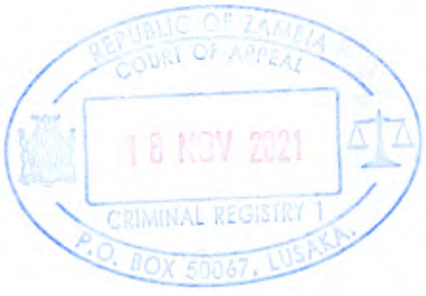
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 134/2020**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:



STEWARD CHABALA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Ngulube, and Siavwapa JJA

On 20th April 2021 and 18th November 2021

For the Appellant: K. Chisala, Legal Aid Counsel, Legal Aid Board

For the Respondent: S. Mwamba-Besa, Principal State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the Court.

CASES REFERRED TO:

1. Kalebu Banda v The People [1977] Z.R. 169
2. Peter Yotamu Hamenda v The People [1977] Z.R. 184
3. George Nswana v The People [1988-1989] Z.R. 174
4. Joe Banda v The People
5. Donald Fumbelo v The People SCZ Appeal No. 476 of 2013,
6. Mutambo and Five Others v The People [1965] Z.R. 15
7. The People v Festus Nakaundi [2010] Z.R. 346
8. The People v Pelete Banda [1977] Z.R. 304

9.R v Woodcock [1789] 1 Leach 580

10. R v Mosley [1838] 2 Lew.C.C 148

11. James Mulenga v The People CAZ No.139 of 2018

12. Steven Mukuka v The People CAZ Appeal No. 156 of 2020

13. Sammy Kambilima Ngati and Others v The People [2003] Z.R. 100

14. Fawaz and Chelelwa v The People [1995-1997] Z.R. 3

15. Nachitumbi and Another v The People (1975) Z.R. 285

16. Chimbini v The People [1973] Z.R. 197

17. Love Chipulu v The People (1986) Z.R. 73.

LEGISLATION REFERRED TO:

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

1. INTRODUCTION

1.1. The appellant, appeared before the High Court (Limbani, J.), on an information containing one count of the offence of murder contrary to **section 200 of The Penal Code.**

1.2. The allegation was that on 14th May 2018, at Kapiri-Mposhi, he murdered Collins Jere.

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

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

1.5. He has appealed against the conviction.

2. CASE BEFORE THE TRIAL COURT.

2.1. The evidence before the trial judge was that on 14th May 2019, in the afternoon, Mary Jere, a farmer of Kapiri Mposhi, sent her brother, Collins Jere, to go and sell 6 tins of maize at a market.

2.2. When he did not return at the expected time, she followed him. She also visited a local bar, but did not find him.

2.3. Later that evening, at about 23:00 hours, James Kumwenda, a member of the Community Crime Prevention Unit, who was checking on bars that where operating beyond authorised working hours, visited Chalimbana Bar. When he found that it was open, he ordered that it be closed.

2.4. As he got out of that bar, he saw the appellant, who was wearing a grey shirt, beating Collins Jere. He described him as light in complexion, with a bold head. He was able to identify him because of the light from an electric bulb.

2.5. He was unable to rescue Collins because he was alone, while the appellant was with other boys. They were kicking and punching him.

2.6. The following morning, Mary Jere continued to look for her brother but did not find him.

2.7. On the 3rd day, she was informed that he had been found in the bush, at Malama's farm.

2.8. His clothes were torn. Although he had no visible injures, he pointed to below his navel, indicating that he was in pain. He also told her that he was kicked by the appellant and she should call him so that he takes him to the hospital.

2.9. He was taken to the hospital and later discharged. He died at home.

2.10. A postmortem on 22nd May 2019, attributed his death to blunt force abdominal trauma. It had caused the small intestines to rapture.

2.11. On being informed of the death of Collins Jere, James Kumwenda started looking for the appellant and he apprehended him from a bar.

2.12. In his defence the appellant said on 19th May, 2019, he went to Chibwelamushi Bar, where he was apprehended by James Kumwenda. He denied being with Collins Jere on the 14th of May 2019.

2.13. The appellant's daughter gave evidence in his defence. She told the trial judge that she was at home with him on the 14th of May 2019.

3. FINDINGS BY THE TRIAL JUDGE

3.1. After reviewing the evidence, the trial judge found that Collins Jere lost his life as a result of the blunt force trauma that he suffered.

3.2. He noted that James Kumwenda was a single identifying witness and after considering the circumstances in which the identification took

place, and ruling out any motive for falsely implicating the appellant, accepted his evidence.

3.3. The trial judge also accepted Collin Jere's dying declaration implicating the appellant.

4. GROUNDS OF APPEAL

4.1. Three grounds have been advanced in support of this appeal. The appellant's position is that:

i. Collins Jere's statement to his sister, incriminating the appellant, should not have been admitted into evidence because it did not amount to a dying declaration;

ii. The evidence of James Kumwenda, a single identifying witness, required corroboration; and

iii. The appellant should not have been convicted in the absence of due and proper investigations.

4.2. Because it is convenient, we will first deal with the third ground of appeal. Thereafter, we will deal with the first and second grounds of appeal, in that order

5. ARGUMENTS FOR AND AGAINST THE 3rd GROUND OF APPEAL

5.1. In support of the 3rd ground of appeal, Mr. Chisala referred to the cases of **Kalebu Banda v The People**[1] and **Peter Yotam Hamenda v The People**[2] and submitted that there was dereliction of duty when the police did not interview any persons who were at the bar, other than James Kumwenda. On that score, an inference favourable to the appellant should have been drawn.

5.2. He also referred to the cases of **George Nswana v The People**[3] and **Joe Banda v The People**[4] and submitted that the trial judge's finding that the appellant's defence was an afterthought was not supported by the evidence, it was speculative.

5.3. Mrs. Mwamba-Besa's response to this ground of appeal was that the witnesses who testified in court, proved the case against the appellant beyond all reasonable doubt. The question of dereliction of duty did not arise.

6. COURTS CONSIDERATION AND DETERMINATION OF THE 3rd GROUND OF APPEAL

6.1. The first issue we will deal with is the finding that the appellant's defence was an afterthought. Examination of the evidence on record establishes that the first time he raised the *alibi,* was when he gave his defence.

6.2. In the case of **Donald Fumbelo v The People**[5], the Supreme Court said the following:

> **'In trying to ascertain what weight should be attached to the testimony of a witness on a particular issue, an important factor that should be considered is the consistency of the testimony. Hence a lot of weight will be attached to the testimony if the witness starts showing at the earliest opportunity, his vision on the issue. In the case of a witness who is an accused person, it is indeed very important that he must cross-examine witnesses whose testimony contradicts his version on a particular issue. When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached to such version. Therefore, in a contest of credibility against their witnesses, the accused is**

> **likely to be disbelieved. This is the approach which the trial court took. We find no fault in it.'**

6.3. The appellant did not raise the *alibi* when he was arrested and neither was it suggested to any of the prosecution witnesses, when they were cross examined.

6.4. In the circumstances, it is our view that the trial judge was entitled to come to the conclusion that the defence was an afterthought.

6.5. Coming to the argument that the failure to visit the scene of the crime was dereliction of duty, the following was held on dereliction of duty in the cerebrated case of **Peter Yotamu Haamenda v The People**[2]**:**

> **"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result; in an acquittal unless the**

evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the derelictions of duty.

6.6. It is our understanding that there is no requirement for more than one witness to be interviewed for an investigation to be declared to be 'complete'. The evidence shows that the witness was dispersing persons who were breaking drinking hours. He was independent and the circumstances do not suggest in any way that there were other persons who were more familiar or had a better view of what happened.

6.7. We find no merit in this ground of appeal and we dismiss it.

7. ARGUMENTS FOR AND AGAINST THE 1ST GROUND OF APPEAL

7.1. In support of the first ground of appeal, Mr. Chisala referred to the cases of **Mutambo and 5 Others v The People**[6], **The People v Festus Nakaundi**[7], **The People v Pelete Banda**[8] and submitted that Collins Jere's statement implicating the appellant, should not have been received into evidence as a dying

declaration, as there was no evidence that he believed that death was imminent.

7.2. In response to this ground of appeal, Mrs. Mwamba-Besa referred to the cases of **R v Woodcock**[9], **R v Mosley**[10] and **James Mulenga v The People**[11] and submitted that even if the statement was not made contemporaneous to the assault, it was admissible as a dying declaration because it was made spontaneously and by a person who was in great pain.

7.3. Further, a proper assessment of the evidence shows that Collins Jere knew that his death was imminent.

8. COURT'S CONSIDERATION AND DETERMINATION OF THE 1ST GROUND OF APPEAL

8.1. In the case of **Steven Mukuka v The People**[12], we said the following on evidence establishing that the declarant believed that death was eminent.

> **'In our view, a declarant's belief that death is imminent 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 imminent.**
>
> **The court must look out for unequivocal conduct or words by the declarant that he believes that death is imminent. An example being lamentation by the declarant of who will look after his children or that his children will suffer in his absence.'**

8.2. In this case, the only evidence that was before the trial judge was that the deceased was in pain and asked for the appellant to be called to take him to the hospital. There is nothing from the testimony of the witness that he had a hopeless expectation that death was imminent.

8.3. As we said in the case of **Steven Mukuka v The People**[12], the declarant must show, by word or conduct, that he believed that death is imminent.

8.4. It is our view that Collins Jere's statement which incriminated the appellant, should not have been admitted as it did not meet all the conditions for it to be classified as a dying declaration.

8.5. We find merit in the first ground of appeal and we allow it.

9. ARGUMENTS FOR AND AGAINST THE 2nd GROUND OF APPEAL

9.1. In support of the second ground of appeal, Mr. Chisala relied on the cases of **Sammy Kambilima Ngoyi and Others v The People**[13] and **Shawi Fawaz v The People**[14]. He argued that because of the circumstances in which James Kumwenda identified the appellant, his identification evidence required corroboration.

9.2. The trial judge purported to rely on the dying declaration as being corroborative, which should not have been the case, as that evidence was not of any probative value. That being the case, James Kumwenda evidence was not corroborated.

9.3. Mrs. Mwamba-Besa's response was that the trial judge was entitled to convict the appellant on the evidence of a single identifying witnesses as long as he was satisfied that the possibility of an honest but mistaken identification had been ruled out. She

referred to the case of **Chimbini v The People**[15], in support of her proposition.

10. COURT'S CONSIDERATION AND DETERMINATION OF THE 2nd GROUND OF APPEAL

10.1. Having determined that Collins Jere's statement of who inflicted the fatal blow on him, should not have been admitted into evidence, the only evidence incriminating the appellant is that of James Kumwenda, a single identifying witness

10.2. In the case of **Nachitumbi and Another v The People**[15], the Supreme Court held as follows, on when a conviction on the evidence of a single identifying witness, is competent.

> **'In single witness identification cases, the honesty of the witness is not the issue; the court must be satisfied as to the reliability of the witness's observation so that the possibility of honest mistake is ruled out. Normally, although not invariably in these single witness cases such possibility cannot be ruled out unless there is something other than the witness's identification to connect the accused with the offence.'**

10.3. Further, in the case of **Chimbini v The People**[16] they went on to point out as follows:

> **'Most important among the factors to be taken into account is whether the witness knew accused prior to the incident; there is the greatest difference between recognising someone with whom one is familiar, or at least whom one has seen before, and seeing a person for the first time and attempting to recognise him later from observations made in circumstances which may be charged with stress and emotion.'**

10.4. Also worth noting, is what they said in the case of **Love Chipulu v The People**[17], it was held that:

> **'Where the circumstances of an attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had been patronising the same bar as an accused for the past nine months does not render an identification safe.'**

10.5. The evidence that was before the trial judge indicates that James Kumwenda had the opportunity to observe the appellant and others who were assaulting Collins Jere. Though it was at night, there was enough lighting and he was able to describe what went on in sufficient detail.

10.6. We are satisfied that on the evidence that was before him, the trial judge was entitled to rule out

the possibility of an honest but mistaken identification.

10.7. Since the quality of identification evidence was satisfactory, we accept Mrs. Mwamba-Besa's argument, that there was no need for James Kumwenda's evidence to be corroborated.

10.8. We find no merit in this ground of appeal and we dismiss it.

11. VERDICT

11.1. Though we have allowed the second ground of appeal, we are satisfied that the case against the appellant was proved beyond all reasonable doubt.

11.2. We find no merit in the appeal against conviction and we dismiss it. We also uphold the sentence imposed by the trial judge.

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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT

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P.C.M. Ngulube
COURT OF APPEAL JUDGE

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M.J. Siavwapa
COURT OF APPEAL JUDGE