IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.23/2016**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

WAMULUME MIYUTU **1ST APPELLANT**

AKAMANDISA NYAMBE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Muyovwe, Kajimanga and Kabuka, JSS**
On 8th August, 2016 and 21st April, 2017.

For the 1st Appellant: Mr. M. Mutemwa SC, Messrs Mutemwa Chambers appearing with Mr. M. Lisimba, Messrs Mambwe Siwila & Lisimba Advocates.

For the 2nd Appellant: Mr. A. Ngulube, Director, Legal Aid Board.

For the Respondent: Ms. C.L. Phiri, Deputy Chief State Advocate, National Prosecution Authority.

JUDGMENT

Kabuka, JS, delivered Judgment of the Court.

Cases referred to:

1. Kombe v The People (2009) Z.R.282.
2. Nsofu v The People (1973) Z.R. 287.
3. Shamwana (E.J.) and 7 Others v The People (1985) ZR 41 (SC).
4. Kashiba v The People (1971) Z.R. 95.
5. Chola and Others v The People (1988) – 1989) Z.R. 163.
6. Bwanausi v The People (1976) Z.R 103.
7. Mutale and Another v The People (1995 – 1997) Z.R. 227.
8. Nyambe v The people (2011) Volume 1 Z.R. 246.
9. Banda v The People SCZ No. 30 of 2015.
10. Zulu v The People (1977) Z.R. 151.
11. Mwanza and Others v The people (1977) Z.R. 221.
12. R v Coney (1882) 8 Q.B.D. 534.
13. Maketo and 7 Others v The People (1979) Z.R. 23 (S.C.).

Legislation referred to:

1. The Penal Code Cap 87 SS. 200; 21; 22.
2. The Criminal Procedure Code, Cap. 88 S.191A (1).

Other works referred to:

1. Phipson on Evidence, 17th Edition, (London, Thomson Reuters Legal Limited, 2010) paragraph 36 – 28, at page 1226.
2. Murphy on Evidence, 13 Edition, (Oxford University Press, 2012), paragraph 9.16.1, at page 367.
3. Bryan A Garner's Black's Law Dictionary (USA, Thomson Reuters, 2009).
4. Oxford Dictionary, 5th Edition, at page 253.

The appellants were convicted of the offence of murder with extenuating circumstances contrary to **section 200** and **section 201 of the Penal Code Cap. 87 of the Laws of Zambia.**

They were each sentenced to 20 years' imprisonment with hard labour, by the High Court sitting at Mongu and now appeal against both conviction and sentence.

The particulars of the offence were that, the appellants on a date unknown, but between the 14th and 16th December, 2015, at Kalabo, in the Western Province of Zambia, jointly and whilst acting together, murdered **Amis Siame.**

According to the facts, Oranta Nyambe, a 25-year-old nurse who testified as the first prosecution witness in the court below (PW1) was a girlfriend of **Amis Siame**, the deceased person in this case. Their relationship had a history of physical abuse on the part of the deceased, who was known to be particularly violent when he had taken some alcohol.

In the night of 14th December, 2015 sometime before 21:00 hours, the deceased called PW1 who was at her home. Since he sounded drunk, PW1 told him that her aunt was around and he could therefore not visit her at that hour. The deceased who was not dissuaded by that information insisted he was still coming to her home. In panic, PW1 then told her young sister, **Akamandisa Nyambe,** 23, who is the 2nd appellant in this appeal

and who at the time, was 7 months pregnant, to lock herself and their two small children inside the house. PW1 herself rushed to seek the aid of their married neighbour, a Mrs. Mwikisa (PW3).

Upon getting to the home of PW3 and while in the process of explaining the reason for her presence at that hour, PW1 and PW3 heard a lot of noise coming from PW1's house. Shortly, they saw the 2nd appellant come running towards the entrance of PW3's yard, the two young children following behind her with the deceased in pursuit. When she got to the gate, the 2nd appellant informed PW3 in the presence of PW4, her husband and other neighbours who testified as, PW5, PW6 and PW7 at the trial, that the deceased had assaulted her. The deceased was accordingly chastised by these people for assaulting a pregnant woman.

In the meantime, PW1 who was earlier advised by PW3 to hide from the deceased, was frantically trying to call the police. When she failed to get in touch with them, she decided to call Matongo, a friend of the deceased who lived near the Police Station to go there on her behalf, which he did. Using Matongo's phone, the police spoke with PW1 and advised her to come to the Police Station and report the matter herself.

Whilst all this was happening, the 2nd appellant had also managed to contact the 1st appellant in this appeal, **Wamulume Miyutu.** She asked him for help and they agreed to meet at a nearby school known as Pilgrim School. This is where PW1 found them standing and talking, whilst she was on her way to the Police Station to report the matter as advised. In her report to the police, PW1 explained what had happened. She further informed the police that the deceased had also assaulted her sister who was 7 months pregnant. The police again advised PW1 to tell the victim to come and report the assault herself and PW1 immediately called the 2nd appellant on the phone. About 15 – 20 minutes later, the 2nd appellant came to the Police Station accompanied by the 1st appellant.

Whilst the 2nd appellant was giving her report to the police, PW1 called one of her neighbours by the name of Kalaluka to inquire whether the deceased was still in their neighbourhood. She also requested him to come and fetch them from the Police Station. Kalaluka followed PW1 to the Police Station where on being queried by the police, he explained to them in the presence of PW1, that the deceased was last seen running towards the harbour but when they followed him there and checked, he was

nowhere to be seen. The 2nd appellant was thereafter given a Medical Report Form to take with her to the hospital for medical attention, the following day.

When they left the Police Station, the 1st appellant proceeded to his home while PW1 and the 2nd appellant were accompanied by Kalaluka to the house of the deceased to check for him there but they only found his young brother Enock (PW2), who told them that the deceased had not come back from the local bar where PW2 had earlier left him. That is how they briefed PW2 of the incident caused by his brother at PW1's house where he had damaged her household goods. Thereafter, PW2 accompanied the trio back to PW1's house to see the damage for himself.

The following morning, the 15th December, 2015, PW3 came to the home of PW1 with a red shirt which the deceased had been wearing the previous evening. She said her young daughter had picked it from the harbour and advised PW1 to dispose of the shirt to avoid being implicated in the matter. PW1 initially hid the shirt but later, she decided to dispose of it in a pit latrine.

In the afternoon of that same day, PW1 went to the harbour in search of the deceased but did not find him. In the evening, Mwila, a friend of the deceased came to her home where he found her seated on the verandah with the 2nd appellant. Mwila solicited for money from PW1 in exchange for information which he claimed he had, regarding the whereabouts of the deceased. Eventually, Mwila revealed to them that the deceased was at the house of his best friend, Mulyata.

On the 16th December, 2015 at around 06:00 hours, PW1 called PW2 to brief him on the information Mwila had given her the previous evening concerning the whereabouts of his brother who was still missing. PW2 rushed to PW1's house and as they were planning to follow up on the said information they saw, PW3 running to PW1's house. She came to tell PW1 that the deceased's body had been found floating in the river at the harbour, and it was partially covered by a canoe. Later, the body was retrieved by the police and taken to the mortuary. A postmortem examination which was subsequently conducted, revealed that the deceased had died from brain hemorrhage.

Two days later, on the 18th December, 2015, PW1 and her sister, the 2nd appellant were picked up by the police, in connection with the deceased's death. The 2nd appellant was detained in the police cells whilst PW1 was taken to Kalabo Remand Prison. PW3, PW4 and PW5 were similarly picked up but they were subsequently, all released and turned into State witnesses. Only the 1st and 2nd appellants were jointly charged for the murder of the deceased.

At the trial of the matter, however, none of the prosecution witnesses testified that they had seen either of the appellants attack the deceased. The substance of the evidence of PW3, PW4, PW5 and PW7 was to the effect that, in the evening of 14th December, 2015, they witnessed cries of the 2nd appellant who had ran away from the deceased who was breaking household goods at PW1's house. Thereafter they heard noises coming from the harbour where the deceased had been seen headed shortly before he disappeared.

The arresting officer, PW9, in his evidence said that, he had initially recorded an ordinary statement from the 2nd appellant in which she implicated the 1st appellant as having struck the

deceased twice on the head with a pot, exhibit 'P2.' That she further informed the police that the pot used was at the neighbour's house. The said statement was admitted in evidence as exhibit 'P4,' without objection from the defence.

PW9's further evidence was that, in a warn and caution statement obtained from her after investigations, the 2nd appellant did not change the substance of her earlier statement, 'P4'. He also obtained a statement from PW1 in which she revealed that she had thrown away the deceased's shirt in a pit latrine and led PW9 to its recovery. A statement was also recorded from the 1st appellant on 18th December, 2015 in which he denied the charge.

PW9 confirmed that no one else apart from the 2nd appellant told him that from Pilgrim School the 1st appellant had gone to PW1's house. That when the statement was recorded, the 2nd appellant was in detention to assist with investigations and was not then, a suspect. She only became a suspect after giving the statement, exhibit 'P4'. PW9 further confirmed that no pictures of the scene had been taken. That he did not search the 1st appellant's house. Neither did he lift finger prints from the

canoe or the pot exhibit 'P2,' as they did not have the equipment to do so. He admitted that the manner in which the pot was retrieved was not referred to in the statement, as he had initially thought the pot was at PW1's house. It was, however, retrieved from the home of DW4 and no statement was recorded from the owner as she had been away at the time. PW9 denied having threatened or in any way induced the 2nd appellant into signing exhibit 'P4'.

In his evidence in defence, the 1st appellant said in the night of 14th December, 2014 he had received a call from Precious who is a sister to both the 2nd appellant and PW1. Precious informed him that the deceased had gone to PW1's house to cause trouble and was fighting her sister and the children. She tried to call her said sisters but her calls went unanswered. This was the reason that she asked the 1st appellant to go to PW1's house to enable her talk to her sisters.

Shortly after this conversation, the 1st appellant said he received another call from a number he did not know. Upon answering, he realized it was the 2nd appellant calling him and she was crying. She asked to meet with him at Pilgrim School. He

went there and found her still crying. She had an injury on her left ear from where blood was oozing. Upon seeing this, he decided to call back her sister, Precious, who then spoke to the 2nd appellant.

As the two were still talking on the phone, PW1 passed near where they were and said she was headed to the police to report the matter. The 1st appellant then escorted the 2nd appellant to PW3's house to return the cellphone the 2nd appellant had borrowed. Whilst at PW3's house, PW1 called and asked the 2nd appellant to go to the police station and report the assault on her and the 1st appellant escorted her there.

Two days later, on 16 December, 2015, the 1st appellant received two phone calls from Precious and the 2nd appellant. They both informed him that the deceased had died and his body had been found at the harbour where he was suspected to have committed suicide. On 1st January, 2016, the 1st appellant was arrested by 6 armed policemen and was later charged with the murder of the deceased. He denied having any knowledge about the murder; or having known the deceased personally, saying he had only heard of him. He also denied that he was in a

relationship with the 2nd appellant or that the pregnancy she was carrying at the time, was his. He noted that the statement, from the 2nd appellant, exhibit 'P4' was in substance the same as the evidence he had given in court except for the part where it was alleging that he hit the deceased with a pot, exhibit 'P2'. He said he did not know why the 2nd appellant had chosen to implicate him.

In her evidence given in her own defence, the 2nd appellant said in the night of 14th December, 2015 she opened the door in response to a knock upon which the deceased forced his way inside PW1's house and started attacking her physically. She managed to escape from him and ran away with the two children she was with, to PW3's house which was nearby. The deceased followed her there and was only restrained from further assaulting her by the people who had gathered as a result of the commotion caused by the incident. As these people were restraining the deceased, she borrowed a phone from PW3 and ran towards Pilgrim School from where she called the 1st appellant to come to her aid which he did.

It was her further evidence that, after the police picked up her sister PW1 and herself, she was detained for a week and was subjected to torture. She was made to urinate and sleep on the floor, which caused her to bleed and led to her being admitted in hospital for 5 days. Whilst there, she was hand cuffed to a hospital bed.

On 30th December 2015, she was brought at the Police Station and the police told her to cooperate with them. The police made her swing on a metal bar and she was threatened with beatings by PW9 and that she would deliver her baby whilst in custody. It was fear of such treatment and the threats, that the 2nd appellant made the statement as instructed by the police in which she implicated the 1st appellant, that he had hit the deceased twice on the head with a pot, when he found him destroying PW1's property.

After giving this statement the 2nd appellant was released to help the police collect the pot that was allegedly used in the murder. The 2nd appellant admitted that she was not in good terms with the deceased and that she called the 1st appellant to her aid as the other neighbours were busy restraining the

deceased and picking up the property he had destroyed. She denied that her reason for calling the 1st appellant was for him to avenge her beatings.

The 2nd appellant called the owner of the pot, DW4 as her witness who explained that she lived next door to PW1. That sometime in November 2015, PW1 had borrowed a pot which she returned a week later and during the incident with the deceased, the pot was at her house. DW4's evidence was that, when she left home in the morning of the incident, the pot was in the oven where it was normally kept. The police only came to get it in connection with their investigations related to the deceased's death, two weeks after the incident and had never returned it.

This evidence was infact confirmed by DW3, the mother to both PW1 and the 2nd appellant who testified that, after she had received a call that her two daughters had been arrested in connection with the deceased's death, she travelled to the home of PW1 but did not find anyone. She however saw them coming from the house of their neighbours DW4 and DW5, in the company of Police Officers who were carrying a pot in a plastic bag. When she went to meet them, the Police Officers informed

her that her daughters were being released as they had given the police the information that they required, that it is the 1st appellant who hit the deceased with a pot. Later, when DW3 was alone with her, the 2nd appellant confided that she was not at peace. The reason she gave was that in order to secure her release, the police had forced her to implicate the 1st appellant in a statement which she had signed.

From this evidence, the learned trial judge below found that exhibit 'P4' the statement of the 2nd appellant incriminating the 1st appellant was voluntarily made by her, despite her assertions that she was tortured and was not warned or cautioned. The judge reasoned that, defence counsel did not object to its admission and she, accordingly, had the discretion to admit it. It was the court's finding that as murder is an offence against public interest, the evidential value of the statement "P4," outweighed its prejudicial effect. The judge also found that, from the injuries inflicted on the deceased, the assailants that killed him had done so with malice aforethought as defined in S. 204 of the Penal Code.

The judge accordingly found, the only reasonable inference to be drawn from the evidence before her was that, the 2nd appellant had the motive to see the deceased hurt and that the 1st appellant had the motive to avenge her beatings at the hands of the deceased. The judge further found that, it was unlikely that the 2nd appellant would falsely implicate the 1st appellant who had assisted her. On the totality of the evidence before her, it was the court's finding, that the two appellants had the time, opportunity and motive to commit the offence, which she found they did, at the time when there was no one else around other than themselves.

In the final analysis, the court came to the conclusion that, the prosecution had discharged its burden of proving the appellants' guilt beyond reasonable doubt despite the evidence being circumstantial in nature. The learned trial judge was of the view that failure to obtain fingerprints from the canoe and the pot was not a dereliction of duty by the police. According to her, it was difficult to preserve evidence at a busy place like the harbour.

Dissatisfied with that judgment, the appellants initially filed 6 grounds of appeal. Later, the second appellant filed a further 3 grounds bringing the total grounds of appeal to 9. In the said grounds the appellants contend that, the learned trial judge in the court below misdirected herself in fact and law, when: -

1. **she admitted 'P4' an *excuria* statement made by the 2nd appellant, as evidence against the 1st appellant, a co-accused in the court below.**
2. **she held that exhibit 'P2', a pot allegedly used by the 1st appellant to strike the deceased on the head was corroborated by 'P4', a statement made by the 2nd appellant to PW9.**
3. **she failed to conduct a trial – within – trial in relation to the statement, 'P4' made by the 2nd appellant to PW9.**
4. **she based the conviction of the appellants on an inference, that the appellants had the time, opportunity and motive to commit the offence in issue;**
5. **she founded the conviction of the appellants on purported circumstantial evidence; and**
6. **she failed, or neglected to summon the Medical Officer who prepared the postmortem report, during the trial to elucidate the same.**
7. **she convicted the appellants on circumstantial evidence as an inference of guilt was not the only inference that could reasonably be drawn from the facts of the case.**

8. **she failed to find the appellants' explanations in court to be reasonably possible and therefore cast reasonable doubt on the prosecution's evidence.**

9. **she convicted the appellants without establishing whether the appellants had formed a common purpose or design to commit the offence of murder.**

In proceeding with his client's appeal learned counsel for the 1st appellant, Mr. Mutemwa SC, argued the first 6 grounds of appeal, only. In respect of the first ground of appeal, he noted that this ground relates to an extra-judicial statement made by an accused person, incriminating another accused. Counsel cited the learned authors of **Phipson on Evidence, 17th Edition, (London, Thomson Reuters Legal Limited, 2010) paragraph 36 – 28,** at page 1226 where they state to the effect that, a statement of one accused not made on oath in the course of the trial, is not evidence against his co-accused.

Counsel also referred to **Murphy on Evidence, 13 Edition, (Oxford University Press, 2012),** paragraph 9.16.1, at page 367 expressing a similar view, the relevant parts of which read as follows: -

> *"At common law, it is a fundamental principle of the use of admissions and confessions that an admission or confession is evidence against*

the maker of the confession only and not against any other person implicated by it.....

This is, of course, in stark contrast to the position when an accused gives evidence from the witness – box in the course of the trial, when, like any other evidence, what he says is evidence in the case for all purposes whether or not it implicates the co-accused."

To buttress the same principle, Counsel further referred to a number of other cases. His argument was that, in this particular appeal, 'P4' is an extra-judicial statement made by the 2nd appellant incriminating the 1st appellant. It cannot therefore be used against the 1st appellant, particularly that, the 2nd appellant resiled the same during the trial when she testified that, the statement was not made freely and voluntarily. This fact was acknowledged by the trial judge at page J45 of the judgment when she observed as follows:

"2nd appellant vehemently denied giving the statement 'P4' freely. She testified that PW9 tortured her by making her swing on a metal rod in his office with her legs suspended in the air. And that she was promised that she would be turned into a state witness if she confessed and implicated the 1st appellant."

The submissions on ground one were that, it was a grave misdirection on the part of the learned trial judge to anchor her diverse findings of fact and holdings, and eventually, the

conviction of the 1st appellant on 'P4', which was an inadmissible piece of evidence.

In ground two of the appeal, it was contended that exhibit 'P2,' a pot allegedly used by the 1st appellant to strike the deceased on the head could not be corroborated by exhibit 'P4', the extra judicial statement made by the 2nd appellant to PW9. Counsel again referred to learned authors of *Murphy on Evidence* where they define the word 'corroboration' in relation to the law of evidence as:

> ".....any rule of law or practice which requires that certain kind of evidence be confirmed or supported by other, independent evidence in order to be sufficient to sustain a given result, such as a conviction of a criminal offence."

Counsel argued to the effect that, from the point of view of weight, evidence requiring corroboration is likely to appear more persuasive to a court of law or tribunal of fact, when it is corroborated, than when it is not. The cases of **Kombe v The People**[1] and **Nsofu v The People**[2] were relied on as decided to the effect that, corroboration is not evidence which needs to be conclusive in itself. It is rather independent evidence which tends to confirm that the witness is telling the truth when he says that the offence was committed, and that it was the accused who

committed it. In contrasting that position from the facts of the present appeal, Counsel pointed to observations made by the learned trial judge in the court below at J50 where she opined as follows:

> *"In my mind, the 2nd appellant was corroborated such that the danger of falsely implicating the 1st appellant is eliminated. As already determined, she told the truth to PW9 and other Police Officers. I do not see how PW9 would have known that the 2nd appellant and PW1 used to borrow the 'pot' from DW4. In fact, I am of the considered view that the issue of the pot is an odd coincidence or independent evidence which tends to show that what the 2nd appellant stated in the statement 'P4' is the truth."*

The arguments of Counsel on the observations upon which the learned trial judge relied were that, where there is need for corroboration of evidence from a witness, the evidence on which the conviction is based is still that of the witness. The corroborative evidence only serves to strengthen the position already taken by the court, that it is safe to rely on the evidence of the witness.

Counsel's submission was that, the statement of the trial judge in this respect was a misdirection as the evidence regarding the 'pot', exhibit 'P2,' being an 'odd coincidence' could not support or corroborate the statement exhibit 'P4' on which she

relied, which was an inadmissible piece of evidence. That if it was to be considered at all, the evidence regarding the pot should have been considered on its own.

In ground three of appeal, faulting as a misdirection, the failure by the learned trial judge to conduct a trial-within-a trial, when she accepted the statement exhibit 'P4' made by the 2nd appellant, to PW9, the case of **Shamwana and Others**[3] was one amongst the many cited, on the principle applicable to the admissibility of confessions. Counsel cited the case of **Kashiba v The People**[4], to underscore the point that, it is the duty of a trial court in all cases, to decide whether or not to admit an incriminating statement. That this duty was well articulated by Deputy Chief Justice Ngulube, then, in **Chola and Others v The People**[5], where he said:

> **"The presumption of innocence and the rule against an accused being compelled to incriminate himself have resulted in the requirement that the prosecution must prove beyond reasonable doubt that a confession was made freely and voluntarily. The danger which the system of criminal justice guards against by this requirement is that even the innocent could be forced to make unreliable self-incriminating statements which have been induced. A demonstration which amounts to a confession must equally be proved to have been given freely and voluntarily after due caution."**

Counsel went on to argue that, contrary to the rationale as stated above, the learned trial judge in the court below when considering the claims by the 2nd appellant that she was coerced into making the statement exhibit 'P4', opined at pages J46 – J 47 as follows:

> *"I find it hard to believe that after she was made to swing, she refused to confess. Only to do so when there were no threats or torture. Even her counsel did not object to the inclusion of the statement 'P4'. ..... The statement will therefore remain as part of the evidence."*

The submission on the point was that, on the authority of the cited cases, whether or not defence Counsel objected to the admission of exhibit 'P4' is inconsequential; the onus was still on the learned trial judge in the court below to satisfy herself as to the admissibility of this statement of the 2nd appellant which was incriminating the 1st appellant. That it was a misdirection on the part of the trial judge when she failed or neglected to order a trial-within- a trial following the vehement objection raised by the 2nd appellant as to the admissibility of 'P4'.

Under ground four of the appeal, attacking the conviction of the appellants based on an inference that they had the time, opportunity and motive to commit the offence in issue, the argument advanced was to the effect that, the learned trial judge

applied a wrong approach in drawing the inference of guilt based on such circumstantial evidence. Counsel relied for the submission on the case of **Bwanausi v The People[6],** where Baron D.C.J. held that:

> **".....where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence..."**

Counsel further cited **Mutale and Another v The People[7],** a case that also rested on the drawing of inferences and the observation of Chief Justice Ngulube, as he then was, 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....."**

Counsel then highlighted the material circumstantial evidence in the case which was before the trial court as that, there was first an altercation involving the deceased on 14th December, 2015 and two days later, on 16th December, 2015 he was found dead at the harbour. None of the prosecution witnesses saw the appellants attack the deceased, a fact acknowledged by the trial judge. There was evidence that shortly before he disappeared the deceased was seen headed towards the

harbour by children. The trial judge also acknowledged that the harbour was a very busy place.

In view of the circumstantial evidence as highlighted, the argument of Counsel was that, the inference that it is the appellants who attacked and killed the deceased was not the only inference that could be reasonably drawn from it. Counsel contended that, there were other factors which on the evidence were in favour of the appellants, but which were not considered by the trial court, such as: failure to lift finger prints; or to have a crime scene expert take pictures of the scene and body; and the failure of the investigating officers to pursue vigorously the various leads that were suggested by prosecution witnesses whilst the matter was being investigated.

Counsel submitted that, the failure to thoroughly investigate, assemble, call, and/or adduce evidence which may have demonstrated what happened, has the effect that it may be necessary to assume in the appellants' favour, facts which the prosecution could perhaps have otherwise negatived.

In ground five of the appeal, Counsel argued that, founding of the conviction of the appellants on purported

circumstantial evidence was a misdirection in fact and law. The definition of circumstantial evidence from **Black's Law Dictionary at page 636** was relied on as states that, it is 'Evidence based on inference and not personal knowledge or observation.' Counsel also cited the case of **Nyambe v The People[8],** to the same effect. Further reference was made to the case of **Banda v The People[9],** a more recent decision, which Counsel described as very instructive, particularly so, the following observations of Malila JS, when he opined that:

> **"Where the prosecution case depends wholly or in part on circumstantial evidence, the court is, in effect called upon to reason in a staged approach. The court must find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot, therefore prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist.**
>
> **Drawing conclusions from one set of established facts to find that another fact or facts are proved clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw on the weight of circumstantial evidence adduced before it."**

Counsel went on to cite the case of **Zulu v The People[10],** which cautioned trial judges against drawing wrong inferences

from circumstantial evidence presented before them. That in order to feel safe to convict, the circumstantial evidence must be so cogent that it takes the case out of the realms of conjecture and leaves an inference of guilt as the only reasonable inference that can be drawn from it.

The submission on the point was that, use of the phrase, 'purported circumstantial evidence' by counsel for the 1st appellant in arguing the present appeal, is on the ground that whereas: "circumstantial evidence" is defined as "evidence based on inference and not personal knowledge or observation." The learned trial judge in the court below in this case, merely expressed her own opinion stated at page J51 of her judgment in the following terms:

> *"I am of the considered view that apart from the statement 'P4' there is circumstantial evidence which strongly connects the accused to the commission of the offence."*

Counsel's arguments were that, the learned trial judge did not first find, that the prosecution evidence had established certain basic facts upon which to found or anchor the inference of guilt, with the result that, the conclusion reached was not supported by established facts.

Counsel reiterated the submission made in ground 4 of appeal, that the inference of guilt which the learned trial judge in the court below made, is not the only inference which could reasonably be drawn from the evidence that was before her. Nor did the circumstantial evidence led, take the case out of the realm of conjecture as was explained in the case of *Zulu,* amongst others.

Finally, on ground six of the appeal, faulting the failure by the learned trial judge to summon the Medical Officer who prepared the postmortem report during the trial, to elucidate the report, Counsel referred to the Criminal Procedure Code, Cap. 88 which in S.191 A (1) allows for the admission in evidence, of any medical report under the hand of a Medical Officer employed in the public service, relevant to the issue in a criminal matter.

Counsel cited a number of cases to stress the point that, the court must satisfy itself on the meaning of the contents of the postmortem report before it can safely rely on it to reach any conclusion on either the guilt of the accused or the severity of the sentence. He cited the case of **Mwanza and Others**[11] and submitted that, the Medical Officer should have been summoned

in this case. First, to explain the various medical terms in the report, as well as the conclusion and opinions expressed in the report. Second, and perhaps more importantly, the Medical Officer could have assisted the learned trial judge in the court below, to determine or evaluate the allegation that the pot used to hit the deceased on the head, could have caused the injuries described in the report. That it was undesirable to place reliance on the evidence of PW9, a Police Inspector in interpreting the contents of a medical report, as purportedly done by the trial judge.

We were accordingly urged to uphold grounds 1-6 of appeal relied on by the 1st appellant and ultimately, the appeal itself.

In his submissions, learned Counsel for the 2nd appellant, started by arguing ground 9 first, and stated that, this is the anchor ground of appeal for the 2nd appellant. Counsel noted that on 1st January, 2016, the 2nd appellant called PW9 and said that she would give a statement. An ordinary statement, exhibit 'P4' was recorded from her and she was released soon after it was given.

Counsel noted that, the 2nd appellant who was in fact pregnant at the material time had been in custody for two weeks when she gave the statement. What could be inferred from these circumstances is that, the 2nd appellant was induced to give the statement by way of a promise for her release, which in fact came to be. His submission was that, it is doubtful that the statement was freely given and as such, the said statement is not reliable.

Counsel also argued that, 'P4' lacked details of how the assault was inflicted on the deceased. Since it incriminated the 1st appellant only, it was of no evidential value against him, neither was it of any evidential value against the 2nd appellant as she did not, in it, incriminate herself at all. It was further argued that, as the 2nd appellant was not shown to have participated in the beating of the deceased nor to have planned the death of the deceased, **sections 21 and 22 of the Penal Code** that deal with situations where more than one person is involved in the commission of a crime, applied.

The submission in this regard was that, there is no evidence on record either direct or circumstantial, on which to base a finding of a joint unlawful enterprise by the appellants to

kill or cause the death of the deceased. The case of ***R. v Coney***[12] was relied on as decided that, non-accidental presence at the scene of the crime, in itself, is not conclusive of aiding and abetting or committing the crime. Counsel concluded his submissions on ground nine by urging that, the conviction of the 2nd appellant for the death of the deceased was wrong both in fact and law.

On grounds seven and eight relating to the finding by the trial court on the inference that, the 1st and 2nd appellants had the time, opportunity and motive to kill the deceased, learned Counsel for the 2nd appellant indicated to the court that, he was adopting the arguments advanced by Counsel for the 1st appellant in respect of the said finding.

Counsel accordingly beseeched us to allow the appeal, quash the conviction, set aside the sentence of 20 years imprisonment and set the 2nd appellant at liberty.

In written submissions filed in response, the State indicated that it was not supporting the conviction of both appellants.

We have considered the arguments, submissions, case law and other authorities to which we were referred by Counsel in great detail, particularly Counsel for the 1st appellant, for which we are grateful. We have also considered all the nine grounds of appeal and are satisfied, that they are all interlinked. Further, that the same raise only four underlying issues which we identify as follows:

1. **the issue raised in grounds 1, 2 and 3 is whether the learned trial judge properly admitted the statement (exhibit 'P4') in evidence.**
2. **in grounds 4,5, 7 and 8 the issue is whether the circumstantial evidence led at the trial had established the case against the appellants to such a degree as to leave the inference of guilt as the only reasonable one to be drawn from it.**
3. **in ground 6 the issue is whether the findings as stated in the postmortem report support the conclusion reached by the learned trial judge, that the fatal injuries were indeed inflicted by the use of the pot, exhibit, 'P2.'**
4. **finally in ground 9 which relates to the 2nd appellant only, the issue there, is whether the evidence led in anyway implicates the 2nd appellant in the commission of the offence.**

Having so identified the issues, we are further satisfied that the entire appeal rests on the determination of the first issue. That is to say, all the grounds of appeal will stand or fall depending on our finding on whether the statement (exhibit 'P4') was properly admitted in evidence by the learned trial judge.

It is clear from page J4 of the judgment of the trial court that the learned trial judge found there was no dispute regarding the material facts of the case. These were that in the night of 14th December, 2015 the deceased physically attacked the 2nd appellant. This happened before 21:00 hours at the house of PW1. As a result of this attack, the 2nd appellant who was then heavily pregnant at 7 months, sustained an injury to the ear from which she started bleeding. The 2nd appellant ran to the house of a neighbour, PW3 and the deceased pursued her there. After being rebuked by a 'mob' of neighbours who had followed the 2nd appellant in response to the commotion caused by the deceased, the deceased retreated to the house of PW1 where he now started breaking household goods. In the meantime, the 2nd appellant called the 1st appellant and they met at Pilgrim School where they were by themselves for about 20 minutes.

The further evidence from PW3 - PW7 was that, after breaking household goods from PW1's house the deceased was seen headed towards the harbour by some children, whilst threatening to commit suicide. Shortly thereafter, people from the neighbourhood of PW1's house who included PW3 - PW7 went to the harbour where they conducted a search for the deceased but

did not find him. Two days thereafter, on the 16th December, 2015 the deceased's dead body was retrieved from the water at the harbour. A postmortem conducted on the body disclosed the cause of death as brain hemorrhage due to head injury.

On 18th December, 2015, PW1 and her sister the 2nd appellant were apprehended by police, to allegedly assist with investigations relating to the deceased's death. After two weeks of detention, the 2nd appellant gave the statement in issue (exhibit 'P4') to the police in which she implicated the 1st appellant as the one who struck the deceased twice in the head with a pot. This pot was allowed in evidence at the trial as exhibit 'P2.'

It is however, the statement (exhibit 'P4') which is at the core of this case. At the trial of the matter, the 2nd appellant claimed that exhibit 'P4' was obtained from her by threats after she had been subjected to torture. That the police also promised to release her and she was infact released immediately after giving the said statement. In allowing this statement in evidence as exhibit 'P4', the learned trial judge reasoned that there could not have been any threats to the 2nd appellant when the statement was not one given under warn and caution.

The learned trial judge accordingly found it is the injuries described in the said statement as having been inflicted by the 1st appellant to the head of the deceased, which caused his death. She further found that the 1st appellant inflicted the injuries using the pot (exhibit 'P2,') at the behest of the 2nd appellant who had pleaded for his intervention to avenge the deceased's attack on herself. In the event, the court found both appellants had the motive, time and opportunity to attack the deceased, during the 20 minute period that they had been by themselves.

The submission of Counsel for both appellants on the admission of exhibit 'P4' on which the finding of guilt by the trial court was clearly anchored, were that, this statement which was made out of court by one accused implicating a co-accused is in law, inadmissible evidence, against the co-accused. Suffice it to state that, the said issue has been subject of numerous decisions of this Court, some of which were also relied upon by learned Counsel for the 1st appellant. The trite legal position was echoed by this Court in the case of **Maketo v The People**[13] where it was held that:

> **"An extra-curial confession made by one accused person incriminating other co-accused is evidence against himself and**

not the other persons unless those other persons or any of them adopt the confession and make it their own."

In view of the above position of the law, the ex-curia statement (exhibit 'P4') in issue in the present appeal which was made by the 2nd appellant incriminating only the 1st appellant is not admissible evidence against him and was improperly admitted in evidence. As the 2nd appellant did not therein incriminate herself, the statement was not evidence against her.

We further note that, in proceeding as she did, the trial judge sought comfort from the fact that defence Counsel did not offer any objection to the admission of exhibit 'P4' in evidence. We can in this respect only re-iterate the guidance given to trial Courts in **Kashiba v The People,** where it was observed that:

"It is the duty of the trial court in all cases, even if the question is not raised by the defence, to satisfy itself as to the admissibility of an incriminating statement. The court must satisfy itself, before evidence as to the content of the statement is led, that it was freely and voluntarily made.....

Whether or not an accused is represented, the record should state whether the allegedly free and voluntary character of a statement was challenged, the subsequent proceedings on the issue and the ruling of the court. These steps are not mere formalities; failure to take them is a serious irregularity which will lead to the setting aside of the conviction unless the appellate court is

satisfied that, on the remainder of the evidence, the trial court must inevitably have come to the same conclusion."

We are mindful of the fact that the finding of guilt and hence, the conviction of both appellants were grounded entirely on the same statement (exhibit 'P4') which we have since excluded on grounds that, it was improperly admitted in evidence. In considering whether there is any other evidence on record on which we could still sustain the conviction, we find only exhibit 'P2', which attempts to connect the appellants to the commission of the offence.

It being a trite legal position, that illegally obtained evidence is nonetheless admissible evidence. Hence, exhibit 'P2' which was obtained by PW9 following upon information from an inadmissible statement (exhibit 'P4'), is nonetheless admissible evidence. The connection of exhibit 'P2' to the commission of the offence is that it was the one which was used to inflict the fatal injuries on the deceased. In our considered view, the judge having made a specific finding of fact that the harbour was a very busy place and the deceased having been last seen alive headed towards the harbour. In order to establish that the deceased's death, given in the postmortem report as brain haemorrhage, was

as a result of injuries inflicted by the pot, in the circumstances of this case, required further explanation. This could have been done through verbal evidence of the doctor who carried out the said postmortem. As Baron DCJ observed in the case of **Mwanza and Others,** relied on by counsel for the 1st appellant:

> **"There may be cases in which the medical report will be sufficient .....but our experience is that medical reports usually require explanation not only of the terms used, but also of the conclusions to be drawn from the facts and opinions stated in the report. It is, therefore, highly desirable save perhaps in the simplest cases for the person who carried out the examination in question and prepared the report to give verbal evidence in court. Certainly, the doctor should have been called in the present case."**

As the doctor was not called at the trial, there is no evidence on record which can support a finding to the required standard of beyond reasonable doubt, that the fatal injuries were inflicted by no other object but the pot, exhibit 'P2'. Further, there was also evidence of DW4 to the effect that, the pot was at all material times in their home with DW5, which evidence was confirmed by that of DW3, when she said she saw Police Officers retrieve it from there.

It is for the said reasons, we find the convictions of the two appellants unsafe. The obvious doubt that is created of a

possibility that something else could have been used to inflict the fatal injuries must be resolved in the appellants' favour. Grounds 1, 2, and 3 of the appeal constituting the first issue, succeed.

The rest of the grounds of appeal which were premised on the failure of the issue raised in those grounds accordingly fall away. The appeal is hereby upheld and the conviction and sentence of both appellants are set aside.

E.N.C. Muyovwe
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE

J.K. Kabuka
SUPREME COURT JUDGE