

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL 133/2020

BETWEEN:

VICTOR MOSES SAMPA
AND
THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Ngulube and Siavwapa, JJA

On 20th April 2021 and 20th October 2021

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

For the Respondent: R. Malibata-Jackson, Senior State
Advocate, National Prosecution
Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the Court.

CASES REFERRED TO:

1. Bernard Chisha v The People [1980] Z.R. 36
2. Haonga v The People [1976] Z.R. 200
3. Yoani Manongo v The People [1981] Z.R. 152
4. Nzala v The People [1976] Z.R. 221
5. Simon Miyoba v The People [1977] Z.R. 218
6. Benson Phiri and Another v The People [2002] Z.R.
107
7. Chimbini v The People [1973] Z.R. 191
8. Champion Manex Mukwakwa v The People [1978] Z.R. 347

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Juveniles Act, Chapter 53 of the Laws of Zambia

1. INTRODUCTION

1.1. The appellant appeared before the High Court (C. Zulu, J.), charged with the offence of murder contrary to **section 200 of the Penal Code**. The allegation was that on 30th June 2017, at Kabwe, he murdered Charity Banda.

1.2. He denied the charge and the matter proceeded to trial.

1.3. At the end of the trial, he was convicted for the offence and condemned to suffer capital punishment.

1.4. He has appealed against the conviction.

2. CASE BEFORE THE TRIAL COURT

2.1. The evidence before the trial judge was that on 30th June 2017, Joe Mwape and his wife, Charity Banda, residents of Kabwe's Mangandanyama Township, went drinking at New Life Bar. At about 22:00 hours, they left the bar.

2.2. Joe Mwape went to another bar, whilst his wife headed home.

2.3. At about 23:00 hours, Joe Mwape left the bar for home. When he got there, he did not find his wife. He looked for her in the township, but did not find her. He then went back home.

2.4. That night, Rita Mbuzi who was sleeping in a house in Mangandanyama Township, heard noise outside. It is not clear what time it was. She also heard a female voice say, 'Victor let me go'.

2.5. When she peeped through the window, she saw the appellant, who she knew, attacking Charity Banda. She was able to see him because of a security light. She went to sleep after he dragged Charity Banda out of their yard.

2.6. Also in the same house, was Emely Bwalya, Rita Mbuzi's grandmother. According to her, when she heard noise outside, she also heard a female voice saying, 'why do you want to kill me, let me go,

you who is a known person why do you want to kill me'.

2.7. She looked through the window and saw a man who was facing downwards. She also heard the sound of a woman who was snoring. She could not see clearly because of the darkness.

2.8. The following morning, Joe Mwape learnt that his wife, who was badly beaten, was lying about 70 meters from their house. He hired a taxi and took her to the hospital, where she died 3 days later.

2.9. Constable Libasi Mukuyu arrested the appellant after receiving information from Rita Mbuzi of what had transpired on the material night. The statement Rita Mbuzi gave to the police was also admitted into evidence.

2.10. In his defence, the appellant testified that on 30th June 2017, he returned home at around 17:00 hours. He only learnt that a person had been killed the following morning. He denied assaulting Charity Banda or knowing Rita Mbuzi.

3. FINDINGS OF THE TRIAL JUDGE

3.1. The trial Judge accepted Rita Mbuzi's testimony that she previously knew the appellant. He also found that she had the opportunity to reliably observe what was happening and identify the appellant. He ruled out the possibility of mistaken identification.

3.2. After considering the contents of the post-mortem report, the trial judge came to the conclusion that the appellant had malice aforethought because he intended to cause grievous harm.

3.3. The appellant was sentenced to death after the trial judge found that there were no extenuating circumstances.

4. GROUNDS OF APPEAL

4.1. Two grounds have been advanced in support of this appeal.

4.2. The first ground is that the trial judge erred when he did not consider the possibility of Rita Mbuzi

falsely implicating the appellant, given that her testimony was characterized with contradictions.

4.3. The second ground is that the trial judge erred when he did not rule out the possibility of an honest but mistaken identification by Rita Mbuzi.

5. ARGUMENTS IN SUPPORT OF THE APPEAL

5.1. First of all, Mrs. Tindi made reference to the case of **Bernard Chisha v The People**¹ and submitted that since Rita Mbuzi was a child, her evidence should have been treated with caution. Being a child, she was susceptible to being influenced on what to say and her evidence required corroboration.

5.2. She then pointed out that Rita Mbuzi gave contradictory evidence in examination-in-chief and when cross-examined.

5.3. While in examination-in-chief, she said that she heard the appellant say 'Victor let me go', and saw the appellant beating a woman, in cross-examination it was established that she said

something different when she gave a statement to the police.

5.4. In that statement, she told the police that when she and her grandmother woke up, they turned the security light on. She made no mention of what the woman said.

5.5. Mrs Tindi then made reference to the case of **Haonga v The People²** and submitted that given that since she had been untruthful, the weight to be attached to Ruth Mbuzi's evidence, should have been reduced.

5.6. Mrs. Tindi also pointed out that Rita Mbuzi's testimony differed from that of her grandmother. While she said she was able to see what was going on, her grandmother said she did not clearly observe what was going on because she failed to switch the light on.

5.7. She submitted that given that Rita Mbuzi and her grandmother were observing the same incident, they should not have given contradictory accounts of what transpired.

5.8. The other argument advanced by Mrs. Tindi was that there being a possibility of an honest but mistaken identification by Rita Mbuzi, the trial judge should not have convicted the appellant in the absence of evidence corroborating her testimony. She referred to the case of **Yoani Manongo v The People**³ in support of the proposition.

5.9. Further, Mrs. Tindi argued that the mere fact that the appellant was identified at an identification parade, could not be the basis for ruling out the possibility of an honest but mistaken identification.

5.10. Finally Mrs. Tindi submitted that there is no evidence that the alibi raised by the appellant was investigated. On the consequences of that failure, she referred us to case of **Nzala v The People**⁴.

6. RESPONSE TO THE GROUNDS OF APPEAL

6.1. The People support the conviction.

6.2. Mrs. Malibata-Jackson's response to the argument that Rita Mbuzi's testimony was not credible because it contradicted that of her grandmother, was that since they were viewing what was going on from different rooms, their observations could not have been the same.

6.3. As regards the argument that Rita Mbuzi's testimony in court was not in line with her statement to the police, Mrs. Malibata-Jackson referred to the case of **Simon Miyoba v The People**⁵ and submitted that out of court statements, are not evidence.

6.4. She then referred to the case of **Benson Phiri and Another v The People**⁶ and submitted that in the circumstances of this case, it was competent for the trial judge to convict the appellant, on the evidence of Rita Mbuzi, a single identifying witness, even in the absence of corroborative evidence. Rita Mbuzi was a credible witness, whose evidence did not require corroboration.

7. COURT'S CONSIDERATION OF THE APPEAL

7.1. Since both grounds of appeal deal with the credibility of Ruth Mbuli's evidence, it is our view that they are best dealt with at the same time.

7.2. The first issue we will deal with is Mrs. Tindi's argument that Rita Mbuli's evidence required corroboration because she was a child.

7.3. Provision for the reception of the evidence of a child is made in **section 122 of the Juveniles Act.**

It reads as follows:

'Where in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence on oath, and understand the duty of speaking the truth:

Provided that-

(a) if in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath and does not understand the duty of speaking the truth, the court shall not receive the evidence; and

(b) Where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.'

7.4. From the provision, it is clear that the 'automatic' requirement for the corroboration of the evidence of a child, only arises if the witness is below the age of 14 years.

7.5. In this case, Rita Mbuzi was 14 years at the time she testified. There was therefore no requirement for the corroboration of her evidence solely on account of her age.

7.6. Rita Mbuzi's testimony was also attacked for being contradictory. This was on account of it being inconsistent with the statement she gave to the police and what her grandmother said in court.

7.7. In the case of **Simon Miyoba v The People**⁵, Baron, Deputy Chief Justice, delivering the judgment of the Supreme Court, said the following on previous inconsistent statements:

'The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof. They are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial; they can be used only to destroy the credibility of the witness or to reduce the weight to be attached to his evidence. To do this it is necessary for the trial court to have before it formally the previous statement, so that it, can compare it with the evidence given in court, and assess for itself the seriousness of the alleged discrepancies.'

7.8. It is our view that before a statement can be classified as a previous inconsistent statement, the degree of its discrepancy with the testimony in court, must be considered. It is also our view that the mere fact that a witness gives a more detailed account of what transpired, in court, as against what she told the police, will not render a statement inconsistent.

7.9. For a statement to be classified as a previous inconsistent statement, the discrepancy in it must be contradictory and of material significance.

7.10. We have examined Rita Mbuzi's testimony in court and the statement to the police. We do not find them to be contradictory. There is no doubt that her account in court was more detailed than the single page statement she gave to the police.

7.11. Both pieces of evidence are consistent on the material part of her evidence, that is, that she saw the appellant assault Charity Banda and that there was light from a bulb. She also previously knew him.

7.12. The credibility of Rita Mbuzi's testimony was also attacked on the ground that it differed with what her grandmother said.

7.13. It doesn't surprise us that the detail in their accounts of what happened was not the same. They were viewing what was going on from different rooms and it is not certain that they observed what was going on at the same time.

7.14. This being the case, it is our view that there was no basis on which the trial judge would have found

that Rita Mbuzi's testimony was not credible and required corroboration.

7.15. Further, Mrs Tindi made reference to the case of **Haonga v The People**² and submitted that since Rita Mbuzi was untruthful, the weight to be attached to her evidence should have reduced. The untruthfulness was anchored on the witness's contradictory evidence.

7.16. It is our view that the principle set out in the case of **Haonga v The People**² is not applicable to this case because we have found that her evidence was not contradictory.

7.17. In any case, a witness cannot be classified as being untruthful merely because they said something contradictory. There must be evidence that they deliberately said something knowing that it was not true.

7.18. The other limb of the attack of the appellant's conviction is that the court should have looked for corroborative evidence before convicting the

appellant on Rita Mbuzi's evidence, a single identifying on witness.

7.19. In **Chimbini v The People**⁷, Baron, Judge President, delivering the judgment of the Court of Appeal, the forerunner of the Supreme Court, said the following on a conviction anchored on the evidence of a single identifying witness:

"It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made . . ."

7.20. Further, commenting on the circumstances when the evidence of a single identifying witness would require to be corroborated, the Supreme Court, in

Champion Manex Mukwakwa v The People⁸, held as follows:

'Although the appellant was identified by two witnesses, which in itself reduced the danger of honest mistake, the circumstances in which the offence was committed were traumatic and the opportunities for observation poor; it would therefore be unsafe to rely on the identifications without some link connecting the appellant with the offence.'

7.21. It cannot, in this case, be said that the appellant was identified by Rita Mbuzi in circumstances that can be classified as being 'poor'. Though the attack was at night, there was lighting from a security light. She had the opportunity to observe what was going on as the attack was not swift, so as to render her view a 'fleeing glance'.

7.22. In addition, she viewed what happened from the safety of the house in which she was.


7.23. All in all, we find no basis on which the trial judge should have required Rita Mbuzi's testimony to be corroborated. It is our view, that he rightly


excluded the possibility of an honest but mistaken identification.


8. VERDICT

8.1. The arguments in support of both grounds of appeal having failed, we find no merits in this appeal and we dismiss it.

8.2. The appellant's conviction for the offence of murder is affirmed. So is the sentence that was imposed on him.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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P.C.M. Ngulube
COURT OF APPEAL JUDGE


.....
M.J. Siavwapa
COURT OF APPEAL JUDGE