

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE**

Appeal No. 152,153/2020

(Criminal Jurisdiction)

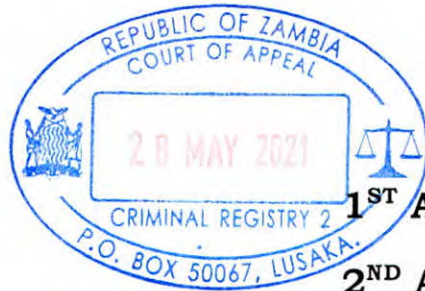
BETWEEN:

JAMES BWALYA MWAMBA

KILLIAN KALONDE

VS

THE PEOPLE



1ST APPELLANT

2ND APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th May 2021 and 28th May 2021

For the Appellant :Mrs. L.T. Tindi, Legal Aid Counsel—Legal Aid Board

For the Respondent :Mrs. M. Chipanta – Mwansa, Deputy Chief State
Advocate- National Prosecution Authority

JUDGMENT

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Chabala v The People* 1976 ZR 14
2. *Murono v The People* (2004) ZR 207
3. *Dorothy Mutale and another v The People* (1997) Selected Judgment 51
(S.C.)
4. *Peter Yotamu Hamenda v The People* 1977 ZR 184.
5. *Kalebu Banda v The People* 1977ZR 169

6. *Bright Katontoka v The People SCZ Judgment No. 9 of 2014*
7. *Saidi Banda v The People SCZ Judgment No. 30 of 2015*
8. *David Zulu Vs. The People*⁸ (1977) ZR 151
9. *Ezious Munkombwe and Others v The People CAZ Appeal No. 7,8,9 of 2017*
- 10 *Nkhata and Others v Attorney General* (1966) Z.R. 124

1.0 INTRODUCTION

- 1.1 The appellants were convicted of the offences of aggravated robbery and murder. The first count was for aggravated robbery contrary to section 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence were that on an unknown date but between 19th and 20th February, 2016 at Kabwe, the appellants jointly and whilst acting together stole from Elias Muyeza a Toyota Corolla registration number ADD 6137 valued at K31,000 the property of Benwell Ng'andu. Actual violence was used to obtain or overcame resistance to the property from being stolen.
- 1.2 The second count was for murder, contrary to section 200 of the Penal Code. It was alleged in the particulars that the appellants, jointly and whilst acting together did murder Elias Muyeza.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The prosecution called 15 witnesses in support of their case in the court below. The gist of the prosecution evidence was that Elias Muyeza (the deceased herein) was a taxi driver

employed by Benwell Ng'andu who was the registered owner of a Toyota Corolla registration number ADD 6137 (hereafter "the subject vehicle").

- 2.2 The testimony of Humphrey Lewanika (PW3), who was also a friend of the deceased, was that on 19th February, 2016 around 15.00 hours he was at the taxi rank in Chibombo district with the deceased's Toyota Corolla. He was then approached by the appellants who asked him to drive them to Kabwe. He then took them to the deceased who agreed and later proceeded to Kabwe around 17.00hours.
- 2.3 He was later informed by the Police that Elias Muyeza was found dead. Consequently, he identified the two appellants on an identification parade at the Police Station as the two who approached him prior to the deceased's death.
- 2.4 The other crucial witness was Silvester Zulu (PW5) who narrated that on 27th February, 2016 around 17.00 hours, he received a call from a person called Davy who told him that there were people who were looking for a person to work as a pirate taxi driver. He was later shown a Toyota Corolla registration number ADD 6167 which was in control of the 1st appellant.
- 2.5 He was eventually employed and he was pirating at New Market in Kabwe. On his way to Makululu, he was apprehended by the Police who told him that the vehicle was a

subject of investigations into a murder case of Elias Muyeza. He then led the Police to the apprehension of the 1st appellant.

- 2.6 Joseph Kapesi was the seventh prosecution witness who explained that the 1st appellant sold him a memory card at K15 when he was given a lift in the subject vehicle. He later discovered that the memory card in fact belonged to the deceased.
- 2.7 Inspector Rodger Kafula organized an identification parade at which Humphrey Lewanika identified the two appellants as the persons who approached him to request for a taxi prior to the deceased's death.
- 2.8 Inspector Damascus James Kumwenda (PW15) testified that during investigations into the incident he managed to apprehend Silvester Zulu who was driving the Toyota Corolla that was on a wanted list. Silvester later led them to the 1st appellant as the person who gave him the vehicle.

3.0 DEFENCE

- 3.1 In his defence, the 1st appellant testified that he went with the 2nd appellant to Chibombo from Lusaka to visit the latter's mother. Whilst in Chibombo, he met Humphrey Lewanika and asked him to take them to Kabwe with his taxi. Humphrey, however, referred them to the deceased who charged them K300. They eventually arrived in Kabwe around 19.00 hours.

He started drinking beer and the deceased then left with two ladies and never returned.

- 3.2 It was his testimony that the 2nd appellant left for Lusaka after he received a call. The next morning, he was called by Humphrey Lewanika who enquired about the whereabouts of the deceased and the car. He was then told to drive the vehicle back to Chibombo. He gave the vehicle to Silvester Zulu to drive the vehicle to raise money for fuel. Zulu was however apprehended by the Police for aggravated robbery and murder charges. He confirmed that it was Silvester Zulu who led the Police to his apprehension and subsequently led them to the apprehension of the 2nd appellant, who was in Lusaka at the time.
- 3.3 The version of the 2nd appellant in his defence was that on 19th February, 2016, he travelled with the 1st appellant to Chibombo to visit his mother who was unwell. They arrived around 10.00 hours.
- 3.4 After visiting the mother, they set out to drink beer and in furtherance of their expedition, they asked Humphrey Lewanika to drive them to Kabwe. Humphrey Lewanika, however, led them to the deceased who agreed to take them at a hiring fee charge of K300. It was his testimony that before entering Kabwe he received a call from Lusaka asking him to go back and get money for school fees. He thereafter boarded a truck and headed to Lusaka. Three days later, he was

apprehended by Police officers for the charges of aggravated robbery and murder. He totally denied committing the alleged offences.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The learned trial Judge considered the evidence from both parties and found the following facts to have been established:

1. The appellants travelled from Lusaka to Chibombo on the material day.
2. Around 17.00 hours, the appellants hired the deceased's taxi to take them from Chibombo to Kabwe.
3. The trial Judge found as a fact that the two appellants were the last person to be seen with the deceased before he was discovered dead the next morning.
4. Following the death of the deceased, the 1st appellant gave the taxi to Silvester Zulu to pirate as a taxi in order to raise money for fuel.
5. That the appellants were properly identified at an identification parade by Humphrey Lewanika as the people who left with the deceased prior to his death.

4.2 From this circumstantial evidence, the court below drew the inferences that they were both guilty of aggravated robbery and murder as charged. She convicted them and sentenced each convict to 15 years for the 1st count and death sentence for the 2nd count, respectively.

5.0 THE APPEAL

5.1 Having been aggrieved by the decision of the trial court, the appellants appealed before this court, advancing one ground of argument as follows:

- i) That The learned trial Court erred in law and fact when the Court convicted the appellants based on circumstantial evidence which did not take the case out of the realm of conjecture.

6.0 APPELLANT'S HEADS OF ARGUMENT

6.1 In support of this ground of appeal, Ms. Tindi argued on behalf of the appellants that in relation to the offence of aggravated robbery, there is nothing linking the appellants to the offence except the fact that the 1st appellant remained with the car that was driven by the deceased. Counsel submitted further that the 1st appellant gave a reasonable explanation regarding how he found himself with the motor vehicle and the prosecution having failed to bring evidence in rebuttal, the appellants ought not to have been convicted of the offence of aggravated robbery.

6.2 In support of this position, reliance was placed on the case of **Chabala v The People**¹ where the Supreme Court held as follows:

"If an 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 a satisfactory explanation. The Court is required to consider whether the explanation may reasonably be true."

- 6.3 Our attention was also drawn to the case of ***Murono v The People***² regarding the burden and standard of proof by the prosecution. In this regard, it was Counsel's contention that the prosecution failed to prove beyond reasonable doubt that the appellants committed the offence of aggravated robbery, adding that the circumstantial evidence relied on by the trial Court to convict the appellants did not take the case out of the realm of conjecture so as to attain a degree of cogency which permits only an inference of guilt.
- 6.4 With regards to the offence of murder, reference was made to the findings on the postmortem examination report, which disclosed the cause of death as asphyxia probably due to poisoning. The appellants' argument in this regard were twofold; firstly, that there is no evidence indicating that the body of the deceased was physically harmed and secondly, that the lack of evidence to the effect that any of the appellants could have given him that poison shows that he possibly consumed the poison at some other place or point other than the time he was with the appellants, especially that the time of death is not known. The case of ***Dorothy Mutale and another v The People***³ was cited to advance the

position that lingering doubts in evidence must be resolved in favour of the accused.

6.5 Counsel argued further on behalf of the appellants that the arresting officer should have investigated the 1st appellant's testimony that he was left in the motor vehicle by the deceased at a bar where the deceased departed with two women. In this regard, it was submitted that such failure to investigate amounted to dereliction of duty, which must operate in favour of the accused, as was held in ***Peter Yotamu Hamenda v The People***⁴.

6.6 ***Kalebu Banda v The People***⁵ was also cited to buttress the position that where evidence available only to the police is not placed before the Court, it must be assumed that had it been produced, it would have been favourable to the accused. On this premise, it was argued that the 1st appellant's alibi cannot be dismissed as a lie or afterthought because no evidence was brought to rebut it and as such, there is no compelling evidence linking him to any of the two offences.

7.0 **RESPONDENT'S HEADS OF ARGUMENT**

7.1 The state's response to the appellants' heads of argument was *viva voce*. Mrs. Mwansa submitted, with regards to the 2nd appellant, that the state is not in support of his conviction, as the evidence on record was not sufficient for a conviction against him to be properly made. As against the 1st appellant,

counsel submitted that the state is in support of the conviction, as the circumstantial evidence against him was sufficient to warrant a conviction.

7.2 Counsel set out the said circumstantial evidence as against the 1st appellant as follows; he was the last to be seen with the deceased when the deceased was booked from Chibombo during daylight, he was positively identified by a witness during an identification parade, a few days after the deceased went missing, the subject vehicle was found with PW5 who was pirating it for the 1st appellant. The state submitted in this regard that the 1st appellant was possessed of the motor vehicle, which at that point was missing, as the actual thief or guilty receiver.

7.3 The case of ***Bright Katontoka v The People***⁶ was cited in in furtherance of the submission that the appellant may properly be deemed to be the thief of the motor vehicle, as his explanation was not reasonable. Mrs. Mwansa further called in aid the case of ***Saidi Banda v The People***⁷ to support her submission that this court should not consider the pieces of evidence in their individual capacity but in totality in relation to one another. In conclusion, the state submitted that only an inference of guilt may be inferred in the circumstances.

8.0 **CONSIDERATION AND DECISION OF THE COURT**

8.1 Having analysed the evidence on record, the judgment of the lower court and arguments in support of and in response to this appeal, we will now proceed to determine the sole ground of appeal. We hold the view that this appeal raises one pertinent question for determination, that is; was the circumstantial evidence on record so cogent as to remove the case out of the realm of conjecture such that it attained such cogency as to warrant only an inference of guilt?

8.2 Fortunately, legal issues pertaining to the nature and application of circumstantial evidence are very well preceded in our jurisdiction. There is a wealth of authorities outlining the requirements that must be satisfied before a trial court can safely convict on circumstantial evidence. Prominent among these authorities is the case of **David Zulu Vs. The People**⁸ where the Supreme Court gave guidance as to what circumstances would warrant a conviction on the basis of circumstantial evidence, as follows;

"The judge must 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 guilty."

8.3 As regards the approach of the trial court when applying itself to various pieces of evidence of a circumstantial nature, this Court held in **Ezious Munkombwe and Others v The People**⁹

that when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellant must be looked at in their totality and not individually. This was in conformity with the Supreme Court case of **Saidi Banda** (*Supra*) cited by the state regarding the same principle.

8.4 We will address the legal issue raised herein by examining the evidence on record that formed the basis upon which the trial court's decision to convict the appellants. We are guided that as an appellate court, we can only quash the lower court's conviction in circumstances set out in **Nkhata and Others v Attorney General**¹⁰.

8.5 The trial court's analysis of the circumstantial evidence on record is outlined at pages J16 to J20. The appellants were the last to be seen with the deceased when, according to PW3, they hired his taxi from Chibombo to Kabwe. When the whereabouts of the deceased were unknown, the subject vehicle was found with PW5, who told the police that the subject vehicle had been given to him for pirating purposes by the 1st appellant, who was in the company of someone else. This information is what led to the apprehension of the 1st appellant in connection with the death of the deceased. The 2nd appellant was equally apprehended in Lusaka and returned to Kabwe. PW3 later positively identified the appellants on an identification parade, as confirmed by PW11 and PW12 who are police officers.

- 8.6 As regards the 1st appellant's defence, the trial Court questioned his credibility because he continuously contradicted himself during examination in chief and cross-examination and the Court further observed that his demeanour was questionable.
- 8.7 The record also shows that PW3 testified to the effect that when he asked to accompany the deceased to Kabwe with the appellants, one of the appellants said they intended to pick other people on their way to Kabwe. This evidence remained uncontested and, in our view, suggests that the appellants may have wanted to be alone with the deceased.
- 8.8 We also note that the 1st appellant told the court that the morning after they went to Kabwe, PW3 told him that the deceased had returned to Kabwe, and yet PW3 had not seen or spoken to the deceased after he left Chibombo with the appellants. This evidence negates the submission of Mrs. Tindi that there can be no conviction if the accused person gives an explanation which might reasonable be true, as PW3's testimony that he had neither seen nor heard from the deceased after he drove off to Kabwe with the appellant rebuts the truthfulness of the appellant's explanation. To this extent, we find that the case of ***Chabala v The People***¹ is not applicable.

8.9 Addressing the appellants' submission that there was no evidence that the deceased was physically harmed nor that the appellants could have given him poison, we are of the view that owing to the inherent nature of circumstantial evidence, these facts need not have been proved by direct evidence linking the appellants to the crimes. We are fortified in this regard by **Saidi Banda v The People**⁷, where the Supreme Court stated:

"Circumstantial evidence, notwithstanding its weakness as we alluded to in the David Zulu case, is in many instances probably as good, if not even better than direct evidence."

8.10 Our position is that the lack of direct evidence disclosing the means used to kill the deceased does not entirely absolve the appellants of liability. This leads us to the task of examining the various pieces or strands of circumstantial evidence and ascertaining whether they are collectively so tangible as to form a web of solid evidence incriminating the appellants. Our examination of the totality of the circumstantial evidence as we have outlined earlier, indeed leaves us with no choice but to approve of the learned trial judge's analysis and finding that only an inference of guilt can be drawn from the evidence of the prosecution against the appellants, more so the 1st appellant.

8.11 We will now address Mrs. Mwansa's submission that there was insufficient evidence to warrant the 2nd appellant's conviction.

The record shows that both appellants gave evidence to the effect that just as the trio arrived in Kabwe, the 2nd appellant received a call from his boss asking him to go to Lusaka to collect some money. It is in fact the 1st appellant who confirmed that the deceased assisted the 2nd appellant to hike a truck that took him to Lusaka, where he was later on apprehended after the 1st appellant's arrest in Kabwe.


8.12 In our view, this evidence shows that when the appellants parted ways, the deceased was still alive. Consequently, the only evidence linking the 2nd appellant to the subject offences is that he was one of the people last seen with the deceased as they left for Kabwe from Chibombo and that justifies why PW3 identified him together with the 1st appellant on an identification parade. The rest of the chain of circumstantial evidence is not linked to the 2nd appellant. On this premise, we are inclined to agree with the state that there was insufficient evidence to justify a conviction against the 2nd appellant, and we accordingly quash his conviction on both counts and set him at liberty.


8.13 As regards the 1st appellant, the record shows that all the material evidence adduced by the prosecution is linked to him in one way or the other. When we consolidate all the strands of evidence implicating the 1st appellant, we are faced with a sequence of events that paints a picture that the 1st appellant stole the motor vehicle from the deceased and killed him. We

find no basis upon which to reverse the findings of the learned judge in convicting the 1st appellant.

8.14 We uphold the 1st appellant's conviction in both counts and dismiss the appeal as against him for lack of merit.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


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B. M. Majula
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE