

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(CRIMINAL JURISDICTION)

HK/51/2011

BETWEEN:

THE PEOPLE
AND
DAVIES MAMBWE

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 25th day of August, 2011
For the State: Mr. M.C. Hamachila – State Advocate
For the Accused: Mr. T. Chabu – Ellis and Company

JUDGMENT

Cases referred to:

1. *Mwewa Murono v. The People (2004) ZR 207*
2. *Ernest Mwaba & Others v. The People (1987) Z.R. 19*
3. *Mohan and Another v. Regina (1967) 2 ALL ER*

Legislation referred to:

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

The accused was charged with one count of aggravated robbery contrary to Section 294(1) of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence were that the Accused, on the 6th day of January 2011 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown and whilst armed with offensive weapons did steal one cell phone and K335,100 cash together valued at K820,100 the property of FRANK KALAMBO and at or immediately before or immediately after the time of such stealing did use or threatened to use actual violence to FRANK KALAMBO

in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

The Accused denied the charge.

I remind myself that in all criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of an accused lies from beginning to end on the prosecution. The standard of proof is high- one beyond reasonable doubt. Therefore, if I entertain any doubt as to the Accused's guilt in this case I am required to resolve that doubt in favour of the accused person and to acquit him (see case of MWEWA MURONO V THE PEOPLE (2004) ZR 207).

Section 294(1) under which the Accused is charged provides thus:

“294(1) Any person who, being armed with any offensive weapon instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years”.

Section 264 of the Penal Code provides:

“264(1) Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.”

The definition of theft is given under section 265(1) of the Penal Code as follows:

“265(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if does so with any of the following intents, that is to say;

(a) an intent permanently to deprive the general or special owner of the thing of it”

In order for me to convict the accused of the subject offence, I must be satisfied beyond reasonable doubt that the prosecution have proved every element of the offence as outlined in the foregoing legal provisions.

In support of their case, the prosecution called four witnesses whose evidence I now proposed to summarize first.

Pw1 was FRANK KALAMBO SICHAMBA, the complainant, who testified that on 6th January, 2011 he left Chamboli Township in Kitwe around 16:00 hours to go to his farm in the Kakolo 7 settlement area. He had gone cycling. As he was about to reach his farm around 19:00 hours, he saw a group of about five men ahead of him on the road. He said it was not dark and he was able to see them. As he drew near, he slowed down, but as he tried to pass the said men they got hold of the bicycle and stopped him. They told PW1 to choose between his life or surrendering what he had on him. Before PW1 could respond, the said men started beating him. He said one of those men had a gun, another had a machet or panga, and others had iron bars. They started removing what was in his pockets, namely a Nokia cell phone which was in his breast shirt pocket and K335,100 cash which was in his rear trousers pocket. Even after getting the said cell phone and cash, the men continued beating Pw1 thereby prompting him to start

shouting calling for help fearing that he could be killed. That is when some people who were at a house near the road went to his rescue.

Upon seeing the people who had gone to PW1's rescue, his attackers scampered in different directions in the bush. However, PW1's rescuers pursued one of the attackers, apprehended him and disarmed him of the panga he had. PW1 said he was in the group that pursued and apprehended that man. He said the young men who had come to his rescue were five in number. After he had been apprehended, the suspect was taken to the road side where he was initially interviewed. The suspect said he lived in the Kakolo area also and was taken to the area chairman Mr. MUSHAPI who contacted the police who said they would pick the suspect the following day. The suspect was detained at the Chairman's place overnight and was taken to Kitwe Central Police Station the following day. PW1 identified the Accused as the one they had apprehended that day.

Under cross examination, PW1 reiterated that the person they had apprehended had a panga with him which the young men who had gone to PW1's rescue recovered. He said among the group that apprehended the Accused was a person he knew as HARRISON. He said the money that was stolen from him was not recovered. Neither was the cellphone.

HARRISON MACHIKO (PW3) said he was with his elder brother DOUGLAS at their farm in the Kakolo area on 6th January, 2011 around 19:00 hours when they heard shouts for help from someone by the road. PW3 and his brother went towards where the shouts were coming from. When they reached the roadside, they saw a group of five people beating someone who was on the ground. PW3 and his brother rushed to the scene. Upon them being spotted, the attackers took off. PW3's group gave chase and pursued one of those men through the grass who finally fell down upon hitting a tree stump as he was running. That man was then apprehended by PW1, PW3 and his elder brother. PW3 came to know his name as MAMBWE whom he identified in Court

as the Accused. PW3 also said the Accused had a panga at the time which they recovered from him. He identified that panga also in Court.

PW4 was Detective Inspector RODGERS TUMWIMBILE of Kitwe Central Police Station who received the report of the robbery in this case. He also received the suspect who was taken to the Police Station by PW2, KELVIN MWELEMUKA Chairman of the Crime Prevention Unit in the Kakolo area together with the panga that was said to have been recovered in the case by the witnesses. He produced the panga which was admitted in evidence as exhibit P1. He interviewed the suspect whom he came to know as DAVIES MAMBWE and finally charged and arrested him for the subject offence. He identified the Accused as the suspect he arrested in this case who, under warn and caution in the Bemba language which the Accused understood well, gave a free and voluntary reply denying the charge.

After the close of the case for the prosecution, I found, in my Ruling of 18th August, 2011, the Accused with a case to answer and I put him on his defence. After explaining his rights to him, the Accused elected to give evidence on oath and said he did not have any witnesses to call.

He said that on 6th January, 2011 around 19:00 hours, he left the farm where he lives in the Kakolo area to go and buy some cigarettes at a stand in the same area. As he was going along he heard some noise ahead of him. Shortly, thereafter he heard people say "Here he is, coming from this direction". Those people then apprehended him alleging that he had been in the group of others who had run away. He denied and told them his mission. But they insisted and started beating him. Later they took him to the area Chairman where he spent the night before being taken to the Police Station the following day in the company of the complainant and one member of the Crime Prevention Unit. At the Police station, he said he was accused of robbery but Police refused to accept that charge since there was no weapon that had been recovered. On 8th January, 2011 the accusers took a panga to the Police as the weapon accused had been found with. That is when the Police proceeded to charge the accused with the

subject offence. He, however, denied that he had any weapon on him when he was apprehended. He denied that he was in the group of people who had attacked PW1 or that he was apprehended while trying to run away. Further, he denied having taken any money or cell phone from PW1 and nothing of the sort was recovered from him.

Under cross examination, he said the noise he heard was of shouts of “Thieves, Thieves”. He said he did not know the people who had apprehended him and they did not know him either. He said prior to his being apprehended he did not have any conflict or differences with them. He did not know why they had implicated him in this case.

It goes without saying that both a cell phone as well as cash are inanimate things which are movable and are capable of being stolen.

From the evidence on the record, I am satisfied and I find it as a fact proved that on the date in question PW1 was accosted and attacked by some five men in the Kakolo farming area. During that confrontation, those men first told PW1 to choose between giving them what he had or death. This meant that if he refused to surrender his possessions, those men would beat him to death. Before PW1 could respond and indicate his choice, the men started beating him while taking away his cell phone and the K335,100 cash he had on him.

The fact that PW1 was attacked by five men was corroborated by PW3 who said he and his elder brother heard someone shouting for help along the road near to their home in the area. When PW3 and his brother went to where the shouts were coming from, he saw five men beating someone he came to identify as PW1 who was on the ground.

It is the evidence of both PW1 and PW3 that when PW1’s attackers saw the people who had gone to PW1’s rescue, those attackers scampered in different directions. However, the two witnesses said they pursued one of the men who later fell to the ground and was apprehended. The incident happened around 19:00 hours according to PW1, PW3

and the Accused himself. PW1 and PW3 said they were able to see the attackers because it was not dark. There was no suggestion from the evidence on the record that it was too dark for the witnesses to observe the attackers. There is also no evidence to suggest that they had lost sight of the person that they pursued and apprehended, so as to lend credibility to the Accused's story that he was mistaken for one of the men who had attacked PW1 and ran away.

I am therefore satisfied that the person that was apprehended that day was the Accused whom I find to have been among the five men who attacked PW1. I have ruled out mistaken identity or the possibility that the Accused was falsely implicated in this case. Accused admitted that he did not know PW1 or PW3 before that date and that they did not know him either; he said he had had no conflict or differences with them and did not know why they had implicated him in this case. I find that there was indeed no reason for witnesses to falsely implicate the Accused.

Apart from being five in the group, PW1's attackers were armed with offensive weapons, namely, iron bars, a machet or panga, and what, according to PW1, looked like a gun. PW1 and PW3 said a panga was recovered from the Accused when he was apprehended. That weapon was identified and produced in court as exhibit P1.

Further, apart from threatening PW1 with death if he did not surrender his possessions, PW1 was actually beaten prompting him to shout for help when he feared that they could kill him. I am also satisfied that the prosecution have proved that a cellphone and K335,100 cash was taken from PW1, which property has not been recovered. The fact that the said property was not found on the Accused at the time he was apprehended is, in my view, an irrelevant consideration in the charge in the instant case. I find that the five man who attacked PW1 had a common design, namely to rob PW1.

Under section 21(1) of the Penal Code,

“when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

- (a). every person who actually does the act or makes the omission which constitutes the offence;**
- (b). every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
- (c). every person who aids or abets another person in committing the offence**”

Let me illustrate or explain this from a few decided cases I referred to and relied upon to come to that conclusion.

In the case of **ERNEST MWABA & OTHERS v. THE PEOPLE (1987) Z.R. 19**, it was held:

- “(i) where joint adventures attack the same person, then unless one of them suddenly does something which is out of line with the common scheme and to which he alone the resulting death is attributable, they will all be liable.**
- (ii). where the evidence shows that each person actually participated in an assault then they were all Crimines Participes. The fact that other persons may have also assaulted the deceased at the one stage can make no difference where the nature of the assaults was such that their cumulative effect overcame the deceased”**

In the murder case of **Mohan and Another v. Regina (1967) 2 ALL ER**, which was referred to in the **Ernest Mwaba** Case, it was held that:

“once more or less equal participation in the unlawful assaults on the same victim was established, it was unnecessary to show who struck the fatal blow and each was fully liable for the manslaughter”

In the instant case, it was not necessary for the prosecution to show that it was actually the Accused who took the cell phone and the cash from PW1. I am satisfied that the Accused acted together with another four men in attacking and stealing from PW1. They had a common scheme to attack and steal from PW1. There is no evidence that it was one of those other four men, and not the Accused, who had done something out of line with the common scheme. The common scheme is deduced from all the five men, armed as they were, threatening death to PW1 proceeding to beating and stealing from him. The purpose of the attack was to subdue PW1 and to steal from him. And having stolen, they continued to beat him and then ran away at the sight of the men who went to rescue PW1.

In the circumstances of this case, particularly from the evidence of PW1 and PW3, I am unable to accept the story by the Accused that he was falsely implicated or mistakenly identified as one of the attackers of PW1.

I find that all the essential elements of the offence have been proved beyond reasonable doubt. I therefore, find the Accused guilty as charged and I convict him accordingly.

Delivered at Kitwe in Open Court this **25th** day of **August**, 2011

I.C.T. Chali
JUDGE