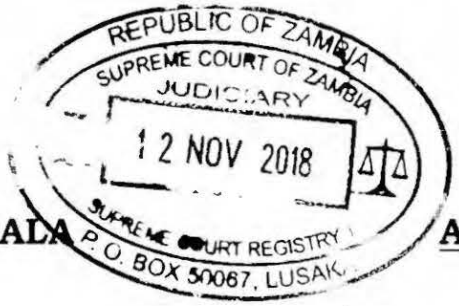
SCZ Appeal No. 518/2013

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

STEVEN KAYONGO SAMUHALA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe, JJS and Lengalenga, Ag/JS
On the 4th February, 2014 and 7th November, 2018

For the Appellant: **Mr. A. Ngulube, Director Legal Aid Board**

For the Respondent: **Mrs. M. Kawimbe, Deputy Chief State Advocate**

JUDGMENT

Phiri, JS, delivered the judgment of the court.

Cases referred to:

1. **Benson Phiri and Another vs. The People (2002) Z.R. 107**
2. **Katebe vs. The People (1975) Z.R. 13**
3. **Jonas Nkumbwa vs. The People (1983) Z.R. 103**
4. **John Timothy and Feston Mwamba vs. The People (1977) Z.R. 326 (Reprint)**

When we heard this appeal we sat with Madam Justice F. M. Lengalenga, Acting Judge of this Court who has since reverted to her substantive position. This is therefore the majority Judgment.

The appellant originally stood charged with seven (7) counts of **Aggravated Robbery contrary to Section 294(2) (a) of the Penal Code, Chapter 87 of the Laws of Zambia.** He was eventually convicted on 2 counts of **Armed Aggravated Robbery** and on one lesser count of **Stock Theft contrary to Section 275(1) and Section 275(2) (a) of the Penal Code, Chapter 87 of the Laws of Zambia.** He was sentenced to death for the two counts of Armed Aggravated Robbery and 10 years imprisonment with hard labour for the offence of Stock Theft.

The particulars of these offences alleged that on the 27th of April, 2000 at Chavuma in the North Western Province of the Republic of Zambia, the appellant, jointly and whilst acting together with other persons unknown and whilst armed with AK47 assault Rifles did steal various items, including herds of cattle from Jonas Salwenyeka (PW1) and Jonathan Kanguya (PW5) using violence.

The convictions were mainly based on the evidence of Jonas Salwenyeka (PW1) his son Golden Musoka Salwenyeka (PW2) and Jonathan Kanguya (PW5).

Their collective evidence was that on the material day during the night, they were at their fishing camp when they came under attack from about 18 foreign soldiers who were dressed in military fatigues and were armed with guns which looked like AK47 Rifles. Through moonlight, these three witnesses recognized the appellant as one of the members of the group of soldiers. Each of these three witnesses knew the appellant very well and lived together with him in the same area until he migrated to neighbouring Angola to join his father.

According to PW1, during the attack the appellant came close to PW1 and hit him with his gun butt before physically seizing him with the aid of the other foreign soldiers. Thereafter, the assailants forced PW1 to lead them to the villages in the area where they stole cattle which they shepherded to the fishing camp until the next morning. Thereafter, the soldiers prepared food which they all ate. The food was prepared in broad daylight with clear visibility giving

PW1, PW2 and PW5 ample opportunity to see the people in the group of assailants and to identify the appellant among them. After eating the meal, the assailants forced PW1 and PW2 (PW1's son) to drive the stolen cattle into Angola. After PW1 and PW2 were made to cross the border into Angola with the stolen animals, they were compelled to spend the next night in Angola until they were released to undertake their journey back to Zambia. When they returned to their village, both PW1 and PW2 fell sick from their ordeal and injuries which they suffered at the hands of the Angolan soldiers. The two witnesses reported their ordeal to the Police much later after they recovered.

In his defence, the appellant stated to the trial Court that he knew PW1, PW2 and PW5 and that they all hailed from the same area on the Zambian side of the border with Angola. He explained that the events that occurred were triggered by a group of 30 Angolan troops from the MPLA of Angola who forced or coerced him to steal cattle from the Zambian side of the border. After driving the stolen cattle into Angola, he escaped from his captors with two other colleagues who unfortunately were shot dead during the

escape. The appellant further explained that during his escape he landed into the hands of the Angolan rebel UNITA soldiers who kept him and treated his wounds before they released him to proceed back to Zambia. He returned to the Zambian side of the border where he was quickly apprehended by members of the neighbourhood watch group in the area.

The learned trial Judge considered and analyzed the evidence adduced in the case by both sides and discounted the defence of duress or coercion given by the appellant under **Section 16(1) of the Penal Code, Chapter 87 of the Laws of Zambia.** The Court found as a fact that the defence of duress or coercion was not put to the test during cross-examination of the prosecution witnesses and therefore concluded, that it was a mere afterthought.

The learned trial Judge further found that the appellant was part of the foreign militia because he was also dressed in military uniform and carried a military assault rifle; that the appellant was an active participant in the crime because he hit PW1 with the butt of the gun during the attack. The learned trial Judge also accepted the prosecution's evidence establishing the fact that the appellant

lived in the same area with the prosecution witnesses until he migrated to Angola to join his father long before the attack took place. The conviction was based on these findings of fact.

The appellant advanced four (4) grounds of appeal. The first ground was that the trial Court erred in law and in fact when it convicted the appellant on the basis of the evidence given by PW1, PW2 and PW5 as their evidence was inconsistent and, therefore, unreliable. The second ground was that the trial Court erred in law and in fact when it found that the defence put up by the appellant was an afterthought as there was evidence that he was captured and forced to accompany the Angolan soldiers into Zambian territory. The third ground was that the trial Court erred in law and in fact when it convicted the appellant for the offence of Aggravated Robbery with the use of a firearm when there was no evidence of the use of a firearm. The last ground was that the trial Court erred in law when it sentenced the appellant to death.

In support of ground one, Mr. Ngulube submitted that there was inconsistency in the evidence of PW1 and PW2 because their accounts of their beatings were different. PW1 testified that he was

hit once but when he was cross-examined, he said he was hit with the butt of a gun around the body and was kicked while lying on the ground. In addition, it was argued that PW1 did not say that PW2 and PW3 were beaten. All he said was that they remained at the fishing camp with four soldiers who were guarding them. PW2 on the other hand testified that he was beaten for an hour by all the 18 soldiers, thereby contradicting PW1's evidence.

Regarding their movements on and around the crime scene, Mr. Ngulube stated that PW1 claimed that after the other soldiers came back with the cattle, they started off for Kasupa around 17.00 hours while PW2 claimed that they started off at 12.00 hours. Mr. Ngulube pointed out that PW2 spoke of the appellant leading the group to Chambi, yet he was not there. According to Mr. Ngulube, this is a classic example of a witness who speaks to things in a convincing manner as though he witnessed them, yet it was information given to him. This suggests the possibility of a coached witness or indeed a witness given to exaggeration.

Our attention was also drawn to a portion of the record where PW2 stated that there were other friends who were apprehended by

the group of foreign soldiers during the night he and his father were attacked; while his father (PW1) said that the foreign soldiers were with other civilians. Further, it was stated that while PW2 exaggerated his evidence by stating that the appellant ordered PW1 to drive the cattle, PW1 himself did not say the appellant told him to drive the cattle. It was also pointed out that while PW5 talked about two women and one child at the fishing camp, other witnesses did not mention that fact.

Mr. Ngulube further questioned the reason PW1 and PW2 gave for delaying their report to the Police which was done after some months. According to Mr. Ngulube the reasons given were questionable because the two witnesses managed to move from Angola up to their homes in Zambia and they could easily have extended their return trip to the nearest Police station in Zambia or they could have reported by proxy. According to Mr. Ngulube, those areas of the prosecution's evidence demonstrated that PW1, PW2 and PW5 were inconsistent and therefore unreliable to safely anchor a conviction for a crime that carries capital punishment. It was therefore argued that the Court erred in convicting the

appellant on such evidence. We were implored to find in favour of the appellant and quash the conviction.

In response, the learned Deputy Chief State Advocate supported the appellant's conviction. In support of ground one, she argued that the evidence given by PW1 and PW2 was very consistent and reliable; and the inconsistencies complained about by the appellant's Counsel were minor and could not affect the quality of the evidence given by PW1 and PW2.

It was submitted that none of the prosecution witnesses were coached to give their evidence which was very clear on the participation of the appellant in the robberies. We were referred to our decision in the case of **Benson Phiri and Another vs. The People**[1] where this Court pronounced that minor inconsistencies in the evidence of the prosecution witnesses were not fatal and did not discredit the evidence of the prosecution. It was submitted that such were the circumstances in this case because the inconsistencies noted would not warrant the quashing of the appellant's conviction.

On ground two, the learned Chief State Advocate submitted that the learned trial Judge was on firm ground in holding that the evidence given by the appellant to the effect that he had been taken captive by the foreign soldiers was an afterthought because the question of the appellant being taken captive was never put to the prosecution witnesses in cross-examination. It was also submitted that there was no attempt by the appellant to show that he was a fellow captive like PW1 and PW2. Regarding the appellant's evidence that he sustained injuries from beatings inflicted by the foreign soldiers during his captivity, it was argued that no medical evidence was produced; and the appellant did not bring his wife or brother-in-law to Court to support his testimony that those two were aware that he had been captured and held against his will in Angola.

Further, it was argued that when the police arrested the appellant, he made no attempt to inform them or provide sufficient information regarding his alibi so that the police would have had sufficient time and opportunity to investigate it. The alibi was only given by the appellant in Court during his defence and was clearly

an afterthought. It was argued that there was no dereliction of duty on the part of the officers who investigated this case, hence the Court was justified in holding that the appellant's defence of alibi was an afterthought. For this proposition, reliance was placed on the case of **Katebe vs. The People**[2]. The learned Deputy Chief State Advocate implored us to dismiss the second ground of the appeal.

In respect of grounds three and four which were argued together, it was conceded that there was no evidence on the use of firearms because no firearm was recovered by the police who could have tested it in order to determine whether what was used was a firearm within the meaning of the **Firearms Act, Chapter 110 of the Laws of Zambia.** The Learned Deputy Chief State Advocate therefore submitted that the conviction under **Section 294(2) (a) of the Penal Code** could be substituted with a conviction under **Section 294(1)** to the extent that the firearm was not recovered and tested.

The respondent's position in respect of grounds three and four was based on the authority of our decision in the case of **Jonas**

Nkumbwa vs. The People[3], where we held that it is unsafe to uphold a conviction on a charge of Armed Aggravated Robbery where there is no direct evidence of the use of a firearm. Mrs. Kawimbe however, pointed out that given the peculiar circumstances of this case where the robberies were carried out by foreign soldiers from Angola; and that it was impossible for the Zambian police officers to recover the firearms from Angola; and in the face of the reliable testimony from PW1 and PW2 who were very clear and consistent in the roles played by the appellant during the robberies, it was proper for this Court to uphold the appellant's conviction for the offence of **Armed Aggravated Robbery under Section 294(2) (a) of the Penal Code** which provides for Armed Aggravated Robbery involving the use of a firearm. We were urged to uphold the conviction and the extreme sentence given by the lower Court.

We have considered the submissions made by learned Counsel for both sides. We have also considered the evidence on the record of the appeal and examined the judgment of the trial Court. In particular, we have considered the 4 grounds of the appeal

advanced on behalf of the appellant. On ground one of the appeal, the gist of the argument is that the evidence given by PW1, PW2 and PW5 was inconsistent and therefore unreliable. In support of this ground, the Learned Director of Legal Aid gave a resume of the prosecution's evidence given by PW1, PW2 and PW5 which was considered inconsistent. On the other hand, the respondent's argument was that the inconsistencies alleged by the appellant were minor and did not affect the overall quality of the evidence given by PW1 and PW2.

We do take note that there was a degree of inconsistency in the testimony given by PW1, PW2 and PW5 who were at the fishing camp during the night they were attacked by the armed foreign soldiers from Angola. The Learned Deputy Chief State Advocate acknowledged this fact. The issue is whether the acknowledged inconsistencies go to the root of the credibility of the evidence given, particularly, by PW1 and his son PW2 who were at the scene of the robbery. Our examination of the listed inconsistencies between the evidence of PW1, PW2 and PW5 satisfies us that the inconsistencies do not raise any substantial issues that would lead to the question

of whether or not they could cause a substantial miscarriage of justice. On behalf of the appellant, it was argued that the accounts of beatings by PW1 and PW2 are different. It was also pointed out that PW1 did not say in his evidence that PW2 and PW5 were also beaten; whereas PW2 stated that he was beaten by all the 18 soldiers; when four of them remained guarding PW1 at the fishing camp.

The undisputed fact remains that these witnesses were attacked by a gang of foreign soldiers who took them captive during the whole night and part of the next day. It is immaterial to seek to establish which parts of the victims' bodies were directed at during the beatings. The cardinal point is that each of the witnesses described how they were assaulted and mistreated by the appellant's gang of armed foreign soldiers. In his own evidence the appellant put himself at the scene with PW1, PW2 and PW5; but claimed to have equally been captured.

The other issue raised in support of the argument regarding inconsistency relates to the timeline of events as given by PW1 and PW2 at the fishing camp and at Kasupa where the invading soldiers

took the stolen cattle. It should be noted that although PW1, PW2 and PW5 experienced the traumatic events when the soldiers invaded their fishing camp, it is normal for them to perceive things and events differently during the attack by multiple assailants. We do not think that the complaint about their testimonies being different in terms of timeline or in terms of how many times each one was beaten, is a cogent argument. The learned Director went further to suggest that the evidence of PW1, PW2 and PW5 could have been coached evidence. In our view, the suggested position was not backed by any evidence on record.

In our considered view, the only time when inconsistency in the prosecution evidence can upset or alter a finding on appeal is when that inconsistency, in the opinion of the appellate Court, occasioned a substantial miscarriage of justice. This position appears to us to be embedded in the provisions of **Section 353 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia** which provides as follows:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on any ground whatsoever unless any matter raised in such ground has, in the**

opinion of the appellate court, in fact occasioned a substantial miscarriage of justice;

Provided that, in determining whether any such matter has occasioned a substantial miscarriage of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding".

We are therefore unable to accept the appellant's argument in ground one of the appeal which alleged that the evidence of PW1, PW2 and PW5 was inconsistent and therefore unreliable. We are further fortified in this position by the facts of the case which were clearly established.

In ground two, the appellant's conviction was put to question on the ground that there was evidence to support his defence that he was captured and subjected to duress by the foreign soldiers.

We have examined the entire record of the appeal and we have not found any evidence which suggests the appellant's defence of capture, duress or coercion by the foreign soldiers. The prosecution established the fact that the appellant was well known in that area bordering Zambia and Angola. The description of the appellant given by PW1 is recorded as follows:

".....he was a soldier with a gun and he was the one who led in the driving of the cattle.....I used to see him before that case. We used to stay with him in Zambezi".

The appellant's description by PW1 was consistent with that of all the other witnesses who testified against him. According to the record of the appeal, the prosecution witnesses were never challenged regarding the appellant's identity, and remained solid in their evidence that they identified the appellant during the robbery and after the robbery and that the appellant was dressed in military uniform and carried his own gun.

On his part, the appellant, in his defence, gave a story of how he was captured by UNITA rebel soldiers and later how he was treated by Angolan soldiers in Angola before he entered Zambia where he was apprehended by members of the neighbourhood watch. The appellant however failed to explain what he did to PW1, PW2, and PW5 that would qualify him to the defence of duress or coercion as provided under **Section 16 of the Penal Code.** To the contrary, he disputed the evidence given by PW1, PW2 and PW5; while conceding that he knew them. There was no evidence that he had differences with them even before this incident. The learned

trial Judge discounted the evidence of duress or coercion under **Section 16(1) of the Penal Code** because: 1) the defence was not put to any of the prosecution witnesses, including the police officers who dealt with the case; 2) the appellant was also dressed in military uniform and carried an AK47 assault rifle during the raid; 3) the appellant hit PW1 with the butt of the gun during the attack; and 4) the appellant was well known in the border area where he lived until he migrated to Angola to join his father long before the attack. These are findings of fact for which we find no cause to interfere. We find no merit in the second ground of appeal and we dismiss it.

The third ground of the appeal relates to the question whether the robbery in this case fell within the provisions of **Section 294(2)(a) of the Penal Code,** which applies when the weapon used is a firearm within the definition in **Section 2 of the Firearms Act, Chapter 110 of the Laws of Zambia.** This ground is somewhat directly connected to the fourth and final ground of the appeal which assailed the sentence of death awarded by the lower Court to the appellant. The argument advanced in support of grounds three

and four was based on the authority of our decision in the case of **Jonas Nkumbwa vs. The People**[3] in which we held that:

> **"It is unsafe to uphold a conviction on a charge of Armed Aggravated Robbery where there is no direct evidence of the use of a firearm".**

The question of whether the offence of Aggravated Robbery fell within the provisions of **Section 294(2) (a) of the Penal Code** was comprehensively addressed by this Court in the case of **John Timothy and Feston Mwamba vs. The People**[4].

In that case, the brief facts were that the two appellants were convicted of Aggravated Robbery, the allegation being that, whilst acting together and being armed with a firearm they stole a considerable quantity of property from a dwelling house and used or threatened violence against the occupants. A servant of the complainants succeeded in summoning the police without the knowledge of the robbers, but when the police arrived, the robbers made their escape. Shots were fired by the police and one of the robbers was killed. The first appellant was found hiding in the grounds of the complainants' house and his appeal was dismissed on the facts. The second appellant was found in the afternoon of the

day following the robbery, and some considerable distance from the scene, with an injury in his left buttock, and his appeal was allowed on the ground that the evidence that the injury was caused by a bullet was insufficiently clear; that certain evidence given by prosecution witnesses as to the finding in his possession of some of the stolen property was unsatisfactory; and, that the second appellant's own evidence as to the circumstances in which he had sustained his injury might have been true.

In that case, a firearm similar to the one described by the prosecution witnesses was found five days after the robbery at a place one mile away from the complainants' house. There was no evidence that this gun was the one used in the robbery, and no effort was made to test it for fingerprints.

In dismissing the first appellant's appeal regarding the application of **Section 294(2) (a) of the Penal Code,** this Court made the following pertinent pronouncements:

> **"1. 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 barreled weapon from which a shot could be discharged or which could be adapted for the discharge of a shot.**

2. **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 eyewitnesses was so capable. This can be proved by a number of circumstances even if no gun is ever found.**

3. **The finding of a magazine with two live rounds on the path taken by the robbers when they ran away must lead to the irresistible conclusion that the automatic weapon seen by the complainants in the hands of one of the robbers was capable of firing the live rounds found in the magazine."**

The appellant's contention in the present case is that because no firearm was recovered and tested, and in the absence of evidence to show that a firearm was actually fired during the raid, it was unsafe to convict the appellant for Armed Aggravated Robbery. The established facts of the present case are that the robberies were committed on the Zambia/Angola border; in particular, on the Zambian side where a number of villages were raided by a large number of military men dressed in military combat uniforms and each one of them armed with an AK47 assault rifle. The appellant was identified amongst the invading soldiers. He was recognized by witnesses who knew him before the attack.

The respondent's evidence established that the appellant was also dressed in military combat uniform and was carrying an AK47 rifle which he in fact used on PW1 by slamming him with its butt.

The raiding soldiers stole a total of 31 herds of cattle which they drove across into Angola where they came from. These are the brief circumstances in which the appellant found himself. In short, the gun which the appellant used was not found. In fact, none of the 18 guns used in the raid were recovered.

It is cardinal in this case to understand what we meant in the **John Timothy case.** We expressly said in that case that in circumstances such as these, the question is not whether the gun found was capable of being fired, but whether the gun seen by the eyewitnesses was so capable. We unequivocally stated that this could be proved by a number of circumstances even if no gun is ever found. We specifically pronounced in that case that there may be many other ways to provide proof that the gun seen during the robbery is within the definition of a firearm. Of particular note, is the fact that we never defined or exhaustively stated the many other ways in which proof of the use of a gun could be provided. We do not think it is possible to do that.

There was no dispute that the assailants in the present case were not ordinary men or ordinary robbers. They were armed

foreign soldiers from Angola who first raided a fishing camp where they took PW1 and PW2 captive overnight. They forced PW1 and PW2 to lead them to the villages where cattle were found. They found the cattle which they stole and went back to the fishing camp where they had their meals, and, once again, forced PW1 and PW2 to drive the animals back into Angola where they came from. It is common cause that guns seen in the hands of combat soldiers in military uniform pause actual threat to their possible victims and no reasonable person can fail to submit to their demands because the operational norm of soldiers is to kill or be killed when in operation.

It is inconceivable to us that a group of soldiers can set out to carry out robberies in an area while armed with imitation guns or toy guns. The prosecution's evidence established to the full satisfaction of the trial Court that the assailants were soldiers on a mission from Angola to steal and rob in Zambia. This was confirmed by the appellant himself; with the only deviation being his claim that he was coerced into joining the soldiers, which the learned trial Judge correctly dismissed on the basis of eyewitness accounts given

by PW1, PW2 and PW5. We are therefore satisfied that the rifles which the witnesses saw were firearms within the meaning of the **Firearms Act, Chapter 110 of the Laws of Zambia,** whether such firearms were recovered in Zambia or not.

When we decided the **Jonas Nkumbwa case**[3] and the case of **John Timothy and Feston Mwamba**[4] we clearly dealt with local Zambian domiciled civilian assailants who committed robberies within the Zambian territory while armed with firearms. We did not contemplate circumstances where the robbery is committed by such a foreign invading armed force entering or exiting the Zambian territory with their weapons and stolen loot. In our view, in limited special circumstances, **Section 294(2) (a) of the Penal Code** must apply whether or not the assault rifles used by the invading soldier, soldiers or robbers was recovered and tested. We do not think that our view principally departs from the *ratio decendi* in the **Timothy Mwamba case**[4]**.** In our view therefore, the learned trial Judge was perfectly on solid ground when he concluded that **Section 294(2) (a) of the Penal Code** applied to the appellant in this case. We find no merit in grounds three and four and we decline to quash the

mandatory sentence of death for **Armed Aggravated Robbery.** We find no merit in the appeal and it is dismissed.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE