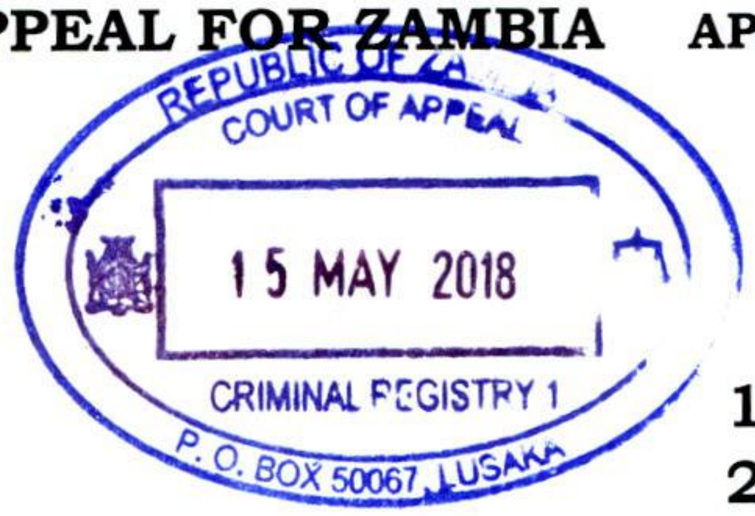
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO.183/2017**
HOLDEN AT NDOLA
(Civil Jurisdiction)
BETWEEN:



CHRISPIN CHUUNGA **1ST APPELLANT**
ERNEST CHOONDE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Makungu, Kondolo and Majula, J.J.A
On 3rd February and 15th May, 2018.

For the Appellants: Mr. Kabesha of Messrs Kabesha & Co
For the Respondent: Mr. R.L. Masempela Deputy Chief State Advocate of NPA

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Kambarange Kaunda v. The (1990/ 1992) ZR 124*
2. *Chola Nyampande and Sichula v. The People (1988-1989) ZR 163*
3. *Nsofu v. The People (1973) ZR 287*
4. *R v. Turnbull & Others (1976) 3 ALL ER 550 -551*
5. *Elias Kunda v. The People (1980) ZR 125*
6. *Chisoni Banda v. The People ZR 70 at P.78 (1990-1992)*
7. *The People v. John Nguni (1977) ZR 379*
8. *Edward Sinyama v. The People (1987) ZR 99*
9. *Ilunga Kalaba and another v. The People (1981) ZR 102 at P.33*
10. *David Zulu v. The People (1977) ZR 151*
11. *Chitalu Musonda v. The People SCZ - Appeal No. 38 of 2014 (unreported)*
12. *Kahilu Mitingochi v. The People - Appeal Number 58 of 2016 (CAZ) (unreported)*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia – Sections 22 and 200*

This is an appeal against conviction and sentence. Both appellants were convicted of murder contrary to ***Section 200 of the Penal Code*** [1] and sentenced to death.

In brief, the evidence on record is that on the 26th January, 2016 around 19:00 hours, the 2nd appellant had visited the deceased, Clement Maako Muleya also known as Sichikolo at his home in Choma District. The deceased and the 2nd appellant were cousins and they used to get along very well. Around 20:00 hours the deceased escorted the 2nd appellant out of the yard. Thereafter, PW1 (Alice Muntanga) and PW2 (Gift Lupakula) both wives of the deceased heard two gunshots and the deceased calling out for help. Then they went and found the deceased bleeding from bullet wounds about ten metres away from the house. The deceased then informed them that the one who had shot him was Chripin and asked for his father PW3 (Maambo Muleya) so that he could bid him farewell. A few minutes later, PW3 showed up and the deceased told him that he should not go searching for the one who had killed him because it was Chrispin and that it was the 2nd Appellant who betrayed him. This was said in the presence of the deceased's four wives including PW1 and PW2. A few minutes later, he died. It was also in evidence that the only Chrispin that PW1, PW2 and PW3 knew was the 1st appellant who was the deceased's brother in law. The deceased and the 1st appellant were also on good terms.

Further evidence was that, on the material day, between 14:00 hours and 22:00 hours, PW4 (Boyd Muchindu) the 1st appellant's best

friend was with the 1st appellant at his shop. PW4 was helping the 1st appellant with the sales. That the 1st appellant was operating outside while PW4 was selling merchandise inside the shop. Around 20:00 hours, the 1st appellant informed PW4 that there were rumours that the deceased was shot dead. The 1st appellant was apprehended on 29th January, 2016 on a bus to Choma. The second appellant was apprehended the day after the shooting. The police investigator PW5 (Morgan Chasha Malobela) found that there was only one Chrispin in that area. PW5 also found out that the 1st appellant had an affair with the deceased's 4th wife in 2008 which created animosity between the deceased and the 1st appellant. PW5 also informed the court that the crime scene was 10 meters from the deceased's house and that the 1st appellants shop was approximately 500 meters from the crime scene. That there was a chief's retainer who confirmed to PW5 that the 1st appellant was at the shop at the material time.

The gist of the 1st appellants' defence was that he was working at the shop with PW4 on the material date. He had plans to go out of town the following day. That he thought it was just a rumour that the deceased had been killed. Further, that there were other Chrispins in the village. He denied having had an affair with one of the deceased's wives and denied playing a part in his killing.

In his defence, the 2nd appellant admitted having visited the deceased that night in order to collect some hoes but they were not yet ready. After being escorted by the deceased, he went straight home. He denied having heard gunshots at the deceased's house that night.

The following day, he learnt of the death of the deceased from PW1 and then went to the funeral house where he was apprehended by the police.

The learned trial Judge found that before the deceased died, he told his wives and father, "*not to waste time trying to find out how he had died because it was Chrispin A1 in this case who shot him after he was betrayed by A2.*" He further found that the deceased was shot when he was escorting the 2nd appellant who had paid him a visit in the evening of 26th January, 2016. The trial Judge took what the deceased said just before he died as part of *res gestea.* He found the evidence of the prosecution credible and cogent. He further found that there was a possibility that the 1st appellant could have left the shop without PW4's knowledge, to go and shoot the deceased who was only half a kilometer away. That the fact that the deceased mentioned the 1st appellant, entails that he saw him. The Judge further found that the explanation given by the 1st appellant after the shooting and the fact that he was caught fleeing from his home showed guilty consciousness on his part. That the 1st appellant had a motive to kill the deceased because he was caught in adultery with the deceased's wife. He stated that there was strong circumstantial evidence against the 1st appellant. He also found that the 2nd appellant lied that he did not hear the gunshots and yet he was with the deceased at the material time. That the 2nd appellant lured the deceased into escorting him to enable the 1st appellant shoot him. That was the basis of the conviction.

At the hearing of the appeal both counsel relied on their Heads of Argument filed herein on 22nd and 23rd February, 2018 respectively.

The appellants have raised three grounds of appeal as follows:

1. The trial Judge erred in law and in fact in convicting both appellants as he did without considering the inconsistencies in the prosecution evidence with regard to the time the deceased was shot and the name of the assailant purportedly mentioned by the deceased shortly before his death, which inconsistencies vividly showed that the prosecution witnesses were not credible.
2. The trial judge erred in law and fact by not taking into account the fact that the prosecution witnesses had their own interests to serve.
3. The trial court misdirected itself by not considering whether both appellants had motives to kill the deceased.

In support of ground one, Mr. Kabesha submitted that the deceased was killed by unknown people. His contention was that if the deceased had truly mentioned the appellants as his assailants before his demise, Dickson Chingaila who reported the matter to the police would have mentioned the name of the assailant to the police. The issue of the deceased having named his assailant was just an after thought by PW1, PW2 and PW3. That the police who went to pick up the body of the deceased were not told the names of the assailants and that it why the apprehension of the 2nd appellant took more that two days. He further submitted that the deceased's statement should not be taken as part of *res gestea* because of the very strong alibi

raised by the 1st appellant which was investigated by PW5 and found to be true.

Counsel further stated that there were a lot of inconsistencies in the prosecution evidence with regard to the time the deceased was shot and the names of the assailants. That the discrepancies discredited the prosecution evidence.

In response to ground one, Mr. Masempela submitted that the deceased's killers were known as the deceased had mentioned them and that his utterances should be taken as part of *res gestea*. He further submitted that Dickson Chingaila was not called as a witness and therefore the appellants are merely speculating as to the information that he gave to the police. Further that the 2nd appellant was arrested a day or two later because the police had to first investigate the matter. He contended that the alibi was disproved.

Mr. Masempela contended further that there are no material inconsistencies in the prosecution evidence. That the shooting occurred in a village set up where people tell time by estimation. Even in cross-examination defence counsel was soliciting for the estimation of time in relation to how long it took from the time the deceased and the 2nd appellant left the house to the time that gun shots were heard. He stated that people estimate time differently. On page 39 line 1 of the record, PW2 told the court that 30 minutes passed from the time the 2nd appellant and the deceased left to the time that gunshots were heard while PW1 stated that 10 minutes

elapsed. PW3 told the court that he received news that his son had been shot around 21:00 hours. Mr. Masempela submitted that these different estimations cannot be said to be inconsistent and he prayed that ground 1 should fail.

In arguing ground two, Mr. Kabesha submitted that the prosecution witnesses had their own interests to serve and therefore they should have been treated as suspect witnesses. That Dickson Changaila, the person who reported the murder and the chief retainer were deliberately excluded from the witness list by the prosecutor and this prejudiced the appellants. He relied on the case of ***Kambarange Kauda v. The People*** [1] to support his contention that relatives or friends of the deceased should be taken as suspect witnesses whose evidence requires corroboration and should be treated with caution.

In response to ground 2, Mr. Masempela argued that the prosecution witnesses had no interests of their own to serve as there was no reason for them to falsely implicate the appellants. That there was something more that excluded the dangers of false implication. He relied on the case of ***Chola Nyampande and Sichula v. The People*** [2] where it was held as follows:

> ***"In the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of***

the circumstances of the case, may have had the motive to give false evidence.

Where it is possible to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility the evidence falls be approached on the same footing as that of accomplices."

He further submitted that the 2nd appellant visited the deceased on the date he was shot and as such, there was consistency in PW1 and PW2's evidence. He also referred to the case of ***Nsofu v. The People*** [3] where the Supreme Court held as follows:

"Mere opportunity does not amount to corroboration but the opportunity may be of such a character as to bring in the element of suspicion. That is that the circumstances and the locality of the opportunity may be such as in themselves amount to corroboration."

In light of the above authority, he argued that the trial court found that the distance from the deceased's house to the 1st appellant's shop was only five hundred meters. Therefore the 1st appellant was near the deceased's house and had an opportunity to dash there and commit the crime. He stated that it was an odd coincidence that the deceased had mentioned both appellants as his assailants just before he died. That the odd coincidence was not explained by the appellants and therefore it should be taken as supporting evidence.

He referred us to the case of ***R v. Turnball and Others*** [4] where it was stated that:

> ***"..... odd coincidences if they remain unexplained may be supporting evidence."***

In support of ground three, it was argued that the evidence of PW1 PW2 and PW3 revealed that the appellants had cordial relations with the deceased and therefore they had no motive to kill the deceased. He added that the time factor does not link the 1st appellant to the scene of the crime because his alibi was solid. The trial Judge erred in fact by finding that the 1st appellant was conducting business outside the shop as stated by PW4 and therefore he went and shot the deceased because there was nothing on record to show that he left the shop. Therefore, the trial Judge erred by making findings which were not supported by credible evidence before him and his findings ought to be set aside. He relied on the case of ***Elias Kunda v. The People*** [5] where the Supreme Court held *inter alia* that:

> ***"(1) A judgement of a trial court can only be challenged on the basis that evidence relied upon could not reasonably have been held credible.***
>
> ***(2) In cases where guilty is found by inference, ... there can not be conviction if an explanation given by the accused, either at an early stage (such as to the police) or during the trial might reasonably be true."***

He further submitted that the deceased was murdered around 21:00 hours i.e. two hours after the 2nd appellant had visited him. This indicates that the 2nd appellant was also not at the crime scene. He therefore prayed that the convictions and sentences be quashed.

In response, Mr. Masempela argued that the assertion that the appellants and the deceased had cordial relations is misconceived because the 1st appellant had an affair with the second wife of the deceased and that might have caused hostility between them. That the 2nd appellant was used by the 1st appellant to lure the deceased to a place where the 1st appellant could commit the offence.

Further that the alleged alibi was negatived by the prosecution evidence as it was possible for the 1st appellant to sneak out of the shop and go to kill the deceased and then return to the shop. That the alibi would have been strong if he was in another town.

We have considered the record of appeal and the arguments made by the parties. We shall deal with the three grounds of appeal together because they are inter-related.

Mr. Kabesha relied on the ***Kambarange case*** [1] to support his contention that PW1, PW2 and PW3 were suspect witnesses because they were closely related to the deceased and had their own interests to serve. In the case of ***Chitalu Musonda v. The People*** [11] the Supreme Court had an opportunity to propound Zambian

jurisprudence regarding suspect witnesses. At page J21 they stated that:

> ***"In the Kambarange case we regarded the witnesses who were friends and relatives of the deceased as having a possible interest of their own to serve, not merely because they were friends and relatives of the deceased, but because they fell into the category of witnesses who were subject of a complaint lodged by the appellant."***

The court further stated that:

> ***"As we explained in the Mwambona case in regard to an employee..."***
>
> ***"..... Although an employee may in appropriate cases be regarded as a witness with a possible bias, just as one might so regard a close relative, and in such cases, one would approach his evidence with caution and suspicion, but this is not to say that one would not normally convict on such evidence unless it were corroborated."***

In the recent case of ***Kahilu Mungochi v. The People*** [(12)] we stated *inter alia* that:

> ***"A relative is not automatically a suspect witness, it is the circumstances of the case that can render a relative to be a suspect witness."***

In this case, we are of the view that PW1, PW2 and PW3 fell into the category of suspect witnesses whose evidence required circumspection, not necessarily corroboration before being upheld.

We take judicial notice that people estimate time differently. The fact that the evidence of the prosecution witnesses as regards the time when the deceased was shot was inconsistent, makes it difficult for us to determine the exact time that the deceased was shot and whether the 2nd appellant was close by or he had already walked far away from the crime scene.

It is clear from the evidence on record that before the deceased passed away, he told his wives and father that it was Chrispin who shot him and that Choonde the (2nd appellant) had betrayed him. Therefore, the argument by Mr. Kabesha to the effect that the deceased did not mention the appellants names holds no water and it is rejected. There is no indication that PW1, PW2 and PW3 fabricated the story about what the deceased told them.

As regards the said betrayal by the 2nd appellant, the view we take is that the deceased did not describe the nature of the betrayal to his wives and father. In light of the fact that it was not unusual for the 2nd appellant and the deceased to visit one another as stated by PW1 in her evidence on page 26 of the record, lines 21 and 22, it would be unsafe to assume that the 2nd appellant visited the deceased that night in order to lure him outside his yard to be shot at. The escort in itself was not made under suspicious circumstances. We have not found cogent evidence or sufficient circumstantial evidence of the 2nd

appellant having lured the deceased outside his yard to be shot at. The court below therefore misdirected itself when it found that the 2nd appellant lured the deceased outside his yard that night. This takes us to the issue whether what the deceased said before he died should be taken as part of *res gestae*. On the doctrine of *res gestae*, in the case of ***Chisoni Banda v. The People*** [6] the Supreme Court referred with approval to the case of ***The People v. John Nguni*** [7] and stated that:

> ***"We respectfully agree with the decision in the Nguni case that evidence of a statement made by a witness who is not available maybe admitted as part of the res gestae and can be treated as an exception to the hearsay rule, provided it was made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or to the disadvantage of the accused."***

The Supreme Court also gave guidelines on the application of the **Res Gestae** in the case of ***Edward Sinyama v. The People*** [8] when it held *inter alia* that:

> ***"If the statement has otherwise been made in condition of proximate 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 dispensed with in the particular case."

In the present case, the deceased made a spontaneous declaration to his wives immediately after he was shot and before the mind had an opportunity to conjure a false story to the disadvantage of the said Chrispin and to his own advantage. The statement he made to his wives before PW3 showed up can therefore be taken as *res gestae*. However, it is unclear as to which Chrispin he was referring to. The prosecution evidence to the effect that there was only one Chrispin in that area whom they knew of was discredited in cross examination. There was no evidence as to how many Chrispins the deceased knew. Therefore, the court should have considered all the circumstances of the case before coming to the conclusion that the Chrispin mentioned by the deceased was the 1st appellant.

We have considered the Judge's finding that the deceased told the said witnesses that *".... It was Chrispin A1 in this case who shot him.."* and we are of the view that it is contrary to the evidence on record because the deceased did not give the surname of the Chrispin he was talking about or any other description of him from which the court would have ascertained that it was the 1st appellant that he was referring to. We therefore upset the finding that *"It was Chrispin A1 who shot him"*

The deceased only mentioned that the 2nd appellant had betrayed him when PW3 arrived at his house more than 30 minutes after he was

shot. We are therefore of the view that it was possible for the deceased to concoct the story about the 2nd appellant between the time he was shot and the time that PW3 showed up. Therefore, that part of the deceased's statement cannot be taken as *res gestea*.

We reject Mr. Masempela's argument that it was an odd coincidence that the deceased mentioned both appellants as his assailants because what he said was to be considered properly under the rule of law of evidence of *res gestae* and not as an odd coincidence. Therefore, the case of ***R v. Turnball and others*** [4] is not applicable.

The question to be answered is whether there was any other evidence connecting both appellants to the commission of the offence? The 1st appellant properly raised an alibi to the effect that he was at his shop at the material time. That alibi was supported by PW4 and PW5. In the case of ***Ilunga Kalaba and another v. The People*** [9] the Supreme Court held that:

> ***"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution take a serious risk if they do not adduce evidence from witnesses who can discount the alibi, unless the remainder of the evidence is itself sufficient to counteract it."***

In this case, there was no prosecution witness who gave evidence disproving the alibi, therefore the alibi was solid. We have considered the trial court's finding that the 1st appellant had an opportunity to travel half a kilometer from his shop to the deceased's house to shoot

him and return to the shop. Applying the case of ***Nsofu v. The People,*** [3] we are of the view that the opportunity that the 1st appellant might have had to go and kill the deceased was not of such a character as to bring in the element of suspicion. Therefore, that opportunity does not support the prosecution's case. Applying the case of ***Elias Kunda v. The people*** [5] we are of the view that both appellants gave reasonable explanations to the police and the court and therefore they should not have been convicted.

In the case of ***David Zulu v. The people*** [10] it was held that:

> ***"The possible defects in circumstantial evidence may include those in direct evidence such as falsehood, bias or mistake on the part of the witness, but also the effect of erroneous inference..... It is therefore incumbent on the trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."***

In the present case considering that the alibi was not disproved, the court below drew a wrong inference that the 1st appellant left the shop to go and kill the deceased. The circumstantial evidence did not take the case out of the realm of conjecture so as to attain such degree of cogency which could permit only on inference of guilt as regards both

appellants. It is also noteworthy that there was no evidence that either appellant had handled a gun at the material time.

With regard to Mr. Masempela's contention that the 1st appellant had a motive to kill the deceased because he had an affair with one of the deceased's wives in 2008, we are of the firm view that evidence of adultery only came from PW5 and it was not confirmed by any other witness. The adultery allegedly took place 8 years before the event. Furthermore, PW1, PW2 and PW3's evidence was that both appellants and the deceased were on very good terms. Therefore, PW5's evidence was insufficient to prove that the 1st appellant had a motive to kill the deceased. There was no proof of motive on the part of the 2nd appellant.

This takes us to the issue of arrest of both appellants. The 1st appellant was caught on a bus destined for Choma about two days after the shooting and was within the village during the entire period. It was therefore incorrect to conclude that he fled the area. He testified that he was a businessman and he had prior plans to go to Choma. The trial court therefore misdirected itself when it found that the 1st appellant's attempt to flee showed his guilty consciousness. On the other hand, the 2nd appellant was apprehended at the funeral house. The 2nd appellant's actions were in our view not the actions of a man guilty of murder.

There was no evidence that the 1st appellant had connived with the 2nd appellant to murder the deceased. Therefore, ***Section 22 of the***

Penal Code [1] on joint tort feasors is inapplicable to this case. As a result, the trial court's finding that the appellants had acted together to murder the deceased is hereby upset as it was not made on the basis of the evidence on record or on sufficient circumstantial evidence.

For the reasons stated in this judgment, there is merit in all the grounds of appeal and therefore the appeal is allowed. The convictions and sentences are hereby quashed and both appellants are set free.

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C.K. MAKUNGU

COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC

COURT OF APPEAL JUDGE

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B.M. MAJULA

COURT OF APPEAL JUDGE