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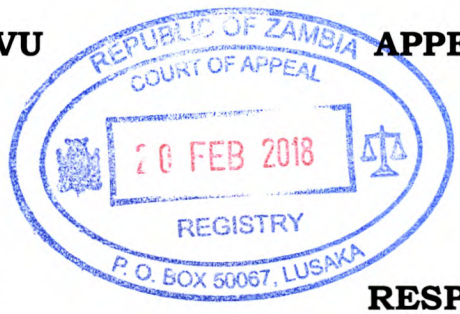
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 22/2016**
HOLDEN AT KABWE
(*Civil Jurisdiction*)

BETWEEN:

FRANK KAZOVU **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

Coram: Makungu, Chashi and Kondolo, SC J.J.A
Dated the 20th day of February, 2018.

For the Appellant: *Mr. R. Mainza of Mainza & Co.*
For the Respondent: *Mrs. R.N. Khuzwayo, Chief State Advocate – National Prosecutions Authority*

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. *Joseph Mulenga and another v. The People (2008) Z.R. Vol.2 (S.C).*
2. *Molley Zulu, Abraham Masenga and Smiling Banda v. The People (1978) ZR 277*
3. *Nyambe v. The People (1973) ZR 228*
4. *Mwansa Mushala v. The People (1978) ZR. 58 (S.C)*
5. *Gideon Hammond Millard v. The People (1988) ZR 84*
6. *Honest Solopi v. The People SCZ Judgment No. 11 of 1974*
7. *Katebe v. The People (1975) ZR 13 (S.C)*
8. *ILunga Kalaba and John Masefu v. The People (1981) ZR 102 (S.C)*
9. *Joe Banda v. The People (SCZ Appeal No. 183 of 2013)*
10. *Nkhata and 4 others v. The Attorney General (1966) ZR 124*
11. *Machobane v. The People (1972) ZR 101*

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LEGISLATION REFERRED TO:

1. *Court of Appeal Act No. 7 of 2016 – S. 16*
2. *Criminal Procedure Code, Chapter 188 of the Laws of Zambia – S. 191*
3. *Evidence Act, Chapter 43 of the Laws of Zambia – Ss. 3, 4*
4. *Firearms Act Chapter 110 of the Laws of Zambia – S.2*
5. *Penal Code, Chapter 187 of the Laws of Zambia – S. 294 (1), (2)*

OTHER AUTHORITIES REFERRED TO:

1. *Black's Law Dictionary by Bryan A. Garner, 10th ed. (1995) Thomson Reuters: U.S.A. – P. 104*

The appellant was convicted by the High Court of aggravated robbery contrary to Section 294 (1) and (2) (a) of the **Penal Code**, **Chapter 87 of the Laws of Zambia** and sentenced to death. The Particulars of the offence are that, on 3rd January, 2016 at Namwala in the Namwala District of the Southern Province of the Republic of Zambia, while armed with an offensive weapon namely a pistol Astra – serial number 836067, caliber 7.65 mm, the appellant herein did steal K2,800.00 cash and at or immediately before or immediately after the time of stealing it, used or threatened to use actual violence to Astridah Nabanyama to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

At trial, the prosecution called four witnesses, while the appellant gave evidence on oath and called one witness. The prosecution's case was that on 3rd January, 2016 around 12:00 hours the appellant also known as Munabi and his friends were drinking at PW2 - Astridah Namatembe Nabanyama's bar in Namwala where the appellant and his friend PW1 - Melanie Shankoma used to work. While PW1 was cooking lunch for the appellant and his

friends, the appellant fired two gun shots at a tree, saying that he could cut it. PW1 had known the appellant for a period of 5 years. On the same day, PW2 also saw the appellant at the bar around 10:00 hours. She had known him for about 10 years and he was as close as a nephew to her. The appellant left the premises after having lunch.

Further, the prosecution evidence was that PW2 closed the shop by 22:00 hours and carried with her the day's takings amounting to K2, 800.00 in her purse, which she had put in a basket together with some bowls and food warmers. As PW2 was walking home under the moonlight, she by passed the appellant who was headed the opposite direction towards his motor bike which was parked under a tree near the bar. She had earlier seen him ahead of her standing with his friends at the road side with the aid of lights from a passing car. As she continued walking, suddenly, the appellant accosted her, pointed a gun at her and slapped her on the head while demanding for money. Then the appellant fired two gun shots in the air. They struggled for her basket which he managed to tug out of her hand leaving her with bruises. She recognised him as Munabi and told him so. Thereafter, PW2 ran to her neighbour PW3 - Shadrick Moonga's house while screaming. She told PW3 what had transpired and mentioned the name of the assailant before they went back to the scene together.

At the scene, they found her purse which was empty, the basket, food warmers and bowls. A day thereafter she reported the matter to the police, and named her assailant as Munabi. No police medical report form was issued to her. The money has

since not been recovered. During the investigations, PW4 - Detective Inspector Chilufya Emmanuel Mbokoshi of Namwala Police Station was led to the crime scene by PW2, where he found 2 empty cartridges of a 7.65 millimetre caliber pistol which he sent to Police Service Headquarters for examination.

Thereafter he went and apprehended the appellant whom he found with a pistol described as an Astra – serial number 836067 with 2 rounds of ammunition, which he also sent to Police Headquarters for examination. An identification parade was conducted but the results were discarded because PW2 had merely recognised the appellant whom she had known for some time. PW4 produced in evidence the ballistics report, the gun, cartridges, ammunition, basket, food warmers and bowls belonging to PW2. PW4 stated that he did not receive any report from the appellant regarding theft from the appellant's shop prior to the appellants arrest. It was also in evidence that PW2's husband picked up an empty cartridge at the same scene.

The defence evidence was that, the appellant (DW1) was a peasant farmer and business man based in Namwala before his incarceration. His shop which was located a long distance from PW2's shop was broken into on 27th December, 2015 by unknown people. The following day he reported the matter to PW4 who made no arrest. On 2nd January, 2016 around 03:00 hours while he was sleeping in his shop, he was awakened by some thieves who had damaged the lock to the shop. He pursued them and fired two warning shots in the air but was unable to catch them. The following day, 3rd January, 2016 around 06:00 hours he left his home with DW2 Munyengwa Shimoomba for

Lutunga, a grazing area. They arrived between 14:00 and 15:00 hours and found Kelan Mwika there. He stayed there from 3rd to 5th January, 2016 with both DW2 and Kelan.

The appellant's further evidence was that on 5th January, 2016 he reported himself to Namwala police because he had learnt that they were looking for him. As he was being interviewed by PW4, he explained that he was in Lutunga on the material date. He further told the police that he suspected PW2's husband of having robbed him of some "*solo soap*" from the shop, because in PW2's shop there were some bars of solo soap on sale which was only stocked by him in that area. He confirmed that he knew PW2 very well and regarded her as an aunt but denied having robbed her. He stated that he was in good terms with PW4.

DW2 - Clever Shimoomba confirmed DW1's story that they went to Lutunga together on the material date and found Kelan and that they returned to their homes on 5th January, 2016.

In her judgment, the learned trial Judge found that it was not in dispute that the accused was found with the gun described in the indictment with two rounds of ammunition. The Judge identified the following issues for determination:

1. Whether the alleged robbery took place.
2. Whether the robber was identified.
3. Whether an alibi was properly raised and negated by the prosecution.
4. Whether the witnesses were credible.

She found that aggravated robbery had indeed occurred in circumstances whereby two gun shots were fired in the air, the complainant was slapped and thereby terrorized before the sum of K2,800.00 was stolen from her. The Judge stated that she was not convinced by the appellant's story alleging an alibi, for even his witness DW2 was unconvincing from the beginning to the end and made unnecessarily long pauses before answering questions. She noted that DW2's testimony was that they went to the grazing area in Lutunga upon being notified that the accused's cattle had strayed. The accused on the other hand stated that he went to the grazing area according to his usual routine and while there he discovered that a number of his cattle had strayed. She found it unusual that DW2 could neither state the number of cattle that went missing nor the ones that were recovered. She therefore found DW2's testimony manifestly unreliable, suspect and uncorroborated.

As regards the appellant's evidence, the trial Judge stated that the evidence of PW1 was substantially not contradicted in cross – examination. She therefore treated the appellant's evidence as an afterthought and PW1's evidence plausible and true on the authority of ***Joseph Mulenga and another v. The people.*** [1]

On the issue of identification, she found that PW1's evidence had a sound base as she had recognised the appellant whom she had known for a period of five years. She observed that in his evidence the appellant did not impeach PW1's entire evidence. She further held that PW1's evidence corroborated PW2's evidence in terms of the identity of her attacker and that the complainant's testimony was also supported by the evidence of

PW3 who confirmed having heard the gunshots shortly before the complainant went to complain to him. She therefore found that the evidence of PW1 and PW2 had negated the alleged alibi.

Her further findings were that the two empty cartridges that were picked from the crime scene matched the two rounds of ammunition found on the appellant. She noted that the Forensic Ballistics' examination report (exhibit P3) also confirmed that the said empty cartridges were fired from the accused's firearm (exhibit P2). The foregoing was the basis of the conviction and death sentence.

The appellant raised three grounds of appeal but abandoned one, leaving the following:

> *"1. The trial court misdirected itself both in law and in fact when it held that the appellant was sufficiently identified by PW2 and that the identification evidence of PW1 supported that of PW2".*
>
> *"2. The trial court misdirected itself both in law and in fact when it held that the alibi raised by the prosecution was defeated by the evidence of PW1 and PW2 when the duty to investigate the alibi fell on the investigating officer who failed to investigate."*

In the heads of argument filed on 4th October, 2017 which were relied upon by the appellant's advocates, it was argued in support of the first ground that, PW2 was terrified during the attack and therefore she did not have a good opportunity to observe her assailant. PW2's evidence to the effect that she was

able to see her assailant that night, is contradicted by the evidence of PW3 who said he could not see PW2 clearly because it was dark.

Mr. Mainza, counsel for the appellant further submitted that if PW2 had recognised her assailant at the time that the motor vehicle provided light, she would not have asked for his identity when he approached her.

He further submitted that the trial court misdirected itself by relying on the evidence of PW2, who was a single identifying witness, because she did not describe her assailant. To fortify this, he relied on several cases including ***Molley Zulu, Abraham Masenga and Smiling Banda v. The People*** [2] where the Supreme Court held *inter alia* that:

> ***"Although recognition of a person one knows is less likely to be mistaken than identification of a stranger, even in cases of recognition the danger of mistake is present and it must be considered."***

He also relied on the case of ***Nyambe v. The People*** [3] where it was held *inter alia* that:

> ***(ii) There is great danger of honest mistake in identification, particularly where the accused was not previously known to the witness. The question is not one of credibility in the sense of truthfulness but of reliability.***
>
> ***(iii) The greatest care should be taken to test the identification. The witness should be asked, for***

instance, by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing, and so on, and the circumstances in which the accused was observed in the state of the light, the opportunity for observation, the stress of the moment should be carefully canvassed.

(iv) The adequacy of evidence of personal identification will depend on all the surrounding circumstances and each case must be decided on its own merits."

In light of the aforementioned authorities, counsel submitted that PW2 did not point out the peculiar features that could have enabled her to identify the appellant and the danger of mistaken identity was not ruled out by the court. He therefore urged us to find accordingly.

In response to ground one, Mrs. Khuzwayo stated in her heads of argument that the State supports the conviction. She contended that there is overwhelming evidence of identification of the appellant as the perpetrator of the offence. That the law referred to by the appellant pertaining to single identification evidence does not apply to this case but the law relating to evidence of recognition does. She cited the case of ***Mwansa Mushala v. The People*** [4] where the Supreme Court held *inter alia* that:

"(iii) Although recognition is accepted to be more reliable than identification of a stranger, it is the

duty of the court to warn itself of the need to exclude the possibility of an honest mistake."

In light of this, she contended that the trial Judge's failure to warn herself is a procedural error, which this court can cure by invoking ***Section 16 of the Court of Appeal Act, No. 7 of 2016*** [1] as no prejudice or miscarriage of justice would result. Further that, the identification of the appellant by PW2 is strong, because there was moonlight and an oncoming vehicle with sufficient light exposing the appellant and his colleagues, just before the attack and the appellant and PW2 knew each other.

It was submitted further that should this court find the identification evidence poor, it should consider other supporting evidence. To fortify this, she relied on the case of ***Molley Zulu***[2] where it was held that:

"(iii) On the facts, the opportunity for reliable identification was poor within the meaning of the Turnball case... in order to test the reliability of the identification, it was therefore necessary to consider whether there was any other evidence or circumstances which supported the identification."

She contended that there was other evidence supporting the identification which the trial court had rightly considered. She pointed out that on pages 141 line 10 to the end of the page and 142 lines 1 to 14 of the record of appeal, indicate that the trial court found evidence corroborating PW2's identification of the appellant.

It was therefore submitted that the learned trial Judge cannot be faulted for accepting the evidence of PW2.

At the hearing of the appeal, in augmenting the submissions in ground 1 Mr. Mainza stated that the record of appeal at page 57 lines 17 – 29 shows that when PW2 ran to PW3's house, she told him that someone had attacked her. It was his argument that the implication thereof was that she did not know the attacker. That on page 39 of the record, lines 20 – 22 PW2 gave conflicting evidence as to the identity of her attacker. The evidence referred to reads: *"At that time my lady I said could it be true that you could do such a thing to me, have you forgotten that I'm your aunty Shanty's wife."* Mr. Mainza pointed out that on page 55 of the record lines 2 – 9, PW3's evidence was that PW2 told him the name Munabi. On page 54 of the record lines 19 – 22, PW3 told the court that PW2 told him the name of the assailant which he had forgotten. Then the prosecutor asked the court if he could remind PW3 of that name. The court agreed and counsel named the attacker as Munabi. That is how PW3 accepted the name. It is therefore clear that PW3 was led to mention the appellant's name.

Counsel requested us to carefully review PW2's evidence of what transpired just before the attack. He submitted further that the trial court's failure to warn itself of the possibility of mistaken identity is fatal to the prosecution's case. He stated further that the Judge erred when she found that PW2's evidence corroborates PW1's evidence because PW1 saw the appellant in the morning and at mid-day. On the other hand, PW2 saw the

appellant in the morning and the attack occurred at night. Therefore there was no corroboration.

Mrs. Khuzwayo's oral response to the additional submissions by counsel for the appellant was that, it does not matter that PW2 did not say to PW3 who had walked beside her and twisted her arm at the material time because the appellant acted jointly with others unknown in the commission of the offence as PW2 had seen him with his friends immediately before the attack. She further stated that, page 54 line 19 of the record indicates that PW2 told PW3 the name of the assailant. It is unfortunate that he forgot the name. She further submitted that the appellant was represented by Senior Legal Aid Counsel Mrs. Chitundu in the lower court, who did not object to the state advocate reminding PW3 of the name of the culprit that PW2 had given him. She stated that Mrs. Chitundu therefore sat on the appellant's rights. Therefore, the disputed evidence must be taken into account. To fortify this, she relied on ***Gideon Hammond Millard v. The people.*** [5]

She contended that it was PW2's uncontroverted evidence that there was moonlight, therefore there was enough light to see her assailant clearly. She further stated that although PW2 was scared at the material time, she was able to recognize the appellant. When queried by the Court as to whether the ballistics' report was properly admitted in evidence, her answer was that it was properly admitted pursuant to ***Section 192 of the Criminal Procedure Code.*** [2] In her understanding, a ballistic expert is an analyst, therefore a police officer may

produce his ballistics report. She argued that there was no objection to the production of the ballistics report.

In reply Mr. Mainza stated that since the State has conceded that the court did not warn itself of the dangers of PW2 mistakenly identifying the appellant, this Court should allow the appeal on that misdirection alone because such a misdirection cannot be cured. He further argued that a ballistics' expert is not an analyst but an examiner and therefore ***Section 192 of the Criminal Procedure Code*** [2] does not apply.

Having considered the record of appeal, the written and oral arguments by both parties and the applicable law, we are of the view that the first ground lacks merit because the trial Judge considered the possibility of PW2 mistakenly identifying the appellant and dispelled it on page 142 of the record, J19 lines 13 and 14. Therefore, there was no material irregularity or misdirection by not stating that she was warning herself of the dangers of false implication by a single identifying witness. In actual fact the learned trial Judge excluded the possibility of honest mistaken identity upon taking into account important factors supporting the identification evidence.

The learned Judge properly considered the opportunity that PW2 had to observe her assailant and she found that she had known him for five years as shown at J18, page 141 of the record. According to page 34 of the record, she had known him for ten years and not the five years mentioned in the judgment. Therefore we upset her finding that PW2 had known the appellant for 5 years. It was not in dispute that PW2 and the

appellant had known each other and were close. The trial Judge also considered that it was undisputed that the night was moon lit and the appellant was seen and recognized by PW2, amongst his colleagues in the vicinity a few minutes before the attack, as the car that was passing by shone light on them. Further that, in fact PW2 and the appellant had a conversation during the attack and that even though the appellant was terrorized, she had an ample opportunity to observe him. The Judge stated that PW2's evidence was not controverted by the appellant in cross – examination and we agree with her.

The fact that PW3 was unable to see how PW2 was looking when she ran to him for help does not contradict the evidence regarding the surroundings at the scene that night. It is clear that the appellant and respondent were able to see one another and so were PW2 and PW3 who even went to the crime scene and found the items that were exhibited before court. We hold that the requirements mentioned in the cases of ***Molley Zulu***[2]***, Mwansa Mushala and others*** [3] and ***Nachitimbi and others*** [4] were satisfied even though PW2 did not describe how the appellant was dressed that day. The evidence of PW2 was reliable taking into account the case of ***Honest Solopi v. The People*** [6] that it is not a question of credibility in the sense of truthfulness but of reliability.

We are of the measured view, that even if PW3's evidence of the name of the appellant was based on a leading question and therefore not much weight can be placed upon it, the fact remains that PW2 mentioned her assailants name to PW3 who merely forgot it. The question of PW2 having asked her assailant

who he was, is neither here nor there because there is unchallenged evidence that she recognized him as Munabi and reminded him of their relationship. She apparently named the appellant as her assailant to PW4 and that information led to his arrest.

The lower court's finding that PW1's evidence supported PW2's evidence of identification is misconceived and we hereby set it aside because PW1 was not there immediately before the attack and during the attack. She merely confirmed that the appellant was at PW2's bar that morning and afternoon.

We however, take the view that the two empty cartridges found at the scene corroborated PW2's evidence that the appellant had pointed a gun at her before firing two shots in the air. We note that on the material day it was only the appellant who was at the bar which was near the crime scene with a gun which was capable of firing.

This leads us to the issue whether the ballistics report was properly admitted in evidence having been produced by PW4 and not the writer thereof. ***Section (4) (1) & (2) of the Evidence Act*** [3] provides that:

> ***"(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if-***

(a) the document is, or forms part of, a record relating to any trade or business or profession and compiled, in the course of that trade or business or profession, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and

2. The person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied."

In the present case the ballistics report was produced by a person who was not the author and yet there was no information given to the court regarding the whereabouts of the maker of that report and the reason why he was not called as a witness to produce the report that he signed and explain the circumstances under which it was made as required by the provisions of the law above-mentioned. Therefore, notwithstanding that there was no objection to the production of the report, it was inadmissible and

the Judge erred to admit it. The ballistics expert should have been called unless he is dead or he was outside jurisdiction or too sick to give evidence.

We therefore set aside the ballistics report and we will now consider whether the remainder of the evidence is sufficient to show that the gun was a firearm as defined under Section 2 of the ***Firearms Act*** [4] in order to support the conviction under ***Section 294 (1) and (2)*** of the ***Penal Code.*** [5] Even though we have disregarded the ballistics report, it is our considered view that it was still safe to convict the appellant as charged because firstly, PW1 confirmed that the appellant had a gun capable of firing that day. It is clear that he was so trigger happy on the material day so that he fired two shots at a tree. Secondly, it is not in dispute that the appellant owned a firearm matching the description given in the indictment, which was licensed and therefore we have no difficulty in finding that it was a firearm as defined under the **Firearms Act.** [4] Thirdly, PW2 saw the appellant fire the gun twice. Fourthly, two empty cartridges were found at the crime scene by PW4 confirming that two live bullets were fired at the scene.

The appellant's argument that there was conflicting evidence as to who picked up the cartridges from the crime scene is unacceptable because there was no cogent evidence that PW2's husband picked up some empty cartridges therefrom but that PW4 did so. The appellant's other argument that the cartridges were picked up from a place near his shop is also unacceptable because the shop was far from the crime scene. For the foregoing reasons, the first ground of appeal fails.

The issue raised by the respondent that the appellant acted together with other persons' unknown in the commission of the offence came as an afterthought because the indictment does not show that. The respondent did not even adduce such evidence in the court below.

In support of the second ground of appeal, Mr. Mainza argued that the appellant raised an alibi the moment he was arrested by the police and maintained it during the trial, that on the material date he had travelled to Lutunga, a place far away from the purported crime scene. However, PW4 did not extend his investigations to Lutunga. Neither did he bother to interview the people that the appellant had gone with. He argued further that PW4 deliberately relied on the statements by PW1 and PW2 who could have connived as they were employee and employer respectively. That there was dereliction of duty on the part of the police for failing to investigate the alibi thoroughly despite sufficient details having been given to them.

Under the circumstances, he urged us to uphold the alibi. He relied on the case of ***Katebe v. The People*** [7] where it was held that:

> ***"Where a defence of alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on the accused to establish his alibi, the law as to the onus is precisely the same as in cases of self defence and provocation.***

(ii) It is a dereliction of duty for an investigating officer not to make proper investigation of an alleged alibi."

He also cited the case of ***Ilunga Kabala & John Masefu v. The People*** [8] where it was held that:

"The prosecution takes serious risk of they do not adduce evidence from witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it."

In light of these authorities, he submitted that the alibi was not sufficiently rebutted as the police failed to investigate it thoroughly. DW1 and DW2's evidence should therefore not have been dismissed as unconvincing. He pointed out that nowhere on the record did the trial Judge indicate her perception of DW2's demeanour except in the judgment. He further submitted that it was erroneous for the court to hold that alibi was pleaded as an afterthought. In support of this he relied on the case of ***Joe Banda v. The People*** [9] where it was held that:

"The accused person is entitled to bring up any issue relevant to his defence. And in our view the appropriate time to do so is when it is his turn to give evidence in his defence."

In response to the second ground of appeal, Mrs. Khuzwayo's contentions were as follows:

The appellant only raised an alibi in his defence and as such, the trial Judge was on firm ground when she found that the defence

was raised as an afterthought. Nevertheless, the prosecution negated the alibi through cross – examination of the defence witnesses and the evidence of the spent cartridges found at the scene which placed the appellant at the scene.

The respondent further contends that the appellant's fled from the scene and did not report himself to police as he alleged. This is confirmed by the fact that he was caught on a bus by the police and therefore he was not innocent. In light of the foregoing, the prosecution concluded that the lower court was on firm ground when it held that the alibi was negated.

In determining the second ground of appeal, we note that the law on alibi is firmly established as in the cases cited by the parties. In this case the appellant properly set up an alibi soon after he was arrested and he mentioned it in his defence. It is also clear that PW4 did not thoroughly investigate the alibi by interviewing DW2 and Kelan who were allegedly in Lutunga at the material time with the appellant. Although the appellant called DW2 to prove his alibi, by law it is not his duty to prove his defence. We are fortified by the case of ***Katebe v. The People.***[7] Based on the same case it is clear that there was dereliction of duty on the part of the police by failing to properly investigate the alleged alibi. However, applying the case of ***Ilunga Kabala and John Masefu v. The People*** [8] we cannot fault the lower court for finding that although the prosecution did not adduce evidence from witnesses who could discount the alibi, the remainder of the evidence was itself sufficient to counteract it.

The learned trial Judge relied mainly on the evidence of PW1 and PW2 whom she found credible in order to dismiss the alibi. In the case of ***Nkhata and 4 others v. The Attorney General***, [10] it was held that:

> ***"A trial judge sitting alone without a jury can only be reversed on fact when it is demonstrated to the appellate court that;***
>
> ***(d) In so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where, those witnesses have on some collateral matter, deliberately giving an untrue answer."***

In the present case, applying the ***Nkhata & 4 others*** [10] case, we have observed that there are no other circumstances indicating that the evidence of PW1 and PW2 which the Judge accepted is not credible. Therefore, there is no reason to upset such findings and we hereby uphold them. The same goes for the rejection of the appellant and DW2's evidence as regards their unsatisfactory demeanours. We therefore hold the view that the trial Judge accurately directed herself when she rejected the alibi.

On findings as to demeanour having been made only in the judgment, we opine that the Judge was entitled to do so because it is apt to include such observations and findings in the Judges notes during trial or in the judgment as decided in ***Machobane v. The People.***[11]

For the forgoing reasons, the second ground of appeal also fails. In sum, the appeal is dismissed and the conviction and sentence upheld.

Dated this 20th day of February, 2018

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J. CHASHI
COURT OF APPEAL JUDGE

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE