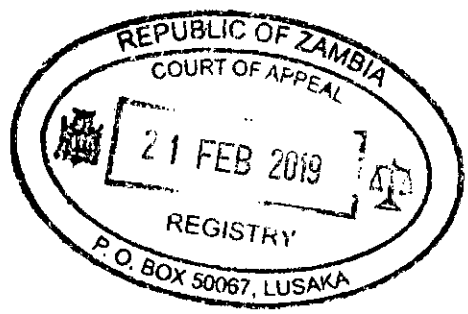
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 121 OF 2018

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

BENNY HABULEMBE **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga, DJP, Chashi and Mulongoti, JJA

ON: 22nd January and 21st February 2019

For the Appellant: *K. Muzenga, Deputy Director, National Legal Aid Board*

For the Respondent: *S. C. Kachaka (Mrs.) Senior State Advocate, National Prosecution Authority*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Muwowo v The People (1965) ZR, 91**
2. **Chingowe v The People (1977) ZR, 21**
3. **The Minister of Home Affairs, The Attorney General v Lee Habasonda, suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes (2007) ZR, 207**

4. **Muvuma Kambanja Situna v The People (1982) ZR, 115**
5. **David Zulu v The People (1977) ZR, 151**
6. **Nsofu v The People (1973) ZR, 287**
7. **Abel Banda v The People (1986) ZR, 105**
8. **Major Isaac Masonga v The People (2009) ZR, 242**
9. **Wilfred Kashiba v The People (1971) ZR, 95**
10. **Solo v The People (1967) ZR, 127**
11. **Steven Mushoke v The People (2014) ZR, Vol 2, 253**
12. **Muwowo v The People (1965) ZR, 107**
13. **Liswaniso v The People (1976) ZR, 341 - Reprint**
14. **Kafuti Vilongo v The People (1977) ZR, 562 - Reprint**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

This appeal is against the conviction of the Appellant by the High Court on 26th January 2018 for the offence of murder contrary to Section 200 of ***The Penal Code***[1]. There being no extenuating circumstances, the Appellant was sentenced to death.

The Appellant is alleged to have killed his eleven (11) months old stepson, who had been left lying on the bed in the house, using a sharpened bicycle spoke, which he pricked the deceased's' armpit with.

The evidence against the Appellant in summary is that, on 28th October 2014, Charity Banda (PW1), the second wife to the Appellant, and mother

to the deceased put the deceased to bed around 20:00 hours and then went to bath. The Appellant made a brief appearance where she was bathing and left. Thereafter PW1 heard the deceased crying. PW1 called out to the Appellant and others outside to take care of the deceased, but the deceased continued crying.

When PW1 rushed to the house, she met the Appellant exiting the house.

When asked why he was leaving the house, the Appellant said; when the child is sleeping, he should not be placed on the bed.

PW1 found the deceased face down and was crying as if suffocated.

At the funeral house, William Shakuyobika (PW2), the elder brother to PW1, on checking the deceased body, discovered a small wound with blood under the armpit. The following day, in the presence of the Police, a sharpened bicycle spoke, blood stained with a small piece of meat was discovered from the house.

According to the post mortem conducted by a Pathologist, a punctured wound perforation on the left side of the chest was found. It was also discovered that the left lung had completely collapsed and the chest was filled with air. The Pathologist concluded that a sharp instrument such as a needle or a wire could have been used and that the cause of death was respiratory failure.

The Appellant after being apprehended by the Police confessed to PW2, in the presence of the Police to having murdered the deceased.

In his defence, the Appellant asserted that the child might have fallen off the bed and hit onto a bicycle hub which he had been repairing which he had pushed under the bed. When he went to the house with the Police, he showed them a bicycle spoke which was in the roof of the kitchen which he was using to mend a bicycle tyre.

According to the Appellant, he admitted killing the child as he was scared that he would be killed.

After considering the evidence, the learned Judge in the court below was convinced that the deceased was killed by the Appellant, based on the following:

(1) On the Appellants own confession, in which he admitted killing the deceased using a bicycle spoke to pierce the chest. In the English translated version, this is what he said:

"After having supper, my wife was having a bath behind our house leaving my stepson sleeping in the house. We had some difference with the father of my stepson.

I went into the house where my stepson was sleeping. I got a sharp spoke. I stabbed him in the left side of the chest several times. After stabbing him, I left him crying on the bed. I did this

because the father to my stepson in June 2014 came to my house and started insulting me and my wife.

I think the father to my stepson is still having an affair with my wife. I also did not want him to be coming to my house. To stop this, I decided to kill his son who was making him come to my place."

(2) That there was sufficient circumstantial evidence to support the verdict based on the evidence.

Disenchanted with the Judgment, the Appellant has appealed to this Court advancing the following grounds:

(1) The learned trial Judge erred in law and fact when he admitted the confession statement without rendering a proper ruling at the end of a trial within a trial.

(2) The learned Judge misdirected himself when he admitted a confession statement after holding a trial within a trial in the absence of proof beyond all reasonable doubt that the statement was obtained voluntarily.

(3) The learned Judge misdirected himself in law when he delivered a Judgment which fell short of the standard set out in Section 169 (1) of ***The Criminal Procedure Code***[2] as it was devoid of a summary of the Appellant's evidence.

(4) The learned Judge erred in law and fact when he convicted the Appellant for the offence of murder in the absence of cogent circumstantial evidence.

At the hearing of the appeal, Mr. Muzenga, Counsel for the Appellant relied on the Appellant's heads of argument, which he augmented with brief oral submissions.

Counsel addressed grounds one and two simultaneously and submitted that, the learned trial Judge, for reasons unknown, made a ruling stating that he had found the Appellant with a case to answer after the close of the prosecution case during the trial within a trial.

According to Counsel, this was unnecessary as no such finding is supposed to be made. Counsel urged us to give guidance to trial courts in this regard.

Counsel then drew our attention to the guidelines which have been set by the Supreme Court as regards a trial within a trial and in that respect cited the cases of **Muwowo v The People**[1] and **Chingowe v The People**[2] and submitted that from the aforestated authorities, it is abundantly clear that the onus to prove beyond all reasonable doubt that the confession statement was voluntary lies on the prosecution. Counsel further submitted that, a ruling after a trial within a trial is a Judgment and it must be comprehensive in nature. It must contain a summary of the evidence received and must have a thorough analysis of the evidence and reasons for the decision reached.

Counsel contended that, the ruling by the trial Judge on the trial within a trial is devoid of the aforestated. The learned Judge does not state who bore the burden of proof and whether he was satisfied beyond all reasonable doubt that it was voluntary.

According to Counsel, the failure by the learned trial Judge to render a proper ruling cannot be cured subsequently by some sentiments in the Judgment.

As regards the third ground, Counsel submitted that, the Judgment fell short of the standard set in Section 169 (1) of ***The Criminal Procedure Code***[2] as it was devoid of a summary of the Appellant's evidence. That whilst the evidence of the prosecution witnesses was reproduced in sufficient summary form, that was not the case with the Appellant's evidence.

Counsel noted that, this is all the learned Judge said about the Appellant's evidence:

> *"In his defence he gave a long-winded testimony, but the gist of his defence is that he did not commit the murder."*

It was Counsel's contention that this was a misdirection and as such the Judgment was defective. Reference was made to the case of **The Minister of Home Affairs, The Attorney General v Lee Habasonda, suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes**[3] where the Supreme Court held *inter alia* as follows:

> *"Every Judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts."*

Furthermore, the case of **Muvuma Kambanja Situna v The People**[4] where the Supreme Court had this to say:

> *"Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is merited."*

According to Counsel, the learned Judge made inadequate or no consideration of the Appellant's defence and therefore the Judgment was defective and full of prejudice.

In arguing ground four, Counsel submitted that, after exclusion of the confession, the evidence against the Appellant is circumstantial.

According to Counsel, after the deceased died, it is not clear as to who had custody of the body.

The wound was only discovered at the time of burial. That it is possible that the injury was postmortem or antemortem. It was Counsel's view that there is also a possibility that the child died from a fall. Further there is no evidence of motive on the part of the Appellant to cause the death of the

deceased and also no evidence to the effect that no other person could have caused the death, in the event that this is a homicide.

Counsel drew our attention to the case of **David Zulu v The People**[5] on the need of the trial Judge to be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilty.

According to Counsel, there are a number of inferences that can be made in *casu*. It cannot be said that the evidence against the Appellant has taken the case outside the realm of conjecture. That the circumstantial evidence is weak, such that an inference of guilt cannot certainly be the only inference which could reasonably be drawn from the facts.

In turn, Mrs. Kachaka, Counsel for the Respondent relied on the Respondent's heads of argument.

In response to grounds one and two, Counsel submitted that the learned Judge rendered a ruling as shown at page 18 of the record of appeal (the record). That the said ruling was in respect to the trial within a trial and not for the case to answer as being alleged by the Appellant.

According to Counsel, the learned Judge followed procedure and delivered a ruling before proceeding to admit the evidence. It was Counsel's contention that the prosecution proved the case at this stage beyond all reasonable doubt.

In response to ground three, Counsel submitted that, the learned Judge rendered a well-reasoned Judgment after considering all the evidence in the matter. That with respect to the Appellant's testimony, the trial Judge indicated that the gist of his evidence is that he denied committing the offence. According to Counsel, this is the most vital consideration in any accused person's story.

Counsel contended that, the learned Judge evaluated the Appellant's evidence, the essence being that he denied committing the offence.

It was counsel's submission that Section 169 (1) of ***The Criminal Procedure Code***[2] talks of the Judgment containing the point or points for determination, the decision thereon and the reasons for the decision. That the learned Judge gave consideration to the points on which it based its determination of the issues in arriving at his decision.

In response to ground four, Counsel submitted that, circumstantial evidence points to none other than the Appellant and even without the confession, it is still justified to find him guilty of the offence. That the Appellant's presence in the house provided him an opportunity to commit the offence.

Our attention was drawn to the case of **Nsofu v The People**[6] where it was stated that, opportunity to commit an offence is not conclusive in itself, but may be corroboration on the point.

Counsel submitted that the circumstantial evidence has taken the case out of the realm of conjecture which permitted an inference of guilt.

In reply, Mr. Muzenga, out of hand, sought the Courts indulgence to give guidance and take a position in future cases, as regards the status of an accused person who gives a confession to a civilian in the presence of the Police as was the position in this case in respect to PW2.

According to Counsel, he brought this issue up in light of the case of **Abel Banda v The People**[7] which made it clear that a confession or an admission to a person not in authority is admissible.

Reference was also made to the case of **Major Isaac Masonga v The People**[8] where according to Counsel, the Supreme Court indicated that a confession or admission which is obtained in unfair circumstances, notwithstanding that it was given to a person not in authority, is inadmissible.

We have considered the arguments by Counsel and the Judgment being impugned. We shall address the grounds as argued by the parties.

Grounds one and two attack the learned Judge's admission of the Appellant's confession into evidence.

It is trite law that, if in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, and it is represented to the court that the confession was or may likely have been obtained:

In the High Court case of **Solo v The People**[10], Picket, J articulated the procedure as follows:

> *"In the first place, whenever the prosecution seeks to put in evidence a confession alleged to have been made by the accused party, it is the duty of the magistrate to find out first of all whether or not the accused objects to such confession being admitted in evidence and, if so, on what grounds.*
>
> *These are usually allegations to the effect that the confession was not a free and voluntary one, the accused alleging maybe, that he was beaten and so on. Then it is the duty of the magistrate to hold what has come to be known as 'a trial within trial' before allowing the confession or statement to be put in evidence. This trial within a trial consists first of all of allowing the witness seeking to produce the statement to give evidence regarding the circumstances under which it was taken; then permitting the accused to cross examine this witness and when all the prosecution witnesses regarding the statement have been called, then permitting the accused, if he so desires, to give evidence on oath as to the manner in which he says that statement was taken and also he must be given the opportunity to call witnesses regarding the taking of the statement if he so desires. When all*

these things have been done, the magistrate will then make a formal ruling on the issue."

The Supreme Court recently had the opportunity to pronounce itself and give further guidance on the procedure in the case of **Steven Mushoke v The People**[11]. In that case, a trial within a trial was conducted after which the learned trial Judge admitted the confession statement and stated that he would give the reasons for admitting the statement later. The learned trial Judge gave his reasons for admitting the confession statement in the Judgment. Phiri, JS had this to say on the matter:

"We do partly agree with Mr. Chomba's criticism of the manner the trial Judge dealt with the trial within a trial as failure to give the reasons at the conclusion of trial within a trial for admitting the confession statement there and then was a clear misdirection. The cavalier approach to give his reasons for admitting the confession statement in the main Judgment of the court was clearly a misdirection."

It was also held *inter alia* in the same case as follows:

"The prosecution bore the onus of proving beyond reasonable doubt the voluntariness of the alleged confession at a trial within a trial. Evidence should have been led on both sides at the close of the trial within a trial, submissions might be made by both sides and the court was obliged to deliver its ruling. In the present

case, the learned trial Judge admitted the appellants alleged confession statement soon after the appellants evidence in the trial within a trial and without rendering a formal ruling giving reasons why the alleged confession statement was admitted. This cavalier procedure amounted to a serious misdirection."

In *casu*, Counsel for the appellant has alleged that, the learned Judge made a ruling that he had found the Appellant with a case to answer after the close of the prosecution's case during the trial within a trial.

A perusal of the record and in particular page 16 of the record shows that after the close of the prosecutions case in a trial within a trial, the learned Judge found the Appellant with a case to answer and then the Appellant proceeded to give his evidence on oath. As can clearly be seen from both the **Solo**[10] and **Steven Mushoke**[11] cases, the procedure adopted by the learned Judge was strange and a clear misdirection. We agree with Mr. Muzenga on this point.

After the prosecution witnesses gave evidence, the learned Judge should have called upon the Appellant to give his evidence, and not make a ruling that he had a case to answer.

We also note at page 18 of the record that this is all the learned Judge said in his short ruling after conducting a trial within a trial:

"I have considered the evidence adduced. I am satisfied that the warn and caution was voluntarily given in an atmosphere that was conducive to the accused. The statement is freely admitted into evidence marked P3 and P4 respectively."

We are of the view that the said ruling did not amount to a formal ruling as envisaged in the **Steven Mushoke**[11] case. There was no review and/or evaluation of the evidence of the witnesses to enable the learned Judge arrive at the conclusion that beyond all reasonable doubt that the confession was obtained without oppression; neither did the learned Judge satisfy himself that the prosecution discharged the requisite burden of proof. In **Muwowo v The People**[1] it was held that the prosecution must prove its case beyond reasonable doubt, that a confession was made voluntarily.

The learned Judge's ruling in our view fell far short of the required formal ruling and was therefore a misdirection as it was prejudicial to the defence.

The learned Judge's attempt at page 34 of the record to justify the admission of the confession in the main Judgment was procedurally wrong and a misdirection. The summary of the evidence, evaluation of the same, findings of the court and its verdict must all be contained in the formal ruling alluded to.

In view of the procedural lapses by the learned Judge, which amounted to misdirections, the confession statement should not have been admitted into

evidence. The same is therefore accordingly excluded as part of the prosecution's evidence.

We now turn to ground three. The gist of this ground is that the learned Judge delivered a Judgment which fell short of the requisite standards set out in Section 169 (1) of **The Criminal Procedure Code**[1]. In that, the learned Judge did not address his mind to the evidence of the Appellant. He did not reproduce the Appellant's evidence in summary form; there was no adequate, consideration of the Appellant's evidence.

Section 169 (1) provides as follows:

> *"The Judgment in every trial in any court shall, except as otherwise expressly provided by the Code be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."*

We note that indeed there was no summary of the Appellant's evidence in his defence. In our view, such a summary is necessary as it would assist the court in determining the veracity of the Appellant's evidence as well as assist the court in identifying any inferred or possible defence.

However, we do not see what bearing the issues being raised by the Appellant has on the threshold under Section 169 (1) of **The Code**[1], as at the

end of the day the learned Judge identified the issues for determination, evaluated the evidence, determined the issues and reached a decision.

This ground of appeal has no merit and is accordingly dismissed.

Ground four attacks the learned Judge's conviction of the Appellant based on circumstantial evidence.

Notwithstanding the exclusion of the confession statement, as earlier alluded to, the learned Judge opined that there was sufficient circumstantial evidence to support the conviction based on the evidence.

We agree with the learned Judge that there was sufficient and overwhelming circumstantial evidence which in our view took the case out of the realm of conjecture, so much that it attained a degree of cogency which permitted only an inference of guilt.

We have taken this view, based on the evidence that the Appellant and his wife, PW1, were the only ones who had access to the house at the material time. When PW1, met the Appellant exiting the house, the Appellant, being the stepfather to the deceased, did not show any concern or care for, nor did he attempt to attend to the crying child. His conduct and reaction to the situation was one of indifference and therefore questionable.

We also agree with Counsel for the Respondent that the Appellant's presence in the house, in the absence of evidence of any other person being there, provided the Appellant the opportunity to commit the offence while

the mother to the deceased was bathing. The opportunity the Appellant had added credence to the other circumstantial evidence.

There is also the evidence of the murder weapon, the bicycle spoke, having been discovered in the roof of the house at the instigation of the Appellant; which evidence was correctly admitted, following the holding in the case of **Liswaniso v The People**[13] where it was held that evidence illegally obtained, such as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether it violates a provision of the constitution or some other law.

The fourth ground of appeal has no merit and is accordingly dismissed.

Before we conclude, although it is not relevant to the determination of the appeal, having excluded the confession, we wish to say something on the issue brought up by Mr. Muzenga, on the status of a confession made to a person who is not a police officer in the presence of the Police.

In our view, the **Abel Banda** case and **Major Isaac Masonga** case are by no means contradictory. In **Abel Banda**, the Court was dealing with the Judge's Rules as regards the administering of a warn and caution before interrogating a person. It is in that respect, it was held that a village headman was not a person in authority for purposes of administering a warn and caution before interrogating a suspect, since his normal duties do not pertain to investigating crime.

Chomba, JS, went on to state as follows:

> *"This court takes judicial notice that the training of police officers includes instructions in administering the warn and caution. There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime...on a careful review of the position we are satisfied that the Judge's rules do not contemplate as persons who should administer the warn and caution to suspects, persons like village headmen because it is not their normal responsibility to investigate criminal cases."*

In **Major Isaac Masonga**, although the Supreme Court made no reference to the **Abel Banda** case, they followed the same principle when they held that it is a well-established principle at law that a suspect who has to be interviewed by a person in authority has to be warned and cautioned before he makes any statement which may be produced in court against him.

Perhaps what arouses interest on the part of Mr. Muzenga is the statement by Chibesakunda, JS, as she then was, when she stated the following:

> *"Underlying Judge's Rules are these principles in their own right. There are independent of Judges Rules. Any unfair or improper conduct by people other than police officers extracting evidence can lead to exclusion of evidence by the discretion of the court."*

In that statement the Court was dealing with independent principles relating to what amounts to a fair trial which had nothing to do with the Judges' Rules. It is in that respect, it was held that any unfair or improper conduct by persons, other than police officers extracting evidence can lead to exclusion of evidence by the discretion of the court.

In our understanding it follows that, the court can exercise its discretion to exclude a confession or admission made to a person not in authority, if there is unfair and improper conduct on the part of that person or if the making of the statement is induced by a person in authority.

It is also our understanding that the mere presence of a person(s) in authority is not enough to exclude evidence. In the case of **Kafuti Vilongo v The People**[14], it was held that, the objection that the Appellant could have been scared is not sufficient; it must be alleged that he was actually put in fear which induced the making of the confession statement. This is a question of fact to be determined upon the evidence available as each case turns on its own facts.

In this case, other than the evidence that the Appellant was handcuffed and in the presence of the police officers when he admitted to PW2 that he had stabbed the child, there is no evidence that the police officers induced or intimidated him into making the confession. The evidence was therefore admissible

The sum total of this appeal is that, having dismissed the third and fourth grounds of appeal, this appeal fails and is accordingly dismissed.

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE