

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA AND NDOLA  
(Criminal Jurisdiction)

APPEAL 137,140,141,  
142, 143/2019

B E T W E E N:

CHRISTOPER MUBITA  
CLIFFORD MULOMBWANYAMA  
CHRISPINE SHAPAMBE  
OWEN KABUKI IMAATA  
DAVY SITALI SILILO



1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
3<sup>RD</sup> APPELLANT  
4<sup>TH</sup> APPELLANT  
5<sup>TH</sup> APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Majula, JJA

On 20<sup>th</sup> May 2020 and 16<sup>th</sup> November 2020

For the Appellants: H. Mweemba, Legal Aid Counsel, legal Aid Board.

For the Respondent: S.C. Kachaka, Senior State Advocate, National  
Prosecution Authority

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## JUDGMENT

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Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to:

1. Kambafwile v The People [1972] Z.R. 242
2. Maseka v The People [1972] Z.R. 9
3. Zonde and Two Others v The People [1980] Z.R. 337



4. Lazarous Kantukomwe v The People [1981] Z.R. 185
5. George Nswana v The People [1988-1989] Z. R. 174
6. Kalonga v The People [1988-1989] Z.R. 124
7. Elias Kunda v The People [1980] Z.R. 100
8. David Zulu v The People [1977] Z.R. 151
9. Joseph Mulenga and Another v The People [2008]2 Z.R  
1
10. Peter Kapindula v The People [1978] Z.R. 327
11. R v Rudd [1948] 32 Cr. App. R. 138
12. Yotam Manda v The People [1988-1989] Z.R. 129
13. Crate v The People [1975] Z.R. 232
14. Nyambe v The People [1973] Z.R. 228
15. Charles Lukolongo and Others v The People [1986]  
Z.R. 1
16. Toko v The People [1975] Z.R. 196
17. John Mkandawire v The People [1978] Z.R. 46
18. Kenneth Mtonga and Victor Kaonga v The People  
[2000] Z.R. 34
19. Boniface Chanda Chola, Christopher Nyamande and  
Nelson Sichula v The People [1988-1989] Z.R. 163
20. Lewis Matambo v The People CAZ Appeal No. 6 of  
2017
21. Mwape v The People [1976] Z.R. 160
22. Ali and Another v The People [1973] Z.R. 232
23. R v Shemu Nyalongo 2 N.R.L.R. 136
24. James Kunda v The People SCZ Appeal No. 235 of  
2017

**Legislation referred to;**

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

**1.0. Introduction**

1.1. The appellants, with two others, appeared before the High Court (M. Chanda J), facing four charges, arising out of two robberies they are alleged to have committed in Livingstone.

1.2. In the first count, they were charged with the offence of aggravated robbery contrary to **section 294(1) of the Penal Code**. It was alleged that on the 22<sup>nd</sup> of April 2017, they robbed Clint Simango, who was guarding the March Zambia premises. They stole property that included a studio camera and a laptop computer.

1.3. The second count, was another charge of aggravated robbery contrary to **section 294(1) of the Penal Code**. It was alleged that on 18<sup>th</sup> August 2017, they robbed Marthias Sinyangwe,



who together with Timothy Kunda, where guarding Winners Chapel Church. In the course of that robbery, they killed Timothy Kunda, and attempted to kill Marthias Sinyangwe, thus the charges of murder and attempted murder, in the third and fourth count, respectively.

1.4. The other two persons they were charged with where, Kabowa Sitali and Charles Duuli. Kabowa Sitali died before the trial commenced, while Charles Duuli was acquitted of all the charges he was facing.

1.5. At the end of the trial, the 5 appellants where convicted of all the four charges they were each facing. They were sentenced to death for the two robberies and the murder. As regards the attempt to murder Mathias Sinyangwe, they were condemned to suffer imprisonment for life.

1.6. They have all appealed against their convictions in all the four counts.

**2.0. Prosecution evidence before the trial judge**

2.1. The evidence in support of the robbery at March Zambia (count 1), was that Chrispin Simasiku was deployed to guard their premises on 22<sup>nd</sup> April 2017. Early, the following morning, at about 01:00 hours, he was attacked by a group of robbers who were armed knives and iron bars.

2.2. After beating him up, the robbers tied up his limbs and put him in a sack. They covered it with a jacket, and as a result, he was not able to identify any of his assailants.

2.3. Chrispin Simasiku was rescued by another guard, who took him to the hospital, where he was treated for the stab wounds he suffered in face, neck and ears.

2.4. On inspecting the premises, Clint Simango, the project coordinator at March Zambia, discovered that articles including a studio camera and a laptop computer, had been stolen during the robbery.

2.5. In July 2017, the 1<sup>st</sup> appellant approached Henry Muzungu and offered to sell him the stolen laptop computer and camera. Henry Muzungu bought the laptop computer and linked the 1<sup>st</sup> appellant, to Kunatela Chibata, who bought the studio camera.

2.6. Investigations led the police to the apprehension of the 2<sup>nd</sup> appellant. He led police officers, who included Detective Sergeant Limbambala, to the apprehension of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, who he said he was with when he committed the offence.

2.7. The 1<sup>st</sup> appellant also led the police to Henry Muzungu and Kunatela Chibata, where they respectively recovered the stolen laptop computer and studio camera.

2.8. In the case of the robbery at Winners Chapel Church (counts 2, 3 and 4), in the night of 18<sup>th</sup> August 2017, Mathias Sinyangwe and Timothy Kunda, were on guard duties at the church, when



they were attacked by a group of robbers, some of whom where masked.

2.9. In an ordeal that lasted for between 10 to 12 minutes, they were badly beaten before being tied up. As a result of the beatings, Timothy Kunda lost his life.

2.10. The property that was stolen during the robbery included microphones and a hard-drive.

2.11. According to Stephen Muyatwa Moonga, sometime in August 2017, he was given the two microphones for safe keeping, by the 4<sup>th</sup> and 5<sup>th</sup> appellants. Later, the two microphones where recovered from him by the police, who were led by the 1<sup>st</sup> appellant. In the case of the 2<sup>nd</sup> appellant, he led police officers to the recovery of the hard-drive from a Mr. Kandeles house, in Kalomo.

2.12. Christopher Sichilongo, a secretary at the church, identified the hard drive by a name that was written on it. In the case of the

microphones, he identified them because he had been using them for his day to day work.

**2.13.** Following the appellants' apprehension, Inspector Mukuwa, conducted an identification parade at which Mathias Sinyangwe identified the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants, as the persons who attacked them. After that parade, the common complaint by the appellants, was that the police took photographs of them before the parade. However, in court, Mathias Sinyangwe identified the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants, as the robbers who attacked them.

### **3.0. Defence evidence before the trial judge**

**3.1.** In his defence, the 1<sup>st</sup> appellant told the trial judge that between January and June 2017, Kabowa Sitali sold him electronic goods that included a camera, laptop computers and a phone. On his apprehension, in connection with these matters, he told the police that they had



executed a document, to that effect, but the police ignored it.

3.2. The police officers insisted that he leads them to where he had sold the articles and he led them to Henry Muzungu where a laptop was recovered. He also led them to Kunatela Jackson Chibata, where a camera was recovered.

3.3. However, the camera that was produced in court is not the one that he gave to Kunatela Jackson Chibata. Similarly, the laptop computer produced in court, was different from the one he gave to Henry Muzungu.

3.4. As regards the microphones, the 1<sup>st</sup> appellant testified that he told the police about them being with Stephen Muyatwa Moonga after he was tortured.

3.5. Further, Mathias Sinyangwe was able to identify him and the other appellants because the police officers took photographs of them and he saw them at the reception of the police station,

before the identification parade. He denied being involved in any of the robberies.

3.6. In his defence, the 2<sup>nd</sup> appellant equally denied being involved in the two robberies.

3.7. He said on 26<sup>th</sup> September 2017, police officers visited and searched his house. They found nothing. They asked him about a television set, provided some information. They also accused him being involved in the two robberies which he denied. He also denied leading the police to the apprehension of any of the other appellants.

3.8. Like the 1<sup>st</sup> appellant, the 2<sup>nd</sup> appellant claimed that the identification parade was unfair. Pictures of them were taken before the parade and they were exposed to the witness, just before the parade.

3.9. In the case of the 3<sup>rd</sup> appellant, he told the court that on 20<sup>th</sup> September 2017, he was detained by the police in connection with a

theft that had occurred at his work place. He found the other appellants, detained in police cells and denied being involved in the robberies.

3.10. The following day, pictures of them were taken. Three days later they were placed on a parade.

3.11. Coming to the 4<sup>th</sup> appellant, his testimony was that on 3<sup>rd</sup> October 2017, he was offered a lift by unknown persons to a place called Dry Manzi, when they got there, they were apprehended by the police. He was then detained and assaulted.

3.12. Subsequently, pictures of him were taken by the police. Just before the identification parade he was exposed to Mathias Sinyangwe. He denied knowing Stephen Muyatwa Moonga or giving him any microphone. He said he saw him for the first time in court. He equally denied being involved in the robberies.



3.13. The 5<sup>th</sup> appellant, like the other appellants denied being involved in the robbery. He also said pictures of him were taken at the police station and that he was exposed to the witness just before the parade.

3.14. He also said on the 2<sup>nd</sup> of October 2017, he was apprehended from Dambwa, on suspicion of loitering. Following his apprehension, he was charged with the other appellants, persons that he did not previously know. He denied being involved in the robberies or taking the microphones, to Stephen Muyatwa Moonga. He said he did not know him.

**4.0. Trial judge's assessment of the evidence before her**

4.1. The trial judge found that there was overwhelming evidence that on 2<sup>nd</sup> April 2017, the March Zambia offices, were robbed of property, that included laptop computers and a studio camera. Chrispin Simasiku, a guard who

was on duty at the time, was assaulted during the robbery.

4.2. She also found that the 2<sup>nd</sup> appellant, after his apprehension, led the police to the apprehension of the other appellants. In turn, the 1<sup>st</sup> appellant, led the police to the recovery of a stolen laptop computer and studio camera.

4.3. The trial judge also found that the evidence incriminating the appellants, in the robbery at March Zambia, was circumstantial because the guard who was on duty during the robbery, could not identify his assailants.

4.4. She considered whether the recovered studio camera was sufficiently identified, and found that the evidence before her confirmed that it belonged to March Zambia. The owners had identified the property because it was engraved with their initials.

4.5. The trial judge also accepted Detective Sergeant Limbambala's evidence that the 2<sup>nd</sup> appellant led the police to the 1<sup>st</sup> and 3<sup>rd</sup> appellants, who he said he was with, during the robbery. She rejected the 1<sup>st</sup> appellant's claim, that the studio camera and laptop computer presented in court, are not the ones that he led the police to recover and found that he led the police to their recovery.

4.6. Further, the trial judge took the view that the 1<sup>st</sup> appellants claim that he bought the stolen articles from Kabowa Sitali, was an afterthought because it was not suggested to Detective Sergeant Limbambala, when he testified.

4.7. Finally, she found that the only inference that could be drawn on the evidence before her, was that the appellants were part of the group that assaulted and robbed Chrispin Simasiku, at March Zambia, on 22<sup>nd</sup> April 2017.



4.8. As regards the robbery at the Winners Chapel Church, the trial judge considered, whether the recovered microphones and hard-drive, belonging to the church. She accepted Christopher Sichilongo testimony that he they belonged to the church, because he was familiar with them and he used them at church.

4.9. Coming to the identification evidence of Mathias Sinyangwe, she discounted the appellants' claims that he was exposed to them before the identification parade at the police station and through photographs taken by the police. She found that the claims were not supported by any evidence.

4.10. The trial judge then considered the quality of the identification evidence and noted that Mathias Sinyangwe gave conflicting evidence on the number of robbers who were masked. She then looked out for corroborative evidence. She

found that his testimony was corroborated by the recovery of stolen property.

4.11. The identification of the 1<sup>st</sup> appellant was corroborated by evidence that he led Detective Sergeant Limbabala to the recovery of the Micro phones. In the case of the 2<sup>nd</sup> appellant, he led the same police officer to the recovery of the hard drive from Kalomo.

4.12. Coming to the 4<sup>th</sup> and 5<sup>th</sup> appellants, their identification evidence was corroborated by the testimony of Stephen Muyatwa Moonga, that they took the stolen microphones to his house.

4.13. Having dismissed all the appellants testimonies of how they were arrested as not being credible, she found that the prosecution proved, beyond all reasonable doubt, that they had committed the robbery at the Winners Chapel church.

4.14. On the murder of the guard, after considering the medical evidence, which showed

that Timothy Kunda suffered a broken skull and brain injury, resulting in his death, she found that the appellants must have intended to cause him grievous harm. That being the case, they had malice aforethought and she found all of them guilty of the charge.

**4.15.** Similarly, all the appellants were found guilty of the attempted murder of Mathias Sinyangwe. She found that the injuries they inflicted on him during the robbery, were indicative of their intention to kill him, like the other guard.

#### **5.0. Grounds of appeal**

**5.1.** Two grounds have been advanced in support of the appeals.

**5.2.** The first ground of appeal, is that there was insufficient evidence to warrant the conviction of the appellants, for the robbery at March Zambia.



5.3. In the second ground of appeal, the contention is that there was no reliable identification evidence, to warrant the conviction of all the appellants for the robbery, murder and attempted murder, at the Winners Chapel Church.

**6.0. Arguments in support of the first ground of appeal**

6.1. In support of the first ground of appeal, Mr. Mweemba submitted that in the absence of evidence conclusively proving that the stolen property belonged to March Zambia, the appellants should not have been convicted for the robbery. He also referred to the cases of **Kambafwile v The People<sup>1</sup>** and **Maseka v The People<sup>2</sup>**, in support of the proposition.

6.2. He then argued that the studio camera and laptop computer produced in court, were articles that were mass produced and there was need to identify them through serial numbers, distinctive features or inventory records. In the absence of such evidence, their

identification in this case, as belonging to March Zambia, was not beyond all reasonable doubt.

6.3. In addition, Mr. Mweemba referred to the case of **Zonde and Two Others v The People**<sup>3</sup> and submitted that since the studio camera and laptop computer were recovered from suspect witnesses, that is, receivers of stolen property, the evidence of those witnesses required corroboration; in this case, it wasn't.

6.4. Finally, Mr. Mweemba submitted that since all the appellants were convicted for the robbery at March Zambia, on the basis of the doctrine of recent possession, the trial judge should have first ruled out the possibility that they were mere receivers. He referred to the cases of **Lazarous Kantukomwe v The People**<sup>4</sup>, **George Nswana v The People**<sup>5</sup>, **Kalonga v The People**<sup>6</sup> and **Elias Kunda v The People**<sup>7</sup> and argued that the

failure by the trial judge, to rule out that possibility, was a misdirection.

6.5. We were urged to set aside the conviction because it is possible that the appellants were receivers and not the robbers.

**7.0. States response to the first ground of appeal**

7.1. Responding to the first ground of appeal, Mrs. Kachaka first referred to the case of **Joseph Mulenga, Albert Joseph Phiri v The People<sup>8</sup>**, and submitted that since the evidence of the appellants leading the police to the recovery of the stolen property was not challenged, the trial judge was bound to accept it.

7.2. That being the case, she rightly convicted all the appellants, for the robbery at March Zambia, because an inference of guilt, is the only inference that could have been drawn on the evidence that they had recent possession of the stolen property. She referred to the case



of **David Zulu v The People**<sup>9</sup> in support of the proposition.

7.3. Mrs. Kachaka also pointed out that the 2<sup>nd</sup> appellant led to the apprehension of his colleagues and in turn, they led the police to the recovery of property that was stolen during the robbery. In addition, the 1<sup>st</sup> appellant led to the recovery of the studio camera and laptop computer.

7.4. Finally, Mrs. Kachaka argued that the principles set out in the cases of **Kambafwile v The People**<sup>1</sup> and **Maseka v The People**<sup>2</sup>, were not applicable to his case, because the stolen property was sufficiently identified.

7.5. She also argued that the question of the two witnesses who were found with the stolen property, being suspect witnesses, did not arise, because the appellants led the police to the recovery of the stolen property.

8.0. Was the case against the appellants, in the Winners Chapel robbery, proved beyond all reasonable doubt?

8.1. The first issue we will deal with, in connection with the first ground of appeal, is whether the testimony of Henry Muzungu and Kunatela Chibata, required corroboration, on account of them being 'suspect witnesses'. In the case of **Peter Kapindula v The People**<sup>10</sup>, it was held inter alia that:

'When a witness is found in possession of stolen property this raises the issue whether or not he falls into the category of a witness with a possible interest of his own to serve so that it is dangerous to accept his evidence without corroboration or support; it is then the duty of the court to make a specific finding as to whether or not the witness falls into that category.'

8.2. We agree with Mr. Mweemba, that for all intents and purposes, Henry Muzungu and Kunatela Chibata, being receivers of stolen property, were suspect witnesses. Their testimony on where they got the stolen articles would have ordinarily required to be corroborated.

8.3. But as it turned out, the 1<sup>st</sup> appellant is the person who told the police to where he had sold the stolen property. In addition, in court, the 1<sup>st</sup> appellant did not deny selling a camera and laptop computer to those witnesses or leading the police to the recovery of such articles from them.

8.4. This evidence corroborated the two witnesses' testimony that the 1<sup>st</sup> appellant sold them the stolen studio camera and laptop.

8.5. Coming to the question whether the recovered property was properly or sufficiently identified as belonging to March Zambia, it is common cause that the studio camera and laptop computers, are articles that were mass produced.

8.6. However, Clint Simango, the project coordinator at March Zambia, identified them as property that belonged to March Zambia, which was stolen



during the robbery. He indicated how, and the trial judge accepted his evidence.

8.7. While we agree with Mr. Mweemba, that the ownership of the stolen property, like any other element of the offence, should have been proved beyond all reasonable doubt, the amount of evidence required to discharge such a burden, is dependent on the circumstances of a particular case.

8.8. We do not think that in all cases, property will only be said to have been properly identified, when a serial number, receipt or inventory, is used. Clint Simango, identified the two articles as belonging to March Zambia, through engravings that they had.

8.9. Given that the 1<sup>st</sup> appellant denied that the two articles produced in court were not what he sold, we find no basis on which the trial judge could have been faulted for finding that they belonged to March Zambia.

8.10. In this count, as correctly found by the trial judge, the case against all the appellants was that they were in recent possession of the stolen property and thus their conviction on the basis of the doctrine of recent possession.

8.11. The testimony of Detective Sergeant Limbambala, was that after his apprehension, the 2<sup>nd</sup> appellant told the police that he was with the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants, when he committed the offence.

8.12. On their apprehension, it is the 1<sup>st</sup> appellant led to Detective Sergeant Limbambala and other police officers, to the recovery of the stolen property.

8.13. In the case **R v Rudd**<sup>11</sup>, it was pointed out that an out-of-court statement made in the absence of an accused person by one of his co-accused person, cannot be evidence against the former, unless the maker goes into the witness

box and gives such evidence in the course of a joint trial. When that happens, what he says becomes evidence for all the purposes of the case, including the purpose of being evidence against his co-accused.

8.14. In this case, the 2<sup>nd</sup> appellant, when in the witness box, not only denied knowing his co-accused before his arrest for this case, he also denied saying that he was involved in the robbery or that the other appellants were involved. That being the case, there was no evidence incriminating the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants for the robbery at March Zambia, as the 2<sup>nd</sup> appellant did not adopt his out of court statement.

8.15. Consequently, we find that there was no evidence incriminating the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants, in the March Zambia robbery and we acquit them.



8.16. As regards the 1<sup>st</sup> appellant, as earlier pointed out, he was implicated by Kunatela Chibata and Henry Muzungu, who testified that he delivered the stolen property, between April and July, 2017. In the case of **Yotam Manda v The People**<sup>12</sup>, the Supreme Court held, *inter alia*, that:

'The trial court is under a duty to consider various alternative inferences which can be drawn when the only evidence against an accused person is that he was in possession of stolen property. Unless there is something in the evidence which positively excludes the less severe inferences against the accused person (such as that of receiving stolen property rather than guilt of a major case such as aggravated robbery or murder) the court is bound to return a verdict on the less severe case.'

8.17. In this case, the trial judge did not consider whether the 1<sup>st</sup> and 2<sup>nd</sup> appellant would have come by the property by virtue of being recipients other than robbers. Given that they may have sold the stolen property close to two months after it was stolen, that is a high possibility.

8.18. We therefore set aside their conviction and in its place convict them for the lesser offence of receiving stolen property. Contrary to **section 315 of the Penal Code**. We sentence each one of them to two years imprisonment with hard labour.

9.0. **Arguments in support of the second ground of appeal**

9.1. Coming to the second ground of appeal, Mr. Mweemba referred to the cases of **Crate v The People**<sup>13</sup> and **Nyambe v The People**<sup>14</sup> and submitted that given the traumatic circumstances in which the witness identified the appellants as the robbers during the Winners Chapel robbery, the possibility of a honest but mistaken identification, should not have been ruled out.

9.2. He also referred to the cases of **Charles Lukolongo and Others v The People**<sup>15</sup> and **Toko v The People**<sup>16</sup> and submitted that the identification evidence should not have been

accepted because of the unfair circumstances that prevailed during the identification parade.

**10.0. States response to the second ground of appeal**

10.1. In response, Mrs. Kachaka submitted that the witness had sufficient opportunity to identify the appellants and that in any case, if the evidence was found to be of poor quality, there was corroborating evidence.

10.2. She referred to the case of **John Mkandawire v The People<sup>17</sup>** and **Kenneth Mtonga and Victor Kaonga v The People<sup>18</sup>** and submitted that the recovery of stolen property and the implements that were used to commit the offence, provided corroborative or supporting evidence.

10.3. Further, she referred to the case of **Boniface Chanda Chola, Christopher Nyamonde and Nelson Sichula v The People<sup>19</sup>** and submitted that they led the police to the recovery of stolen property.



11.0. Where the charges in the robbery, murder, attempted murder proved?

11.1. Before we deal with the issues raised by Mr. Mweemba, we will deal with the question whether it was competent to charge the appellants, with the offence of attempted murder, for the injuries suffered by Mathias Sinyangwe, during the robbery, at Winners Chapel Church.

11.2. In the case of **Lewis Matambo v The People**<sup>20</sup>, the appellant, while in the company of others, robbed a bureau de change. In the course of that robbery, they shot and injured a police officer, who was guarding the premises.

11.3. In addition to being charged for the robbery, the appellant was also charged with the offence of attempted murder, for the injuries the police officer suffered, during the robbery.

11.4. We considered the propriety of the appellant being charged with the offence of attempted murder, for injuries suffered by the police officer during that robbery. We stated as follows:

'The shooting of Constable Mbewe did not amount to a separate offence of attempted murder because it is actually an ingredient of the aggravated robbery; the use of violence to overcome resistance during a theft.'

11.5. Similarly, in this case, the assault of Mathias Sinyangwe, during the robbery did not amount to a separate offence. The use of force or violence, on a person guarding property during a theft is an element or ingredient of an aggravated robbery; see the case of **Mwape v The People**.

11.6. That being the case, a separate charge of attempted murder should not have been proffered against any of the appellants. Consequently, we quash the conviction of all the appellants on that charge.

11.7. Getting back to whether the appellants were sufficiently identified to warrant their conviction for the offences of aggravated robbery and murder at the church, Mathias Sinyangwe identified the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> appellants at the identification parade. In court, he also identified the 3<sup>rd</sup> appellant, as one of the robbers.

11.8. Though the trial judge found that there was no evidence of unfairness at the parade, she found that the contradictions in his testimony on the number of robbers who were masked, warranted the need to look for corroborative evidence.

11.9. We will first deal with the 3<sup>rd</sup> appellant. The only evidence incriminating him is the court room identification by Mathias Sinyangwe. In the case of **Ali and Another v The People**<sup>21</sup>, it was held, *inter alia*, that:

'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.'

11.10. In this case, the 3<sup>rd</sup> appellant was on the parade but was not identified. There is no explanation of how he failed to identify him on the parade but was able to do so in court. Further, other than this court room identification, there was no other evidence incriminating him. In the circumstances, we find that his convictions for both the murder and the robbery, are not safe and we set them aside.

11.11. Coming to the 5<sup>th</sup> appellant, the evidence incriminating him is that he was in the company of the 4<sup>th</sup> appellant when they went to deliver the stolen microphones to Stephen Muyatwa Moonga. The robbery took place on 18<sup>th</sup> August 2017 and they were delivered that same month. Since the only evidence incriminating him was that of being in recent possession, the trial

judge should have considered whether he was a mere recipient; see **Yotam Manda v The People**<sup>12</sup>.

11.12. It is our view that the 5<sup>th</sup> appellant's conviction for both the murder and robbery is not safe. We set them aside and acquit him of both charges.

11.13. In the case of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants, in addition to being identified as being the robbers at an identification parade by Mathias Sinyangwe, they were also linked to the offence by stolen property.

11.14. The 1<sup>st</sup> appellant led the police to the recovery of the stolen microphones from Stephen Muyatwa Moonga. Coming to the 2<sup>nd</sup> appellant, he led the police to the recovery of a stolen hard-drive from Monze, while the 4<sup>th</sup> appellant, took the stolen microphones to Stephen Muyatwa Moonga.

11.15. In the case of **Kenneth Mtonga and Victor Kaonga v The People**<sup>18</sup>, it was held, *inter alia*, that:

- '(i) 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.
- (ii) If the identification is weakened then, of course, all it would need is something more, some connecting link in order to remove any possibility of a mistaken identity.'

11.16. In this case, the handling or possession of stolen property soon after the robbery, provided the corroborative evidence against the three appellants. We therefore uphold their convictions for the robbery and murder at the Winners Chapel Church.

## 12.0. Sentence

12.1. The matter does not end there. Following the appellants conviction, for two counts of aggravated robbery, one count of murder and a count of attempted murder, the trial judge, made the following pronouncement, when imposing



the sentence; 'Having convicted the accused persons for capital aggravated robbery and murder, I sentence them to death and direct in keeping with S303 of the CPC that they shall be hanged by their necks till pronounced dead.'

12.2. In the case of **R v Shemu Nyalongo**<sup>22</sup>, it was pointed out that where a person is convicted of more than one offence, a sentence must be imposed in respect of each offence. Since the appellants were each convicted of more than one offence, the trial judge should have imposed a sentence in respect of each and every offence they were charged with, even if some of the offences carried the same sentence, the death penalty.

12.3. Further, appellants were charged with aggravated robbery, contrary to **section 294(1) of the Penal Code**, for the robbery at Winners Chapel Church. A charge under that provision, attracts a maximum of life imprisonment.

12.4. In the case of **James Kunda v The People**<sup>23</sup>, it was pointed out that capital punishment cannot be imposed for an aggravated robbery where a firearm is not used unless the particulars of offence indicate that grievous bodily harm was caused during the robbery. In this case, the particulars, do not indicate that it was the case.

12.5. That being the case, the death penalty should not have been imposed on any of the appellants following their conviction for that offence.

12.6. We set it aside and, in its place, we impose imprisonment for life.

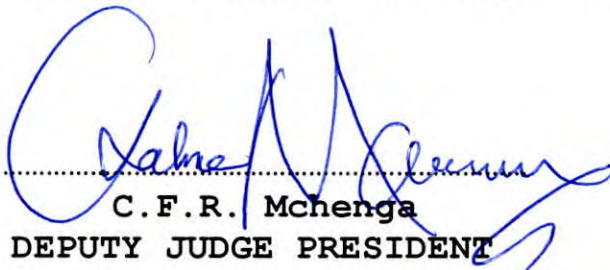
13.0. **Verdict**

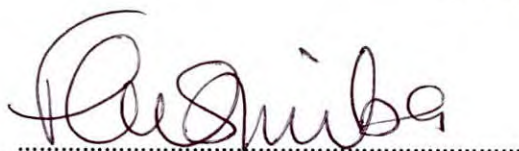
13.1. The net effect of these appeals, are that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants', are all acquitted of the robbery at March Zambia (count 1). In the case of the 1<sup>st</sup> and 2<sup>nd</sup> appellants, they are convicted of the offence of receiving


property stolen contrary to **section 318 of the Penal Code**, in connection with that incident and each sentenced to 2 years imprisonment, with effect from the date of arrest.

13.2. As regards the attempt to murder Mathias Sinyangwe, all the appellants are acquitted.

13.3. Coming to the robbery and Murder at Winners Chapel Church, the 3<sup>rd</sup> and 5<sup>th</sup> appellants are acquitted of both charges. The convictions of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> appellants are upheld. The death penalties imposed on each one of them for the murder are upheld, while the death penalty for the aggravated robbery is set aside, in its place they are sentenced to imprisonment for life.

  
C.F.R. Mchenga  
DEPUTY JUDGE PRESIDENT

  
F.M. Chishimba  
COURT OF APPEAL JUDGE

  
B.M. Majula  
COURT OF APPEAL JUDGE