IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 47/2015**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

SAMUEL MWABA MUTAMBALILO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Kaoma JJS
On the 14th July, 2016 and 1st November, 2016

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

For the Respondent: Ms. G. Nyalugwe, State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mutambo and 5 Others vs. The People (1965) Z.R. 24**
2. **Chisoni Banda vs. The People (1990-92) Z.R. 70**
3. **Edward Sinyama vs. The People (1993-94) Z.R. 16**
4. **R v Andrews [1987] A.C. 281**
5. **R v Ratten [1972] A.C. 378**
6. **R. v Pennell [2003] 1 N.Z.L.R. 289**

Legislation referred to:

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

The appellant was convicted by the High Court sitting at Kabwe of the offence of murder contrary to Section 200 of the Penal Code, Cap 87 of the laws of Zambia.

The particulars of the offence alleged that on the 17th day of September 2013 at Mkushi in the Central Province of the Republic of Zambia the appellant murdered Stanley Fwalanga (hereinafter called "the deceased"). Suffice to state that although the deceased died on the 17th September 2013, the incident which is in contention happened in May 2013.

The summary of the events which are not in dispute leading to the death of the deceased are as follows: It was during the month of May 2013 when Oswald Siwila a general worker at Dausea Farm was awakened by a knock around midnight. When he opened the door he found the deceased outside and since he was new in the area, he did not know the deceased. Oswald Siwila observed that the deceased was burnt from the neck up to the waist. He said the

deceased told him that he had been burnt by the appellant whom he referred to as Bashi Mwaba. According to Oswald Siwila, the deceased who was shivering said he needed clothes and fire to warm himself. Oswald Siwila then gave the deceased clothes and sat him by the fire so that the deceased could warm himself. The witness then went to wake up his neighbour Reagan Chilekwa, a member of the neighbourhood watch, who recognised the deceased. Fred Fwalanga and his wife were informed around 01:00 hours of the serious condition the deceased was in. The deceased told his relatives that he owed the appellant K10 and when he failed to pay him, he poured hot water on him and that this happened at the appellant's house. The following morning the deceased was rushed to the hospital where doctors confirmed that the burns were a result of the hot water which had been poured on him. Apparently, the deceased lived with Fred Fwalanga and the appellant was his neighbour. The deceased was found at Oswald Siwila's house which was about one hour's walk from Fred Fwalanga's house, while the deceased's clothes were found early in the morning outside the house of another neighbour to Fred Fwalanga by the name of Mabvuto Phiri. According to Mabvuto Phiri, he was also a

neighbour to the appellant though he lived about a kilometre away from Oswald Siwila's house.

Meanwhile, the matter was reported to Mkushi Police Station and although the deceased was in a critical condition he was able to talk and he informed Sergeant Nyirongo who interviewed him that the appellant burnt him with hot water. The deceased was immediately admitted at Mkushi General Hospital. Interestingly, a statement was only recorded from him in hospital on the 4th September, 2013. The statement was produced and admitted in evidence without any objection from the defence. The following is the statement recorded by Detective Chief Inspector Kenneth Chiyala on 4th September 2013:

> **"I do recall very well on the 27th May, 2013 at around 18:00 hours, as I was coming from my grandmother going home, I passed through the home of M/Samuel Matambalilo whom I owed some money. When I reached there M/Samuel Matambalilo started asking me as to when I will pay him the money I owe him and I told him that I paid the money to his son when he was out. He started complaining that we the people of that area we were not good. He was saying these words whilst drinking home brewed beer. Then he went into the grass thatched kitchen whilst complaining without me knowing what he went to do. I just felt hot water being poured on me and I looked as to see who poured water on me I just saw M/Samuel Matambalilo holding a pot. Then I had to**

undress the T-Shirt of which even my skin started peeling off. That is how I left the T-Shirt in his yard and started straggling to go home. When I reached the main road I failed to move and just slept on the road. After sometime I just heard people lifting me and when I opened the eyes I saw M/Samuel was among the people who lifted me and took me in the bush after sometime in the bush I started forcing myself until I reached at the Farm of a certain white man and found two Security Guards whom I requested to spend a night and asked them if they can inform my relatives. Then on 28/05/2013 at around 02:00 hours I just saw my relatives who came and picked me and took me to the Police and later taken to the Clinic then later referred me to Mkushi District Hospital."

Suffice to note that the appellant was apprehended and charged with the offence of assault occasioning actual bodily harm. Trial could not proceed as the deceased passed on before he could testify.

For some unknown reason, the postmortem was only conducted after the body of the deceased was exhumed on the 7th February, 2014. The postmortem report revealed that the deceased died as a result of the infected burn wounds to his chest, abdomen, neck, and both arms which caused severe lung oedema, pneumonia and acute respiratory failure.

In his defence, the appellant said on the 27th May, 2013 he was with his family and they retired to bed around 20:30 hours. The following day around 16:00 hours, he was apprehended on an allegation that he had burnt the deceased. The appellant denied that the deceased passed through his home on the material day around 18:00 hours; that he did not pour hot water on the deceased and he denied that the deceased owed him K10. According to the appellant, his house is located in a busy area and if he had burnt the deceased, it would have attracted members of the public. The appellant said he only heard in court that the deceased was burnt and that he was found at Dausea Farm which was about 2km away. The appellant confirmed that he used to appear at the Subordinate Court on a charge of assault but the deceased never appeared until he died. It was the appellant's evidence that he had a cordial relationship with the deceased and that the deceased even used to help him with work. The appellant said he could not understand why the deceased accused him of pouring hot water on his body.

In her judgment, the learned judge found that the deceased had consistently told people that it was the appellant who burnt him. She also relied heavily on the statement recorded by the police and found the appellant guilty as charged and sentenced him to the mandatory death sentence.

On behalf of the appellant, Mr. Muzenga the learned Deputy Director of Legal Aid Board advanced two grounds of appeal couched in the following terms:

1. **The learned trial Court erred in law and in fact when it relied on the hearsay evidence of the deceased without considering whether or not it could be admitted as being *res gestae* an exception to the rule against hearsay.**

2. **The learned trial Court misdirected itself in law and in fact when it relied on the inadmissible statement of the deceased as the basis for convicting the appellant.**

Mr. Muzenga, in his filed heads of argument, argued grounds one and two together. It was submitted, *inter alia*, that the learned trial judge did not address her mind to whether or not the statement made by the deceased to Oswald Siwila that the appellant burnt him met the requirements for it to be accepted as an exception to the hearsay rule under the *res gestae* principle. It

was pointed out that this was in spite of both Counsel submitting on the issue. Counsel contended that the trial court appeared to have been preoccupied with the reliability or consistency of the deceased's allegation rather than the admissibility of the statement. It was Counsel's submission that this approach by the learned trial judge was a misdirection. He cited the case of **Mutambo and 5 Others vs. The People**[1] where it was stated that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."**

Counsel contended that had the learned trial judge addressed her mind to the conditions precedent to the acceptance of a statement under the *res gestae* principle, she would not have relied on it and the appellant would not have been convicted. Further, that since the inadmissible evidence was erroneously accepted and relied on by the trial court leading to the conviction of the appellant he must be acquitted as there exists no other evidence to support the conviction. In support of this argument, Mr. Muzenga referred

us to the cases of **Chisoni Banda vs. The People**[2] and **Edward Sinyama vs. The People.**[3]

Mr. Muzenga submitted that from the holdings in **Chisoni Banda**[2] and **Edward Sinyama**[3] there is a requirement that the statement in issue must be made in conditions of approximate though not in exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion that the actor or maker of the statement must at the time of making it be intensely involved in the throes of the event or activity. Counsel submitted that this tends to guard against the danger of distortion and/or concoction. Mr. Muzenga alluded to the evidence of Oswald Siwila who had the first contact with the deceased. He made reference to the fact that when Oswald Siwila asked the deceased what had happened, the deceased responded that "it was bashi Mwaba who did that." Mr. Muzenga's argument is that since Oswald Siwila was a key witness for the prosecution, he needed to establish the circumstances under which that statement was made. It was submitted that Oswald Siwila should have revealed to the trial court his observations on

the deceased, whether he was panting for breath as a possible sign of fleeing from the scene of crime and all the other evidence which could have effectively established contemporaneity and involvement in the throes of the event. According to Mr. Muzenga, a lot of time passed from the time of the alleged burning to the time the deceased got to Oswald Siwila to ask for fire. Counsel argued that the circumstances in this case do not meet the requirements under the *res gestae* principle.

Further, Counsel contended that the statement recorded by the police three months after the incident was inadmissible as to the truth thereof. Counsel argued that the burden lay on the prosecution to establish beyond all reasonable doubt that the statement was made in accordance with the *res gestae* principle. In the present case, he submitted that the prosecution failed to discharge its burden.

In conclusion, he submitted that in the absence of the inadmissible hearsay evidence relied on by the trial court, there is no other evidence upon which a conviction could be competent and,

therefore, this appeal should be allowed and the appellant should be set at liberty.

In response, Ms. Nyalugwe, the learned Counsel for the State filed lengthy submissions. With regard to the statement made by the deceased to Oswald Siwila, Ms. Nyalugwe submitted that it is admissible as *res gestae*. She contended that the appellant's conviction was not based solely on the statement of the deceased as argued by learned Counsel for the appellant. She submitted that there are two statements on record which are in contention, that is, the statement made by the deceased to Oswald Siwila on the night of the incident around 24:00 hours and the statement recorded by Detective Chief Inspector Kenneth Chiyala three months after the incident. Ms. Nyalugwe took the view that both statements are vital pieces of evidence for their unique reasons and that the learned trial Judge was on firm ground when she referred to them in her judgment.

She submitted with regard to the statement made by the deceased to Oswald Siwila on the night of the incident, the statement is admissible only to the extent that the deceased did

make the statement and not to ascertain the truthfulness of the contents thereof. Counsel argued that this statement to Oswald Siwila qualifies for admission under the *res gestae* principle and that the learned trial judge neither erred in fact or in law when she relied on the statement to convict the appellant. It was contended further that the mere fact that the learned judge never specifically considered the statement under the *res gestae* principle, neither takes away what the statement is nor renders it inadmissible as such. She relied on the decision in **Edward Sinyama vs. The People**[3] on the test trial courts ought to use when admitting a statement as part of *res gestae*. Counsel submitted that according to the evidence of Oswald Siwila, the appellant burnt the deceased and the deceased wanted some help. It was argued that the fact that the deceased reported the incident to Oswald Siwila coupled with the condition he was in at the time the report was made, are clear signs that the deceased was still burdened with and actively affected by the event that it was not reasonably plausible or possible for him to fabricate the events of that night. Counsel submitted that in addition, the deceased remained at Oswald Siwila's house while Oswald Siwila alerted the deceased's relatives

and that this could have given him ample time for reasoned reflection or concoction, but the deceased recounted what he had told Oswald Siwila to his relatives Fred and Josephine Fwalanga in the presence of Oswald Siwila, with the same accuracy and consistency. It was contended that there being nothing on record to show that the deceased had or could possibly have had a malicious motive to make false claims against the appellant, is something which should go to the deceased's credit and can be used to discard the possibility of concoction or distortion. Counsel referred us to the evidence by Oswald Siwila in the court below where he said:

> **"He was knocking at my door, he told me to wake up as he was not alright... the person told me that he had been burnt... this person was burnt from neck up to the waist... I asked him what happened and he said it was Bashimwaba who did that."**

According to Counsel, the excerpt from Oswald Siwila's evidence strongly indicates that the deceased was still in the throes of the event and it adequately describes the condition of the deceased at the time he made the report to Oswald Siwila. Counsel emphasised that the deceased's condition was also reflected in the evidence of Fred Fwalanga, Josephine Fwalanga, Detective Sergeant

Godlack Nyirongo and Detective Chief Inspector Kenneth Chiyala who gave a thorough description of the condition and state of the deceased. In the words of Ms. Nyalugwe, it can be reasonably inferred from the facts and evidence on record that the deceased person was "skinned alive" by the appellant who, she contended, being a man of reasonable prudence, ought to have known or been aware of the likely consequences of his actions. She submitted that the act of pouring hot water on the deceased was unlawful and caused grievous harm within the meaning of **Section 204 (a) and (b) of the Penal Code, Cap 87** and that such harm resulted in the death of the deceased contrary to **Section 200 of the Penal Code**.

It was contended that although the record shows that the deceased asked for fire from Oswald Siwila at the time he made the report, it does not take away the primary purpose of the deceased's presence at Oswald Siwila's house which, Ms. Nyalugwe submitted, was to report his assailant and seek for help. She submitted that the consistency with which the deceased recounted what had happened to him speaks to the truthfulness of the statement and the reasonable inference to be drawn is that the deceased did not

fabricate or concoct his narration of events. It was contended that owing to the very state he was in and the severity of the injuries, there was no room for reasoned reflection or error. Counsel submitted that the deceased died as a result of the severe burn wounds of the chest, abdomen, neck and both arms which caused severe lung oedema, pneumonia and acute respiratory failure as disclosed by the post mortem report.

It was submitted that the circumstances of the event were so unusual and that the deceased was involved in the pressure of the event such that there was no possibility of concoction. Further, that the statement was sufficiently spontaneous although not made in condition of exact contemporaneity, the event which provided the trigger mechanism for the statement was still operative. Counsel contended that from the analysis of the facts of this case and the evidence on record, it clearly shows that the statement qualifies as part of *res gestae* and therefore admissible. Counsel submitted that had proper consideration been given to the issues raised by Counsel for the appellant in their submissions in the court below, the learned judge would have inevitably found that the prosecution

had proved beyond all reasonable doubt that the statement of the deceased formed part of *res gestae* and was admissible as such. Ms. Nyalugwe submitted that the appellant was convicted on clear evidence and therefore, his conviction should be upheld and his appeal should be dismissed.

At the hearing, Mr. Muzenga undertook to file his reply to the State's submissions within a week. To date we have not received his heads of argument in reply.

We have considered the evidence in the court below, the judgment appealed against and the submissions by learned Counsel for the parties.

We will now deal with both grounds together as they are interrelated.

From the outset, we wish to state that there are two issues for consideration and these are: whether the statement the deceased made to Oswald Siwila that the appellant burnt him was an exception to the hearsay rule under the *res gestae* principle; and whether the statement Detective Chief Inspector Kenneth Chiyala

recorded from the deceased three months after the incident was admissible.

We now address the admissibility of the statement the deceased made to Oswald Siwila as he is the person to whom the deceased first made the statement that it was the appellant who burnt him.

We agree with the learned Counsel for the parties that the learned judge ought to have considered whether the deceased's statement was admissible under the *res gestae* principle. Mr. Muzenga attacked the statement for not being contemporaneous with the event. Counsel looked at the time that had elapsed from the time of the incident, which was said to be around 18:00 hours, to the time of the deceased's first report to Oswald Siwila which was around midnight. Mr. Muzenga's argument is that five to six hours was too long a time for the statement to be contemporaneous with the event. On the other hand, Ms. Nyalugwe contended that from the testimony of Oswald Siwila, when the deceased was making the statement to him, he was severely burnt and was obviously in a trauma.

In our view, the factor to consider is not the time that passed between the event and the making of the statement but, whether going by what transpired between the event and the making of the statement, the deceased had had an opportunity for reasoned reflection which would have motivated him to concoct or distort the story surrounding the event.

In **R v Andrews,**[4] the facts were that shortly after a man was attacked and robbed by two men, he named his attackers to the police, referring to the co-defendant O'Neill by name and to the appellant, Donald Andrews as "Donald" or "Donavan." **The victim died before trial.** *(emphasis ours)* The House of Lords held that the evidence was rightly admitted as part of *res gestae.* They accepted the accuracy and value of Lord Wilberforce's clarification of the law in the case of **R v Ratten**[5] in which case Lord Ackner, with whom the remaining members of the court agreed, summarised the position which confronts the trial judge:

> **"1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?**
>
> **2. To answer that question a judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or**

startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. (In R. v Pennell [2003] 1 N.Z.L.R. 289.[6] The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. .... The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk too excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such

circumstances, the trial judge must consider whether he can exclude the possibility of error.

R. v Andrews[4] was decided on the principles laid down in **R v Ratten.**[5] In the **Ratten**[5] case, Lord Wilberforce considered the test to be applied before evidence is accepted as *res gestae.* In particular, he emphasised the importance of spontaneity as the basis for the test. He said:

> **"The possibility of concoction, or fabrication, where it exists, is an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish; such external matters as the time which lapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event, it must be for the Judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded....."**

In our own case of **Edward Sinyama vs. The People**[3] we held that if the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no

opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case. We also said that the possibility has to be considered against the circumstances in which the statement was made.

In the case in *casu*, firstly, the deceased who was so badly burnt, after gaining consciousness ended up at Oswald Siwila's home far away from his home. Oswald Siwila said he observed that the deceased was burnt from the neck up to the waist and that he had no shirt. According to Oswald Siwila, the deceased was shivering and said he needed clothes and fire to warm himself. And according to the post mortem report, the deceased died as a result of the severe burn wounds of the chest, abdomen, neck, both arms which caused severe lung oedema, pneumonia and acute respiratory failure. Based on Oswald Siwila's observations and the post mortem report, it is evident that the burns were severe such that at the time the deceased had contact with Oswald Siwila, he was still so much in the throes of the incident that he could not

We have also considered the appellant's defence, and notably, apart from saying he was at home with his wife and children, his own testimony was that he had a cordial relationship with the deceased who even used to help him with work. We take the view that therefore, the deceased had no motive to falsely implicate the appellant, of all people, of such a serious crime.

As regards the admissibility of the deceased's statement recorded by Detective Chief Inspector Kenneth Chiyala, we note that **Sections 237 of the Criminal Procedure Code, Cap 88** give guidance regarding the recording and production of a statement by a terminally ill person. Section 237 provides that:

> **"Whenever it appears to any magistrate that any person dangerously ill or hurt and not likely to recover is able and willing to give material evidence relating to any offence triable by the High Court, and it shall not be practicable to take the deposition, in accordance with the provisions of this Code, of the person so ill or hurt, such magistrate may take in and shall subscribe the same, and certify that it contains accurately the whole of the statement made by such person, and shall add a statement of his reason for taking the same, and of the date and place when and where the same was taken, and shall preserve such statement and file it for record."**

was the appellant who burnt him. Grounds one and two, therefore, fail.

In sum, we uphold the Judgment of the court below and dismiss the appeal for lack of merit.

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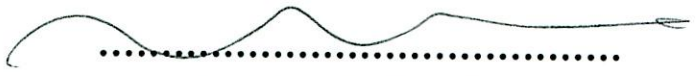
G.S PHIRI
SUPREME COURT JUDGE



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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE