IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 18/2016**
HOLDEN AT NDOLA
(*Criminal Jurisdiction*)

BETWEEN:

ANANIA TEMBO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kajimanga, and Chinyama, JJS.

On the 10th April, 2016 and on the 10th December, 2018.

For the Appellant: *Mr J. Phiri, Senior Legal Aid Counsel - Legal Aid Board.*

For the Respondents: *Ms S. Muwamba, Senior State Advocate, National Prosecutions Authority.*

J U D G M E N T

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

Cases referred to:

1. ***Simon Mudenda v The People (2002) ZR 76***
2. ***John Timothy and Feston Mwamba v The People (1977) ZR 394.***

Statutes referred to:

1. ***Penal Code, Chapter 87, Laws of Zambia, section 294(2) (a).***
2. ***Firearms Act, Chapter 110, Laws of Zambia.***

Anania Tembo, the appellant was convicted on one count of Aggravated Robbery contrary to **section 294(2) (a)** of the **Penal Code**

and sentenced to death. The appeal affects the conviction and sentence only so far as they are based on the finding that the appellant and his accomplice had used firearms during the robbery at PW1, Gilbert Siame's Bonanza Gaming Shop in Garden Compound in Lusaka in which K1,000 cash and gaming coins of an undisclosed value were stolen. The fact that the robbery took place and the appellant was involved is not in issue in this appeal. The appellant, however, disputes the use of firearms.

In the trial before the lower court, the evidence established that Joseph Lulamba, PW2, who was manning the shop was attacked just after he had opened up the Bonanza Gaming Shop and the appellant and his accomplice had entered apparently to play some games. According to PW2, he screamed when he was being attacked and the appellant's accomplice threatened to shoot him if he screamed again. He tried to scream again and the accomplice told the appellant to "produce a gun" so that the witness could be shot if he screamed. PW2 was then blindfolded. While the robbery was going on, according to PW2, a boy named Junior came to the shop and when he inquired about what was going on a gun was pointed at him and

he was threatened to be shot. Junior fled from the shop and alerted other people in the market.

One of the people alerted was PW3, Joseph Banda who rushed to the shop with other people. In the process of the appellant and his accomplice trying to escape, the accomplice threatened some people on his way out at the gate with what PW3 described as a small firearm and managed to get away in a vehicle parked at the gate. The appellant was apprehended and in the process he dropped a bag. The witness saw something which looked like a plank in the bag but he was not able to see it "*nicely*". He learnt later that the appellant had a firearm but did not say whether that was what he had earlier seen.

PW4, Boniface Musonda, who was at his makeshift stand in the same vicinity also heard the alert and headed for the shop. Before he could get there he saw the appellant and his accomplice leaving the shop. The accomplice managed to escape in the vehicle. The appellant was apprehended and he dropped a black bag which he had in his hand and it opened. The witness saw a firearm. The firearm was in pieces with a piece which looked like a plank. He

likened it to those used for killing animals. In court, the witness identified the firearm which was now assembled by the piece of *"plank"* he claimed to have seen earlier.

PW5, Detective Sergeant Conrad Andeleki who was the arresting officer learnt from PW4 when he rushed to the scene of the robbery that an air gun had been recovered. He stated also that PW2 complained that two men armed with firearms had attacked and robbed him. He later on assembled the air gun and sent it to police forensic ballistics for examination. He stated that it would take a few minutes to disassemble the firearm.

PW6, Vincent Riggy Chibesa, the police forensic ballistics expert, received and examined the firearm and stated that it was a Brazilian made Armed Ross Shotgun. He found that it was functional and opined that it was capable of loading and discharging cartridges (bullets) of the 18.5 mm calibre otherwise known also as 12 bore.

The appellant's defence was that he knew nothing about the use of any firearms during the robbery. In any case, this appeal is not about the merits of the appellant's defence.

The trial judge regarded the evidence of PW's 2, 3, 4 and 5 as unmistakably establishing that at the time of the robbery, the appellant was armed with an offensive weapon, more particularly a dangerous firearm. Having convicted the appellant she went on to impose the death penalty citing the case of **Simon Mudenda v The People**[1] in which this Court held that the death penalty is mandatory for an aggravated robbery committed when the accused is armed with a firearm and that the Court cannot take into consideration any extenuating circumstances or pass any other sentence.

The amended ground of appeal alleges that the trial court misdirected itself when it convicted the appellant under **section 294 (2)** of the **Penal Code** when the evidence adduced did not establish that a fireman was used in the robbery.

In his written Heads of Argument which Mr Phiri, fully relied upon, he submitted that the prosecution did not establish that the appellant was armed with a firearm as defined under the **Firearms Act**. Counsel cited the case of **John Timothy and Feston Mwamba v The People**[2] in which this court held inter alia that:

(i) **To establish an offence under section 294 (2) (a) of the Penal Code the prosecution must prove that the weapon used was a firearm within the meaning of the Firearms Act, Cap. 111, i.e. that it was a lethal barrelled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.**

(ii) **The question is not whether any particular gun which is found and is alleged to be connected with the robbery is capable of being fired, but whether the gun seen by the eye-witnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.**

Learned Counsel submitted that PW2's evidence that the appellant and his accomplice had a gun [or guns] is not reliable because his evidence was not clear how he saw the firearm when he was blindfolded; and that he could not have seen the gun pointing at Junior for the same reason. Counsel pointed out to the effect that PW3's evidence was equally not reliable as his evidence was that he did not see what was in the bag "*nicely*" stating only that the bag contained something which looked like a plank. Counsel also criticized the evidence of PW4 because the firearm was not disassembled in court for the witness to confirm whether that was what he saw during the occurrence of the debacle and that it fitted the appellant's bag. It was Counsel's contention, therefore, that the connection between the purported gun and the exhibit produced in court was not established. Counsel added that "the chain of custody"

of the gun was not fully established beginning with the person who picked up the firearm at the scene and handed it over to the police. Counsel accordingly submitted that the appeal should be upheld and the death sentence set aside.

In response, Ms. Muwamba contended that there was sufficient evidence to uphold the conviction under section 294(2) of the **Penal Code**. She contended to the effect that the evidence of PW's 2, 3, 4, 5 and 6 clearly established that PW2 saw the appellant with a gun at the time of the attack which he shortly after wards pointed at Junior; that the appellant must have disassembled it into three parts one of which looked like a plank, and put it in the bag just before he was apprehended; that PW5 confirmed that the firearm could be disassembled within a few minutes. Counsel asserted in effect that this was the firearm that was taken for ballistic examination and which PW6 found "was able to fire". It was submitted that the court below was on firm ground when it convicted and sentenced the appellant to death.

In reply to Ms Muwamba's response, Mr Phiri insisted that PW2 had not testified at any time that he saw the appellant assemble and

disassemble the gun. Counsel stated that (according to his evidence) PW2 was blindfolded and could not have seen Junior being threatened with a gun.

We have considered the single ground of appeal and the spirited arguments from either side. The question to decide is whether the appellant and his accomplice had a firearm or firearms during the robbery. In this case we agree with the appellant that if we are to follow the sequence in which PW2 recounted the events of that morning, then we must find that the witness was already blindfolded when Junior came on the scene and could not have seen the appellant point a gun at him.

The evidence of PW2 is, however, that the first time he wanted to scream after he was pulled to the ground and a cloth was stuffed into his mouth, the appellant's accomplice threatened to shoot him. The threat was soon repeated when PW2 tried to scream again and the appellant's accomplice instructed the accomplice "to produce a gun" to shoot him if he screamed again. He was then blindfolded. If this were the only evidence adduced it would leave a lingering doubt that a firearm was used at all, in view of the possibility that the

robbers may only have been pretending that they were armed in order to aid the execution of the robbery.

The evidence of PW3, however, indicates the possibility that the appellant and his accomplice were armed when he said that he saw the accomplice with a small fire arm which he used to threaten those at the gate before making his escape. The witness also saw something which looked like a plank in the appellant's bag but did not see it properly, as we understood the expression *"nicely"* to mean. PW4, however, said he saw a disassembled firearm in the appellant's bag when it dropped with a piece that looked like a plank. At the trial of the matter, he identified the firearm which was now assembled by the piece of plank.

It should be noted that PW3 and PW4 were at the scene at the same time and whereas they were not able to give the same or similar evidence of what they saw, it is clear that their evidence was substantially similar in the material respects confirming that at the time of his apprehension, the appellant dropped a bag which contained an object or objects whose common feature in the eyes of the two witnesses was a piece which looked like a plank. The evidence

of PW4 as such confirmed the evidence of PW3 that coming out of the robbery the appellant was carrying a bag which contained a dismantled firearm. From this evidence, it is clear that this is the firearm which the accomplice told the appellant to produce and shoot PW2 with thus establishing that the appellant and his accomplice had the firearm at their disposal. We have no doubt that it is the same firearm that was in the bag which the appellant dropped when he was apprehended and was given to PW5, the arresting officer and onward to PW6, the forensic ballistics expert who confirmed that the firearm was a lethal weapon capable of discharging live ammunition of the requisite calibre. We also accept that PW2 saw the firearm as he stated. Indeed, the appellant had enough time to dismantle it before he tried to escape bearing in mind the evidence of PW5 that it could be disassembled within a few minutes.

It is also notable that there was no contention that the appellant's accomplice was armed with a firearm seen by PW3 which he used to secure his getaway in the vehicle that was waiting at the gate.

On the basis of the foregoing evidence we have no doubt that the appellant was properly convicted under section **294(2) (a)** of the **Penal Code** and sentenced to death. We find no merit in the appeal. We dismiss the appeal and confirm the conviction and sentence of death.

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E.M HAMAUNDU
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE