

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

Appeal No. 173,174,175/2020

(Criminal Jurisdiction)

BETWEEN:

SPENCER BANDA

1ST APPELLANT

JOSEPH NSHIMBA

2ND APPELLANT

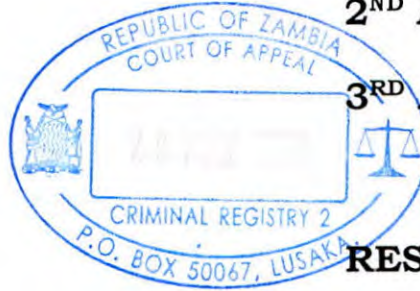
DENICIOUS BANDA

3RD APPELLANT

VS

THE PEOPLE

RESPONDENT



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

For the Appellant : Mrs. K.M. Chileshe - Nshimbi, Legal Aid Counsel -
Legal Aid Board

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

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Haonga vs The People* (1976) ZR 200 (SC)
2. *Dorothy Mutale & Another vs The People* (1997) SJ 51 (SC)
3. *The Director of Public Prosecutions vs Risbey* (1977) ZR 38

1.0 INTRODUCTION

1.1 This appeal emanates from the conviction of the 3 appellants on a charge of arson contrary to section 328(a) of Penal Code, Chapter 87 of the laws of Zambia. Upon being found guilty, the appellants were sentenced to a term of imprisonment for 10 years by Madam Justice Y. Chembe. The case is about a tragic tale of a travelling coffin.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The prosecution presented five (5) witnesses in support of their case. The summary of the evidence was that on 11th August 2018 Mr. Lyson Banda had died in the village. And on the 13th of August 2018 there was a burial service held for the deceased. After the service and whilst proceeding to the graveyard, suddenly there was some commotion as the people carrying the coffin turned and went to the house of Mathews Ngalande (PW1).

2.2 In the meantime, Mathews Ngalande was at the graveyard when he heard the disturbances. He also heard his cousins shouting that he was going to die. The pallbearers proceeded to start hitting into Mathews Ngalande's house with the coffin. The 3 appellants who are cousins of Mathews Ngalande were also part of the vandals.

2.3 Mathews Ngalande saw that the 1st appellant, Spencer, get matches and lit his house. The 2nd and 3rd appellants

collected some grass and started lighting other rooms. At this point members of the public joined in this fiasco and were also breaking down the house. The house was burned to ashes which were subsequently collected and tendered in court as part of the evidence.

- 2.4 The 2nd, 3rd and 4th prosecution witnesses were all singing from the same hymn sheet as the 1st prosecution witness. They too narrated how the pallbearers were striking the house with the coffin. Their combined evidence was that the 1st appellant is the one that got the matches and lit the kitchen followed by the 2nd and 3rd appellants who took grass and threw it in Mathews Ngalande's house. The evidence was also that the 1st appellant was in the forefront before the house started burning. The time the incidence took place was in broad day light.
- 2.5 All the prosecution witnesses identified the appellants as the perpetrators and they had no motive to falsely implicate them. All the 3 appellants were related. The prosecution witnesses also indicated that they had no cold blood against the appellants.

3.0 DEFENCE

A1

3.1 He expressed ignorance as to what transpired and indicated that he did not know who demolished Mathews Ngalande's house.

A2

3.2 According to the 2nd appellant, his defence was that he was at the graveside when he heard noises where the coffin was. He saw Mathews Ngalande's house on fire and people demolishing it. It was his evidence that the coffin left Mathews Ngalande's house and headed to A1's house which was also demolished by people. He claimed that he stood at a distance as he watched what was going on. He was in shock and strongly refuted the assertion that he took part in burning down the house.

A3

3.3 The deceased was A3's father. His defence was that on the material day of burial he went to dig the burial ground. He returned back to the funeral house and after body viewing he stood near the grave. 20 minutes later he heard some noises. At this point he thought it was the choir but alas when he got to the road he heard people saying that the coffin had turned back.

- 3.4 Shortly thereafter he saw smoke from Mathews Ngalande's house and observed people breaking it. The father's coffin then travelled back to the funeral house, then to his sisters back to Spencer's house and then his house and that is when it proceeded to the graveyard.
- 3.5 Paul Nkonde (DW4) was called as a witness for A1. His evidence was that as they were heading to the graveyard he met with Spencer when they had heard some noise. At this point he advised him to sit with him at the house until they finish demolishing Mathews Ngalande's house. He only met with A1. He testified that he did not know who burnt the house but was sure about A1 who was next to him.
- 3.6 The evidence of Evans Mwelwa (DW5) was very brief. He stated that whilst he was at the graveyard he heard noises and went to Mathews Ngalande's house and found it demolished as well as A1's house and went back to the graveyard.
- 3.7 Webby Sankutu was DW6 who also spoke about the return of the coffin. He explained that after body viewing people had left for the graveyard. In the meantime A3 was crying and he requested him to remain for some time. It was during this time that he was informed that the coffin had returned. That was when he and A3 went to check and found Mathews Ngalande's house demolished and on fire. He and A3 did not go to the graveyard after their houses had been set on fire and A3 remained with him at his home.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After scrutinising the evidence the learned magistrate found the following facts to have been established:

1. That Mathews Ngalande's house was burnt and demolished on suspicion that he was responsible for the death of his uncle; Lyson Banda.
2. The Lyson Banda was the father to the 1st and 3rd appellants and father in law to the 2nd appellant.

4.2 She identified the issue in contention as being, whether the appellants were responsible for lighting Mathews Ngalande's house. The learned magistrate acknowledged that there were inconsistencies in the prosecution evidence concerning who exactly started the fire; whether it was the 1st appellant or the 2nd appellant. Her view, however, was that the discrepancies did not go to the root of the matter as the witnesses observed the incident from different angles.

4.3 Ultimately, the magistrate dismissed any motive on the part of prosecution witnesses to falsely implicate the appellants. She accepted that they were correctly identified, beyond reasonable doubt, as the perpetrators of the arson.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the decision of the lower court, the appellants have appealed against conviction on the following grounds:

1. The trial court erred in law and fact when it accepted the inconsistent evidence of Mathews Ngalande with regards to who started the fire between the 1st and 2nd appellant by lighting a matchstick.
2. The trial court erred in law and fact when it did not address its mind to the inconsistent evidence of Everisto Ngalande (PW2) with regards the 1st and 3rd appellants only breaking the house and not burning it.

6.0 APPELLANTS HEADS OF ARGUMENTS

- 6.1 In support of ground one, Mrs. Chileshe - Nshimbi submitted that the lower court was aware of the inconsistencies in the prosecution evidence as to who exactly started the fire but did not resolve the doubt in favour of the appellants. She observed that while Mathews Ngalande testified that it was the 1st appellant who started the fire, the other witnesses claimed it was the 2nd appellant. The case of ***Haonga vs The People¹*** was brought to our attention wherein it was observed:

“Where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.”

- 6.2 In *casu*, it was argued that since it is not known who started the fire between the 1st and 2nd appellant, then both should

have been acquitted in line with the guidance of the Supreme Court.

- 6.3 In relation to ground two the thrust of the submission was that in view of the inconsistencies in the prosecution evidence, the lower court should have adopted an inference which is more favorable to the appellants. The case of ***Dorothy Mutale & Another vs The People***² was relied upon for this proposition.
- 6.4 In a nutshell, Mrs. Chileshe – Nshimbi implored us to allow the appeal and quash the conviction.

7.0 RESPONDENT'S HEADS OF ARGUMENT

- 7.1 In response to ground one Mrs. Chipanta – Mwansa submitted that the lower court was on firm ground when it accepted the alleged inconsistent evidence since it did not go to the root of the case. The issue was that the appellants collectively burnt the house. Counsel argued that there was direct evidence against the appellants and therefore the case of ***Haonga vs The People***¹ is distinguishable on the basis that there was no direct evidence of who shot the deceased.
- 7.1 Moving to the ground two, Mrs. Chipanta – Mwansa submitted that according to Mathews Ngalande and Everisto Ngalande, the 3 appellants were seen burning and breaking the house. She pointed out that the incident happened in broad day light

and they freely participated in the unlawful common enterprise.

- 7.2 In conclusion, Mrs. Chipanta – Mwansa urged the court to interfere with the sentence imposed by the lower court on the basis that the appellants acted heartlessly and prevented anyone from salvaging any property for Mathews Ngalande. They also threatened to kill him if found.

8.0 CONSIDERATION AND DECISION OF THE COURT

- 8.1 We have critically examined the record of proceedings. The grounds of appeal and the arguments by the opposing parties.
- 8.2 The grievance in the first ground emanates from the trial court choosing to believe the evidence of PW1 as to who between A1 and A2 started the fire by lighting a matchstick. According to appellant's Counsel, the evidence of PW1 was inconsistent. The contention is that it was not established as to who exactly started the fire and both should have been acquitted.
- 8.3 The respondent on the other hand disagrees with this view and contends that there were no inconsistencies in the testimony of PW1 as the appellants collectively burnt the house by lighting up different rooms.
- 8.4 An examination of the record and particularly the judgment reveals that all three appellants played different roles but had the same objective of demolishing and burning down the house. PW1 in his evidence did give an account of what each

of the appellants' role was in relation to what transpired. The appellants and their witnesses equally gave their side of the story and in their versions of events, they distanced themselves from the horrendous act. The trial Magistrate in his wisdom decided the case based on credibility of the witnesses. He discounted the evidence of the appellants in preference for that of PW1.

- 8.5 In a matter where a case has been decided on the credibility of witnesses, we stand guided by the case of ***The Director of Public Prosecutions vs Risbey***³ where it was held as follows:

“But where the issue is one of credibility and inevitability reduces itself to a decision as to which of two conflicting stories the trial court accepts, an appellate court cannot substitute its own findings in this regard for those of the trial court.”

- 8.6 Based on the foregoing it is plain to see that we cannot substitute our opinions for that of the trial court. We therefore are inclined to dismiss the first ground of appeal for want of merit.
- 8.7 The unhappiness in ground two stems from the trial court's alleged failure to address its mind to the inconsistent evidence of PW1 with regards A1 and A3 only breaking down the house and not burning it.

- 8.8 Flowing from the first ground of appeal which we have dismissed, we must state here that the court below believed PW1 when he explained what role each of the appellants played. We are in agreement with the submission by the respondent that the actions of burning and breaking were simultaneous and not separate. Each of the appellants did participate in the burning and demolishing of the house.
- 8.9 In light of what we had stated in the preceding paragraph we see no basis upon which the trial Magistrate could be faulted. We accordingly find no merit in ground two and dismiss it.
- 8.10 In conclusion, we find the two grounds of appeal to be destitute of merit and dismiss them forthwith.
- 8.11 We uphold the conviction and sentence of the court below for each of the three appellants.


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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