

**IN THE HIGH COURT OF ZAMBIA  
HOLDEN AT LUSAKA**  
(Criminal Jurisdiction)



**HP/42/2017**

**THE PEOPLE**

**V**

**RICHARD MUKWAMBA  
JONES CHISULO  
JOHN NJOBVU,  
COSMAS TEMBO  
BINACK KASOSA**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25<sup>th</sup> DAY OF APRIL,  
2017**

*For the State* : Mrs P. Mulenga, Principal State  
Advocate, NPA

*For the Accused persons* : Mr I Nyambe and Mr C. Siatwinda Legal  
Aid Counsel, Legal Aid Board

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**R U L I N G**

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CASES REFERRED TO:

1. ***Mbewe V The People* 1976 ZR 317**
2. ***The People V Dimeni* 1980 ZR 234**

LEGISLATION REFERRED TO:

1. ***The Juveniles Act, Chapter 53 of the Laws of Zambia***

The accused persons in this matter stand charged with two counts. In the first count the offence is murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence allege that Richard Mukwamba, Jones Chisulo, John Njobvu, Cosmas Tembo and Binack Kasosa

on 11<sup>th</sup> April, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder Justin Kameya.

In count two the offence is aggravated robbery contrary to Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that Richard Mukwamba, Jones Chisulo, John Njobvu, Cosmas Tembo and Binack Kasosa on 11<sup>th</sup> April, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together did steal from Justin Kameya, one motor vehicle namely Toyota Spacio registration number ACP 4826, the property of Ntakuritimana Theogere, 1 Nokia cell phone valued at K900.00, the property of Justin Kameya, 1 MTN cell phone the property of Daniel Kameya, and at or immediately before the time of such stealing did use or threaten to use actual violence to the said Justine Kameya and Daniel Kameya in order to obtain or retain, or prevent or overcome resistance from the items being stolen.

All the accused persons denied both counts. During the evidence of PW6 Detective Sergeant Patron Kazhimoto, the defence raised objection to the evidence given by PW6 to the effect that accused persons 1 to 3 led him to the crime scene. The objection was raised that the leading, which amounts to a confession was involuntary. A trial within trial was held to determine the voluntariness or otherwise of the leading by the three accused persons to the crime scene.

Detective Patron Kazhimoto was the first state witness in the trial within trial. He stated that he is a scenes of crime officer and that his duties include visiting crime scenes, taking photographs of scenes, and compiling reports of the scenes visited. He also testified that he is a general investigator of criminal matters.



This witness stated his qualifications as possessing three certificates obtained from Lilayi Training College, as a scenes of crime officer, in handwriting as well as in collection of evidence from scenes, DNA compilation, and how to keep and preserve scenes.

With regard to the matter before court it was PW1's evidence that on 14<sup>th</sup> April 2016 Cosmas Tembo who is A4 led him around 03:00 hours to Chibolya compound where three male suspects were apprehended. That he had interviewed the three suspects who were picked up for the offence of aggravated robbery, and under a verbal warn and caution the three led by A1 had directed him to a place behind Sandy's Creation where the body of Justin Kameya was found.

It was his testimony that the body lay about three metres from the road upside down, and the hands were tied behind with cello tape. That the nose and mouth were also tied and the face was swollen, with a blood spot on the left eye. PW1 stated that the trousers of the body was pulled halfway down and the deceased wore a purple pant and half a pair of canvas. He named the suspects as Richard Mukwamba, Jones Chisulo and John Njobvu.

As regards the voluntariness of the leading PW1 testified that after the three were taken to Chilanga Police on being apprehended, they had waited there for about thirty minutes in order to enable the vehicle refuel. During that time he had administered a verbal warn and caution in Nyanja language, which the suspects understood. In response the three suspects had stated that they would take PW1 to the point where they had left Justin Kameya.

Still in his testimony PW1 told the Court that no inducement was made to the three in order for them to lead them to the scene, and that Detective Sergeant Manda was present during the time. He did not induce the suspects to lead PW1. His testimony was that he had advised the three suspects that they had the right to remain silent or say something but that if they said anything, it could be used in evidence against them. That none of the suspects had

complained about anything when the Warn and Caution was administered. He stated the purpose of the leading was to check if Justin was alive as he had been missing from 11<sup>th</sup> April 2016.

He stated that A1 had told him that he would lead him to the place where Justin Kameya was left, as they had only tied his hands behind, and did not harm him, while A2 stated that Justin Kameya was strong and had shouted and made noise, but they managed to tie his mouth, so that he could stop making noise. That A3 had told him that he was not very conversant with the area, though he could recall the road well.

In cross examination PW1 testified that A3 was apprehended first when A4 led them to the apprehension, and then A1 and A2 were apprehended from one house. He denied having assaulted A3 and the other two so badly on apprehending them. PW1 agreed that photographs were taken of the three accused persons when they were apprehended, and that he had compiled a photographic album to that effect.

When referred to page 5 of the said album, he agreed that the person in the middle had a swelling on his forehead, but denied that it was as a result of the beatings administered on him. He agreed that the person on the photograph on pages 6 and 7 with his back towards the camera had white stuff on his hands. He stated that the white stuff was because the three had been made to lie down so that they could be apprehended, as seen on page 7.

PW1 denied that the three were beaten during the handcuffing. He also denied that they were beaten or tortured before leading PW1 to the scene. He stated that none of the suspects had asked for water but had insisted on leading PW1 to the scene. It was stated that even though the suspects sat at the back of the van when leading him to the scene, they led him, as PW1 and other officers sat at the back with them. Therefore he could not have led the suspects to the scene.



The last witness for the state was Detective Sergeant Joseph Manda. Like PW1 he testified that A4 had led them to the apprehension of A3 first and then A1 and A2, all in Chibolya compound. He confirmed that on being apprehended the three suspects were taken to Chilanga Police where PW1 warned and cautioned them, informing them of their right to remain silent or say something in relation to the charges of aggravated robbery and murder. That none of the suspects had expressed reservation about the Warn and Caution, and neither did any of them make any requests.

That thereafter the three had led them to the crime scene, and A1 had led them to the recovery of the body of Justin Kameya, a few metres from the road, in the grass. He confirmed that the deceased was found lying face down with his hands tied behind his back with cello tape. He also stated that the deceased's mouth was also covered with cello tape.

When cross examined PW2 denied that the suspects were beaten on being apprehended or that they were made to roll on the ground before being taken to Chilanga Police. He expressed ignorance on the assertion that one of the suspects sustained a swollen forehead after being made to roll on the ground, but agreed that they were made to lie on the ground on being apprehended.

He also denied that they asked for food and water, whilst at Chilanga Police before going to the scene. While admitting that the suspects sat at the back of the van when leading police to the scene, PW2 testified that they led them there, and it was not the driver who did so.

In defence A1 testified that on the material day police had apprehended him from his house in Chilanga around 02:00 hours. That after they had knocked and he had opened the door, they had ordered him to sit at the door and he had done so and lifted up his hands. When they told him to go to them, they had kicked him on his eye and he had fallen down. Thereafter he was beaten with a short button and handcuffed.

When asked if he knew the two who were lying down he had denied, and he was beaten. It was his testimony that after dropping one of the suspects at Chibolya police, he was taken to Chilanga police with two other people where they were beaten and asked to show police where they had left the person whose vehicle they had stolen.

With regard to how they were beaten A1 stated that the police used slashers, round bars and short buttons to beat them everywhere. That there were about six police officers. He stated that he sustained injury on his head and leg, and that to date, his right leg is not okay.

He further testified that he had refused to lead police to the scene, but the police said that they would take them there, as they knew where the body was. He added that when they went to the scene they were made to lie down at the back of the vehicle and they did not see where they were going. That once the vehicle stopped two police officers disembarked and went into the bush, and they were ordered to follow them.

That is how they had found a dead body and they were ordered to pick it up, and when he had refused, police had a fired shot in the air, saying they would be killed. That is how he had lifted the body with the other two suspects, while in fear and they were photographed.

In conclusion he stated that he was not taken to the clinic after being beaten, as police had refused to do so. In cross examination A1 stated that he had not limped from the dock into the witness box, but that he does sometimes limp. He stated that photographs of him were taken after he was beaten on his eye.

When shown the photograph on page 5 of the photographic album he stated that he is the person wearing the blue trousers in the photograph and that the black spot on his face was a swelling and not a pimple. He admitted that he was told to lie down by the police, when he was being handcuffed, and that he got the white stuff on his arm from lying down.



He denied that he was searched before being handcuffed and it was his testimony that when he appeared before the Subordinate Court for explanation of the charge, he had not complained about being beaten. He stated that when taken to the remand prison he had not asked for a doctor to attend to him, as it was at night, and as he felt better after some days, he did not seek medical attention.

He testified that it was only sometime later when he was watching soccer in the prison that he was pushed, and the leg started hurting but he did not go for an x-ray despite being advised so. He agreed that he was warned and cautioned at Chilanga police before going to the scene, but stated that they were led there under duress. That he had disputed the Warn and Caution but police refused.

A1 denied that the body was decomposed when they found it. He agreed that a slasher is a sharp instrument and that it caused the injuries on his hand and legs. He denied that the injury on his head was caused by burns.

A2 in his defence in the trial within trial was similar to that of A1. He stated that he was with A1 when police apprehended them. He added that upon A1 opening the door of the house police pepper sprayed or tear gassed the house. That once outside they were made to lie down and they were beaten. He stated that there was a third person wearing a short, and outside lying down whom he did not know.

Like A1 he testified that police beat them with short buttons and they were taken to Chilanga police where they were again beaten this time with slashers apart from the short buttons. A2 stated that a gun but was used to hit him on the mouth and his front tooth came out while the bottom teeth shake. He showed the court the missing front tooth. Like A1 the testimony was that they were made to lie down in back of the van when going to the scene, and were threatened that if they lifted their heads up, they would be beaten.

A2 stated he did not see where they were driven to and repeated A1's evidence that there two police officers disembarked and they were ordered to follow them. That they were photographed and in the bush they found the dead body. He confirmed that the deceased was tied with his hands at the back and his mouth was tied with cello tape. That they were ordered to carry the body whilst handcuffed and they were threatened.

A2 testified that he went to the prison clinic to seek treatment but the treatment he was given was not sufficient. This he attributed to some remandees having escaped some time back when taken to the hospital, and that now any remandee will just be given pain killers.

A2 in cross examination stated that he is in grade 10. He agreed that he is the person in the photograph wearing a red trousers on pages 5, 6 and 11 of the photographic album. He agreed that no visible injuries on him can be seen on those photographs. He stated that the photograph on page 11 was taken after they were beaten by police at Chilanga police station. He told the court that his tooth had come out by then, but he had closed his mouth and it could not be seen. He agreed that the photograph shows no injuries on him.

He agreed that they were made to lie down before being handcuffed, and that he was warned and cautioned before going to the scene. He maintained that they were beaten on being apprehended, and at Chilanga police. A2 also stated that when cross examined he did not complain of having been beaten at the Subordinate court when he appeared for explanation of the charge. He testified that he had told the prison authorities to take him to the hospital, but he was just given pain killers.

He denied that his evidence that he had gone to the clinic at prison was an afterthought, even though he had not brought the book from the prison clinic. It was his evidence that he did not know that he was supposed to bring it.



A3 was the last witness for the defence. He testified that on 14<sup>th</sup> April 2016 around 02:00 hours he was apprehended by the police from his home. That the police had tied him with a wire and he was photographed and ordered into a police vehicle and they proceeded to leave a person he did not know at Chibolya police.

A3 told the court that from there they went to a house with a black gate where the police knocked, but no one opened. That is how the police officers had jumped over the wall fence and shortly a person he said was the landlord of the premises opened the gate as he stood there. Then two people he does not know came out of the gate and they were told to lie down.

They were beaten and taken to Chilanga police. A3 like his co -accused persons stated that there they were beaten with slashers, short buttons and round bars, and that he was hit on his shoulders and hands and he has marks to that effect. Further in his testimony A3 testified that the police officers asked them where they had left the person, but he stated that he did not know anything.

That from there they were put back into the police vehicle and driven to a place he does not know. He repeated A1 and A2's evidence that when the vehicle stopped and two police officers disembarked from it, they were ordered to follow the two police officers into the bush where a dead body was found. He stated that the police officers told them that they are the people who had killed that person. That despite denying having done so, he was ordered to kneel down and police threatened to kill them.

It was his testimony that because of fear of being killed, he held the body by the legs whilst handcuffed and his co- accuseds held the torso and head, and they were photographed. He also testified like his co-accused persons that police then ordered them to put the body in the vehicle, and they were taken back to Chilanga police. In conclusion he testified that he did not receive any

medical treatment for his injuries as the police officers denied him access to treatment.

In cross examination A3 admitted that he was warned and cautioned before being they went to the crime scene. He denied having led police there. He agreed that a body was recovered at the scene and that it was covered with cello tape on the mouth. He stated that he did not complain to the Subordinate Court when he appeared before the Subordinate Court that he was beaten but that he had told the prison authorities that he needed to go to the hospital but was however only given pain killers and not taken there.

I have considered the evidence. The question that falls for determination is whether the A1, A2 and A3 did lead the police to the recovery of Justin Kameya's body at an area near Sandy's Creation, and whether such leading was voluntary?

It is not in dispute that the three accused persons were warned and cautioned in this matter before they led police to where the body was discovered. They however dispute having led the police to the recovery of the said body, arguing that the alleged leading was involuntary as they were beaten and threatened that they would be killed. That moreover they were at the back of the vehicle and could not have led the police there.

I had ordered that A1 and A2 be taken for age determination to establish their actual ages, as they claimed to be juvenile offenders. The age determination reports for the two have since been availed to the court, and they state that A1 is aged seventeen years, while A2 is aged less than eighteen years.

The two are therefore juvenile offenders. In the case of **MBEWE V THE PEOPLE 1976 ZR 317** the appellant, a juvenile, was convicted of aggravated robbery. As was conceded by the State, if an alleged confession which had been admitted in evidence by the trial court were excluded, the conviction could not be supported on the remainder of the evidence. The police officer who recorded



the statement said in evidence that fifteen minutes after the appellant had volunteered the confession he completely denied everything in his statement. The appellant in his evidence on oath said that the confession was obtained under threat and torture.

It was held that in the case that ***“it is desirable, whenever possible, in the interests of both the police and the juvenile to have a parent or guardian present at the police station when a statement is being taken from juvenile”***.

The court in that matter had noted that ***“Section 217 of the Juveniles Act stresses the importance which the legislature attaches to the attendance whenever possible during all stages of the proceedings in court, of a parent or guardian of a juvenile but there is no such provision in the Act for the attendance of a parent or guardian at a police station during the taking down of a statement of a juvenile. We would however urge that it is desirable in the interests of both the police and the juvenile to have a parent or guardian whenever possible to be present at the police station when a statement is being taken from a juvenile and no doubt the legislature would view the importance of such a procedural provision in the Act in the same light as obtains in section 217 of the Juveniles Act.***

Going by the decision in that case it is clear that there is no requirement under the Juveniles Act to have the parents or guardians of the juvenile offender when a juvenile offender is being questioned at the police station. The case gave guidance that it is desirable to have parents or guardians present at the police station when questioning the juvenile offender.

While the Juveniles Act has not been amended, there has been reform internationally by the passing of legislation such as the Convention on the Rights of the Child (CRC) and other treaties under it such as the Riyadh guidelines, which recognize the need to have parents or guardians present during all the processes in the criminal justice system when a juvenile offender

comes into conflict with the law, and Zambia having ratified the CRC agreed to be bound by its provisions.

It was therefore expected that the police when warning and cautioning A1 and A2 before leading them the scene they should have required the attendance of their parents or guardians, unless there was good reason to dispense with their presence. There is no evidence on record to show that any effort was made to secure the parents or the guardians before the Warn and Caution was administered.

In my view by the police proceeding to Warn and Caution the juvenile offenders before they were led to the scene prejudiced the juvenile offenders. This is so even though the evidence on record shows that the juvenile offenders led police to the scene, and from the cross examination of the juvenile offenders by the state, the allegations of having been beaten were not substantiated thereby raising very little doubt that the leading was not voluntary. I say so because it was established that the white marks on the juvenile offender's bodies were due to them having been ordered to lie down when they were apprehended, and that the photographs though not tendered as evidence do not show any evidence of assault, as the juvenile offenders alleged that they were assaulted with slashers, short buttons and round bars. These objects would definitely have left visible marks if indeed they were used, which is not the position in this case.

In the case of ***THE PEOPLE V DIMENI 1980 ZR 234*** where a juvenile offender charged with murder signed a confession statement in the absence of the parents and guardians it was noted that;

***“although the juvenile has no parents in Zambia (as per his evidence) in the absence also of a guardian it would have been desirable in the interest of justice to have some other person not a police officer, to have been present when recording the statement. Although the Supreme Court has accepted the desirability to have a parent or guardian at the police***



*station when a statement is being taken from a juvenile it is perhaps unfortunate that Zambia still operates under the pre-1964 English Judges Rules (see Chinyama case). The pre- 1964 Judges Rules have no provisions for the presence of a parent or guardian at the Police station during the interrogation of children and young persons which is specifically provided for in the revised English Judges Rules (see Rule 4 p. 763, para. 1391a of Archbold, 39th edn).*

*For reasons outlined above, I am satisfied that this is "a proper case" in which I should exercise my discretion to exclude the confession, notwithstanding that it was voluntary and therefore strictly admissible, because in all the circumstances, the strict application of the rules as to admissibility would operate unfairly against the juvenile offender. Accordingly I refuse to accept the introduction of the confession into the evidence".*

Therefore I find that because the juvenile offender's parents and guardians were not present at the time and no other person apart from the police was present, I accordingly exclude the evidence of the leading as it relates to A1 and A2, despite them having been warned and cautioned and not having been beaten.

As regards A3 his contention was also that he was beaten and threatened before they driven to the scene where the police disembarked from the vehicle and stood at some place where they were asked to go and the body was found.

A3 agreed to having been warned and cautioned before they were taken to the scene. He stated that he did not lead the police there, but the evidence of PW1 was that he said he would lead the police there. PW1 had also testified that A3 had stated that although he was not conversant with the area he could recall the road very well. This evidence was not challenged in cross examination.

Whilst stating that he was injured, A3 had failed to state the nature of the injuries that he sustained, and such that it can be said that he led police to the scene, as a result of the beatings. A3 had also alleged that the police had actually led them to the scene and fired shots to threaten him.

This allegation was not substantiated in any way as PW1 was not cross examined on it thereby discrediting such evidence, so that it can be inferred that the leading was involuntary. The defence was just an afterthought. A3 having been warned and cautioned, and not having been beaten or threatened as alleged, did in fact lead the police to the body of the late Justin Kameya.

I accordingly rule that the leading by A3 was made freely and voluntarily and the objection is overruled. The evidence of leading on A3's part shall form part of the evidence in this matter.

**DATED THE 25<sup>th</sup> DAY OF APRIL, 2017**

*S. Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**