

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA

SCZ NO. APPEAL NO. 52 & 53/2001

(CRIMINAL JURISDICTION)

B E T W E E N

JONATHAN KASONGO  
SAMUEL MUTAMBO

1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Sakala, Chibesakunda, JJS and Mambilima, Ag. JS  
on 4<sup>th</sup> September 2001 and 5<sup>th</sup> March 2002

For the Appellant: Mrs. I Kunda of Messrs George Kunda and Company  
For the Respondent: Mr Mukelabai Mukelabai, Director of Public Prosecution

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**JUDGMENT**

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Chibesakunda JS, delivered the judgment of the Court

In this appeal the Appellants were convicted at the High Court level on aggravated robbery contrary to section 294 (1) of the Penal Code Cap. 87 of the Laws of Zambia and sentenced to 15 years IHL with effect from 20<sup>th</sup> July 2001. The particulars were that they on the 28<sup>th</sup> of July 2001 at Ndola in the Ndola District of the Republic of Zambia jointly and whilst acting together did rob Charles Chiwilo of K35,000.00 and at or immediately before or immediately after the time of such robbery did use or threaten to use actual violence to the said Charles Chiwilo in order to obtain or retain the said property.

The evidence before the court on which the lower court convicted the two Appellants was that PW1 Charles Chiwilo was coming from his in-law's house around 21.00 hours on 20<sup>th</sup> June 2000 following the location path of Sinia compound in Ndola. As he did so, he came to the point where one man emerged and got hold of him and

quickly blind folded him with a cloth whilst pointing a kitchen knife against his right ear. As he was in that position he then pinned PW1 to the ground and searched him. It was during that search that PW1 realized that he was being attacked by more than one person. These persons got money from PW1 and they ran away. PW1 quickly removed the cloth from his face and saw his two attackers running to a certain house within that compound. He was brave enough and followed them to the house. When he got to them he demanded for his money. The two pounced on him and started beating him very severely. PW2 who was the owner of the house witnessed the attack of PW1 by two people. PW1 testified that he was unable to go to the assistance of PW1 as he was frightened. He kept peeping through the window and at the time identified the 1<sup>st</sup> Appellant as the friend to his tenant who was renting his kitchen. He identified him as the one who came visiting his tenant during the day. After the attackers had run away, the complainant remained on the scene and PW2 assisted him by giving him valuable information. The matter was reported to the Police. The following morning PW1 with his sympathizers visited PW2 for further details. The police then investigated and two Appellants were arrested for the subject offence.

The 1<sup>st</sup> Appellant's evidence before the lower court is that the Appellants had gone to PW2' house to visit his friend who was his tenant and he had gone there to rest. As he was resting, PW1 came and grabbed his leg and accused him of having assaulted his daughter called Sharon. This was the cause of the fight. He was surprised that he following day was apprehended by members of the public and handed over to the Police as the one who assaulted PW1 and stole from him in the course of assaulting him. The 2<sup>nd</sup> Appellant's version is to the effect that during the evening in question he was passing through Chalembwa's place as he was going to see his young brother in riverside then found the 1<sup>st</sup> Appellant fighting with PW1. He was under the wrong impression that his friend was being attacked by criminals so he tried to separate them although he discovered contrary to his view that is two brothers were involved in.

The court accepted the prosecution's evidence and held that the admission by the two Appellants of being present at PW2's house on the evening on the date in question

and their acceptance that there was a fight between the 1<sup>st</sup> Appellant and PW1 confirm the Prosecution's evidence. This led to the court refusing to accept the 2nd Appellant's version that he was an innocent passerby and not at all involved in the fracas. The learned trial Judge went on to hold that the fact that the Appellant did not tell the court the reason why PW1 and the 1<sup>st</sup> Appellant were fighting supported the evidence of the prosecution that the two were involved in the fight. He therefore convicted them of the subject offence.

Before us Mrs Kunda arguing for the Appellants argued that the lower court erred in accepting the version of the prosecution. The court ought to have accepted the evidence of the two Appellants. The learned Director of Public Prosecutions supported the conviction.

We have looked at the record of the lower court. We have also considered the judgment of the learned trial Judge. We have pondered over the arguments by the two Appellants. We hold that the learned trial Judge was best suited to look at the demeanour of the witness and he believed the evidence of the prosecution. As an Appeal Court, we are not in a position to assess the demeanour of witnesses. We, therefore, uphold the lower court's findings. We find therefore no merit in the appeal. We dismiss it. We confirm both conviction and sentence.

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**E L Sakala**  
**SUPREME COURT JUDGE**

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**L P Chibesakunda**  
**SUPREME COURT JUDGE**

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**I C Mambilima**  
**AG. SUPREME COURT JUDGE**