

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

Appeal No. 183/2020

(Criminal Jurisdiction)



BETWEEN:

RENDO MWANDO CHENDA

APPELLANT

VS

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th May 2021 and 27th May 2021

For the Appellant : Mrs. L.Z. Musonda, Legal Aid Counsel—Legal Aid Board

For the Respondent: Ms. Sekelebaka Muwamba, Acting 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. *Ilunga Kabala & John Masefu vs The People* (1981) ZR 102
2. *Hamfuti vs The People* (1972) ZR 240
3. *Kasuba vs The People* (1975) Z.R. 274 (S.C.)
4. *Tapisha vs The People* (1973) ZR 222
5. *Green Musheke Kayewa vs The People* (1966) S.J. 8 (S.C.)
6. *Kenious Sialuzi vs The People* (2006) ZR 87 SC

1.0 INTRODUCTION

1.1 The appellant was arraigned before the High Court presided over by Lady Justice M. Chanda on one count of murder contrary to section 200 of the Penal Code. It was alleged in the particulars that on 1st March 2017 at Kanyama in the Lusaka District of the Lusaka Province he did murder Gift Daka.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 The crucial evidence against the appellant was from Brian Phiri (PW4) and Oswald Banda (PW5) who both testified that they are taxi drivers who operate from Twashuka taxi rank which is located in Kanyama compound. Gift Daka, the deceased herein, was also a taxi driver who operated from the same taxi rank.
- 2.2. Their collective evidence was that on 1st March 2017, the appellant went to their taxi rank around 21.00 hours. They were able to recognise him because the area is illuminated by electric bulbs from shops that are located nearby. It was also their evidence that the appellant was a regular patron of the rank and had previously hired their taxis' prior to the incident.
- 2.3 At the time the appellant went to the taxi rank, he was putting on a yellow cap and he also had a black bag with him. The next morning, they were informed that Gift Daka was found

dead in his taxi. A few days later they identified the appellant on an identification parade that was mounted by the police.

- 2.4 Essential evidence was also solicited from Claudia Chalwe (PW1), the appellant's sister. According to this witness, on 4th March 2017 between 01.00 and 02.00 hours some police officers and taxi drivers went to her place in search of the appellant. The appellant could not be found and efforts to trace him proved futile.
- 2.5 Two days later, Claudia got information that the appellant was spotted in Serenje. She alerted the police and that is where he was eventually apprehended and transferred to Kanyama police station. She was later summoned at the police station where she identified a yellow cap, a long sleeved pink and white t-shirt, a black pair of trousers and a black bag as property that belonged to her brother.
- 2.6 Detective Thomas Nyirenda was the arresting officer who carried out investigations following a report of the incident. He visited the crime scene where he found the deceased's body lying motion less in a white Toyota Corolla. He observed that the deceased's body was facing downwards with his stomach on the side of the gear lever and legs on the passenger's seat. When he searched the car, he came across a knife and a black bag. He checked inside the bag and found a yellow cap, a pink t-shirt, a pair of grey trousers, a black belt and a black rubber

string. When he turned the body, he noted a stab wound in the abdomen area from where blood was oozing.

- 2.7 The deceased's body was subsequently transported to the University Teaching Hospital (UTH) mortuary. A postmortem examination was later conducted by Doctor Mucheleng'anga. The cause of death was established as being the result of stab wounds in the chest and abdomen.
- 2.8 On completion of investigations, Detective Nyirenda formally charged and arrested the appellant for the subject offence.
- 2.9 When called upon for his defence, the appellant elected to remain silent.

3.0 FINDINGS AND DECISION OF THE LOWER COURT

- 2.1 The learned trial Judge analysed the evidence and came up with the following notable findings of fact:
 1. That Gift Daka died on 1st March 2017. His body was found with stab wounds that were later confirmed by the pathologist in the postmortem report.
 2. That around 21.00 hours on the fateful day, the deceased's taxi was hired by the appellant from Twashuka taxi rank.
 3. That a black bag which contained a yellow cap, t-shirt, a pair of trousers and a belt were recovered from the deceased's taxi.

2.2 The learned Judge then identified the issue which had fallen for her determination as being; whether the appellant was responsible for inflicting the fatal stab wounds on the deceased. In her reflection of the issue, the learned Judge categorized the prosecution case as being premised on circumstantial evidence. The trial Judge noted that there were a series of odd coincidences which pointed to the appellant as being the perpetrator of the offence. She pointed out that the appellant was the last person seen with the deceased around 21.00 hours before the latter was discovered dead the next morning. Immediately after the incident, the appellant took off for Serenje without any notice to his sister whom he used to reside with. The unexplained evidence of his bag being found in the deceased's taxi was also found to be unusual.

2.4 She also accepted the admission statement that he made to PW7 in the presence of his sister as having been obtained voluntarily. Adverting to the case of ***Ilunga Kabala & John Masefu vs The People***¹, the learned Judge firmly concluded that the odd coincidences provided supporting evidence to the inference of guilt. The appellant was subsequently convicted and sentenced to death by hanging.

5.0 GROUND OF APPEAL

5.1 Beleaguered with the trial court's decision, the appellant has appealed on two grounds that were stated thus:

- “1. *The learned trial Judge misdirected herself in law and in fact when she convicted the appellant on the alleged admission evidence of PW7 without establishing the voluntariness of the said admission.*
2. *The learned trial Judge misdirected herself in law and in fact when she convicted the appellant for the subject offence when the circumstantial evidence had not taken the case outside the realm of conjecture in order to attain such a degree of cogency so as to permit only an inference of guilt.”*

6.0 APPELLANT’S HEADS OF ARGUMENT

- 6.1 The gist of the submission in relation to ground one was that the learned trial Judge misdirected herself when she relied on the alleged admission made to PW7 without ascertaining the voluntariness of its admission. Mrs. Musonda noted that the trial court assumed that the admission by the appellant was made voluntarily on account of the fact that the statement was made in the presence of the appellant’s sister.
- 6.2 We were referred to the cases of ***Hamfuti vs The People***²; ***Kasuba vs The People***³ and ***Tapisha vs The People***⁴. They collectively advance the principle that a trial court should inquire whether an accused objects to admission into evidence of a confession before it is led.

- 6.3 It was contended that the appellant in *casu* was greatly prejudiced although he elected to remain silent in his defence.
- 6.4 Pertaining to ground two, Counsel submitted that in the absence of ill motive by the appellant to kill the deceased, it cannot be safely concluded that he was the last person to be seen with the deceased and that he killed the deceased.
- 6.5 It was pointed out that although the appellant was apprehended in Serenje, the evidence of running away is not conclusive of guilt. The case of ***Green Musheke Kayewa vs The People***⁵ was relied on.
- 6.6 It was argued that the failure to extract finger prints on the knife found in the deceased's car raises the presumption that the deceased could have been killed by another person apart from the appellant. Mrs. Musonda concluded that the inference of guilt is not the only one that can reasonably be drawn from the facts. We were called upon to allow the appeal and quash the conviction.

7.0 RESPONDENT'S HEADS OF ARGUMENT

- 7.1 In opposing ground one, Ms. Muwamba submitted that the lower court did not rely on the alleged admission to reach her finding of the appellant's guilt. We were referred to page J.13 of the judgment where the lower court stated as follows:

“I must, however, assert here that there are doubts about the reliability of the accused’s self-incriminating account to the arresting officer of the leading to the stabbing of the deceased.”

7.2 It was contended that the court considered other pieces of evidence which were on record, hence ground one should be dismissed.

7.3 In relation to ground two, it was submitted that there was cogent evidence to support the inference of guilt that was drawn by the lower court. She reiterated that this was so in that the court considered the totality of the evidence. The case of ***Kenious Sialuzi vs The People***⁶ was cited where it was observed:

“There is no obligation on the accused person to give evidence but where an accused does not give evidence, the court will not speculate as to the possible explanation for the event in question. The court’s duty is to draw the proper inferences from the evidence before it.”

7.3 Counsel accordingly prayed that the appeal be dismissed.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the record of appeal, the judgment sought to be assailed and the submissions by counsel.

8.2 The issue that the appellant is aggrieved with in relation to ground one is that the lower court relied on admission evidence that was tendered in court by PW7, without

ascertaining its voluntariness. In ground two, the criticism is that the circumstantial evidence did not take the case out of the realm of conjecture to permit only an inference of guilt. We propose to deal with both grounds at once as they are interrelated.

8.3 Mrs. Musonda has strenuously argued that although the statement was obtained in the presence of the appellant's sister, there is no evidence to show that a warn and caution statement was administered prior to obtaining the statement to ascertain its voluntariness. We hasten to point out that the trial court was duty bound to inquire from the appellant with regard to the admission evidence. It however, does not affect the effect the outcome of the appeal as the trial court did not take the said admission into consideration when arriving at its decision.

8.4 As rightly argued by Ms. Muwamba, our scrutiny of the learned trial Judge's decision reveals that the conviction of the appellant was not solely anchored on the admission statement that the appellant made to PW7. The trial Judge also considered odd coincidences that were highlighted in the evidence. Particularly at page J14 of her judgment the learned Judge found as a fact that:

1. The appellant was the last person to book the deceased's taxi around 21.00 hours and the following day he was found dead.

2. That on the night the deceased was killed, the appellant never returned home as testified by his sister who used to keep him.
 3. That he immediately took off for Serenje without notice to his sister.
 4. That there was unexplained evidence of his bag being found in the deceased's car which contained his personal effects that were positively identified by the sister.
- 8.5 The fundamental question that agitates the mind of this court is what is the effect of these findings and odd coincidences in a case such as this one. The answer is to be found in the case of ***Ilunga Kabala and Another vs The People***¹ where it was held:


“Odd coincidences if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”

- 8.6 After a close examination of the facts and circumstances of this case, the evidence that was before the court and the manner in which the trial Judge analysed it, we are persuaded that the trial Judge correctly found that the circumstantial evidence was so cogent leading to the inescapable conclusion that the appellant was the assailant. The Judge took into consideration the circumstantial evidence and the last seen principle in establishing the guilt of the appellant. Failure on the part of the appellant to furnish an explanation entitled the court to find in the face of overwhelming circumstantial

evidence that the appellant had a hand in the death of the deceased.

- 8.7 From our perspective, we see no basis upon which the High Court can be faulted for arriving at the conclusion that the prosecution had proved the case against the appellant beyond reasonable doubt and consequently retaining a guilty verdict.
- 8.8 We accordingly find no merit in both grounds one and two and dismiss them;
- 8.9 Therefore, we uphold and maintain the conviction of the appellant under Section 200 of the Penal Code and the death sentence awarded.


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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