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IN THE COURT OF APPEAL
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL NO. 107/2018

BETWEEN:

MILNER MULENGA

1st Appellant

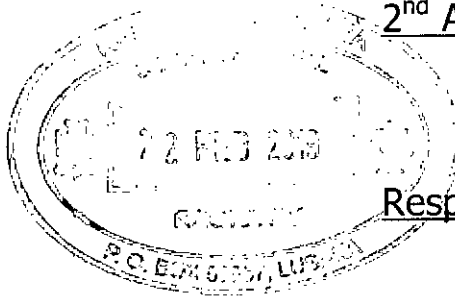
HENDRIX TAMBATAMBA

2nd Appellant

VS

THE PEOPLE

Respondent



CORAM: **Chishimba, Lengalenga and Siavwapa, JJA**
on 20th November, 2018 and 22nd February, 2019.

For the Appellant: Mr. K. Muzenga – Deputy Chief State Advocate
Miss K. Chitupila – Senior Legal Aid Counsel

For the Respondent: Mrs. N. G. Kashishi Ngulube – Senior State Advocate

J U D G M E N T

LENGALENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. NYAMBE v THE PEOPLE (1973) ZR 228

2. **LOVE CHIPULU v THE PEOPLE (1986) ZR 73 (SC)**
3. **JOHN MKANDAWIRE v THE PEOPLE (1978) ZR 46 (SC)**
4. **FAWAZ & ANOR v THE PEOPLE (1995 – 99) ZR 3 (SC)**
5. **YOANI MANONGO v THE PEOPLE (1981) ZR 152 (SC)**
6. **GEORGE NSWANA v THE PEOPLE (1988 – 89) ZR 174 (SC)**
7. **KUNDA v THE PEOPLE (APPEAL NO. 135/2012 ZMSC 34)**
8. **KENNETH MTONGA & ANOR v THE PEOPLE (2000) ZR 33**
9. **MUVUMA KAMBANJA SITUNA v THE PEOPLE (1982) ZR 115 (SC)**
10. **CHABALA v THE PEOPLE (1976) ZR 14 (SC)**
11. **WINZY SAKALA & ANOR v THE PEOPLE (2009) ZR 99 at page 109**

Legislation referred to:

1. THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA

This is an appeal against the conviction and death sentence for the offence of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of offence were that the appellants, Milner Mulenga and Hendrix Tambatamba on 6th October, 2010, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Isaac Siamafuwa.

The prosecution case was anchored on the evidence of PW1, PW2, PW3, PW4, PW5 and PW6.

PW1 was Lydia Makumo, the deceased Isaac Siamafuwa's widow. She testified that on 5th October, 2010 her husband left home in John Laing Compound in Lusaka at 11:00 hours to go to the University of Zambia where he was studying Social Work. When he did not return home she was worried and at 21:00 hours she phoned her sister-in-law Melody Munkombwe to find out whether he had gone to her home. She discovered that he was not there and later at 22:00 hours Melody and her husband phoned PW1 to find out if he had arrived. According to PW1's evidence, the following day she accompanied her husband's aunt and sister to Kanyama Clinic to look for him. She testified that it was at the clinic where they learnt that her husband was referred to the University Teaching Hospital (UTH) as he had been badly attacked.

As they were on their way to the hospital, whilst they were on the bus, Melody's husband phoned the deceased's aunt and told her that PW1's husband was found dead and he told them to go home. From there they went home to prepare for the funeral.

According to PW1's testimony she learnt that he was attacked by some people and that one of the assailants was apprehended and taken to the police. At the police station she identified the small black school bag

that her husband carried when he left home. She further testified that when the bag was recovered after four days, only two books were found.

PW2, Jimmy Zimba's evidence was to the effect that on 6th October, 2010, around 20:00 hours he was at home. As he was eating he saw someone who passed in a great hurry and said that someone was being killed. Upon hearing that PW2 went to the roadside and he found a person on the ground being beaten by two people.

According to PW2, his house was about 16 metres away from the scene of the incident which was at the gate to the car park and there was a light there. PW2's evidence was further to the effect that initially he did not go near to where the attack took place because he was threatened that they would kill him. However, he summoned up enough courage to approach the scene and upon seeing him approaching, the assailants fled. At that time the deceased was still on the ground and PW2 chased them and he managed to kick one who fell to the ground whilst the other one ran away.

PW2 and other people who went to his assistance apprehended the one who had fallen and they beat him up and retrieved the deceased's bag. As they were taking the deceased and the person who was

apprehended to the police, the deceased who appeared confused fell and PW2 booked a bus and took him to the police station in Chibolya. Upon arrival at Chibolya police, they were given a medical report so that they could take the deceased to Kanyama Clinic which they did. At Kanyama Clinic they were referred to the University Teaching Hospital (UTH).

It was PW2's further evidence that he slept at the hospital and that he left the deceased alive when he left. He took the deceased's shoes as they were removed at the clinic and he went in search of his relatives.

PW2 informed the court that he saw the deceased's body on 10th October, 2010 at the grave side and he identified it as the body of the person he had attempted to help. He had further testified that the incident he witnessed took ten minutes.

In the courtroom, PW2 identified the 1st appellant as the person he had apprehended and the 2nd appellant as the one who had threatened him and the person who ran away.

He further identified the black bag he recovered from the 1st appellant. With regard to the question on the state of lighting at the scene, PW2 stated that there was a spot light at the gate like the one that was at the roadside.

In cross-examination, PW2 stated that there was no-one else at the scene apart from the deceased, the two appellants and the person who had alerted him about the attack. He further stated that the deceased was swollen. PW2 conceded that the crime rate is high in John Laing and that the rate of people being beaten at night there is also high. He denied seeing the 2nd appellant before the identification parade.

PW3 was Samson Nkata who had testified that on 6th October, 2010 around 20:00 hours he saw a person running who told him and his friend Jimmy that someone was being killed. According to PW3's evidence, he saw someone being beaten with an iron bar at a distance. He corroborated PW2's evidence that there was a spotlight where the attack took place.

As for the rest of PW3's evidence it was similar to PW2's evidence.

PW4, Saul Zambangana's testimony was to the effect that Isaac Siamufuwa was his wife's young brother and that on the date in question around 20:00 hours, they had received a phone call from the deceased's wife who asked them if her husband had passed through their home. He thereafter tried to call his brother-in-law, but the phone indicated that it was out of coverage. Then around 22:00 hours the call went through and

PW4 spoke to an unknown person and he demanded to speak to the owner of the phone. According to PW4's evidence, that person angrily told him that was his phone and he thereafter switched off the phone and he stayed outside coverage area.

Afterwards, PW4 asked his neighbour for assistance and they got a taxi and they went in search of the deceased along Kafue road in case he had been hit by a vehicle. They went as far as Castle Police Post but there was no information about the deceased.

Thereafter, they went to the deceased's house and asked his wife to give them a description of what he wore that day when he left home. From there they went to the University Teaching Hospital (UTH) where they tried to find a body that fitted his description but to no avail and then they went back home.

According to PW4's evidence, the following morning, he told his wife to go to Chibolya Police Post and other police posts in the area. He proceeded to the University Teaching Hospital to go and check and it was there where he was told that after they left the previous night, a body that fitted the description they had given was received. PW4, was led to the brought in dead (BID) section where he identified the body and the

clothes. He observed that there was a bandage that had a lot of blood on it on his head, and he saw two wounds on the head.

Thereafter, PW4 phoned his wife and the deceased's uncle, one Winter Samachenya. When the said Winter arrived at the hospital he was shown the body and they then went to the funeral house. According to PW4, Jimmy went to the funeral house and told them the role that he played. Afterwards PW4 went to Chibolya Police Post where he saw the 1st appellant.

PW4 further testified that when the postmortem examination was conducted on 11th October, 2010 he was present and he identified the body.

PW5 was Sergeant Kelvin Haamambo of Millenium Police Post, whose evidence was that on 6th October, 2010 whilst he was on duty around 20:00 hours when he was at Chibolya Police Post, he received a report from Frederick Mwaba that a suspect was being apprehended by members of the public. Upon receiving the report he and reserve Constable Mulenga together with Mr. Owen, a fellow worker at the said police post, rushed to the scene where they saw a suspect being beaten and lying unconscious in a pool of blood. They rescued him and took him to the University Teaching

Hospital (UTH) whilst he was still unconscious. According to PW5, the suspect regained consciousness after two days and he was discharged. Thereafter, the police detained him for murder in connection with the deceased's death. He identified the 1st appellant, Milner Mulenga as the suspect who was hospitalised.

PW6 was Detective Inspector Harrison Mwikisa, the dealing officer. The gist of his testimony is that on 7th October, 2010 whilst he was stationed at Chibolya Police Post, he received a docket of murder of Isaac Mukambwe who was attacked by two men in Chibolya compound on Kafue Road on 6th October, 2010. He also learnt that one suspect was already in police custody at that time. The deceased's body had already been taken to University Teaching Hospital mortuary. Investigations were instituted into the matter by PW6 visiting the scene, interviewing witnesses and suspect, collecting other relevant evidence and requesting for a post-mortem examination to be conducted. When a second suspect was apprehended he was detained at Castle Police Post and later picked up by PW6 and later jointly charged with the appellant. He was identified as Hendrix Tambatamba.

According to PW6's evidence, an identification parade was conducted at which the 2nd appellant was identified by PW2, Jimmy Zimba.

PW6 later identified both appellants in court as the persons he jointly charged with one count of murder. He also caused the black bag "P1" that was recovered at the scene, the two books (P2 and P3) and post-mortem examination report (P4) to be produced and admitted in evidence.

In cross-examination, PW6 confirmed PW2's evidence that the appellant was apprehended by members of the public and the police.

At the close of the prosecution case the court found the appellants with a case to answer and placed them on their defence.

In his defence DW1, Milner Mulenga testified to the effect that he was a vendor at City Market and that on 5th October, 2010 he knocked off around 18:00 hours. He informed the Court that he used to walk to Misisi where he lived and that he would pass through Chibolya to get there.

According to his evidence on that day when he reached the corner where Metropolitan School is, and about 20 metres away from Kafue Road, he heard the sound of people running behind him. When he looked back, he saw three people running and they by-passed him. Then after a few seconds he heard people shouting:

"Thief! Thief!"

When he looked back, he saw many people running towards him and they later apprehended him and beat him up to the extent that when he was taken to the police station, he lost consciousness and woke up in hospital.

It was DW1's further evidence that after he was discharged from hospital the following day, he was taken back to the police station where he was later charged with murder and detained. He told the court that PW2, Jimmy lied when he said that he beat the deceased and threatened those who wanted to rescue him.

In cross-examination DW1 informed the court that he had been selling kapenta at City Market for four years and that he had friends there but he was not sure if they were afraid to testify on his behalf. In relation to his wife, DW1 told the court that they were on separation and he did not know if she was alive. Whilst he claimed that his relatives were tired of attending Court.

He said that it took him 15 minutes to walk from City Market to the place where he was apprehended. When it was put to him that he was however apprehended at 20:00 hours as opposed to 18:15 hours as he

suggested, he denied. He also denied knowing Hendrix Tambatamba before and he said that he got to know him at Central Police.

DW2, Hendrix Tambatamba in his defence testified that on 3rd December, 2010 he came from Kafue with a Hino truck that parks in Shalom Car Park in Chawama. As he was going home at 21:00 hours, on the way he met two police officers who asked him where he was coming from and he told them but they told him that he was lying. One of them told him that he would be taken with the vehicle to the cells because it was late and he was actually taken to Castle Police Post where he was charged with disorderly conduct. He pleaded with the police officers and he even offered to pay but they refused.

Furthermore, according to DW2's testimony when he gave his name as Hendrix they told him that they were looking for a person called Hendrix. He was later taken to Chibolya Police Post where he was informed that he had killed a person with his friends who were in prison. After staying in custody for one month and two days, he was taken to the office where he found the 1st appellant. He was asked if he knew him and he denied and told them that it was his first time to see him. He was then

told that he would be jointly charged with the person he found in the office for killing a person and that was subsequently done.

DW2 testified that at the identification parade where twelve people were assembled, the person who had been taken to the cells where he was at Chibolya had identified him. When he tried to protest he was stopped by officer Musukwa and photographs were taken.

In cross-examination, DW2 insisted that he told the police that he was a lorry mate and that he could have been out of town at the time when the offence was committed. Even though DW2 was able to give the registration number of the truck as ABH 2245 in court, he did not give the number earlier in his statement. He was also unable to give the name of the owner of the truck and he said that the one who knew the name was the driver, and that he was just a lorry boy. He gave the driver's name as Fred and he claimed that he did not remember his surname but he said that he stayed in Chawama.

DW2 recalled that it was Jimmy (PW2) who was taken to the cells by Officer Musukwa and who held him on the shoulder while a female officer took a photograph of him. He was challenged on his evidence that he was charged with disorderly conduct and he conceded that Officer Musukwa did

not say so in his evidence but he still denied that he had fabricated the story of being charged with disorderly conduct.

After the close of the defence case, the trial court found the two appellants guilty as charged and convicted them accordingly. They were both sentenced to death.

It is this conviction and sentence that the appellants now appeal against on the following grounds:

- 1. The learned trial Court misdirected itself when it convicted the two accused persons based on the inconsistent evidence of PW2 and;**
- 2. The learned trial Judge erred in law and in fact when he held that the identification parade was fair.**

The appellants' heads of argument in support of the grounds of appeal were filed into court by their counsel.

In ground one, the appellants challenged the trial court's reliance on the identification evidence of PW2 and PW3 in convicting the appellants. It is the appellants' Counsel's contention that the inconsistencies in PW3's description of the 1st appellant indicate that the danger of honest mistake was not ruled out. She submitted that PW2 and PW3 ought to have

explained further, how they recognised the 1st appellant, by describing his physical features, unusual marks, if any, or the clothing that he wore.

To support this submission, Miss Chitupila, Senior Legal Aid Counsel relied on the case of **NYAMBE v THE PEOPLE**¹ where the Supreme Court gave guidance on what a trial should consider in testing identification evidence by witnesses. The Supreme Court stated that:

“..... the greatest care should therefore be taken to test the identification..... It is not enough for the witness simply to say that the accused is the person who committed the offence. The witness should be asked to specify by what features or unusual marks, if any, he alleges to recognise the accused, what was his built, 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.”

Miss Chitupila argued that in this case the attack on the deceased occurred under traumatic circumstances and that when PW2 was threatened by the assailants he was scared. It is contended by Senior Legal Aid Counsel that PW2 was not able to clearly see or identify the persons who attacked the deceased. She submitted that PW2 testified that he was able to see the deceased's two assailants because there was light in the car park. Senior Legal Aid Counsel however contends that PW2 was unable to look at the

assailants since he was too scared. She further argued that since the assailants fled when PW2 approached them even though he chased them, he did not have ample time to observe his attackers' faces.

To support this argument, she relied on the case of **LOVE CHIPULU v THE PEOPLE**² where the Supreme Court observed that:

"Where the circumstances of an attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had been patronizing the said same bar, as an accused for the past nine months does not render an identification safe."

She further relied on the case of **JOHN MKANDAWIRE v THE PEOPLE**³

where it was held that:

"..... the evidence of a single witness must be treated with the greatest caution because of the danger of an honest mistake being made. Usually this possibility cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of coincidence."

It was argued that in the present case, there is no connecting link between the appellants and the offence that would render a mistaken identification too much of a coincidence. Appellants' Counsel further submitted that PW2 is the only witness who identified the two appellants and that there was no corroboration as to the identification of the 2nd appellant. Miss

Chitupila submitted that the 2nd appellant was not found with any of the deceased's items at the time of his apprehension and he also did not lead the police to the recovery of any of the stolen items.

It is contended that PW2 and PW3's identification of the 2nd appellant is insufficient and, that, therefore, it is not safe to rely on it.

On the issue of requirement of corroboration to support single witness identification, she relied on the case of **FAWAZ & ANOR v THE PEOPLE**⁴, where the Supreme Court held *inter alia* that:

- “(i) In single witness identification, corroborations or something more is required;**
- (ii) It is not sufficient for the trial court to find that the prosecution witness probably spoke the truth. The evidence of the witness must be accepted beyond reasonable doubt.”**

In the instant case, it is contended that PW2's evidence was of poor quality, especially in relation to the 2nd appellant who was not apprehended at the scene and that, therefore, there is need for supporting evidence to rule out the possibility of an honest mistake.

Miss Chitupila, therefore, urged this Court to allow the appeal, quash the conviction, and set aside the death penalty and set the appellant at liberty forthwith.

In ground two, it is contended that the trial court erred in law and in fact when it held that the identification parade was not properly and fairly conducted. It was submitted that this was indicated by the 2nd appellant in his testimony when he alleged that he was singled out in the cells as he was exposed to PW2 before the identification parade. Reliance was placed on the case of **YOANI MANONGO v THE PEOPLE**⁵ where the Supreme Court held that:

“Where the identification of an accused person is or might be, an issue it is necessary to hold a properly conducted identification parade and failure to do so is a serious dereliction of duty, which may in a suitable case result in an acquittal.”

In relation to the present case and in particular, ground two, it is the appellants’ contention through Counsel that the police’s failure to conduct a proper and fair identification parade amounted to a serious dereliction of duty on their part which should result in the appellants’ acquittal.

Senior Legal Aid Counsel, therefore, urged this Court to allow the appeal, quash the conviction and set aside the death penalty and release the appellant forthwith.

Respondent’s heads of argument were filed in response to the appellants’ arguments. In the introductory submission, Mrs. Kashishi

Ngulube Senior State Advocate submitted that they support the conviction by the trial court based on the evidence on record.

With regard to ground one, she submitted that PW2's and PW3's identification evidence is not inconsistent. To support this argument she referred this court to the record at page 7, lines 9 to 20 where PW2 stated that he found two people beating the deceased and he summoned up enough courage and he went to where they were. She said that he said that they noticed that he was not scared and that he was not stopping. Further at page 8, lines 1 to 5, PW2 said:

"After chasing them, I kicked one and he fell to the ground the other one ran away he stood on the other side of the road we apprehended this person."

Mrs. K. Ngulube further referred to lines 14 – 15, where PW2 stated further that:

"The bag was taken from the thief when I apprehended him from the time I saw them and the time they decided to flee 10 minutes passed...."

She further submitted that at page 9 from lines 16 to 20, PW2 distinguished the two appellants by stating that:

"Accused 1 is the one I apprehended, accused 2 is the one who ran away."

**Accused 2 identified at the parade.
Accused 2 is the one who threatened me."**

Mrs. K. Ngulube further drew the Court's attention to page 10, lines 17 to 20 where PW2 described state of lighting at the place where the deceased was attacked, when he said that:

"There was a spot light at the gate like the one on the road side. Distance between light and beating was 5 metres."

She submitted that PW2's evidence was corroborated by PW3 at page 13 in lines 1 to 8 when he stated that:

"There was a chi light. The light was where the beating was taking place. Jimmy gave chase and we followed behind. Jimmy apprehended the short one, the tall one crossed the road into Misisi Compound."

She submitted that according to the evidence on record, PW3 managed to identify A1 as the short one who had the iron bar.

Mrs. K. Ngulube further submitted that the evidence by PW2 and PW3 was not discredited in cross-examination and that, therefore, it cannot be considered to be inconsistent as alleged by appellants' Counsel.

She submitted that the evidence of the two witnesses is not inconsistent and that there was no danger of an honest mistake being

made. She further submitted that the witnesses were not scared as alleged, since they approached the two assailants at the crime scene until they fled and they managed to apprehend the 1st appellant. PW3 described him as being short and the one who had an iron bar.

It was further submitted that the crime scene was well lit with a spot light and that, therefore, PW2 had sufficient time to observe the assailants. The assertion that the lighting was poor was rejected in those circumstances.

Mrs. K. Ngulube submitted that PW2's identification cannot be considered as being of poor quality when he was even able to distinguish the two assailants by the roles they played. She said that PW3 could not possibly forget A2 who threatened to kill him and A1 who was apprehended with the deceased's bag not far from the scene.

She referred this Court to the case of **GEORGE NSWANA v THE PEOPLE**⁶ where it was held that:

"The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence."

In relating the cited authority to the present case, Mrs. K. Ngulube submitted that the 1st appellant was caught with the deceased's bag within the vicinity of the crime scene shortly after the attack, thereby ruling out any possibility of the bag having exchanged hands and leaving the only logical conclusion that he obtained the bag after attacking the deceased. She further submitted that the fact that the 1st appellant was apprehended at the scene after PW2 and PW3 gave chase after they fled, also rules out any possibility of an honest mistake being made concerning the 1st appellant's identity. She argued that PW2 and PW3 had sufficient time to observe the two assailants and that they did not just get a fleeting glimpse.

In conclusion, she submitted that PW2 and PW3's identification evidence is, therefore, safe and reliable to sustain the convictions.

Mrs. K. Ngulube responded to the appellants' allegations in ground two that the trial court erred in law and fact by holding that the identification parade was fair. She submitted that the 2nd appellant's allegation of being singled out in the cells is a mere afterthought because the issue was not raised in cross-examination of PW2 by Senior Legal Aid Counsel. She submitted that the record shows that the said allegation only arose at defence stage, thereby confirming that it is a mere afterthought.

She further submitted that the evidence on record clearly indicates that the 2nd appellant was properly identified.

To support her argument in relation to ground two, she relied on the case of **KUNDA v THE PEOPLE**⁷ where reference was made to the case of **KENNETH MTONGA & ANOR v THE PEOPLE**⁸:

“(ii) If, therefore, any irregularity committed with the identification parade can be regarded as having an effect whatsoever on the identification, it would not be to nullify the identification, given the ample opportunity available to the witnesses.”

Mrs. K. Ngulube submitted that in the present case, PW2 had an ample opportunity to properly observe the appellants hence his evidence at page 10, lines 3 to 10 where he stated that:

“A month after the incident, I was taken upstairs straight back stairs. I found them and was told to identify the person who had run away and touch his shoulders and I did that (accused 2 identified). There were just men at the parade, a lot about thirty. It was in the afternoon.”

In conclusion, she submitted that both appellants were adequately identified as the deceased's assailants and as such, she urged this Court to uphold the conviction and sentence and to dismiss the appeal for lacking merit.

We have considered the evidence on record, the judgment appealed against, the arguments by Counsel, together with the authorities cited and the sentence meted out to the appellants.

In ground one the appellants challenge the trial court's conviction on what they allege to be inconsistent identification evidence of PW2 and PW3.

In the case of **NYAMBE v THE PEOPLE** cited by the appellants' Counsel, the Court of Appeal when considering the evidence of identification held *inter alia* that:

"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 the present case, the evidence on record is that when PW2 and PW3 noticed the deceased being attacked by two persons, PW2 summoned enough courage to approach the scene, even though the 2nd appellant threatened to kill him if he went any closer. According to both witnesses the place was well lit with a flood light at the gate. Therefore, the witnesses had an opportunity to see the deceased's assailants.

There was also evidence by both witnesses that when the two assailants that PW2 was not deterred by their threats and that he kept

advancing towards them until they fled. After chasing them, PW2 apprehended one of them, who is now the 1st appellant.

With regard to the issue of PW2's and PW3's identification of the 1st and 2nd appellants, we considered the surrounding circumstances of the identification. That is, the basis on which the two witnesses claim to have identified the 1st and 2nd appellants as the people who assaulted the deceased.

The starting point of the identification evidence by PW2 is that the scene of crime was well lit. The second aspect is that he was the one who apprehended the 1st appellant so he had an opportunity to look at him even if he did not describe him physically or by the clothing he wore. We also took into consideration PW2's evidence that he had an opportunity to observe the assailants for about ten minutes from the time he saw them up to the time they fled.

The other aspect of PW2's identification evidence is that he was able to distinguish the two assailants from one another by stating that the 1st appellant is the one he apprehended after giving chase and that the 2nd appellant is the one who threatened to kill him.

On the issue of corroboration, we observed from the evidence on record that PW3's evidence corroborated PW2's evidence on the spot light, the assault of the deceased, the chase, PW2's apprehension of the 1st appellant and that he was found with a bag. He also corroborated PW2's evidence that one of the assailants crossed the road.

We considered also the fact that appellants' counsel alleged that the quality of the identification was poor and insufficient for purposes of securing a conviction. For guidance we called in aid the case of **MUVUMA KAMBANJA SITUNA v THE PEOPLE**⁹ where the Supreme Court held *inter alia* that:

"(ii) If the opportunity for a positive and reliable identification is poor then it follows that the possibility of 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."

Upon perusal of the record, we found the connecting link between the 1st appellant and the offence in the bag that he was found with when he was apprehended according to PW2's and PW3's evidence. The said bag (exhibit "**P1**") was later identified by PW1, Lydia Makumo, the deceased's wife at the police station and in court.

reference to the bag or how he came to be in possession of the same. He merely denied that he did not know anything about the case.

In the circumstances, considering the evidence on record, we find that the trial court was on firm ground in accepting the 1st appellant's recent possession of the bag as a connecting link to the offence if the identification was poor.

We also observed that Miss Chitupila argued that the 2nd appellant was not found with any of the stolen items. We are of the considered view that even if he was not found with any of the stolen items, PW2 and PW3's evidence placed him at the scene of crime. PW3 described him as the tall one who crossed the road into Misisi Compound while PW2 identified him as the one who threatened to kill him. We, therefore, accept Mrs. K. Ngulube's submission that it is highly unlikely that PW2 would forget to recognise someone who had threatened to kill him.

In conclusion, on the totality of the evidence on record, we find that the trial court was on firm ground in relying on the identification evidence by PW2 and PW3. We also hasten to state that we did not find any inconsistencies in the said evidence as alleged by Miss Chitupila.

Consequently, we find no merit in this ground of appeal and we, accordingly, dismiss it.

We turn to ground two wherein the 2nd appellant challenges the fairness of the identification parade based on the reasons advanced by Senior Legal Aid Counsel.

We have perused the evidence on record and we observed that the 2nd appellant did not raise it earlier during the trial so that the officers involved in the parade could be cross-examined on the allegation that he was exposed to PW2 prior to the identification. We even looked at PW6's evidence and we found nowhere where he was cross-examined on the allegation by the 2nd appellant.

We, however, observed from his defence that he mentioned the alleged exposure at that stage so that there was no opportunity for PW2 and PW6 to be cross-examined on it. The case of **WINZY SAKALA & ANOR v THE PEOPLE**¹¹ is instructive on the issue where at page 109, the Supreme Court stated that:

"The assertion by A1 and A2 that PW1 had earlier on seen them at the CID offices at the Lusaka Central Police Station was rejected by the learned trial judge, and rightly so, because it was an afterthought intended by the appellants to extricate themselves. If they were really seen by PW1 at the CID offices, why was she not cross-examined on this very

important aspect of their evidence? To have not properly instructed Counsel to raise the matter of prior and irregular identification, clearly means to us that nothing of the sort ever took place.”

Similarly, in the instant case, we find that the fact that the 2nd appellant did not instruct Counsel to raise the matter of prior and irregular identification indicates that it was an afterthought and it was rightly rejected by the learned trial judge.

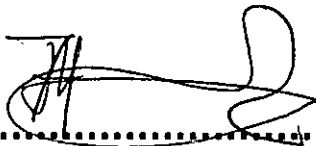
Before we conclude, we wish to adopt the Court’s holding in the **KENNETH MTONGA** case that was cited by Mrs. K. Ngulube in her arguments.

Therefore, for the reasons stated we find no merit in ground two and it also fails.

Both grounds having failed, the net effect is that the entire appeal fails and it is accordingly dismissed.



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F. M. Chishimba
COURT OF APPEAL JUDGE



.....
F. M. Lengalenga
COURT OF APPEAL JUDGE



.....
M. J. Siavwapa
COURT OF APPEAL JUDGE