APPEAL NO.107,108,109/2012

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

PEARSON MUMBA — **1ST APPELLANT**
ELIAS YAKOBO — **2ND APPELLANT**

V

THE PEOPLE — **RESPONDENT**

Coram: Phiri, Muyovwe and Hamaundu, JJS
On 5th February, 2013 and 13th August, 2020

For the Appellants : Mrs A.N. Sitali, Principal Legal Aid Counsel

For the State : Mrs C.L. Phiri, Assistant Senior State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Charles Lukolongo & Ors v The People (1986) ZR 115**
2. **Mtonga and Another v The People (2000) ZR 33**
3. **Kabala and Another v The People (1981) ZR 102**

This appeal is against conviction.

The two appellants, and another person named Plainson Biyundu, were charged in the High Court, before Lewis J, with two counts of aggravated robbery in which the 1st appellant was the only accused charged in both. The two robberies had taken place two years apart. In the first count, which was for a robbery that had taken place in March, 2000, the 1st appellant was jointly charged with Plainson Biyundu. The second count was for a robbery that took place two years later, on 25th February, 2002. In this count, the 1st appellant was jointly charged with the 2nd appellant. Trial was held for the two counts, at the end of which the 1st appellant and Plainson Biyundu were acquitted on the first count. However, the 1st appellant and the 2nd appellant were convicted of the second count. This is now the subject of this appeal.

The case against the appellants in the second count was that, on the material day, the two appellants, while wearing some military attire, ambushed a van belonging to Alfa Bakery on the road known as Kalengwa road, between Kalulushi and Lufwanyama. In the van was a driver, PW3, and a Saleslady, PW4. The two witnesses told the court that the two appellants were armed with guns; they explained the roles that each appellant played. At the end of the robbery, the appellants took cash that the two witnesses had raised from the sale

of buns. They also took an umbrella and a coat (or jacket) bearing the company's logo which the driver had been wearing. Both items belonged to the company.

The appellants were apprehended two days later during an operation in which the police were rounding up people suspected of involvement in various robberies. At the farm belonging to the 1st appellant's parents, where he lived as well, the police recovered a shot gun, an air gun, some military apparel and the two items belonging to Alfa Bakery-the umbrella and coat. The two victims of the robbery, PW3 and PW4, identified the appellants at an identification parade a few days later. In court, the two witnesses identified the guns, military apparel, the umbrella and the coat.

The appellants denied any knowledge of the robbery. The 1st appellant said that the shot gun and air gun belonged to his father. He told the court that the military apparel too belonged to his father, who was an ex-army officer. He said that when the police apprehended him, they went and took these items from his father's bedroom. The 1st appellant's story was supported by his father, DW4.

The 2nd appellant merely recounted how he was apprehended by the police.

The learned trial judge found that the robbery took place in broad day light – 14:40 hours to be precise – and that the two victims PW3 and PW4, were with the attackers for a considerable period of time before the attackers released them. In the learned judge's view, the two witnesses had had sufficient opportunity to observe the robbers. The learned judge also observed that the two witnesses had identified the shotgun and air gun which according to their testimonies had been in the hands of the robbers; and that these were recovered at the house of the 1st appellant's father. Further, the learned judge also observed that the military attire which the two witnesses had said were worn by the robbers were also recovered from the 1st appellant. Finally, the learned judge took into account the evidence from the arresting officer that the umbrella and the company's coat, as well as a sum of K50,000 were also covered from the 1st appellant, and K95,000 from the 2nd appellant.

The two appellants were then convicted of the offence and sentenced to death.

The appellants now contend that the identification parade was faulty and that the learned trial judge should not have accepted the evidence concerning the conduct of the identification parade without other evidence to corroborate it. They further contend that the items

that were exhibited in court were not properly identified and, therefore, the trial judge ought not to have accepted them.

With regard to the identification parade, the bone of contention stems from the admissions by PW3 and PW4 that, on the parade, the two appellants were wearing the same military attire that they had been wearing during the attack. Mrs. Sitali, for the appellants, argued that, for the above reason, the identification parade was defective and must be treated with caution. Counsel went on to argue that, in this case, there was no other satisfactory evidence which could buttress that of identification. She referred us to the case of **Charles Lukolongo & Ors v The People**[1] in which we held:

> **"(v) at identification parades, accused persons should not be dressed conspicuously different from the others taking part in the parade"**

The case of **Mtonga and Another v The People**[2] was also cited. In that case we held:

> **"(i) The Police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification."**

Mrs. Phiri, for the prosecution, however, argued that the strength of the identification evidence did not lie in the identification parade but the fact that the offence was committed in broad daylight and that the witnesses spent some time with the assailants.

We have examined the evidence on record. First, there was evidence that the appellants were not the only persons wearing military attire on the parade. While agreeing, during cross examination, that the appellants were wearing military attire on parade, PW4, explained that there were some other people on parade who were made to wear combat attire. PW8, the officer who conducted the identification parade also said that, in total, there were four people on parade who were wearing military attire. This was obviously done in an effort to maintain fairness of the parade. We cannot, therefore, say that the parade was unfair, or defective.

Secondly, and perhaps more important, in the case of **Mtonga and Another v The People**[2] which has been referred to us, we further considered the fact that there were more than one witness who identified the accused persons: we noted the reliability of that evidence, for example where some witnesses were able to point out certain features on the accused persons; and we then said:

> **"If therefore, any irregularity committed in connection with the identification parade can be regarded as having any effect whatsoever on the identification, it would not be to nullify the identification given the ample opportunity available to the witnesses."**

This is the point that learned counsel for the State is making: That, in this case, the quality of the identification was so good that it cannot be nullified by any irregularity in the holding of the identification parade, assuming that that were the case. We agree with that submission. The two witnesses, PW3 and PW4, did not merely identify the appellants at an identification parade; they were able to describe what either appellant was doing during the robbery; they were able to say which gun either of them was holding. Indeed, the conditions for reliable observation were present; it was broad daylight and the appellants had abducted the two witnesses for a considerable period of time. We, therefore, find no merit in the appellants' argument on this issue.

In the second issue the appellants' bone of contention is the manner in which the learned trial judge was allowing the prosecution to introduce real evidence on to the record. According to the appellants, real evidence was allowed on to the record even before sufficient ground had been laid. Mrs. Sitali pointed out that PW3, for

instance, merely described the guns as; one being long and the other being shorter; and yet he was immediately shown the guns and asked to identify them. Counsel went on to submit that, even in the case of other items, PW3 merely gave descriptions which were scanty and of a general nature. Addressing the umbrella, in particular, counsel submitted that no details were given such as features, colour, company logo or marks. While acknowledging our holding in **Kabala and Another v The People**[3]that there is no rule of evidence or practice in Zambia which calls for the holding of a firearm's identification parade, counsel still submitted that in this case it would have been prudent to hold one.

In response to this argument, Mrs. Phiri simply relied on the case of **Kabala and Another v The People**[3].

In that case, we made a corollary holding regarding the identification of firearms. We held:

> **"(v) While it is necessary for an identifying witness to positively pick out a person at a parade, a witness cannot be expected to say any more than that a firearm which he sees on a firearms identification parade is similar to the one which he saw previously on a specified occasion."**

This applied to a court room identification of a firearm, as it was in this case. However, in this case PW3 went further: He was able to

tell the court which of the two appellants held the shotgun and which one had the airgun. In our view, the identification of the guns was further enhanced by that evidence. Besides, we wish to point out that the appellants have overlooked the recovery of PW3's company coat which bore the company's logo. This did not require much labouring in laying the foundation for its introduction onto the record.

All in all, we hold the view that the evidence of identification of the appellants on its own was sufficient to sustain the conviction. The other evidence such as the recovery of the coat and the guns only went to compliment that of identification. We, therefore, find no merit in the appeal. We dismiss it.

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G. S. Phiri
SUPREME COURT JUDGE

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E. N .C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE