file copy

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO.85/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

TYSON CHOOKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: M'chenga, Makungu and Ngulube JJA
On the day of 19th January, 2021 and the ..... day of March, 2021

For the Appellant: Miss Z. Ponde, Legal Aid Counsel – Legal Aid Board
For the Respondent: Miss N.T. Mumba, Chief State Advocate – National Prosecution Authority

---

JUDGMENT

Makungu, JA delivered the Judgment of the court.

Cases referred to:

1. *Nyambe v. The People (1973) ZR 228*
2. *Lipepo and Others v. The People – SCZ Appeal No.20 of 2014*
3. *Chimbala v. The People (1986) ZR 7*
4. *Mwape v. The People (1976) ZR 160*
5. *Simon Malambo Choka v. The People (1978) ZR 243*
6. *Molley Zulu & 2 others v. The People (1978) ZR 277*
7. *Ali and Another v. The People (1973) ZR 232*
8. *Mungochi v. The People – CAZ Appeal No.58 of 2016*
9. *Mourice Mweene v. The People – CAZ Appeal No.112/2019*

Legislation referred to:

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

1.0 INTRODUCTION

1.1 This is an appeal against conviction as Judge Kenneth Mulife convicted the appellant for aggravated robbery contrary to section 294 of the Penal Code, Chapter 87 of the Laws of Zambia and gave him the death penalty.

2.0 PROSECUTION'S CASE IN THE COURT BELOW

2.1 The prosecution's case rested on the evidence of five witnesses whom we shall refer to as PW1 to PW5. PW1 was Bonaventure Mwiinga, the complainant. PW2 was Bridget Haluwa, daughter of PW1. PW3 was Bertha Kabwenda: PW1's wife. PW4 was Jerva Bubbala: PW1's neighbor and PW5 was Francis Chisenga: Arresting Officer. Their collective evidence was as follows:

On 16th December, 2018 around 23:00 hours, PW1 and PW3's home was well-lit when it was invaded by five robbers. One of them was wearing a police uniform and armed with a gun, another had a knife. Three of them including the gunman were masked. PW1 was forced to go outside. A gunshot was fired into the air as he fled.

2.2 While in the house, PW2 recognized the appellant as she had known him for 2 years from the same neighborhood and he was not masked. The robbers beat up the children together with PW2 and forced the children to go under the bed.

2.3 The appellant who wore dreadlocks at the time, leaned against the main exit door while looking in the direction of PW3 who was hiding behind a cupboard. PW3 was also able to recognize the appellant whom she had known for about 6 years from the same village as a patron of her shop. PW3 came out of hiding and proceeded to check on a child who was crying. She was hit with an iron bar by one of the robbers and she fell down. He made her stand up and demanded for money whilst they were in her bedroom. The robber with a knife and another, threatened to kill her if she did not give them the money while the armed robber stood at the bedroom door. She ended up giving them K15,000. 00 and an LG cell phone worth K400.00. As she was leaving the bedroom, the appellant slapped her and she fell down again. He took two mobile phones from the sitting room. A few minutes later, the robbers left after firing three gunshots. As PW1 was returning home with some

helpers, he heard the gun shots. He later learnt about the robbery.

2.4 The following day, the appellant was apprehended and taken to the police station by individuals who were sent by PW1. Under warn and caution, the appellant told the police that he knew nothing and that he had nothing more to say. His warn and caution statement was produced in evidence.

2.5 PW5 who investigated the matter found an empty cartridge at the crime scene. According to the forensic ballistic examination report, the said cartridge would be discharged from many firearms such as AK47, AKM SKM and SHE which are restricted to the defence and security personnel in their official duties in Zambia.

3.0 THE DEFENCE

3.1 The appellant in his defence, denied the allegations stating that, on 16th December, 2018, he was at home with his family the whole day. At night, he retired to bed in a room shared with his uncle DW2.

3.2 During cross examination, the appellant conceded that he knew PW1, PW2 and PW3 and they also knew him since he used to patronize their shop. DW2 confirmed DW1's story.

4.0 DECISION OF THE LOWER COURT

4.1 The lower court found that on the night of 16th December, 2018, there was a robbery at PW1's house and property worth K16, 050. 00 was stolen. The robbers used actual violence and a firearm within the meaning of the Firearms Act, Cap. 110 when executing the robbery.

4.2 That the appellant was among the robbers as he had been identified by PW2 and PW3 who knew him well for significant periods of time. He noted that the attributes of reliable evidence of identification were present based on the authorities of **Nyambe v. The People** [1] **and Lipepo and Others v. The people.** [2]

4.3 The defence of alibi raised by the appellant was rejected because he had not raised it at the police station and even if there was a dereliction of duty by PW5 to investigate the alibi it would be defeated by the strong evidence of identification;

Chimbala v. The People [3] was cited in support of these findings.

4.4 The appellant's assertion that PW2 and PW3 falsely implicated him in this matter was also rejected as the Judge could not find any basis upon which the two witnesses would have colluded and conspired to falsely implicate him, neither did the appellant highlight the circumstances which might have motivated the two witnesses to falsely implicate him.

4.5 The Judge further found that the doctrine of common purpose within the meaning of section 22 of Cap. 87 as elucidated in the case of **Mwape v. The People** [4] was applicable to this case and that, the appellant actively participated in the robbery. Therefore, he was found guilty as charged and sentenced to death as there was proof that a firearm was used.

5.0 GROUNDS OF APPEAL

5.1 The appellant has advanced two grounds as follows:

1. *The learned Judge erred in law and fact when he convicted the appellant on the uncorroborated evidence of PW2 and PW3 both*

being witnesses with an interest to serve or witnesses whose evidence was suspect.

2. *The learned trial Judge misdirected himself by not considering the possibility of honest mistake in the evidence of identification.*

6.0 APPELLANT'S ARGUMENTS

6.1 At the hearing, Counsel for the appellant Ms Z. Ponde, relied on the appellant's heads of argument. In respect of the 1st ground of appeal, she submitted that the trial judge heavily relied on the evidence of PW2 and PW3 who were suspect witnesses and whose evidence was not corroborated. She drew our attention to the case of **Simon Malambo Choka v. The People,** [5] where it was held *inter alia* that:

> ***"The evidence of one suspect witness cannot be corroborated by the evidence of another suspect witness."***

6.2 According to counsel, since PW2 and PW3 were closely related and both went through a traumatic night, there was need for their evidence to be corroborated by some independent evidence.

6.3 With respect to ground two, counsel submitted that no identification parade was conducted to eliminate the danger of false implication. There was only court room identification. There was no explanation as to why an identification parade was not held. PW2 had stated that she was frightened and confused at the time of the attack and did not pay attention to look at the assailants closely. PW3 also stated during cross examination that she was scared and confused that she could not really observe the attackers.

6.4 Reliance was placed on the case of **Molley Zulu & 2 others v. The People** [6] where it was held that:

> ***"Although recognition of a person one knows is less likely to be mistaken than identification of a stranger, even in cases of recognition, the danger of mistake is present and it must be considered."***

6.5 The trial court did not consider the danger of mistaken identity and heavily relied on the fact that the appellant had been recognised by PW2 and PW3 despite them acknowledging that they were traumatized, confused and scared.

6.6 Counsel contended that even if one of the assailants was known by the witnesses, there was need to hold an

identification parade to exclude the possibility of mistaken identity and not rely on court room identification which has little or no value. We were referred to the case of **Ali and another v. The People** [7] to buttress this point.

6.7 The failure to conduct an identification parade was a dereliction of duty on the part of the arresting officer and was highly prejudicial to the appellant. There was no other evidence connecting the accused to the offence apart from the identification by the prosecution witnesses which is not safe. We were therefore urged to quash the conviction and set aside the sentence.

7.0 RESPONDENT'S ARGUMENTS

7.1 The respondent's Counsel Miss T. Mumba responded to the appellant's arguments *viva voce*. She submitted that there was sufficient identification evidence from PW2 and PW3 who both knew the appellant previously and saw him clearly in their house during the attack as the lights were on and he was not masked. PW3 had known him for 6 years and on the material night she had looked at him directly as she was hiding behind the cupboard. She was reliable in her

observation. Even the appellant confirmed that he was well known to the duo. This is not a case of single identification evidence.

7.2 Miss Mumba further submitted that, the lower court rightly found that there was no evidence that the two witnesses had colluded to falsely implicate the appellant. Reliance was placed on the case of **Mungochi v. The People** [8] where it was held that a relative is not automatically a suspect witness and that the court has to consider the circumstances of the case. She contended that the trial court rightly addressed its mind to the possibility of false implication and found that the prosecution witnesses had not colluded to falsely implicate the appellant. We were therefore urged to confirm the conviction.

8.0 OUR DECISION

8.1 We have considered the record of appeal and the arguments by both counsel.

GROUND 1

8.2 In the case of **Kahilu Mugochi v. The People,** [8] this Court stated that:

"The case of Yokoniya Mwale v. The People does not depart from the Supreme Court's earlier position on who is a witness with a possible interest of his own to serve. It simply restates the law by clarifying that a relative is not automatically a suspect witness, it is the circumstances of the case that can render a relative to be a suspect witness."

8.3 Although in the **Yokoniya Mwale** case *supra*, the Supreme Court dealt with relatives or friends of the deceased, the above stated principal applies even to this case. The evidence on record shows that PW1, PW2 and PW3 are family. This relationship would ordinarily place them in the category of witnesses with an interest to serve or possible bias. However, having considered the circumstances of the case, we take the view that they were not witnesses with an interest to serve or a possible bias as there is nothing on record to suggest that they colluded and conspired to falsely implicate the appellant in this matter. For this reason, their evidence did not require corroboration. The trial court looked at the opportunity that PW2 and PW3 had to observe the appellant and the scenario before excluding the possibility of mistaken identity. It is trite law that findings of fact whether based on oral or other

evidence, must not be set aside unless clearly erroneous, and the appellate court must give due regard to the trial court's opportunity to judge the witnesses' credibility. The trial Judge had the opportunity to observe PW2 and PW3's demeanor and found them to be reliable witnesses. The issue of these witnesses having been traumatized therefore falls away. We find no reason to interfere with the trial court's findings in this respect. The first ground of appeal therefore fails for lack of merit.

GROUND 2

8.4 Coming to the second ground of appeal, it is clear that the appellant was not masked during the attack and was recognised by PW2 and PW3 who knew him very well from the neighbourhood as he used to patronise their shop. PW2 had known him for approximately 2 years and PW3 for 6 years. The house was well lit at the time and both witnesses had ample time to observe him during the ordeal.

8.5 Turning to the appellant's argument that the failure to hold an identification parade was highly prejudicial to the appellant; our firm position is that an identification parade is the

procedure used by the police as a matter of practice. An identification parade merely ensures that a witnesses' ability to identify an alleged criminal is tested. Failure to conduct an identification parade is not *ipso facto* fatal as there are other factors that the court should consider in each particular case to ensure that justice is done.

8.6 In this case, although an identification parade was not conducted, the appellant was not prejudiced because as earlier stated, he was identified by two witnesses (PW2 and PW3) who knew him. The appellant confirmed that he was known by the duo and that he also knew them.

8.7 As regards the purported defence of alibi, we echo what we stated in the case of **Mourice Mweene v. The People** [9] that:

> ***"The law is settled that an alibi must be properly raised by an accused person at the earliest opportunity and that such an allegation can only be investigated if the accused provides details as to witnesses who could vouch for him, when an alibi is properly raised it is the prosecution's onus to negative it."***

8.8 In the present case, although the defence of alibi was supported by DW2, it was properly rejected as it was not raised during the

investigations. The warn and caution statement made by the appellant appearing at page 107 of the record indicates that the appellant said he knew nothing about the case. Under the circumstances, the police were under no legal obligation to investigate the alleged alibi which was raised only during trial. For the foregoing reasons, the second ground of appeal is bereft of merit and it also fails.

9.0 CONCLUSION

9.1 All things considered, the appeal fails in its entirety and is dismissed.

.....
C.F.R. M'CHENGA
DEPUTY JUDGE PRESIDENT

.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE