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IN THE SUPREME COURT OF ZAMBIA **Appeal No. 651/2013**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E E N:

08 DEC 2020

MASHATI KALEYO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe, and Wood, JJS
on the 6th May, 2014 and 8th December, 2020

For the Appellant: Ms. S. C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. M. M. Bah, Senior State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

<u>**Cases referred to:**</u>

1. **Chipango and Others vs. The People (1978) Z.R. 304**
2. **Simon Malambo Choka vs. The People (1978) Z.R. 243**
3. **Toko vs. The People (1975) Z.R. 196**
4. **Katebe vs. The People (1975) Z.R. 13**
5. **Ilunga Kabala and John Masefu vs. The People (1981) Z.R. 102**
6. **Peter Yotam Hamenda vs. The People (1977) Z.R. 184**
7. **Felix Silungwe and Shadreck Banda vs. The People (1981) Z.R. 286**
8. **Machobane vs. The People (1972) Z.R. 101**
9. **George Musupi vs. The People (1978) Z.R. 271**
10. **Machipisha Kombe vs. The People (2009) Z.R. 282**

When we heard this appeal, we sat with Hon. Mr. Justice Phiri who has since retired. Therefore, this judgment is by majority.

This is an appeal against conviction and sentence. The appellant was tried and convicted by the late Wanki J (as he then was) of the offence of aggravated robbery. The particulars of offence alleged that on the 14th November, 2007 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, the appellant whilst armed with a pistol robbed Nicholas Sampa of a motor vehicle namely a Toyota Sprinter registration number ACH 3389 valued at K27,000,000 (unrebased), the property of Lovemore Mulenga.

According to PW1 (Nicholas Sampa), a taxi driver who was employed by Lovemore Mulenga (PW2), on the day in question around 22:00 hours, he was booked by the appellant who requested him to take him to Chibwe Crescent in Kansenshi Ndola at a negotiated fee of K15,000 (unrebased). On reaching Chibwe Crescent, the appellant told PW1 that he was not familiar with the area and they stopped at a house and the appellant went to ask for directions. When he came back into the car, the appellant requested to use PW1's mobile phone while advising him to drive

slowly. At some point the appellant told him to stop the car and the appellant produced a pistol and threatened to shoot PW1. The appellant bundled PW1 in the boot of the car and continued driving the car and as it was moving slowly, PW1 managed to escape from the boot of the moving car and proceeded to report the robbery at Kansenshi Police Post, in the company of PW2, his employer and owner of the vehicle.

The following morning, while at the police station, PW2 dialed PW1's number and a woman (PW4) answered and disclosed that the owner of the mobile phone was their visiting pastor from Lusaka and she gave him her residential address and the directions to her house. In the company of the police, he rushed to the house where they found his vehicle covered in a black plastic without number plates and tyres. PW2 and the police found PW3 and PW4 (Mr. and Mrs. Ngulube) and the duo informed them that the owner of the vehicle had gone to the market to buy plastic to cover the whole vehicle.

The combined evidence of PW3 and PW4 was that the appellant was a family friend and a pastor who was visiting from Lusaka. That he arrived on 14th November, 2007 around 10:00

hours to 11:00 hours. He informed them that he had come with a vehicle which he left at a garage in Masala area and that he would fetch it later and indeed the vehicle with no registration number was brought and parked in their yard around 23:00 hours. The following morning, the appellant removed the tyres from the vehicle. He informed them that he was going to Chingola for church meetings and would be away for a week and decided to cover the vehicle with a plastic. The plastic did not cover the whole vehicle and the appellant went to the market by bicycle to buy another plastic.

With the description given to them by PW3, the investigations officer Detective Sergeant Mpande (PW5) stated that they apprehended the appellant and found a Motorola mobile phone belonging to PW1 on his person. He also had a black plastic. At the police station, PW1 who had remained at the police station identified the appellant as the person who had robbed him of the vehicle and phone at gunpoint. PW1 identified the phone that was stolen from him by the appellant. That the appellant led them to where he had parked the stolen vehicle; he showed them the number plates for the stolen vehicle and the firearm which he had

hidden behind the seat in the stolen vehicle. PW5 arrested and charged the appellant with the offence of aggravated robbery.

The appellant's response to the prosecution evidence is that the vehicle belonged to PW3 and PW4. He admitted that he was a pastor and that he was a friend to the Ngulubes whom he had known for some years. He stated that he found the stolen vehicle with no tyres and no number plate at the home of Mr. and Mrs. Ngulube. According to the appellant, he was apprehended on his way from the market and that the toy pistol was recovered from the vehicle which was parked outside the couple's house.

The appellant raised an *alibi* stating that on the 14th November, 2007 he was at Chilenje in Lusaka. On 15th November, 2007 he travelled to Ndola by Chembe Carriers and produced a bus ticket to this effect. He went straight to the Ngulube's residence where he found the vehicle in question parked at their home. He completely denied having robbed PW1 whom he said he saw for the first time in court.

Francis Zulu, the appellant's witness employed by Chembe Carriers could not confirm that the appellant was a passenger on

their bus on 15th November, 2007. DW2 however, stated that the bus carrier did not issue tickets to non-travellers.

The learned trial judge after considering the evidence from both sides found that: PW1 had the opportunity to identify the appellant from the time that he booked him as he was not in fear of his life until he threatened him with a pistol; that he gave a description of the appellant and identified him at the police station. The learned trial judge accepted the evidence of the Ngulubes that the appellant arrived on the 14th November, 2007 and came back with the stolen vehicle in the night. That the appellant was also in possession of PW1's mobile phone which Mrs. Ngulube answered when it rang and gave directions to Lovemore Mulenga who in the company of the police found his way to their house where they found the stolen vehicle.

The learned trial judge rejected the appellant's *alibi* on the ground that the police would have found the bus fare ticket on his person when they searched him at the time of apprehension. The learned trial judge found that in the appellant's own evidence, he gave the impression that on arrival in Ndola, he went straight to the Ngulube residence and that, therefore, his story that he gave the

wallet containing the ticket to his sister two days after his lawyer visited him in prison could not hold water.

The learned trial judge found that the appellant's denial and his claim that the vehicle and the mobile phone belonged to the Ngulubes could not stand in the face of the prosecution evidence that showed that at the time of robbing PW1, the appellant was wearing a 'bomber' and cap and armed with a pistol all produced before court.

The learned trial judge convicted the appellant as charged and sentenced him to 20 years imprisonment with hard labour.

On behalf of the appellant Mrs. Lukwesa raised the following grounds namely:

1. **The learned trial judge misdirected himself in law and in fact when he found PW3 and PW4 not to have been witnesses with a possible interest to serve when the evidence and the circumstances of the case show otherwise.**
2. **The learned trial judge erred in law and in fact when he held that the purported identification by PW1 of the appellant was of good quality when the evidence suggests great dereliction of duty by the police and the circumstances suggest otherwise.**

3. **The learned trial judge erred in law and fact when she rejected the alibi advanced by the appellant in the absence of evidence by the prosecution disproving the alibi to the required standard.**

4. **The learned trial judge fell into error when he did not consider the failure by the police to lift finger prints from the vehicle and recovered toy gun as dereliction of duty.**

In support of ground one, Mrs. Lukwesa cited the case of **Chipango and Others v The People**[1] and the case of **Simon Malambo Choka v The People**[2] which both dealt with suspect witnesses. It was submitted that the totality of the evidence and the circumstances of the case clearly show that the Ngulubes were witnesses with their own possible interest to serve and their evidence required corroboration. Mrs. Lukwesa argued that in this case, it is not a question of the demeanour of the witnesses but rather whether the danger of relying on suspect evidence had been excluded. That the trial judge fell into grave error when he found that the couple had no interest in the case and that had he properly directed himself he would have found the conviction unsafe as the remainder of the evidence is weak and unreliable.

In support of ground two, Mrs. Lukwesa cited the case of **Toko v The People**[3] which dealt with the conduct of identification parades and the concept of fairness in an identification parade. Although no identification parade was held in the case in *casu*, she pointed out that PW1 stated that the police took the appellant to him and asked him if he knew him. That PW5 stated that the appellant was the only person in handcuffs at the time. Counsel submitted that the conduct by the police of taking the appellant to PW1 amounted to dereliction of duty which should operate in favour of the appellant to the extent that had the police conducted themselves properly, the appellant may not have been identified by PW1.

In ground three, Mrs. Lukwesa argued that the appellant set out his defence of *alibi* in accordance with our decisions in the cases of **Katebe v The People**[4] and **Ilunga Kabala and John Masefu v The People**[5] but the trial court wrongly rejected it without the prosecution disproving it. Mrs. Lukwesa submitted that there is no law that provides that an *alibi* is only a valid defence if it is brought to the police's attention at the time of arrest. In this case, Counsel argued that the police contributed to the

failure by the appellant to inform them as they brutally assaulted him and did not afford him the opportunity to give his side of the story.

In ground four, learned Counsel criticized the police for their failure to lift finger prints from the recovered motor vehicle and toy gun. She alleged that there was dereliction of duty as guided by this court in the cases of **Peter Yotam Hamenda v The People**[6] and **Felix Silungwe and Shadreck Banda vs. The People.**[7] Mrs. Lukwesa submitted that the allegation against the appellant is that he stole the vehicle and drove it away and the failure to lift fingerprints amounts to dereliction of duty which should be resolved in favour of the appellant. She urged us to quash the conviction and set aside the sentence and set him at liberty.

In response to ground one, Ms. Bah supported the appellant's conviction. She submitted that the judgment of the lower court shows that the trial court found the evidence of PW3 and PW4 to be credible as they had no interest in the case and they had no reason to tell lies. The two witnesses' evidence was not shaken in cross-examination. Counsel for the State submitted that the two

witnesses gave evidence as they perceived things to have happened as regards the stolen vehicle.

In relation to ground two, Ms. Bah submitted that the trial court observed the demeanour of PW1 whose evidence was very clear that he was booked by the appellant. She pointed out that PW1 stated that at the time of negotiating the taxi fare the light in the vehicle was on and they had a normal conversation and were together for about 40 minutes. He gave a description of the appellant and what he was wearing. She submitted that the appellant was identified at the police station by PW1. According to Ms. Bah, there was no need for an identification parade and the police cannot be accused of dereliction of duty.

Arguing ground three, she submitted that the trial court was on firm ground when it ignored the *alibi* raised by the appellant as evidence on the record is clear.

Responding to ground four, Counsel submitted that PW5 stated that fingerprints could not be lifted from the vehicle and the gun. She argued that on the totality of the evidence, it is clear that the appellant robbed PW1 of the vehicle and his phone. She

submitted that the ingredients of the offence were satisfied and the exhibits were properly connected. In conclusion she submitted that the appeal has no merit.

We have considered the arguments by the parties. It is not in dispute that the vehicle belonging to Lovemore Mulenga driven by PW1 was stolen on the 14th November, 2007. In the four grounds of appeal, Counsel raised the following issues: That PW3 and PW4 were witnesses with an interest to serve contrary to the finding by the trial court; that the evidence of identification was inadequate and that there was dereliction of duty on the part of the police; the appellant's *alibi* should not have been rejected as the prosecution failed to negative it and lastly, the police's failure to lift fingerprints from the recovered motor vehicle and the toy gun amounted to dereliction of duty.

The issues raised in the grounds of appeal are inter-related and we will deal with them together.

According to PW1, he was booked by the appellant around 22:00 hours on the 14th November, 2007 and he was robbed of the vehicle and cell phone by the appellant. This was the same

day that PW3 and PW4 stated that the appellant arrived at their home in the morning from Lusaka. He was a family friend and a Pastor. On arrival, he informed them that he had come with a vehicle but he had left it at a garage in Masala township within Ndola. Later, the appellant left their home to go and pick up the vehicle. True to his word, he came back around 23:00 hours with a vehicle. The following morning, the appellant removed the tyres and partially covered the vehicle with a black plastic. That morning, PW2 called PW1's stolen mobile phone and to his surprise a woman answered who informed him that the owner of the phone, a visiting Pastor from Lusaka was taking a bath. When requested for the residential address and directions to her house, she willingly revealed. This is how the stolen vehicle and the mobile phone were recovered and the appellant was eventually cornered and apprehended.

Addressing specifically the evidence of identification by PW1 the victim of the robbery, we agree with Mrs. Lukwesa that PW1's evidence of identification left much to be desired. Although PW1 was clear in his evidence that he was able to identify his assailant as he spent quite some time with him from when he booked him up

to the time he bundled him into the boot, our view is that the evidence of identification was mishandled. This is because after apprehending the appellant, the police took the appellant to the police station in handcuffs in full view of PW1 who was present at the police station. The police even asked PW1 whether this was the person who robbed him. It is trite that the police should have conducted an identification parade to ensure fairness and to eliminate the danger of an honest mistake since the appellant was a total stranger to PW1. In the case of **Peter Yotamu Hamenda vs. The People**[6] we held that:

> **(ii) Where the quality of identification is good and remains so at the close of the defence case the danger of mistaken identification is lessened; the poorer the quality the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. Odd coincidences can provide corroboration.**

The question is whether there is any evidence to support PW1's poor evidence of identification? We take the view that the appellant provided unflinching support to the evidence of PW3 and PW4 by placing himself at the scene. This evidence is in the form of the appellant leading the police to the recovery of the number plates

of the stolen vehicle and the pistol used in the robbery which he had hidden in the stolen vehicle. Clearly, after robbing PW1 of the vehicle and phone, the appellant made his way to the Ngulube residence where he parked the vehicle and police found it there. On this evidence alone, the appellant's guilt cannot be doubted. We could end here but we have been invited by Counsel for the appellant to consider whether the learned trial judge erred when she found that PW3 and PW4 had no interest in the matter.

We agree that the learned trial judge misdirected himself when she held that PW3 and PW4 had no interest in the matter. *Prima facie* and following our numerous decisions on the status of persons found in possession of stolen property, PW3 and PW4 are accomplices. In **Machobane vs. The People**[8], we held that:

> **(i) Where a witness is found in possession of stolen property he must be regarded as an accomplice unless, on the whole of the evidence, the court finds as a fact that he is not an accomplice and in the absence of such finding such witness will be assumed to be an accomplice in considering an appeal.**

Further, in the case of **George Musupi vs. The People**[9] we held that:

(i) Although there is a distinction between a witness with a purpose of his own to serve and an accomplice, such distinction is irrelevant so far as the court's approach to their evidence is concerned; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded.

(ii) The tendency to use the expression "witness with an interest (or purpose) of his own to serve" carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.

(iii) Once in the circumstances of the case it is reasonably possible that the witness has motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe. (Emphasis ours)

The important consideration is whether the danger of false implication was excluded in this case in view of the fact that the stolen vehicle and mobile phone were found at the residence of Mr. and Mrs. Ngulube who were key witnesses. It was a misdirection for the learned trial judge to ignore the danger of false implication which was present in this case. The only way to eliminate the danger of false implication was to find corroborative evidence. Of course, we have already found that the appellant led the police to the recovery of the number plates and the pistol. On the authority

of **Machipisha Kombe vs. The People**[10] we find that there were odd coincidences in this case which constitute "something more": the appellant is the same person who according to PW3 and PW4 arrived at their home the previous night with the vehicle; on apprehension, the appellant led the police to the recovery of the number plates of the stolen vehicle and the firearm allegedly used in the robbery which were identified by PW1; the mobile phone belonging to PW1 was found on his person as well a black plastic which he had gone to purchase at the market to cover the vehicle in line with PW3 and PW4's evidence. Surely, if PW3 and PW4 were involved in the robbery a few hours earlier, we doubt if PW4 would have willingly given directions to her home to an unknown person for fear of the stolen vehicle being discovered and the appellant would not have been found in possession of PW1's phone if it belonged to the Ngulubes as he stated. In our view, the conduct of PW3 and PW4 did not disclose any guilt on their part. As far as they were concerned the vehicle belonged to the pastor (the appellant) who had arrived the previous day and parked the vehicle at night. When the police arrived at their home in the company of PW2 the owner of the vehicle, PW3 and PW4 were unperturbed and

explained that the person who brought the vehicle had gone to the market to buy a plastic to completely cover the stolen vehicle. In contrast, at the time of apprehension, when the appellant saw the police, he attempted to flee and was stopped by the warning shot fired by the police. His behaviour was not that of an innocent person.

Turning to the issue of the appellant's *alibi*, our view is that with the overwhelming evidence adduced by the prosecution, there was no room for the appellant's *alibi* to stand.

On the issue of lifting of fingerprints, our considered view is that failure to lift fingerprints from the vehicle and the gun did not prejudice the appellant as the evidence produced by the prosecution left no doubt as to the guilt of the appellant.

We find no merit in all the grounds of appeal. We uphold the conviction and sentence by the lower court. The appeal is dismissed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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A.M. WOOD
SUPREME COURT JUDGE