, and whilst armed with an AK47 Rifle, did steal from Mwakamui Muhau, a Wall Clock valued at K25,000 and at or immediately before or immediately after such stealing did use or threatened to use violence to Mwakamui Muhau in order to obtain the said property or to prevent resistance to its being stolen.

The evidence on which the conviction was founded was from four (4) prosecution witnesses who all testified on oath; these were, Chikwaya Sikasiya (PW1), James Kaunda (PW2), Biemba Muzala (PW3) and Detective/Inspector Mwalula Saikolo (PW4).

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PW1 was the Plumber at Lukona Secondary School where the Aggravated Robbery took place. His evidence was that on the 23rd December, 1999, around 16.00 hours he was in the School Registry where returning students were paying up their school fees. Suddenly four men, one of whom was dressed in what appeared to be Paramilitary uniform, entered the room. All the four had black masks covering their faces. One of the men carried a crowbar; which was exhibited as **‘P2’.** The other one carried a knife, which was exhibited as **‘P3’.** The third man carried an AK47 Rifle; which was exhibited as **‘P1’.** The robbers pushed PW1 and demanded for money. They threatened him with the crowbar and the knife. PW1 did not have any money. The robbers then attacked the Headmaster’s office as well as that of the Deputy Headmaster. They failed to break the door down. They grabbed the keys and ransacked the School cabinets placed in the Registry. As all this was happening, the robber who carried the exhibited gun remained outside; occasionally firing his gun in order to prevent resistance from students.

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The students mobilized themselves and launched a counter attack on the robbers, with stones. The robbers came out from the Registry; took the School Wall Clock which hang at the entrance, and took to their heels towards the bush over the school fence. The gunman occasionally reloaded his gun with a single bullet and fired it towards the students. The gun did not have a magazine. The students pursued the robbers relentlessly until they apprehended three of them. The fourth robber escaped. The three captured robbers were unmasked. The stolen wall clock was recovered during the chase. Also recovered was the AK47 Rifle, the knife and the crowbar. The robber who had been firing the gun died from beatings before he and the other two were taken to Kalabo Police Station.

PW1 identified both appellants as having been in the group of four robbers who attacked the school. He gave a description of their features. When cross-examined, PW1 said he was able to see the robbers clearly during the chase because the grass around the school premises had been cleared by bushfires. The gunman had

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run out of ammunition and was killed by students during his capture.

PW2, a school teacher, locked himself in the Bursar’s office during the attack. He later saw both appellants, and the third robber who was killed. PW2 also identified both appellants during the trial, as having been in the group of robbers at Lukona Secondary School.

PW3 took part in pursuing the robbers through the burnt bush until the three robbers were caught. He witnessed the recovery of the gun and the other exhibits. This witness also identified both appellants as having been amongst the three robbers who were apprehended. PW4 received the appellants and the exhibits after their capture and recovery at the school. He also effected their formal arrest and charging..

When put on their defence, both appellants gave their evidence on oath. The first appellant’s evidence in the trial Court was a total denial of his participation in the robbery. He conceded that he was

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apprehended while in the company of the second appellant near the school where the robbery took place. However, his defence was that they were both innocent cattle buyers who were in a wrong place at the wrong time. The second appellant’s evidence was that on the material day; they left a fishing camp around 15.00 hours to buy cattle in Shekela area at the edge of the Zambezi plain. They stopped over at a water pump where they had a meal. After the meal, a group of school children ran in their direction and apprehended them. They were beaten until he became unconscious. He denied any knowledge about the robbery at the school, and about the recovered firearm and other exhibits. He also denied that he led the Police to the recovery of any of the exhibits. His evidence was that he could not have led the Police to the recovery of those exhibits because of the severe beatings he received from the students. Upon being cross-examined, the second appellant insisted that they were both mistaken for other people. He conceded that the shrubs were not very thick at the time but

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insisted that he and the second appellant did not run away when they saw the chasing students.

The trial Court convicted both appellants on the basis of the evidence from the four witnesses. The trial Court sentenced each one of them to death and issued the certificate of sentence of death.

What makes this appeal unusual is that there is no Judgment of the trial Court in the record of appeal and all efforts to retrieve the Judgment have been negative. The attempts to retrieve a copy were made on the former Marshal of the trial Judge, the late Judge’s residence, the offices of the Director of Public Prosecutions and the Legal Aid Board. What is on the record therefore, are the following: all Police statements, committal procedure documents, and all the evidence given by both the prosecution witnesses and the appellants, in their defence; all the notes of the Learned trial Judge and the two Certificates of Sentence of Death.

The Learned trial Judge who delivered the Judgment is now deceased. Mr. Muzenga, for the appellants confirmed to us that

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indeed he did receive the Judgment on behalf of the appellants but it cannot be found. Mrs. Soko indicated to us that she did not trace the record at the DPP’s Criminal Registry.

There is an affidavit of missing Judgment sworn to by Sitali Imenda, Assistant Registrar at Mongu High Court on the 26th of September, 2011. The missing Judgment created a couple of challenges to us. There is a technicality of hearing an appeal without its Judgment because this Court should not be turned into a fact finder. After due consideration, we resolved to hear the parties on the basis of the verbatim record of proceedings. In the circumstances, there were no heads of arguments and grounds of appeal filed.

Mr. Muzenga’s arguments and submissions were based on two previous decisions. First, the case of ***Nyirongo vs. The People(1)***  where the Court of Appeal held as follows:

**“Where a record of the Judgment has been lost, the appellant is deprived of the opportunity of pursuing an appeal against the Judgment and the appeal must be allowed”.**

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In that case, the Court of Appeal ordered a retrial. Secondly, the ***case of DPP vs. Risbey(2)*** where the Supreme Court held as follows:

**“The absence of the Magistrate’s Judgment deprived the respondent of the opportunity properly to prosecute his appeal before the High Court since he was deprived of the relevant material upon which an argument based on misdirection by the trial Magistrate would be founded”.**

Mr. Muzenga submitted that in the present case there were no common facts so as to enable this Court to draw inference or make findings of fact. To the contrary, there are two versions of events at, and around the scene of crime. On one hand, was the account given by the prosecution witnesses, and on the other, was the evidence given by the appellants to the effect that they were innocent cattle buyers in a wrong place at the wrong time.

According to Mr. Muzenga, in such a situation, the issue of credibility arose, which issue could probably be resolved by the trial Court which had the opportunity to hear witnesses and observe their demeanor and resolve which of the witnesses were truthful. He argued that it was for the latter reasons that the third holding in

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the ***Risbey case*** was that where there is the issue of credibility, the Court of Appeal or this Court cannot do anything.

Mr. Muzenga further argued that in the ***Nyirongo case***, the Court of Appeal held that where the record of the Judgment is lost, the appellant is deprived of the opportunity to appeal, and the appeal should be allowed or the matter should be referred back to the trial Court for retrial. In both the ***Risbey and Nyirongo cases***, retrial was considered on appeal. However, Mr. Muzenga took this argument further. He contended that in the event that this Court agreed with his submissions, his view was that retrial in the present case may not be a just decision or order because the offence is alleged to have been committed about thirteen (13) years ago. It was argued that there was a problem of the availability of witnesses; the period is too long; and the High Court has no jurisdiction to acquit on the ground of non-attendance of witnesses. These factors left a high probability that the appellants may be in custody for an indefinite period of time. The foregoing therefore, presented very

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exceptional circumstances which justly require that the appellants should be acquitted by this Court and set at liberty.

In response to Mr. Muzenga’s arguments, Mrs. Soko, State Advocate, argued, in the main, that the primary facts in the present case are common cause. She further submitted that the issue of credibility does not arise because the version of events portrayed by the prosecution witnesses were consistent; the crime was committed in broad daylight; the appellants were apprehended in broad daylight near the scene; while attempting to flee, and that recoveries of incriminating evidence were made; while the accused persons’ accomplice was killed by the mob of students.

It was argued that the position in the ***Nyirongo case*** appears to have created an misnomer in the criminal justice system in the sense that the case was initially decided by the Subordinate Court before it proceeded on appeal, which appeal succeeded and a retrial was ordered on grounds of “appropriate circumstances”. It was argued that by precedent, the ***Risbey case*** which was decided much later attempted to correct the misnomer by providing that

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where the primary facts are common cause, the appellate Court may proceed to hear the appeal based on the record before it.

Mrs. Soko urged us to consider the common facts and uphold the conviction and sentence and to dismiss this appeal. In the alternative, she urged the Court to consider ordering a retrial.

In reply, Mr. Muzenga argued that the appellants were not caught at the scene of crime, contrary to the respondent’s argument. There was a pursuit and the appellants were apprehended at some distance. With regard to the issue of credibility as argued by the prosecution, Mr. Muzenga submitted that the issue of credibility should not be limited to prosecution witnesses, but it should extend to accused persons as well.

We are indebted to Counsel for their spirited arguments and submissions. We have carefully considered these submissions, the evidence on record and the cases cited. We must say that we have paid great attention to the details of the submissions because, unlike the normal criminal appeals, this appeal is devoid of

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substantive grounds of appeal and heads of arguments on account of the missing Judgment.

We agree with both Counsel that the precedents in the ***Nyirongo and Risbey cases*** cited by Mr. Muzenga outline the earliest positions on appeal where the judgment of the trial Court is missing on the record of appeal. In our view, the two precedents create a variation of possible solutions where a judgment of the trial Court is missing on appeal. We must add, from the outset, that the judgment of the trial Court must always be an important part of any record of appeal. There are a number of previous decisions that this Court has made which clearly show how important a judgment of a trial Court is to the entire life of a criminal case. In the case of ***Muvuma Kambanja Situna vs. The People(3)*** this Court held as follows:

**“Judgment of the trial Court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited”.**

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Where a judgment of the trial Court goes missing, technically there will be nothing to show, on its face that the trial Court adequately considered all the relevant material that was placed before it. It is this failure which deprives the appellate Court from assessing the merits of the case. This, in no way, should be taken to mean that when the judgment of a trial Court is poor or goes missing on appeal, the appeal must succeed and the appellant be acquitted. We do recognize that all human records must be bound to err at one time or another and for a variety of reasons. We do recognize that a Judgment can go missing for a variety of human reasons; which may include either errors or by deliberately calculated desire to deprive the appellate Court from considering the judgment of the trial Court; in order to pervert the course of justice and do harm to the Criminal Justice system.

In our considered view, to hold that when a Judgment of the trial Court goes missing from the record of appeal in a criminal matter, the appellant be acquitted, would unjustly invite all manner of uncertainties in the criminal justice system; and those with a

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propensity or habit to break the law could acquire a hand in some missing judgments in order to achieve technical acquittals. We want to emphasize that there must be the overall consideration of ‘merit’ or lack of it, in the relevant material before the appellate Court, in every case where there is a complete verbatim record of proceedings; but for the Judgment of the trial Court.

We invite Counsel for both sides to look at the precedents in the ***Nyirongo and Risbey cases*** with extreme care so that the underlying principles of criminal justice are not undermined.

In the case of ***Malachi and Mabuye vs. Council of Legal Education(4),*** this Court held the following:

**“The position of this Court in these situations, where we are asked to reverse the finding made by a lower Court or tribunal of facts was clearly stated by Baron, DCJ in *Wasamunu vs. The People(5)* when he said at page 144:**

**“I stress that, this Court, where the question is purely one of inference from facts about which there is no dispute, has both the right and duty to substitute its own views for those of the trial Judge.”**

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In the ***Wasamunu case,*** Baron, DCJ, adopted the reasoning in the English case of ***Benmax vs. Austin Motor Company Limited(6)*** which stated as follows:

**“Where there is no question of credibility of witnesses but the question is the proper inference to be drawn from specific facts, an appellate Court is in good a position to evaluate the facts of a trial Judge and should form its own independent opinion….”.**

One of the arguments spiritedly canvassed by Mr. Muzenga was that the evidence on record in the present case raises an issue of credibility in that there are two versions of evidence; namely, the evidence from the prosecution witnesses on one hand and the evidence given by the appellants. According to Mr. Muzenga, there is an issue of which witnesses told the trial Court the truth between the prosecution and the appellants on the other hand. With the greatest respect to Learned Counsel, we must state that we totally disagree with this approach and we are very satisfied that Learned Counsel has shown failure to properly comprehend the situation when credibility of a witness is at issue. Authorities are abound.

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Mr. Muzenga has not told us in very certain terms which of the prosecution witnesses created a doubt on credibility. He simply pitted all the prosecution witnesses against the two appellants’ stories. In our view, that is a wrong way of approaching the question of credibility of witnesses. Learned Counsel should have endeavoured to show us which of the prosecution witnesses could not have been relied upon on account of reasonably not being held to be credible. The reasons which usually underpin credibility include; poor visibility, fleeting glimpse, poor evidence of identification, suspect witness, etc. None of these are noted from the record.

We have examined the evidence on record and we are satisfied that the prosecution’s case was not based on any issue which would invite the Court to make an inference on the facts. We have also not found any evidence on record which suggests the issue of credibility among the prosecution witnesses. Indeed, Mr. Muzenga did not refer us to any portion of the record of appeal which raises the question of credibility. Mr. Muzenga also invited us to consider

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the question of credibility as extending to the accused persons as well. We understood this to mean that because the judgment is missing, we should be unable to tell whether there was any finding of fact on the demeanor of witnesses including accused persons.

By requirement of precedent, when a Court makes a finding on demeanor of a particular witness during trial, the Judge must have written in the notes, the nature of the observation and the exact point in time when the demeanor was observed. For example, that the witness was hesitant in answering questions or that the witness displayed anger or inconsistencies. None of these is shown anywhere in the record of proceedings that can reasonably be held against the demeanor of any of the prosecution witnesses. As for the demeanor of the accused, that should, by precedent, not mean much to a trial Court and should not normally be subject of adverse comments. This is so because an accused person bears no burden of proof in criminal cases, and it really does not matter whether or not he chooses to lie to the trial Court. The burden is always on the prosecution to prove their case beyond reasonable doubt.

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Having considered all the issues raised, we agree that both the ***Nyirongo and Risbey cases*** are still good law; and that the leading precedent should be the ***Risbey case*** because it was decided much later in time. We take note that in both ***Nyirongo and*** ***Risbey cases,*** the proceedings originated in the Subordinate Court and by virtue of the prescribed procedure under the ***High Court Act,*** the appeals were heard by way of rehearing.

The present case originates in the High Court, and the appeal is strictly on the record of proceedings. Nonetheless we entirely agree with the State Advocate that the facts, as shown by the record of proceedings, are in common cause.

Mr. Muzenga argued that the appellants were not caught at the scene because there was a pursuit. We note from the record of proceedings that the scene was an isolated rural Secondary School surrounded by a burnt out bush. The occurrence was in broad daylight in the presence of school teachers, staff and students. The robbers were chased until both appellants were apprehended. The third robber was killed by the students while the fourth managed to

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escape. The gun which the robbers used together with unused ammunition, as well as the masks, the crowbar, the knife and the stolen wall clock were all recovered during the chase.

In our view, when an offender is seen in broad daylight committing a crime and a chase is made, and he is captured at the end of that chase, without the pursuer or pursuers losing sight, that arrest is as good as the offender being caught committing the crime at the scene of crime. How far he was apprehended would not really matter. The proper effect of this evidence should be that the offender be treated as having been caught “red-handed” and in the course of committing the crime. There is no other reasonably possible finding of fact which any tribunal may make in such exceptional circumstances. It is therefore our view that the principle in the ***Risbey case*** should extend to any appeals being heard in this Court; in all cases that present these exceptional circumstances. We must add that the circumstances must however, be very exceptional rather than being exceptional. We find

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this case to be very exceptional and we dismiss the arguments raised on behalf of the appellants.

 For the reasons given, we reiterate our agreement with the Learned State Advocate’s argument that the facts of this case were in common cause and unassailable.

We have found force in Mr. Muzenga’s argument regarding the appropriateness of an order of retrial. We agree that an order of retrial would be inappropriate due to the length of time from the date the crime was committed. We are fortified in this view by our decision in the case of ***Wina and Wina vs. The People(7)*** where we said the following:

**“(2) a retrial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interest of justice: where, as here, the prosecution had adduced all the evidence it had, there would be no point to a re-trial”.**

 In the circumstances, we are in “good a position to evaluate the facts of the trial Judge”. Our independent opinion is that both

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appellants were properly convicted. We dismiss the appeal against Conviction and Sentence.

**F. N. M. MUMBA**

**ACTING DEPUTY CHIEF JUSTICE**

**G. S. PHIRI**

**SUPREME COURT JUDGE**

**M. E. WANKI**

**SUPREME COURT JUDGE**