

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA  
(Criminal Jurisdiction)

APPEAL Nº 140/2018

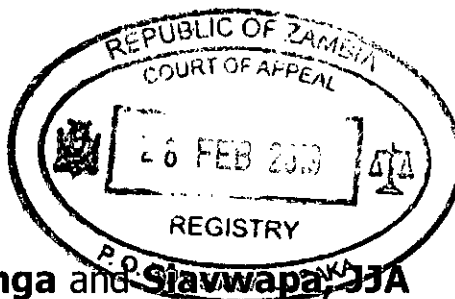
BETWEEN:

**PASSMORE KWECHELE**

APPELLANT

AND

**THE PEOPLE**



RESPONDENT

CORAM: **Chashi, Lengalenga and Siavwapa, JJA**  
on 19<sup>th</sup> February, 2019 and 27<sup>th</sup> February, 2019

For the Appellant: Mr. P. Chavula – Senior Legal Aid Counsel

For the Respondent: Mrs. A. Kennedy Mwanza – Senior State Advocate

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## J U D G M E N T

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**LENGALENGA, JA delivered the Judgment of the Court**

Cases referred to:

1. **GEORGE MUSUPI v THE PEOPLE (1978) ZR 271**
2. **SIMON MALAMBO CHOKA v THE PEOPLE (1978) ZR 243**
3. **FREDRICK CHEWE & 2 ORS v THE PEOPLE (SCZ APPEAL Nºs 119, 120 & 121 OF 2012)**
4. **BORNIFACE CHANDA & ORS v THE PEOPLE (1988 – 89) ZR 163**
5. **YOKONIYA MWALE v THE PEOPLE (SCZ Nº 285 OF 2014)**

- 6. CHABALA v THE PEOPLE (1975) ZR 98**
- 7. SALUWEMA v THE PEOPLE (1965) ZR 4**
- 8. CHIYENGWA MANGOMA v THE PEOPLE (SCZ APPEAL Nº 217 OF 2015)**
- 9. NKHATA & ORS v ATTORNEY GENERAL (1966) ZR 124**
- 10. MADUBULA v THE PEOPLE (1993 – 94) ZR 91**
- 11. KANYANGA v THE PEOPLE (SCZ APPEAL Nº 145 OF 2011)**
- 12. KAMBARAGE MPUNDU KAUNDA v THE PEOPLE (1990 – 92) ZR 215 (SC)**
- 13. CHIMBO & ORS v THE PEOPLE (1982) ZR 20 (SC)**
- 14. DONALD FUMBELO v THE PEOPLE (SCZ APPEAL Nº 476 OF 2013)**

Legislation referred to:

**1. THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA – SECTION 200**

This is an appeal against conviction and sentence arising from the judgment of the High Court by which the appellant was convicted and sentenced to the death penalty for the offence of murder.

The particulars of offence are that the appellant on 3<sup>rd</sup> July, 2017 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia whilst acting together with other persons unknown, did murder one Rasper Hamiyanda.

The brief background to the appeal is that at the appellant's trial, six prosecution witnesses were called to testify whilst the appellant testified on

oath in his defence and he did not call any witnesses to testify on his behalf.

The prosecution case was anchored on the evidence of PW1, PW2, PW3 and PW5.

According to PW1, Tackson Chikombe's testimony, on 1<sup>st</sup> July, 2017 between 09:00 and 11:00 hours, he received a phone call from Rasper Hamiyanda (the now deceased) who was his son-in-law, who informed him that his father, Albert Chikombe was beaten up at his farm at Katukwe in Chaloba village in Kapiri Mposhi on suspicion of causing the death of a child through witchcraft. At that time Albert Chikombe's whereabouts were unknown and when he was found, PW1 accompanied him to the police station where they reported the assault.

Thereafter, several police officers accompanied PW1 and his father back to the farm where on arrival they found no one there but they heard noise coming from Hamiyanda's farm and when they approached the farm they saw people who were beating others. However, when they arrived, the people upon seeing the police vehicle, scampered in different directions. PW1 identified the people who were fighting as members of the Kwechele and Hamiyanda families.

It was PW1's further evidence that when they arrived with the police, the coffin with the child's body was in the Hamiyandas' house and that the Hamiyandas were present whilst the Kwechele family had fled.

It was PW1's further evidence that Rasper Hamiyanda who had earlier phoned him was found injured within the farm near a thatched shelter where he was lying down. His head was swollen, his left arm motionless, his left leg dysfunctional and he was unable to walk on his own. He was lifted into the police vehicle by PW1 and a police officer.

When Rasper Hamiyanda was asked who had assaulted him he told them that it was Billy Kwechele, Friday Kwechele, Passmore Kwechele, Elias Chimbishi Kwechele, Delux Katilayi and Shadow Mungalaba. He is also alleged to have told them that he was almost dying.

Thereafter, the police officers also picked up the coffin and it was taken for burial in the presence of the community members who were there. According to PW1's evidence he and the police searched twice for the people who were mentioned by Rasper Hamiyanda before and after the burial. Thereafter, the injured person was taken to the hospital where he was admitted and he died the following morning.

PW1 explained his relationship to both the Hamiyanda and Kwechele families by informing the court that Rasper Hamiyanda (now deceased) married his daughter and that Kwechele is the elder brother to his mother and that their sons are his cousins. He confirmed that the appellant, Passmore Kwechele is his cousin who he has known from the time of his birth and that he knows all the people that Rasper Hamiyanda named as his assailants.

PW1's evidence was further to the effect that on 2<sup>nd</sup> September, 2017 in the morning around 07:00 hours when he was heading to the mine area to conduct his business, and whilst he was in the vehicle, he spotted the appellant who also saw him and tried to cover his face with a cap before he fled. PW1 disembarked from the vehicle and pursued him until he later found him at the Green Market where he apprehended him with the assistance of members of the public and they took him to town centre police post.

He also identified the appellant in court.

PW2, Noah Hamiyanda's testimony was to the effect that on 2<sup>nd</sup> July, 2017 around 12:00 hours, he saw a group of people who were carrying a small coffin approaching his home. When they arrived they banged on the

door whilst he was seated at his son's house. He estimated the number of people to be more than hundred. He mentioned that he knew that on 1<sup>st</sup> July, 2017, a child died in Katayi's village.

According to PW2 upon seeing the people banging on the door to his house, he stood up with a view of finding out what was happening. Then, Senior Headman Cilolo Zimba held him by the hand and the people took turns to continuously hit him with the coffin and whilst they were doing so they accused him of being the one who killed the child whilst the Senior Headman encouraged them to kill him. He said that he could have been killed and that he was only rescued by the arrival of the police who threw about three tear gas canisters to disperse the crowd. Thereafter, the police got the coffin and his son, Rasper Hamiyanda who was beaten when he went to rescue his brother, Kipton Hamiyanda. They went and buried the child and they thereafter took the injured person to the hospital. On 3<sup>rd</sup> July, 2017 he received a message that his son had died.

PW2 clarified in cross-examination that he noticed the cut on his late son's head after the post-mortem examination since he did not witness the beating because he was being held by someone.

PW3, Kipton Hamiyanda's evidence was that on Sunday, 1<sup>st</sup> July, 2017 between 14:00 to 15:00 hours, he was at home with his elder brother, Lastone Hamiyanda and his father Noah Hamiyanda when he saw people who were carrying a coffin approaching their house. Shortly after that he got his bicycle and left for a short while because his friend called him on the phone. However, upon his return as he was about to join the road the people were using, Phiri Kwechele and the appellant held onto his bicycle and beat him on the head as the others stood by and watched.

He claimed to know his two assailants as they had stayed in the same village for three years. He, however, denied that there was any relationship between them.

It was PW3's further evidence that when his brother, Rasper Hamiyanda went to his rescue, he was hit on the head with an axe handle and a plank by Elias Kwechele, Phiri Kwechele, Passmore Kwechele, Shadi Mungabala and Deluxe Katilayi. Thereafter, he fainted and Laston Hamiyanda poured water on him and in the meantime his assailants scampered when the police threw tear gas canisters at them. Rasper Hamiyanda was later taken to Kabwe General Hospital by the police and

the following morning PW3 and his family received information of his death.

PW3 later identified the axe handle that the appellant used to hit his brother and he also identified the appellant as Passmore Kwechele in court. He further informed the court that he knew the appellant and he said that they used to play football together. He also said that his brother and the appellant knew each other as neighbours.

He explained that he and his brother wanted to rescue their father. In cross-examination, PW3 clarified his earlier evidence about the beating he sustained. He claimed that he was first hit by Phiri followed by the appellant.

PW4, Kebby Hamiyanda, another brother to the deceased Rasper Hamiyanda testified that he was told the names of the brother's assailants by his brother before he was taken away by the police. He attended the postmortem examination that was conducted on his brother's body at Kabwe General Hospital. He also described the injuries on his body.

PW5, Modify Hingoma's testimony was to the effect that on Sunday, 2<sup>nd</sup> July, 2017 at about 14:00 hours he went to follow up on a debt of K150.00 from one of the Hamiyandas. Upon his arrival he found a lot of



people at the Hamiyanda home and he wondered what they were doing there. He noticed that there were many people and that they were using a coffin to hit Hamiyanda, the person who owed him K150.00. He noticed Kipton approaching with his bicycle together with his elder brother Laston Hamiyanda who was going towards his father.

He confirmed that Phiri Kwechele held the bicycle and started beating Kipton and that upon seeing that, Rasper Hamiyanda went to his rescue. However, Rasper Hamiyanda was hit with a plank by Elias Kwechele and he fell down and that whilst he was still on the ground the appellant also hit him with an axe handle on the right side of his head. He named the six people who hit Rasper Hamiyanda as Elias Kwechele, Passmore Kwechele, Delux Katilayi, Friday Kwechele, Shady Mungalaba and Phiri Kwechele.

PW5 noticed that Rasper Hamiyanda sustained injuries and more specifically a cut on the head. He confirmed that when the police arrived, the crowd dispersed as the people ran away and that the police later took Rasper Hamiyanda to the hospital.

He also described the weapons that were used to assault the late Rasper Hamiyanda and he was able to tell the court what weapon was used by each respective assailant. According to PW5, Elias Kwechele hit

Rasper with a plank and after he fell down, the appellant hit him with an axe handle, Delux Katilayi held a plank, Friday Kwechele used a broken piece of the axe handle, Phiri Kwechele held a big stick whilst Shady Mungalaba had something made of animal skin.

When PW5 was asked about his relationship with the appellant, he informed the court that he was not related to the appellant. He, however, mentioned that he knew him in 1988 from the school days.

PW6, Lastone Ndhlovu, a detective constable based at Kabwe Central Police Station investigated the matter and he is the one who officially charged and arrested the appellant for the offence of murder.

In his defence, the appellant denied the charge. He, however, admitted being present at the crime scene but he denied participating in the assault on the deceased. He said that he was a mere bystander who watched what transpired.

In his judgment, the learned trial judge considered the evidence before him and found that Rasper Hamiyanda died on 3<sup>rd</sup> July, 2017. The cause of death as indicated in the postmortem examination report was blunt force head trauma caused by a hard object. Consequently, the trial

judge found that Rasper Hamiyanda died from unnatural causes after being hit on the head.

He accepted the evidence by PW2 and PW3 that the appellant beat the deceased and he found that the said evidence was corroborated by PW5's evidence. He noted that PW5 identified the appellant who he had known for twenty (20) years from his school days.

The learned trial judge rejected the appellant's defence that he was a mere bystander and that he did not participate in beating the deceased. He, however, found that the appellant's defence indicates that he took part in the entire dead child's procession as he narrated how each and everyone who was alleged to have caused the child's death was identified by the moving coffin. He also found that the people alleged to have assaulted the deceased were identified by Rasper Hamiyanda and the prosecution witnesses. He further observed that PW3 who Rasper Hamiyanda went to rescue, clearly identified the appellant and that his evidence was corroborated by PW5.

In conclusion, the learned trial judge found that unlawful means were used to cause death of the deceased with malice aforethought and that

there were no extenuating circumstances. The appellant was convicted and accordingly sentenced to the mandatory death penalty.

Dissatisfied with the said conviction and sentence, the appellant now appeals and has advanced the following grounds:

- 1. The learned trial judge erred and misdirected himself both in law and fact when he convicted the Appellant based on the evidence of witnesses with a possible interest to serve whose evidence was inconsistent.**
- 2. The learned trial judge erred and misdirected himself both in law and fact when he rejected the unchallenged explanation of the Appellant in his defence when the same was reasonably possible.**

The Appellant's and Respondent's heads of arguments supporting their respective positions were filed into court.

In support of ground one, Mr. P. Chavula, Senior Legal Aid Counsel, submitted that the appellant's conviction was based on the evidence of PW1, PW2, PW3 and PW5. He further submitted that it is clear from the evidence on record that PW1, Tackson Chikombe was the deceased's father-in-law whilst PW2, Noah Hamiyanda was the deceased's father and PW3, Kipton Hamiyanda was the deceased's brother.

It is contended that PW1, PW2 and PW3 were witnesses with a possible interest to serve and whose evidence requires corroboration. Mr.

Chavula submitted that according to the evidence on record, PW5, Modify Hingoma on the fateful day had gone to the Hamiyanda's family to collect the K150.00 credit that he had extended to Mr. Hamiyanda. He interpreted that to mean that PW5 was a close associate of the Hamiyandas for him to extend a credit facility to him. He submitted that it, therefore, follows that PW5 also falls in the category of witnesses with a possible interest of his own to serve. He further submitted that, therefore, the evidence by PW1, PW2, PW3 and PW5 requires corroboration before a conviction can be said to be safe and satisfactory. To support his argument, Mr. Chavula relied on the case of **GEORGE MUSUPI v THE PEOPLE**<sup>1</sup> where the Supreme Court gave guidance that:

**"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."**

In the present case, it is contended that the circumstances of the case suggest that PW1, PW2, PW3 and PW5 may have a motive or incentive to falsely implicate the appellant herein. He submitted that PW1 stated that the deceased told him that he was injured by Billy Kwechele, Friday Kwechele, Passmore Kwechele, Elias Chimbishi Kwechele, Delux Katilayi

and Shadow Mungalaba. He contends that the learned trial judge treated the said evidence as a dying declaration by relying on it in convicting the appellant. Mr. Chavula argued that it cannot be true that the deceased mentioned those names to PW1 because the police officers who were present would have heard him as well.

He submitted further that it is strange that the police officer who was present at the time was not called as witness to corroborate PW1's evidence. He further submitted that it is clear that PW1 concocted the said evidence with a motive to falsely implicate the appellant. He drew this court's attention to PW2's evidence in cross-examination in which he stated that he did not witness the beating because someone was holding him. Mr. Chavula submitted that it meant that PW2 did not provide any corroborative evidence implicating the appellant. He submitted that consequently, the appellant's conviction was based on the inconsistent and uncorroborated evidence by PW3 and PW5 who gave statements to the police after two and a half months of Rasper Hamiyanda's death.

To fortify his argument, Mr. Chavula relied on the case of **SIMON MALAMBO CHOKA v THE PEOPLE**<sup>2</sup> where the Supreme Court stated *inter alia* that:

**"A witness with a possible interest of his own to serve must be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence."**

He further relied on the case of **FREDRICK CHEWE & 2 ORS v THE PEOPLE<sup>3</sup>**, where the appellants were convicted for murder based on the uncorroborated evidence of PW1 and PW2 who were the deceased's daughters and the Supreme Court held *inter alia* that:

**"the court below had erred to rely on their uncorroborated evidence as they were witnesses with interest to serve."**

Mr. Chavula further argued that there is no independent evidence that corroborates the evidence by PW3 and PW5 that the appellant assaulted the deceased with an axe handle. He submitted that they were mindful that a mere relationship or friendship with the deceased does not automatically make a witness a person with an interest to serve. For guidance, he relied on the case of **BORNIFACE CHANDA & ORS v THE PEOPLE<sup>4</sup>** where the Supreme Court stated that:

**"Once this is a possibility, their evidence falls to be approached on the same footing as for accomplices .... And it is necessary to examine the circumstances to see if the danger of a jointly fabricated story was excluded."**

He further relied on the more recent case of YOKONIYA MWALE v THE PEOPLE<sup>5</sup> where the Supreme Court gave guidance that:

**"The point in all these authorities is that this category of witnesses may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused. Once this is discernible, and only in those circumstances, should the court treat those witnesses in the manner we suggested in the Kambarage case."**

In the present case, Mr. Chavula submitted that the circumstances, namely the inconsistent evidence by PW3 and PW5 coupled with their delayed statements to the police creates a possibility of a motive to falsely implicate the appellant.

It is the appellant's contention through Counsel that PW3 was very inconsistent in his evidence. He gave examples of the inconsistency by drawing the court's attention to PW3's evidence where he only mentioned five names of the people who assaulted Rasper Hamiyanda. He submitted that when PW3 was examined he conceded that in the statement he gave to the police, the appellant's name does not appear. Mr. Chavula further submitted that PW3 and PW5's evidence was further discredited by PW6's



evidence that in their statements to him, they mentioned Phiri Kwechele and Friday Kwechele as the deceased's assailants.

He further submitted that it was imperative for the trial judge to satisfy himself that the dangers of false implication were excluded before convicting the appellant. He argued that the record has no proof that the trial judge satisfied himself of that.

In support of ground two, Mr. Chavula argued that the appellant's explanation that he left home after he received information that his name was on the list of suspects. He submitted that in PW6's evidence he confirmed that the appellant told him that he fled home because he had been falsely implicated in this case.

He further submitted that the appellant's evidence was not discredited when he stated that on 5<sup>th</sup> July, 2017, the Hamiyanda family went to his house with sticks and other weapons and asked him where Phiri was and troubled him. He argued that had the appellant participated in assaulting the deceased, they would have apprehended him on that day.

Mr. Chavula also drew the court's attention to the trial judge's description of the appellant's defence as an afterthought without fully analyzing the said defence. He argued that since an accused person is

only required to raise a reasonable doubt in order to escape a conviction, it is good practice that trial courts give equal weight to both parties, that is, the prosecution and the accused in order to arrive at a just decision. To fortify his argument, he relied on the case of **CHABALA v THE PEOPLE**<sup>6</sup> where it was held *inter alia* that:

**"There is no onus on an accused to prove his explanation. The court is required to consider whether the explanation might reasonably be true."**

In this case, it was submitted that the appellant's defence that he was a mere onlooker or observer when there was also prosecution evidence that some members of the alleged mob were bystanders, raises a doubt that entitles him to an acquittal. The case of **SALUWEMA v THE PEOPLE**<sup>7</sup> was relied on for the contention that the appellant's defence was reasonably possible.

Mr. Chavula, therefore, prayed that the appeal be allowed, the conviction be quashed, the sentence be set aside and the appellant be set at liberty forthwith.

In responding to the appellant's heads of argument, Mrs. Kennedy Mwanza, Senior State Advocate, decided to argue the two grounds

concurrently. Her reasoning was that the said grounds and arguments raised therein are somewhat interrelated.

On the issue of witnesses with an interest to serve, she noted that in the appellant's arguments, it indicates that PW1, PW2 and PW3 were placed in the category of suspect witnesses just by virtue of being related to the deceased. In response she argued that there is nothing ascertainable on evidence of the case at hand that places those witnesses in the category of suspect witnesses. She relied on the YOKONIYA MWALE case that was earlier cited by appellant's Counsel, where the Supreme Court stated that:

**"We ought to, however, stress that these authorities did not establish, nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than the near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This, in our view would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident."**

She also relied on the case of **DAVIS CHIYENGWA MANGOMA v THE PEOPLE<sup>8</sup>** in which this position was restated and which she submitted is instructive on how to deal with witnesses who are relatives, whether in environments where only family members are present or where other independent witnesses could have been present.

Mrs. Kennedy Mwanza submitted that from the cases cited, it is clear that the main issue before a trial court faced with such a decision, is to ascertain whether the category of witnesses before it for particular reasons ascertainable on evidence, have a bias or have an interest of their own to serve, or a motive to falsely implicate the accused before declaring or placing them in a category of witnesses whose evidence requires corroboration.

She submitted that there is nothing ascertainable on evidence of the case at hand that places the witnesses in the category of suspect witnesses. She argued that their evidence was clear and concise and that an examination of the court judgment shows that the court below addressed its mind to the issue of a possible bias on the part of the prosecution witnesses.

She submitted that the trial court was alive to the dangers of false implication and appropriately warned itself as indicated at page J14 and lines 14 to 16 of the judgment, when it stated that:

**"I also warn myself at the outset about the danger of false implication by suspect witnesses who are related to the deceased and may have interests to serve."**

She submitted that the trial court admitted Rasper Hamiyanda's statement to PW1 as a dying declaration. Mrs. Kennedy Mwanza responded to the appellant's argument that the officers who were in the vehicle should have been called to corroborate the statement, by stating that the issue was not raised during the trial. She submitted that PW6, the arresting officer testified and that no questions in that regard were posed. She, submitted, however, that the statement was appropriately corroborated by PW3 and PW5 who witnessed the assault on the deceased. She further submitted that even without the said statement there is overwhelming evidence that the appellant participated in assaulting the deceased.

Mrs. Kennedy Mwanza argued that even though the appellant contends that the fact that PW1 is related to the deceased and that he could have concocted the statement to falsely implicate the appellant, she pointed out that PW1 is the appellant's cousin as his father is the elder

brother to his mother, which absorbs him from the possibility of bias against the appellant. She further submitted that PW1's testimony was clear and concise and that it was aimed at narrating to the court how the events unfolded on the day in issue and how he apprehended the appellant on 2<sup>nd</sup> September, 2017.

She further responded to the appellant's argument that PW5 is also a suspect witness because he had gone to collect a debt of K150.00 from the Hamiyanda family by stating that a mere relationship or friendship with the late Rasper Hamiyanda does not automatically make someone a suspect witness with an interest to serve. She submitted that the case of **GEORGE MUSUPI v THE PEOPLE** cited by the appellant is instructive on that issue.

She argued that the term **"witness with an interest to serve"** does not apply to this case as the record does not disclose that there is pre-existing ill motive or bias established against the prosecution witnesses that would warrant them being categorized as witnesses with an interest to serve.

On the issue of PW3 and PW5 giving inconsistent testimonies and a possibility of false implication against the appellant, Mrs. Kennedy Mwanza

argued that according to PW6's testimony, the police interviewed the witnesses shortly after the burial whilst their statements were only recorded two and half months later. She submitted that this indicates that their minds were still fresh and even by the time the actual recording was made, they had already indicated who the suspects were to the police. She submitted that in addition to that, the evidence on record shows that the appellant and other suspects fled soon after the burial and that even PW6 testified that from the time of Rasper Hamiyanda's death, all the six mentioned suspects were nowhere to be found. She argued that if they did not participate in assaulting the deceased, they would not have run away.

On the issues of inconsistencies, she submitted that the trial court's judgment discloses or reveals the court's reasoning in finding the prosecution witnesses to be more credible than the appellant. This is found at page J16 and lines 7 to 14 where the trial judge stated that:

**"I am satisfied from the adduced evidence that the accused was not only part of the people who beat the deceased but that he has been positively identified beyond reasonable doubt to be the one who hit the deceased with the axe handle. His defence is but an afterthought meant to cover up the events of the fateful incident. His claim that the police told him that the deceased was beaten 200 metres**

**away does not hold as evidence has been adduced that when the police arrived none of the suspects were found at PW2's house as they all fled."**

To fortify her argument Mrs. Kennedy Mwanza relied on the case of **NKHATA & ORS v ATTORNEY GENERAL**<sup>9</sup> where the Court held *inter alia* that:

**"A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to an appellate court that .....**

**(d) In so far as the judge has relied on the demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."**

She argued that in the present case, there is nothing to show that the prosecution witnesses were untruthful on any collateral matter. She submitted that the trial court evaluated both the prosecution and defence evidence and found the prosecution evidence to be more credible.

With regard to the discrepancies referred to by the appellant's Counsel, Mrs. Kennedy Mwanza called in aid the case of **MADUBULA v THE PEOPLE**<sup>10</sup> where it was held *inter alia* that:

**"Minor discrepancies in the prosecution's evidence that do not go to the root of the case are not fatal to the prosecution case."**



She submitted that the cited case applies to the present case as the discrepancies herein are not fatal to the prosecution case.

In response to the appellant's argument in support of ground two, Mrs. Kennedy Mwanza submitted that the court assessed in detail the appellant's claim and defence that he was a mere bystander and that he did not take part in assaulting the deceased. She further submitted that after the court's analysis of the same, it concluded that the appellant failed to adduce evidence to support his defence.

She submitted that the appellant's explanation was found to be a mere afterthought and to be devoid of merit which she said is in line with their preceding arguments.

She further relied on the case of **KANYANGA v THE PEOPLE**<sup>11</sup> where the Supreme Court held that:

**"We are satisfied that the findings in question were not perverse or made in the absence of any relevant evidence or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. This is what we said in WILSON ZULU v AVONDALE HOUSING PROJECT."**

In applying the cited case to this case, she submitted that the trial court had the opportunity of seeing and hearing the witnesses and the appellant

and that it is, therefore, best placed to make any findings of fact. She further submitted that from the evidence on record and as argued, there can only be one conclusion, that the appellant committed the offence and that he was appropriately convicted and sentenced.

She concluded by submitting that the trial court was on firm ground in convicting the appellant and she urged this court to uphold the conviction and sentence, and to dismiss the appeal.

We have considered the evidence on record, the judgment appealed against, the sentence meted out by the court below, the respective arguments by Counsel, together with the authorities cited.

In ground one, the appellant challenges the trial court's conviction on what he alleges to be evidence of witnesses with a possible interest of their own to serve whose evidence is alleged to be inconsistent. From the evidence on record as attested to by PW1, PW2 and PW3, the three witnesses are related to each other and to the late Rasper Hamiyanda. The relationship has already been well articulated and therefore, we will not belabour the point.

In the circumstances, therefore, by virtue of the family connections existing between them, we accept the appellant's contention that they may

be classified as suspect witnesses with possible interests of their own to serve whose evidence requires corroboration or something more to ensure that the danger of false implication of the appellant has been excluded. Authorities that support this position such as the case of **KAMBARAGE MPUNDU KAUNDA v THE PEOPLE**<sup>12</sup> and the other cases cited by both Counsel abound.

We must also state that the evidence of suspect witnesses must be corroborated by an independent witness and cannot be corroborated by another or other suspect witnesses as was guided by the Supreme Court in the case of **CHIMBO & ORS v THE PEOPLE**<sup>13</sup> when it held that:

**"The evidence of suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons."**

From the evidence on record, we observed that PW5, Modify Hingoma's testimony corroborated PW2's and PW3's evidence on what transpired at the Hamiyanda residence on that fateful day.

We, however, further observed that the appellant seeks to discredit PW5's evidence by concluding that since he extended a credit facility to one of the Hamiyandas, he was, therefore, a close associate of the

Hamiyandas and falls in the category of witnesses with a possible interest of their own to serve.

We are not persuaded that by PW5 merely extending a credit facility to one of the Hamiyandas, he ought to be categorised as a close associate to the Hamiyandas who has a possible interest of his own to serve on the same standing as PW1, PW2 and PW3. We noted from PW5's evidence on record that he denied being related to the deceased, Rasper Hamiyanda and the appellant herein. He, however, attested to having known the appellant from 1988 when they attended the same school. He also claimed to be on good terms with the appellant and the appellant has not disclosed an ulterior motive that PW5 would have had to falsely implicate him in the murder of the deceased.

We are, therefore, of the considered view that PW5 was an independent witness who narrated the event as it unfolded. As an independent witness, his evidence corroborated PW2's and PW3's evidence and we, accordingly, accept his testimony as such.

We also took into account the fact that the trial court warned itself of the danger of false implication of the appellant by the suspect witnesses in

following the guidance by the Supreme Court in the **YOKONIA MWALE** case and other earlier cases.

With regard to the alleged inconsistencies in the prosecution witnesses' evidence, we are satisfied that the issue was adequately addressed by the **MADUBULA** case cited by Mrs. Kennedy Mwanza that minor discrepancies in the prosecution's evidence that do not go to the root of the case are not fatal to its case.

We find that the learned trial court was on firm ground in convicting the appellant as he did. We find that ground one is devoid of merit and we accordingly, dismiss it.

We turn to ground two which challenges the trial court's rejection of the unchallenged explanation by the appellant in his defence when the same was reasonably possible. We had occasion to peruse the record and the trial court's judgment that is the subject of this appeal.

We observed that the trial court gave its reasoning for rejecting the appellant's defence that he was a mere bystander and that he did not participate in assaulting the deceased.

We also observed from the evidence on record that apart from the appellant claiming to have been a mere bystander, he also alleged that he

was told by police that the deceased was beaten 200 metres away when there was evidence that when the police arrived the suspects had fled and that they were nowhere to be found. In the case of **DONALD FUMBELO v THE PEOPLE**<sup>14</sup>, the Supreme Court gave guidance on how to evaluate the evidence of a witness when it stated that:

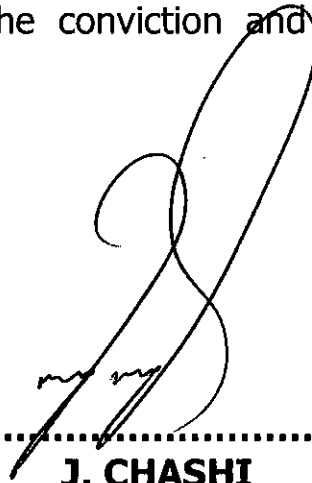
**"In trying to ascertain what weight should be attached to the testimony of a witness on a particular issue, an important factor that should be considered is the consistency of the testimony. Hence a lot of weight will be attached to the testimony if the witness starts showing at the earliest opportunity, his version on the issue .....  
When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version."**

In this case, we observed from the appellant's defence that the appellant's allegation of what the police told him about the deceased was raised for the first time in his defence. In view of the guidance in the cited case, we find that the trial court was on firm ground in finding as it did.

We, therefore, equally find no merit in ground two and we dismiss it.

In conclusion, the entire appeal fails and it is, hereby, dismissed.

Consequently, both the conviction and sentence are, accordingly,  
upheld.



.....  
**J. CHASHI**  
**COURT OF APPEAL JUDGE**



.....  
**F. M. LENGALENGA**  
**COURT OF APPEAL JUDGE**



.....  
**M. J. SIAVWAPA**  
**COURT OF APPEAL JUDGE**