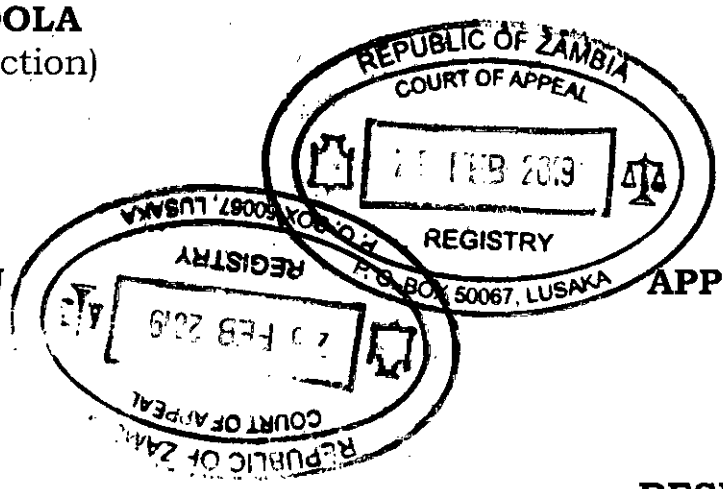
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL 141/2018**
HOLDEN AT NDOLA
(Criminal jurisdiction)

BETWEEN:



BRIAN NKANDU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Mchenga DJP, Chishimba and Mulongoti, JJA**

On 19th February, 2019 and 25th February, 2019

For the Appellant: *Mr. C. Siatwinda of Legal Aid Board*

For the Respondent: *Mrs. M.K. Chitundu of National Prosecution Authority*

J U D G M E N T

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

Cases referred to:

1. ***R.v Turnbull (1976) 3 ALL ER 549***
2. ***Hamenda v The People (1977) ZR (reprint) 184 (SC)***

3. ***Chimbini v The People (1973) ZR 191 (SC)***
4. ***Love Chipulu v The People (1986) ZR 73 (SC)***
5. ***Ilunga Kabala and another v The People (1981) ZR 102 (SC)***
6. ***Situna v The People (1982) ZR 115 (SC)***
7. ***Molley Zulu and others v The People (1978) ZR 227 (SC)***
8. ***Miyoba v The People (1977) ZR (reprint) 292 (SC)***
9. ***Crate v The People 1975 ZR 232 (SC)***

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**.

The appellant Brian Nkandu, was arraigned in the Kabwe High Court on two counts; one of murder **contrary to section 200 of the Penal Code** and the other of attempted murder **contrary to section 215 (a) and (b) of the Penal Code**. He was convicted and sentenced to death for murder and life imprisonment for attempted murder.

The convictions were anchored on the testimony of PW1, Dorothy Mwape the victim of the attempted murder.

The testimony of PW1 was that on 2nd May, 2017 around 01:00 hours, she was in bed with her husband Chief Muchinda whose

names were Evans Mukosha Mutolwa (the deceased). As they lay in bed, she heard a bang on the door then saw two men enter the bedroom. One was armed with a gun and the other carried a torch. She recognized the one with a torch as Brian Nkandu and the one with the gun as Chisenga Kapi. The duo started searching for where the bed was. When they saw them lying on the bed, the one with the gun shot at the chief. PW1 who was now seated on the bed shouted for help. Then she was shot in the armpit and fell on the bed. The attackers checked on them to see if they were dead and she heard Chisenga say they were dead. Then Brian said ***"Let him rule now, we see"***. Then they left.

Then her grandson Ganizani Zulu went to her bedroom, tied up the wound and assisted her in getting to the hospital in Serenje while her husband lay dead in a pool of blood. She was later transferred to Kabwe General Hospital where she was given a medical report 'P1' and was later interviewed by PW5 the arresting officer.

Ganizani Zulu, who was PW2, confirmed that he assisted his grandmother by tying up her wound and getting her to the hospital.

He said he noticed his grandfather, the chief, on the bed lying motionless, with lots of blood on his face. Ganizani told the trial court that after he heard the gunshots, he saw Brian leaving the house, carrying a torch. Both PW1 and PW2 alluded to the fact that Brian Nkandu, the deceased chief and six others were vying to ascend to the throne of Chief Muchinda. The deceased emerged victorious and became chief.

After analyzing the evidence, the trial Judge aptly restated the position of the law on identification evidence as espoused in **R. v Turnbull**[1] which was followed in this jurisdiction in **Hamenda v The People**[2] and **Chimbini v The People**[3] which was quoted at page 76 (J10) of the record of appeal that:

> ***"The case against the appellant rests entirely on the evidence of the complainant. It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honest of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night-***

time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made (i.e. whether there was a confused fight or scuffle or whether the parties were comparatively stationary). Most importantly, it is relevant to consider whether the witness knew the accused prior to the incident, since there is the greatest difference between recognizing someone with whom you are familiar, or at least whom you have seen before, and seeing a person for the first time and attempting to recognize and identify him later from observations made in circumstances which are no doubt charged with stress and emotion."

The trial Judge then stated that he was content that PW1 truthfully and reliably recognized her attackers, who were previously known to her.

The trial Judge found that notwithstanding the terrifying or horrific atmosphere on the fateful day, the quality of PW1's recollection was considerably impressive. And, that not only did PW1 physically observe the assassins for a period of five minutes, but she also recalled the remarks uttered by one of them.

Furthermore, that the recognition of the appellant by PW1 was compatible with the testimony of PW2 Ganizani Zulu. The trial Judge

found that Ganizani equally truthfully and reliably recognized the appellant. The Judge concluded that the possibility of an honest mistake was untenable so too was the possibility of false implication or witness collusion to falsely implicate the appellant.

Dissatisfied, the appellant raised two grounds of appeal as follows:

1. ***The trial court erred in law and in fact when it convicted the accused person based on a single identifying witness with an interest to serve.***
2. ***In the alternative, the trial court misdirected itself when it found the accused person guilty of murder and attempted murder despite the unreliable identification evidence of PW1 and PW2.***

The appellant's counsel filed heads of argument in support of the grounds which were argued together. It is contended that PW1 was not only a single identifying witness but one with an interest to serve because she was the wife to the deceased and she believed the appellant killed the deceased because he did not support him as chief. Additionally, that PW1confirmed during trial that the room was dark. Relying on the Supreme Court decision in **Love Chipulu v The People**[4] where the court stated that:

"Where circumstances of an attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that the appellant had been patronizing the same bar, as an accused for the past nine months does not render an identification safe."

Counsel argues that it was not possible for PW1 and PW2 to confidently identify their assailants. PW1 admitted that it was dark and she was afraid when she heard people break into the house. As for PW2 he admitted that he immediately returned to his room when he saw a bright light coming towards him. He, therefore, had no opportunity to clearly identify the assailant who he purported to have been the appellant. In addition, that both PW1 and PW2 did not even indicate by what features they were able to identify the assailant as being the appellant. All they said was he did not want the deceased to be chief.

We have been urged to set aside the conviction as the trial court erred when it convicted based on the evidence of PW1, a single identifying witness with an interest to serve.

The learned state advocate also filed and relied on the respondent's heads of argument in response. She argues that there were two eye witnesses and not one as asserted by the appellant. One (PW2) saw the appellant leaving the crime scene after the gunshots and one (PW1) actually saw the appellant participate in the killing of the deceased. PW1 also heard the appellant say some utterances that go to prove the appellant's state of mind at the time, thus satisfying **section 204 of the Penal Code** on *mens rea.*

It is the further submission of counsel that there are odd coincidences in this case. The first odd coincidence being that the appellant claimed that he had a good relationship with the deceased chief and his family since childhood and yet at the same time stated that he had never been to the palace. According to counsel this odd coincidence cannot be explained away. It equally defies logic that the family he claimed to have a good relationship with, would suddenly turn around and falsely accuse him of killing the chief.

The other odd coincidence being that the appellant who claimed to have never been at the deceased's house was able to give exact

measurements of the distance from his home and that of the deceased. Therefore, the explanations given by the appellant cannot reasonably be true and the said odd coincidences satisfy the conditions in the case of **Ilunga Kabala and another v. The People**[5] that:

> ***"odd coincidences if unexplained maybe supporting evidence. An explanation which cannot reasonably be true is, in this connection no explanation at all".***

The learned deputy chief state advocate also submitted that PW1 and PW2 cannot be classified as witnesses with a possible interest to serve simply because they are related to the appellant.

At the hearing of the appeal both counsel relied on their respective heads of argument.

We have considered the arguments and submissions by counsel. We will deal with the two grounds of appeal simultaneously as they deal with one issue, that is, whether the identification of the appellant by PW1 and PW2 was of good quality, given the circumstances of the case. The attack happened at night when both PW1 and PW2 were asleep and only awakened by the commotion and gunshots.

We note that the trial Judge based the conviction of the appellant solely on the identification evidence of PW1 and PW2. PW1 and PW2 both testified that the appellant was one of the people that attacked them at their house on the night in question.

In the case of **R v Turnbull**[1] which the trial Judge relied on, it was pointed out that the evidence of identification ought to be treated with caution before it can be relied on as founding a criminal conviction. That if the quality is not good, there is need to look for supporting evidence to rule out the possibility of an honest mistaken identity.

In **Chimbini v The People** supra, the court elucidated that in relying on the identification evidence of a witness, many factors must be considered such as whether it was daytime, or night time and if at night the state of the light is crucial. Also of importance are the circumstances in which the observations were allegedly made.

In **Situna v The People**[6], it was observed that:

> ***"If the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest***

mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identity too much of a coincidence".

In **Molley Zulu and others v The People**[7], the Supreme Court held inter alia that:

"(i) *Although recognition of a person one knows, is less likely to be mistaken than identification of a stranger; even in cases of recognition, the danger of a mistake is present and must be considered.*

(ii) On the facts, the opportunity for reliable identification was poor within the meaning of the ***R v Turnbull case****, in order to test the reliability of the identification, it was necessary to consider whether there was any other evidence or circumstance which supported the identification.*

(iii) Odd coincidences may well provide supporting evidence of poor quality identification to the extent that it renders such identification reliable. The finding of the gun in the possession of the father to the 1st appellant was such a coincidence as was knowledge of the 2nd appellant of the whereabouts of the stolen gun.

(iv) In respect of the 1st and 2nd appellants the evidence of identification was supported by evidence of such weight that the trial judge must have convicted..."

In *casu*, both PW1 and PW2 admitted that they were asleep, when they heard the bang on the door. According to PW1, she then saw two people enter her bedroom which she said was dark. She recognized the two people as Brian Nkandu (appellant) and Chisenga Kapi. One of the two people who happened to be the appellant was carrying a torch, as they searched for the bed where she and her husband lay. She saw them go to the wall first, until they eventually located the bed. Then according to her Chisenga Kapi shot the chief and also shot her, when she shouted for help, while the appellant held the torch.

It is clear that PW1's identification evidence is of poor quality, given the fact that it was dark and she was terrified.

In the case of PW2, in court he testified that he saw Brian exiting their house and carrying a torch after the gunshots. During cross examination (at page 23 of the record of appeal, lines 21-24) he said he chatted with his grandmother (PW1), after the assailants had left. He admitted that he did not tell her that he saw the appellant exiting the house and PW1 also did not tell him that she saw Brian

(appellant) carrying a torch during the attack. PW2 was then referred to his statement which he gave to the police (which was admitted in evidence as 'P2') which revealed that he did not mention to the police that he saw Brian exiting their house on the night in question.

And, according to the statement 'P2', he said it was too dark and he could not identify anyone. In **Miyoba v The People**[8] the Supreme Court per Baron DCJ, as he then was, observed that:

> ***"The general rule is that the contents of a statement made by a witness at any time, whether on oath or otherwise, are not evidence as to the truth thereof. They are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial; they can be used to destroy only the credibility of the witness or to reduce the weight to be attached to his evidence. To do this it is important for the trial court to have before it formally the previous statement, so that it can compare it with the evidence given in court, and assess for itself the seriousness of the alleged discrepancies."***

Furthermore, that ***"unless the previous statement has been made part of the record in one or other of the methods available, an appellate court has no basis on which to assess how serious the alleged discrepancies are and what weight to attach to the evidence of the witness"***.

Given the inconsistencies between PW2's evidence and his statement to the police, we are of the view that the credibility of his account of the circumstances in which he identified the appellant is questionable. We note that the trial Judge did not pronounce himself on the discrepancies or inconsistencies between what PW2 told the police and what he said in court. Having seen the discrepancies in the statement and evidence in court, and guided by the **Miyoba v The People**[8] case, we are of the view that the discrepancies are quite serious. In court PW2, said he saw Brian exiting his grandparents' house carrying a torch. In the statement 'P2' he said, ***"I managed to open the door to my room slowly and saw about three men that I couldn't identify because it was too dark. After they left I went direct to the room where the chief was..."***

Given the serious discrepancies or inconsistencies between 'P2' and his evidence in court, we are of the view that properly directing himself, the trial judge would have entirely discounted or attached very little weight to PW2's identification evidence.

Even though the appellant was previously known to both PW1 and PW2, given the circumstances of this case, that it was dark and both PW1 and PW2 were awakened by the intruders and who they identified in an atmosphere which was traumatic and horrific, the trial Judge, could have considered and ruled out the possibility of an honest but mistaken identification. The failure to do so was a misdirection. See **Crate v The People**[9].

In **Situna v The People**[6], it was held that where the opportunity for a positive and reliable identification is poor and the possibility of an honest but mistaken identification has not been eliminated, a conviction is only tenable if there is some other evidence connecting the offender to the commission of the offence. In other words, corroborative evidence becomes necessary.

It was submitted on behalf of the respondent that the evidence of PW1 and PW2 was corroborated by odd coincidences. The first odd coincidence being that the appellant claimed that he had a good relationship with the deceased chief and his family since childhood and yet at the same time stated that he had never been to the palace.

The other odd coincidence being that the appellant who claimed to have never been at the deceased's house was able to give exact measurements of the distance from his home and that of the deceased.

We do not find these two instances to be odd coincidences that can support PW1 and PW2's evidence that the appellant was one of the assailants. The fact that the appellant denied having ever visited the palace, ridiculous as it may be, cannot, in the circumstances of this case, be said to support PW1 and PW2's evidence that he was one of the assailants. Similarly, the fact that he was able to give the exact distance from his home and that of the deceased, is nothing odd. He stayed in the same area with the deceased.

Odd coincidences are such as were found in the **Molley Zulu and others v The People**[7] case. For instance being found in possession of a gun used in the commission of the offence or recently stolen property or some other connecting link. The cases of **R v Turnbull**[1], **Chimbini v The People**[2] and **Hamenda v The People**[3] which the trial Judge relied on are

good law but were misapplied on the facts of this case. In **Hamenda v The People**[3] it was in fact pointed out that:

> ***"Where the quality of the identification is good and remains so at the close of the defence case, the danger of mistaken identity is lessened, the poorer the quality, the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak identification. Odd coincidences can provide corroboration".***

On the evidence that was before the trial court, we find that there was no evidence that corroborated or supported the poor quality identification evidence. We find Mrs. Chitundu's arguments on odd coincidences to be meritless.

In *casu*, the quality of the identification was poor and the trial Judge erred in law and fact when he did not consider if there were odd coincidences or other connecting link. There being no connecting link or supporting evidence to support the poor quality identification, the possibility of an honest mistaken identity was not eliminated. We must acquit the appellant as the convictions are not safe. Consequently, we find merit in the appeal.

We quash the convictions, set aside the sentences and acquit the appellant forthwith.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

F.M.CHISHIMBA
COURT OF APPEAL JUDGE

J.Z. MULONGOTI
COURT OF APPEAL JUDGE