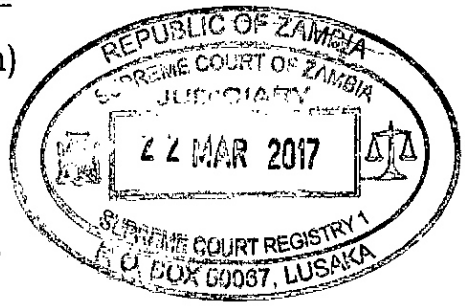
SCZ Appeal Nos. 481, 482/2013

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

ANDREW KAFWAYA — **1ST APPELLANT**
HOPKINS MUSONDA — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram: Phiri, Hamaundu, JJS and Lengalenga, Ag/JS
On the 7th January, 2014 and 9th March, 2017.

For the Appellants: **Mr. A. Ngulube, Director of the Legal Aid Board**

For the Respondent: **Mr. R. L. Masempela, State Advocate, NPA**

JUDGMENT

Phiri, JS, delivered the judgment of the court.

Cases referred to:

1. **Machobane vs. The People (1972) Z.R. 101**
2. **Machipisha vs. The People (2009) Z.R. 282**
3. **Chimbo and Others vs. The People (1982) Z.R. 20**
4. **Wilson Mwenya vs. The People (1990-92) Z.R. 24**

When we heard this appeal we sat with the Hon. Madam Justice F. M. Lengalenga who is no longer Acting Judge of the Court. This judgment is therefore by the majority.

This is an appeal against both conviction and sentence. The appellants, both Community Crime Prevention Unit officers (CCPU), based at Chamboli Police Post in Kitwe, were jointly 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 were that on the 7th of March, 2012, at Kitwe, the appellants murdered Griva Ng'ambi. The deceased was a suspected offender under their custody and charge. The appellants were each sentenced to 25 years imprisonment with hard labour. They were not given the mandatory sentence of death for the capital offence of murder on account of extenuating circumstances which the learned trial Judge considered to have been present at the time of the killing.

The prosecution's case was anchored on the evidence of four key witnesses. These were; PW1, another suspected offender who shared the Police cell with the deceased; PW2 the Pathologist who conducted the postmortem examination on the deceased's body; PW3, the deceased's elder brother, who identified the deceased's body to the Doctor and to the Police; and PW5, the police officer

who examined the deceased's body at the crime scene and interviewed PW1 and the appellants before they were charged.

Their collective evidence was that around 20.00 hours on the material day, PW1, whilst being detained in a police detention cell, saw the two appellants in the company of one other person bring the deceased into the police cell. PW1 shared the police cell with the deceased who had also been detained as a suspect. According to PW1, the deceased appeared to have been drunk and was talkative. The first appellant handcuffed the deceased to the grill door of the police cell. The deceased later requested the appellants for permission to use the toilet room outside the police cells. The appellants escorted him. After a short while, the first appellant returned to the cell and talked to PW1 about the deceased. He informed PW1 that the deceased was still in the toilet room. The first appellant went away, but later returned to PW1 to inquire why he was not sleeping. During all this time, the deceased was not returned to the detention cell.

Later around 22.00 hours, PW1 pretended to have drifted into deep sleep, and saw both appellants return to the police cell. They

called out PW1's name twice, but PW1 ignored them and continued to pretend to be in deep sleep. Later, both appellants went away and dragged the deceased back into the police cell. The deceased, who was earlier wearing a shirt, did not have a shirt and was unresponsive. The shirt was carried by the second appellant as they dragged the deceased's body back into the police cell. In the police cell, the first appellant placed the deceased's body against the grill door while the second appellant tied the deceased by the neck to the grill door using the deceased's long sleeved shirt; such that the deceased's body remained erect by the grill door with his legs on the ground, as if he had hanged himself. Both appellants then closed the grill door and left the area.

After a short while, the appellants returned to the police cell and screamed to alert PW1 that his cellmate wanted to commit suicide. They asked PW1 to assist saving him. PW1 got hold of the deceased's pair of trousers which had dropped from his hanging body while the first appellant removed the shirt from his neck. They placed the deceased's body on the floor of the police cell. The first appellant warned PW1 against implicating them.

The postmortem examination of the deceased's body was performed by PW2, a Pathologist at Kitwe Central Hospital. PW2 found strangulation marks on the upper part of the neck. Her internal examination revealed more marks inside the neck; with collapsed lungs. Her conclusion was that the cause of death was strangulation by squeezing. According to PW2, she could not tell whether the strangulation was caused by suicide or not; but she insisted that the characteristics for suicidal hanging and strangulation were similar. PW5 investigated the case. He visited the scene of crime and examined the external features of the deceased's body and interviewed all the witnesses; as well as the appellants.

In their defence, both appellants denied the offence. The first appellant conceded that he was on duty at the scene of crime as a CCPU officer, while the 2nd appellant was his neighbor and friend. They both rejected the evidence given by PW1 and insisted that the deceased committed suicide in the police cell. They both claimed that when they discovered the deceased in the process of hanging himself, they tried to save his life but were unsuccessful. They both

claimed to have been assisted by PW1 in their attempt to save the deceased's neck. They untied his shirt and placed his body on the floor of the police cell. Thereafter, the first appellant reported the incident at Wusakile Police Station.

The learned trial Judge considered the totality of the evidence received and concluded that the appellants strangled the deceased. The lower Court accepted PW1's evidence as a truthful account of the events leading to the killing; and found PW1's evidence to have been corroborated by the evidence of PW2 the Pathologist. The lower Court visited the scene of the crime during the trial and concluded that the deceased could not have strangled himself without PW1, who shared the tiny police cell with him, being alerted. The trial Court discounted the evidence given by both appellants on the basis of contradictions which were pointed out, and found both appellants guilty of murder as charged.

When sentencing the appellants, the lower Court considered the evidence of PW1 and that of the first appellant to the effect that the deceased was rowdy and appeared drunk. These factors were found to be extenuating circumstances. Therefore, the appellants

were found guilty of murder with extenuating circumstances in accordance with **Section 201(b) of the Penal Code, Chapter 87 of the Laws of Zambia,** and sentenced to 25 years imprisonment with hard labour.

Both appellants were dissatisfied with the judgment of the lower Court and canvassed two grounds of appeal before us. These were as follows:

1) The trial Court erred in law and in fact by finding the appellants guilty of murder on the evidence of PW1 who was unreliable.

2) The trial Court erred in law and in fact when it found that there was corroboration of PW1's evidence who was a suspect witness.

In support of ground one, the learned Director of Legal Aid submitted that PW1 fabricated his story in order to save his own skin and his evidence was unreliable. It was argued that it was highly unlikely that a lifeless body could be made to stand and be held in a standing position by being tied to a grill door with a shirt.

It was further submitted that PW1 was asleep when the deceased was returned to the police cell and only changed his story to the Police through PW5 after he was detained in connection with the death of the deceased. It was argued that the prosecution failed to discharge its burden of proof as explained in the case of **Machobane vs. The People**[1].

In support of ground two, the gist of Mr. Ngulube's argument was that PW1was a suspect witness because he was apprehended and detained in connection with the deceased, and his evidence lacked corroboration. In support of this submission, the case of **Machipisha Kombe vs. The People**[2] was cited.

In response to ground one of the appeal, Mr. Masempela submitted that the evidence before the trial Court from PW1 was that the deceased was brought into the police cell alive. He was locked up until he asked to use the toilet room where he was taken by both appellants; only to be brought back dead by the two appellants, who also tied him up to the grill door to make it look like he had hanged himself in suicide. According to Mr. Masempela, the circumstances of this case coupled with

corroboration from the medical evidence given by PW2, permitted only one inference; namely, that the deceased was murdered.

In response to ground two of the appeal, Mr. Masempela submitted that PW1 was not detained in connection with the deceased's death, because his evidence before the trial Court was that he was detained in police custody earlier than the deceased, and for a totally different reason. It was also contended that in any event, PW1 had no reason to harm the deceased within the small police cell where they both were detained for different reasons; and that he was not a suspect witness, but an independent witness who had nothing to lose by telling the truth.

It was also contended that PW1's evidence was corroborated by the circumstantial evidence. In support of this argument, the case of **Chimbo and Others vs. The People**[3] was cited.

Further, it was argued that the police never suspected PW1 of being connected to the deceased's death; and the formal report they received from the first appellant was that the deceased committed suicide; and that this treatment of PW1 by the Police excluded

motive on his part to kill the deceased. It was contended that PW1's evidence, together with the evidence of PW2, the Pathologist, constituted sufficient evidence to sustain the conviction for the offence of murder. This was the gist of the respondent's submissions.

We have carefully considered the evidence on the record of the appeal, the grounds of the appeal and the arguments presented before us. We have also examined the judgment of the lower Court.

A reading of the two grounds of the appeal shows that they are related and raise the same issue. They principally question the trial Court's reliance on the evidence of PW1. The combined import of both grounds is that PW1 was unreliable and a suspect witness with a possible motive of his own. We will first briefly deal with the second ground of the appeal for convenience.

The argument in support of the second ground of the appeal is briefly that PW1 was a suspect witness because he was detained in connection with the deceased's death; and that his evidence was

not corroborated. In support of this submission, the case of **Wilson Mwenya vs. The People**[4] was cited. In that case it was held that:

> **"Where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence needs corroboration".**

The near converse of the *ratio decidendi* in the **Wilson Mwenya case** is illustrated in the case of **Chimbo and Others**[3], which was also cited as authority in support of the appellant's case. In the **Chimbo case,** it was held that:

> **"The evidence of a suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons".**

An examination of the facts and decisions in both the Chimbo and the Wilson Mwenya cases, shows that they were both wrongly cited in support of the appellants' appeal, because the facts and circumstances of the present case are very different. PW1 was the only witness from the police cell where the deceased was later detained before he died. The question of corroboration of PW1's evidence cannot be approached in the same manner as was the approach adopted in the Chimbo and Wilson Mwenya cases. PW1 was not a suspect witness in the context discussed in those cited

cases. He was detained at Chamboli Police Post on the 3rd of March, 2012; while the deceased was detained at the same Police Post on the 7th of March, 2012 and died during the same night.

Further, from the evidence on record, PW1 was apprehended and detained as a suspect in a case of defilement of a girl under the age of 16 years; for which he was later cleared by the police. The deceased, on the other hand, was apprehended and detained by the two appellants after he was found with a plastic bag containing charcoal which, as it turned out, was given to him by his elder brother, PW3. He was taking the charcoal to his own home. PW1 was therefore not a suspect witness in the context of the appellants' submission in support of ground two of the appeal. we find no merit in ground two of the appeal and we dismiss it.

With regard to ground one of the appeal, it was argued that PW1's evidence was unreliable because he fabricated his story; that he initially told the investigating officer, PW5, that he was awakened in the cell by the first appellant who asked him what happened to the deceased, but later told the lower Court that he observed the

appellants as they brought the deceased back to the cell and hanged him to the grill door when he was already unresponsive.

It is trite that what PW1 might have said to PW5 during the investigation cannot amount to material evidence. The material evidence is what was said and tested in Court during the trial. With this in mind, we note that the learned Counsel for the appellant did not point out to us any evidence on the record of the appeal which suggests that PW1 was unreliable. To the contrary, the evidence given by PW1 and the two appellants on record firmly establishes that PW1 was the only eyewitness to the events which occurred in the tiny police cell which he shared with the deceased under the charge of the two appellants. PW1 was not related to the deceased in any way and did not know his name. He recognized the two appellants as members of the community crime prevention group and he identified them because they took him into their custody around 18.30 hours, and detained him in the tiny police cell from the 3rd of March, 2012 to the 7th of March, 2012 when they released him, without a charge, after his cellmate was killed. The appellants' identification by PW1 was without question because

they were in contact with him; they talked with him; and they passed food to him in the police cell during his detention. PW1 saw the appellants bring the deceased, alive and well, into the police cell and gave details of what exactly happened between the appellants and the deceased, including the specific roles played by each one of them.

According to PW1, the deceased was brought in the police cell alive and taken out to visit the toilet room alive; but was later brought back half naked and a dead man. PW1's observation did not end there. The appellants brought the deceased back to the police cell after they ensured that he, (PW1), was supposedly asleep when he did not respond to their calls; while PW1 actually feigned deep sleep. More importantly, PW1 observed the appellants when they hanged the dead body to feign suicide. In all this evidence, PW1 was put to a grueling test during cross-examination; but remained consistent.

We unreservedly agree with Mr. Masempela's submission that PW1 was strongly supported by the strong and compelling circumstantial evidence and the medical evidence given by PW2

which established that the deceased died from strangulation; which could only have taken place when the appellants took the deceased out of their police cell to visit the toilet room. He died at the hands of the appellants.

We, therefore, do not agree that PW1's evidence was unreliable. To the contrary, we find his evidence to have been conclusive in the circumstances of this case. We find no merit in ground one of the appeal and we dismiss it.

Before we end, we note that the Court below found that there were extenuating circumstances in this case to warrant a lesser sentence than the mandatory sentence of death for the killing of the deceased. This finding was ostensibly made, as noted in the judgment of the lower Court, on the basis of evidence from PW1 and the first appellant to the effect that the deceased was cheeky, rowdy and appeared drunk when he was placed in the police cell. We do not agree that this assessment of what constitutes extenuating circumstances is correct. There is no evidence on the record to establish that the deceased provoked or fought any of the appellants; and none of the two appellants raised any failed

defences of provocation, self defence or drunkenness. The deceased had already been restrained and secured in the police cell; with his hands handcuffed and the cell grill door locked. He posed no risk or danger to anyone and he was non-violent.

According to PW1, the deceased continuously protested his innocence and refused to share food brought into the cell by the appellants on the ground that he could not eat food while his children at his home slept hungry on account of his detention and the charcoal which the appellants had seized from him. Any person suspected of committing a criminal offence is perfectly entitled, if he so wishes, to protest his innocence to any police officer; and it is the duty of the police to quickly investigate such protest of innocence, because the suspect may as well be stating the truth. In any event, rowdiness or talkativeness of a suspect cannot, and should not be the justification for torture and murder by a person or persons in authority.

We, therefore, reject the finding that there were extenuating circumstances in this case. The deceased's killing was a cold blooded murder, pure and simple, without any extenuating factor.

The net result is that we find no merit in this appeal and we dismiss it. We also set aside the sentence of 25 years imprisonment with hard labour and reinstate the mandatory sentence of death for both appellants.

G. S. Phiri
SUPREME COURT JUDGE

E. M. Hamaundu
SUPREME COURT JUDGE