IN THE COURT OF APPEAL OF ZAMBIA APPEALS No. 17-23/2019
HOLDEN AT KABWE/LUSAKA/NDOLA
(Appellate Jurisdiction)

BETWEEN:

RAPHAEL CHIPAMPE TAFUNA SIKAZWE	**1ST APPELLANT**
CLEMENT YAMBAYAMBA	**2ND APPELLANT**
ISRAEL SIKAZWE	**3RD APPELLANT**
ONISHA NAMWINGA	**4TH APPELLANT**
ARNOLD KAITE	**5TH APPELLANT**
MAUREEN NAMWINGA	**6TH APPELLANT**
MATTHEWS CHABALA	**7TH APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Kondolo and Lengalenga, JJA

On 21st May 2019, 23rd May 2019, 25th June 2019, 28th August 2019 and 25th October 2019.

For the Appellants: In person

For the Respondent: M. K. Chitundu, Deputy Chief State Advocate, National Prosecutions Authority.

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Kambarange Mpundu Kaunda v The People [1990-1992] Z.R. 215
2. Sipalo Chibozu and Chibozu v The People [1981] Z.R. 32
3. Abedinegal Kapeshi and Best Kanyakula v The People SCZ No. 35 of 2017
4. Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People [1988-1989] Z.R. 163
5. Director of Public Prosecutions v Ngandu and Others [1975] Z.R. 253
6. Webster Kayi Lumbwe v The People [1986] Z.R. 93
7. Situna v The People [1982] Z.R. 115
8. Love Chipulu v The People [1986] Z.R. 73
9. Chimbini v The People [1973] Z.R. 191
10. Philip Mungala Mwanamubi v The People
11. Molley Zulu, Abraham Masenga And Smiling Banda v The People [1978] Z.R. 227
12. Robertson Kalonga v The People [1988-1989] Z.R. 90

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.

Introduction

1. This is an appeal, from a judgment of the High Court (Chembe J.), delivered on 29th March 2018. By that judgement, the appellants, who were jointly charged with 11 others, and were each facing two counts of murder and a count of attempted murder, were all convicted of the three offences. They were each condemned to suffer capital punishment for the murders, and sentenced to 20 years imprisonment, for the attempted murder.

2. The appellants, have all appealed against both their convictions and the sentences, imposed on them.

Charges before the trial court

3. In the first and second counts, the appellants were charged with the offences of murder, contrary to **sections 200 of the Penal Code**. The allegations were that, on 2nd June 2016, while acting together with others, they murdered Benson Mukupa Kaoma and Raibos Chifunda.

4. The charge in the third count, was that of attempted murder contrary to **section 251(a) of the Penal Code**. It was alleged that on the same day, they attempted to murder Peter Sinyangwe.

Evidence in support of charges

5. On 24th June 2013, Senior Chief Tafuna, of the Lungu of Mpulungu died. Following his death, his son, Cosmas Tafuna, was appointed to act as chief. He did not act for long, because the succession rules of the Lungu, did not allow him to succeed his father. Consequently, sometime in November 2013, the 1st appellant was appointed to act as chief.

6. On 24th March 2016, at a meeting organized by the member of parliament for Mpulungu, Christine Muselu, a journalist, recorded the 1st appellant, telling the attendees that, if Benson Mukupa Kaoma, the chief in waiting, turned up at Isoko Village, there would be bloodshed. Notwithstanding, on 29th March 2016, Benson Mukupa Kaoma, was recognized as Senior Chief Tafuna by the Government.

7. Following the conclusion of the traditional rites, initiating him as the new chief, on 2nd June 2016, Benson Mukupa Kaoma travelled to Isoko Village for his installation. He was in a convoy of about four motor vehicles carrying persons including Zambia Police Officers, his wife, Raibos Chifunda and Cosmas Tafuna Sikazwe.

8. The others travelling with them were, Kanafred K. Sinyangwe, Winston Henry Sikazwe, Yamwela Moriland Sikazwe, Enock Chisabi, Peter Sinyangwe, Gaston Chisha Yambala, Christopher Mazimba and Margaret Chisha.

9. As they approached the village, they found the roads blocked with logs, fire and stones, at various points. The police officers cleared the obstructions and they proceeded with their journey, until they reached Isoko Village, around 17:00 hours.

10. At the village, they found a group of unruly people

who threw stones at them. The police managed to disperse them using tear gas. Soon after arriving at the palace, the police officers returned. A group of people, who were armed with different weapons, including stones, advanced towards the palace.

11. The appellants, who are said to have been part of that group, were identified by thirteen prosecution witnesses, who were at the palace at the time. All the thirteen witnesses, previously knew the appellants because they lived in the same area.

12. Because the case against the appellants is anchored on identification evidence, it is necessary that we reproduce their testimony on the circumstances in which they identified the appellants.

1. Kanafred K. Sinyangwe

1. He was standing outside the entrance, when a group of people approached the palace. He identified the 1st appellant, who was carrying a machete, a pistol and catapults, around his neck.

He also identified the 2nd and 5th appellants. The 5th appellant was carrying an axe.

2. At about 18:00 hours, he saw members of the group set on fire a motor vehicle that was parked at the palace. Some of them entered the palace. Those who remained outside, began to throw stones into the palace.

3. He went to hide in a toilet which was behind the house. Whilst hiding, he heard Benson Mukupa Kaoma crying out for help. He also heard the 1st appellant say "just kill him".

2. Wiston Henry Sikazwe

1. He was in the procession that was bringing Benson Mukupa Kaoma to Isoko Village. When they arrived, he saw a group of people who were armed. He identified the 1st, 2nd and 5th appellants, in that group. When he saw the commotion, he decided to take Benson Mukupa Kaoma into the palace.

2. Soon thereafter, the 1st appellant, who was carrying a sickle, a pistol and catapults, went

in. Benson Mukupa Kaoma pleaded with him to spare his life, but the 1st appellant told him that he was going to kill him and assume the position of chief. He hit him with the sickle and instructed his followers to do the same.

3. When the door was opened, he managed to escape. Thereafter, fire was thrown into the palace. He went and stood near a window of the palace. From there, he was able to see what was going on inside. He saw the 1st, 2nd and 5th appellants drag Raibos Chifunda outside, where they eventually burnt him, together with Benson Mukupa Kaoma.

4. He then fled and hid in the bush, as he was frightened. Whilst in the bush, he heard the appellants singing and rejoicing that they had killed Benson Mukupa Kaoma.

3. Yamwela Moriland Mwambazi

1. Between 18:00 and 19:00 hours, a group of people entered the palace and began throwing stones and caused havoc. The 1st appellant, who was wearing a

short and a white vest, and had catapults around his neck was in the group and had what looked like a pistol.

2. Benson Mukupa Kaoma, told the 1st appellant, that if he wanted to become chief, he could leave the position for him, but the 1st appellant's response, was that, what he wanted, was his life. The 1st, 2nd and 5th appellants, then struck Benson Mukupa Kaoma with sticks and a machete. The others who were outside, threw stones and burning grass into the house.

4. Chomba Chapu Sikazwe.

1. When they arrived at Isoko Village, he saw the 1st appellant and his followers, enter the palace. It was between 18:00 and 19:00 hours. The 1st appellant was wearing a white t-shirt, a short and had catapults around his neck. He was carrying a machete in his right hand, and a black shotgun, in his left hand.

2. He also identified the 2nd appellant, who was carrying a sickle and the 5th appellant, who was carrying a short axe. Benson Mukupa Kaoma told the 1st appellant that, if he wanted to become chief, he would leave the throne to him, but instead, he was struck with a machete on the neck and he fell down.

3. Thereafter, the 1st appellant's followers also attacked Benson Mukupa Kaoma. At that time, he was about 1 meter and a half, away from where Benson Mukupa Kaoma was sitting, with the Indunas.

5. Tabu Nanyangwe

1. On the 1st and 2nd June 2016, she heard the 3rd appellant inciting villagers in Isoko Village, to show up, carrying their hoes, sickles, axes and axe handles, to kill their enemy, Benson Mukupa Kaoma.

2. Following an announcement that Benson Mukupa Kaoma had arrived, she went to the palace. She

saw a group of people at the roadside throwing stones. She was able to identify the 4th and 6th appellants, as they were carrying stones on their back. When the violence escalated and the group of people got closer, she went behind the palace.

3. The 4th and 6th appellants gave grass and stones to the that group of people. After the group burnt down the door and the windows, the 1st appellant entered the palace. He grabbed Benson Mukupa Kaoma, who fell to the ground.

4. Later on, the 4th and 6th appellants give grass to the others, who used it to burn Benson Mukupa Kaoma's body. The 1st appellant was her brother in law.

6. Enock Chisabi.

1. At about 18:00 hours, he noticed that the situation was getting hostile, he advised that Benson Mukupa Kaoma be taken inside the palace. Before he entered the palace, he identified the

1st, 2nd 3rd, 4th and 6th appellants, in the hostile group. The 1st appellant was wearing a vest, had catapults around his neck, a machete in his right hand and a pistol, in his left hand. The 4th and 6th appellants, were carrying stones on their back.

2. After members of the group entered the palace, Benson Mukupa Kaoma knelt down and told the 1st appellant that if he wanted the position of chief, he was ready to step down. In response, the 1st appellant, struck Benson Mukupa Kaoma with a machete on the cheek. Raibos Chifunda was also attacked in the process. This assault instilled fear in him and he jumped out of the palace, through a window.

3. He hid between ridges, in a field which was 10 meters away, from the front door of the palace. Thereafter he heard them sing that they had killed Benson Mukupa Kaoma and his brother. Members of the group dragged the bodies of Benson

Mukupa Kaoma and Raibos Chifunda, outside. The 1st appellant asked for grass to be brought and the 4th and 6th appellants, offered him the grass. They were referring to him as chief.

4. They poured petrol on the bodies, and set them ablaze. Peter Sinyangwe, who was badly injured, was also set ablaze. Thereafter, 3rd appellant made announcements on a mega phone.

7. Peter Sinyangwe

1. When the procession arrived at Isoko Village, some people threw stones at them and also burnt a motor vehicle, which was near the palace. They broke the windows to the palace and burnt down the door. He heard Ben Mukupa Kaoma begging not to be killed. When he tried to escape, he was axed and he collapsed. He was severely burnt, together with Benson Mukupa and Raibos Chifunda.

2. Prior to the attack, he identified the 1st and 2nd appellants, in the group.

8. Gaston Chisha Yambala

1. When they arrived in Isoko Village, he pleaded with the police officers not to leave because the environment was hostile. Notwithstanding, the police insisted that their mandate had come to an end, and they left. He then saw a large group of people carrying machetes, hoes, stones and handles.
2. He hid behind a tree when the mob begun throwing stones at them. He was near a motor vehicle, that had been set ablaze, and was able to identify the persons involved. The 5th appellant was carrying an axe and a 2.5 litres container of petrol, which he poured on the motor vehicle, before it was set ablaze.
3. The 1st appellant was carrying a pistol in his left hand, and a machete in his right hand. He also had catapults around his neck. They forcefully entered the palace, after breaking the

windows. They also threw burning grass into the palace.

4. In fear, he went to hide in the bush, where he subsequently heard the 7th appellant, make a phone call, saying they had killed Benson Mukupa Kaoma. Thereafter, he heard the mob singing a song that the 1st appellant had told them to kill Benson Mukupa Kaoma.

9. Annie Nachangwa.

1. On 2nd June 2016, she heard the 3rd appellant announcing that villagers must gather together with hoes, sickles and axes because they had been attacked by their enemies. When Benson Mukupa Kaoma arrived, he was taken into the palace and a group of people begun to throw stones.

2. Since the atmosphere was violent, she went to hide between the ridges in a sweet potatoes field. Between 1800 and 1900 hrs. she saw the 1st appellant, who was wearing a vest, and carrying a machete in his right hand and a pistol in his

left hand, in the group that was advancing towards the palace. She also saw the 4th and 6th appellants. In addition, she saw the 7th appellant who was carrying a sickle.

3. After members of the group entered the palace, she peeped through the window and saw the 1st appellant standing in front of Benson Mukupa Kaoma. He raised his right hand, in which he was carrying the machete, but did not see what followed. Afterwards, she just saw a person being dragged outside. At that point, she decided to go home, from where she heard people singing that the 1st appellant sent them to kill Benson Mukupa Kaoma.

10. Christopher Mazimba

1. When they reached the palace, he remained outside and saw a large group of people advancing. From the group, he was able to identify the 2nd appellant. He phoned the police to inform them of

what was going on and they advised him to call Chomba Chapu Sikazwe.

2. When he called, the person who answered told him that they had killed the person he wanted to talk to. He asked who he was talking to, and the 1st appellant introduced himself as "Chief Ben".

11. Margaret Chisha

1. She was Raibos Chifunda's wife. While they were inside the palace, some injured people were brought in. As a result, she went outside to see what was happening, and saw a group of people setting a motor vehicle on fire. In that group, she identified the 1st and 5th appellants.

2. She then went back into the palace, she found the 1st appellant talking to Benson Mukupa Kaoma. Benson Mukupa Kaoma, knelt down and pleaded with him, but the 1st appellant and his followers, threw him to the ground and begun hitting him. The 5th appellant and others, attacked her

husband, with axes on the head, and dragged him outside.

12. Chisha Sichangwa

1. After Benson Mukupa Kaoma arrived, he saw the 4th and 6th appellants giving stones to the group of people that were throwing stones. He was able to see what was going on from a field, where he was hiding. It was 15 metres away. He also saw them pick grass and put it under the motor vehicle. The 5th appellant, was carrying petrol in a 2.5 litre container. He sprinkled it on the motor vehicle and then set it on fire.

2. He also saw the 1st, 2nd, 3rd and 7th appellants. The 1st appellant was carrying a machete in his right hand, and a pistol in his left hand. He also had catapults around his neck. The 2nd appellant was carrying a sickle, the 3rd appellant threw stones, the 5th appellant had an axe and the 7th appellant, had an axe handle.

3. In order to get a good view of what was going on, he advanced to the palace and pushed the door open. He saw Benson Mukupa Kaoma kneeling down and holding his hands up. The 1st appellant then struck him on the left jaw with a machete. He later saw the 2nd and 5th appellants drag Benson Mukupa Kaoma and Raibos Chifunda, outside. He also saw the 4th and 6th appellants, putting grass on top of their bodies, prior to their being burnt.

13. David Simuchenje

1. On 2nd of June 2016, he was waiting for Benson Mukupa Kaoma at the junction, when he saw the 1st appellant transporting people to various points, which were to be used by Benson Mukupas Kaoma's entourage. The 1st appellant then gave a mega phone to the 3rd appellant, who announced that people of Isoko Village ought to be united. He urged the people to carry slashers, small hoes and axes.

2. After Benson Mukupa Kaoma arrived, the mob set a motor vehicle on fire, and the 1st appellant ordered them to quickly enter the palace. The 1st appellant, was carrying a machete, pistol and catapults.

Defence evidence

13. All the appellants gave evidence in their defence. They took a common position, they all denied being at the palace during the attack. It was their common position, that they were not even aware, of the fact that Benson Mukupa Kaoma, had been taken to Isoko Village, for installation as Senior Chief Tafuna. Further, they all denied being aware of the commotion, and violence, that took place on that day, in Isoko Village.

14. They either claimed to have been home, with their families, or at their places of work or businesses. The 1st appellant, denied inciting the violence, or holding a grudge, against Benson Mukupa Kaoma. The 2nd, 3rd, 4th, 5th, 6th and 7th appellants, all claimed

that they were implicated because of animosity, arising out of their association, with the 1st appellant. He had dismissed a good number of the witnesses, from their jobs, when he acted as chief.

15. The 5th appellant, denied ever making an announcement, using a mega phone, instructing all the residents to turn up on 2nd of June 2016, with hoes, axes and sickles, to attack Benson Mukupa Kaoma. He said, the only announcement he made, was on 1st June 2016. It was about the Electoral Commission of Zambia, going to Isoko, to teach the residents how to vote, on 2nd June 2016.

Trial Judge's findings of fact

16. The trial judge found that the appellants, were aware, that Benson Mukupa Kaoma, had been gazetted as Senior Chief Tafuna, and was going to be taken to Isoko Village, for installation on 2nd June 2016. She also found, that the 1st appellant, through the 5th appellant, mobilized villagers to prepare and

prevent, the installation of Benson Mukupa Kaoma. The villagers, blocked the roads to prevent him, from reaching the palace.

17. In the face of evidence, that some of the witnesses were related to the deceased persons, or related to persons dismissed by the first appellant, the trial judge considered the possibility that they may have had the motive, to falsely implicate the appellants. She found that none of them had any motive to falsely implicate them and that they were credible witnesses. She also found that in any case, those witnesses testimony, was corroborated by some other witnesses.

18. She also found that the appellants, took advantage of the withdrawal of the police, and attacked Benson Mukupa Kaoma, whilst armed with sickles, machetes, hoes, axes, sticks and stones. Further, she found that although it was dark when the attack took place, the appellants burnt a motor vehicle, which provided light to the surrounding areas.

19. In addition, despite the attack taking place at dusk and under traumatic circumstances, the trial judge found that all the appellants, were sufficiently identified. The duration of the attack took between 1 and 2 hours, and all the witnesses had a reasonable opportunity, to identify them.

20. Further, the trial Judge found that after the 1st, 2nd, 3rd, 5th and 7th appellants entered the palace, they viciously assaulted the occupants. Thereafter, Benson Mukupa Kaoma, Raibos Chifunda and Peter Sinyangwe, were dragged outside, where the 4th and 6th appellants, placed grass on them before they were set them ablaze. She found that Benson Mukupa Kaoma and Raibos Chifunda, died as a result of the injuries they suffered at the hands of the appellant, whilst Peter Sinyangwe survived the injuries.

21. She also found that even though not all the appellants inflicted the fatal blows, they had a common purpose, they set out armed, responding to a

call to prevent Benson Mukupa Kaoma from taking up the position of chief. They had *malice aforethought* because being armed, death was a very probable consequence of their excursion.

22. The trial judge also ruled out the suggestion that there was a dereliction of duty on account of the failure to investigate the appellants' alibis and lift fingerprints. She found that the overwhelming identification evidence, offset any prejudice the appellants may have suffered by the failures to investigate.

Grounds of appeal.

23. Two grounds have been advanced in support of this appeal. They essentially deal with identification evidence, implicating the appellants. It is contended that:

1. The appellants were convicted on the testimony of witnesses, who had a possible interest of their own to serve; and

2. The identification evidence, on which the appellants were convicted, was unreliable because it was conflicting.

Most prosecution witnesses having an interest of their own to serve

24. In support of the argument that the key witnesses had possible interests of their own to serve, it was pointed out that Kanafred K. Sinyangwe, Winston Henry Sikazwe, Yamwela Moriland Mwambazi, Christine Muselu, Chomba Chapu Sikazwe, Tabu Nanyangwe, Enock Chisabi, Peter Sinyangwe, Gaston Chisha Yambala, Annie Nachangwa, Margaret Chisha, Chisha Sichangwa and David Simuchenje, were either relatives, friends or supporters, of Cosmas Tafuna Sikazwe (who was acting as Senior Chief Tafuna), Benson Mukupa Kaoma and Raibos Chifunda.

25. Further, when the 1st appellant was appointed as acting Senior Chief Tafuna, he dismissed them from their different positions they held in the royal establishment. On the basis of the case of **Kambarange Mpundu Kaunda v The People**[1], it was

submitted that the trial judge, ought to have treated their evidence with caution and should have only relied on it, after ruling out the danger of false implication.

26. It was pointed out that the witnesses claim, that the appellants, killed Benson Mukupa Kaoma and Raibos Chifunda, are not supported by the evidence. They referred to the case of **Sipalo Chibozu and Chibozu v The People**[2] and submitted that having failed to call a medical doctor, to support the assertion, the appellants should have been acquitted. This is because an essential ingredient of a charge, the cause of death, was not proved.

27. In response, Mrs. Chitundu referred to the case of **Abedinegal Kapeshi and Best Kanyakula v The People**[3] and submitted that Cosmas Tafuna Sikazwe, Tabu Nanyangwe, Enock Chisabi, Gaston Chisha, Annie Nachangwa and Margaret Chisha, were not witnesses with a possible interest of their own, to serve.

They all gave evidence, on events, they perceived, first hand.

28. She pointed out that Tabu Nanyangwe's testimony, highlighted the fact that she was related to both the 1st appellant and Benson Mukupa Kaoma, through marriage. There was no evidence of bias, on her part, to sustain the appellants' assertion that she was a suspect witness. With regard to Enock Chisabi, she argued that he testified that he had other sources of income, thus ruling out being resentful, as a result of being dismissed by the 1st appellant.

29. In the case of Gaston Chisha, she argued that he had no motive to be resentful because he was never dismissed by the 1st appellant.

30. Mrs Chitundu also submitted that the charges of murder where proved beyond reasonable doubts.

Were the appellants convicted on the uncorroborated testimony of witnesses with a possible interest of their own to serve?

31. In the case of **Boniface Chanda Chola, Christopher**

Nyamande and Nelson Sichula v The People[4], the Supreme Court, held, *inter alia*, that:

> **"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices."**

Further, in the case of **Abedinegal Kapeshi and Best Kanyakula v The People**[3], the Supreme Court reaffirmed this position, and pointed out that the mere fact that a witness is a relative, does not make such a person, a witness with a possible interest of their own to serve.

32. In this case, the trial judge considered the possibility that Tabu Nanyangwe, Magaret Chisha, Anna Nachangwa, Chisha Sichangwa, Kanafred Sinyangwe, Cosmas Tafuna and Gershom Yambala, were witnesses who may have had a possible interest of their own to serve and found that it was not the

case. She found that athough Tabu Nanyangwe was related to deceased persons, and Magaret Chisha was the wife to one of the deceased persons, they gave a candid and unexaggerated account of what happened. She found them to be credible and ruled out the possibility that they had an interest of their own to serve.

33. In the case of Anna Nachangwa, Chisha Sichangwa, Kanafred Sinyangwe, Cosmas Tafuna and Gershom Yambala, who are said to have been interested in the thrown or were against the 1st appellant because he dismissed them or their relatives, she equally found that they did not colour or exaggerate, their testimony. She found that they were not witnesses with a possible interest of their own to serve and that their testimony was supported or confirmed by independent witnesses, Christine Muselu, Yamwela Mwambazi, Peter Sinyangwe and Chisha Sichangwa.

34. In the case of **Director of Public Prosecutions**

Ngandu and Others[5], the Supreme Court held that an appellate court can only set aside a finding of fact, if it was made without any evidence or on a view of the facts, which could not reasonably be entertained. Further, in the case of **Webster Kayi Lumbwe v The People**[6], the Supreme Court held that:

> **"An appeal court will not interfere with a trial court finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous."**

35. We have examined the judgment, and the reasons advanced by the trial judge, for finding that none of the witnesses, had a possible interest of their own to serve. We are satisfied that, on the evidence that was before her, she was entitled to come to that conclusion. The finding is supported by the evidence and cannot be said to be perverse.

36. The testimony of the witnesses, who are alleged to have had an interest of their own to serve, did not depart from that of the independent witnesses in any material way. Other than point out that they were relatives, no evidence was led, on why they

should have been found to be suspect witnesses. The trial judge was therefore entitled to find that they were not witnesses with a possible interest of their own to serve. Since the trial judge rightly found that the witnesses were not suspect witnesses, the question of their testimony being corroborated does not arise.

37. Despite this finding, the trial judge still exercised some degree of caution, she accepted their evidence as being credible after confirming that it was in line with that of the independent witnesses. We are satisfied that she applied the right test when assessing the testimony of the prosecution witnesses.

38. As regards the submission that the failure to call the doctor was fatal to the prosecution case, which premised on the case of **Sipalo Chibozu and Chibozu v The People**[2], we find that it was not the case. In that case, at page 32, the following was said about **section 191A of the Criminal Procedure Code**:

> **"All that the above provisions say is that the report of a medical officer employed in the public service shall be admitted in evidence "to prove" the contents thereof. The section does not say that the report shall necessarily be admitted as proof conclusive of its contents. No doubt the legislature has specifically provided for the summoning of the medical officer, when either party or indeed the court may summon him as a witness in any event, in the face of an inconclusive as much as an involved or vague report. Usually indeed the contents of the medical report will in the least require elucidation, a point which is stressed in the following passage from the judgment of this court per Baron, D.C.J., in Mwanza and Others v The People (1) at p. 222:."**

39. It follows, that the failure to call a doctor is only a problem, if the medical evidence is not clear. We have examined the two medical reports which set out the causes of death as follows:

1. Benson Chifunda Mukupa Kaoma: *"Burns all body and multiple injuries; left frontal penetrating wound, fracture of number 2 ribs, sharp cut lower lip, fracture of the left frontal bone, intracranial hematoma"*; and
2. Ribos Chifunda: *"severe head injury, (Compound fracture of the skull and a deep laceration on the right temporal region)"*.

40. In our view, the cause of the two victims' death's,

can be discerned without difficulty from the postmortem reports. In the circumstances, we find that there was no need to corroborate the prosecution witnesses' to call the doctor to prove the cause of death.

41. Consequently, we find no merit in the first ground of appeal and we dismiss it.

Contradictory and unreliable prosecution witnesses

42. In support of the second ground of appeal, the appellants argued that their convictions were anchored on contradictory and unreliable identification evidence, the appellants pointed out that Kanafred K. Sinyangwe, Winston Henry Sikazwe, Yamwela Moriland Mwambazi, Chomba Chapu Sikazwe, Tabu Nanyangwe, Enock Chisabi, Peter Sinyangwe, Geston Chisha Yambala, Annie Nachangwa, Margaret Chisha, Chisha Sichangwa and David Simuchenje, gave

contradictory testimony on the events of the evening of 2nd June 2017.

43. It was submitted that Kanafred Sinyangwe failed to articulate, with clarity, his location at the material time and so his evidence of identification was doubtful.

44. In was also submitted that Winston Henry Sikazwe gave evidence that he saw the 1st, 2nd and 5th appellants, armed with sticks as they entered the palace house. He also saw the 1st appellant armed with a pistol, sickle and catapult. It was argued that in view of his acknowledged poor sight, he could not have identified them at night.

45. Similarly, the evidence of Yamwela Moriland Mwambazi, Enock Chisabi and Annie Nachangwa, was said to be doubtful owing to its inconsistences in what the 1st appellant precisely wore, at the material time. Yamwela Moriland Mwambazi said he wore a vest, Enock Chisabi said it was a white t-

shirt, while Annie Nachangwa said it was a sleeveless muscle shirt.

46. On the authority of **Situna v The People**[7], it was submitted that in view of the inconsistencies, the trial court ought to have treated their evidence with caution, and not found them to be credible witnesses.

47. Further, it was argued that violence and the distressful atmosphere, throughout the incident, compromised the identification evidence of all the prosecution witnesses. Reference was made to the case of **Love Chipulu v The People**[8] and it was submitted that, the evidence should only have been received, after eliminating the possibility of an honest, but mistaken identification.

48. In response to these arguments, Mrs. Chitundu submitted that the identification evidence was reliable because the appellants were recognised by people who knew them well prior to the incident. She added that Tabu Nanyangwe, Enock Chisabi,

Gaston Chisha, Annie Nachangwa, Chisha Sichangwa and David Simuchenje, were all permanently resident in Isoko Village, together with all the appellants. Even though there was tension on the material day, identification was not very challenging. In support of these arguments, she referred to the cases of **Chimbini v The People**[9] and **Philip Mungala Mwanamubi v The People**[10].

Was the identification evidence of poor quality

49. In the case of **Molley Zulu, Abraham Masenga And Smiling Banda v The People**[11], Gardner JS, at page 229, observed as follows:

> **"Although recognition may be more reliable than identification So of a stranger, even when the witness is purporting to recognise someone whom he knows, the trial Judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made. Even in recognition cases a trial Judge should warn himself of the need to exclude the possibility of honest mistake, and the poorer the opportunity for observation the greater that possibility becomes. The momentary glance at the inmates of the Fiat car when the car was in motion cannot be described as good opportunity for observation."**

Further, in the case of **Roberson Kalonga v The People**[12], it was held that:

"Poor identification evidence requires corroboration such as a finding of recent possession of stolen property."

50. In her judgment, the trial judge found that the attack took place at night in a very violent environment. However, she found that the appellants were sufficiently identified because there was light from a burning motor vehicle; the incident lasted for between 1 and 2 hours; and the appellants were previously known to the witnesses.

51. But before we deal with the specific arguments against the identification evidence, it is necessary to point out that the 6th and 7th appellants were each identified by 3 witnesses. The 4th appellant was identified by 4 witnesses, while the 3rd appellant was identified by 5 witnesses. In the case of the 2nd and 5th appellants, they were both identified by 8 witnesses each. The 1st appellant, was identified by 11 witnesses.

52. It was argued that the 1st, 2nd and 5th appellants' identification, by Winston Henry Sikazwe, was unreliable because of his poor sight. The trial

judge did find that Winston Henry Sikazwe had poor sight, but she also found that his identification evidence, was corroborated by other witnesses.

53. We have examined the record and find that other than Winston Henry Sikazwe, the 1st appellant was identified by 10 other witnesses. In the case of the 2nd appellant and 5th appellants they were both identified by 7 other witnesses. This being the case, we are satisfied that Winston Henry Sikazwe's "poor identification" of the 3 appellants, was corroborated by the identification evidence of other witnesses.

54. We have also examined the evidence of Yamwela Moriland Mwambazi, Enock Chisabi and Annie Nachangwa, on what the 1st appellant precisely wore. Yamwela Moriland Mwambazi said he wore a vest, Enock Chisabi said it was a white t-shirt, while Annie Nachangwa said it was a sleeveless muscle shirt. In our view, these witnesses simply gave different names for the white top that the first

appellant was wearing. We do not think that their different descriptions would have warranted a court finding that their evidence was contradictory. All the witnesses were agreed on the fact that he was armed and was directing the group.

55. We turn to the argument that the situation at the palace on the evening of 2nd of June 2016, was traumatic and the witnesses were terrified and thereby compromised the identification evidence. The trial judge acknowledged that the situation was traumatic and the witnesses were terrified, but she also considered the lighting and the fact that the appellants were previously known to the witnesses.

56. It is common cause that all the 15 witnesses, whose evidence we have already reproduced, previously knew all the appellants. They all testified, in a lot of detail, of the circumstances in which they each identified the appellants. They were also cross examined at length. We are satisfied that even if the atmosphere was traumatic, the trial

judge was entitled, on the evidence before her, to find that they had sufficient opportunity to identify the appellants. There was lighting from the burning motor vehicle; the witnesses previously knew them and the attack lasted over an hour. Since they were perceiving the event from different places, one would not expect that they would agree on each and every detail of what transpired.

57. We accept Mrs. Chitundu's submissions and find that the trial judge properly assessed the evidence before her when she came to the conclusion that the evidence of identification was credible. It is our considered view that her finding was supported by the evidence and we uphold it. The second ground of appeal equally fails.

Verdict

58. Having found that all the grounds of appeal, which sought to challenge the propriety of the conviction lack merit, we uphold all the appellants'

convictions on all the 3 charges on which they were convicted.

59. Even though the appeals were also against sentence, no arguments were advanced attacking the sentences. Notwithstanding, we have looked at the sentences. Capital punishment was imposed for both murders, we find no extenuating circumstances that would have warranted alternative sentences. In the case of the 20 years imprisonment for the attempted murder, it does not come to us with a sense of shock.

60. Consequently, we uphold all the convictions and sentences imposed on all the appellants and dismiss the appeals.

.....

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....

M. M. Kondolo
COURT OF APPEAL JUDGE

.....

F. M. Lengalenga
COURT OF APPEAL JUDGE