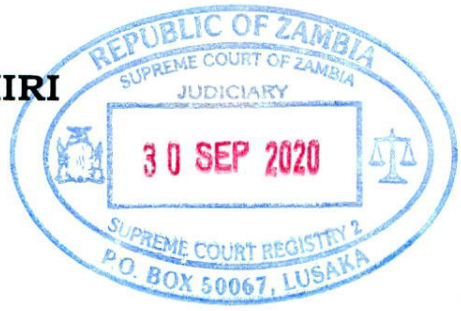
SCZ. Appeal No.93,94/2014

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

BETWEEN:



AGNESS TEMBO PHIRI — **1ST APPELLANT**
JACKSON CHEMBE — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram: **Phiri,Wanki and Muyovwe, JJS**

On 14th April, 2015 and 30th September, 2020

For the Appellant: **Ms. B. Pizo, Senior Legal Aid Counsel.**

For the Respondent: **Mrs. C. M. Hambayi, Principal State Advocate.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Patrick Sakala v The People (1980) ZR 205**
2. **Kaseke v The People (1974) ZR. 5**
3. **Mwachilawa v The people (1977) ZR. 286 (Reprint)**
4. **Yaoni Manonga v The People (1981) ZR 152**
5. **George Musupi v The People (1978) ZR 271**
6. **Katukula Trywell v The People SCZ Judgment No. 32 of 2015**

7. Mulenga v the People (1972) ZR. 349

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia – Section 224(a)**

The delay in rendering this judgment is deeply regretted.

This is an appeal against the judgment of madam Justice F.M. Lengalenga (as she then was) delivered on the 19th of June, 2014 by which judgment the two appellants were convicted of the felony of Aggravated Robbery Contrary to Section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia, and sentenced to 20 years simple imprisonment and 20 years imprisonment with hard labour, respectively.

The brief facts established at the trial were that on the 9th June, 2011 the 1st appellant sought employment and was engaged as a temporary maid at the complainant's residence in the Northmead suburb of Lusaka. She commenced her duties immediately on agreed terms including an agreed wage of K300 per month. PW 1 (Sejal Patel) and her mother, PW2 (Tara Patel) lived together at that residence. The next day on the 10th June, 2011 at about 12:00 hours PW1 and PW2 were attacked by a male intruder who was let into their residence by the newly employed 1st appellant. PW1, who is a wheel

chair bound differently abled person, and her mother (PW2) were severely assaulted with a metal bar by the intruder who was joined by the maid. They sustained severe injuries during the attack, and the items listed in the charge sheet and the Information were stolen from their house. They were both hospitalized and later identified both appellants on the Police identification parade.

The appellants' conviction was mainly based on the evidence of PW1 and PW2 who identified the appellants on two Police identification parades. According to these witnesses, both the 1st and the 2nd appellants took part in assaulting them before robbing them. The two complainants gave graphic details of how the assault and the robbery were carried out in broad day light. Among the items that were stolen were a DVD player and a cell phone handset which were recovered by the Police from the 2nd appellant at his house. According to Police evidence the 1st appellant was traced through PW4 who was related to her. PW4 provided the Police with the 1st appellant's cell phone number which led the Police to apprehend her after she returned from Petauke where she had gone soon after the robbery. The 1st appellant in turn led the Police to Chaisa compound where the exhibited stolen items were recovered from the 2nd

appellant. The 1st appellant was also identified by PW3 who was a security guard on duty at the complainants' premises. According to PW3, he saw her when she reported for work at the complainant's premises before his shift ended.

When put on their defence, both appellants denied the charge. The 1st appellant claimed that PW1 and PW2 lied about her. She also claimed that she did not leave for Petauke to run away from the crime, but that she went to harvest her maize at her village.

The 1st Appellant conceded that she was employed by PW1 and PW2 as a maid, but claimed that she was mistreated and was not paid for her work which she had done for two days. She claimed that she was allowed to get the exhibited DVD player and the cell phone as payment for the work she did. The 2nd appellant claimed that the DVD player and the cell phone were found in his possession because they were brought to him by the 1st appellants' daughter for repairs.

The trial court considered the evidence received and concluded that the positive identification by PW1 and PW2 was supported by the evidence of recent possession of the stolen items and odd coincidences which placed both appellants at the scene of the crime. The trial court relied on the authority of the case of **Patrick Sakala**

v The People[1], and held that the case had been proved beyond reasonable doubt. Thus, both appellants were convicted.

Before us, the appellants canvassed three grounds of the appeal as follows:

1. The trial court erred in law and in fact when it convicted the appellants on the testimony of PW1 and PW2 only in the absence of corroboration of these witnesses who were in the category of witnesses with an interest of their own to serve or witnesses with possible bias.
2. The trial court erred in law and in fact when it failed to address its mind to, or refused to consider the defence of bonafide claim of right which was clearly raised by the 1st appellant in her defence in the court below.
3. The trial court erred and misdirected itself in law and in fact when it made findings of fact that were not supported by the evidence before it.

In support of the first ground, Ms. Pizo argued that PW1 and PW2 were related and that in the face of the allegation that they denied the 1st appellant her dues after she worked for them, the trial Judge should have warned herself against the danger of false

implication and should have ensured that the danger was excluded. It was further argued that the 1st appellant gave a reasonable explanation which the trial court should have considered as guided in the case of **Kaseke v The People**[2]. As for the 2nd appellant, it was argued that the court failed to resolve whether the exhibits were stolen or received by him before concluding that he was guilty as charged.

With regard to ground two of the appeal, Ms. Pizo argued that the court failed to address the 1st appellant's defence of bona fide claim of right in accordance with **Section 8 of the Penal Code, Chapter 87 which** provides that:

> **"a person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."**

Ms. Pizo submitted that it was an established principle that it is not necessary for the claim to be valid or for it to be reasonable, provided there was an honest belief in the validity of the claim. It was stated that the 1st appellant did substantial work at the complainant's house for the two days she worked there. The result was that when she asked for her money, she was instead told to get whatever she wanted, and that is how she got the pink phone (exhibit

P1) and the Nokia DVD player (exhibit P2) with an honest belief that she had the right to deal with the property as she did while believing that its value was equivalent to the value of work which she had performed. In support of this suggestion we were referred to the case of **Mwachilama v The People** [3] in which we stated as follows:

> **"It is not necessary for the claim to be valid nor indeed, as the authorities make clear, is it necessary for it even to be reasonable; All that is required is that the belief in the validity of the claim should be honestly held."**

Learned Counsel therefore submitted that the trial court's approach when it expressed the view that the wages to which the appellant was entitled did not reasonably justify her taking of two items whose value was far too excessive, was wrong. It was argued that the value of the property should not have been an issue; but the overriding principle should have simply been the belief in her entitlement.

With regard to the third ground of appeal, Ms. Pizo submitted that the value of the stolen property was far less than what the court established to be worth K6, 750 as only the pink cell phone and the DVD player were tendered in evidence while the other listed items may well have not belonged to PW1 and PW2. Secondly, Ms. Pizo argued that there were contradictions in the evidence on the nature

of the threats, the force used by the assailants and the nature of the injuries suffered by PW1 and PW2. PW1 alleged that an iron bar was used while PW2 stated that a knife was used. Ms. Pizo suggested that there were no medical reports to prove that PW1 and PW2 suffered any injuries during the robbery. It was therefore contended that there was no basis for the trial court to hold that the 1st appellant's story was a fabrication.

It was further submitted that the court misdirected itself when it drew an inference of guilt from the aspect of recent possession, as corroboration of PW1 and PW2's evidence. We were referred to the case of **Yaoni Manonga v The People** [4] where we stated that:

> **"where evidence of recent possession is used as corroboration it is not necessary to draw therefrom an inference as to the guilt of an accused person..."**

In response to ground one of the appeal, Mrs. Hambayi submitted that the evidence adduced by PW1 and PW2 was comprehensible, cogent and did not require corroboration; and that the mere fact that these witnesses were mother and daughter did not automatically make them suspect witnesses, and there was no motive for them to lie or falsely implicate the appellants. She further argued that the conclusion by the trial court that the evidence

required corroboration because there was no eye witness to the offence was an error because PW1 and PW2 were the eye witnesses and their evidence did not fall in the realm of circumstantial evidence.

With regard to ground two, Mrs. Hambayi submitted that the 1st appellant could not reasonably have had a bona fide claim of right to take the complainant's property, particularly that she conceded that the property she took exceeded the money she claimed to be owed; and she never told the Police officer who interviewed her (PW6) that she had taken the phone and the DVD player as payment in lieu of her wages.

Responding to ground three, which disputed the value of the stolen items, Mrs. Hambayi submitted that there was nothing erroneous in the court's approach in its findings on the value of the stolen property including the value of the things not recovered. On the suggestion that there was no evidence adduced to show that threats and violence were used on PW1 and PW2, Mrs. Hambayi submitted that this evidence came from PW1 and PW2 and it was supported by the Police officer who investigated the case.

In response to the appellant's argument concerning recent possession, Mrs. Hambayi conceded that there was a misdirection on

the part of the trial Judge in the finding that the evidence in this case was circumstantial because PW1 and PW2 were eye witnesses; and the suggestion that recent possession merely provided corroboration to the evidence of these two witnesses was incorrect.

We have considered the three grounds of the appeal and the submissions advanced by both parties. We have also considered the judgment of the trial court.

The first ground alleged that the appellant's conviction was without corroboration and suggested that PW1 and PW2 were in the category of witnesses with an interest of their own to serve, or witnesses with a possible bias because they were related to each other as mother and daughter and were complainants in the alleged crime to which the 1st appellant claimed was simply a quarrel over money that was not paid for the work done.

The evidence which was before the trial Judge which she believed and accepted came from PW1 and PW2 who were indeed related and were together when the 1st appellant was hired as a househelp a day before the attack took place. It was also accepted that the attack took place in broad day light a day later, soon after the 1st appellant let the 2nd appellant into the complainant's house

without authorisation; and the two appellants severely assaulted the complainants and robbed them in the process. It was also accepted that PW3 who was a security guard, saw the 1st appellant at the complainant's house before ending his duty shift on the day the robbery took place. The court also found that both appellants were connected to the stolen cell phone and DVD player which were recovered by the Police and exhibited during trial.

The main issue for consideration in deciding the first ground of appeal is whether the learned trial Judge misdirected herself when she believed the testimonies given by PW1 and PW2 in the circumstances of this case. It was alleged that PW1 and PW2 had a possible interest to serve. We have had many occasions where we have addressed this aspect of evidence. In the case of **George Musupi v The People** [5] which we highlighted in the case of **Katukula Trywell v The People** [6], we said that:

> **"the expression witness with an interest to serve carries with it a danger of losing sight of the real issues... The critical consideration should be evidence based and must focus on the particular circumstances of whether such a witness may have a motive to give false evidence."**

In her argument, the learned Counsel for the appellants suggested that the motive to give false evidence was the failure by

PW1 and PW2 to pay the 1st appellant her entitled wages. Nothing was said about the 2nd appellant who was identified by PW1 and PW2 on the Police identification parade. In our considered view, the suggested motive does not hold any ground and is not evidence based. According to the evidence on record, which the 1st appellant never disputed, the 1st appellant was employed on a monthly salary of K300.00. She was not employed for a single day of work which she served. Secondly, as correctly observed by the learned trial Judge, the value of the stolen items was way beyond what her agreed monthly pay was.

A reading of the judgment of the trial court clearly establishes that the learned trial Judge was on firm ground when she found that PW1 and PW2 had no motive to falsely implicate the appellants and that the recent possession of stolen property on their part provided that nexus for purposes of corroboration and the exclusion of the dangers of false implication.

Regarding Ms. Pizo's argument that the evidence of PW1 and PW2 required to be corroborated in the circumstances of this case, we do not think so on the basis of our decision in the case of **Mulenga v The People** [7], where we said:

"where two or more complainants, in addition to alleging assaults on themselves, are eye witnesses of the assaults .... their evidence of the assaults... is direct evidence and is capable in law of being corroboration."

In our considered view, the evidence given by PW1 and PW2 did not need any further corroboration. In any case, corroboration was established by the evidence of identification and the possession of stolen property to which both appellants connected themselves. We do not find any merit in the first ground of appeal.

Regarding the second ground which alleged that the learned trial Judge neglected to deal with the defence of bonafide claim of right, our view is that there was no such neglect. In our decision in the case of **Mwachilawa v The people** [3] we observed that it was not necessary for the claim to be valid nor is it necessary for it to be reasonable; and that all that is required is the belief in it. In the present case, there is no evidence that the 1st appellant believed in her claim of right to the cellphone and the DVD player she stole because she disappeared and quit her job without notice soon after the attack and left for Petauke to go and harvest her maize in the village, as she put it. If she genuinely believed that she had a bona fide claim of right she should not have escaped to her village in

Petauke without giving notice. We find no merit in ground 2 and we dismiss it.

In ground 3 a number of issues were raised. Specifically, the value of the stolen property as well as the use of violence during the attack were put in question. We do not find any merit in those issues for the simple reason that the findings by the trial court were based on direct evidence in addition to the totality of the evidence received by the trial court including identification and possession of the stolen property. We wish to reiterate that the evidence in this case was not circumstantial as suggested. We equally find no merit in the third and last ground of the appeal and we dismiss it in its entirety.

.....

G.S. Phiri

SUPREME COURT JUDGE

.....

E. C. Muyovwe

SUPREME COURT JUDGE