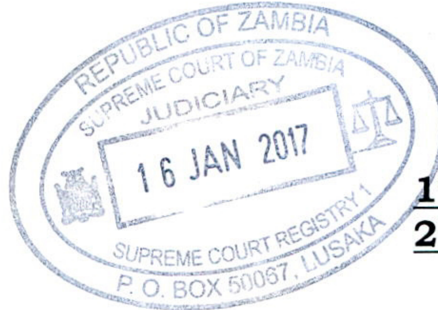
SCZ Appeal Nos. 165,166, 167/2013

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:



PATHIAS SIAME — **1ST APPELLANT**
PAUL NKOSI — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram: Phiri, Muyovwe, JJS and Lengalenga, Ag/JS
On the 13th of August, 2013 and 10th January, 2017

For the Appellants:	**Mr. A. Ngulube, Director of the Legal Aid Board**
For the Respondent:	**Mr. R. L. Masempela, State Advocate**

JUDGMENT

Phiri, JS, delivered the judgment of the court.

Cases referred to:

1. **Mbundi Nyambe vs. The People (1973) Z.R. 305 (Reprint)**
2. **Winfred Sakala vs. The People (1987) Z.R. 23**
3. **Mwewa Murono vs. The People (2004) Z.R. 207**
4. **Mushanga vs. The People, SCZ Judgment No. 18 of 1983.**
5. **George Nswana vs. The People (1988-89) Z.R. 174.**
6. **Zonde and Others vs. The People (1981) Z.R. 337**
7. **Sinyama vs. The People (1993-94) Z.R. 16**

8. **Kaposa Muke and Another vs. The People (1983) Z.R. 94**
9. **Kashenda Njunga and others vs. The People (1988/89) Z.R. 1**

When we heard this appeal, we sat with Hon. Madam Justice F. M. Lengalenga, acting Judge of this Court who has since reverted to her substantive position. Therefore, this judgment is by the majority.

This is an appeal against conviction. The appellants were jointly tried and convicted of two counts of felonies; namely, **Aggravated Robbery contrary to Section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia, and Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

In brief, the particulars of the offence alleged that the appellants together with one Anderson Phiri on the 4th day of September, 2009 at Mpika in the Mpika District of the Republic of Zambia, violently robbed Emmanuel Sikapizye of his unregistered motor vehicle, temporary registration No. IT 7168, Mitsubishi Pajero. In the second count, they were alleged to have murdered the said Emmanuel Sikapizye on the same date, at the same place

and time. The said Anderson Phiri was acquitted at the close of the prosecution's case. He was found with no case to answer. Both appellants were sentenced to suffer the extreme mandatory sentence of death.

Before we proceed, we wish to clarify that the inclusion of the name Anderson Phiri on the title of the record of the appeal, as well as the inclusion of Appeal No. 167/2013 on the same record of the appeal were clerical errors. We must add that the inclusion of the name Anderson Phiri in the Judgment of the Court below as the third accused was also a clerical error. We say so because, as already stated, although Anderson Phiri was originally jointly charged with the first and second appellants, he was acquitted after being found with no case to answer in accordance with the provisions of **Section 291 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

We further wish to observe that there was no appeal filed by the State in respect of the said Anderson Phiri. We are, therefore, satisfied that the reference to Anderson Phiri in connection with Appeal Nos. 165, 166, 167/2013 was a harmless clerical error in

the compilation of the record of the appeal. We order that the same be corrected by the deletion of the name Anderson Phiri and Appeal No. 167/2013 from the title of the record of the appeal.

The facts in common cause were that the victim in both counts was discovered with fresh stab wounds by PW1, lying by the roadside at a lay-by along the Mpika/Serenje Road. He was lying on the ground in a fresh pool of blood. Moments earlier before the victim was stabbed, PW1 saw a motor vehicle park at the lay-by which was located near his village house at a distance of about 60 meters away. PW1 then saw another vehicle which was driven past the parked vehicle. That vehicle turned back and was driven in front of the vehicle that was parked earlier at the lay-by. The two motor vehicles faced each other while their headlights were turned on. PW1 saw four people who came out of the two motor vehicles. PW1 later told the police that he was able to identify some of the people he saw at the place where the vehicles had stopped. In Court, he said he had seen the two appellants and the deceased standing by the parked vehicles.

According to PW1, he came to the scene and stood six metres away in order to observe what was happening. One of the two motor vehicles was a Mitsubishi Pajero with green and grey colours. As he observed the scene, the second appellant turned to face him while the first appellant stood in front of one of the motor vehicles, looking at the engine under the bonnet which he had opened. The second appellant came to the spot where PW1 stood and threatened to stab him with a knife. The second appellant insulted his manhood and chased him from the scene. Later PW1 saw the two motor vehicles being driven away from the lay-by at high speed.

Thereafter, PW1 heard sounds of a man in distress and pain near the place where the motor vehicles had been parked. He returned to the spot and saw the deceased lying on the ground by the roadside with grave injuries. This was around 22.00 hours. PW1 was able to speak to the deceased who narrated that he was stabbed in the stomach and had his motor vehicle snatched by the robbers. The deceased also gave PW1 his name; which appears in the particulars of the offence in both counts. PW1 sought assistance from other members of the community and conveyed the

deceased to Chilonga Mission Hospital where he later died. The postmortem examination conducted on the body of the deceased was witnessed by PW3, the police officer who produced the doctor's report in the Court below. The cause of death was listed as severe blood loss due to a huge gaping wound on the left arm with four multiple penetrating wounds to the abdomen.

Besides the evidence of PW1, the prosecution's case was also anchored on the evidence of PW2 Levison Mulilo and PW4, Susan Lungu, who were both Wildlife police officers. These two witnesses were driving to Mpika through the Lubushi National Park around 23.00 hours. They were on duty and armed with a firearm, and were dressed in Wildlife police uniforms. They became suspicious of the appellants' vehicle and intercepted it around 23.00 hours during the same night; within an hour of the robbery and murder. Apparently, PW2 and PW4 became suspicious of the presence of the motor vehicle in which the appellants were found because the National Park was closed to traffic at about 18.00 hours; and 23.00 hours was a very awkward hour for the appellants' vehicle to be

driven through the National Park. Both appellants were in the stolen motor vehicle with temporary registration No. IT 7168.

PW2 and PW4 observed that the first appellant was the driver, while the second appellant was the passenger. The latter had blood stains on his clothes. PW2 and PW4 recovered a blood stained knife which was hidden between the two front seats. PW2 and PW4 searched the area and secured both appellants and the stolen vehicle until they were handed over to the investigating officer, Assistant Superintendent Mudenda Timba, who formally charged them with the two counts.

At the trial in the lower Court, both appellants elected to remain silent. The learned trial Judge considered the prosecution's evidence and found both offences overwhelmingly established. The learned trial Judge also found that this was a case of a single identifying witness whose evidence of identification was poor and inadequate, but which had been supported by the evidence of the Wildlife police officers, PW2 and PW4. The learned trial Judge in her reasoning, relied on the authority of the case of **Mbundi Nyambe vs. The People**[1] which emphasized the need for greatest

care to be taken in testing the evidence of identification by a single identifying witness. The learned trial Judge also relied on the authority of **Winfred Sakala vs. The People**[(2)] on the interpretation of **Section 22 of the Penal Code Chapter 87 of the Laws of Zambia,** which contemplates criminal liability by joint offenders in prosecution of a common purpose. On the basis of that reasoning, both appellants were convicted of the two counts charged. They appealed to this Court, advancing two grounds of appeal.

Ground one was that the Court below erred both in law and in fact and misdirected itself when it concluded that the blood stains on the second appellant and on the knife recovered from the vehicle was that of Emmanuel Sikapizye, the deceased, without proof of that evidence being adduced by the prosecution. The second ground was that the learned trial Judge erred in law and fact when she held that the motor vehicle, Mitsubishi Pajero registration No. IT 7168, found in both appellants' possession belonged to the deceased Emmanuel Sikapizye, when the only evidence from PW1 was that the vehicle had the figure 71 as part of its registration number plate.

In support of ground one of the appeal, the thrust of Mr. Ngulube's submission is that the police, after collecting the 2nd appellant's blood stained clothes and the blood stained knife, should have caused the blood stains to be analyzed and compared for the determination of the blood group; and that their failure to do so when they had the opportunity to do so, was a dereliction of duty which raises doubts, which the lower Court should have considered favourable to the appellants. It was contended that without that evidence, the trial Court should not have concluded that the blood stains belonged to the deceased. In support of this argument, the case of **Mwewa Murono vs. The People**[3] was cited. In that case, we held, among other findings, that in criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution; and the standard of proof is high.

In support of the second ground of the appeal, Mr. Ngulube submitted that PW1's identification of the motor vehicle was too remote to connect the two appellants; and no documentation on the

vehicle was exhibited to support the claim that the vehicle found with the two appellants belonged to the deceased. It was contended that in the absence of further evidence to prove the ownership of the recovered motor vehicle, the death of the deceased should not be connected to the appellants; particularly that there was a possibility that the motor vehicle the appellants were found with is not the same vehicle which belonged to the deceased. It was also contended that this possibility raises several other inferences that can be drawn, which were favourable to the appellants. These were the appellants' arguments in summary.

On behalf of the respondent, Mr. Masempela covered both grounds of the appeal in one submission. He submitted that the Court below was on firm ground when it convicted the appellants because the evidence of their identification from PW1, PW2 and PW4 was overwhelming. On the appellants' argument that the 2nd appellant's blood stained clothes and the recovered knife needed to be tested for determination of the blood group, it was argued that such a test would be worthless in view of the overwhelming evidence of the deceased's death by stabbing and the appellants'

identification through the doctrine of recent possession, as the appellants were both found in the stolen motor vehicle by PW2 and PW4 during the same night that the deceased was attacked, stabbed and had his motor vehicle, a Mitsubishi Pajero, snatched from him.

Regarding the second ground of appeal which suggests that the motor vehicle, Mitsubishi Pajero, found in possession of the two appellants could have belonged to someone else other than the deceased, Mr. Masempela submitted that the ownership of the stolen motor vehicle was not in dispute during the trial, and that the deceased, in his statement to PW1, did establish that he was the owner of the stolen motor vehicle. In addition, PW1 positively identified the exhibited motor vehicle during the trial. He effectively described it as a Mitsubishi Pajero, green in colour and gray underneath and it had a 71 on its registration number plate. PW1 identified all these features when the trial Court moved to view the stolen motor vehicle. He also identified the first and second appellants as having been among the four people he had seen with the same motor vehicle at the place where the deceased was found

with fresh stab wounds. Thus, we were urged to dismiss this appeal.

We have considered the two grounds of the appeal and the arguments and submissions exchanged by the parties. Before we proceed to decide this appeal, we wish to deal with the lower Court's assertion in the judgment, that this was a case of a single identifying witness, and the trial Court's reliance on our decision in the case of **Mbundi Nyambe vs. The People[(1)];** in which we emphasized the need to test the identification in order to eliminate the danger of an honest mistake.

We have examined the totality of the evidence on record, and we do not think this is a case that is anchored on the evidence of PW1, as a single identifying witness. In our view, the evidence of identification given by PW1 was an addition to all the other evidence which was available to the trial Court. The most telling evidence against both appellants was from PW2 and PW4 who found them in possession of recently stolen property; namely, the Mitsubishi Pajero, temporary registration No. IT 7168. We will return to this aspect of this case later. For now, suffice to state that the Court

below misdirected itself when it held that this was a case of a single identifying witness. This misdirection, however, will have no effect on the outcome of this appeal because the Court did consider and assess all the other evidence placed before it, including the evidence of recent possession of the stolen motor vehicle.

The first ground of appeal alleges that the trial Court should not have concluded as it did on the blood stains found on the 2nd appellant's clothes and on the knife recovered from the vehicle in which the appellants were found, without evidence of a blood test. It is almost trivial for us to state that the finding of fresh blood stains in the interior of a vehicle that was not involved in any road traffic accident is an unusual occurrence that can only be explained by the person or persons found in that vehicle; particularly if that vehicle was stolen from someone who was stabbed with a knife.

In the present case, Mr. Ngulube conceded in his submission that both appellants were found in the exhibited vehicle. His argument however, was that there was no proof that the vehicle belonged to the deceased. We do not see any need for such proof.

There is evidence from PW2 and PW4 that when they asked the 2nd appellant how he got the blood stains, the 2nd appellant failed to give any answer. Instead, the 1st appellant offered an answer in which he stated that his friend could have picked up the blood stains from the bush where he went to relieve himself. This attempted explanation was proved false when PW2 and PW4 instantly ordered the appellants to lead them to the place, but no blood stains were found. The short of all this, is that the appellants failed to explain the blood stains on the clothes and on the knife in the vehicle, and indeed their possession of the vehicle at that awkward hour of the night; and, in a national park which was closed at the time. Our considered view is that the appellants' arguments about the blood stains is both trivial and of no consequence to the prosecution's case. In any event, conclusive medical evidence, including evidence of blood groups, is not always necessary for a conviction to be founded and secured. This extends to medical evidence as to the cause of death. In the case of **Mushanga vs. The People[4],** this Court held that:

> **"Medical evidence presented to the trial Court may or may not be conclusive. However, the Court is bound to consider the medical evidence together with all other relevant evidence. Its quality and**

weight will be assessed in light of all other facts and circumstances of the case".

We clarified the principle in the **Mushanga case** further in the case of **Kashenda Njunga and others vs. The People[9],** when we held that:

> **"It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a *novus actus interveniens,* a Court is entitled to accept such evidence as an indication that the assault caused the death".**

In the present case, there was conclusive proof in the form of the postmortem report and evidence from PW1 and the deceased, through *res gestae;* that he was stabbed and robbed of his vehicle. He bled until his death. This crime occurred around 22.00 hours; and an hour later, the appellants were found in possession of the stolen vehicle, which PW1 identified. In our considered view, evidence of human blood groupings was absolutely irrelevant. We find no merit in ground one of the appeal and we dismiss it.

With regard to ground two of the appeal, we entirely agree with Mr. Masempela, on behalf of the people, that the doctrine of recent possession of stolen property applied to the appellants' case, and

that the learned trial Judge was on firm ground when he applied it against them.

From the evidence on record, it is clearly established, and Mr. Ngulube, on behalf of the appellants, very properly conceded, that both appellants were found in the car which did not belong to any one of the two. Curiously, his argument was that the vehicle could have belonged to someone else other than the deceased.

As already noted, when PW2 and PW4 confronted both appellants in the Mitsubishi Pajero, they not only failed to offer any explanation of their circumstances, but also according to the evidence, offered to discuss some kind of settlement, and connected these two witnesses to a purported boss called Arthur, through their mobile phone. According to PW2 and PW4, the appellants also cheated saying they were carrying a lot of money in the place where the blood stained knife was recovered during the search. No money was found.

Much as we have always said that a person accused of a crime bears no burden of proof, the appellants had an opportunity to offer an explanation which might reasonably be true; but they failed to

do so. In the case of **George Nswana vs. The People[5],** we held that:

> **"The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence".**

In the present case, the circumstances in which the appellants were found by PW2 and PW4 with the stolen vehicle, in the National Park, at about 23.00 hours during the night and within an hour after the violent robbery and stabbing of the victim, clearly establish that there was no opportunity for the motor vehicle to have changed hands in the bush. These circumstances present a clear inference of guilt on the part of both appellants.

We were perhaps more explicit with how the doctrine of recent possession applies in the case of **Zonde and Others vs. The People[6],** when we said:

> **"(ii) The doctrine of recent possession applies to a person in the absence of any explanation that might be true when found in possession of the complainant's property barely a few hours after the complainant had suffered an aggravated robbery".**

In addition, we also find that the statement given by the deceased to PW1 on the spot where the deceased lay gravely injured

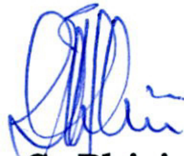
qualified to be treated as *res gestae.* PW1 told the trial Court what the deceased said to him; namely, that he had been stabbed in the stomach and had his vehicle stolen. That statement was contemporaneous and spontaneous with the deadly stabbing which occurred, and there was no possibility of concoction or distortion. The circumstances in which the victim was found and what he said to PW1 met the test for *res gestae* as we discussed in our decision in the case of **Sinyama vs. The People[7].** The deceased's statement of the stabbing and ownership of the stolen vehicle, was also available to the trial Court; and the trial Court was perfectly on firm ground when it considered it as evidence of proof of ownership of the stolen vehicle, notwithstanding the trial Court's failure to specifically refer to the admissibility of the deceased's statement as *res gestae.*

On the argument that the prosecution should have exhibited documents of ownership, our position is that this was absolutely unnecessary in the circumstances of this case because the question of the vehicle's identity or ownership did not arise. We are fortified

in our position by our earlier decision in the case of **Kaposa Muke and Another vs. The People**[8], that:

> **"(i) There is no rule of law that an allegedly stolen article must be an exhibit in a trial unless the question of its identity or ownership arises".**

The net result is that we find no merit in both grounds of appeal and we dismiss the appeal.



G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE