

IN THE COURT OF APPEAL OF ZAMBIA CAZ APPEAL No. 40,41,42/2020
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

DAVID KUNDA
FRANCIS LUKAMA
JOHN SOSI MUSUNGU



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM : Kondolo, Chishimba and Mulongoti, JJA
On 28th August, 2020 and 2nd September, 2020

For the Appellant : Ms. M. Marabesa Legal Aid Counsel-Legal Aid Board
For the Respondent : Mr. S. Simwaka National Prosecution Authority

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **David Zulu v The People (1977) ZR 151 (S.C)**
2. **Emmanuel Phiri and Others v The People 1978 ZR 79 and 81**
3. **Saluwena v The People (1964) ZR**
4. **Chipango and Others v The People (1978) ZR 204**
5. **Simon Malambo Choka v The People (1978) ZR 243**
6. **Wilson Mwenya v The People 1990) SCZ No.5**
7. **RV Shippey and Others (1980) Grim L.R 767**
8. **Machobane v The People (1972) ZR 101 (CA)**

9. **Sipalo Gibozu and Chibozu v The People (1981) ZR 28**
10. **Mwewa Muroño v The People (2004) ZR 207**
11. **Yoani Manongo v The People 1981 ZR**
12. **Ezious Munkombwe and Others v The People CAZ No. 7,8,9/2017**
13. **Joseph Banda and Ashanti tonga v The People Appeal 41 and 42/2017**
14. **Nalisa Sikola v The People Appeal 5/2019**
15. **Machipisha Kombe v The People SCZ No. 27/2009**
16. **Simon Miyoba v The People (1997) ZR 218 (SC)**
17. **Teper v R (1952) AC 48.**
18. **Haamenda Vs. The People [1977) ZR 184 (SC)**

LEGISLATION AND OTHER WORKS REFERRED TO:

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

INTRODUCTION

1. This is an appeal against the decision of Justice Charles Zulu sitting at Kabwe. The Appellants were charged and convicted of the offence of aggravated robbery and were sentenced to 15 years imprisonment with hard labour.
2. The Appellants appeal against both conviction and sentence.

FACTUAL BACKGROUND

3. The prosecution called 8 witnesses in support of its case. The evidence before the trial court was that a Tanzanian Truck

- driver, Selehe Juma, was attacked and robbed by the Appellants whilst parked by the road side in Kapiri Mposhi.
4. PW3 testified that on 29th August 2016 around 01:00 hours, a man was heard crying for help in a foreign language, along the Great East road at Mubalashi area. One of the witness's friend Numkwa was able to understand the language and translated. When they enquired from the victim what had happened, they were informed that he was attacked by unknown persons whilst in transit and parked by the roadside.
 5. PW3 observed that the victim was limping and complained that he had been assaulted with a metal bar by the assailants. Whilst they were interrogating the victim, his lorry mate emerged from the bush where he had been hiding and informed them that there were people stealing goods from the truck and loading the same into a blue Toyota Corolla.
 6. The lorry mate led the witnesses to the roadside where the truck was parked. PW3 saw about four people off loading goods from the container of the truck into a blue car registration number 1622. That when the Appellants saw them, they advanced towards them and threatened them with machetes.

Police Officers from Nkumbi and Kapiri Mposhi were called. In addition, Zambia National Service officers were also called. Zambia National Service (ZNS) officers were the first to arrive at the scene and found the assailants still loading items in the blue vehicle.

7. Upon seeing the officers, the assailants got into their car and drove off. Attempts to block them by the officers failed as they swerved their getaway vehicle and drove off.
8. PW3 and his colleagues got into the police vehicle which gave chase. After a short chase, the Appellants abandoned the vehicle and ran into the bush. The officers seized the blue motor vehicle and drove it back to the crime scene. When it was inspected, the officers discovered and recovered a National Registration Card belonging to a person called James Chola. PW3 informed the police that he knew a 'James Chola' and led them to the house of a person called Henry Chola. When they got there, they found him sleeping. Henry Chola led them to the Chola Family house. According to the evidence adduced, when the officers arrived at the Chola Family house, they saw tyre marks and drops of diesel fuel lubricants on the ground.

9. There was evidence from PW3 that a phone was recovered from the blue vehicle. A call was received on the said phone and the caller stated that he was at a place called "Mutanuka". The Officers accompanied by PW3 proceeded to Mutanuka, where they saw two or three people walking in the bush near the road. As they approached and told them to stop, they bolted. Gunshots were fired. The 1st Appellant was apprehended at the layby. PW3 recognised him as one of the persons at the crime scene. The 2nd Appellant was also apprehended soon thereafter after a chase at the rail line.
10. PW2 testified that his uncle, James Chola had visited the family farm on 27th August, 2016 in the company of the Appellants. None of them slept in the house but instead slept in the car. According to PW2, in the wee hours of the morning, he heard James Chola shouting from the window telling his grandmother that something bad had transpired and that they should leave the house immediately. His grandmother left while he remained sleeping. PW2 stated that later, the Appellants returned to the Family House. PW2 heard them enquiring about the items that they had carried. A dispute ensued and they resolved that they

call James Chola. A3 then informed PW2, that his uncle, James Chola had requested that he accompany them to a certain place. Enroute, upon seeing a police vehicle, A1, A2 and A3 all ran away. PW2 only scampered upon hearing the sound of gunshots and was apprehended together with the 1st and 2nd Appellants.

11. PW6, a Police Inspector testified that upon receiving a call to the effect that a truck driver who had a breakdown at Mubalashi had been attacked, a joint operation was carried out together with ZNS Officers. When he got to the scene of crime a Toyota corolla registration number AFB 1622 sped off. The Officers gave chase, whilst in pursuit, the Appellants abandoned the vehicle which was recovered and driven back to the scene of the crime.
12. Detective Inspector James Mungu (PW7), stated that he arrived at the crime scene around 08:00 hours on the date in issue. He was shown the impounded vehicle namely a Toyota corolla, blue in colour, registration number AFB 1622. When he inspected the truck, he noticed that the seals and locks were damaged. He was also shown the recovered five 20 litre

containers of diesel and a 5 litre container of cooking oil. There was also recovered an NRC belonging to James Chola and two mobile phones, recovered from the Toyota Corolla.

13. PW7 confirmed that the 1st and 2nd Appellants were pursued and apprehended. He added that when he got to the Chola Family House, he found burning boxes. He subsequently enquired about the whereabouts of James Chola, from the mother who informed him that she had not seen him.

14. Detective Sergeant Jojo Hamunyanga's (PW8) evidence was materially similar to that of PW7. He narrated how the 1st and 2nd Appellants were apprehended after being chased and pursued. He added that the victim was taken to the hospital for treatment. James Chola was never apprehended. The 3rd Appellant was only apprehended sometime in November, 2016. That when the 1st Appellant was apprehended, he had with him a bag containing diesel stained clothes.

DEFENCE BY THE APPELLANTS

15. The Appellants gave evidence on oath. The 1st Appellant narrated that on 28th August, 2016 his friend James Chola visited him at home in Mufulira. The said James Chola

requested to accompany him to Kapiri Mposhi to visit his sick mother at the farm. They found James Chola's mother who was very sick. Around 19:00 hours the 1st Appellant got into a blue Toyota Corolla vehicle AFB 1622 belonging to James Chola and proceeded to buy food stuff at the roadside shops.

16. It was the 1st Appellant's evidence that he remained at a bar and was only joined by James Chola at midnight. James Chola then informed him that he had bought diesel and asked the 1st Appellant to assist him load the same. As they loaded the diesel into the vehicle, a police vehicle arrived. James Chola got into his car and sped off much to the 1st Appellant's surprise. The police vehicle pursued the fleeing vehicle.

17. The 1st Appellant remained at the bar and continued drinking until 06:00 hours, when he returned back to Chola's mother's house. The 1st Appellant met police officers on his way to buy charcoal. They asked him to get into the vehicle while they searched for other suspects. He maintained that all the Appellants were innocent. The 1st Appellant confirmed that containers of fuel were found in the blue Toyota corolla and that his clothes were stained with diesel.

18. The 2nd Appellant testified that he heard gun shots on his way to Mutanuka Village to collect food from his parents' house. When he heard the gunshots, he ran away as people had scampered. He was subsequently apprehended by the police officers. He refuted taking part in the robbery and was merely in the area visiting his parents.

19. The 3rd Appellant testified that he did not take part in the robbery. While he was away from his home, the police had seized his household goods. Upon his return on the 9th November, 2016, he went to enquire about his household goods. The police instead apprehended him. He denied that his name was Sosi, that the police added on the said name. His name was John Musunga.

DECISION OF THE TRIAL COURT

20. The trial court found as a fact that in the early hours of 29th August, 2016 a Truck was in transit from Tanzania carrying goods belonging to AVIC International. The truck was driven by a Tanzanian national, Selehe Juma. The driver was attacked and assaulted. That fuel and other items were stolen from the truck.

21. The court below found that the 1st Appellant was at the crime scene with James Chola. The explanation given by him regarding his whereabouts on the fateful night were false as he admitted being at the scene assisting James Chola load diesel in the car. Further, that he was found with a bag containing clothes stained with diesel. The court further found that the fact that the Appellants' apprehended after the crime was committed was an odd coincidence that was devoid of any explanation.

22. The court relied on the evidence of PW2 who testified that he heard the Appellants arguing about the goods and they were all concerned with the whereabouts of James Chola. The lower court further found that it was odd that the Appellants ran away when they saw the police officers that morning. The 1st and 2nd Appellants were apprehended while the 3rd Appellant managed to escape and was apprehended at a later date. The learned trial judge held that PW2 was a reliable witness despite having earlier been a suspect in the robbery and that he had no ulterior motive to falsely implicate the Appellants.

23. It was also the court's finding that the explanations offered by the 2nd and 3rd Appellants were falsehoods in light of the evidence that was before the court. Consequently, the court convicted the Appellants for the offence of aggravated robbery and sentenced them to 15 years imprisonment with hard labour.

GROUND'S OF APPEAL

1. **The court erred in law and in fact when it convicted the Appellant based on circumstantial evidence.**
2. **The court erred in law and fact when it convicted the Appellant based on the evidence of a suspect witness.**
3. **The court erred in law and fact when it convicted the accused on the evidence of PW2 who clearly gave inconsistent evidence in court compared to what he gave to the police at the time he was apprehended.**
4. **The court erred in law and fact when it convicted the Appellant when the ingredients of the offence, they were charged with were not proved beyond all reasonable doubt.**

HEADS OF ARGUMENTS BY THE PARTIES

24. The Appellants in ground one assail the conviction based on circumstantial evidence. The case of **David Zulu v The People⁽¹⁾** on circumstantial evidence was cited where it was stated that circumstantial evidence is not direct proof of a matter in issue but is proof of a fact not in issue, from which an inference of the fact in issue may be drawn. For conviction to be safe, the circumstantial evidence must take the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.
25. It was submitted further that for one to be convicted on circumstantial evidence there must be something more as stated in the case of **Emmanuel Phiri and Others v The People⁽²⁾** to satisfy the court that the danger of falsely implicating the accused has been excluded.
26. It was contended that there is nothing on record that excludes the likelihood of PW2 falsely implicating the accused. Neither was the case taken out the realm of conjecture, to attain only the inference of guilt. The accused persons gave reasonable explanations which are believable. As authority the case of **Saluwena v The People⁽³⁾** was cited

27. Counsel for the Appellants submits that aside from weak circumstantial evidence, there was no complainant brought to claim ownership of the goods stolen. Further the victim Seleshe Juma was not brought before court, nor was a medical report produced to prove the violence, therefore they should not have been convicted of aggravated robbery as the ingredient of violence was not proved.

28. In ground two, the Appellants contend that PW2 is a suspect witness having been arrested and released for the subject offence. His evidence ought to have been corroborated. The case of **Chipango and Others v. The People** ⁽⁴⁾ was cited on the issue of a suspect witness who may be an accomplice or have an interest, and that their evidence must be corroborated to exclude the danger of false implication. Further, that PW2's evidence ought to have been treated as an accomplice whose evidence required corroboration. The case of **Simon Malambo Choka v The People** ⁽⁵⁾ was cited on treatment of a witness with a possible interest of his own to serve. We were also referred to the cases of **Wilson Mwenya v The People** ⁽⁶⁾, **R v Shippey and Others** ⁽⁷⁾ and **Machobane v The People** ⁽⁸⁾

29. It was submitted that the 2nd Appellant was apprehended for the sole reason that he was a stranger in the area. Further that he had explained his presence in the area and only ran away upon hearing gunshots.
30. The 1st Appellant is contended to have exonerated the 2nd and 3rd Appellants. As regards the 3rd Appellant, he was apprehended when he went to claim for his seized property at the police station. The evidence of PW2 as to the identity of the robbers was not corroborated.
31. Ground three assails the learned trial judge's alleged reliance on PW2's inconsistent evidence vis-a-vie the evidence tendered in court and the one given in his statement to the police (ID1). At the time of apprehension, PW2 denied having seen the 2nd and 3rd Appellants. In court, PW3 testified that he saw the two Appellants with his uncle and not that he saw them committing an offence. It was submitted that the court failed to observe the inconsistency in the evidence by PW2 and therefore erred. The case of ***Sipalo Gibozu and Chibozu v The People*** ⁽⁹⁾ was cited where it was stated that failure to observe inconsistency in the prosecution evidence constitutes a serious misdirection.

32. In ground four, the Appellant submits that the prosecution failed to prove the violence inflicted on the victim and the owners of the goods were not brought before court. The essential elements of the offence of aggravated robbery were not proved. Reference was made to the cases of **Mwewa Muroso v The People** ⁽¹⁰⁾ and **Yoani Manongo v The People** ⁽¹¹⁾ on the standard of proof being beyond reasonable doubt. It was prayed that the appeal be upheld.

33. The Respondent relied upon its heads of arguments dated 27th August 2020. In response to ground one, it was submitted that the circumstantial evidence on record was sufficient and strong enough to sustain the conviction of the Appellants. The only inference to be drawn was that the Appellant committed the offence. The case of **Eziou Munkombwe and Others v The People** ⁽¹²⁾ was cited where it was held that:

“... when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the Appellants must be looked at in their totality and not individually”

34. It was contended that when considered as a whole or in totality, the evidence on record took the case out of the realm of conjecture. The Respondent alluded to the evidence that all the

Appellants were in the area where the offence occurred, they slept in James Chola's car on the night in issue, the stolen containers of diesel were recovered from the said vehicle and 1st Appellant was found with diesel stained cloths coupled with the coincidence that the Appellants were heard asking about the items stolen from the truck and the running away from the police. Such behaviour was inconsistent with innocence. The case of **Joseph Banda and Ashanti Tonga v The People** ⁽¹³⁾ was cited on circumstantial evidence.

35. In response to ground two on the issue of PW2 being a witness with interest of his own to serve, it was submitted that there was no evidence adduced to show such interest. The fact that PW2 was once picked by the police during investigations does not mean he had an interest to serve. As authority the case of **Nalisa Sikola v The People** ⁽¹⁴⁾ was cited where the court stated that:

"we must hasten to point out that a witness is not considered a witness with an interest to serve merely because that witness was detained in connection with the subject offence. There must be other evidence on record to suggest that, indeed, such a witness has an interest of their own to serve."

36. It was contended that the learned trial judge considered the evidence of PW2 and made a finding of fact that he was trustworthy and had no ulterior motive to falsely implicate the Appellants and his uncle, James Chola. The court found PW2 to be a credible witness. Further, the evidence of the 1st Appellant placing himself at the scene corroborated the evidence of PW2, and the diesel stained clothes found with A1. The above also constituted odd coincidences as stated in the ***Machipisha Kombe v The People*** ⁽¹⁵⁾

37. As regards ground three, on the inconsistent statements of PW2 in his statement to the police and in court, the case of ***Simon Miyoba v The People*** ⁽¹⁶⁾ was cited in which it was held that:

“the general rule is that the contents of the statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition and that in a challenge of the truth of the evidence the witness has given at the trial.”

It was contended that the court found PW2 to be a trustworthy and reliable witness.

38. In respect to ground 4, it was submitted that the failure to bring Selehe Juma to testify as to the items stolen and violence

encountered is not fatal to the case as there was sufficient evidence from other witnesses such as PW3. PW3 saw the victim climbing and saw four people loading goods from the truck into the blue Toyota Corolla, brandishing machetes on the road.

39. The seals of the truck were broken and the locks were damaged. Therefore, the elements of stealing and use of violence was proved as set out in **Section 294(1) of the Penal Code**. The absence of the medical report as to the injuries sustained by the victim is not fatal to the case. It is trite that threatening to use actual violence to any person or property to obtain or retain the things stolen suffices under **Section 294(1) of the Penal Code**. We were urged to dismiss the appeal and uphold the conviction and sentence of the lower court.

DECISION OF THE COURT

40. We have considered the appeal, the evidence adduced in the court below, the heads of arguments and the authorities cited by learned Counsel.

41. The offence of aggravated robbery is prescribed under **Section 294 (1) of the Penal Code**. The ingredients of the offence as can be discerned from the said provision are as follows;

- (a) *person being armed with offensive weapon or instrument or being in a group with another person or persons;*
- (b) *stealing anything capable of being stolen;*
- (c) *an intention to deprive the owner of the thing stolen permanently of it;*
- (d) *the use of actual violence or threats of violence in order to obtain or overcome resistance of it being stolen or retained.*

42. We will deal with the grounds raised by the Appellants together as the issues are connected. The issue raised in ground one is whether the circumstantial evidence had taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

43. The contention by the Appellant being that the accused persons had given a reasonable explanation, further no complainant was brought before court and no evidence as to violence used was proved beyond reasonable doubt. These are the same issues raised again in ground four and relate to the ingredients of the offence.

44. It is not in issue that there was no direct evidence connecting the Appellants to the offence. The evidence adduced by the prosecution was circumstantial. In order to convict based on circumstantial evidence, the court must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt. We refer to the cited case of **David Zulu (supra)**

45. In a nutshell, when a case rests entirely on circumstantial evidence, the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established, they should be of a definite tendency pointing unerringly towards the guilt of the accused and should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and no one else. See the case of **Teper v R** ⁽¹⁷⁾.

46. The evidence before the lower court was that about four persons were seen by PW3 offloading items from the truck onto a blue Toyota Corolla vehicle. When PW3, the truck driver and lorry mate went to the scene, the assailants threatened them by

brandishing machetes. PW3 testified that the police had received a call on one of the recovered phones, the person on the call stated that they should meet at Mutanuka. When they got there, the Appellants fled and the 1st Appellant was apprehended.

47. With regards to the 1st Appellant, he does not dispute being in the area, and concedes that he knows James Chola whom he went with to Mkushi area. He further admits assisting James Chola load containers of diesel into the Toyota Corolla that was impounded. His explanation is merely that though he assisted with the aforementioned, he did not take part in the aggravated robbery. There was undisputed evidence that he was found with clothes stained with diesel in his possession.

48. As regards the 2nd and 3rd Appellants, they were connected to the crime by the evidence of PW2 a nephew to James Chola. PW2 testified that the Appellants came to James Chola's mother's farm. They slept in the vehicle on the date in issue.

49. The Appellants argued that the evidence of PW2 should be discredited because he had a motive to falsely implicate the Appellants as he had at one time been detained as a suspect

and also had an interest of his own to serve. The issue being whether PW2 ought to have been treated as a witness with a possible interest to serve. The Appellant further raised issues of inconsistencies in respect of PW2's evidence.

50. On the issue of whether PW2 had at one point been detained, we are of view that merely having been detained at one point does not on its own entail interest of own to serve or motive to falsely implicate an accused person.

51. There must be a basis or material before court to show that a witness has an interest of his own to serve or a motive to falsely implicate the accused persons. There is no evidence on record suggesting that PW2 had motive to falsely implicate the Appellants and his uncle James Chola, the master mind of the crime. As was stated in the ***Nalisa Sikota v The People (Supra)*** there must be other evidence on record to suggest that a witness has an interest of his own to serve and not merely because the witness had been detained in connection with the subject offence. We therefore reject the argument advanced to that effect.

52. Equally on the issue of contradictory statements given by PW2 in court and in his statement, the court below made a finding as to the credibility of the evidence by PW2 and the Appellants and found the former to be reliable. The court below had the opportunity to observe the demeanour of witness and made its finding of facts upon the alleged conflicting evidence. We hold that the court was on firm ground when it found PW2's evidence trustworthy and reliable.
53. We do not find merit in ground two on the issue of PW2 being a witness with an interest of his own to serve and on the findings of the court on credibility of PW2.
54. The Appellants, in respect of the ingredients of the offence of aggravated robbery, contend that they were not proved beyond reasonable doubt. Their contention being that there was no evidence of violence used or owner of goods proved.
55. We have analysed the evidence adduced in the court below. As regards the elements of the offence to be proved in aggravated robbery, the prosecution must prove beyond reasonable doubt that the accused were armed with offensive weapon or instrument or were in a group of persons. That the items stolen

were capable of being stolen, with intention to deprive owner of the thing stolen permanently of it and the use of actual violence or threats in order to obtain or overcome resistance of it being stolen or retained.

56. There was undisputed evidence that the truck driver was attacked and injured. He was limping, we refer to PW3's evidence on record. This shows that violence was used in order to obtain the items stolen. There was also evidence that there were about three or four persons who threatened PW2, the lorry mate and driver when they went to the truck to check on it. The assailants were brandishing machetes threatening them. PW2 and others retreated due to the threats of violence. The Appellants were armed with offensive weapons or instruments and were in a group with other persons.

57. Further, the diesel stolen is something capable of being stolen and was done with intention to deprive the owner of the diesel permanently. We are of the view that the ingredients of the offence of aggravated robbery was proved beyond reasonable doubt.

58. The last issue to be determined is whether the circumstantial evidence had taken the case out of the realm of conjecture so as to attain such degree of cogency permitting only an inference of guilt.
59. We had earlier narrated the evidence on record and the links connecting the Appellants and will not recite. Suffice to add that there were also odd coincidences which implicated the Appellants. We refer to the case of ***Haamenda Vs. The People*** ⁽¹⁸⁾ where the court held that odd coincidences may be deemed as something more thus corroborating the evidence.
60. The odd coincidences being that the Appellants slept in the vehicle at James Chola's house. Further, that the following morning PW2 heard them arguing about goods they had collected and were enquiring on the whereabouts of James Chola. Our view is that there were several odd coincidences that pointed to the guilt of the Appellants. There was evidence that the three Appellants ran away when they saw the police vehicle and that the 1st and 2nd Appellants were apprehended following a chase. The 3rd Appellant escaped but was apprehended days later.

61. We are of the view that there was sufficient evidence before the trial court showing that the Appellants stole items from the truck after assaulting the driver. The assailants were seen loading items from the truck into their vehicle. When the officers arrived on the scene, they found the blue Toyota Corolla at the scene. When the Appellants saw them, they drove off and later abandoned the vehicle which was impounded. Further, they found inside the vehicle a national registration card belonging to James Chola. The follow up to the owner of the national registration card lead to Chola's family home. At the said home, tyre marks of a vehicle were seen. In addition, diesel was found on the ground. The 1st Appellant was found with clothes stained with diesel when he was apprehended.

62. We are of the view that there was overwhelming circumstantial evidence against the Appellants which had taken the case out of the realm of conjecture attaining such a degree of cogency, permitting only the inference of guilt. We cannot fault the trial court for convicting the Appellants based on circumstantial evidence.

63. We hold that the appeal lacks merit and accordingly dismiss it.

The conviction and sentence by the lower court is upheld.

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M. M. Kondolo, SC
COURT OF APPEAL JUDGE

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F.M. Chishimba
COURT OF APPEAL JUDGE

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J. Z. Mulongoti
COURT OF APPEAL JUDGE