IN THE HIGH COURT FOR ZAMBIA **HPA/21/2016**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N :

MUTUKWA SIMUKONDA	**APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

Before the Honorable Mrs. Justice M. Mapani-Kawimbe

For the Appellant	:	*Mr. B. Mwanza, Legal Resources Foundation*
For the Respondent	:	*Mr. C. Ng'oma, State Advocate, National Prosecution Authority*

J U D G M E N T

Case Authorities Referred To:

1. *Communications Authority v Vodacom Zambia Limited (2009) (S.C.)*
2. *David Zulu v The People (1977) ZR 151*
3. *Dorothy Mutale and Richard Phiri v The People (1997) SJ 51*
4. *Yotam Manda v The People (1988 - 1989) ZR 129*
5. *Katebe v The People (1975) Z.R. 13 (S.C.)*
6. *Bwalya v The People (1975) ZR 125 (SC)*
7. *The Minister of Home Affairs, Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes SCZ Judgment No. 23 of 2007*
8. *Capital and Suburban Properties v Swycher (1976) Ch. 319*
9. *Gideon Hammond Millard v The People (1998) S.J. 34 (S.C.)*
10. *Patrick Kunda and Robertson Muleba Chisenga v The People (1980) ZR 105 (SC)*

Legislation Referred To:

1. *Penal Code, Chapter 87*
2. *Criminal Procedure Code, Chapter 88*

The Appellant was tried and convicted by the Lusaka Subordinate Court of one count of the offence of riotous behavior contrary to section 76 of the Penal Code. The particulars of the offence are that the Appellant and twenty nine others (who are not part of this appeal) on the 1st day of January, 2016 at Kafue in the Kafue District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together took part in riotous conduct thereby causing damage to public and private property.

From the record of proceedings of the trial Court, there were initially thirty accused persons, twelve of which were acquitted at the stage of no case to answer. For the remaining accused persons, the prosecution called a total of fifteen witnesses.

PW1 was **Joseph Nkhoma** who testified that on 1st January, 2016 at about 07:08 hours, he was in custody at Lumumba police post when he heard stones fall on the roof top of the police cell. He

testified that whilst in the police cell a rastaman went to the cell and broke the lock. All the suspects therein escaped. Out of the accused persons paraded by the prosecution, he did not identify the Appellant. **PW2** was **Chief Inspector Aaron Banda** of Kafue police post who gave evidence of the events of 1st January, 2016 on how Lumumba police post was attacked by a riotous crowd that damaged the police station, motor vehicles and the fire tender. PW2 told the trial Court that a number of persons who were alleged to have participated in the riot were subsequently apprehended. He did not identify the Appellant as a member of the riotous mob.

PW3 was **Assistant Superintendant Jason Lungu,** officer in charge Kafue police station who gave similar evidence to PW2 on how a riotous mob attacked Lumumba police post, police vehicles and a fire tender. He like PW1 did not identify the Appellant as one of the persons in the riotous mob. The evidence of **PW4 Sergeant James Sikede**, **PW5 Nachama Nakuweza**, a fire officer, **PW7 Sergeant Mwana Nyembe, PW9 Detective Constable Nkuwa**, **PW10 Detective Constable Mulenga, PW11 Detective Inspector**

Chishala, **PW12 Inspector Simango**, **PW13 Constable Nguni, PW14 Detective Inspector Nkandu** and **PW15 Detective Inspector Mumba** was no different from the evidence of PW2 and PW3. Just like the earlier witnesses, except for the evidence of PW9 and PW10, they did not identify the Appellant as one of the members of the riotous mob that attacked Lumumba police post.

PW9 testified that police officers threw tear gas canisters to disperse the riotous mob at Lumumba police post. As a result some of the members of the riotous mob scatted into different directions, with some running into a bar called Uncle Steve. PW9 and other police officers chased some of the members of the mob to Uncle Steve's bar, where they picked up about twelve persons, who among them included the Appellant. PW9 told the Court that all twelve persons who were arrested at Uncle Steve's bar appeared before the trial Court.

PW10 on the other hand testified that at about 10:00 hrs on 1st January, 2016 he went to Uncle Steve's bar with PW9 and police officers, where they picked up eleven people, whom they suspected

to have been part of the riotous mob. The Appellant was one of the persons the police picked up. The evidence of PW6 George Banda and PW8 Theresa Nambela confirmed that a riot took place at Lumumba police station. In particular PW8 was able to observe the events at Lumumba police station at a distance. She did not associate the Appellant with the riotous act.

After the prosecution case, the Appellant was found with a case to answer and put on his defence.

The Appellant gave evidence on oath and called one witness. The Appellant told the trial Court that on 1st January, 2016 he heard the noise of the rioters in the compound at about 08:00 hours. At around 10.00 hours, when the noise calmed down, he decided to go to town to buy meat for his family, but found the butchery closed.

On his way back, he decided to go to Uncle Steve's bar where he had a beer. Whilst inside the bar he smelt tear smokes and later police officers entered the bar and ordered everyone inside to lie down. Afterwards, the police took all the people who were in the

bar to the police station, where he was charged with the offence of riotous conduct. In cross-examination, the Appellant told the trial Court that he lived in Kashelela. He recalled that there were four ladies and a few men who included two of the accused persons (A9 and A30) who were taken to the police station.

The Appellant's only witness was **Decons Chewe** testified as **DW4** she worked as a bar lady at Uncle Steve's Bar. She testified that the Appellant and two other accused persons were at the bar on 1st January, 2016. Between 10:00 and 11:00 hours, the Appellant entered Uncle Steve's Bar and bought himself a beer. He then went to chat with some people who were inside the bar. DW4 also told the trial Court that while she was standing at the bar counter, she smelt tear smokes. Afterwards some police officers opened the door to the bar and told the people who were there to lie down. DW4 did not know the time that the riot started.

The offence for which the Appellant was convicted and sentenced is created by section 76 of the Penal Code as follows:-

"***Any person who takes part in a riot is guilty of a misdemeanour and is liable to imprisonment for seven years.***"

Riotous behavior is defined in section 74 (2) of the Penal Code as follows:-

"When an unlawful assembly has begun to execute a common purpose by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled."

A riot occurs when a group of persons in disobedience of the law, gather to carry out activities, which are capable of violating peace and causing fear amongst the members of the public. In this case, the Appellant was convicted and sentenced to six months imprisonment with hard labor.

It is from the said conviction and sentence that the Appellant has now appealed on three grounds framed as follows:

1. *The learned trial magistrate erred in law and in fact when he found Mutukwa Simukonda (A5) guilty of riotous behavior against the weight of evidence on record.*

2. *The learned trial magistrate erred in law and in fact when he found Mutukwa Simukonda guilty without satisfying the requirements for the commission of the offence of riotous behavior.*
3. *The learned trial magistrate erred in law and in fact when he failed to make findings of fact, to apply the law to the facts and provide a reason for his decision in his judgment.*

Learned Counsel for the Appellant and Respondent filed written submissions, dated 23rd August, 2016 and 14th September 2016 respectively. I am very grateful to both Learned Counsels for their well researched submissions.

The main issue contended by the Appellant is that the trial Court did not attach any value to the evidence of the Appellant and as a consequence thereof, it did not satisfy itself that the requirements of the offence of riotous behavior were met. Further, Learned Counsel contended that the trial Court failed to give reasons in its judgment for convicting the Appellant.

On the other hand the Respondent's submissions were that the Appellant did not defend himself in the wave of the prosecution's evidence, even after the Court had given the Appellant

an opportunity to do so. Further, Learned Counsel for the Respondent argued that the Appellant had the responsibility of presenting his alibi at the time of his arrest. In sum the Respondent's averred that the trial Court was on firm ground, when it convicted and sentenced the Appellant.

In **ground one,** Learned Counsel for the Appellant submitted that the trial Court should have acquitted the Appellant of the charge of riotous conduct as the evidence before it was overwhelmingly in his favour. Counsel for the Appellant referred the Court to the case of **Communications Authority v Vodacom Zambia Limited**[1] where the Supreme Court reiterated the grounds on which an Appellant Court can interfere with findings of fact. He canvassed the argument that the trial court erred in law and in fact when it found the Appellant guilty of riotous conduct, when the evidence before it did not support such finding. Counsel referred the Court to the testimony of A9 who was acquitted on the same facts as that of the Appellant, quoting the relevant portion as follows:

"During cross examination A9 told the court that he was apprehended from the bar inclusive of A5 and A30. He told the court that he did not see any person enter the bar who was being chased by police officers."

Further, the testimony of A30 who was also acquitted on the same facts as the Appellant quoting the relevant portion of his evidence as follows:

"...Around 09:00 hours A9 my friend came and he wanted to go home and I told him to wait for me and escort me to the bar B1 near uncle Steve. We went to the bar B1 they were people playing pool and entered the bar DW4 the bar lady and A9. Enter the counts and A5 was at the count [counter] drinking, I got my book were I do my stock book.

While in the bar smiled [smelled] tear gas and told DW4 to close the door and a short time officers ordered to open or would throw tear gas. DW4 opened the door and officers entered and told to put our heads down and went outside and told to lay down and communication for transport to carry us to police."

Learned Counsel for the Appellant submitted that the testimony of the Appellant, A9, A30 and DW 4 was consistent with the events that transpired at the bar on the day of the occurrence of

the riot. Equally, there was no evidence adduced by the prosecution to show that the Appellant was identified, chased and apprehended from the bar by police officers. He wondered how the trial Court could justify a finding of guilt.

In other words, Counsel contended that there was an absence of direct evidence linking the Appellant to the riot. Counsel further argued that the trial Court relied on the testimony of prosecution witnesses, which was circumstantial without considering the evidence of the defence. He referred the Court to the cases of **David Zulu v The People**[2] and **Dorothy Mutale and Richard Phiri v The People**[3] on how circumstantial evidence should be received by the Court.

It was Learned Counsel's submission that the circumstantial evidence was not taken out of the realm of conjecture to a degree of cogency which permitted only an inference of guilt. He insisted that there were two possible inferences that could be drawn from the facts: firstly, that the Appellant was chased into the bar by police officers after they dispersed the riotous mob that had gathered

outside Lumumba Police Post using tear gas; or secondly, that the Appellant entered the bar without being chased by police officers to have a drink. He relied on case of **Yotam Mande v The People**[4] to support his proposition. He prayed to the Court to quash the conviction of the Appellant and the sentence passed on him in ground one.

In response, Learned Counsel for the Respondent argued that the record of proceedings of the Court below showed that the Appellant was one of the members of the riotous mob. Counsel submitted that the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9 was not challenged by the Appellant, let alone discredited in cross examination. Counsel also submitted that the trial Court accorded the Appellant an opportunity to challenge the prosecution witnesses who testified against him but chose to keep quiet.

Counsel for the Respondent contended that the Appellant's defence of an **alibi** stating that he was at home when the riot started was 'an after thought'. Further, that there was no evidence

on record to show that the Appellant told the police officers during his incarceration that he was not at the scene of crime but at his house. Counsel relied on the case of **Katebe v The People**[5] where the Supreme Court held that:

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

Counsel also placed reliance on the case of **Bwalya v The People**[6] where the Supreme Court held inter alia, as follows:

> ***"Simply to say "I was in Kabwe at the time" does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says "I was not there" he puts forward an alibi which it is the duty of the police to investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been the duty of the police to investigate, but the appellant not having done so there was no dereliction of duty on the part of the police."***

Counsel submitted that if the Appellant was indeed at his house at the time of the riot, then he could have told the police

immediately he was arrested. The fact that the Appellant brought up his alibi during cross-examination at trial was the reason that the trial court disbelieved him. Counsel urged the Court to dismiss ground one of the appeal because there was evidence linking the Appellant to the riot.

In order to prove the offence of riotous behaviour, the prosecution must show that:

1. *That the accused persons did unlawfully assemble to execute a common purpose by a breach of the peace*
2. *That the unlawful assembly caused extreme fear to the public*
3. *That the accused persons took part in a riotous conduct.*
4. *That the accused persons caused damage to public and private property.*

I have weighed the submissions of both the Appellant and Respondent in this ground of the appeal. It is not in dispute that a riot occurred on 1st January, 2016 in Kafue at Lumumba police post. From the prosecution evidence, the mob that took part in the riot caused extensive damage to the police station, police vehicles and a fire tender. In certain instances, police officers who are trained well to handle such attacks were subdued by the mob and

had to run for their lives. However, from the evidence of the prosecution in the trial Court, I find that there was no direct evidence tendered by the prosecution linking the Appellant to the riot, except the evidence of PW9 and PW10, that the Appellant was found at the bar with A9 and A30, who were similarly circumstanced as the Appellant but acquitted.

I therefore find that only the testimonies of PW9 and PW10 linked the Appellant to the riot and not the other prosecution witnesses. I also find that PW10 was cross examined by the Appellant. In addition, the Appellant called DW4 as his witness and perhaps if I may say so and by extension, the evidence of A9 Samuel Muyunda and A30 Francis Banda which had a bearing on the Appellant's defence. Be that as it may, it is perplexing that A9 and A30 who were similarly circumstanced as the Appellant were acquitted while the Appellant was convicted and sentenced. I find it worthy to mention that the Appellant gave evidence that he was at Uncle Steve's bar having beer after the riot had been quelled. The evidence I must say was corroborated by that of DW4, A9 and A30.

From my thorough inspection of the record, I find that the Appellant was not given an opportunity to explain himself, given the manner in which he and others were bundled out of the bar by the police officers. I am therefore not swayed by the Respondent's arguments that the Appellant's alibi might have come as an "after thought" given the circumstances of his arrest. I nonetheless agree with the case of **Kateba v The People**[5] cited by Counsel for the Respondent, but for its application. The reason I give is that it does not fall on an accused person to prove his alibi, but on the prosecution. Any shortcoming on the investigation of an alibi results into a dereliction of duty on the part of the police. Since the circumstances of the Appellant's arrest only arose during cross-examination, the view I take is that as an appellate Court, I have no to jurisdiction to speculate what might or ought to have been true at trial stage.

I shall therefore not consider the arguments that have been advanced by Learned Counsel for the Respondent on the propriety of the Appellant's alibi.

As I have observed there was no direct evidence adduced linking the Appellant to the offence he was charged of, except the evidence of PW9 and PW10 which was circumstantial. In the case of **David Zulu v The People**[2] the Supreme Court stated thus:

> ***"However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn...***
> ***It is therefore incumbent on a trial judge that he should guard against drawing wrong inference from the circumstantial evidence at his disposal before he can feel safe to convict. Thus in our view in order to feel safe to convict, the Court must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."***

Further in the case of **Dorothy Mutale and Richard Phiri v The People**[3] the Supreme Court held that::-

> ***"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."***

From the facts before me I find that the relevant evidence adduced by the prosecution against the Appellant is derived from PW9 and PW10, which is purely circumstantial. I also find that two inferences can possibly be drawn from the facts of this case. The first is that the Appellant may have been one of the members of the riotous mob who the police chased into a bar. The second inference is that the Appellant on his own will went to Uncle Steve's bar to have a drink.

In the circumstances, I am inclined to the inference that is more favourable to the Appellant that is, the Appellant went to Uncle Steve's bar to have a drink and was not part of the riotous mob. I find that the explanation given by the Appellant that he went to have a drink at Uncle Steve's bar is quite believable. For that reason I find merit in this ground of appeal.

In ground two, Counsel for the Appellant contended that the there was no direct evidence linking the Appellant to the breach of peace. Neither was there any evidence adduced by the prosecution to show that the Appellant was part of the riotous mob. Counsel

contended that the trial Court was instead swayed by the testimonies of PW 9 and PW 10 about the Appellant.

Counsel further argued that PW 9 did not identify the Appellant as one of the persons who was at Mukulunga Market and throwing stones at Lumumba Police Station; and then took refuge at Uncle Steve's bar. Further, an examination of PW10's testimony did not prove that the Appellant participated in the riot and was part of the mob that attacked the police officers. Counsel's prayer to the Court was that it quash the conviction and sentence of the Appellant for failure on the part of the prosecution to prove the offence of riotous behaviour beyond reasonable doubt.

In ground three, the Appellant contended that the lower court erred in law and in fact when it failed to make any findings of fact and providing reasoning for its decision. Counsel made reference to section 169 (1) of the Criminal Procedure Code which provides thus:-

> ***"The Judgment in every trial in any court shall, except as otherwise expressly provided by this 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." (Emphasis Ours)

Counsel then adverted 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 Africa Centre for the Constructive Resolution of Disputes**[7] where the Supreme Court held 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."

Counsel also cited the English case of **Capital and Suburban Properties v Swycher**[8] which espouses the same principles on judgment writing.

He argued that the ingredient that the Appellant damaged property was not proved at all and that the prosecution was required to prove that the Appellant was part of the riotous mob and that he did take part in the riot. Counsel further submitted

that there was unchallenged evidence that public and private vehicles were destroyed by the Appellant and others.

The response of Learned Counsel for the Respondent on the second ground of appeal was that the prosecution had proved the ingredients of the offence and that the Appellant was among the persons that unlawfully assembled at the Lumumba Police Post. Further, that the Appellant was one of the persons who were throwing stones and destroying property at Lumumba Police Post and that he agreed with the prosecution that there was noise in the compound.

I find merit in the second ground of appeal which was quite casually approached by the Respondent for the reasons I have given in ground one.

In the third ground of appeal Counsel for the Respondent argued the trial Court's reasons were stated at page J34, paragraph 4. Further, that the trial Court's judgment was based on its discretion and observation of the Appellant's demeanor. Learned Counsel also argued that the trial Court did not believe the

Appellant and gave a reason for doubting his testimony. For that reason, Counsel contended that the approach taken by the trial Court fulfilled the pre-requites of a good judgment.

Counsel for the Respondent urged the Court to dismiss the appeal against sentence as the Appellant was given a punishment of 6 months with hard labor while the maximum sentence for the offence was seven years. He called in aid the case of **Gideon Hammond Millard v The People**[9] where the Supreme Court held, *inter alia* that:

> ***"An appellate court should not lightly interfere with the discretion of the trial court on question of sentence but that for the appellate court to decide to interfere with the sentence, it must come to it with a sense of shock."***

In terms of ground three, the record of the appeal shows that the trial Court expressed its findings as follows:

> ***"With A5 I find it quite odd that a reasonable prudent person having knowledge of the incident of the riot would later leave his home no matter how calm the situation would have been and to top it all after having moved from his home and finding the purported butchery closed decides to go to a bar on such a day. I find that A5 would have been the better person to relate the riot to people in***

his opinion without stating findings of fact. As a result there was certainly a miscarriage of justice.

I am fortified by the case of **Patrick Kunda and Robertson Muleba Chisenga V The People**[10] where the Supreme Court stated thus:

> ***"We are bound to say that the learned trial commissioner did not deal with the detailed allegations which arose during the trial within the trial as fully as would have been desirable. In our view it was not sufficient for the learned commissioner to say that he did not believe the Appellants, and his reasoning should have been set out in sufficient detail to enable this court to know what was in his mind when he made his ruling. The result of such brevity is in effect that there is no judgment on the trial within the trial and the appellants are deprived of their opportunity to appeal against it. We find that it would be unsafe to allow the admission of the statements to stand, and this appeal must be dealt with on the basis that the statements have been excluded."***

Thus the trial Court's statement that:

> ***"Having found the facts, I now state the law to these facts, Section 74 (2) and Section 76 of the Penal Code has been compiled with and section 120 (a) of the Penal Code has been compiled with in relation to aiding prisoners to escape."***

is indeed a miscarriage of justice.

Had the trial Court made a thorough finding of fact, then it would have been possibly attempted to apply the law. Because it did not make findings of fact, it failed to apply the law. I therefore find merit in the Appellant's third ground of appeal. On the whole the appeal has merit. I allow it and acquit the Appellant forthwith.

Leave to appeal is granted.

Delivered in open Court at Lusaka this 10th day of November, 2016.

MMapani

M. Mapani-Kawimbe
HIGH COURT JUDGE