IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 52/2016**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

BONIFACE ZULU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Kajimanga and Chinyama, JJJS
On 10th January 2017 and 12th May 2017

FOR THE APPELLANT: Mr. A. Ngulube, Director, Legal Aid Board

FOR THE RESPONDENT: Mrs. R. M. Khuzwayo, Chief State Advocate, National Prosecution Authority

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J U D G M E N T

KAJIMANGA, JS, delivered the judgment of the court.

Cases referred to:

1. **Saluwema v The People (1965) ZR 5 (CA)**
2. **R v Ratten [1972] A. C. 378**
3. **Sammuel Mwaba Mutambalilo v The People Appeal No. 47/2015**

The appellant was tried and convicted on a charge of murder.

The particulars allege that on 6th November, 2013 at Lusaka the appellant murdered Benson Kangombe (the deceased).

The prosecution evidence disclosed that on 5th November 2013 in the night, the deceased was heard by PW1 shouting that he was burning. When PW1 got out of his house and rushed towards his deceased brother's house where the shouting was coming from, he saw a person fleeing from the scene. He chased after and apprehended the person who happened to be his young brother, the appellant. His uncle (PW3) joined him and they went to the deceased's house with the appellant where they found the deceased rolling on the ground and the house was burning. That the deceased told them that the appellant had burnt him. With the help of other people, PW1 and PW3 took the appellant to the police.

The prosecution evidence also disclosed that on the fateful night, the deceased woke up and told his wife (PW2) that he had heard some noise coming from the extended part of their house. PW2 went back to sleep. She was later awakened by the deceased who was shouting that she should run away because there was fire. PW2 saw the deceased crawling in agony and saying that he was burnt by

the appellant. On the deceased's instruction, she broke the window with a TV stand through which they escaped with the children. PW2 stated that when PW1 and PW3 brought the appellant to their house, they found the deceased crying that his young brother (the appellant) had burnt him and the house was on fire. The deceased was taken to the hospital where he died the following day. According to the post-mortem report, the deceased died of burns.

In his defence, the appellant stated that on the material night, he was on duty as a security guard at Zamtel's Tower 22 which was about one hundred metres from the deceased's house. Whilst in the guard room he heard his brother, the deceased shouting. When he peeped outside he saw a flame of fire at his house and he rushed there. Since he could not access the main door as there was fire, he went behind the house and broke the window. He then assisted his sister-in-law to come out and thereafter, the deceased. The last to be assisted were their two children. He then rushed to go and inform PW1 and PW3. He met them on the way. Before he could explain anything, they apprehended him and accused him of burning the

house. They did not go back to the house where the deceased was but went to the police station instead.

In her judgment at pages 73 – 74 of the record of appeal, the learned trial judge found as follows:

> **"In the evidence before me, PW1 was the first to see the accused. At first he saw a person running and he gave chase and caught this person. He identified this person as the accused, his half-brother. The danger of an honest mistake does not arise in this case... There is no evidence that there were other people around...**
>
> **The evidence of PW1 is clear and satisfactory in every aspect... The court is satisfied that PW1 was reliable in his observation. The testimony of PW2 and PW3 was that the person apprehended and brought to the burning house of the deceased was the accused.**
>
> **In their testimonies, PW1, PW2 and PW3 all stated that as the deceased was agnonizing from the burns, they heard him say Boniface had burnt him. The court considered this to have been res gestae..."**

And at page 75 of the record of appeal, the learned trial judge stated that:

> **"I have found the statement made by the deceased admissible. I have considered the statement of the deceased about the accused burning him as res gestae. There is no doubt that the accused person with the intention of causing death or to do grievous bodily harm to the**

deceased by an unlawful act is guilty of the murder of Benson Kangombe and I convict him accordingly."

The appellant now appeals against the conviction and sentence, advancing one ground of appeal namely, that the trial court erred in fact and law when it convicted the appellant of murder and sentenced him to death.

At the hearing of the appeal, Mr. Ngulube, the learned Director of the Legal Aid Board relied on the appellant's written heads of argument. He submitted that there was no dispute that the deceased was burnt and died as a result of the burns but the issue was whether it was the appellant who set the house on fire. According to Mr. Ngulube, the appellant testified that he was the one who rescued the widow (PW2) and the children. He argued that it was not disputed that the appellant worked as a security guard at Tower 22 which was not far from the residences of PW1, the appellant and the deceased. That the prosecution did not call evidence in rebuttal to challenge the evidence regarding the window which was central in the case, i. e., whether it had burglar bars; whether the window frame was intact

and only the glass was broken as testified by PW2, or was the window frame removed as testified by the appellant.

Mr. Ngulube contended that the narration of PW2 about 'throwing' the deceased through the window appears to be an exaggeration. That there were no cuts sustained by PW2, the deceased or the children from the remaining glass on the edges of the window after breaking the window pane. He argued that PW4 who was the dealing officer did not help much as he overlooked visiting the scene and thereby left questions lingering as to how the house was configured; the extent of the damage, the state of the window, the existence of the plank used to break and remove the window frame, and any other relevant evidence at the scene.

It was counsel's argument that in view of the foregoing facts the trial court erred in finding the appellant guilty of murder. He submitted that the appellant's case was reasonably possible and cited the case of **Saluwema v The People**[1] in aid, where the Court of Appeal stated that:

> **"If the accused's case is reasonably possible, although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof."**

Counsel submitted that in casu, the appellant's case was reasonably possible and as such the prosecution failed to discharge its burden of proof. We were accordingly urged to allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

At the hearing, Mrs Khuzwayo, the learned Chief State Advocate was granted leave to file the respondent's heads of argument out of time, on which she entirely relied. In response to the appellant's heads of argument, Mrs. Khuzwayo submitted that the lower court did not err by convicting the appellant and, therefore, supported the conviction. It is clear from the record, counsel contended, that the deceased died from cardiac arrest due to secondary degree 80% burns and the only issue for determination by the trial court was the person responsible for the arson. She submitted that albeit circumstantial, there was overwhelming evidence identifying the appellant as the perpetrator of the offence and the lower court properly convicted him.

Counsel submitted that the explanation given by the appellant that he was on duty at the Zamtel tower at the time the deceased was

burnt is not reasonably possible and cannot stand in light of the totality of the evidence on record. By testifying that he was 100 metres away from the house where the deceased was in when he heard screams from there and that there were no houses in between the Zamtel tower and the deceased's house, the appellant actually placed himself within the proximity of the scene of crime. According to counsel, this in itself clearly indicates that the appellant had opportunity to commit the offence.

On the appellant's contention that the prosecution failed to rebut his evidence of being on duty, Mrs Khuzwayo submitted that there was no need to rebut this evidence since a 100 metres distance was within the vicinity of the scene of crime which was easily accessible by the appellant. Further, that the evidence of PW1 and PW3, the relatives to both the appellant and the deceased was that the person seen fleeing from the scene of crime was chased up to the time of apprehension, and he turned out to be the appellant. According to counsel, it was odd that the appellant was fleeing from the scene instead of going towards it, if he had nothing to do with the arson.

Regarding the appellant's argument that the prosecution failed to rebut the evidence on the nature of the window that the deceased and his family used to escape from the burning house, Mrs Khuzwayo submitted that the size or type of the window used to escape the inferno does not go to the material fact of who caused the death of the deceased. She contended that the gist of this appeal is the identity of the person responsible for setting the deceased's house on fire.

The learned counsel also submitted that the other reason why the appellant's explanation cannot reasonably be possible and does not cast doubt in the prosecution's case is that the learned trial judge, who observed the demeanour of the witnesses, found PW1 to have been reliable in his observation; that PW2 gave her evidence in a fair and dispassionate manner and that there was no reason to doubt her evidence. That this indicates that the lower court believed the testimonies of these witnesses and attached weight to their evidence. Further, that in its analysis of the evidence, the lower court dispelled any likelihood of false implication, PW1 and PW3 being related to the appellant.

It was also submitted that a further reason why the explanation given by the appellant in the court below cannot reasonably be possible is that the learned trial judge qualified the statement made by the deceased to PW1, PW2 and PW3 that it was the appellant who had burnt him as a dying declaration. Before such qualification, counsel contended, the learned trial judge directed her mind to the law relating to dying declarations.

Mrs. Khuzwayo finally urged us to confirm the conviction of the appellant because the circumstantial evidence against him is cogent as it has been removed from the realm of conjecture. She submitted that the appellant is linked to the offence by opportunity to commit the offence which is established by his presence at the Zamtel tower, only 100 metres away from the scene; evidence of a bad relationship between him and the deceased which proved malice aforethought; act of fleeing from the scene of crime and PW1 giving chase until the appellant's apprehension; and the dying declaration made by the deceased. According to counsel, the only irresistible conclusion to make, therefore, is that the appellant is the one who set fire to the deceased's house and she urged us to dismiss the appeal.

No submissions in reply were filed on behalf of the appellant. We have considered the evidence in the court below, the judgment of the lower court and the submissions of both counsel.

The sole ground of appeal is that the trial court erred in law and fact by convicting the appellant of murder and sentencing him to death. According to Mr. Ngulube, the basis of this ground of appeal is that the appellant's evidence that he worked as a security guard at Tower 22 which was not far from the residences of PW1, the appellant and the deceased was not disputed by the prosecution; that the prosecution did not call evidence in rebuttal to challenge the appellant's testimony regarding the window which was central in the case; the appellant's case was reasonably possible on the principle enunciated in the **Saluwema** case and as such, the prosecution failed to discharge its burden of proof.

From the outset, we wish to state that the appellant's arguments cannot hold, given the overwhelming circumstantial evidence linking the appellant to the crime scene. The evidence adduced in the court below indicates that PW1 saw someone running from the direction where the deceased's house was burning. He gave

chase and apprehended that person who turned out to be the appellant, his young brother. PW1 was joined by his uncle (PW3). We accept the finding by the learned trial judge that the danger of an honest misstate did not arise as there was no evidence that there were other people around apart from the appellant. In view of the foregoing, the appellant's evidence that he was going to inform PW1 and PW2 when he met them on the way is a red herring and cannot be reliable. As correctly submitted by counsel for the respondent, it was an odd coincidence that the appellant was fleeing from the scene instead of running towards it if he had nothing to do with arson.

Another factor found by the trial judge, and rightly so, as connecting the appellant to the crime is the deceased's dying declaration. According to the evidence of PW1, PW2 and PW3 which the learned trial judge accepted, they heard the deceased, while agonising in pain, saying that the appellant had burnt him. The court below found this statement admissible as *res gestae*. In **R v Ratten**[2], Lord Wilberforce considered the test to be applied before evidence is accepted as *res gestae* as follows:

> **"The possibility of concoction, or fabrication, where it exists, is an entirely valid reason for exclusion, and is probably the real test**

which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish; such external matters as the time which lapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event, it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded...".

In **Samuel Mwaba Mutambalilo v The People**[3], Muyovwe, JS., stated that:

"In our own case of Edward Sinyama v The People [1993 – 94 Z. R. 16] we held that if the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the court must be whether the possibility of concoction or distortion should be disregarded in the particular case. We also said that the possibility has to be considered against the circumstances in which the statement was made".

The evidence in this case shows that the deceased made the statement to PW1, PW2 and PW3 that he had been burnt by the appellant in clear circumstances of spontaneity while his body was

agonizing from the burns. There was, therefore no possibility of concoction. We find that the learned trial judge properly accepted this evidence as *res gastae*.

Mr. Ngulube contended that the prosecution did not adduce evidence to challenge the appellant's testimony regarding the type of window used by PW2, the deceased and children to escape from the inferno which, according to counsel, was central to the case. The view we take is that the manner in which the occupants of the burning house exited is immaterial to proving the guilt or otherwise, of the appellant. As aptly submitted by Mrs Khuzwayo and well conceded by Mr. Ngulube, this appeal hinges on the identity of the arsonist and not how the occupants escaped from the house.

We also agree with counsel for the respondent that the appellant's explanation that he was on duty guarding at the Zamtel tower at the time the deceased was burnt is not reasonably possible, given the evidence on record. Further, we agree with her contention that the appellant's proximity to the crime scene suggests to a high degree that he had opportunity to commit the offence. It is our view that the facts in the **Saluwema** case on which the appellant has

placed reliance are clearly distinguishable from this case. In that case, the prosecution alleged that the appellant caused the death of the deceased by kicking him in the head. After the fight was over it was obvious that the deceased was seriously injured. He was eventually taken to hospital where he died eight days later. The issue for determination was whether it was the kick administered by the appellant which caused the deceased's death. Blagden J. A., stated that:

> **"... it is clear that the deceased received at least two fist blows in the first fight and one or both of them was of sufficient force to knock him down. I have already referred to Dr Swain's evidence as to how the fatal blow might have been struck. She said: I would think it unlikely that the blow would be caused by a fist'. I do not consider that the observation rules out the reasonable possibility that this was how the fatal blow was inflicted. It may not be probable, but if it is only reasonably possible, as I think it is here, then there must be a reasonable doubt as to whether it was the kick administered by the appellant which caused the deceased's death. In these circumstances the prosecution cannot be said to have discharged the burden of proof upon it of proving the accused's guilt beyond reasonable doubt; and that is fatal to this conviction. It was for these reasons that I concurred in allowing this appeal."**

In our considered view, the principle in the **Saluwema** case does not apply to this case where there is cogent circumstantial evidence

identifying the appellant as the person responsible for the deceased's death, thereby removing such evidence from the realm of conjecture as aptly submitted by counsel for the respondent. We are, therefore, satisfied that the prosecution succeeded in discharging its burden of proof.

The net result is that we uphold the judgment of the court below and dismiss the appeal for lack of merit.

E. C. Muyovwe
SUPRIME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE