IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 50/2010
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

ALEX NJAMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Musonda, DCJ, Muyovwe, Malila, Kajimanga and Mutuna, JJS

On the 7th May, 2019 and 14th January, 2020

For the Appellant: Mr. K. Muzenga, Deputy Director Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate, National Prosecutions Authority

---

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mathews Tembo vs. The People SCZ. No. 56/2006**
2. **Clement Moonga and Another vs. The People SCZ No. 234/2017**
3. **Jutronich and Others vs. The People (1965) Z.R. 9**
4. **Stewart vs. The People (1973) Z.R. 203**

5. **Simon Mudenda vs. The People (2002) Z.R. 76**
6. **Champion Manex Mukwakwa (1978) Z.R. 347**
7. **Roberson Kalonga vs. The People (1988-1989) Z.R. 90**
8. **Mulenga Katete vs. The People SCZ Judgment No. 10 of 2010**
9. **Chibuye, Luckwell Ng'ambi and Penius Zulu vs. The People SCZ Judgment No. 33 of 2010**
10. **James Kunda vs. The People SCZ Judgment No. 235 of 2017**

Legislation referred to:

1. **The Constitution of Zambia 1991, (as amended by Acts 17 and 18 of 1996) Articles 59, 60**
2. **Penal Code, Cap 87 of the Laws of Zambia, Section 294 (1) and (2)**
3. **Criminal Procedure Code, Cap 188 of the laws of Zambia, Section 305**
4. **The Firearms Act, Cap 110 of the Laws of Zambia, Section 2**

The appellant and one Richard Mbao were charged with the offence of aggravated robbery contrary to Section 294(1) of the Penal Code, Cap 87 of the laws of Zambia.

However, Richard Mbao passed away after the close of the defence case but before delivery of judgment.

The particulars of the offence alleged that on 18th January, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, Richard Mbao and Alex Njamba jointly and whilst acting together with other persons unknown did steal from

Patel Nasir, a cell phone, warehouse keys, 1 note book, ten pens and K2.9 million unrebased cash all valued at K3.9 million (unrebased) and at or immediately before or immediately after the time of such stealing did threaten to use actual violence to Patel Nasir in order to obtain or retain the said property or to prevent or overcome resistance to its being stolen.

The facts are that on the 18th January, 2001 around 15:50 hours there was an armed robbery at Nasir Enterprises situated at Soweto Market in Lusaka. On entering the premises the robbers, who happened to be the appellant and Richard Mbao ordered everyone to lie down. The appellant jumped over the counter in the shop and took the money which was packed in a grey bag. Somehow, James Chisanga (PW3), a worker at Nair Enterprises managed to sneak out of the shop. When the appellant and Richard Mbao went out of the shop, James Chisanga gave chase, assisted by members of the public. At some point, the appellant and Richard Mbao fled in different directions and James Chisanga directed members of the public who were assisting him, to chase after the appellant, while he chased after Richard Mbao. As they

were about to apprehend Richard Mbao, he (Richard Mbao) produced a firearm and fired in the air. When he attempted to fire the second time, the firearm jammed and Obby Mulubwa (PW4) wrestled with him and with the help of other members of the public he was overpowered and conveyed to the offices for the Movement for Multiparty Democracy (MMD) where they found the appellant already in custody. The prosecution called no evidence to explain who and how the appellant was apprehended. The appellant and Richard Mbao were later handed over to the police together with the firearm and the empty cartridge picked from the scene.

Around 18:00 hours the same day, the bag containing money and other items, which were earlier stolen from the complainant's premises was handed over to the police by John Tembo (PW8), Chairman of the MMD Branch. According to John Tembo, the bag was handed over to him by a woman who found it in a toilet within the market.

The firearm, a Tokarev pistol (whose serial number was erased) together with the spent cartridge picked from the scene were handed over to the Forensic Ballistics Expert for forensic

examination. It was established that the pistol was in a good working condition and that the spent cartridge was fired from the same pistol. According to the Forensic Ballistics Expert, the pistol was a firearm within the meaning in Section 2 of the Firearms Act, Cap 110 of the Laws of Zambia.

The appellant and Richard Mbao were identified at an identification parade by PW2, PW3, PW4 and PW7 as the robbers who had staged the robbery. It was established by the prosecution that during the robbery, Richard Mbao was the one who was armed with a pistol while the appellant was unarmed.

The appellant's defence was that on the material date Richard Mbao requested his assistance to sell his vegetables at Soweto Market at a commission. However, the two had a disagreement over the amount that Richard Mbao gave him after sales, which led to a fight. Unfortunately, members of the public severely assaulted them until the appellant fell into a state of unconsciousness. He later found himself at the Police Post together with Richard Mbao.

It is noteworthy that although at the time of delivery of the judgment by the court below, Richard Mbao was deceased however, the judgment covered both the appellant and Richard Mbao. The learned trial judge stated that the appellant and Richard Mbao were charged under Section 294(2). After analysing the evidence, he found that on the material date, there was an armed robbery at Nasir Enterprises and that the duo was apprehended shortly after the robbery. In the words of the learned judge, "all the identifying witnesses were credible and beyond question particularly that the offence was committed in broad daylight." The learned judge accepted that the duo committed the robbery while armed with a pistol. That the duo placed themselves at the scene and the explanation in their defence was a mere afterthought. He found them guilty as charged, convicted them and sentenced them to the mandatory death sentence.

Regarding Richard Mbao who passed on after the close of the defence case but before delivery of judgment, in line with our decision in the case of **Tembo vs. The People**,[1] the proper procedure should have been for the prosecution to enter a *nolle*

prosequi. Therefore, it was erroneous for the trial court to have convicted and sentenced Richard Mbao who was deceased.

Before we delve into the main appeal, we wish to deal with the preliminary issue raised by learned Counsel for the State, Mrs. Chipanta-Mwansa. Since the preliminary issue is cardinal, we must for obvious reasons deal with it first because the outcome of our decision will affect the main appeal, in one way or another.

In the preliminary issue, Mrs. Chipanta-Mwansa is seeking the dismissal of this appeal on the following grounds: That this Court has no jurisdiction to hear this appeal following the exercise of the prerogative of mercy by the Republican President. Mrs. Chipanta-Mwansa informed us that the appellant's death sentence was commuted to life imprisonment by the President on the 15th July, 2015. She submitted that the Executive having exercised its powers, this Court cannot interfere with the sentence as this will be tantamount to interfering with Executive powers. She alluded to the doctrine of separation of powers.

Counsel for the State argued that the appellant cannot choose to enjoy part of the grace by accepting life imprisonment and turn around to challenge the conviction out of which the sentence arose. She opined that once the process of engaging the Executive began, the appellant was barred from pursuing his appeal before this Court. In support of her argument, she relied on our recent decision in the case of **Clement Moonga and John Moonga vs. The People**[2] where according to Counsel, we dismissed the appeal on similar grounds. She submitted that in applying for the prerogative of mercy, the appellant should have disclosed that he had not yet exhausted the appeal process. She concluded by arguing that this appeal is wrongly before us given the fact that whatever decision comes out will affect the authority of the Executive. She urged us to dismiss the appeal for lack of jurisdiction.

In opposing the preliminary issue, the learned Deputy Director of Legal Aid, Mr. Muzenga maintained that the appellant's appeal is against conviction and sentence. As far as Counsel for the appellant is concerned, there is no evidence before us to show that

the death sentence was commuted to life imprisonment. He contended that this matter is properly before us notwithstanding the report from his learned friend that the death penalty was commuted to life. Mr. Muzenga argued that the exercise of the prerogative of mercy cannot deprive an appellant from having his appeal heard. It was submitted that the case of **Moonga**[2] was totally different from the case in *casu*. He pointed out that in ground two, the State has conceded that the learned trial judge erred when he sentenced the appellant to death under Section 294(2) of the Penal Code and that he should have been convicted of ordinary aggravated robbery. It was submitted that the appellant should not be deprived of the opportunity to enjoy a lesser sentence. We were urged to dismiss the preliminary issue and proceed to determine the main appeal, which is against conviction and sentence.

We have considered the arguments by Counsel on the preliminary issue.

We have noted that in her bid to stop this court in its tracks, Mrs. Chipanta-Mwansa relied heavily on our recent decision in the case of **Moonga and Another vs. The People.**[2] In the **Moonga**[2] case, the appellants were convicted of armed aggravated robbery contrary to Section 294(2)(a) of the Penal Code. At the hearing of that appeal, Mrs. Chipanta-Mwansa who coincidentally was appearing for the State, brought it to our attention that the appellants who were sentenced to death on 19th February, 2015 had Their sentence commuted to life imprisonment. There was on the record of appeal a letter dated 28th April, 2015 written by the trial judge pursuant to Section 305 of the Criminal Procedure Code (CPC), in which he recommended to the President that the appellants' death penalty be commuted to life imprisonment. Section 305(1) of the CPC provides that:

> **As soon as conveniently may be after sentence of death has been pronounced by the High Court, if no appeal from the sentence is preferred, or if such appeal is preferred and dismissed, then as soon as conveniently may be thereafter, the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observation on the case he may think fit to make.**

In his letter to the President, the learned trial judge noted that the stolen property in the case was recovered and no appeal had been lodged by appellant by the date of the letter of recommendation.

In the **Moonga**[2] case, we noted that while the judgment was delivered on 19th February, 2015 the appellants only filed their Notice of Intention to appeal on 17th October, 2017 which was more than 2 years after the date of judgment and beyond the time allowed to file the appeal. Further, leave to file the appeal out of time as provided under Rule 12 of the Supreme Court Rules had not been obtained thereby rendering the appeal incompetent. We stated that:

> **"...After the period within which to appeal has elapsed and recommendation has been made to the President it should be improper for the convict to institute an appeal as the matter is now within the realm of the Executive to deal with. ..."**

Clearly, the **Moonga**[2] case is distinguishable from the case in *casu* and it cannot assist Mrs. Chipanta-Mwansa whose main bone of contention is that we have no jurisdiction to hear this appeal.

At this juncture, we want to look at the provisions of the Constitution of Zambia, 1991 (as amended by Acts 17 and 18 of 1996) in relation to the prerogative of mercy as this is the issue in this preliminary issue. Article 60 of the Constitution of Zambia 1991 provided for the establishment of an Advisory Committee on the prerogative of mercy appointed by the President whose responsibility was to advise the President on an action or a decision to be taken in relation to a person convicted of an offence by a Court or a court martial.

Further, **Article 59 of the Constitution of Zambia 1991 provided that the President may-**

> **(a) grant to any person convicted of any offence pardon, either free or subject to lawful conditions;**
>
> **(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;**
>
> **(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and**
>
> **(d) remit the whole or part of any punishment imposed on any person for any offence or any penalty or forfeiture or confiscation otherwise due to the Government on account of any offence.**

Reading this provision together with Section 305 (1) of the CPC which we have quoted above, we take the view that the Constitution

envisaged a situation whereby an application for clemency could only be set in motion once a convict had exhausted the court process. For a convict to knock on the doors of the Executive only to return to the courts of justice is a recipe for confusion or anarchy.

In the case in *casu*, it is significant, therefore, that while the appeal was pending before us, the Executive decided to exercise its prerogative of mercy in favour of the appellant and commuted his sentence to life imprisonment in accordance with Article 59 of the Constitution. Mrs. Chipanta-Mwansa's argument is that we have no jurisdiction to tamper with the sentence as 'that sentence can only be appealed against to the same Executive that commuted it through proper channels'. She laid the blame on the appellant that he failed to inform the Executive that he had not yet exhausted the appeal process. We wonder how the appellant would have communicated with the Executive to that effect. The present situation cannot be blamed on the appellant but on the system. In our view, the Advisory Committee on the Prerogative of Mercy should ensure that a convict applying for clemency has no pending

appeals in any court of law. This is to avoid any conflict or overlapping of decisions between the Executive and the Judiciary. The role of the Executive is clearly defined, so is that of the Court. As things stand now, we were only informed by Mrs. Chipanta-Mwansa that the appellant's death sentence was commuted to life when the appeal came up for hearing. And yet, the procedure in matters of this nature is laid down in the Constitution and the Criminal Procedure Code. Section 305(3) of the CPC states that:

> **After receiving the advice of the Advisory Committee on the Prerogative of Mercy on the case, in accordance with the provisions of the Constitution, the President shall communicate to the said Judge, or his successor in office, the terms of any decision to which he may come thereon, and such Judge shall cause the tenor and substance thereof to be entered in the records of the court.**

The line of communication is clearly defined but for reasons we cannot understand, it has been totally ignored. For example, in the **Moonga**[2] case relied on by Mrs. Chipanta-Mwansa, following the letter of recommendation by the learned trial Judge in that case, there should have been communication to the Judge of the

decision by the President to commute the sentence as recommended by the Judge. Alas, contrary to the provisions of Section 305(3) of the CPC, this was only brought to the attention of this Court during the hearing of the appeal.

Coming to this appeal, apart from the fact that this case should not have been dealt with by the Advisory Committee on Prerogative of Mercy, again we were only informed at the hearing of the appeal that the appellant's sentence was commuted on the 15th July, 2015. Such communication should come from the Executive through the Attorney-General's office and not from a State Advocate appearing before us at the point of hearing an appeal.

Listening to Mr. Muzenga's arguments on this issue, it is clear that the appellant is demanding his right to be heard on appeal because he did not apply for clemency and he did not withdraw his appeal. In fact, as far as the appellant is concerned, he is on death row and his appeal remains an appeal against conviction and sentence and Mr. Muzenga insisted that the appeal must be heard on the merits.

Considering the background to this case, the Executive has itself to blame for such a turn of events. Looking back, the Court of Appeal (the forerunner of this Court) in the case of **Jutronich and Others vs. The People**[3] a case heard in 1965 and this Court in earlier cases such us **Stewart vs. The People**[4] and **Simon Mudenda vs. The People**[5] advised the appellants to channel their pleas for mercy to the Executive through the Prerogative of Mercy Committee. We have always been alive to the fact that court process must end before a convict can embark on a journey to ask for mercy before the Advisory Committee. Therefore, for Mrs. Chipanta-Mwansa to argue that we have no jurisdiction to hear this appeal on the ground of separation of powers is misplaced. Counsel's argument that it is only the Executive which can tamper with the sentence has no leg to stand on as *ab initio* the Executive had no power to commute the appellant's sentence while the appeal was pending before us. As we have stated in this judgment, Counsel for the State cannot find solace in the **Moonga**[2] case as it is clearly distinguishable from this appeal.

In conclusion, for the reasons we have given above, this Court is still clothed with jurisdiction to hear this appeal, which as we have stated is properly before us. The preliminary issue has no merit and we dismiss it.

We now turn to the main appeal. During the hearing of this appeal, Mr. Muzenga applied for leave to file the second ground of appeal and we allowed the application with no objection from Mrs. Chipanta-Mwansa.

We now have two grounds of appeal couched in the following terms:

1. **The trial judge erred when he convicted the appellant against the weight of evidence**
2. **The learned trial judge misdirected himself in law and in fact when he convicted the appellant for the offence of aggravated robbery under Section 294 (2)(a) of the Penal Code, when he was charged under Section 294 (1) of the Penal Code.**

Mr. Muzenga relied entirely on his filed heads of argument.

In arguing ground one, it was contended that the prosecution evidence was very weak and unreliable and, in some parts, concocted.

Counsel submitted that the evidence before the trial court was that two men stormed Nasir Enterprises with one of them brandishing a firearm and ordered everyone in the shop to lie down. Counsel, therefore, argued that since all the witnesses were ordered to lie down this means that, the witnesses only had momentary glances of the attackers and were no doubt terrified hence their haste to comply with the robbers' demands. That in fact, the attack took only five minutes and that the learned judge erred when he relied on the evidence of identification. It was submitted that the danger of an honest mistake was not ruled out. On this argument Counsel relied on the case of **Champion Manex Mukwakwa v. The People**[6] where we said:

> **"Although the appellant was identified by two witnesses, which in itself reduced the danger of honest mistake, the circumstances in which the offence was committed were traumatic and the opportunities for observation was poor, it would therefore be unsafe to rely on the identifications without some link connecting the appellant with the offence."**

Counsel pointed out that according to the evidence the two robbers split up as they fled, one to the right and one to the left. According to Counsel, James Chisanga and the crowd pursued the robber with the gun who had gone to the right and that James Chisanga lost sight of the second robber. That in fact no evidence was led as to the apprehension of the appellant. Counsel argued that if the appellant was truly part of the duo that robbed Nasir Enterprises then he ought to have been apprehended with a bag as James Chisanga gave evidence that one robber carried a firearm while the other a bag. Instead, the bag was found in a toilet around 18:00 hours. The only plausible explanation is that during the confusion, the appellant was honestly mistaken for one of the robbers.

In her response to ground one, Mrs. Chipanta-Mwansa submitted, *inter alia*, that the appellant was properly identified and connected to the robbery. She argued that from the record, the witnesses never lost sight of the appellant from the time he ran out of the complainant's premises to the time he was apprehended and that, therefore, mistaken identity is not an issue. That the appellant was identified during and after the robbery. Counsel pointed out that PW2 and PW3 stated that the appellant had permed hair at the time of the robbery and they were able to identify the appellant at the identification parade and they described the role that he played during the robbery which took place in broad daylight.

We have considered the arguments in relation to ground one. The question we must determine is whether there was sufficient evidence to connect the appellant to the offence he was charged with. The evidence from the prosecution which placed the appellant at the scene of crime came from PW1, PW2 and PW3 who were in the shop at the time of the robbery. That everyone in the shop was ordered to lie down is not disputed. However, there is the evidence of PW3 who managed to sneak out before the robbers came out of the shop. This is the witness who alerted members of the public to help apprehend the robbers. As submitted by Mrs. Chipanta-Mwansa and this was not in dispute, the robbery took place in broad daylight. It was established that the appellant entered the shop first followed by Richard Mbao who produced a firearm. PW3 had the opportunity to identify the robbers especially that he followed them outside the shop.

While we agree with Mr. Muzenga that there was no witness who gave evidence to the effect that they took part in apprehending the appellant, we take the view that PW3's evidence of identification is sufficient: He saw the appellant when he entered the shop and when he sneaked outside the shop as the robbers were leaving, he alerted members of the public who gave chase and the appellant was apprehended by members of the public. PW3 found him in custody at the MMD offices after apprehending Richard Mbao. PW3 was able at that point to confirm that the appellant was one of the two robbers who had just robbed Nair Enterprises. PW3 together

with other witnesses later identified the appellant at the identification parade. In fact, PW3 should not have taken part in the identification parade as he had already seen the appellant at the MMD offices a few minutes after the robbery. The argument by Mr. Muzenga that if the appellant was one of the robbers, he would have been caught with the stolen bag is neither here nor there. Further, the appellant's claim that he was apprehended following a fight with Richard Mbao cannot be believed and was rightly discounted by the learned trial judge as an afterthought. The danger of an honest mistake was eliminated in this case. Therefore, the case of **Champion Manex Mukwakwa**[6] cited by Mr. Muzenga is inapplicable. We find no merit in ground one.

Coming to ground two, Mr. Muzenga submitted that the record of appeal shows that the statement of offence indicated the offence as aggravated robbery contrary to Section 294(1) and that the particulars of offence disclosed ordinary aggravated robbery. However, Counsel pointed out that the learned trial judge in his judgment alluded to the fact that the appellant was charged under Section 294(2). It was contended that there was no amendment to the charge and yet the learned trial judge proceeded to convict the appellant under Section 294(2) which was a misdirection. On this

argument, Mr. Muzenga relied on **Roberson Kalonga vs. The People**[7] where we said that:

> **"The learned Director of Legal Aid on behalf of the appellant has drawn the attention of this Court to the fact that the appellant was not charged with the offence of armed robbery in accordance with section 294(2) of the Penal Code. Neither did the particulars of the charge allege the use of a gun. We agree with the learned Director that it is essential when there is an allegation of armed robbery that an accused must be notified that he stands charged with such an offence. In this particular case there was no notification to the appellant and therefore, as we will say later in this judgment, he will not be subjected to the death penalty."**

Counsel further relied on the cases of **Mulenga Katete vs. The People;**[8] **Chibuye, Luckwell Ng'ambi and Penius Zulu vs. The People;**[9] and **James Kunda vs. The People**[10] where we reaffirmed our holding in the **Kalonga**[7] case.

Mr. Muzenga emphasised that this Court has guided that the accused must be notified that he is at the peril of suffering the death penalty. According to Counsel, if no amendment to the charge or information is made at the earliest possible time, the trial court, as in the circumstances of this case, has no luxury to prefer a different charge. He opined that this is only possible where the

accused is found guilty of a minor offence under Section 181 of the Criminal Procedure Code. In this case, he argued that a conviction under Section 294(2) is not tenable at law as it is not a minor offence in relation to Section 294(1). Counsel's argument is that only a conviction for ordinary aggravated robbery could possibly lie in this case and that in the circumstances of this case, the learned trial judge fell into grave error when he sentenced the appellant under Section 294(2)(a).

Counsel prayed that the appeal be allowed, and the death sentence be set aside, and a reasonable sentence be substituted for ordinary aggravated robbery.

In response to ground two, Counsel for the State conceded that the appellant should have been properly informed that he stood charged with armed aggravated robbery which carries a death penalty and that, therefore, the trial court erred when it convicted the appellant for armed aggravated robbery.

We have considered the arguments by Mr. Muzenga in support of ground two. Mrs. Chipanta-Mwansa has rightly conceded that

the learned trial judge misdirected himself when he convicted the appellant for armed aggravated robbery. We are alive to the authorities cited by Mr. Muzenga and we agree with him entirely that the learned trial judge lost track when he convicted the appellant of armed aggravated robbery when the particulars of the offence did not show that the offence was committed with a firearm. Granted that the evidence revealed that Richard Mbao was armed with a firearm, it is mandatory that the accused is notified in the particulars of offence that he is charged with the offence of armed aggravated robbery. There is, therefore, merit in ground two and it succeeds.

In the premises, we set aside the conviction for armed aggravated robbery under Section 294(2) and the death sentence imposed by the trial court. However, the circumstances of this case reveal that there are aggravating circumstances which take the case out of the realm of the minimum sentence of 15 years for ordinary aggravated robbery as the complainants were threatened with death itself.

We sentence the appellant to 25 years imprisonment with hard labour with effect from the date of arrest.

To that extent, the appeal succeeds.

.....
M.C. MUSONDA
DEPUTY CHIEF JUSTICE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
DR. M. MALILA, SC
SUPREME COURT JUDGE

.....
C. KAJIMANGA
SUPREME COURT JUDGE

.....
N.K. MUTUNA
SUPREME COURT JUDGE