APPEAL NO.117,118,119,120,121,122,123/2020

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

BETWEEN:

KETSON NYONDO	**1ST APPELLANT**
ANDERSON PHIRI	**2ND APPELLANT**
LEON ZIMBA	**3RD APPELLANT**
SAID MUKUNAKA	**4TH APPELLANT**
FRED SAKALA	**5TH APPELLANT**
V	
THE PEOPLE	**RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 11th August, 2020 and 20th August, 2020

For the Appellants : Mr. H.M. Mweemba, Legal Aid Counsel
For the Respondent : Mrs M.C. Kabwela, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Ali and Another v The People (1973) ZR 232**
2. **Bwalya v The People (1975) ZR 125**
4. **Nyambe v The People (1973) ZR 228**
5. **Ilunga Kabala and John Masefu v The People (1981) ZR 102**
6. **Bwalya v The People (1975) ZR 227**

The appellants appeal their conviction by the High Court, presided by C.B. Phiri, J.

The indictment of the appellants before the High Court was on four counts; namely, two of murder, one of attempted murder and one of aggravated robbery. The offences in these counts were committed during two incidents which occurred several months apart. The first incident happened on 18th December, 2008 in Linda compound, in Lusaka. On that day, in the evening, some assailants pounced on a businessman named Clement Mwanza and his friend named Leonard Mudian, PW9, as they were walking home. The assailants dragged them to Clement Mwanza's house whilst demanding money. There they shot him in the presence of his family, and fled the scene. Clement Mwanza died the following morning at the University Teaching Hospital from the gunshot wound that he sustained. This incident is the subject of the murder charge in the first count.

The second incident happened on 28th October, 2009 in Kamwala area of Lusaka. In the evening of that day, gunmen stormed a residence, demanding money from the occupants. During

the raid, they shot Zakeera Ahmadi to death, they shot and wounded her husband, Mohammed Yakub, and they robbed Ahmadi Yunus of a sum of K15,000(rebased). This incident comprises the other three counts of; murder, attempted murder and aggravated robbery.

The appellants were apprehended a month later. The police who were investigating a spate of robberies in Lusaka received a tip from a suspect in another case. It was said that this suspect first led the police to the arrest of Said Mukunaka, the 4th appellant. From there, it was simply a case of one suspect leading to another, or others, until all the appellants were rounded up.

During the trial that ensued, Aliness Mwanza, PW6, and Florence Tembo, PW7, daughter and wife respectively of Clement Mwanza, told the court that they had identified Anderson Phiri, the 2nd appellant, at an identification parade conducted by the police, as having been one of the assailants. No other appellant was said to have been identified in connection with the murder in the first incident. Hence the 2nd appellant alone was convicted of the murder in the first count, while the rest of the appellants were acquitted of that count.

Regarding the second incident, Ahmed Yunus, PW1, told the court that Ketson Nyondo, the 1st appellant, Leon Zimba, the 3rd appellant, Said Mukunaka, the 4th appellant and another accused named Chester Chipango were the people that he had identified as having been among the gunmen. He admitted in re-examination, however, that he was identifying the 4th appellant for the first time in the courtroom, and had not previously identified him at an identification parade.

Mohammed Yakub, PW2, told the court that Leon Zimba, 3rd appellant, Fred Sakala, 5th appellant, and their co-accused named Chester Chipango were among the assailants that he saw on the fateful evening. He explained thus: The 3rd appellant was the one who shot him and his wife; the 5th appellant was the assailant that he saw standing five metres from the kitchen when he opened the door thereto; and Chester Chipango was one of the assailants armed with an AK47 rifle. He explained that, at an identification parade conducted by the police, he had identified and touched the 5th appellant and Chester Chipango, and that, as for the 3rd appellant, he did recognize him but he did not touch him because it still pained him to see his wife's killer.

The trial court first found that the appellants' co-accused named Chester Chipango had successfully explained that he had merely been a taxi driver who used to be hired by another of the appellants' co-accused named Gregory Lungu (who was deceased when trial was going on). The learned judge therefore acquitted Chester Chipango. The judge, however, found that all the other appellants had been identified by one witness or other in the Kamwala incident. Surprisingly, the 2nd appellant was found to have been identified in the Kamwala incident. Hence they were all convicted of the charges in the second, third and fourth counts.

We wish to point out that the convictions in this case were based entirely on identification evidence: And this is the only issue in this appeal.

We shall quickly deal with the conviction of the 2nd appellant for the offences in the Kamwala incident. Mr Mweemba, on behalf of the 2nd appellant, has argued that there was no evidence linking the 2nd appellant to that incident. Mrs Kabwela, for the State, has conceded that that is the position. We, too, found it surprising that the learned judge made a finding that the 2nd appellant was also identified as having taken part in the Kamwala incident because

such evidence is not on record. We, therefore, do not hesitate to hold that the 2nd appellant's appeal with regard to the Kamwala incident has merit. We accordingly quash his conviction with respect to the second, third and fourth counts.

Mr Mweemba has gone on to argue that the identification of the 4th appellant was a mere courtroom identification which carries little weight, and as such his conviction should not be allowed to stand. Again Mrs Kabwela has conceded that argument. However, she adds that even the 5th appellant was only identified in the courtroom. We do not share Mrs Kabwela's view with regard to the 5th appellant because PW2 told the court that the 5th appellant was one of the two suspects that he was able to touch during the identification parade. As for the 4th appellant, we agree that his identification was only by PW1, and it was a courtroom identification, with no explanation at all being given as to why the 4th appellant was not identified at a parade. In the case of **Ali and Another v The People**[1], a case that has been referred to us by the State, the Court of Appeal, forerunner to this court, held:

> **"(i) 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"

We have maintained this rule of law to this day. We agree, therefore, that the courtroom identification of the 4th appellant was of no value, and so his conviction cannot be allowed to stand. We quash that conviction, and acquit him.

The remainder of the appeal is now only with respect to the 2nd appellant in the first count for the incident in Linda compound and the 1st, 3rd, and 5th appellants in the second, third and fourth counts, for the incident in Kamwala.

With regard to the identification of the 2nd appellant, Mr Mweemba's argument is that, by reason of the circumstances prevailing at the time of the attack, the risk of an honest mistake had not been excluded. He points out that the light in this case was only by means of a candle; and that the witnesses were undergoing a stressful ordeal. He points out further that PW6 was even made to lie down during the ordeal. All these, argues Mr Mweemba, did not afford the witnesses an ideal opportunity to observe the assailants. In his written submissions, Mr Mweemba referred us to, among others, the following cases on the subject: **Bwalya v The People**[(2)]

and **Nyambe v The People**[4]. We shall be citing another case of **Bwalya v The People**[6] whose holding better applies to the facts in this case.

Mrs Kabwela's argument on behalf of the State, however, is that the two witnesses had given sufficient descriptions of the 2nd appellant to satisfy the court that they had observed him carefully. Counsel pointed out, for example, that PW7 even described the 2nd appellant as having a long face and being short in height.

The decisions in the authorities referred to us by Mr Mweemba are particularly applicable in cases in which there is only a single identifying witness. In this case, there were two witnesses who observed the assailants from their respective viewpoints. These witnesses attended an identification parade. Both of them pointed at the 2nd appellant as a person that they had seen during the attack.

The case of **Ilunga Kabala and John Masefu v The People**[5] holds:

> **"The sole object of an identification parade is to test the ability of an identifying witness to pick out a person he claims to have previously seen on a specified occasion...."**

By the identification parade that was held, PW6 and PW7 had shown their ability to pick out one or more of the assailants.

We do not accept the proposition that the witnesses could both have mistakenly identified one and the same person. Besides, PW6 said that she saw the 2nd appellant shooting her father. PW7 said that, although she did not witness the shooting, she did observe that the 2nd appellant was the one who was carrying a gun among the assailants. In our view, such odd pieces of evidence strengthened the witnesses' identification of the 2nd appellant. The trial court was therefore on firm ground when it convicted the 2nd appellant on that evidence. We find no merit in the 2nd appellant's appeal against the conviction in the first count.

As for the 1st, 3rd and 5th appellants, we must point out that they stand in different positions. The evidence against the 1st and 5th appellants is by single identifying witnesses; the 1st appellant was identified by PW1 only, while the 5th appellant was identified by PW2 only. The 3rd appellant, however, was identified by both PW1 and PW2.

Mr Mweemba proceeds with his arguments in the Kamwala incident on the wrong assumption that PW2 only identified the

accused who was acquitted by the court below, Chester Chipango. He argues thus: that the appellants were not previously known to PW1; that there was a risk of an honest mistake on the part of PW1, which in this case was very real due to the fact that PW1 had said in his own testimony that, at the identification parade, he had even mistakenly identified another person who was not involved in the case at all. Mr Mweemba further points out that the appellants were not found with anything that could link them to the offence.

Mrs Kabwela's argument however is that, although PW1 wrongly identified a person at the parade, he still managed to correctly identify three others. In counsel's view, that should weigh in favour of the reliability of PW1's identification of the appellants. Mrs Kabwela further submits that the trial court had noted that there was sufficient light in the yard and the room; thus providing the witness ample opportunity to observe the assailants.

In **Bwalya v The People**[6], a case which was decided in the same year as, but subsequently to, that referred to us by Mr Mweemba, we held as follows:

> **"(i) In single witness identification cases the honesty of**

the witness is not in issue; the court must be satisfied that he is reliable in his observation and the possibility of honest mistake has been ruled out.

(ii) 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"

What is of concern about PW1's evidence is this; first there is the statement that he made in re-examination that he only identified the 4th appellant in court and that he could not remember all the assailants because they were many; secondly, PW1 did actually wrongly identify someone at the parade; thirdly, he did not give the court any particular features of those suspects that he had identified, nor indeed, did he tell the court anything that they had done on the particular night which made them stand out. He only gave a general description of all the assailants as being of relatively smaller size, and of similar height. There was one assailant that he gave a much more detailed description of. He said that that assailant was quite tall in height and slim in build. He said that that assailant was armed with an AK47 rifle and was the one who

slapped him. That assailant however, according to the witness, was not in court. The witness did provide other information such as that, among the assailants that he saw, one was stout and dark in complexion while others were slightly lighter in complexion. But the witness did not go further to state, for example, which one of those that he had identified was stout and dark in complexion. So, there was no description of those that PW1 identified regarding any distinctive features or any other accurately fitting description of them. We cannot say, therefore, that in the circumstances of this case the risk of honest mistake by PW1 had been ruled out; especially that nothing was found on the appellants to link them to the offence. It was therefore unsafe to rely entirely on the identification evidence of PW1.

However our conclusion on PW1 only affects the 1st appellant. For this reason, it is only the 1st appellant's appeal that we allow.

The 5th appellant's position, on the other hand, is different. Contrary to Mr Mweemba's assumption, the 5th appellant was identified at a parade by PW2. That witness even told the court that the 5th appellant was the one whom he had found standing

about five metres from the kitchen when the witness had opened the door thereto. We hold the view therefore that, in the case of the 5th appellant, the risk of honest mistake by PW2 in the identification had been ruled out. The learned trial judge was on firm ground to convict the 5th appellant on that evidence. We consequently find no merit in the 5th appellant's appeal, and dismiss it.

Coming to the 3rd appellant he, too, was identified by PW2. The witness, in this case, also went further to tell the court that the 3rd appellant was the one who had shot him and his wife. It cannot be argued that PW2's identification of the 3rd appellant was only a courtroom one because PW2 had clearly told the court that he had recognized the appellant at the identification parade but that he did not want to touch him because it still pained him to see his wife's killer. There was, therefore, a valid explanation for the witness not having pointed at the 3rd appellant on the parade. As the holding in **Ali and Another v The People** clearly states, it is when there is a valid explanation like this one that a courtroom identification will be considered as being of value. Besides, the witness buttressed it with other evidence which shows that he was

certain about the person that he had identified. We, therefore, hold that even in this case the risk of honest mistake had been ruled out, and the learned judge properly convicted the 3rd appellant. We find no merit in the 3rd appellant's appeal. We dismiss it.

The net result is that the 2nd appellant Anderson Phiri stands convicted in the first count only. The 1st appellant Ketson Nyondo is acquitted of the second, third and fourth counts. The 3rd and 5th appellants Leon Zimba and Fred Sakala remain convicted in the second, third and fourth counts.

.....
E. N. C. Muyovwe
SUPREME COURT JUDGE

.....
E. M. Hamaundu
SUPREME COURT JUDGE

.....
J. Chinyama
SUPREME COURT JUDGE