

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CRIMINAL JURISDICTION)**

**JEFF MALALIKI**

**Appellant**

**V**

**THE PEOPLE**

**Respondent**

**CORAM: Ngulube, CJ, Chirwa and Chibesakunda, JJs on 2<sup>nd</sup>  
April and 20<sup>th</sup> August 2002**

**For the 1<sup>st</sup> Appellant: In Person**  
**For the 2<sup>nd</sup> Appellant: Nil**  
**For the 3<sup>rd</sup> Appellant: In Person**  
**For the 4<sup>th</sup> Appellant: Mr. A.C. Nkhausu, Principal Legal Aid Counsel**  
**For the People: Mr. M. Mukelabai, Director of Public Prosecutions**

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**J U D G M E N T**

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**Chirwa, J.S. delivered judgment of the court: -**

**Cases referred to:**

- (1) R V TURNBULL [1976] 3 ALL E.R. 445**
- (2) KATEKA v THE PEOPLE [1977] Z.R. 36**
- (3) CHIMBINI v THE PEOPLE [1973] Z.R. 191**

This judgment should be considered as judgment of the majority of the court.

The original indictment involved seven accused persons but after trial only the four appellants were found guilty and convicted on some counts. Whilst the appeal was pending, the second appellant, JOHN KAWINA died. At the

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hearing of the appeal the 1<sup>st</sup> and 4<sup>th</sup> appellants withdrew the appeals and their appeals were accordingly dismissed. The appeal and judgment only relates to the 3<sup>rd</sup> appellant, **JEFF MALALIKI** and in this judgment he is referred to as the appellant.

The appellant was convicted on one count of aggravated robbery, contrary to Section 294 (1) of the Penal Code, Cap. 87 of the laws of Zambia and was sentenced to 20 years imprisonment with hard labour with effect from 25<sup>th</sup> February 1994, the date of his arrest. He has appealed against conviction only. The appellant had himself put in written heads of argument in support of the appeal and Mr. Nkausu who represented him also relied on grounds filed by the appellant and amplified them in his oral submissions. The conviction is attached on the identification of the appellant by the complainant in that count, Mr. Keith Mwanza, who was PW 11 during trial which it was said was unsatisfactory and also the reliability of the identification parade was questioned. In essence the appeal is based on a single identifying witness.

The evidence of PW 11 was that in the evening of 21<sup>st</sup> January 1994 around 1900 hours he was driving his motor vehicle with South African registration number OKE 148 in Bulangililo compound to go and see his girl friend. As he was approaching the house, he observed in his rear view mirror another motor vehicle following him, he indicated to this other vehicle to overtake his as he turned to the gate of the house of his girl friend and he hooted for the people to open the gate for him. As he was waiting for the gate to open he saw one man from the vehicle that had been following him come to

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him and pointed a gun at him and was ordered to come out of the motor vehicle and to hand over the keys. He gave away the keys and as he was with a friend, they were ordered to lie on the ground of which they did. They were then lifted from the ground and put at the back of his motor vehicle which was incidentally a van. They were then driven into the bush after he showed them how to start the vehicle. Whilst in the bush they ran out of fuel and the assailants then started debating amongst themselves as to whether to kill them or not. The assailants then tied a rope to the witness' vehicle and towed it to a near stream where they stopped. Again the assailants debated whether to kill them or not. They again decided not to kill them instead they tied their hands and legs and abandoned them in the bush. Around 0400 hours or 0500 hours they were rescued by charcoal burners and were told that they were not the first ones to be left in the bush. The witness then made his way to Riverside Police Station and reported the matter. PW11 stated that where he was robbed there was some light and that of the people who robbed them he recognized four (4) out of a group of 7. He recognized the 4 as he knew them before and were his acquaintances and knew their names as Jeff, Chanda, Slim and Blacky. He identified Jeff as the appellant and that he used to do business with him in the Congo. He further stated that he identified the appellant at an identification parade on 22<sup>nd</sup> February 1994. Under extensive cross-examination he told the court that after he was robbed and reported the matter to the Police, he and some Police Officers followed the appellant where he knew he was doing some business in the Congo and that he could not be mistaken on identify.

The evidence of arresting officer is that on 16<sup>th</sup> April 1994 he was handed over four (4) men from Zaire (Congo D.R.) who included the appellant and he arrested the appellant for one count of aggravated robbery where the

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complainant was Keith Mwanza and this was after an identification parade conducted on 22<sup>nd</sup> April 1994 by PW 15.

The evidence of PW 15 was that he conducted an identification parade on 25<sup>th</sup> April 1994 at which the appellant was one of the suspects and the appellant was identified by Keith Mwanza. From the evidence, of this witness, he conducted a number of identification parades involving many complainants and suspects but at only one of 25<sup>th</sup> April 1994 was the appellant identified by Keith Mwanza.

On the evidence as to when the identification parade was conducted at which the appellant was identified, we agree that there is a confusion on the prosecution side but from the evidence of the complainant, PW 11, Keith Mwanza he attended one identification parade at which he identified the appellant and one other person. The arresting officer stated that he arrested the appellant on one count of aggravated robbery in which the complainant was Keith Mwanza. Also the evidence of the officer who conducted the identification parades, only at one parade did he have a witness Keith Mwanza identify the appellant. Accepting this confusion of the dates, one common factor comes out that Keith Mwanza attended one parade at which he identified the appellant and this is supported by the officer who conducted the parade.

This evidence of the date of identification parade has been made a point in arguing this appeal, namely that if the parade was conducted on 22<sup>nd</sup> February 1994 at which Keith Mwanza identified the appellant, that was not possible as the appellant was in Zaire (Congo D.R.) and this is also supported by the arresting officer who stated that the appellant and three others were handed over from Zaire (Congo D.R.) on 16<sup>th</sup> April 1994 and he arrested the appellant after the parade conducted in April 1994. Does this confusion in date affect the

credibility of any prosecution witness? In the circumstances of this case, we do not think so. It could have been otherwise if the complainant attended a number of identification parades. But here, he attended one parade and identified the appellant. The officer who conducted a number of parades involving a number of suspects in a number of crimes states that PW 11 identified the appellant on one parade. There is one common factor of PW 11 attending one parade and identifying the appellant.

However, this is not the end of the matter as both the appellant and The People agree that this was a case of a single identifying witness so that even if we disregarded the evidence of the identification parade, the prosecution case falls or stands on the identification evidence of Keith Mwanza.

This court has stated in a number of cases that a court is competent to convict on a single identification witness following upon the famous case of **R V TURNBULL (1)** in **KATEKA v THE PEOPLE (2)** and the case of **CHIMBINI v THE PEOPLE (3)** is more relevant to the present case.

The single identifying evidence of, PW 11, has already been referred to in our judgment. The appellant was known to him before and they used to do business together in the Congo. At the time of the robbery, there was some electric light at the gate of the house where he intended visiting. The appellant was with the robbers for a considerable time when they took him to the bush and where they were debating whether to kill him or not and when they finally tied him up. The witnesses further showed his observation and confidence when he led Police Officers into Congo looking for the appellant. We agree with the learned Director of Public Prosecutions that there was ample opportunity for the

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witness to observe the appellant. It was not a glimpsing opportunity. We are satisfied that the possibility of an honest but mistaken identification has been eliminated in this case. We confirm his conviction and dismiss his appeal against the conviction. There was no appeal against sentence, we feel the sentence is adequate considering that it was a gang aggravated robbery and the dehumanizing experience that the witness went through of being tied and left in the bush at night.

**M. M. S. W. NGULUBE**  
**CHIEF JUSTICE**

**D. K. CHIRWA**  
**SUPREME COURT JUDGE**

**L.P. CHIBESAKUNDA**  
**SUPREME COURT JUDGE**