

IN THE SUPREME COURT OF ZAMBIA Appeal Nos. 212, 213, 214,215/2020
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

DERRICK MUNGAILA
MELVIN MUDENDA
CLAIN MUSANKA
JOHN ZULU
AND
THE PEOPLE



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT

RESPONDENT

Coram: Hamaundu, Malila and Kaoma, JJS

On 13th April, 2021 and on 21st April, 2021

For the Appellants: Mrs. L.Z. Musonda – Legal Aid Counsel

For the Respondent: Ms. C. Soko – Deputy Chief State Advocate

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Roberson Kalonga v The People (1988-1989) Z.R. 90**
2. **Kenneth Mtonga and Victor Kaonga v The People – SCZ Judgment No. 5 of 2000**
3. **Chabala v The People (1976) Z.R. 14**
4. **Saluwema v The People (1965) Z.R. 4**

Legislation referred to:

1. **Penal Code, Cap 87 of the Laws of Zambia, section 294(1)**

1. Introduction

1.1 When this appeal was called for hearing on 13th April, 2021, we were informed that the 3rd appellant, who was a juvenile at the time of the commission of the subject offence, was not before court.

- 1.2 The learned Deputy Chief State Advocate, Ms. C. Soko produced copies of two reformatory orders, one for the offence of stock theft and the other for the offence of manslaughter, both made in **2014** but none related to the subject offence. We were also informed that the 3rd appellant had since been discharged from Katombora Reformatory and his whereabouts were not known. Therefore, we deemed that he had abandoned his appeal and we dismissed it. We then proceeded to hear the appeals of the other three appellants.
- 1.3 Regrettably, we do not have the full record of appeal. It seems that the original High Court case record was lost. On 12th November, 2019, because of complaints by the appellants, her Ladyship the Chief Justice directed that the appeal must be processed on the basis of the judgment. Therefore, we heard this appeal based only on the High Court judgment.
- 1.4 The appeal is against conviction only and the appellants are assailing the High Court judgment on one ground, that the trial judge misdirected herself in law and fact when she found them guilty and convicted them in the absence of evidence of proof beyond reasonable doubt.

2. Background facts and evidence in the High Court

- 2.1 The High Court convicted the appellants of the offence of Aggravated Robbery contrary to section 294(1) of the Penal Code, Cap 87. However, the judgment does not state the particulars of the offence

or the sentences imposed on the appellants by the High Court but the appellants denied the charge.

- 2.2 The facts as can be gleaned from the judgment are that on 9th April, 2012, PW1 was driving a truck from Kazungula in Southern Province to Lusaka. He was with PW2. Unfortunately, the truck developed a mechanical fault at a place called Senkobo, after Livingstone. This prompted PW1 to park the truck and his superior sent two people to help him secure the truck in the night.
- 2.3 Around 23:00 hours, four intruders approached PW1's truck and demanded that he gets out of the vehicle or he would be killed. They threatened him with a knife and out of fear, he gave away his purse, which contained money in US dollars, Pula and Kwacha and his friend's cell phone. The assailants also took 60 litres of fuel and 800 litres of diesel. All the items were valued at K11.6 million.
- 2.4 According to PW1, he was only able to identify two of the four intruders who spoke to him directly. He was able to see them, as there was moonlight. He said as he and his colleague left the vehicle; he saw a green Toyota Corolla, registration No. ACL 3553 pulling away. He called his superior and informed him of the situation, who in turn called Collins who later told PW1 that the police had impounded the green Toyota Corolla. They went to Livingstone Central Police Station around 03.00 hours and

positively identified the Corolla as the vehicle they had seen at the crime scene.

- 2.5 PW1 was also able to match a slipper the intruders had left behind on his truck to one they found on the back seat of the green Toyota Corolla and the next day he identified the 1st and 4th appellants at an identification parade. He denied in cross-examination that he identified them at the police station or on instructions of the police officers before the identification parade.
- 2.6 PW2 confirmed that they had a breakdown near Zimba; and that they were attacked in the night around 23:00 hours. According to PW2, he heard a noise and then the vehicle door opened and the intruders demanded for all their property and threatened to kill them. He gave them a mobile phone, free to air decoder and 4,000 pula. They also took 800 litres of diesel and 60 litres of oil. Due to fear, they left the vehicle and hid in the bush.
- 2.7 It was also PW2's testimony that he saw the metallic green Toyota Corolla leave the crime scene. On his part, he saw three attackers and was able to identify the 1st and 2nd appellants. He also saw the slipper stuck among some iron bars of the truck and he heard the intruders sharpening knives on the tarmac.
- 2.8 PW3 was one of the people who assisted PWs 1 and 2 guard the truck that night. He testified that around 23.00 hours as he sat by a fire not far from the truck, he saw four men approach in a green

Toyota Corolla. The four men came out of the vehicle and asked him if the driver was around. He answered in the affirmative. The men began to sharpen knives on the tarmac and throwing stones prompting PW3 to run into the bush. According to the trial judge, PW3's version of the events was to a great extent similar to PWs 1 and 2 except that he did not see the registration number of the green Toyota Corolla until he got into the bush.

2.9 PW4 was the owner of the green Toyota Corolla. He had employed the 2nd appellant as a taxi driver and the latter was operating from Choma. He identified the vehicle after the police impounded it.

2.10 PW5 received a phone call concerning the attack on PW1. He went to the Livingstone Weighbridge and together with some police officers from there; they went towards Senkobo in pursuit of the green Toyota Corolla. They found it at Senkobo lay-by. Within ten minutes, a maroon RAV 4 approached the Corolla. The occupant of the RAV 4 said he had received a call from Mungaila (1st appellant) about a breakdown but he had no tools. The police took all the suspects to the police. PW5 saw three knives in the boot of the green Toyota Corolla under the spare wheel and noticed that one of the suspects had only one slipper on his feet.

2.11 PW6 was operating a road block at the Weighbridge when he received a report from PW5 around 23:40 hours concerning the aggravated robbery. They made a follow up and found the green

Toyota Corolla with tinted windows at Senkobo. Shortly, thereafter, the RAV 4 arrived. They questioned the driver and decided that he was one of the suspects. They searched the Corolla and found three knives and a slipper. They took the suspects to the police station.

2.12 PW7 conducted the identification parade where the prosecution witnesses identified the appellants. According to this witness, the appellants had no complaint regarding the manner the identification parade was conducted or any other complaint. PW8 charged and arrested the appellants for the subject offence. Whilst he denied that the appellants led him to Dambwa in relation to a stock theft matter, he admitted going there in the afternoon.

2.13 In their defence, the appellants denied any involvement or knowledge of the crime or the truck. According to the 1st appellant, on the material night, around 22:00 hours, he went with the 2nd appellant from Choma to Senkobo to collect meat for a buyer in Dambwa. The police apprehended them at the lay-by as they waited for the seller of the meat. They found three knives, an axe, a rope and some clothes in their car. He explained that the knives were for skinning the animal, the axe for chopping its neck, the rope for tying its horns and the clothes for changing afterwards.

2.14 It was also his evidence that he offered to take the police to Dambwa and he and the 4th appellant were released from cells but on the

way out, they stopped at the Enquiries Desk where the arresting officer told two witnesses to look carefully at them.

- 2.15 He disclosed that he had previously stolen an animal to sell; that the incidence was meant to procure a stolen animal; and that the 4th appellant would inform him when an animal was available.
- 2.16 The 2nd appellant testified that he was asked by the 1st appellant to take a vehicle to him to ferry meat from Senkobo to Livingstone and he asked the 3rd appellant to escort him. His vehicle developed a fault at Senkobo and the 4th appellant informed the 1st appellant. They decided to sleep but the police awakened and searched them and put them in another vehicle. The 4th appellant arrived at that point and was also apprehended. The police took them to Zimba to pick containers of diesel.
- 2.17 The 3rd appellant said he was asked by the 2nd appellant to escort him to collect meat for sell in Livingstone; that their car developed a fault at Senkobo; and they parked at the lay-by. They were with the 1st appellant. In the night, the police apprehended them and took their personal items: a cell phone, K600 and slippers.
- 2.18 The 4th appellant's position was that the 1st appellant requested for transport to Zimba on the morning of 8th April, 2012. He got a lift from Livingstone on a RAV 4 belonging to Zambia Railway. At Senkobo he only saw two vehicles, the green Corolla and the RAV 4 he came in. He did not see any truck. As he walked towards the

only two cars, he found on the road, a police officer approached him and grabbed his phone as he tried to call the 1st appellant.

2.19 At the police station, the police interrogated them concerning the diesel but he denied the charge of stealing diesel and offered to take the police to the lay-by. Thereafter, the police took them to Zimba where they found four containers of diesel, which the police demanded that they collect.

3. Decision by the High Court

3.1 Based on the evidence and the submissions by counsel on both sides as captured in the judgment, the learned High Court judge, Salasini, J in one paragraph found that a robbery took place on the night in question at which the appellants, who were identified by the prosecution witnesses, stole diesel and threatened to use actual violence on the witnesses. The judge pointed out that there was recovery of the stolen items, which the witnesses recognised and that the appellants' defence was weak because two of them, attempted to direct her to another offence of stock theft, which they had readily admitted in the lower court.

3.2 The judge did not accept that the identification parade was predetermined as other witnesses positively identified the appellants. She found the appellants guilty and convicted them.

4. Arguments by the parties on appeal to this Court

- 4.1 Counsel for the appellants filed heads of argument on which she relied. She argued two points in the heads of argument. The first point was that although the police apprehended the appellants a few hours after the alleged attack, they found no stolen items in their possession. That from the judgment, what was recovered was diesel, which the appellants denied stealing; that they were simply taken to Zimba where the police officers demanded that they collect four containers of diesel.
- 4.2 The second point counsel argued was that although the prosecution had contended that the witnesses properly identified the appellants and no honest mistaken identity existed, the appellants testified that the identifying witnesses were introduced to them prior to the identification parade. Therefore, the evidence raised a lot of doubt as to the reliability of the identification, which was also unjust and unfair, thus weakening the identification.
- 4.3 In support of the second contention, counsel referred to the cases of **Roberson Kalonga v The People**¹ where we said poor identification evidence requires corroboration such as a finding of recent possession of stolen property and **Kenneth Mtonga and Victor Kaonga v The People**², which relates to the conducting of an identification parade.

- 4.4 Counsel extended the argument by submitting that looking at the few hours that passed from the time of the alleged attack to the time of apprehension; it was expected to find all the stolen items on the appellants. That in the absence of any recoveries, the appellants' explanation that the incidence was intended to procure a stolen animal and that they had a breakdown at Senkobo lay-by was reasonably true. Hence, the trial judge should not have found that the prosecution had proved the case beyond all reasonable doubt.
- 4.5 Counsel also relied on the cases of **Chabala v The People**³ and **Saluwema v The People**⁴ and urged us to allow the appeal, quash the convictions, set aside the sentences and acquit the appellants.
- 4.6 At the hearing of the appeal, counsel for the appellants insisted that the prosecution evidence was doubtful, because the 2nd appellant who was alleged to be the person wearing the half slipper said he was wearing sneakers.
- 4.7 On the green Toyota Corolla, counsel insisted that the prosecution witnesses had the opportunity to see the vehicle at the police after it was impounded, as the offence occurred in the night and the only source of light was the moon. As to the evidence that PWs 1, 2 and 3 saw and heard the sharpening of knives on the tarmac, counsel insisted that the prosecution witnesses only heard the sound of knives being sharpened and that the appellants gave a probable explanation as to why they were found in possession of the knives.

- 4.8 In her oral response to the appellants' arguments, counsel for the respondent supported the convictions of the appellants, which she said were based on strong circumstantial evidence that placed the appellants at the crime scene. She referred to the evidence of the slipper left at the crime scene by the robbers, which matched the slipper found in the Corolla; the knives that witnesses saw at the crime scene and the knives found in the Corolla; and the Corolla itself seen at the crime scene and found with the appellants.
- 4.9 Counsel also referred to the direct evidence of identification, which she said was not impugned during trial. She submitted that the appellants' contention that the prosecution witnesses saw them before the identification parade was conducted did not make sense and there was no basis for contesting the identification evidence.
- 4.10 As to the argument that the appellants gave a probable explanation for possession of the knives, counsel's response was that there was overwhelming evidence connecting the appellants to the commission of the offence as captured in paragraph 4.8 above.
- 4.11 Concerning the argument that no recoveries of the stolen items was made, counsel submitted that the presence of the second vehicle, which the 4th appellant came with, in fact created an opportunity for the appellants to get rid of the stolen items.
- 4.12 In reply, counsel for the appellants insisted that the explanation the appellants gave was more probable than the prosecution evidence.

5. Consideration of the matter and our decision

- 5.1 We have considered the judgment appealed against and the arguments by learned counsel from both sides. There was no dispute as found by the learned trial judge that an aggravated robbery took place on the night in question during which the assailants stole a number of items including money and diesel. The only question was the identity of the perpetrators of the crime.
- 5.2 It is quite clear to us that the evidence against the appellants was not merely circumstantial evidence; there was also direct evidence of identification by PWs 1 and 2.
- 5.3 Firstly, according to PW1's evidence as captured in the High Court judgment, the subject offence occurred on the night of 9th April, 2012 and not 8th April, 2012, which was alluded to by the 4th appellant. Secondly, PW1's evidence was that four intruders approached his vehicle although he was only able to identify two of them who spoke to him directly. The next day he identified the 1st and 4th appellants at an identification parade.
- 5.4 PW1 insisted that he saw the appellants as they opened the door of his truck. He denied identifying them at the police station before the identification parade or on instructions of the police officers.
- 5.5 PW3 who sat outside the truck confirmed seeing four men as they approached in a green Toyota Corolla, four men came out of the Corolla and one of them asked him if the driver was around though

the judgment is silent on whether he identified any of the assailants. PW2 who was in the truck with PW1 saw three attackers go to their vehicle and he was able to identify the 1st and 2nd appellants. However, this does not mean that there was no fourth assailant. It is quite possible that PW2 did not see the fourth assailant who PWs 1 and 2 saw.

5.6 As we have said in paragraphs 3.1 and 3.2 above, the learned trial judge found that the prosecution witnesses identified the appellants and she rejected the argument by the defence that the identification parade was predetermined. We find no basis for faulting the conclusion by the learned judge since the evidence of PW7, the police officer who conducted the identification parade was that the appellants had no complaint as regards the manner the identification parade was conducted or any other complaint.

5.7 Thirdly, there was evidence from PWs 1, 2 and 3 that the assailants were armed with knives. In particular, PW1 testified that he was threatened with a knife and out of fear; he gave away his purse, which contained the money and his friend's cell phone. PW2 only heard the sharpening of knives on the tarmac but PW3 saw, the men sharpening the knives and throwing stones, which prompted him to run into the bush and he remained there even after the police arrived.

- 5.8 Therefore, we cannot accept the argument by learned counsel for the appellants that the assailants were not armed with knives or that they did not threaten any of their victims with the knives.
- 5.9 There was no dispute that the appellants had possession of three knives at the time of their apprehension. Of course, they explained their possession of the knives and counsel for the appellants has spiritedly argued that the explanation was more probable than the prosecution evidence. Unfortunately, possession of the knives was not the only piece of evidence against the appellants. There was much more as we have endeavoured to explain in our judgment.
- 5.10 The next piece of evidence against the appellants was the half slipper that the assailants left on the truck. PWs 1 and 2 alluded to this and PW2 explained the exact spot where the slipper remained on the truck. The prosecution witnesses matched this slipper to the slipper that they found in the Corolla. To be precise, PW5 said one of the suspects had only one slipper on his feet while PW6 said when they searched the Corolla they found the knives and a slipper.
- 5.11 Additionally, the 3rd appellant mentioned that the police took their personal items which included the slippers. Hence, we have no doubt that one of the assailants left the slipper on the truck. We reject the argument by counsel for the appellants that the prosecution evidence was doubtful, since the 2nd appellant who was

alleged to be the person wearing the half slipper now said he was wearing sneakers. That clearly is an afterthought.

5.12 Fourthly, the assailants were using a green Toyota Corolla with registration number ACL 3553. PWs 1, 2 and 3 saw the green Toyota Corolla at the crime scene. PW3 saw four attackers arrive in the green Toyota Corolla whilst PWs 1 and 2 saw the metallic green Corolla leave the crime scene. They noted its registration number and passed it on to their superior.

5.13 Subsequently, PWs 5 and 6 went in search of the green Toyota Corolla, registration No. ACL 3553 and found it parked at the lay-by at Senkobo and the 1st, 2nd and 3rd appellants were found in the same vehicle. Upon searching the vehicle, the police found the three knives in the boot and one of the occupants, who we understand to be the 2nd appellant, was wearing a half slipper which matched the slipper left on the truck by the assailants.

5.14 The view we take is that these were not mere coincidences. They were 'odd coincidences' or 'something more' that strengthened the evidence of identification and went to prove that the appellants were the perpetrators of the aggravated robbery. The argument by counsel for the appellants that PWs 1, 2 and 3 mentioned the colour and registration number of the vehicle because they saw it at the police station is attractive but we are not persuaded.

- 5.15 Although it is true that the witnesses went to the police station and identified the vehicle as the car they had seen at the crime scene, as conceded by counsel for the appellants, they actually informed their superior of the colour and registration number of the vehicle and the police officers and PW5 went in pursuit of that particular vehicle. That evidence could not have been a mere fabrication.
- 5.16 Counsel for the appellants argued that in the absence of any recoveries of the stolen items, even when the police arrested the appellants shortly after the alleged attack, the appellants' explanation that the incidence was intended to procure a stolen animal and that they had a breakdown at Senkobo lay-by was reasonably true.
- 5.17 According to the learned trial judge, there was recovery of the stolen items that the witnesses recognised although she only specifically mentioned the diesel and the appellants alleged that the police took them to Zimba to collect the diesel from the police station.
- 5.18 We find it hard to accept this proposition by the appellants. Whilst we accept that the High Court judgment does not mention what other items the police recovered from the appellants (if any), there was the diesel, which the appellants alleged was collected from Zimba. That diesel could only have been part of the stolen diesel. We do not see why the police could force the appellants to collect diesel from Zimba that was unrelated to the subject offence.

- 5.19 In any case, even if the police had not made any recoveries at the time of apprehension of the appellants that would be insignificant in light of the other overwhelming evidence on record.
- 5.20 There was also evidence by PWs 5 and 6 that the 4th appellant told them that he went to Senkobo because he got a phone call that there was a breakdown. However, the 4th appellant did not mention any breakdown in his evidence. What he said was that the 1st appellant requested for transport to Zimba on the morning of 8th April, 2012 and that he got a lift from Livingstone on a RAV 4 belonging to Zambia Railway.
- 5.21 According to PW1, the subject offence was committed on 9th April, 2012 which was the day after the date the 4th appellant claimed the 1st appellant requested for transport. Further, if indeed, the 1st appellant had requested for transport to Zimba, we do not understand how the 4th appellant could catch a lift instead of taking the transport requested for.
- 5.22 In addition, PW6 said after the RAV 4 arrived, they questioned the driver and decided that he was part of the suspects. If the 4th appellant was the driver; it could not be true that he got a lift on a vehicle belonging to Zambia Railway. Further, the 1st appellant mentioned the 4th appellant's name as the alleged seller of the stolen animal they were waiting for. Therefore, the 4th appellant's presence at Senkobo lay-by was not innocent.

- 5.23 In our view, the submission by the learned Deputy Chief State Advocate that the presence of the second vehicle the 4th appellant came with, could have created an opportunity for the appellants to get rid of the stolen items has merit, especially that the 4th appellant was identified by PW1 as one of the assailants. What is more, the learned trial judge rejected his contention that the identifying witnesses saw him and the 1st appellant at the police station before the identification parade was conducted.
- 5.24 As held in **Roberson Kalonga v The People**¹, cited by learned counsel for the appellants, poor identification evidence requires corroboration such as a finding of recent possession of stolen property. Further, as we held in **Kenneth Mtonga and Victor Kaonga v The People**², also cited by counsel for the appellants, if the identification evidence is weak then, all it would need is something more, some connecting link in order to remove any possibility of mistaken identity. This could be any other piece of evidence besides, recent possession of stolen property, such as possession of a vehicle used in the commission of the offence.
- 5.25 The 2nd and 3rd appellants alleged in their evidence that they parked at Senkobo lay-by because they had a breakdown and that the 4th appellant went there to deal with the breakdown. However, the appellants did not explain how a motor vehicle that had a

breakdown was driven to Livingstone police station where the prosecution witnesses positively identified it at 03:00 hours.

5.26 Moreover, the 1st appellant did not mention that their vehicle had a breakdown. His evidence was that they were at Senkobo lay-by to wait for the seller of the stolen meat by the name of John Zulu; they waited for a long time until the police found them.

5.27 Whilst it is possible that the appellants could have gone to Senkobo lay-by to organise a stolen animal (admittedly they were cattle rustlers), it is also plausible that whilst there, they saw an opportunity to rob the truck, which had broken down in the same area. We do not believe that the appellants did not see the truck when they were the assailants and when they used their vehicle to go to the crime scene and to get away.

6. Conclusion

6.1 On the totality of the evidence on record, we find and hold that the learned trial judge was on firm ground when she found the appellants guilty and convicted them of the subject offence.

6.2 Therefore, we dismiss this appeal for lack of merit and uphold the convictions of the three appellants and the sentences imposed by the High Court.


E. M. HAMAUNDU
SUPREME COURT JUDGE


M. MALILA
SUPREME COURT JUDGE


R. M. C. KAOMA
SUPREME COURT JUDGE