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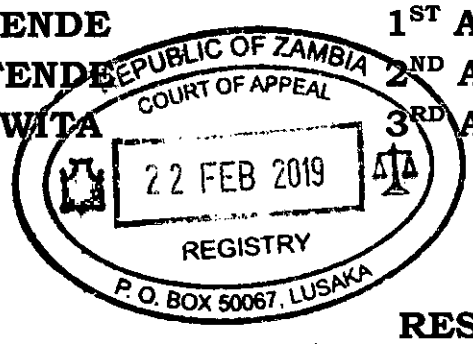
IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 131/2017**
HOLDEN AT NDOLA
(*Criminal Jurisdiction*)

BETWEEN:

MATEO MWANSAPA KATENDE **1ST APPELLANT**
DAVIES MWANSAPA KATENDE **2ND APPELLANT**
ODILO MUKWEMBA KABWITA **3RD APPELLANT**



AND

THE PEOPLE **RESPONDENT**

Coram: Makungu, Sichinga and Ngulube J.J.A
On the 19th and 22nd day of February, 2019

For the Appellants: Mr. P. Chavula Senior Legal Aid Counsel – Legal Aid Board
For the Respondent: Mrs. M.K. Chitundu, Deputy Chief State Advocate – National Prosecutions Authority

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JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Winfred Sakala v. The People (1987) ZR 23*
2. *Kambarage Mpundu Kaunda v. The People (1990 – 1992) ZR 45*
3. *Simon Malambo Choka v. The People (1978) ZR 243*
4. *Chilombo and others v. The People (1982) ZR 205*
5. *Yokoniya Mwale v. The People – Appeal No. 285/2014 (SC)*
6. *Katebe v. The People (1975) ZR 13 (SC)*
7. *Peter Yoram Kaamenda v. The People (1976) ZR 184*
8. *Muvuma Kambanja Sitina v. The People (1982) ZR 115*

9. *Mukena v. The People – Appeal No. 128/2009 (2012) ZMSC 34*
10. *Morgan Gibson Mwape v. The People – CAZ 31/2016*
11. *Ngati and others v. The People – SCZ Judgment No. 14 of 2003*
12. *Abednego Kapesha and Best Kanyakula v. The People - SCZ 35/2017*
13. *Donald Taulo and Wayson Mboko v. The People – SCZ Appeal No 527/2017*
14. *Chitalu Musonda v. The People – Appeal No. 138/2014*
15. *Joe Mulenga and others v. The People – CAZ Appeal No. 92 – 95/2018*

Legislation referred to:

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

The appellants were convicted of one count of murder contrary to Section 200 of the Penal Code and sentenced to death by the High Court on 29th May, 2018. The particulars of the offence were that on the 20th day of August, 2015 at Solwezi in the Solwezi District of the North- Western Province of the Republic of Zambia, jointly and whilst acting together, the appellants murdered Juberk Mishele.

In this Judgment we shall refer to Juberk Mishele merely as Mishele. The case for the prosecution rested on the evidence of three witnesses namely Alex Kashibeni (PW1) Mishele's brother, Nkomba Mishele-Mishele's son (PW2) and Annette Kaunda a Police Officer (PW3). Each accused person, now appellant, gave evidence on oath as DW1, DW2 and DW4 respectively. The 1st and 2nd appellants

called one witness, namely Harrison Simutanda (DW3). The 3rd appellant also called a witness, Luka Mukwamba (DW5).

The prosecution evidence can be summarized as follows:

On 18th August 2015, PW1 and PW2 were both at village Katelwe in Kamebende, Solwezi District attending the funeral of Given Lunganda the grand child of Mishele's wife. The pallbearers were the 1st and 2nd appellants and Konkeni Katende who went and demolished the front part of Mishele's house with the coffin where the corpse of Given Lunganda was lying. Thereafter, they started looking for Mishele whom they found behind the house giving instructions to his workers. They beat him up and brought him to the front of the house where Chida, Tom Katende, Musonda and others joined in beating him. PW1 attempted to stop them from beating Mishele but they threatened to kill him. They sat Mishele on the ground and placed the coffin on his lap which they tied to his feet. They also tied his hands. Then the 3rd appellant climbed on the coffin and started shaking it. The 2nd appellant got a stick and hit Mishele on the head and ribs. Mishele asked the headman to intervene but he refused saying he knew what he had done and they would teach him a lesson. Thereafter, the 1st appellant hit Mishele

with a brick on the head. Kaunda, Kabwita, Chida, Tom and Konkeni kicked Mishele and only stopped after he had wet himself and started wheezing with blood coming out of his mouth. Thereafter they moved him to the funeral house and placed the coffin next to him. The ordeal lasted from 08:00 hours to 16:00 hours. Further prosecution evidence was that the deceased was beaten up because he was accused of having killed Given Lunganda through witchcraft. PW1 went and reported the matter to the police that day, who went and picked up Mishele and took him to Solwezi General Hospital where he was admitted until 20th August, 2015 when he passed away. On 22nd August, 2015 a postmortem was conducted at Solwezi General Hospital and a report issued indicating the cause of death as "Hemothorax and severe head injury."

PW3 investigated the matter from 24th August, 2015. She tendered in evidence the postmortem report dated 22nd August, 2015. She stated that all the witnesses she interviewed were the late Mishele's relatives. Each accused person told her that they were not in Kamabende at the material time but she did not investigate their alibis.

In brief, the defence evidence was that on the material date, DW1 and DW2 who are brothers and relatives to the late Given Lunganda were working at the bus station in Solwezi as bus driver and conductor respectively. They only learnt about the 'Kikondo' that was performed on the death of their cousin's child two days after the incident. The 3rd appellant is a stranger to them and Mishele's wife is their grandmother. DW3's testimony was that he worked with both DW1 and DW2 on 20th August, 2015 at the bus station throughout the day.

DW4's evidence was that on 20th August, 2015 he was at his shop at the check point in Kilumba area from 08:00 to 20:00 hours. He had no idea why PW1 and PW2 told the court that he was at Kamabende village participating in the 'Kikondo.' DW5 stated that he was with DW4 at the check point doing business on 18th and 20th August, 2015 from 06:00 to 20:00 hours and they knew nothing about the funeral.

The lower court found that Mishele was mercilessly assaulted by a mob because he was suspected to have killed a child through witchcraft. The court considered Sections 22, 200 and 204 of the

Penal Code and the case of **Winfred Sakala v. The People,** [1] and the evidence on record. He further found that the postmortem report corroborated the evidence of PW1, PW2 and PW3 that Mishele was assaulted. He found PW1 and PW2 to be credible witnesses. He dismissed the evidence of DW1 and DW2 that they did not attend the funeral of their relative because they were elsewhere as strange and untrue. DW4's evidence was also rejected as the court found it totally false.

The court applied the case of **Kambarage v. The People** [2] and found PW1 and PW2 to be witnesses with possible interests of their own to serve as relatives of the late Mishele. However, he ruled out the danger of false implication.

The appeal is based on two grounds couched as follows:

1. The learned trial Judge erred and misdirected himself both in law and fact in convicting the appellants on the uncorroborated evidence of PW1 and PW2 when the dangers of false implication had not been excluded.
2. The learned trial Judge misdirected himself both in law and fact when he held that the prosecution had proved the case against

the appellants when there was in fact a dereliction of duty on the part of the investigating officer in failing to investigate the alibis.

The appellant's heads of argument were filed herein on 12th February, 2019 while the respondent's heads of argument were filed on 17th February, 2019. During the hearing of the appeal, both learned counsel relied on their heads of argument.

The arguments contained in the appellants' heads of argument are as follows:

PW1 and PW2 fall in the category of witnesses with possible interests of their own to serve because they were relatives of the Late Mishele. In support of this argument, reliance was placed on the cases of **Simon Malambo Choka v. The People** [3] and **Kambarage Mpundu Kaunda v. The People.** [2] Counsel argued further that since PW1 and PW2 could not corroborate each other's evidence their evidence was unreliable. He referred to the case of **Chilombo and Others v. The People** [4] where it was held that:

"Evidence of a suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspects for different reasons."

The appellants' advocate contended that the postmortem report only confirmed the commission of the offence and not the identity of the perpetrators of the offence. It is strange that the alleged brick or stone and sticks which were allegedly used to assault Mishele were not produced in evidence. Had they been produced, they would have probably constituted corroborative evidence which would have excluded the dangers of false implication.

In the case of **Yokoniya Mwale v. The People** [5] the Supreme Court discussing the dangers of false implication stated at page J.19 as follows:

"It is sufficient that the record reflects the fact that the trial Judge was alive to this possibility and that on the facts, he was satisfied that any possibility was discounted."

In light of the foregoing, it was contended that the dangers of false implication in this case were not excluded.

To buttress the second ground of appeal, it was submitted that PW3 the police officer, clearly stated in her evidence that she did not investigate the alibis raised by the appellants. The appellants' evidence that they were not there, was discredited in cross – examination. It was therefore incumbent on the prosecution to negative the alibis.

We were referred to the case of **Katebe v. The People** [6] where it was held among other things that:

> ***"Where a defence of alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on an accused person to establish his alibi, the law as to the onus is precisely the same as in cases of self defence or provocation.***
>
> ***It is a dereliction of duty for an investigating officer not to make a proper investigation of an alleged alibi."***

Mr. Chavula further argued that the failure by the police to investigate the alibis prejudiced the appellants. In the case of **Peter Yoram Haamenda v. The People** [7] the Supreme Court held among other things that:

> ***"Where the nature of a given criminal case necessitates that a relevant matter be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which should have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."***

It was argued further that the trial court did not analyse or comment on the evidence of DW3 and DW5. Failure by the court to consider relevant material placed before it may result in an acquittal as

directed in the case of **Muvuma Kambanja Sitina v. The People.** [8] Counsel prayed that the appeal be allowed on both grounds.

In response to the appellants' arguments, Mrs. Chitundu argued that the first ground of appeal should not succeed for the following reasons: In the case of **Mukena v. The People,** [9] the Supreme Court in addressing an issue whether relatives to a murdered person had interests of their own to serve or witnesses whose evidence was suspect, adopted the rationale of Lord Hailsham in the English case of DDP v. Kilborne that the critical consideration is whether or not the witnesses had a possible motive to give false evidence against the appellant.

In light of the foregoing, Mrs. Chitundu pointed out that PW1's evidence was that he did not stay in that village and he had good relations with the appellants who also had good relations with the deceased. PW2's testimony elicits no possible interest to serve in giving false evidence against the appellants.

Mrs. Chitundu went on to submit that in the case of **Morgan Gibson Mwape v. The People,** [10] this court restated the law laid down in **Yokoniya Mwale v. The People** [5] thus:

"A conviction will be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or victim provided that on the evidence before it, those witnesses could not be said to have bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key is for the court to satisfy itself that there is no danger of false implication."

Mrs. Chitundu pointed out that in the present case, PW1 and PW2 are relatives of the late Mishele and the appellants. She submitted that they would not falsely implicate their relatives when there were other villagers who participated in attacking Mishele. She submitted further that the trial court considered the dangers of PW1 and PW2 who were suspect witnesses, falsely implicating the accused persons and excluded such a danger as he found that the postmortem report supported their evidence. The prosecution supports the position taken by the court. The record shows no discrepancy between the evidence of PW1 and PW2 and as such their testimonies are mutually corroborative, Mrs Chitundu said.

As regards the second ground of appeal, Mrs. Chitundu argued that PW3's evidence was that she was told by the appellants that they were not at the crime scene on the material date. The record does not show that the officer was given sufficient information by the appellants to enable her investigate their alleged alibis. There was therefore no dereliction of duty on her part.

Mrs. Chitundu submitted further that PW1 and PW2 had known the appellants for significant periods of time and had witnessed the gory incident for close to eight hours. It was proven that the appellants committed the murder. On this point, the case of **Ngati and Others v. The People** [11] was called in aid. In that case, the Supreme Court discounted the alibis on the basis that the witness was with the attackers for a long time during broad daylight. She saw what each of them did, therefore, the possibility of mistaken identity was eliminated.

Counsel submitted that the facts relating to the identifying witnesses in this case are similar to the facts of the **Ngati** [11] case. The trial Judge was on firm ground when he found as he did.

Mrs. Chitundu argued that the sentence should not be interfered with because there was no extenuating circumstance. She pointed out that the 'Kikondo' practice was elucidated in the case of **Abednego Kapesha and Best Kanyakula v. The People** [12] as follows:

> ***"The specific witchcraft belief implicated in the present appeal involves what in kikonde is known as kikondo, meaning a moving coffin in which a body of a dead person is laid will, once appropriately smeared with mumone, an indigenous charm or medical preparation, and given commands by relatives of the dead person, assume supernatural powers and effectively overpower the pallbearers and lead them to the person lying in it. The coffin is also believed to acquire the ability to identify, isolate and hit the witch or wizard. At the stage, rough justice and mob violence by members of the community are directed at the identified witch or wizard who is made to suffer harassment and assault, and in some cases, even death."***

Mrs. Chitundu pointed out that there is absolutely no evidence that Mishele the deceased, practiced witchcraft or that the appellants believed in witchcraft. She also referred us to the case **Donald Taulo and Wayson Mboko v. The People** [13] where it was held among other things that:

> ***"Evidence of belief in witchcraft must reach the threshold of provocation in order to attract the lesser penalty than death following a conviction for murder."***

We have considered the record of appeal and the written arguments made by the advocates for both parties.

In the first ground of appeal, the issues as we see them are whether PW1 and PW2 were witnesses with their own interests to serve or suspect witnesses and whether their evidence required corroboration. In the case of **Chitalu Musonda v. The People** [14] Malila, JS delivering the judgment of the court, considered a number of consistent Zambian authorities concerning how to treat the evidence of an accomplice and that of a witness with a possible interest of his own to serve or witness with a bias, in general suspect witnesses. The honourable Judge stated at page 20 of the judgment

that the line of cases did not establish, nor were they intended to lay down any general proposition that all witnesses related to the deceased, or the victim should always have their evidence corroborated. To the contrary, a conviction will be safe if it is based on the uncorroborated evidence of witnesses with possible bias or interests of their own to serve, provided that the trial court warns itself of the dangers of false implication and satisfies itself that the danger is eliminated.

Malila, JS stated that in the **Kambarage** [2] case, friends and relatives of the deceased were regarded as having a possible bias and with a possible interest of their own to serve not merely because they were friends and relatives of the deceased but because they fell in a category of witnesses who were friends and relatives of the deceased and were the subject of the complaint lodged by the appellant.

The court at pages 21 to 22 of the judgment, stated that relatives and friends of the deceased fell under the category of suspect witnesses whose evidence required circumspection, and not necessarily corroboration, before being relied upon. That courts need to consider all the circumstances of the case in determining whether

the evidence of a witness is suspect and to what extent, if any, such evidence would require to be corroborated.

In the present case, Mr. Chavula has rightly pointed out that the postmortem report which was said to corroborate PW1 and PW2's evidence only corroborates their evidence that Mishele was assaulted and not that the appellants were the ones that assaulted him. However, we also accept the submissions by the state that PW1 and PW2 had known the appellants for considerable periods of time. The record shows that PW1 had known them for 20 years and PW2 had known them for 3 years. Both witnesses had witnessed the ordeal from morning until afternoon for about 8 hours in broad daylight. This entails that they had good opportunity to observe what transpired. Both witnesses were able to narrate to the court full details of the roles that each appellant played in the attack.

In the case of **Joe Mulenga and Others v. The People** [15] this court held among other things that:

> ***"In offences perpetrated by mobs, the trial court must convict suspects only on clear evidence identifying the***

specific roles that they played in the commission of the offence."

In this case, it is clear from the evidence of PW1 and PW2 that the 1st appellant used a stone or brick to hit Mishele on his head after beating him. The 2nd appellant hit him with a stick on the ribs and head and generally beat him. The 3rd appellant kicked him, climbed on the coffin and shook it. The state has rightly pointed out that PW1 and PW2 were related to the late Mishele as well as the 1st and 2nd appellants. They were not related to the 3rd appellant. The inference that can be drawn from this evidence is that they had no motive to falsely implicate their own relatives and the 3rd appellant as there were other assailants. They merely testified about what they actually saw that fateful day and gave the police the names of the three assailants whom they knew.

Under the circumstances, PW1 and PW2 cannot be considered as witnesses with their own interests to serve and we set aside that finding as it was based on a misapprehension of the law and facts. We take a similar view as that taken by the Supreme Court in the **Chitalu Musonda** [14] case that PW1 and PW2 fell under the category

of suspect witnesses whose evidence required circumspection and not necessarily corroboration. The trial Judges reference to the **Kambarage** [2] case was a clear indication that he was aware that the evidence of PW1 and PW2 was to be looked at with suspicion. The Judge did not have to expressly warn himself. He was on firm ground when he proceeded to exclude the danger of false implication for a reason other than a belief in the truth of the evidence based merely on the demeanor of the witnesses. However, he misdirected himself by considering whether the evidence of PW1 and PW2 was corroborated because excluding the dangers of false implication was enough. Since PW1 and PW2's evidence was reliable, it was inconsequential that the brick and sticks used in the attack were not produced. For the foregoing reasons, the 1st ground of appeal fails.

Coming to the second ground of appeal, we are of the view that the appellants did not disclose to PW3 during her investigations where they were on the material date and the names of witnesses who could vouch for them. Merely stating that they were not there was insufficient to enable her investigate their alleged alibis. They did not properly set up alibis to oblige her to investigate. As a result, we find that there was no dereliction of duty on her part. The law is

clear in **Katebe v. The People** [6] that the accused has no onus of establishing an alibi. In this case, the trial Judge did not consider the law on alibis. However, he did examine the defence evidence and rightly rejected it as being false. PW1 and PW2 were found to be credible witnesses. The Judge referred to the case of **Winfred Sakala v. The People** [1] in which Section 22 of the Penal Code on joint tort feasors or common purpose was analysed and applied but he failed to make a specific finding that the appellants in this case were acting in concert. However, the evidence clearly shows that they were acting in concert and Section 22 of the Penal Code applies. We therefore reject the appellants' submissions that the lower court failed to analyse the evidence adduced by the appellants and their witnesses.

We cannot interfere with the lower court's finding on the credibility of the witnesses as he was better placed to determine that than us as he was able to see the witnesses.

If there was dereliction of duty on the part of the police, the case of **Peter Yoram Haamenda v. The People** [7] would apply. The appellants would not have been prejudiced by that "dereliction"

because the evidence given on behalf of the prosecution was so overwhelming so that the prejudice which might have arisen was counteracted.

The lower court was on firm ground when it found each appellant guilty of murder. For the forgoing reasons, we find no merit in the second ground of appeal as well.

As regards the sentence, we accept the submissions made on behalf of the respondent regarding the lack of extenuating circumstances and find no reason to interfere with the sentence.

For the reasons stated in this judgment, the appeal is dismissed. The convictions and sentences are hereby upheld.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE