

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

ANDREW LUNGU

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Chashi, Mulongoti and Lengalenga, JJA

On 21st January, 2020 and 19th February, 2020

For the Appellant:

Ms. E. I. Banda, Legal Aid Board

For the Respondent:

Mrs. M.K. Chitundu- National Prosecution Authority

J U D G M E N T

Mulongoti, JA, delivered the Judgment of the Court

cases referred to:

1. *Sammy Kambilima Ngati and others v The People SCZ No. 14 of 2003 (SC)*
2. *Mukukela v The People Appeal No. 146 of 2011 (SC)*

3. *Ilunga Kabala and John Masefu v The People* (1981) ZR 102 (SC)
4. *Ali and another v The People* (1973) ZR 232 (C.A)
5. *Bwalya v The People* (1975) ZR 227 (SC)
6. *Evaristo Bwalya v The People* SCZ No. 52 of 1975 (SC)
7. *Hamenda v The People* (1977) ZR 184 (SC)
8. *Manongo v The People* (1981) ZR 152 (SC)

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia*

1.0 Introduction

- 1.1 The appellant, Andrew Lungu, was arraigned and convicted on two counts of Aggravated Robbery contrary to **section 294(2) of the Penal Code**¹, by the High Court presided by Chitabo, J.
- 1.2 The particulars in count one alleged that on the 2nd day of August, 2016 at Lusaka, the appellant and one Timothy Jere, jointly and whilst acting together and whilst armed with a firearm (Mini Uzi Rifle) did steal one Dell Laptop and one Samsung GT Cell Phone the properties of Luo Chabala (PW1) and at the time of such stealing used or threatened to use actual violence on Luo Chabala.
- 1.3 In count two, it was alleged that on the same day, the appellant and Timothy Jere, whilst armed with the same firearm stole one television set and one DVD player from Aaron Chileshe (PW3),

and that at the time of stealing used or threatened to use actual violence on the said Aaron Chileshe.

2.0 **Facts/Evidence in the Court Below**

2.1 PW1 (Luo Chabala) and PW2 Collins Chitila were asleep at their boarding house at Eden Institute, where they were students. Around 01:00 hours PW1 awoke PW2 after he heard noises in the sitting room.

2.2 PW1 decided to go and check out the noises. When he got to the sitting room, he saw two men; one who was wearing a black coat and head sock whilst armed with a pick and bottles. The second man wore a khaki coat and head sock on his face and was armed with a gun.

2.3 The second man pointed the gun at him and ordered him to go back to the bedroom and grabbed his phone. When they got to the bedroom, he found PW2 with the other housemates Martha Kaoma and Aaron Chileshe (PW3). The men then closed the door to the bedroom and told them not to make any noise. The two assailants then returned to the sitting room and started packing things and also got PW1's laptop.

- 2.4 PW1 then decided to pretend as if he was talking on the phone, asking for help. He then heard the door in the next room open. When he went to check, he saw the two men running away. One ran in the right direction and the other in the left.
- 2.5 He gave chase to the one on the left, because he had his laptop. The man dropped the laptop but PW1 chased him until he caught up with him. The man hit him with the gun on his head and he dropped it. Others like PW2, arrived at the scene and someone called the police who came and apprehended the man.
- 2.6 At the trial, PW1 identified the appellant as the man he chased and was apprehended at the scene. He also identified the gun and his laptop which were all recovered at the scene.
- 2.7 PW2 testified that he found PW1 wrestling with the assailant when he gave chase. According to PW2, when he went to the police to give his statement he was taken to the cells where he saw two persons lined up. And, that the police recovered the laptop and television set.
- 2.8 PW3 equally gave chase as PW1 was shouting thief as he gave chase. Then their neighbours awoke and joined in. One of the neighbours called the police (flying squad), who came and

apprehended the assailant. PW3 like PW1 and PW2 testified that the men wore head socks over their faces during the attack.

2.9 According to PW3 the men left the television set outside the house. PW3 equally identified the gun, the television set and DVD player in court. He said he was the owner of the television set and DVD player.

2.10 PW5 was the forensic ballistic expert who examined the gun recovered from the appellant at the time of apprehension. She fired the gun and concluded that it was a dangerous weapon, capable of causing fear, injury or death once loaded and fired upon any animal or sane person.

2.11 PW6 was the arresting officer who apprehended the appellant when he found him with the students at the scene. PW6 also recovered the gun found with the appellant at the time of apprehension by the students.

2.12 PW6 identified the appellant, the laptop and the gun in court. He said when he interviewed the appellant over the gun, he said it belonged to Timothy Jere. However, when Timothy Jere was later apprehended and the duo questioned about ownership of the gun, they pointed at each other.

2.13 In his defence, the appellant denied the charges and said he was a victim of mistaken identity.

3.0 **Consideration of the Evidence and Decision of the Trial Court**

3.1 After analyzing the evidence, the trial Judge noted that only PW1 identified the appellant. After stating the law on single identifying witness by the Supreme Court as held in cases such as **Sammy Kambilima Ngati and others v The People**¹ which held that:

"It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated."

3.2 The learned Judge reasoned that the appellant's case could be distinguished from the cited case. This he said, was because the appellant was apprehended shortly when PW1 and others gave chase. The trial Judge observed that PW1 was a credible witness and was unshaken under cross examination. His evidence that he gave chase was corroborated by others.

3.3 The appellant's defence was rejected as it did not hold any water. Because in one breath he said, he was apprehended after he dropped off from the bus and later went to buy chickens at

a shop, and in another he said after he disembarked, a mob ran towards him. The learned trial Judge observed that, in his evidence in chief, there was nothing to point to the fact that he had two chickens and yet he recalled two bottles of Junta in his pocket.

3.4 The trial Judge further observed the evidence that PW1 recovered the firearm at the scene; and that PW6 testified that the appellant told him that it belonged to Timothy Jere. He concluded that it was an odd coincidence that the firearm that was used in the commission of the offence is found in the possession of the appellant when he was apprehended at the same place he alleged he was from a drinking spree.

3.5 Relying on the Supreme Court decisions in **Mukukela v The People**² and **Ilunga Kabala and John Masefu v The People**³ that odd coincidences, if unexplained, maybe supporting evidence, the learned Judge concluded that the odd coincidences in this case supported the prosecution's case and that the appellant's explanation was no explanation at all.

3.6 He accordingly convicted the appellant of aggravated robbery contrary to section 294 (2) as he was armed with a gun. He was, for this reason sentenced to death.

4.0 **The Appeal**

4.1 Dissatisfied with the conviction, the appellant has appealed to this court raising two grounds as follows:

1. *The learned trial Judge misdirected himself when he convicted the appellant on the basis of court room identification.*
2. *The learned court below misdirected itself by not considering the possibility of honest mistake in the evidence of identification.*

5.0 **The Arguments:**

5.1 Both parties filed heads of argument for and against the appeal, respectively.

5.2 Ms. Banda, who appeared for the appellant argued the two grounds simultaneously. She argued that it was not possible for PW1 to have observed that one of the assailants ran to the left and the other to the right given the circumstances of the case. It was the further submission of counsel that PW1, PW2 and PW3 did not give the trial Judge a general description of their assailants or a proper description of the gun save to say, it was black and short, which could fit any gun.

5.3 Learned counsel amplified that since the assailants were strangers to the witnesses, there was need to hold an identification parade to exclude the possibility of mistaken identity and not to rely on court room identification which has little or no value. The case of **Ali and another v The People**⁴ was cited as authority that:

"Although it is within the court's discretion to allow it in appropriate circumstances, a courtroom identification has little or no value, particularly where there is no satisfactory explanation for the failure to hold an identification parade and there is no other evidence incriminating the accused..."

5.4 That the police did not even offer an explanation as to why they failed to conduct an identification parade. Thus, only two inferences could reasonably be drawn from this failure; first the prosecution witnesses could not identify the assailants and second, it was sheer dereliction of duty on the part of the police. Counsel maintained that the failure to conduct an identification parade so that the prosecution witnesses could identify which one of the alleged assailant they apprehended was highly prejudicial to the accused.

5.5 In addition, that the single identifying witness PW1, is unreliable as he did not state any distinctive features of the

appellant that could distinguish him from anybody else. The trial Judge thus misapplied the principle of single identifying witness as elucidated by the Supreme Court in **Bwalya v The People**⁵ that:

"Usually in the case of an identification by a single witness the possibility of honest mistake 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 a coincidence, or evidence such as distinctive features or an accurately fitting description on which a court might properly decide that it is safe to rely on the identification."

5.6 Learned counsel maintained that the appellant was deliberately exposed to PW1 and PW2. The appellant was mistakenly apprehended as he returned from a drinking spree. His explanation was probable notwithstanding that he did not mention the chickens. Even the prosecution witnesses failed to mention that the head sock and khaki coat were recovered because the wrong person was apprehended.

5.7 Ms. Banda further relied on the case of **Evaristo Bwalya v The People**⁶ to argue that there was no evidence to provide a connecting link that the appellant committed the offences.

- 5.8 In response, Mrs. Chitundu the Deputy Chief State Advocate, who appeared for the respondent, argued that it was an odd coincidence that the appellant placed himself at the scene. The appellant testified that he actually went to a shop near Eden Institute, which is in the opposite direction of his home.
- 5.9 That in the case of **Ilunga Kabala and John Masefu v The People**³ it was elucidated that odd coincidences if unexplained, can be supporting evidence. Furthermore, that an explanation which cannot reasonably be true is not an explanation at all.
- 5.10 It was the further submission of counsel that there is nothing that stops the court from relying on a single identifying witness, as all the court need to do is eliminate dangers of an honest mistake. An honest mistake can be eliminated by a connecting link which would render a mistaken identity too much of a coincidence.
- 5.11 Thus in *casu*, the evidence of the appellant's apprehension, and recovery of the gun at apprehension, connect him to the offence. The appellant cannot distance himself from the firearm. At page 110 line 16 of the record of appeal, when questioned about the firearm, the appellant said it belonged to Timothy Jere. This

shows that he admitted to being found with the firearm but disputed ownership.

5.12 Regarding the identification parade, Mrs Chitundu submitted that it was going to be a mockery and a mere academic exercise to conduct an identification parade in this case. Because PW1 and other prosecution witnesses apprehended the appellant and were with him for over an hour before the Police (PW6 and others) picked him. PW1 and others needed not to have identified the appellant in court because they knew him as the person they had apprehended.

5.13 Thus, even though court room identification is of little or no value, it was allowed here because there was a satisfactory explanation given for not holding the identification parade being that the appellant was apprehended by the prosecution witnesses.

5.14 Therefore, the issue of his clothing (head sock and khaki coat) and of poor lighting do not arise as the appellant was apprehended by the witnesses after being chased from the crime scene. The trial court was on firm ground in convicting the appellant because it observed PW1's demeanor and concluded

that he was a credible witness. We were urged to uphold the conviction.

6.0 **Issues on Appeal**

6.1 As we see it, the cardinal issue, the appeal raises is, whether the trial court erred when it convicted the appellant of aggravated robbery in the absence of an identification parade. Key to the issue is the question whether court room identification was adequate given that the appellant was apprehended at the scene by the prosecution witnesses?

6.2 The other issue that arises is, whether there was a possibility of mistaken identity as PW1 was a single identifying witness.

7.0 **Consideration and Determination of the Issues of Appeal**

7.1 We have considered the Judgment appealed against and the submissions by both counsel.

7.2 It was not disputed that the appellant was apprehended near Eden Institute by the students (PW1, PW2 and PW3) who alleged that he had robbed them of a laptop, Samsung mobile phone, television Set and a DVD player.

- 7.3 The prosecution witnesses' testimony that the appellant was armed with a gun, which was picked by the police when they picked him from the crime scene was corroborated by PW6 (arresting officer).
- 7.4 We have considered the submissions by Ms. Banda that it was a dereliction of duty not to hold an identification parade and that PW1 was a single identifying witness, yet the dangers of mistaken identity were not eliminated.
- 7.5 We also note the arguments on court room identification by both counsel. Indeed it is trite law that court room identification has little or no probative value; particularly, where there is no satisfactory explanation for the failure to hold an identification parade and there is no other evidence incriminating the accused as held in **Ali and another v The People**⁴.
- 7.6 The circumstances of this case are such that the appellant was apprehended by his victims near the house he had robbed. As argued by Mrs. Chitundu at paragraphs 5.12 and 5.13 of this Judgment, conducting an identification parade would have been a mockery and a mere academic exercise.

7.7 Furthermore, there is in this case incriminating evidence against the appellant, being the gun recovered at the time of his apprehension.

Thus, in the circumstances of this case it was not fatal that the prosecution witnesses did not describe his features nor the gun in detail.

7.8 Additionally, it is the law that in circumstances such as here where the appellant was apprehended by the prosecution witnesses the court can use the discretion to allow court room identification. The issue of mistaken identity does not arise in *casu* given the fact of the appellant's arrest and the recovery of the gun which is supporting evidence or an odd coincidence.

7.9 In the case of **Hamenda v The People**⁷ it was held that:

"Where the quality of identification is good and remains so at the close of the defence case, the danger of mistaken identity is lessened; the poorer the quality the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. Odd coincidence can provide corroboration."

7.10 Further in the case of **Manongo v The People**⁸ it was observed that:

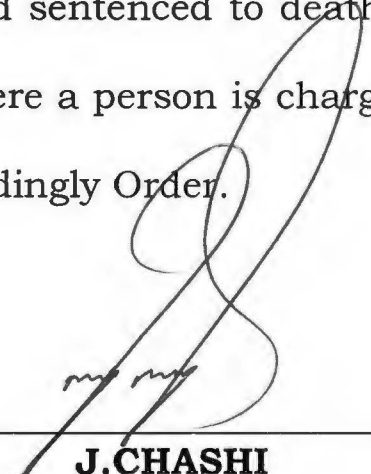
"the finding of the trial commissioner that the identity of the appellant did not depend entirely on the evidence of PW1 alone, that the evidence of PW1 was fully corroborated by the evidence of PW2 and that it was also supported by the evidence of PW3 and the recovery of 'P3' the hat was sufficient to negative the defence counsel's submission that the trial court had misdirected himself for accepting without question the evidence of identification by PW1 and PW2..."

7.11 Guided by the these decisions, we opine that the trial Judge rightly found that even though PW1 was a single identifying witness, the danger of honest but mistaken identity had been ruled out by evidence that the appellant was in possession of the gun which was used at the time of the robbery near the house he attacked and importantly was apprehended when he was armed with the said gun.

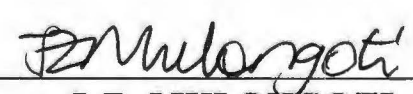
7.12 We further opine that in fact his identification was not in issue, as he placed himself at the scene as canvassed by Mrs Chitundu at paragraph 5.8. The trial Judge properly analyzed the evidence and rightly rejected the appellant's testimony that he was mistakenly apprehended as he returned from a drinking spree.

7.13 We find no merit in the two grounds of appeal. The net result is that the appeal is devoid of merit. We uphold the conviction and death sentence.

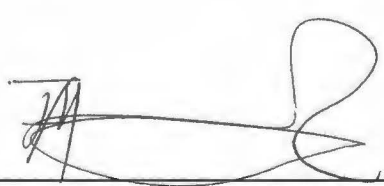
7.14 Before we leave the appeal, we wish to point out that the trial Judge omitted to pronounce that the appellant was convicted on both counts and sentenced to death on both counts, as is the proper way where a person is charged with more than one count. We so accordingly Order.



J. CHASHI
COURT OF APPEAL JUDGE



J.Z. MULONGOTI
COURT OF APPEAL JUDGE



F.M. LENGALENGA
COURT OF APPEAL JUDGE