IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 156/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

STEVEN MUKUKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Majula and Muzenga, JJA

On 18th May 2021 and 26th August 2021

For the Appellant: Z. Ponde, Legal Aid Counsel, Legal Aid Board

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

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JUDGMENT

Mchenga DJP, delivered the judgment of the court.

CASES REFERRED:

1. The People v Festus Nakaundi [2010] Z.R. 346
2. Nicolas Malaya v The People SCZ Appeal No. 29 of 2017
3. R v Woodcook 1789 I Leach 500
4. R. v. Perry [1909]2 K. B. 697
5. R. v. Forester (1866) 10 Cox 368
6. R. v. Smith (1887) 16 Cox 170

7. R. v. Mitchell (1892) 17 Cox 503
8. R. v. Whitmarsh (1898) 62 J. P. 680
9. Edward Sinyama v The People [1993-1994] Z.R. 16

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

WORKS REFERRED TO:

1. Archbold: Pleading, Evidence and Practice in Criminal Cases 1992, London, Sweet & Maxwell

1. INTRODUCTION

1.1. The appellant, appeared before the High Court (Limbani, J.), on a charge of murder contrary to **section 200 of The Penal Code.** The allegation was that on 29th February 2019, he murdered Joseph Bwalya.

1.2. He denied the charge and the matter proceeded to trial. At the end of the trial, he was convicted for the offence and condemned to suffer capital punishment.

1.3. He has now appealed against the conviction.

2. CASE BEFORE THE TRIAL COURT

2.1. The evidence before the trial judge was that on 22nd January 2019, around 14:00 hours, Joseph Bwalya left his house in Chalabasa Village, in Mpika. He did not return home at the expected time.

2.2. Later that evening, his wife, Bridget Bwalya, was informed that he had been beaten and was in hospital. She followed him to the hospital, where she found him unconscious. He only regained his consciousness the following morning.

2.3. Soon after regaining consciousness and on being asked about what had happened, Joseph Bwalya told his wife that he had been assaulted by the appellant. He also told her that he had not offended the appellant in anyway.

2.4. Joseph Bwalya told Jonas Chilekwa the same story. It is not clear whether it was on the same day, or the following day, but it was after he had talked to his wife. He told him that he was not feeling

well because he had been severely beaten by the appellant.

2.5. Joseph Bwalya died two weeks later.

2.6. A post-mortem examination was conducted on his body and it was found that he died from injuries he suffered from the assault.

2.7. There was no witness to the assault and the appellant was incriminated by the statements Joseph Bwalya made to his wife and Jonas Chilekwa.

2.8. The trial judge admitted the statements on the basis that they were dying declarations and therefore an exception to the rule against the admission of hearsay evidence.

3. GROUND OF APPEAL AND ARGUMENT IN SUPPORT

3.1. The sole ground of appeal is that, the statements made to Bridget Bwalya and Jonas Chilekwa, should not have been admitted into evidence as dying declarations.

3.2. On behalf of the appellant, Ms. Ponde referred to the case of **The People v Festus Nakaundi**[1] and submitted that the statements Joseph Bwalya made to his wife and Jonas Chilekwa, should not have been admitted into evidence as dying declarations because there was no evidence that he had lost all hope of living, at the time they were made.

4. ARGUMENTS AGAINST THE APPEAL

4.1. In response, and on behalf of the respondent, Ms. Muwamba submitted that the statements were admissible, because they formed part of *res gestae*. She anchored this argument on the case of **Nicolas Malaya v The People**[2], where statements made by the deceased person, two days after he had been shot, were admitted into evidence as being part of *res gestae*.

5. CONSIDERATION OF ARGUMENTS AND COURT'S DECISION

5.1. The basis for the admission of dying declarations, which are essentially hearsay statements, was aptly

stated by Eyre C. B. in **R v Woodcock**[3], and cited with approval in **R. v. Perry**[4], as follows:

> **"The general principle on which this species of evidence is admitted is that, they are declarations made in extremity when the party is at the point of death and when every hope of this world has gone; when every motive of falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by the positive oath administered in a court of justice."**

5.2. In paragraph 11-27 of Chapter 11 of **Archbold :Pleading, Evidence and Practice**, the editors point out that it is now settled law that for declarations to be admitted, **'there must be a settled hopeless expectation of imminent death, i.e. that the declarant must have abandoned all hope of living; but that the declarant need not be expecting immediate death'**

5.3. In the same paragraph, they go on to say that **'it must be shown for the prosecution that the deceased, when he made the statement, was under the**

impression that death was impending, not merely that he had received an injury from which death must ensue, but that he then believed that he was at the point of death' They refer to the following cases in support of the proposition: **R. v. Forester**[5]; **R. v. Smith**[6]; **R. v. Mitchell**[7]; **R. v. Whitmarsh**[8] and **R. v. Perry**[4].

5.4. In this case, there was no evidence that Steven Bwalya had a settled hopeless expectation of imminent death when he told his wife and Jonas Chilekwa, that the appellant had assaulted him. All he said was that he was assaulted by the appellant.

5.5. In arriving at the decision that the statements were dying declarations, the trial judge stated as follows:

> **'It was clear from the adduced evidence that the deceased, upon gaining conscious on the 23rd of January 2019, some 21 days or so after being attacked, identified the accused as the person who beat him and inflicted the injury. The identification was spontaneous considering the circumstances and with no room or opportunity for**

> **conclusion. It was not only made to the wife, PW1, but also to the accused's relative PW2. As per PW2's evidence from the observations, the deceased was not in the good condition as his head had swelled at the back which is a very sensitive part of the body. The injury inflicted was therefore very serious and death was eminent.'**

5.6. He also went on to note that:

> **'I also take cognisance of the explanation by the deceased to PW2 on the injury, that is, that he was not feeling well as he had been badly hit by stones on the head by the accused. It is my considered view that the deceased was alive to the seriousness of his injury and that his words speak volumes about his expectation of life. His narration and the evidence of PW2 clearly show that death was eminent.'**

5.7. In our view, a declarant's belief that death is eminent cannot be deduced by solely considering the extent of the injuries suffered. This is because a person may suffer injuries that turn out to be fatal and yet not believe that death is eminent.

5.8. The court must look out for unequivocal conduct or words by the declarant that he believes that death is eminent. An example being lamentation by the

declarant of who will look after his children or that his children will suffer in his absence.

5.9. We agree with Ms. Ponde that in the absence of evidence that Steven Bwalya believed that death was eminent, his statements to his wife and Jonas Chilekwa, should not have been admitted as dying declarations.

5.10. Ms. Muwamba appeared to concede that the statements were not dying declarations, however, as indicated earlier on, it is her position that the statements were admissible in that they were part of *res gestae*.

5.11. The facts in the case of **Nicholas Malaya v The People**[2], which Ms. Muwamba relied on, can be summarised as follows; Nicholas Malaya, who had gone on a hunting expedition with his friend returned to the village and informed his friend's relatives that his friend had shot himself. He then led the relatives to where the body was, it took them two days to get there.

5.12. When they got to his friend, they found that he was still alive. His friend told his relatives that although he did not know what happened, the firearm was with Nicholas Malaya at the time he was shot. He also advised them not to place any blame on Nicholas Malaya. He subsequently died and the Nicholas Malaya was charged with the offence of murder.

5.13. The trial judge took the view that the case against Nicholas Malaya was anchored on circumstantial evidence. The evidence by the relatives, of what Nicholas Malaya's friend told them, qualified as *res gestae*. The trial judge also opined that their joint evidence and that of a ballistic expert confirmed that he could not have shot himself.

5.14. On appeal, the argument was that an inference of guilt, is not the only one that could been drawn on the evidence that was before the trial judge. It was argued that the possibility that someone else

could have shot Nicholas Malaya's friend was not ruled out.

5.15. The Supreme Court took the view that what was before them for determination in that appeal, was whether Nicholas Malaya shot his friend and he had malice aforethought.

5.16. Our understanding of the judgment is that the case was to a great extent, determined on the basis of the statement made by Nicholas Malaya that his friend shot himself could not have been true. The court found that given the evidence before the trial court, the only inference that could be drawn on it, was that Nicholas Malaya who shot his friend.

5.17. In the circumstances, it is our view that the facts in case of **Nicholas Malaya v The People**[2], can be distinguished from what happened in this case.

5.18. In this case, the only evidence that incriminates the appellant was that given by Bridget Bwalya and Jonas Chilekwa.

5.19. In the case of **Edward Sinyama v The People**[9], the Supreme Court said the following on what would amount to *res gestae:*

> **'A statement is not ineligible as part of the res gestae if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case.'**

5.20. It is our understanding that for a statement to be treated as *res gestae,* it must be made contemporaneous to the act that causes the injury that leads to the death.

5.21. We will first deal with the testimony of Jonas Chilekwa. It was to the effect that he went to the hospital after hearing that Joseph Bwalya had been assaulted because he was CCPM member. Joseph Bwalya

was woken up, and on being asked, told him that he had been assaulted by the appellant.

5.22. It cannot, in our view, be said that the statement that Joseph Bwalya made to Jonas Chilekwa was made in approximate proximity with the assault that would turn out to be fatal. This is because the statement was made a day or two, after the assault.

5.23. Coming to the testimony of Bridget Bwalya, Joseph Bwalya was reported to have been assaulted in the evening of 22nd January 2019. He only made the statement that incriminated the appellant early in the morning, the following day.

5.24. The statement was made after he had regained consciousness having been admitted into hospital the previous day when he was unconscious. Can it be said that the statement was made in approximate proximity?

5.25. We don't think it is the case, particularly that there was no evidence of when he was assaulted. He was picked up he was unconscious and only spoke the following morning. There was clearly a break in the

continuity of events from the time he was assaulted up to the time he named the appellant as his assailant.

5.26. It is therefore our view that the statements made to Bridget Bwalya and Jonas Chilekwa by Joseph Bwalya that the appellant assaulted him could not have been admissible as *res gestate*. This is on account of them not being made either in exact or relative proximity to the attack.

6. VERDICT

6.1. In circumstances, we find that the appellant's conviction is not safe. We allow the appeal, set aside the conviction and acquit him.

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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