IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 147,148/2018**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

ISAAC MWANZA **1ST APPELLANT**

JEFF GEOFREY BANDA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chashi, Lengalenga, Siavwapa, JJA

ON: 26th March 2019 and 23rd April 2019

For the Appellant: Mr. K. Katazo, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: M.M. B. Matandala (Mrs.) Deputy Chief State Advocate, National Prosecutions Authority

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JUDGMENT

Chashi, JA delivered the Judgment of the Court.

Cases referred to:

1. Chisha v The People (1968) ZR 191
2. Kateka v The People (1977) ZR 35
3. Nyambe v The People (1973) ZR 228
4. David Zulu v The People (1977) ZR 151
5. George Chileshe v The People (1977) ZR 235 - Reprint
6. Dorothy Mutale and Another v The People (1997) S.J 51
7. Gibrian Mweetwe v The People CAZ - Appeal No. 12 of 2017
8. Patrick Kunda and Another v The People (1980) ZR 132 - Reprint

9. Muvuma Kambanja Situna v The People (1982) ZR 115
10. Machobane v The People (1972) ZR 101
11. Mabvuto Banda and Nchimunya Mukuwa CAZ - Appeal No. 14 & 15 of 2018
12. Kenneth Mtonga and Victor Kaonga v The People SCZ - Judgment No. 5 of 2000
13. The Minister of Home Affairs and The Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of The Southern African Centre for the Constructive Resolution of Disputes) (2007) ZR 207
14. Lewis Matambo v The People CAZ- Appeal No 006 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

The Appellants were convicted of two counts by the High Court sitting at Lusaka. In count one, they were convicted of the offence of attempted murder contrary to section 215(a) of ***The Penal Code***[1]. The particulars of the offence alleged that the Appellants, on 14th August, 2009 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did attempt to murder Ali Moshen.

In the second count, the Appellants were convicted of the offence of aggravated robbery contrary to section 294 (2) of ***The Penal Code***[1]. The particulars of the offence alleged that the Appellants on 14th August, 2009 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other unknown persons and whilst armed with a firearm, did steal from Ali Moshen three wrist watches, one cell phone, one lighter and K3000.00 cash altogether valued at K26,000.00 the property of the said Ali Moshen and at or immediately after such stealing, did use or threaten to use actual violence to Ali Moshen in order to obtain or retain the said property or prevent or overcome resistance from its being stolen.

The Appellants denied both offences prompting a trial in which the prosecution called eight (8) witnesses in support of their case.

The brief facts giving rise to the charges being preferred against the Appellants are as follows; at about 08:00 a.m. on the material date, within Roma township, PW1, the complainant and owner of the premises becoming the crime scene and his employees PW2 (the guard), PW3 (the gardener) and PW4 (the maid) were accosted by an

unknown number of robbers who robbed PW1 of the cash and items stated in the second count.

Two of the six robbers were armed with A.K. 47 rifles and in the process of the said heist, PW1 was shot in the stomach. PW1 was rushed to the hospital where he was operated on at CFB hospital and was later evacuated to South Africa.

From the items stolen, only the cell phone was recovered in November 2009.

PWs 1 ,2, 3 and 4 were the only eye witnesses to the robbery and they confirmed that the whole ordeal lasted for close to 20 minutes and insisted that they had sufficient time to observe their attackers. Regarding the visibility on the material day, the witnesses testified that the incident occurred around 08:00 hours in the morning and there was also sufficient lighting inside the house as the bulbs were on which enabled them to see clearly and in some rooms the windows were open.

An identification parade was conducted by PW6, in the course of which, PW2 identified the 1st Appellant as the robber who pointed a gun at him and ordered him to lie down and that he was the one brandishing the gun at him and PW2 inside the house.

PW3 identified the 1st Appellant as the robber who ordered him and PW2 to lie down outside the house, before they were ordered inside the house. PW3 also identified the 2nd Appellant as the one he described to the police as ***light in complexion, medium size*** and who shot PW1.

PW4 identified the 1st Appellant as the one who hit her with a gun on the shoulder and the 2nd Appellant as the robber who shot PW1. PW1, on the other hand, did not attend the identification parade but was shown several pictures by the police, from which he identified the 1st Appellant.

In addition to the physical description of the 1st Appellant, all the witnesses were unanimous about him having a diastema as he yelled orders around.

According to PW7, the arresting officer, after he received information regarding the robbery, he visited the scene of incident and confirmed what had occurred and interviewed the victim. He further received information from an informer on the whereabouts of one of the attackers. Acting on this information, PW7 and his team apprehended the 1st Appellant and found in his possession, a Nokia N96 phone. The 1st Appellant thereafter led PW7 and his team to the 2nd Appellant in Bauleni Compound. The duo voluntarily led the police to the scene of incident. PW7 discovered two empty cartridges of an AK 47 Rifle, one at the gate and one in PW1's bedroom.

In their defence, the 1st and 2nd Appellants gave evidence on oath denying any involvement in the robbery.

Upon considering the evidence before him, the learned trial Judge found the Appellants guilty, convicted them and sentenced them to suffer the ultimate death penalty in both counts.

The Appellants, aggrieved with the decision of the lower court appealed to this Court and advanced three grounds of appeal couched as follows:

1. **The learned trial Judge misdirected himself in law and fact when he convicted the Appellants based on improper identification parade.**
2. **The learned Judge erred in law and fact when he convicted and sentenced the Appellants to death by hanging when there was no direct evidence linking the Appellants to the commission of the offence.**
3. **The learned trial Judge erred in law and fact when he convicted and sentenced the Appellants to death by hanging on unreasoned Judgment.**

At the hearing of this appeal, both learned Counsel confirmed having filed their Heads of Argument, upon which they entirely relied.

In support of ground one, Mr Katazo, Counsel for the Appellant submitted that, the identification parade conducted by PW6 was

improper and fell short of the required standard of fairness and impartiality that ought to be exhibited by police officers. In that regard we were referred to the case of **Chisha v The People.**[1] To further amplify their argument, our attention was drawn to the case of **Kateka v the People**[2] and **Nyambe v The People**[3]. In the latter case the Supreme Court held as follows:

> *"The greatest care should be taken to test the identification. The witness should be asked, for instance, by what features or unusual marks, if any, he alleges to recognise the accused, what was his build, what clothes he was wearing and the circumstances in which the accused was observed - the state of the light, the opportunity for observation, the stress of the moment - should be carefully canvassed".*

It was Counsel's contention that, the lower court erred when it relied on the identification evidence of PW1. It was submitted that PW1 did not attend the identification parade but was only shown pictures of the robbers from which he identified the Appellants and further that PW1 in his testimony stated that the robbery happened so fast that he had insufficient time to observe the robbers. According to Counsel, it is therefore possible that PWs 2,3 and 4 were equally shown pictures of robbers before the identification parade and equally had insufficient time to observe the robbers.

On the strength of the **Nyambe case**, Counsel contended that the identification of the 1st Appellant was planned, owing to the fact that he was the only participant on the parade with a diastema. Counsel argued that, the identification was therefore marked with impartiality and unfairness and thus the Appellants ought to be acquitted and set free.

In support of ground two, it was argued that there was no direct evidence connecting the Appellant's to the offence, as the identification parade was poor and could not be relied upon. According to Counsel, the only evidence linking the Appellants to the commission of the offence was entirely circumstantial. In this regard, reliance was placed on the case of **David Zulu v The People.**[4]

It was further argued that, the explanation proffered by the 2nd Appellant to the effect that he was employed by the 1st Appellant as a bar attendant was logical and that should not have been the basis for his conviction.

Counsel further argued that the mere fact that the 1st Appellant is alleged to have been found with PW1's phone in his possession does not entail that the Appellant stole the phone. According to Counsel, the trial Judge should have considered other possibilities such as; receiving of stolen property or that the Appellant purchased the phone or that the police recovered the phone from someone other than the Appellant. Our attention was drawn to the case of **George Chileshe v The People**[5] and **Dorothy Mutale and Another v The People**[6] where the Supreme held that:

> *"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the court will adopt one, which is more favourable to an accused if there is nothing in the case to exclude such inference".*

It was argued that, in the case at hand, there are two inferences that could be drawn; that the alleged heist was staged by other persons or it could have been the Appellants. In such a case the inference favourable to the Appellants should be adopted.

In support of ground three, Counsel argued that the impugned Judgment of the lower court lacked reasoning on how it arrived at its decision. That the Judgment contained a repetition of the

evidence at trial. Counsel argued that the Judgment fell short of the required standard as it did not meet the requirements as envisaged in section 169 of ***The Criminal Procedure Code***[2]. We were referred to the cases of **Gibrain Mweetwe v The People**[7] **and Patrick Kunda and Robertson Muleba Chisenga v The People**[8] where the Supreme Court quashed a conviction and sentence on the grounds that the Judgment did not meet the required standard as provided for in the above cited provision.

It was argued that, the trial Judge in dismissing the Appellant's defence, did not interrogate, evaluate or analyse their evidence nor did he give his reasoning for dismissing it. In support of this argument, we were referred to the case of **Muvuma Kambanja Situna v The People**[9]**.**

With regard to the 2nd Appellant, it was argued that, the trial Judge did not consider his evidence but merely stated that he was not impressed with his demeanour and did not go further to provide his reasoning. To buttress their argument, Counsel cited the case of Machobane **v The People**[10], where the Supreme court held as follows:

Demeanor of a witness is an item of evidence which must be included in the record or at least the Judgment of the trial court and the absence of any evidence to support an adverse finding on demeanor in the record or Judgment is a serious irregularity.

On the other hand, Counsel for the State, Mrs Matandala opposed the appeal. She argued that the identification parade was conducted with the requisite standard of fairness and impartiality. In support of the argument, Counsel led us through the evidence of PW2, PW3 and PW4 regarding the identification of the Appellants and submitted that the conditions under which the identification was done were favourable for a positive identification. Relying on the case of **Kateka v The People**[2], Counsel contended that the possibility of an honest mistake had been ruled out and that the evidence of PW2, PW3 and PW4 was reliable and safe.

Regarding the pictures of the Appellants being shown to the witnesses before the identification parade, Mrs. Matandala submitted that it was a mere speculation and did not arise as a point of fact. It was argued that the issue of the pictures only relates to PW1 who was shown several pictures of persons suspected to be robbers and not to PW2, PW3 and PW4, as these

witnesses identified the robbers at the scene. However, Counsel conceded that the identification of the 1st Appellant by PW1 was not reliable and safe as it was not done in accordance with the rules regulating the conduct of identification parades. However, we were urged to only consider PW1's evidence in relation to the identification of the Nokia 96 phone.

With regard to ground two, it was argued that the positive identification evidence of the Appellants and the phone directly linked the Appellants to the commission of the offence. In addition, Counsel submitted that the Appellants led no evidence to support their argument that the N96 phone was received as stolen property.

In opposing the third ground of appeal, we were referred to the Judgement of the trial Judge and it was submitted that the Judgment met the requirements of section 169 of ***The Criminal Procedure Code***[2]. The Judgment contained an analysis of the evidence, points of determination, applicable law and its reasoning for arriving at the decision to convict the Appellants.

We have carefully perused the record before us and the Judgment of the court a quo, as well as the grounds of appeal raised by the Appellants and considered these in the light of the rival arguments deployed by learned Counsel.

The facts of the case are largely common cause and not in dispute. What is disputed is the identity of the attackers. It is common ground that the witnesses had no prior knowledge of the Appellants before the incident occurred, as such the only evidence against the Appellants is the evidence of identification. Thus, the nub of this appeal revolves around the identification of the Appellants, which consequently turns on the adequacy of such identification.

Ground one of the appeal is dealing with two aspects of the identification evidence, the first being the identification of the Appellants at the scene and the other is the identification at the parade. It is the Appellant's contention that they were not positively identified since the prevailing conditions at the scene were unfavorable for positive identification. Further that the subsequent identification at the parade was poor.

enjoined to examine such evidence carefully and to be satisfied that the conditions of identification are favourable and free from the possibility of an honest mistake before it can safely make it the basis of a conviction. The above principles were enunciated in the case of **Muvuma Kambanja Situna v The People**[9] where the Supreme Court held that:

> "1) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.
>
> 2) If the opportunity for a positive and reliable identification is poor, then it follows that, the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence."

Further in our recent case of **Mabvuto Banda and Nchimunya Mukuwa v The People**[11] we had the occasion to consider identification evidence and made reference to the above mentioned authority and held that there is need for identification evidence to

be tested and evaluated in order to rule out the danger of an honest mistake. That, the test seeks to determine the prevailing conditions that existed at the time the alleged recognition was made such as the time, was it day or night; if it was the latter, was there sufficient light to enable identification; does the person being identified have distinctive features that allowed for his identification; was the person being identified known to the witness previously; was there sufficient time or opportunity for the witness to observe the accused and did any other witness see the accused person.

The court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification.

PW1, PW2, PW3 and PW4 were the main eye witnesses whose evidence was similar in all material respects. They testified that the incident occurred in broad daylight around 08:00 hours in the morning. They could see clearly as there was sufficient lighting outside and while in the bedroom, with the aid of light from the bulbs in PW1's bedroom.

Further, the witnesses testified that the whole ordeal lasted for close to twenty minutes, which time was sufficient for them to observe the assailants who were unmasked as opposed to a fleeting view. In addition, the witnesses gave a detailed description of how the attackers were dressed, their complexion and physical stature. They also gave a detailed account of the role played by the Appellants in the robbery.

We also note that this is a case in which the identification was not by one but by four eye witnesses, therefore taking it out of the realm of single identification evidence, although we are mindful that it is not inconceivable that in a case where there is more than one identifying witness, an honest mistake can be made.

We are therefore of the considered view that the witnesses gave clear and un-impeached evidence and they got a clear impression of the Appellants during the incident and as such the prevailing conditions at the scene were favourable for a positive identification.

This then leads to the issue of the subsequent identification parade, it has been argued that the Identification parade did not meet the standard of fairness and impartiality.

Identification parades are meant to test the correctness of a witness's identification, so where an identification parade, as part of the evidence of identification is in issue and it is shown that the rules regulating the conduct of an identification parade are flouted, then the evidential value of the evidence of identification depreciates significantly. It is for this reason that the identification parades ought to be conducted in a proper and fair manner. In the case of **Kenneth Mtonga and Victor Kaonga v The People**[12] the Supreme Court held *inter alia* that:

> "(i) The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification.
>
> ii) 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.

> (iii) 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."

It is the Appellant's argument that the identification parade was poor as the police officer had shown pictures of Appellants to the witnesses before the parade was mounted and therefore the identification was planned. The Respondent on the other hand contends that PW1 was the only witness shown pictures of suspects from which he identified the 1st Appellant and conceded that PW1's evidence was therefore unreliable.

PW6, conducted the identification parade, he gave a blow by blow account of what transpired during the parade. He stated that the parade consisted of 11 participants whose complexion and height were similar to those of the Appellants. He informed the Appellants of the reason for the parade and of their rights to have a lawyer or relative present.

The witnesses were then called one by one to identify the assailants and they identified the 1st and 2nd Appellants by touching them. According to PW6, the Appellants did not object to the manner in which the parade was conducted. The only complaint raised was by

the 2nd Appellant to the effect that he did not know why he was part of the parade.

We have perused the evidence on record and it is clear that the eye witnesses gave a detailed physical description of the assailants to the police. The importance of this description cannot be downplayed as it aids the police in arranging a well conducted parade particularly the participants. It is for this reason that PW6 arranged an identification parade consisting of suspects with similar features as those of the Appellants. The most noticeable feature of the 1st Appellant was the gap in his teeth, which all the witnesses deposed to. PW3 in cross examination, stated that all the participants at the parade were asked to smile and then identified the 1st Appellant.

Regarding the allegation that the witnesses were shown pictures of the Appellants before the parade, we agree with the State that PW1 was the only witness shown pictures by the police and it is from these pictures that he identified the 1st Appellant. PW2, PW3 and PW4 made no mention of having seen pictures and nothing on record suggests that they were shown any pictures before the parade.

However, even in the event that there was an irregularity on the identification parade, such irregularity would not be to nullify the identification as stated in **Kenneth Mtonga and Victor Kaonga v The People**[12], there must be an examination of the evidence of the witnesses who described the opportunity they had to make a reliable observation. As earlier indicated, the witnesses had ample opportunity and time to observe the attackers rendering the prevailing conditions favourable for positive identification. We are of the view that the Appellants were positively identified as the assailants.

From the above evidence, there is no material on the basis of which we can find that the parade was not properly conducted. In our view the criticisms by the Appellants are inadequate to vitiate the quality of the identification evidence.

The first ground fails.

Coming to the second ground, the way we see it, the failure or success of this ground was dependent on the outcome of ground one. In ground two, the Appellant's argue that without the

identification parade, the only evidence linking the Appellant's to the offence is circumstantial evidence. However, we hold a different view. As highlighted above, the Appellant's identification, both at the scene and on the parade, was free from error. We have no doubt that there was direct identification evidence connecting the Appellant's to the commission of the offence and was therefore properly relied upon by the court below as a basis for sustaining conviction.

Another issue raised in ground two relates to the Nokia 96 phone found in possession of the 1st Appellant when he was apprehended. The phone was identified by PW1, PW2, PW3 and PW4 as the phone belonging to PW1. It is the Appellant's argument that there are other inferences that could have been drawn such as the possibility that the Appellant could have received stolen property, or purchased the phone. In the case of **Kenneth Mtonga and Victor Kaonga v The People**[12] the Supreme Court held *inter alia* that:

> *"(i) It is not always necessary that the doctrine of recent possession must be invoked especially where there is evidence of identification which if adequate on its own will be sufficient to*

sustain a conviction or which if requiring to be supported will then be supported by the possession of stolen goods."

In this particular case, there was adequate evidence of identification which was supported by the finding of the 1st Appellant in possession of the phone. Such possession only provided the necessary connecting link to corroborate the eyewitness identification. In light of the identification evidence, there was only one inference that could be drawn, that is the Appellant was among the robbers that had stolen from PW1. The trial court was therefore on firm ground.

The second ground fails.

With regard to the third ground, the Appellant's argue that the Judgment of the learned trial Judge falls short of the required standard as it does not meet the requirements as envisaged in section 169 of the ***Criminal Procedure Code***[2] which provides as follows:

"169. (1) The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or

points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

Further in the case of **The Minister of Home Affairs and The Attorney General v Lee Habasonda Suing on his own behalf and on behalf of The Southern African Centre for the Constructive Resolution of Disputes)**[13] the Supreme Court held inter alia that:

"Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts."

On the strength of the above cited authorities, it is clear that a court in its Judgment, must thoroughly analyse the relevant evidence before it and properly articulate the reasoning behind its decision. We have perused the impugned Judgment of the learned trial Judge. We are of the view that the Judgment met the standard as provided for in the above authorities.

The learned trial Judge reviewed the evidence that was adduced before him, he made findings of facts, reasoning on the facts and there application of the law to the facts. We do not agree with the

Appellant's Counsel that the Judgment was unreasoned. We are satisfied that it met the criteria of a Judgment as provided in section 169(1) of ***The Criminal Procedure Code[2].***

Regarding the evidence of the Appellants, the trial Judge disbelieved the Appellants' narrative on account of their demeanour and credibility. By the same token, he found the Prosecution witnesses to be truthful.

As an Appellate Court, we are aware that the trial court had the benefit of seeing and hearing the witnesses first hand and as such it means that we must give due deference to the findings of the trial court on certain aspects of the case. We have perused the Judgment of the lower court and are of the view that the learned Judge considered the Appellant's evidence before dismissing it. The trial court cannot be faulted for arriving at that decision.

The third ground fails.

We note that the Appellants were charged with two counts, that of aggravated robbery and attempted murder. At the hearing of this appeal, we asked Mrs. Matandala whether it was appropriate to

charge the Appellants with the two counts when the attempted murder was done in the execution of the aggravated robbery.

Mrs. Matandala responded in the affirmative that they were two separate offences. To buttress her submission, Counsel furnished the court with an authority from the Republic of Kenya, **Wanjala v R CA No. 174 & 238 of 1978**, which of course is only for persuasive value. In that case, the Appellants were charged with two charges of capital robbery and the Court of Appeal was of the view that no prejudice could have been caused to the Appellants as the robberies formed part of the same transaction and the evidence in support of one charge was relevant to the other.

In addition, Counsel relied on section 135 (1) of **The Criminal Procedure Code**[2] which provides as follows:

> *"(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character..."*

We have considered the authorities submitted by Mrs, Matandala, but the question we ask ourselves is whether or not the Appellants

committed two separate offences when they attacked PW1 on the material date.

We had the occasion to discuss the multiplicity of charges in the case of **Lewis Matambo v The People,**[14] in that case, we held as follows:

> *"from the evidence that was before the trial court, it is apparent that the Appellant and his accomplices set out to rob the bureau de change armed with a firearm. They shot and disarmed a police officer who was guarding it and thereafter, they threatened the manager into surrendering both the bureau's money and his personal property. They also took away the firearm for the police officer they had disarmed when they started committing the offence. It is our view, that had the prosecutor correctly assessed the evidence, the appellant would have only been charged with one count of aggravated robbery and nothing more.*
>
> *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. Neither did the taking of the arm his firearm amount to separate robbery because it was clearly intended to prevent him from using it to resist the robbery."*

The facts of the above case are similar to the present case, only that in this case, the firearm was used immediately after the time of the

stealing in order to obtain or retain the said property or prevent or overcome resistance from its being stolen.

Section 215(a) of ***The Penal Code***[1] provides for attempted murder as follows:

> *Any person who*
> *(a) Attempts unlawfully to cause the death of another or*
> (b)*.....is guilty of a felony and is liable to imprisonment for life.*

It can be deduced from the above provision that for attempted murder, the sole purpose of the injury must be to cause death as opposed to obtain or retain the thing stolen or to prevent or overcome resistance.

On the strength of the above authorities we find that the shooting of PW1 was in the execution of the aggravated robbery and is one of the ingredients of the aggravated robbery.

We find that the information was defective on account of multiplicity of charges as the attempted murder and aggravated robbery were not separate offences. We therefore set aside the

Appellant's conviction and sentence for attempted murder and maintain the conviction and sentence for aggravated robbery.

The upshot, then, is that the appeal against conviction is dismissed as unmeritorious, save for the setting aside of the conviction and sentence on the attempted murder.

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J. CHASHI
COURT OF APPEAL JUDGE

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F.M. LENGALENGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE