**IN THE SUPREME COURT FOR ZAMBIA SCZ Appeal No. 127,128/2011**

**HOLDEN AT NDOLA**

**(Appellate Jurisdiction)**

**IN THE MATTER BETWEEN:**

**PROSPER CHANDA 1ST APPELLANT**

**WILFRED CHANSA 2ND APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CORAM: CHIBESAKUNDA, WANKI AND MUSONDA, JJJS.**

**On 21st March 2012 and 10th July 2012**

***For the Appellants: Mr. Z. Muzenga – Acting Principal State Advocate***

***For the Respondents: Mr. Mutale – Deputy Chief State Advocate***

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

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

***Cases Referred To:***

1. ***Muvuma Kambanja Situna Vs The People (1982) ZR 115.***
2. ***Nkhata and Four Others Vs The Attorney General of Zambia (1966) ZR 124.***

The appellants were convicted of aggravated robbery contrary to Section 294 (1) of the Penal Code. The particulars of the offence were that Prosper Chanda and Wilfred Chansa, on the 11th day of February 2008 at Kasama, in the Kasama District of the Northern Province, jointly and whilst acting together with other persons unknown and whilst armed with sticks did steal from Benard Mukuka 1 bicycle, 3 packets of sweets, 3 packets of rice, 2 bars of soap, 1 tin of mealie meal and K15,000 cash all valued at K350,000 and at or immediately before stealing did threaten to use violence to the said Benard Mukuka in order to obtain or overcome resistance to the said property being stolen.

The prosecution’s case in the court below centred on evidence of PW1 and PW2.

PW1 (complaint) testified that on 11th February 2008, he went to Kasama to buy groceries, which he carried on his bicycle. His home was along airport road or Mporokoso road, which is a tarred road. When he passed the airport three men emerged from the nearby bush and surrounded him. They were armed with iron bars. The other person was behind him, while one was on the side. The first appellant hit him with an iron bar on his mouth thereby knocking out five upper teeth, while some lower teeth became shaky. As complainant fell down the second appellant got hold of his bicycle on which he carried the groceries and pushed it into the bush. All three men fled while complainant remained crying for help. A passing motorist stopped as villagers from the surrounding area also came to the scene. The motorist took complainant to Kasama police station where the matter was reported. He was given a medical report, which he took to the hospital. After treatment he took the medical report back to the police.

Later when going back home, he with the help of passers-by, apprehended one of the robbers whom he took to the police station. At one time he was called to the police station where he found all the three suspects had been apprehended. The complainant told the trial court that he was able to recognize the robbers because it was about 17:00 hours and it was still daylight. The robbers stayed with him in the same neighbouring villages. Nothing of the stolen items were recovered. Before he was attacked, attackers had been hiding in nearby bush. He struggled with his attackers for 7 minutes as they took his bicycle.

PW2 was detective sergeant Sylvester Nkuwa who was given the docket to investigate on 15th February 2008. During his investigations the first appellant led him to the second appellant and he apprehended him. He later charged both with aggravated robbery. Under warn and caution, the appellants denied the charge. The witness produced the complainant’s medical report. The other suspect Charles Mwamba was released so that he could become a state witness.

The first appellant told the court that he was working at a friend’s bar where some pool table balls went missing. He was suspected to the one who stole them. As a result he was apprehended and detained in the cells. He found Charles Mwamba, who had been detained on suspicion that he was one of those who robbed complainant. He was subsequently incriminated in the robbery and arrested as a result and he denied the charge.

The second appellant told the trial court that he was apprehended by police who were led to his house by the first appellant at about 03:30 hours on 23rd February 2008. When the police went to his house, they asked for the bicycle, but he denied that he had no knowledge about the bicycle. He denied too, that the first appellant was his friend. Second appellant denied the charge.

The learned trial Judge was satisfied on that evidence that, the offence was committed during daylight at about 17:00 hours. According to PW1 he had known the Accused before the assault, as he was seeing them. They were staying in neighbouring villages. Further PW1 struggled with them as he was resisting them to steal his things, before they finally got them. In the circumstances, he was satisfied beyond reasonable doubt that the Accused had been correctly identified as the ones who robbed PW1 of his property.

Mr. Muzenga filed one ground of appeal. He argued that the learned trial court erred in law and in fact when he convicted the appellants on the evidence of a single identifying witness. Mr. Muzenga entirely relied on his filed heads of argument.

He argued that, the evidence against the appellants was mainly given by the complainant and that was evidence of identification.

PW1 at page 11 of the record told the police and the trial court in lines 12 to 16 that he had only known one of his 3 assailants. This was also clear from pages 12 – 13 of the record. PW1 later claimed to have known even the other two persons who were apprehended later, as having been part of the people who attacked him, page 13 lines 8 to 9 of the record. It must be noted that the first person whom PW1 recognized as having been one of his assailants was released by the police and was never called as a witness.

It was Mr. Muzenga’s submission that the evidence of PW1 in respect of how many of his attackers he recognized was inconsistent materially and as such very little weight ought to have been attached to it, such that in the absence of corroborative evidence or evidence of something more it should not have been believed. PW1 told the court at page 12 line 17 of the record that the attack took an hour. When probed further by the trial court in lines 18 to 15, he changed and gave an estimated time of 7 minutes. During cross-examination on page 14 of the record he said it had started getting dark. At page 15 he confirmed that his attackers sprung on him, hit him with an iron bar and further confirmed that it was a moment of intense pressure and confusion. These are the circumstances in which PW1 purported to have recognized or identified the appellants.

Mr. Muzenga referred us to our decision in the case of ***Muvuma Kambanja Situna Vs The People***(1) where we said:

***“The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake, the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognize the accused. If the opportunity for a positive and reliable identification is poor then it follows that the possibility for an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence”***

It was Mr. Muzenga’s submission that in light of the inconsistence in the evidence of PW1 and also the conditions within which the purported identification was made were not good so as to rule out the possibility of an honest mistaken identification. He urged this court to acquit the appellants.

Mr. Mutale in his oral submissions supported the conviction. He stated that there was evidence on record that the complainant did not say as alleged that he only knew one person. There was evidence on page 19 of the record line 8, the second appellant told his colleague to give the police officer the bicycle, so their identification was not a fluke. When PW2 went to the office he found the complainant and relatives of Wilfred Chansa, the second appellant who was ready to pay, but the police officer refused ex curia settlement. It was Mr. Mutale’s argument that an innocent person cannot endeavour to settle the matter ex curia. There was other supportive evidence.

In reply Mr. Muzenga reiterated that at page 11 in lines 12 – 16 the complainant said he recognized one assailant. The complainant had recognized an alleged attacker who was not any of the two appellants at page 19. He came to know who the real suspects were after interviewing the suspect who was identified by complainant. The prime suspect was released in suspicious circumstances, he is the one who implicated the two and yet he was apprehended by the complainant.

The evidence of identification is shaky and the conviction cannot stand. The first appellant was questioned about the bicycle, so that issue of the bicycle cannot be surprising and the bicycle was not recovered. The police report was hearsay evidence. It is not known whether the relatives exist. An arrangement by relatives cannot be attributed to an accused.

We have seriously considered the submissions by both counsel. We agree with Mr. Muzenga, that the evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake.

Mr. Muzenga relied on the complainant’s answer on page 11 of the record when the court asked, “you had known one of the assailants” and the complainant answered, “yes my Lord, I had known one”, to impugn the reliability of this single identifying witness. The complainant changing the time the robbery took, from 7 minutes to almost an hour undermined his credibility.

We have observed that at page 10 of the record, when complainant was asked if he knew the persons who had attacked him, he said “yes”. At page 11 complainant said, “when I was going on the way I found one gentleman who was among those people who attacked me and that is how I shouted for the members of the public and they came and helped me and we managed to apprehend him”. He went on that he knew his attackers for 5 years, but they did not stay in the village where he stayed. Complainant said the first appellant hit him with an iron bar and he fell and the second appellant pulled the bicycle. The learned trial Judge found it as a fact that, that the complainant knew the appellants. And there is no material before us to disturb such a finding of fact on appeal. We said in ***Nkhata and Four Other Vs The Attorney General of Zambia(2)*** that:

***“A trial Judge sitting alone without a jury can only be reversed on question of fact if (1) the trial Judge erred in accepting evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the Judge did not take proper advantage of having seen and heard the witnesses (4) external evidence demonstrate that the Judge erred in assessing manner and demeanor of witnesses”***

In this case there is something more than evidence of a single identifying witness. The first appellant led PW2 to the second appellant and asked him to surrender the bicycle. The following day complainant and the relatives of the second appellant visited PW2 and told him, “they had sat down and agreed with the relatives of the suspect to pay the complainant”. However, PW2 refused as the offence was serious. In our view, the complainant having known his assailants for five years, the robbery was in broad daylight i.e. 17:00 hours, the possibility of an honest mistake was eliminated. The attempt to settle outside court, is supportive of the evidence of identification and the evidence that complainant knew his attackers as staying in neighbouring villages.

For what we have said, the sole ground lacks merit and we dismiss it. We come to sentence, we have considered the injuries suffered by the complainant and we are of the view that the sentence of 18 years was wrong in principle as there was an aggravating factor. Sentence is enhanced to 25 years in respect of both appellants.

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L. P. Chibesakunda M.E. Wanki

**SUPREME COURT JUDGE SUPREME COURT JUDGE**

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P. Musonda

**SUPREME COURT JUDGE**