

SCZ APPEAL No.309/2015

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

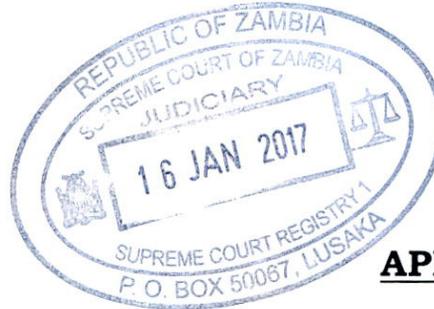
(Criminal Jurisdiction)

BETWEEN:

ROBERTSON TEMBO

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Phiri, Wanki and Malila, JJJS

On the 3rd of March, 2015 and 10th January, 2017.

For the Appellants:

Ms. C. K. Kabende, Senior Legal Aid Counsel.

For the Respondent:

Mr. C. Bako, Deputy Chief State Advocate.

JUDGMENT

Phiri, JS: delivered the judgment of the court.

Cases referred to:

1. **Chimbini-v-The People (1973) Z.R. 255 (Reprint)**
2. **Katebe-v-The People (1975) Z.R. 13**
3. **Haonga and Others-v-The People (1976) ZR 200**

Legislation referred to:

1. **The Penal Code, Cap 87, S. 22, S. 200**
2. **The Criminal Procedure Code, Cap 88, S. 294**

When we sat to hear this appeal, Mr. Justice M. E. Wanki was with us. Mr. Justice Wanki has since retired. This is therefore the majority judgment.

The appellant was tried and convicted of Murder Contrary to **section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence alleged that the appellants on 27th December, 2012, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Allan Ilunga. The appellant was condemned to the death sentence.

The evidence that led to the conviction of the appellant was largely given by Raymond Mpoyi (PW1) and John Mwewa Mukumba (PW2) who themselves were victims of the robbery in the course of which the murder occurred. According to PW1 and PW2; they were attacked in their house by a group of robbers during the night while electricity lights were on. One of the assailants, who PW1 identified as the appellant, entered the house and stabbed him with a screw driver on the forehead and arm. These injuries were inflicted on PW1 during a struggle which lasted 15 to 30 minutes. According to PW1, the appellant left the house and a short while later, a gunshot

was heard at the door and PW1's family member named Allan Ilunga was shot dead. This was around 21.00 hours.

When giving a statement to the Police, PW1 was able to describe the appellant's appearance and his prominent dress. He recalled that the appellant was light in complexion from the use of bleaching creams and was dressed in a yellow Brazilian jersey. Four days later PW1 spotted the appellant and alerted members of the public. Among the members of the public alerted was John Mwewa Mukumba (PW2) who apprehended the appellant. The appellant was captured on a bus as he attempted to escape. According to PW2, he was found with a knife and a screw driver, which were not produced in Court.

The Police Officer who investigated the case was No.9678 Detective Inspector Kennedy Munagisa (PW4) of Chawama Police-CID. On 31st December, 2012, a postmortem examination was conducted on the body of the deceased and during the examination a projectile was recovered and taken to Police Headquarters for a forensic ballistics examination, together with the empty bullet cartridge that was recovered at the scene of crime.

The appellant was detained at Chawama Police Station where he was charged with murder. PW4 produced the medical report pertaining to PW1's injuries, the postmortem report and the ballistics report, as well as the bullet and the bullet shell. The deceased's cause of death was hemorrhage shock due to gunshot wounds to the chest. The bullet recovered from the deceased's body and the bullet cartridge found at the crime scene were found to have been fired from the same gun.

In his defence, the appellant denied the offence and claimed that he was not at the scene of crime on the material date, but was at his home in Chunga Compound. According to the appellant, he escorted his wife to the business centre located at Indeco House around 15:00 hours with the purpose of assisting her to repair her computer. When he was through, he left Indeco House around 17:00 hours and reached his home around 19:00 hours. He insisted that he stayed at his home for the rest of the evening until he retired to bed. In short, the appellant set up an alibi that he was not at the crime scene at the material time and claimed that he was falsely implicated in the murder. The appellant called two other

witnesses (his wife and his 13 year old daughter) who gave testimony to the effect that the appellant was at his home with his family when the offence occurred.

The learned trial Judge considered the evidence from both sides and believed the evidence of identification given by PW1 to the effect that he recognized the appellant as the person who attacked him at his home when he spotted him at a bar called Bulawayo. According to PW1, the appellant attempted to escape when he confronted him. He finally run into a mini bus but was apprehended by PW2 and others. The learned trial Judge reasoned that from the evidence before her, if the appellant did not fire the gun then he was an accomplice; thus, she held that he was captured within the provisions of **Section 22 of the Penal Code, Chapter 87 of the Laws of Zambia** under the doctrine of common purpose.

On the issue of the alibi, the learned trial Judge found that the same had been negated by the strong evidence of identification and she ruled out the dangers of an honest mistake. On the basis of these findings of fact, the learned trial Judge concluded that the

appellant was guilty of murder and convicted him as charged and awarded him the capital punishment.

The appellant appealed against both the conviction and sentence. Three grounds of appeal were advanced on behalf of the appellant as follows:

- 1. The Court below misdirected itself when it convicted the appellant on unsupported evidence of a single identifying witness, PW1 whose total evidence was not properly evaluated.**
- 2. The Court erred at law when it convicted the appellant in light of the defence of alibi raised by the appellant, which evidence was not rebutted by the prosecution.**
- 3. The Learned Trial judge misdirected herself in law and fact when she held that the appellant was a participant in the murder of the deceased in the absence of evidence to that effect.**

In support of ground 1, Ms. Kabende; the learned Counsel for the appellant contended that it was a misdirection to convict the appellant on the unsupported evidence of a single identifying witness, PW1, whose evidence was not properly evaluated. Counsel pointed out that the circumstances under which the offence occurred was traumatic. There was a struggle between PW1 and one of his assailants and the events were happening rather quickly.

According to Ms. Kabende, PW1 did not give a description of his assailants, particularly the person he struggled with in terms of skin colour, height and build; that it was in cross-examination that PW1 stated that the person who attacked him during the night in question was light in complexion, when the appellant's colour of the skin during the trial was seemingly dark as reflected on pages 7 and 8 of the record of appeal. It was also argued that PW1 had seen his assailant for the first time during the attack, and, that a few days later, he saw a person who looked like the person who attacked him and his family.

Ms. Kabende submitted that the evidence of identification given by PW1 was not entirely reliable and there was a possibility of an honest, but mistaken identification in the circumstances of this case. In support of this argument, we were referred to our decision in the case of **Chimbini vs. The People**⁽¹⁾ which urges particular caution in cases of identification by a single witness, and the need for the trial Court to exclude the possibility of an honest mistake. We were urged to allow the appeal and acquit the appellant on this score.

In support of ground 2, Ms. Kabende attacked the decision of the learned trial Judge when she held that even if there was no onus on the appellant to establish his alibi, there was no evidence of any kind to support his alibi. According to the evidence of DW2, she was with the appellant at Findeco House and later at their home in Chunga Township. We were referred to our decision in **Katebe-v-The People**⁽²⁾ where we 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 by calling its own evidence in reply, in accordance with the provisions of **Section 294 of the Criminal Procedure Code, Cap 88 of the Laws of Zambia.**

Ms Kabende submitted that had the learned trial Judge carefully directed her mind to this aspect of the case she would not have made the finding that she did. The trial Court simply dealt with the question of alibi by dismissing the evidence given by the appellant and his witnesses as a concoction. It was argued that the failure to investigate the alibi was fatal to the prosecution's case as there was no evidence connecting the appellant to the murder of the

deceased other than PW1's evidence, which evidence was not sufficient to counteract the alibi set up.

In arguing Ground 3, Ms. Kabende pointed out that there was no evidence to the effect that the appellant participated in the murder of the deceased. As the trial Court correctly observed, PW1 stated that the gun was fired when the appellant was outside the house where two other assailants were lurking by the door. It was argued that since no one actually saw the appellant firing a gun, there was a possibility that the appellant was not even at the scene when the gun shot was fired. The Court below citing **Section 22 of the Penal Code, Chapter 87 of the Laws of Zambia**, came to the conclusion that the appellant was guilty of the offence for which he was charged whether it was him or some other person who fired the gun. According to Ms. Kabende, this was a misdirection on the part of the trial Court because there was no evidence to show that the appellant committed the offence in pursuit of a common unlawful purpose with others. It was contended that in order to convict the appellant for the offence of murder under the doctrine of common

purpose, it was necessary for the Court to consider the general resolution of the group.

Ms Kabende stated that in the present case it was not known whether it was the appellant or some unknown person who fired the shot. We were referred to the case of **Haonga and Others -v- The People**⁽³⁾ where this Court stated that if it is not certain which one committed the offence, then all must be acquitted.

These were the appellant's arguments in support of the three grounds of appeal.

In response to ground 1, Mr. Bako, for the People, submitted that the learned trial Judge was on firm ground when she found as a fact that there was sufficient evidence from the single identifying witness, after analyzing the circumstances in which the observation by the single witness was made. It was also contended that the learned trial Judge examined the evidence of the appellant's conduct when confronted by PW1 four days after the robbery, and concluded that PW1's evidence of identification had been augmented by that conduct; and, that this greatly assisted the Court to eliminate the chances of mistaken identity. It was also

argued that the lower Court did specifically address its mind to the danger of accepting the evidence of identification from a single identifying witness and correctly warned itself of that danger.

With regard to ground 2 of the appeal, which raises the issue of the alibi, Mr. Bako's response was that the lower Court had the opportunity to hear the witnesses, examine their evidence and believe PW1's evidence of identification after dismissing the appellant's evidence of alibi. Mr. Bako submitted that the lower Court was on firm ground when it dismissed the alibi on the basis of findings of fact.

With regard to ground 3 of the appeal which assails the lower Court's finding that although none of the prosecution witnesses saw the appellant fire the gun which killed the deceased, Mr. Bako argued that the appellant was a joint offender in prosecution of a common purpose in accordance with **Section 22 of the Penal Code**. Mr. Bako submitted that the lower Court was on firm ground after examining the circumstances of the shooting; in particular, the manner in which PW1 was attacked and how the appellant gained access to PW1's house through the door, moments

before he left and a gun was fired through that door. It was contended that although one person fired the gun, all the assailants who were at PW1's door during the attack were responsible in accordance with **Section 22 of the Penal Code, Chapter 87 of the Laws of Zambia**. These were the respondent's submissions.

We have very carefully considered the judgment of the lower Court, the record of the appeal, as well as the arguments and submissions made by both sides.

Ground one of the appeal alleges that the evidence of the single identifying witness (PW1) was not properly and correctly evaluated by the lower Court. The gist of the argument in this ground has a strong linkage with the appellant's argument in support of ground 2 of the appeal which raises the defence of alibi; and these two grounds of the appeal rest on the same principle of law which guides on the issues relating to the complainant's identification of the offender. We therefore find it convenient to deal with grounds 1 and 2 of the appeal together.

It is settled law that evidence of a single identifying witness can sustain a conviction, provided it is clear and satisfactory in every

respect. In the case of **Chimbini vs. The People**⁽¹⁾, this Court reiterated the principle that, where the evidence of a single witness in question relates to identification, there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of that single witness with particular care; and that the honesty of the witness is not sufficient, the Court must be satisfied that he is reliable in his observations.

The case against the appellant rested entirely on the evidence of PW1, the complainant. The issue to be determined is whether PW1's evidence of identification was clear and satisfactory in every respect; so as to negative the appellant's alibi and exclude the possibility of an honest mistake.

PW1's evidence before the trial Court was that when the robbers arrived at his house around 21.00 hours, they pushed the door open and the person he identified as the appellant entered the sitting room. A struggle ensued and the appellant stabbed him on the forehead and arm with a screwdriver. When all this was happening, the electricity light was on and the room was well lit. PW1 struggled with the appellant at very close range for a period of

between 15 to 30 minutes. During this time, PW1 observed that the appellant was light in complexion from the apparent use of skin bleaching creams and was dressed in a yellow Brazilian jersey. After the struggle, the appellant went out of the door and immediately began to attempt to re-enter the door with his friends. They pushed the door while PW1 and his family members pushed it back. Moments later, a gun was fired at the door and the deceased was hit and died. The robbery did not succeed. This evidence from PW1 establishes that he had ample opportunity to observe and did observe the appellant at close range and in bright light. PW1's evidence of identification did not end there.

PW1 did inform the Police that he was able to identify one of the assailants when he reported the crime. Four days later, PW1 spotted the appellant and recognized him as the person who entered the house to attack him. When PW1 and the appellant saw each other, the appellant abandoned the bottle of beer he had been drinking and attempted to escape. He quickly walked away and boarded a bus from which he was caught. This behaviour on the part of the appellant was not an innocent odd coincidence. It

renders support and corroboration to PW1's evidence of identification. The learned trial Judge did consider the appellant's conduct and concluded, rightly so, that PW1's evidence of identification was so conclusive as to negative the alibi.

As for the alibi, the appellant's story was that he was at his house with his wife and daughter at the time he was said to have committed the offence. He called these two as his witnesses; and the Court did consider their evidence and found it weak and unreliable to support the alibi. We agree with this assessment. The appellant did not give sufficient evidence of his alibi for the Police to investigate.

In his sworn evidence, the appellant claimed that his eldest son was sick. DW3, his witness, stated that the appellant was lying because they did not stay with such a son at home. DW3, on her part failed to name her school teachers and therefore, was ostensibly unreliable. Thus, the alibi was very weak and unreasonable.

In any event, the strong and conclusive evidence of identification was sufficient to negative the alibi. We therefore find no merit in grounds 1 and 2 of the appeal and we dismiss them.

Ground 3 of the appeal questions the learned trial Judge's conclusion that the appellant was a participant in the deceased's murder under the provisions of **Section 22 of the Penal Code Cap 87 of the Laws of Zambia**. This law provides as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

From the evidence received on the record, it is established that the murder was committed by a shooter who was in the gang of robbers who attempted to rob PW1's house. The shooting occurred moments after the appellant was seen in the house during the attack. The appellant took part in the attack and stabbed PW1 during a struggle; but he failed to rob the house. Clearly, the common purpose was the robbery with violence. The shooting and the murder were a direct consequence of the attack. The learned trial Judge concluded that although no one saw the appellant

shoot, he was liable to be charged for the murder that occurred during the prosecution of the joint unlawful purpose; namely, attempted robbery. The gun was fired through the door moments after the appellant was seen exiting it, and the empty bullet cartridge was picked up from the steps of the same door. Ms. Kabende's argument suggested that since the appellant was not seen shooting the gun, he could not be connected to the person who shot the deceased. We do not agree with this proposition. The time between the physical attack by the appellant and the shooting from outside the door was too short to be attributed to a separate event. All the events were clearly by common purpose. We find no merit in Ground 3 as well. The net result is that we dismiss this appeal.



G. S. Phiri

SUPREME COURT JUDGE



M. Malila

SUPREME COURT JUDGE