IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

Appeal No. 10 of 2002

BETWEEN:

GEOFFREY JORKAN MACHAYI — APPELLANT

AND

THE PEOPLE — RESPONDENT

CORAM: Ngulube, CJ, Sakala and Chitengi, JJS

On 5th March, 2002 and 4th June, 2002.

For the Appellant : Mr. A. E. C. Mulemena
Principal Legal Aid Counsel

For the Respondent : Mrs J.C. Kaumba
Deputy Chief State Advocate

JUDGMENT

Chitengi, JS, delivered the Judgment of the Court.

Case and Legislation Referred to: -

(1) John Timothy and Feston Mwamba Vs The People (1977) ZR 394

(2) Firearms Act Cap 110 of the Laws of Zambia Section 2

The Appellant was sentenced to death for Aggravated Robbery contrary to ***Section 294(2) (a) of the Penal Code Cap 87 of the Laws of Zambia***. The particulars of the offence alleged that Geoffrey Jorkan Machayi and Moses Likomena on the 12th day of April, 2000 at Zambezi in the Zambezi District of the North Western Province of the Republic of Zambia jointly and whilst acting together with other persons unknown and whilst armed with

firearms namely AK47 Rifles did steal five oxen valued at K3,250,000.00 the property of Mpidi Development Farm from Shadreck Kavanda and at or immediately before or after the time of such stealing did use or threatened to use actual violence to the said Shadreck Kavanda in order to obtain or retain the animals stolen.

Moses Likomeno who was jointly charged with the Appellant was acquitted at the close of the prosecution case, the learned trial Judge ruling that a prima facie case had not been made out against Moses Likomeno.

The facts upon which the Appellant was convicted were that on the 12th day of April, 2000 two herdsmen Shadreck Kamuti Kavanda, who was the first prosecution witness, and another man called Yona Chiyoza took cattle belonging to Mpidi Development Farm into the bush for grazing at about 11:00 hours. The number of the cattle was put at 90 by Shadreck Kamuti Kavanda(PW1) and 80 by the cattle section supervisor Steven Kayenda who was the third witness for the prosecution. As the cattle were grazing the Appellant and two others approached the first prosecution witness and Yonah Chiyoza. The Appellant and another man were armed with guns while the third man had a bag. The Appellant went to the first prosecution witness, pointed a gun at and ordered, him to sit still or he (Appellant) would shoot him. The first prosecution witness attempted to run away but the Appellant chased, caught and gagged him so that he could not shout. The first prosecution witness was then forced to lead the Appellant and the other two

men to where the cattle were grazing. By that time Yonah Chiyoza had escaped. When they went to where the cattle were grazing the Appellant selected five oxen from the herd and forced the first prosecution witness to accompany them as they drove the cattle further into the bush. When they reached a plain the Appellant and the other two men forced the first prosecution witness to dig a well for water. The well yielded very little water and they continued driving the oxen.

After three hours the Appellant and the other two men called the first prosecution witness. The Appellant then fired one shot in the air and gave the first prosecution witness the spent cartridge saying that the first prosecution witness was very lucky that he was not killed and told him to give the spent cartridge to the Farm Manager with a message that the bullet was intended to kill him and that the Appellant and the other two men would go to the farm to kill him in the month of June. After that, the Appellant directed the first prosecution witness to go in a certain direction. The first prosecution witness went in the direction pointed to him by the Appellant and later came to a road which he followed until he reached the farm where he reported the matter and gave the spent cartridge to Steven Kayenda (PW3). Steven Kayenda drove to Zambezi on his motorcycle and reported the theft of the cattle to the Police and handed the spent cartridge to the Police.

On the 14th of April 2000 Lawrence Kangusa Muzeya, the second prosecution witness, who was checking his fish traps at the river saw five oxen, which he recognised to be from Mpidi

Development Farm, being driven by a man armed with an AK47 assault rifle. On seeing this, the second prosecution witness hid himself but the man saw him. The man went towards the second prosecution witness while pointing the gun at him. However, the second prosecution witness noticed that the gun had no magazine. Thereupon the second prosecution witness charged the man with his spear and asked him where he got the oxen from. On seeing the second prosecution witness charging, the man fled. The second prosecution witness then reported the matter to the village headman and after that the oxen were driven to the nearby veterinary office and later to the Police.

The Appellant was later apprehended by the Police. On the 16th April, 2000 the first prosecution witness identified the Appellant at an identification parade at Mpidi Development Farm conducted by Chief Inspector Martin Chunga(PW5). When formally charged and arrested the Appellant denied the charge saying, "I deny the charge".

The Appellant gave a long detailed story in his defence the import of which was to deny knowledge of the robbery and the oxen the subject of the charge. The Appellant however admitted being put on an identification parade but said the herdsman failed to identify any one and the Police told him to touch the shoulder of either the Appellant or the second man (presumably Moses Likomeno) so that they should take photographs. Thereupon the herdsmen touched his shoulder and photographs were taken.

Mr. Mulemena, for the Appellant, argued three grounds of appeal.

The first ground of appeal was that the learned trial Judge erred in law and fact in accepting the evidence of the first prosecution witness that the Appellant and others had guns and that one of the guns was fired in the air and the spent cartridge was picked and given to the first prosecution witness to give to his Manager when in fact the firearm and the spent cartridge were not produced to court.

Citing the case of ***John Timothy and Feston Mwamba Vs The People (1977) ZR 394(1)*** Mr. Mulemena submitted that it was held in that case that to establish the offence of Aggravated Robbery under Section 294(2) of the Penal Code the prosecution must prove that the weapon seen or used was a firearm within the meaning of ***Section 2 of the Firearms Act*** then ***Cap 111 of the Laws of Zambia*** (now ***Cap 110)(2)***. In this case, Mr. Mulemena submitted, no firearm was produced and examined by a ballistic expert. Further, Mr. Mulemena submitted that the first prosecution witness gave evidence that he gave the spent cartridge to his manager who in turn gave it to the Police but the Police officer failed to produce the spent cartridge, saying he had left it. It was Mr. Mulemena's submission that the non-production of the firearm and the spent cartridge was fatal to the prosecution.

Mrs Kaumba, for the Respondent, submitted that although the firearm and spent cartridge were not produced, there was

evidence from the first prosecution witness that he saw a gun and that it was fired in the air and later the first prosecution witness' assailants gave him the spent cartridge to take to his manager who in turn gave it to the Police. It was Mrs Kaumba's submission that in terms of the case of ***John Timothy and Feston Mwamba Vs The People*** which Mr. Mulemena cited, the hearing of a gun shot and the finding of a spent cartridge proved a firearm within the meaning of ***Section 2 of the Firearms Act Cap 111 of the Laws of Zambia***.

We have considered the evidence that was before the learned trial Judge and the submissions of counsel on this issue. We do not accept Mr. Mulemena's submission that there was no evidence upon which the learned trial Judge could make a finding that the gun seen by the first prosecution witness was a firearm within the meaning of ***Section 2 of the Firearms Act Cap 111 of the Laws of Zambia***.

As Mrs. Kaumba rightly submitted, although the spent cartridge and the gun were not produced there was ample evidence that a gun was seen by the first prosecution witness and that it was fired in the air and after that the assailants of the first prosecution witness gave him the spent cartridge. The first prosecution witness described the gun as an AK47. We have no evidence on the record that the first prosecution witness did not know anything about guns. The fact that the gun was fired and a spent cartridge came from the barrel is evidence to us that the weapon was a lethal barreled weapon from which a shot could be

discharged or which could be adapted for the discharge of a shot. We are, therefore, satisfied that gun seen by the first prosecution witness was a firearm within the meaning of ***Section 2 of the Firearms Act Chapter 111 of the Laws of Zambia.***

In the circumstances we cannot say that the non production of the spent cartridge was fatal to the prosecution case. The learned trial Judge was on firm ground when made a finding that the gun used was a firearm within the meaning of ***Section 2 of the Firearms Act Cap 111 of the Laws of Zambia*** and we cannot fault him. This ground of appeal, therefore, fails.

The second ground of appeal which Mr. Mulemena argued was about the identification of the Appellant. Mr. Mulemena attacked the finding of the learned trial Judge, saying the learned trial Judge erred in law and fact when he held that the Appellant was properly identified. Mr. Mulemena then attacked the evidence of the fifth prosecution witness as being manifestly unreliable as it was full of inconsistencies contradictions and lies. Further, Mr. Mulemena drew our attention to what he called were contradictions in the prosecution evidence as to where the identification parade was held, who were on the parade and why it was not held at Zambezi Boma. According to Mr. Mulemena, the parade was not properly conducted.

Mrs Kaumba's reply to all this was simply that the parade was fair and that there was nothing wrong in holding the parade at

the farm and that not all the people on the parade were farm workers.

We are persuaded to accept that the identification parade was not held in the fairest manner. For instance, here were two strange persons stuck in an identification parade comprising persons mainly from the farm. We also note some contradictions in the evidence of the Police witness (PW5) which related mainly to the holding of the identification parade and how the Police travelled with the Appellant from Zambezi to Mpidi Development Farm. But, on the facts of this case we cannot fault the learned trial Judge's finding of fact that the Appellant was properly identified. As the learned trial Judge quite properly observed, and as we have repeatedly said before, in cases of identification by a single witness, the honesty of the witness is not the issue. The issue is the reliability of the witness's observation so that the possibility of an honest mistake is excluded.

In this case, there was evidence that the first prosecution witness was with the Appellant and the other persons for three hours in broad daylight. In the circumstances it is inconceivable, even taking into account the fact that the first prosecution witness was under the emotion of fear, that the first prosecution witness could mistake the identity of the Appellant with whom he spoke and spent three hours in broad daylight. We find that the learned trial Judge was justified to make the finding that the Appellant was properly identified. This ground of appeal also fails.

The third ground of appeal argued by Mr. Mulemena appears to us to be an extension of the second ground of appeal. Mr. Mulemena referred us to many earlier cases on corroboration which we have decided before. We do not intend to recite and go into the details of these cases because we are satisfied that in the instant case we are not making any new principles which will depart from those we have laid down in the previous cases cited to us by Mr. Mulemena.

Mr. Mulemena also complained about the absence of one of the alleged suspects who was with the Appellant. Further, Mr. Mulemena went back to the issue of identification of the Appellant and said there was mistaken identity and that there was no armed robbery.

In reply Mrs Kaumba submitted that corroboration is not required in this case because the evidence of the first prosecution witness was good. The robbery took place during the day at about 12.00 hours and the first prosecution witness was with his assailants for three hours. The first prosecution witness was made to dig a well and was speaking with his assailants. The observation was reliable. Mrs Kaumba then explained the missing suspect who she said was discharged via a nolle prosequi.

We have considered these submissions. As we have already intimated, the third ground of appeal is just an extension of the second ground of appeal. We have already held that the appellant was properly identified. We do not apprehend why the non

prosecution of one of the persons who was alleged to have been with the Appellant should be made an issue in this case. We say so because in criminal law it has never been a defence to say that one's co-accused has not been prosecuted. The defence has always been that the accused did not commit the offence with which he is charged. Indeed, that was the defence the Appellant put up at his trial. But the prosecution proved beyond all reasonable doubt that the Appellant committed the offence charged.

About corroboration. We agree with the learned trial Judge's observations that in this case he could rely on the evidence of one identifying witness as long as he was satisfied that the possibility of an honest mistake had been excluded. We also agree with Mrs Kaumba's submission that corroboration was not required in this case because the identification by the first prosecution witness was not poor.

With respect to the submission that on the facts of this case there was no robbery, we say that we find this submission startling.

In reply to Mrs Kaumba's submissions Mr. Mulemena conceded that the firing of the gun and the spent cartridge could be evidence of a gun but argued that nobody else came to testify to the firing of the gun.

We do not appreciate what the import of this submission is supposed to be. The evidence we have is that while the first

prosecution witness's friend escaped the first prosecution witness was captured. We have no evidence that there were other persons within the vicinity of the robbery who could have heard the gun shot and who should have been called to confirm or deny the hearing of a gun shot. We view this submission as an invitation to us to venture into the realm of speculation. We decline to accept the invitation.

This ground of appeal must also fail.

Mr. Mulemena said the appeal was also against sentence. Of course, there can be no appeal against sentence where the law has fixed a mandatory sentence like in this case.

For the foregoing reasons, we dismiss the appeal.

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NGULUBE CHIEF JUSTICE

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SAKALA SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE