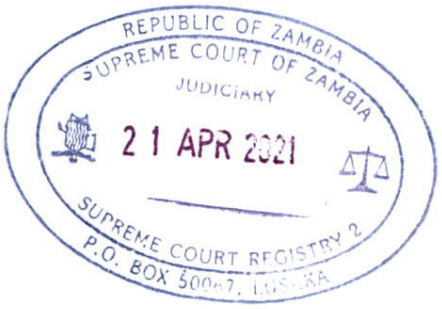
IN THE SUPREME COURT OF ZAMBIA **SCZ Appeal No. 107/2020**

HOLDEN AT KABWE

(Criminal Jurisdiction)



B E T W E E N :

WILLIAM MUFUNGULWA SIPALO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Hamaundu, Malila and Kaoma, JJS**
on 14th April, 2021 and 21st April, 2021

For the Appellant: Mrs. Mwenya Kalela-Liswaniso, Senior Legal Aid Counsel – Legal Aid Board

For the Respondent: Ms. O. Muvwende, Senior State Advocate - National Prosecutions Authority

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J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *Simon Malambo Choka v. The People (1978) ZR 344*
2. *Chabala v. The People (1976) ZR 14*

Legislations referred to:

1. *Immigration and Deportation Act No. 18 of 2010*
2. *Anti-Human Trafficking Act No. 11 of 2008*

1.0. INTRODUCTION AND BACKGROUND FACTS

1.1. This case involves two adventurous Congolese couples whose desire was to go to Namibia. Between them they had five children. They had valid passports though they did not have visas for Namibia, while all the children did not have passports.

1.2. This did not, in the least, diminish their burning desire to cross over into Namibia from Zambia's Sesheke border post, through the Wenela border on the Namibian side.

1.3. According to the prosecution, at a fee of US$300, which he was to share with a security official, the appellant, a brave taxi driver, who was driving at the material time a Toyota Sprinter, agreed to facilitate their exit from Zambia and their entry into Namibia by driving past the Zambian border post and depositing them just beyond the Namibian border post, free of immigration bothers.

1.4. The evidence before the trial court reveals that the escapade was almost successful but for a nosy Immigration Officer called Vascal Muyunda, positioned at the last gate of the

Namibian border post. He demanded to examine passports of the Congolese party.

1.5. The examination of the passports revealed that they had not been stamped by the Zambian immigration officials. Not only that, it also transpired to the inquisitive officer that the passports had no visas for Namibia, and worse still, that the children travelling with the two couples had no passports at all.

2.0. THE APPELLANT IS ARRESTED, ARRAIGNED, AQUITTED AND EVENTUALLY CONVICTED

2.1. The appellant was initially charged with the offence of aiding and abetting illegal immigrants contrary to section 46(1)(a)(2) of the Immigration and Deportation Act, No. 18 of 2010.

2.2. At the close of the prosecution's evidence, the learned magistrate was satisfied that the evidence adduced disclosed a more serious offence which the appellant had not been charged with, namely, one of human trafficking. He amended the indictment and upgraded the offence to that of

smuggling of persons contrary to section 9(c) of the Anti-Human Trafficking Act, No. 11 of 2008.

2.3. At the conclusion of the trial, the magistrate held that, as the State had not produced the passports in evidence to confirm that the appellant had helped foreign nationals to enter Namibia without passing through immigration offices, the accused was not guilty of the offence. He acquitted the appellant on that basis.

2.4. The State appealed, and a High Court judge (Chitabo J) reversed the magistrate's decision, holdings that the appellant was guilty as charged. He imposed the minimum sentence of 15 years imprisonment with hard labour. He also granted the appellant leave to appeal. The appellant then appealed and applied for bail pending appeal which was granted.

3.0. THE APPELLANT APPEALS

3.1. The appellant appealed to us on one ground framed as follows:

The learned honourable Justice M. Chitabo SC erred in law and fact when the court found that the appellant herein did in fact procure the entry of illegal immigrants for financial gain and overturned his acquittal by the honourable magistrate and convicted the appellant of one count of smuggling of persons contrary to section 9(1) of the Anti-Human Trafficking Act No. 11 of 2008 of the laws of Zambia [sic!]

3.2. In support of this lone ground of appeal the appellant, at the hearing of the appeal filed with the leave of the court, heads of argument in support of his position. Mrs. Liswaniso learned counsel for the appellant, chiefly relied on those heads of argument.

4.0. APPELLANT'S CASE ON APPEAL

4.1. The learned counsel for the appellant argued that the learned High Court judge was wrong to overturn the verdict of the Magistrate. This is because a perusal of the record of proceedings in the court below, particularly page 35 (J3) shows that the first prosecution witness in the High Court (PW1) informed the court, wrongly in the appellant's view, that the appellant had requested for the sum of US$300 for him to undertaken the criminal mission; that out of this sum

US$200 would be paid to a Namibian security officer at the gate while US$100 would be for the appellant.

4.2. The plinth of the appellant's case, as we understand it, is that there was no credible evidence to confirm a significant ingredient of the offence of smuggling as defined in the Anti-Human Trafficking Act. The absent ingredient, according to Mrs. Liswaniso, is the obtaining, directly or indirectly, a financial or other material benefit in the process of effecting or facilitating an illegal entry of a person into a country.

4.3. To put context to her argument, Mrs. Liswaniso quoted the definition of 'smuggling' in the Anti-Human Trafficking Act as follows:

> **The procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a country of which the person is not a national or permanent resident.**

4.4. The learned counsel also set out the offence for which the appellant was charged and convicted, by reproducing section 9(1) of the Act which enacts as follows:

Subject to sub-section (2), a person who smuggles another person into or out of Zambia, participates in smuggling or who consents to being smuggled commits an offence and is liable upon conviction, to imprisonment for a term of not less than fifteen years and not exceeding twenty years.

4.5. She contended that PW1, Christian Anbeni, was one of the Congolese nations who were on the failed mission to Namibia. He had originally been apprehended, together with the appellant, for the subject offence. He was, however, not prosecuted and he instead testified for the prosecution against the appellant. His testimony was that the appellant had requested him to pay US$300 which he was to share with a Namibian security officer.

4.6. PW1, according to the learned counsel, was a witness with a possible interest of his own to serve and should have been treated as if he were an accomplice so that his evidence should have required corroboration.

4.7. The learned counsel submitted that shorn of PW1's evidence of gratification, there was no other credible evidence adduced before the trial court to establish the offence for which the appellant was convicted. She argued that the evidence of

PW2, Munengo Simunji, the Immigration Officer-in-Charge of Sesheke District, who told the court that the appellant had told him that he had received US$300 from PW1, US$200 of which he was to give a Namibian security officer, could not corroborate that of PW1 as 'there was no evidence on record to show that the appellant paid the security guards at the Namibia Border the said US$200.'

4.8. To buttress the submission that the evidence of PW1 should have been treated with utmost caution if not discountenanced altogether, Mrs. Liswaniso cited our decision in the **Simon Malambo Choka v. The People**[1] and quoted a passage from our judgment that:

> **A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and the plausibility of his evidence. That 'something more' must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.**

4.9. For reasons not obvious to us, the learned counsel also referred to the case of **Chabala v. The People**[2] and quoted the following passage from the judgment of the court:

> **If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation.**

4.10. The upshot of counsel's submission was that the ingredients of the charge of smuggling of persons were not conclusively proved beyond reasonable doubt.

4.11. We were thus urged to uphold the appeal.

5.0. THE RESPONDENT'S CASE ON APPEAL

5.1. The respondent, with the leave of the court, filed its heads of argument out of time at the hearing of the appeal.

5.2. Ms. Muvwende, learned counsel for the respondent, indicated that she would place reliance on those heads of argument and was willing to clarify any points and answer any questions that the court would have.

5.3. The respondent supported the conviction of the appellant by the High Court and impugned any suggestion by the appellant that the learned High Court judge committed any appealable error in the way he dealt with the evidence of PW1.

5.4. After referring to the evidence as given by PW1 in the trial court, the learned counsel posited that the learned High Court judge did, in fact, fully address his mind to the issue of PW1 being a witness with an interest to serve. We were referred to a passage of the High Court judgment where the judge stated as follows:

> **It is my view that the trial magistrate should have addressed this issue in his judgment as PW1 was an accomplice. He should have satisfied himself that the accomplice evidence was not credible and as such did not warrant conviction.**

5.5. Yet, counsel did not end there. She proceeded to quote another portion of the learned High Court judge's judgment where [he later] stated that:

> **It is my view that the evidence of PW1 was corroborated by the evidence of PW3, PW4 and PW5 and as such the trial magistrate should have considered their evidence quite strongly and not dismiss the evidence without consideration.**

5.6. According to Ms. Muvwende, there is no doubt from the portions of the High Court judgment as quoted above that the lower court judge had directed his mind to the need for PW1's evidence to be corroborated, and had in this regard rightly expressed satisfaction that the evidence of PW1 was indeed corroborated.

5.7. As regards the submission by counsel for the appellant that there was no evidence on record to show that the appellant had paid the security guards at the Namibian border, counsel for the respondent submitted that it was immaterial whether that proof was provided or not. What is of moment is whether the appellant did facilitate, in order to obtain directly or indirectly, a financial or other material benefit, the illegal entry of a person into a country of which the person is not a national or permanent resident.

5.8. Counsel reiterated that the evidence of PW1 established that the appellant was paid US$300 to assist PW1 and others to enter Namibia without valid documentations. PW1's evidence was reinforced by that of PW2.

5.9. Even assuming that the evidence of PW1 could not be corroborated by that of PW2, counsel submitted that the appellant still could justifiably be convicted on the evidence of PW3, PW4 and PW5, all of which corroborated the evidence of PW1.

5.10. Finally, counsel called into question the conduct of the appellant. The evidence, according to counsel, suggests a rather unusual approach by the appellant to border immigration formalities. He told the trial court that there were a lot of cars before him, and noticing that he would run out of time, he decided to talk to the immigration officer who allowed him to proceed and drop off his passengers. This evidence, according to counsel, confirms that of PW1 that PW1 and his family had remained in the vehicle while the appellant went to speak to immigration officials – meaning PW1 and his family did not present themselves to an immigration officer at the check point.

5.11. Counsel submitted that the conduct of the appellant on the material day was inconsistent with that of an honest transporter and can only confirm his criminal intent. The judge, submitted Ms. Muvwende, was right to convict the appellant. We were thus urged to dismiss the appeal.

6.0. REPLY

6.1. We called upon Mrs. Liswaniso to make any submissions in rebuttal to those in opposition.

6.2. She gracefully indicated that she had no arguments in reposte to make.

7.0. OUR ANALYSIS AND DECISION

7.1. It seems to us that the only issue that calls for determination in this appeal is whether the conviction of the appellant on the offence for which he was charged was warranted, particularly in view of the fact that PW1 had initially been charged together with the appellant.

7.2. It is not in doubt that the evidence of PW1 was critical in establishing an important part of the offence of smuggling of persons contrary to section 9(c) of the Anti-Human Trafficking Act. Where it can be shown that there was no smuggling within the meaning of that term as assigned to it in the Act, a crucial ingredient of the offence would be absent. Consequently, there would be no crime committed.

7.3. As we have explained earlier on, smuggling entails the procurement of a financial or other material benefit. The premise upon which the appellant has built his argument is that he did not receive any benefit in the process of conveying the two Congolese families across the border into Namibia. All he received was ordinary consideration for the hire of his taxi while he was undertaking routine business as a transporter.

7.4. The evidence as presented in court, however, pointed to the fact that the appellant was paid or promisedUS$300 as reward for smuggling the Congolese nations out of Zambia. It is this evidence that the appellant impugns, particularly as

it was chiefly given by PW1 who, as already alluded to in this judgment, was one of the persons smuggled and was initially charged with the appellant.

7.5. A perusal of the transcript of proceedings did indeed record that it was not only PW1 who spoke to the issue of the US$300 reward; PW2 spoke to it too. The latter stated in his evidence that he was in fact told of the US$300 by the appellant himself.

7.6. If indeed the issue of absence of financial benefit was from the very beginning the gravamen of the appellant's defence, he could have taken an interest to cross-examine PW2 on his evidence relating to it. Not only that, granted that the learned trial magistrate had, in amending the indictment and replacing the original offence with that of smuggling of persons, satisfied himself that the offence of smuggling had been committed, should have raised red flags for he appellant. His protest should have started then notwithstanding that he was acquitted on that offence.

7.7. To be clear, the judgment of the Magistrate's court implies that the appellant would have been convicted of the offence of smuggling of persons under the Anti-Human Trafficking Act if the State had produced the passports in court. As the appellant had been acquitted, he probably was content to leave sleeping dogs lie. Yet, that was not the end of the matter. The State appealed, not on the basis that it was unhappy with the charge upon which the appellant was acquitted but on a different ground. That ground as set out in the Amended Grounds of Appeal simply reads that:

> **The trial court erred at law when it acquitted the accused person as the prosecution had proven all the ingredients of the offence beyond reasonable doubt.**

7.8. The High Court thus considered the appeal on that sole ground and allowed it. The appellant is unhappy with the High Court judgment for confirming substantially what the Magistrate Court decided (save that the absence of the passport weakened the prosecution's case).

7.9. Our view is that the issue that the appellant raised in the submissions differs from that raised in the sole ground of appeal. There is nothing in the ground of appeal which attacks the treatment of the evidence of the witness and the ingredients of the offence of smuggling.

7.10. In any case, our view is that even if the evidence of PW1 were to be excluded for any reason, the remainder of the evidence is sufficiently weighty to support the appellant's conviction. We, in particular find the evidence of PW2 on the gratification of the appellant sufficiently credible.

7.11. For the reasons we have given, we are inclined to dismiss the appeal and uphold the conviction and we so decide.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE