

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT KABWE AND LUSAKA

IT  
Appeal Nos.12, 13, 14/2021

(Criminal Jurisdiction)

BETWEEN:

**ESAYA MUMPASHA  
NANGE CHITI  
MOSHI BONGOMA  
AND  
THE PEOPLE**



**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
3<sup>RD</sup> APPELLANT  
  
RESPONDENT**

Coram: Hamaundu, Malila and Kaoma, JJS

On 14<sup>th</sup> April, 2021, 4<sup>th</sup> May, 2012 and 14<sup>th</sup> July, 2021

For the Appellants: Mrs. M.Z. Musonda – Legal Aid Counsel

For the Respondent: Mr. C. Bako - Deputy Chief State Advocate

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## **J U D G M E N T**

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Kaoma, JS, delivered the Judgment of the Court.

**Cases referred to:**

1. **Steven Mushoke v The People (2014) 2 Z.R. 253**
2. **Solo v The People (1967) Z.R. 127**
3. **Jackson Kamanga and four others v The People - Appeal No. 30 to 34/2020**
4. **Patrick Kunda and Robertson Muleba Chisenga v The People (1980) Z.R. 105**
5. **Li Shu-Ling v The Queen – Privy Council Appeal No. 11 of 1988**
6. **Musonda and others v The People - Appeal No. 2005/2011**
7. **Douglas Mpofu and Washington Magura v The People (1988/1989) Z.R. 24**
8. **Hamfuti v The People (1972) Z.R. 310**
9. **Maketo and & others v The People (1979) Z.R. 23**

**Legislation referred to:**

1. **Penal Code, Cap 87 of the Laws of Zambia, sections 200 and 294(1)**

## **1. Introduction**

1.1 This is an appeal against conviction only. On 24<sup>th</sup> August, 2015 Mulongoti, J (as she then was) convicted the appellants of murder and aggravated robbery contrary to sections 200 and 294(1) of the Penal Code, Cap 87. In brief, the particulars were that between the 3<sup>rd</sup> and 4<sup>th</sup> of August, 2012, at Kaoma, jointly and whilst acting together with others, the appellants murdered Edwin Kainda and stole from Finance Bank, cash amounting to K665,615,910.00 and they used or threatened to use actual violence against Edwin Kainda in order to obtain or retain the stolen money.

## **2. Background facts**

2.1 It was undisputed in the trial court that the deceased, Edwin Kainda, a security guard with Arma Guard, who was assigned to work at Finance Bank, in Kaoma was murdered within the guardroom during the aggravated robbery that occurred at the Bank during the night of the 3<sup>rd</sup> and 4<sup>th</sup> of August, 2012. The cause of death as disclosed in the postmortem report was strangulation.

2.2 Beneath the deceased's body was a voter's card bearing the names of Victor Chiti, which led to the apprehension of Victor Chiti in Lusaka, who implicated the appellants in the commission of the crimes. The robbers had gained entry into the Bank through the



roof, disarmed the alarm system, blew up the strong room, took the money in total K665,615,910 and broke the back door to exit.

- 2.3 In October 2012, police officers from Kaoma collected the appellants who were in custody in Lusaka. The next morning, around 07:00 hours, warn and caution statements were recorded from the 1<sup>st</sup> and 2<sup>nd</sup> appellants and from Victor Chiti and James Kabwe who was A4 at the trial. The 1<sup>st</sup> and 2<sup>nd</sup> appellants and Victor Chiti allegedly gave free and voluntary statements admitting the charges whereas James Kabwe denied. The 3<sup>rd</sup> appellant's cautioned statement was recorded earlier in Lusaka. He too allegedly admitted the charges.
- 2.4 After recording the confession statements, the suspects were taken to the scene where the 1<sup>st</sup> and 2<sup>nd</sup> appellants and Victor Chiti supposedly demonstrated how they committed the robbery and pictures were taken by the scenes of crime officer (PW3). The 3<sup>rd</sup> appellant and James Kabwe did not participate in the demonstrations. There was no objection by defence counsel at the trial to the admission of the evidence of the demonstrations.
- 2.5 When it came to the production of the alleged confession statements, by the arresting officer (PW7), the defence counsel contested their voluntariness and the prosecution applied for a trial within a trial, as is the procedure. The learned trial judge conducted the trial within a trial after which she said she would give the ruling on the trial within trial in the main judgment.

- 2.6 Thereafter, she continued to hear evidence from PW7 in the main trial. At the close of the prosecution case, she found the appellants with a case to answer and put them on their defence while she found James Kabwe with no case to answer and acquitted him.
- 2.7 In their defence, the 1<sup>st</sup> and 2<sup>nd</sup> appellants said they were in detention at Milima State Prison in Kasama at the time of the alleged commission of the subject offences in Kaoma. They were serving prison sentences of 18 months from 30<sup>th</sup> June, 2012 for obtaining money by false pretences. The police picked them from Kasama, took them to Lusaka in September 2012 concerning a break in, in Lusaka but cleared them after discovering that they were actually in detention though they remained in custody.
- 2.8 Later, the police from Kaoma visited them at Lusaka Central police when they were looking for Victor Chiti and took them to Kabwata police station. The 2<sup>nd</sup> appellant said he disclosed his alibi to the police but they did not listen to him.
- 2.9 The 3<sup>rd</sup> appellant's testimony was that he was at home with his girlfriend and he told the police about his alibi and led them to his girlfriend's home but they found only the mother and sister who told them that she was out of town. He denied booking a room at the lodge in Kaoma. All the appellants reiterated the evidence they had given in the trial within a trial concerning the beatings and the threats.



### **3. Consideration of the matter by the High Court**

- 3.1 The learned trial judge delivered a single judgment. She first reviewed the evidence in the trial within trial and the main trial. She also reviewed the submissions by the parties and made some findings of fact. She then gave a ruling on the trial within a trial, dismissed the appellants' claim that they were beaten and threatened, found that they voluntarily admitted to committing the offences and admitted the confession statements in evidence on the ground that they were voluntary.
- 3.2 In the main trial, the judge found that the appellants' alibis were fake and rejected them. However, she agreed that PW2 saw the 3<sup>rd</sup> appellant at the lodge in Kaoma prior to the identification parade. She was also alive to the fact that Victor Chiti implicated the appellants but she relied heavily on the confession statements and the demonstrations to find all the appellants guilty on both counts.
- 3.3 She found that the prosecution had proved its case beyond all reasonable doubt, convicted the appellants and sentenced them to death for murder and to life imprisonment for aggravated robbery.

### **4. Appeals to this Court and arguments by the parties**

- 4.1 Aggrieved by their convictions, the appellants filed this appeal on three grounds. In the first ground, they attack the trial judge for rejecting their alibis, which in their words might reasonably and

possibly be true. In the second ground, they fault the trial judge for admitting the alleged confession statements in the absence of conclusive evidence that they were free and voluntary. In the third ground, they assail the trial judge for finding that the prosecution proved their case beyond all reasonable doubt and convicting them.

- 4.2 Mrs. Musonda, counsel for the appellants filed heads of argument in support of the appeal. The kernel of her arguments in ground one is that after the appellants' evidence of the alibis; the prosecution should have called for evidence in rebuttal especially that PW7 agreed that he was aware at the start of his investigations that the appellants were already in custody.
- 4.3 In ground two, the gist of her arguments is that the only evidence the prosecution relied on to prove the voluntariness of the confessions was the testimonies of the police officers who were persons in authority, thus with their own interest to serve. She argued that in the absence of an independent witness or a video to confirm that the confessions were voluntary, there was a lot of doubt regarding the circumstances in which they were obtained and the doubt should have been resolved in favour of the appellants.
- 4.4 In ground three, she contended that the prosecution did not prove its case beyond reasonable doubt. First, there was dereliction of duty by police officers in neglecting to lift fingerprints at the scene and to shoot a video for purposes of eliminating any doubt in the



way they obtained the demonstrations since the pictures were not explanatory. Secondly, PW2 met the 3<sup>rd</sup> appellant, prior to the identification parade; which affected the credibility of his evidence.

4.5 Mr. Bako, the learned Chief State Advocate, also filed heads of argument. Without responding to the grounds of appeal, he addressed us on the procedure adopted by the trial judge when she failed to render a ruling at the end of the trial within trial and admitted the confessions in the final judgment, which was contrary to the guidance we gave in the case of **Steven Mushoke v The People**<sup>1</sup>. He also cited the case of **Solo v The People**<sup>2</sup> where the High Court explained the procedure as regards a trial within a trial.

4.6 According to Mr. Bako, the effect of the misdirection by the trial judge is that the court must exclude the confession statements where it considers that they are prejudicial to the appellant. In this case, both the appellants and the respondent were prejudiced when the judge deferred the ruling on the trial within trial and continued with PW7's evidence as if there was no objection made.

4.7 Further, the State was deprived of the opportunity to publish the contents of the statements while PW7 was on the stand and he failed to explain the case theory effectively as a major part of the evidence he gathered was not produced as intended. The appellants were also prejudiced as they proceeded with their defences without knowing whether the court would admit the confession statements.

4.8 Counsel relied on the case of **Jackson Kamanga and others v The People**<sup>3</sup> and lamented that in the absence of other overwhelming evidence to outweigh the misdirection by the trial judge, the convictions are unsafe. In his oral submission, he agreed that the confessions and demonstrations are so connected that they cannot be separated since the demonstrations were based on the confessions and once the confessions are excluded, every other piece of evidence would remain hanging and it could not be said that the prosecution proved its case beyond all reasonable doubt.

4.9 Counsel urged us to restate with much clarity when the trial court ought to give a formal ruling on a trial with a trial so that there is no more deferment of rulings. He also agreed that the police should have investigated the alibi of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and established when and why they were put in custody as they were not found roaming the streets of Lusaka when they were taken to Kaoma and that there was dereliction of duty by the investigator.

4.10 In reply, Mrs. Musonda agreed with Mr. Bako that the learned trial judge misdirected herself when she did not render a ruling at the end of the trial within a trial and when she did so in the judgment.

## **5. Consideration of the matter by this Court and our decision**

5.1 We have considered the record of appeal and the arguments by both learned counsel. The core issue we must determine in this appeal is



at what point the trial court ought to render a ruling on a trial within a trial and the consequences of not doing so. The appeal also discusses the fate of the alleged confession statements by the appellants and the demonstrations by the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

- 5.2 In the case of **Patrick Kunda and Robertson Muleba Chisenga v The People**<sup>4</sup>, the defence objected to the admission of confession statements on the ground that both appellants alleged that the police had beaten them and the court held a trial within a trial. Afterward, the learned trial Commissioner gave a very short ruling in which he said he was satisfied beyond reasonable doubt that the appellants made voluntary statements and that the reasons for his decision would appear later.
- 5.3 On appeal, we held that the result of such brevity was in effect that there was no judgment on the trial within a trial and that the appellants were deprived of their opportunity to appeal against it. We found that it would be unsafe to allow the admission of the statements to stand and the appeal was dealt with on the basis that the confession statements had been excluded.
- 5.4 Later, in 2014, we dealt with a similar issue in the case of **Steven Mushoke v The People**<sup>1</sup>, which Mr. Bako cited. In that case, the trial judge had admitted the appellant's confession statement soon after the appellant's evidence in the trial within a trial and without rendering a formal ruling giving reasons why he was admitting the

alleged confession statement. The judge gave reasons in a single paragraph of his final judgment.

- 5.5 We said that the learned trial judge completely mismanaged the trial within a trial by admitting the confession statement without giving reasons there and then thereby prejudicing the appellant on the alleged confession and proceeded as if no objection had been raised. We pointed out that the cavalier approach to give his reasons for admitting the confession statement in the main judgment of the court and the procedure adopted by the trial judge was a misdirection and completely contrary to the guidance given by this Court in a plethora of cases on confession statements.
- 5.6 We defined the term "trial within a trial" as an interlocutory or preliminary hearing with all the characteristics of the main trial; interlocutory in that it is heard and determined before the conclusion of the main trial. We also said the burden of proof rests entirely on the prosecution and the standard of proof required is beyond reasonable doubt. We held that the trial court is obliged to deliver its ruling after receiving evidence in the trial within a trial and that failure by the court to do so is a serious misdirection.
- 5.7 In this case, as we said earlier, after receiving evidence from both sides in the trial within trial, the trial judge did not give her ruling. She continued to hear evidence in the main trial as if the appellants had made no objection. At the end of the main trial, she delivered



the main judgment wherein she gave the ruling on the trial within a trial, rejected the appellants' allegation that they were beaten and admitted the confession statements in evidence.

5.8 We agree entirely with Mr. Bako that admitting the confession statements in the main judgment without delivering a formal ruling on the trial within a trial was a total misdirection and mismanagement of the trial within a trial by the trial judge. We also concur that by recalling PW7 before the admission of the confession statements in evidence, the judge deprived the prosecution of the opportunity to make public the contents of the statements and the appellants of the chance to question the contents of the statements.

5.9 The procedure is that once the trial court admits the confession statement in evidence, the main trial continues and the witness who was seeking to have the statement admitted in evidence can now publish or disclose the contents of the statement, thereby giving the defence the opportunity to cross-examine the witness on the contents. It does not always follow that because an accused has given a confession then all the contents of the statement are true.

5.10 We restate what we said in the **Steven Mushoke**<sup>1</sup> case that the trial court is obliged to deliver its ruling after receiving evidence in the trial within a trial and that failure by the court to do so, as in this case, is a serious misdirection. Since Mr. Bako entreated us to restate the position with more clarity, we emphasise the need for the

trial court to render a formal, well-reasoned ruling at the conclusion of the trial within a trial before reverting to the main trial. We also reaffirm that the burden remains on the prosecution to prove the voluntariness of the alleged confession beyond reasonable doubt.

5.11 In conclusion, we find that it would be unsafe to allow the admission of the confession statements to stand given that this has not only prejudiced the appellants but it has also affected the entire proceedings. Therefore, in determining this appeal, we shall exclude the confession statements, as we did in the **Patrick Kunda**<sup>4</sup> case.

## 6. What then is the fate of the demonstrations?

6.1 In convicting the appellants, the trial judge relied on both the confession statements and the demonstrations. The 1<sup>st</sup> and 2<sup>nd</sup> appellants alleged that they were forced to demonstrate and the police staged the demonstrations while the 3<sup>rd</sup> appellant did not participate in the demonstrations and Mr. Bako urged us to exclude both the confession statements and the demonstrations. The question is whether the prosecution had proved beyond reasonable doubt that the demonstrations were voluntary as the judge found.

6.2 In **Li Shu-ling v The Queen**<sup>5</sup> (Hong Kong), the appellant killed the deceased in her apartment and the forensic evidence was that she had died because of strangulation applied both manually and with a double ligature. The defence was that it was an accidental killing.



- 6.3 The court convicted the appellant of murder and the Court of Appeal refused leave to appeal against his conviction. The appellant was granted special leave to appeal so that the Board (Privy Council) might consider whether a video recording of the re-enactment of the crime by him and a woman police inspector playing the part of the victim should have been admitted in evidence as a confession.
- 6.4 When the police first questioned the appellant, he gave a false alibi. Later, he gave a different but innocent account of his movements. During further questioning, after two days, he confessed to the killing but said it was accidental. The interview was broken off immediately and the police cautioned the appellant who then made a full confession in which he described what happened and how he ended up strangling the deceased.
- 6.5 After another two days, the police asked the appellant if he would be willing to go back to the scene and re-enact the way in which the killing occurred. He was reminded that he was still under caution and was not obliged to go. He replied that he understood and was willing to go with the police. He was taken to the scene, told that they wanted to have the re-enactment shot by a video tape, again warned that he was under caution, and not obliged to take part in the re-enactment if he did not wish to do so but he expressed his willingness. He was then introduced to a woman detective inspector who was to play the part of the deceased.

- 6.6 A video recording was made which substantially re-enacted the contents of his earlier oral confession and was accompanied by a running commentary explaining his movements. At the trial, both the oral confession and video recording were challenged on ground that they had been obtained because of police oppression and so were not voluntary. The judge ruled that both were voluntary, rejected the submission that he should exercise his discretion to exclude the video and admitted the video recording in evidence.
- 6.7 On appeal, the appellant's objection to the admissibility of the video recording was that a visual re-enactment of the crime by the accused and another person acting the part of the victim would be so far removed from a true reconstruction of the event that it ought never as a matter of principle to be admitted in evidence.
- 6.8 It was conceded on behalf of the appellant that if the video recording had been made of his oral confession, the video film would be admissible in evidence and if during a video confession he was asked to demonstrate how he placed his hands round the deceased's neck using either a dummy or police officer that too would be admissible.
- 6.9 In the Board's opinion, this concession was rightly made because if the accused could say what he did, there was no reason why he should not show what he did. Moreover, if it was permissible to allow the accused to re-enact a part of the crime during



interrogation there was no reason in principle why, if he was prepared to do so, he should not show how he committed the crime at the scene of the crime. Their Lordships further stated as follows:

**“The truth is that if an accused has himself voluntarily agreed to demonstrate how he committed a crime, it is very much more difficult for him to escape from the visual record of his confession than it is to challenge an oral confession with the familiar suggestions that he was misunderstood or misrecorded or had words put in his mouth. Provided an accused is given a proper warning that he need not take part in the video recording and agrees to do so voluntarily, the video film is in principle admissible in evidence as a confession and will in some cases prove to be most valuable evidence of guilt” (Underlining is ours for emphasis only).**

- 6.10 Although the above case related to a video recording and is not binding on this Court, it explains the proper procedure the police have to adopt every time they want to re-enact an earlier confession by an accused person. We find the case to be very persuasive and so we adopt the principle articulated there and apply it to this appeal.
- 6.11 What comes out clearly from that case is that the police must give an accused a proper warning that he need not take part in the re-enactment or demonstration or video recording. If he agrees to do so voluntarily, the video recording or in our case, the pictures taken of the demonstration is admissible in evidence as a confession.
- 6.12 We recognise that a video recording with a running commentary by the accused explaining his movements is more credible than still pictures of the demonstration with only a written explanation by the police. PW3 accepted this at the trial and Mrs. Musonda was trying to make this same argument in ground three of the appeal.

- 6.13 In this appeal, there was evidence that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were cautioned before the confession statements were recorded in Kaoma that morning and afterward, the police took them to the scene where they demonstrated how they broke into the Bank. The trial judge found that the demonstrations were done soon after the confessions, so she did not see why the police would force the appellants to demonstrate when they had already confessed; and that the evidence of demonstration was let in without any objection.
- 6.14 In the case of **Musonda and others v The People**<sup>6</sup>, we took the latter position as the judge in this case. In that case, the High Court convicted the appellants of the murder of a taxi driver and of aggravated robbery involving the theft of the taxi he was driving. The 1<sup>st</sup> appellant was found in possession of the vehicle and the car keys, he led the police to where he sold the spare wheel, and he implicated his co-accused and led the police to their arrest.
- 6.15 There was evidence that the appellants were cautioned before they were interviewed and in the course of the interviews, the 2<sup>nd</sup> appellant told the 1<sup>st</sup> appellant not to waste the police's time and to show them where the body of the driver was buried and the 3<sup>rd</sup> and 4<sup>th</sup> appellants said the same. The 1<sup>st</sup> appellant then agreed to lead the police to where the body was. After that, they all led the police to where the body was found and demonstrated how they killed the



driver and buried him in a shallow grave and the scenes of crime officer took pictures of the demonstrations.

6.16 At the trial, there was no objection to the evidence of leading and demonstrations. On appeal, the appellants attacked the trial court, among other things, for allowing confessions and unfairly obtained statements to be placed on record, for convicting the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants on the evidence of the 1<sup>st</sup> appellant and for convicting the 2<sup>nd</sup> appellant on uncorroborated evidence.

6.17 The first complaint related to the interviews with the 1<sup>st</sup> appellant and the leading and demonstrations which were said to be in breach of the Judges' rules. We observed that the 1<sup>st</sup> appellant and counsel, who represented the 3<sup>rd</sup> and 4<sup>th</sup> appellants, did not raise any objection to the evidence being complained of and that they were all cautioned before they were interviewed and before the leading to where the body was buried. Therefore, we found that there was no misdirection when the trial court allowed the evidence relating to the confessions, the leading and demonstrations by the 1<sup>st</sup> appellant and there was overwhelming evidence against him.

6.18 In respect of the 3<sup>rd</sup> and 4<sup>th</sup> appellants, we observed that the evidence linking them to the offences was that they participated in the leading and demonstrations. We applied the case of **Douglas Mpofu and Washington Magura v The People**<sup>7</sup>, discounted the

evidence of leading, found that there was no other evidence linking them to the offences and quashed their convictions.

- 6.19 As regards the 2<sup>nd</sup> appellant, we upheld the conviction because he advised the 1<sup>st</sup> appellant not to waste the time of the police but to lead them where they buried the taxi driver; he admitted that they killed the driver and buried him; and he led the police to the scene where he demonstrated. We restated that his lawyer did not raise any objection when that evidence was introduced and that as a senior counsel, he could not expect to be asked. He was expected to rise and object to any evidence that he felt incriminated his client.
- 6.20 We might have contradicted ourselves in that regard. It is settled that whether or not an accused person is represented, a trial court should always, when the point is reached at which a witness is about to depose as to the content of a statement, ask whether the defence has any objection to that evidence being led. (See **Hamfuti v The People**<sup>8</sup> and **Jackson Kamanga and others v The People**<sup>3</sup>).
- 6.21 The position we take is that this should apply with equal force to the evidence of demonstration by an accused person because a demonstration is a re-enactment of an oral or written confession. In this case, the trial judge found that there was no objection to the evidence of the demonstrations. However, the judge did not ask the defence counsel if he had any objection. The judge only asked



counsel if he had any objection to the production of the photographic album by PW3 and counsel said he had none.

6.22 The judge found that the photos of the demonstrations did not show any signs of beatings or distress and that the 3<sup>rd</sup> appellant and James Kabwe refused to demonstrate and the latter even refused to confess. However, the record does not show that the appellants voluntarily agreed to demonstrate how they committed the crimes.

6.23 There is no evidence that the police asked them if they would be willing to go back to the scene and re-enact the way in which they broke into the Bank or that the police reminded them that they were still under caution and they were not obliged to go. Neither is there evidence that when the police took them to the scene, they told them that they would take pictures of the demonstrations or again warned them that they were under caution and were not obliged to take part in the demonstrations if they did not wish to do so.

6.24 Even if the defence did not raise any objection when the evidence of the demonstrations was introduced, we are not satisfied that the prosecution had proved the voluntariness of the demonstrations beyond reasonable doubt and we set aside the finding by the trial judge. We agree with Mr. Bako that because the confessions and demonstrations were connected, we must also exclude the demonstrations, as they would remain hanging without the confession statements on which they were anchored.

**7. On what evidence can we sustain the convictions?**

- 7.1 The trial judge rejected the appellants' alibis. However, the failure of the alibis on its own would not prove the appellants' guilt. In relation to the 1<sup>st</sup> and 2<sup>nd</sup> appellants, the judge said they failed to produce warrants of execution of sentence to prove their detention and they did not disclose the alibis to the police. Yet she accepted that PW7 knew that they were in custody but due to passage of time, he was unsure if it was from October 2012 or October 2013.
- 7.2 The record shows that the appellants were taken to Kaoma in October 2012. The alleged confession statements were taken on 9<sup>th</sup> October, 2012. PW3 compiled the photographic album containing the photos of the demonstrations on 10<sup>th</sup> October, 2012 and PW4 testified that the appellants appeared in the Subordinate Court in Kaoma on 11<sup>th</sup> October, 2012. The judge should have made a finding of fact as to when the appellants were moved from Kasama to Lusaka and from Lusaka to Kaoma given that there was only a period of two months between the date of the commission of the offences and the appellants' transfer from Lusaka to Kaoma.
- 7.3 Mr. Bako politely and properly conceded that there was dereliction of duty when the police failed to investigate the 1<sup>st</sup> and 2<sup>nd</sup> appellants' alibi given that they were already in custody at the time they were taken to Kaoma. The 2<sup>nd</sup> appellant had even alluded to a



document he obtained from his docket at the reception at the prison but it was not admitted in evidence.

- 7.4 As regards the 3<sup>rd</sup> appellant, the judge accepted that PW2 saw him at the lodge before the identification parade was conducted and without the confession statement, the 3<sup>rd</sup> appellant's presence at the lodge in Kaoma would not connect him to the crimes at the Bank.
- 7.5 The trial judge was alive to the fact that Victor Chiti implicated the appellants and that a confession by an accomplice does not amount to a confession by others. However, she mistakenly believed that the ex-curial confession by Victor was evidence against the appellants and required corroboration and special circumstances to be relied on when Victor did not testify against the appellants.
- 7.6 We dealt with a similar misdirection recently in the **Joseph Kamanga**<sup>3</sup> case where the trial court treated the 1<sup>st</sup> appellant as an accomplice witness and went to some length to ensure that the danger of false implication had been excluded yet at the trial he did not give any evidence that incriminated his co-appellants. The judge proceeded based on the evidence of the arresting officer that the 1<sup>st</sup> appellant had admitted the offence and implicated the others.
- 7.7 We applied our decision in the case of **Maketo and & others v The People**<sup>9</sup> and held that the 1<sup>st</sup> appellant's alleged implication of his co-appellants was not evidence against them, unless they adopted the 1<sup>st</sup> appellant's confession. That applies to the present appeal.

- 7.8 However, the trial judge relied on the confessions and the demonstrations, which regrettably we have excluded. The judge also took the voter's card found at the scene to be an odd coincidence and something more to connect the appellants to the offences. We do not agree. The voter's card belonged to Victor. If anything, it was evidence against Victor and not the appellants.
- 7.9 Unfortunately, Victor Chiti was according to the evidence of PW4, let loose with the 3<sup>rd</sup> appellant in Lusaka where they were facing similar charges. If the 3<sup>rd</sup> appellant was found and taken back into custody, what happened to Victor and the money that the killers stole since the police had intelligence information that the suspects were differing over the sharing of the money? The circumstances of Victor's release from custody are not clear from the record and we do not understand how the police could let loose a suspect in such a serious case of murder and aggravated robbery. We express our complete disapproval of this conduct by the police.
- 7.10 In fact, as Mr. Bako observed and this is borne out by the record of appeal, Victor Chiti never attended court when the matter was in the Subordinate Court, even though he was in custody. He was committed to the High Court for trial in absentia but he never attended trial and the record is silent on how the prosecution and the learned trial judge dealt with him.



## 8. Conclusion

- 8.1 Without the confession statements and demonstrations, there is nothing left of the prosecution evidence to connect the appellants to the crimes or to sustain the convictions. As submitted by Mrs. Musonda the police even neglected to lift fingerprints at the scene.
- 8.2 We find merit in the appeals and we allow them. We quash the convictions on both counts, acquit all the appellants and set aside the sentences. If the appellants are not being held under any other prison sentence warrants, we set them at liberty.
- 8.3 Lastly, we wish to commend the State and Mr. Bako, in particular, for his magnanimity in conceding to the errors that were apparent on the face of the record in this appeal.



**E. M. HAMAUNDU**  
**SUPREME COURT JUDGE**



**M. MALILA**  
**SUPREME COURT JUDGE**



**R.M.C. KAOMA**  
**SUPREME COURT JUDGE**