

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

APP NO.224/2020

BETWEEN:

KAUMBA SITENGE

AND

THE PEOPLE



APPELLANT

RESPONDENT

***Coram: Kondolo, SC, Banda-Bobo and Muzenga JJA
On the 22nd day of September, 2021 and 25th March, 2022.***

For the Appellant: Mr. C. Siatwinda, Legal Aid Counsel- Legal Aid Board

For the Respondent: Mrs. M. Miyoba-Chizongo, State Advocate, National Prosecutions Authority.

JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court

Cases referred to:

1. *Angel Chibesa, Abel Banda v The People* (Supreme Court of Zambia Appeal No. 46 of 2015)
2. *Whiteson Simusokwe v The People* (SCZ No. 15 of 2002)
3. *Katebe v The People* (1975) ZR 12 (SC)
4. *Nzala v The People* (1976) ZR 221
5. *Valentine Shula Musakanya v The Attorney General* (1981) ZR 1 (S.C)
6. *Peter Yotamu Hamenda v The People* (1977) ZR 184
7. *Kambarage Mpundu Kaunda vs. The People* (1990/92) Z.R. 91
8. *Nyampande and Another v. The People* (1988 – 1989) ZR 163
9. *Simon Malambo Choka -Vs- The People* (1978) ZR 243

10. *Wilson Mwenya v. The People* (1990) S.J (S.C.)
11. *Ilunga Kalaba and John Masefu v. The People* (1981) ZR 102

Legislation referred to:

The Penal Code Chapter 87 of the Laws of Zambia

1.0. INTRODUCTION

- 1.1. This appeal arises from the judgment of Mweemba,J delivered in Mongu on 12th June, 2019.
- 1.2. The Appellant, Kaumba Sitenge, was convicted of murder, contrary to **section 200 of the Penal Code**, Chapter 87 of the Laws of Zambia and subsequently handed the ultimate sentence for a capital offence of death.
- 1.3. It was alleged that the Appellant on 8th March, 2019 at Limulunga, in the Limulunga District of the Western Province of the Republic of Zambia, murdered Alibandila Namiluko.

2.0. EVIDENCE IN THE COURT BELOW

- 2.1. The appellant's conviction was based on the evidence of four witnesses, namely **Mubukwanu Mubukwanu**, PW1; **Lungowe Nawa**, PW2; **Likezo Kutumba**, PW3 and **Detective Sergeant Syachuya Collins**, PW4.
- 2.2. The evidence of PW1, who was the brother to the deceased was that, he received a phone call informing him that his younger brother was dead. He found his brother's body between Lubili

area and Nasitoko village. He said he found the deceased's body lying face down, covered in blood, and that the body was wet, despite no rain having fallen that day. He testified that he was told by a child in that area that, the deceased was chased from PW2's court yard, and that he found the body of the deceased laying in PW2's court yard. He said that after gathering that information, and speaking to PW2 and her parents, who denied the allegation, he decided to call the officer in charge at Limulunga police station.

2.3. He said after investigations, the officer informed him that they had received information that there was a man who had beaten the deceased who had been in PW2's house. He testified that they proceeded to Limulunga Hospital where the body was deposited into the mortuary. He testified that a postmortem was conducted at Lewanika General Hospital and it revealed that the deceased had been beaten up badly such that, there was blood in his skull, skin, and bruises on both of his ribs.

2.4. PW2 was a former girlfriend to the Appellant, who testified that on the fateful night of 8th March, 2019, the deceased came from Machu drunk and staggered into her court yard whilst the Appellant was inside her house. She testified that the deceased was asking for alcohol, and, irritated with the noise outside, the

accused came out from her house and told the deceased to leave, but when there was no response, he launched into kicking him in the ribs until he fell to the ground. She said at this point, she observed that the deceased had become powerless, and that is how she called her brother PW3, to come and help. That her brother advised that they give the deceased time to rest since he was drunk. PW2 said after PW3 left, the accused got some water and poured it on the deceased and they proceeded to go back into her house to sleep, leaving the deceased laying outside with water poured on his body. She said that after some time, the accused left the house without explaining where he was going, and took a considerable time before he came back. Sometime later, she heard wailing from a nearby road and she went out to the road side, where the wailing was coming from, and that is when she realized that the deceased was not where he had been left sleeping. She told court that the accused left her without bidding her farewell. She said she when she got to the road side, where the wailing was coming from, she discovered that it was the deceased who was found dead, lying near the road.

2.5. It was her evidence that after the police officers arrived, a group of people including herself were questioned and she was asked to

lead the police officers where the accused stayed after which he was apprehended. It was her testimony that after the accused was apprehended, the police kept them in detention for six days.

2.6. In cross-examination PW2 confirmed that she was detained for six days alongside Kutumba Likezo, Mwaala Wakumelo, Muleta Mwaangala and Liyali Liyali. Further, that it was only after her uncle, a Mr. Moola came to visit her at the holding cell, that he advised her to tell the truth because the deceased was in her court yard and that she knew what had caused his death, that she told them about the incident.

2.7. PW3, **Kutumba Likezo**, told the court that he knew the accused as he had been his classmate, and that he had heard a rumor that his sister (PW2) and the accused were in a relationship. He said the night of the 8th March, 2019 after supper, PW2 called him to go to her place to help her lift the deceased because, he was in a drunken state. He said he lit his torch and observed that the accused's clothes were wet. He said he advised PW2 to give the deceased time to rest because of his drunken state. He said that the following morning around 5:00 hours, he heard people crying along the roadside, and when he went to observe what was happening, he discovered that the deceased was lying face down

by the road side, and it was the same person that had been in his sister's courtyard the night before. He explained that people then informed the deceased's relatives of what they found and that after the deceased's relatives arrived, they in turn, called the police. He narrated that he told the police his version of the story, how his sister called him over and the state in which he found the deceased. After that, he said they were all put in a police vehicle to go and look for the accused who was later found and apprehended. He explained that all the witnesses were taken to the police station to help with investigations as well as to protect them from the deceased's relatives. He testified that they were only released six days after his sister revealed her version of the events.

2.8. In cross examination PW3 confirmed that when PW1 carried out his investigations, all the adults denied knowing the whereabouts of the deceased the night of the incident because they feared the manner in which the deceased relatives had approached them.

2.9. PW4, the arresting officer, testified that on 9th March, 2019 he received a call from PW1 regarding the murder of his brother. His evidence was that the deceased sustained bruises on his left ear, left arm, leg and that blood was oozing from his mouth and nose. He testified that an unknown instrument was used and that this

act happened on the 8th March, 2019 between Nasitoko village and the Lubili area of Limulunga district of the western province. His evidence was that in his investigations, he was told that PW2 had been in a love relationship with the accused since November, 2018 and that the accused person used to spend nights at her place. He testified that on the 8th March, 2019 the accused person had visited her and she narrated to him what had transpired that fateful night.

2.10. It was PW4's testimony that he collected the witnesses and proceeded to Makapaila area where the police apprehended the accused person. His evidence was that he attended the postmortem at Lewanika General Hospital Mortuary in the presence of PW1 and the postmortem results revealed that the deceased died as a result of internal injuries to the chest and head.

2.11. In his further evidence, PW4 narrated that he detained PW2 and PW3 for safety purposes following the outrage of the deceased's relatives in the village. He stated that the people in Nasitoko village were very annoyed that their relative had died and it was difficult to carry out any form of investigation. His testimony was that he then decided to save the witnesses lives by detaining them. In cross-examination PW4 confirmed that he did not carry out

investigations because the people in the village were not cooperative.

2.12. In his defence, the accused testified as DW1 and on his own behalf, and called two witnesses. He testified that around 21:00 hours on 8th March, 2019, he started off from Nasikela village to Lubili, and people saw him. He explained that when he reached Nasitoko village around 23:00 hours, he went to Mr. Liyali's house where he had left his shorts on 4th March, 2019 after doing some piece work. Unfortunately for him, Mr. Liyali did not open the door, and that is how he proceeded to PW2's house which was only a distance of seven meters away. That eventually, PW2 opened the door and he narrated his dilemma to her, and that is how she allowed him to sleep over. He said around 04:00 hours, he went back to Mr. Liyali's house and collected the shorts. He went back to his village. That around 12:00 hours, and to his surprise, he saw police officers who took him out of his house and handcuffed him. He said he noted that the police had come with Mwangala Likezo and Kutumba Likezo. He testified that the police called in PW2 to implicate him but that, he denied PW2's story regarding what she narrated to the court, concerning him and the deceased.

2.13. In cross examination, DW1 said that it took just over two hours to go to Nasitoko village from where he lived. He admitted to being well known in Nasitoko village as he had worked there from November, 2018 to January, 2019. He confirmed that he left his village around 21.00 hours that night, and walked approximately two and half hours to collect a short that he did not want to use that night. He confirmed having left PW2's house around 04:00 hours but denied hearing people crying around that time. He said the male witnesses were detained together with him in the holding cell while the ladies were outside the door of the male cell.

2.14. DW2 testified that on the 8th of March, 2019 he was at home with his grandson, the accused from 20:00 hours till 21:00 hours, having supper and chatting. After this interaction, the accused left and went to his uncle's place, one called Kashweka Arnold Sikeba. On the 9th of March, 2019, around 14:00 hours he saw a police vehicle and the police officers inquired about the accused. He testified that since he was the headman, he answered on behalf of all the villagers and showed the police the house where the accused lived. It was his testimony, that the accused cooperated and was shortly thereafter apprehended by the police. DW2

claimed that the arresting officer lied by telling the court that the villagers were unruly when this was not the case.

2.15. In cross examination DW2 said that he was with DW1 for ten minutes before he left to go to his uncle's place and that he and his wife retired to bed later on.

2.16. DW3 in his testimony said that at 19:15 hours, the accused knocked at his door, and they had supper together. He said they parted ways around 19:45 hours when the accused went back to DW2's house. He said he took a bath and DW1 came back from his grandfather's house around 21:16 hours, and that is how they continued discussing until 21:36 hours. He testified that they bid farewell to each other and that on 9th March, 2019 around 06:30 hours, the accused passed through his house. Around 14:00 hours the same day, police officers went to inquire about the accused, and then apprehended him. DW3 later found out from the police station that he was apprehended in connection with a murder case.

2.17. In cross-examination, he said around 21:26 hours, he and the accused took food to his father's place and at 21:36 hours, the accused and him parted ways to go and sleep.

2.18.DW4 testified that on 9th March, 2019 his wife called him to let him know that the accused had been picked up by the police and he was asked to go to Limulunga police station where he heard people talking about a person that had been murdered. He was then informed that the accused had been detained in connection with the murder. He testified that on 14th March, 2019 while delivering breakfast for the accused, he met a man by the name of Mr. Moola and a lady by the name of Lungowe Nawa. He told the court that he heard Mr. Moola encouraging PW2 to inform the police that it was her boyfriend who had killed the deceased person in this matter.

3.0. DECISION OF THE LOWER COURT

3.1. After considering all the evidence before him, the trial judge made the following findings of fact:

3.2. That the testimonies of the accused person and his witnesses were marred with inconsistencies and was unsafe for the Court to rely on. He found that the accused person failed to discharge the evidential burden of proof. He found that the failure by the investigating officers to investigate the accused's alibi regarding what time he was at village and not with PW2 did not prejudice the defence, because the accused and his witnesses conspired to

fabricate the story that the accused was on 8th March, 2019 between 19:00 hours and 21:36 hours at his village and not PW2's village. Thus, he found that the veracity of the prosecution's evidence that, the accused assaulted or beat the deceased, could not be doubted.

3.3. That the analysis of the evidence before him revealed that there was some nexus between the contents of the medical report and the assault committed by the accused on the deceased. He found that there was no break in the chain of causation and neither was there any intervening factor which was brought to the Court's attention that could have caused the death of the deceased. He found that the deceased death was caused by the unlawful act or assault committed by the accused.

3.4. That the accused had malice aforethought when he assaulted the deceased because of the grievousness of the injuries inflicted on the deceased by the accused as described in the medical report. He further accepted PW2's evidence that during the night he slept at her house, and he left the house when everybody was sleeping, and took a considerable time before getting back to the house. According to the trial Judge, his absence from the house pointed to an inference that he went to remove the deceased's body from

PW2's courtyard and dump it near the path to the village, 50 meters away. The trial judge was satisfied beyond reasonable doubt that the prosecution had made out the case of murder against the accused. He found the accused guilty as charged and convicted him of the offence of Murder contrary to **Section 200** of the Penal Code of the Laws of Zambia. He then meted out the ultimate sentence for the capital offence of murder.

4.0. **APPEAL TO THIS COURT**

4.1. The Appellant, being dissatisfied with the lower court's judgment, has appealed against both conviction and sentence, advancing three (3) grounds of appeal, namely:

- (1). The learned Trial Court erred in law and fact in convicting the Appellant of murder and sentencing him to death when malice aforethought was not proven by the Prosecution beyond reasonable doubt;
- (2). The Trial Court erred in law and fact when it sentenced the Appellant to death when there was evidence of extenuation (sic) revealed by the record
- (3). The learned trial court erred in law and in fact in making a finding that the Appellant was not prejudiced by the failure to investigate his alibi by the arresting officer.

5.0. **THE ARGUMENTS IN SUPPORT**

5.1. Mr. Siatwinda, Counsel for the Appellant, filed Heads of Arguments in support, on which he relied. In ground one, the argument was that malice aforethought was not proven by the prosecution. His contention was that the Appellant, and PW2 were romantically involved, and the deceased in his drunken stupor, had a confrontation with PW2, which then resulted in the Appellant coming to control the commotion to protect his lover. Additionally, Counsel argued, that the Appellant attempted to resuscitate the deceased with water after kicking him. In support of the foregoing, reference was made to the case of **Angel Chibesa, Abel Banda v The People**¹. Counsel's contention was that, this was a proper case in which a conviction of manslaughter could be substituted because the prosecution failed to establish that the Appellant intentionally caused the death of the deceased.

Counsel further argued that the Prosecution's key witness, PW2, had a motive to falsely implicate the Appellant, because she had a confrontation with the deceased. This was compounded by the fact that PW2 spent six days in the police cells as a suspect in relation to the death of the deceased.

5.2. In ground two Counsel argued that there were extenuating circumstances because PW2 and the Appellant were in a romantic relationship. He contended that when the deceased arrived in a drunken stupor, and kept on troubling PW2, it gave rise to suspicion and eventual beating by the Appellant. Reference was made to the case of **Whiteson Simusokwe v The People**² wherein it was held that a stable relationship of intimacy can be treated on the same footing as a married person. Counsel further contended that given the relationship between the Appellant and PW2, her pleas for help was provocative, such that the defence of provocation arises and that if the court finds that, that defence fails, then it ought to be considered as an extenuating circumstance.

5.3. In ground three, Counsel argued that the record of proceedings show that PW4, the arresting officer confirmed that the Appellant told him that on 8th March, 2019 he was at his village Naskela with some people. However, PW4 did not interview any person to dislodge his alibi. His argument was that the failure by the prosecution to dislodge the accused alibi cannot be cured by the inconsistencies of the defence witness' testimonies because the burden of proof falls on the prosecution. To

buttress, reference was made to the case of **Katebe v The People**³. Counsel argued that, it was a dereliction of duty by PW4, the arresting officer when he failed to investigate the alibi and therefore, Counsel prayed, that the Appellant be acquitted of the offence of murder.

5.4. In summing up, Counsel prayed that this Court acquits the Appellant of the offence of murder and set him at liberty forthwith as the Prosecution's evidence did not prove the element of malice aforethought and that his alibi was not dislodged by way of investigation.

6.0. **ARGUMENTS IN OPPOSITION**

6.1. In response, the Respondent's counsel Mrs. M.M. Chizongo filed heads of arguments on 22 September, 2021. In response to ground one, she submitted that the Prosecution had proved its case beyond reasonable doubt that the Appellant had the intention to kill the deceased. She argued that in terms of **section 204 of the Penal code**, intention to do grievous harm to the victim or mere knowledge that the act or omission causing death will probably cause the death of or cause grievous harm to the victim was sufficient to establish malice aforethought.

She said this was the case, even if such knowledge was accompanied by indifference as to whether death or grievous bodily harm is caused or not, by a wish that it may not be caused. She strongly contended that the injuries on the deceased showed that the assault was done in such a gruesome manner that the only conclusion or inference is that the motive was to kill within the meaning of **Section 204 (B) of the Penal Code**. She added that the fact that the Appellant attempted to cover his unlawful deed by moving the body of the deceased from where he was assaulted, showed that his intention was to end the life of the deceased. Counsel added that the case cited by the Appellant, of **Angel Chibesa, Abel Banda v The People**¹ was distinguishable from the current case because in the aforementioned case, the deceased was assaulted for being an intruder not known to the person who assaulted him. Further that the assault was done by more than one person, such that the cumulative effect of the assault was that it resulted in multiple injuries. She argued that in casu, the deceased was not an intruder, because he was known by PW2 and that the deceased was in a drunken state. She contended that, if the deceased was disturbing the peace, there were other ways in

which he could have been evicted, rather than resorting to kicking him in the ribs until he fell to the ground unconscious. She submitted that the Appellant therefore had the motive to end the life of the deceased. Counsel's contention was that the lower court rightly convicted the Appellant for the offence of murder.

6.2. Mrs. Chizongo further contended that PW2 had no motive to falsely implicate the Appellant and that her detention was not because she was a suspect in the matter but as PW4, PW3, and PW2 testified, they were incarcerated because of her failure to cooperate with the investigations. She argued that there was no confrontation between PW2 and the deceased and that what would have categorized her as a suspect witness was if the confrontation was between her and the Appellant. Her submission was that the lower court was thus on firm ground when it convicted the Appellant for the offence of murder and sentenced him to death. She prayed that this court dismisses ground one for lack of merit.

6.3. In ground two Counsel disagreed with Counsel for the Appellant when he said that, if this Court should uphold the conviction of murder, it should find extenuation, as the record reveals that

the Appellant had a romantic relationship with PW2 who was troubled by the deceased giving rise to suspicion and eventual beating. She argued that the only reason the Appellant came outside was because the deceased was making noise, and that when the Appellant asked the deceased to leave, he did not respond. According to Counsel, this infuriated him, and hence the Appellant beat up the deceased. She added that this piece of evidence was not challenged. She further argued that the case of **Whiteson Simusokwe v The People**² cited by Counsel for the Appellant, did not apply in casu, as no defence of provocation was ever raised by the Appellant during trial. She thus argued that, the Appellant could not put up the defence of provocation whether expressly or impliedly. She contended that there was nothing on record to show that the deceased had so provoked the Appellant to the extent that the only retaliation was to kick the deceased severely, and end up killing him.

6.4. Counsel argued that contrary to Counsel for the Appellant's assertion, PW2 did not shout for help, but that the Appellant came out of the house on his own volition and attacked a harmless person, the deceased, as shown on the record at page 41 of the record of proceedings from lines 5-15. It was Counsel's

contention that there was no provocation and therefore the principles of failed provocation in this matter cannot apply.

6.5. As regards ground three, Counsel submitted that the trial court was on firm ground when it made a finding of fact that, there was no prejudice suffered by the Appellant by the failure to investigate the alibi. She argued that the record of proceedings on pages 71 and 76, lines 17 to 25 and line 4 did not suffice to be detailed information for one to say that a proper alibi had been put forth so as to enable the police investigate. Counsel referred to the case of **Nzala v The People**⁴ in support of the aforementioned. She argued that the foregoing case places a duty on the police to investigate an alibi as well as to adduce evidence disproving it, on the prosecution. She argued that the qualification to investigating the alibi hinges on the duty of the accused to give the police detailed information of such alibi in order for them to effectively investigate.

6.6. Counsel argued that despite the Appellant calling some of his alibis to testify on his behalf, the alibis did not cover the whole stated period. She further argued that there were glaring inconsistencies with the alibis of DW2 and DW3 which only left an inference that the Appellant and the witnesses fabricated

their stories to cover up the Appellant's criminal actions. The case of **Valentine Shula Musakanya v The Attorney General**⁵ was referred to.

6.7. Counsel further submitted that, all efforts were made to interview some people but all was in vain. She argued that it was PW4's testimony that the people in the village were not persons willing to give statements on behalf of the Appellant. Therefore, Counsel submitted, this did not amount to dereliction of duty as it was impossible to investigate further alibis. She submitted that in the event that this court found that there was dereliction of duty, the prosecution evidence was so overwhelming so as to offset any prejudice which might have arisen as a result of such dereliction. Reference was made to the case of **Peter Yotamu Hamenda v The People**⁶. Counsel prayed that, guided by the cases submitted above, this court should dismiss the appeal.

7.0. **DECISION OF THIS COURT**

7.1. We have carefully considered the evidence adduced during trial in the lower Court, the Judgement sought to be assailed, and the submissions by counsel for each party.

- 7.2. The contention in ground one by the Appellant is twofold. Firstly, that malice aforethought was not proven by the prosecution. Secondly, that PW2 who was the star witness, had a motive to falsely implicate the Appellant because she was detained for six days in police cells as a suspect in relation to the death of the deceased.
- 7.3. The Respondent on the other hand contends that the prosecution has proved its case beyond reasonable doubt because the injuries suffered by the deceased show that the Appellant intended to kill the deceased, because the assault was done in such a gruesome manner. Further, that the Appellant's act of moving the body of the deceased out from PW2's premises all point to malice aforethought. Counsel argued that PW2 had no motive to falsely implicate the Appellant and that her detention was not because she was a suspect witness but that she was incarcerated because of her failure to cooperate with investigations.
- 7.4. Malice aforethought relates to the state of mind of the accused person at the time he caused the death of the deceased. By **section 204 of the Penal Code** "malice aforethought" is expressed to include certain specific intents and knowledge on an accused's part. So far as this case is concerned, to establish

"malice aforethought", the prosecution had to prove that the accused either, had an actual intention to kill or to cause grievous harm to the deceased, or that he knew that what he was doing would likely cause death or grievous harm to the deceased.

7.5. The question we ask ourselves is, whether the Appellant intended to kill the deceased and whether the learned trial judge addressed his mind to whether the injuries sustained by the deceased were as a result of the Appellant's action of allegedly kicking the deceased. The learned trial Judge at page 161 of the record of proceedings, lines 5-20 made a finding of fact that the Appellant did have malice aforethought because he believed that the Appellant assaulted the deceased, and that this could be inferred from the grievousness of the injuries as described in the medical report and based on the evidence of PW2, the key witness.

7.6. In the present case, we agree with Counsel for the Appellant that there was no malice aforethought by the Appellant. As **sections 200 and 204 of the Penal Code** shows, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement. We do not gather from the facts of this case that there was a deliberate or an obvious intention by the Appellant to

kill the deceased. Indeed, PW2 testified that it was the Appellant who kicked the accused on the fateful night of 8th March, 2019 but we do not agree that it was the intention of the accused to harm or cause grievous harm to the deceased bearing in mind that the deceased was in a drunken stupor and causing commotion in PW2's homestead. In our view, it could not have been the intent of the Appellant that the kicking he was occasioning on the deceased would result in his death. Further and contrary to what the lower Court said, there is no evidence to show that the accused is the one who moved the body to the roadside. It is therefore our view that malice aforethought was not proved.

7.7. Moving on to the question of whether there was false implication, the case of **Kambarage Kaunda v The People**⁷, is pertinent, where the Court held that:

“Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses. The Court should therefore warn itself against the danger of false implication of the accused, and go further to ensure that the danger has been excluded”

Further in the case of **Nyampande and Another v The People**⁸, the Court held that:

“In the case where the witnesses are not necessarily accomplices, the critical considerations are not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, they may have had a motive to give false evidence. Where it is possible to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe.”

In the case of **Simon Malambo Choka v The People**⁹ the Court held that:

“A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and plausibility of his evidence. That “something more” must satisfy the Court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.”

Further, where a witness has also been detained, guidance was given in the case of **Wilson Mwenya v The People**¹⁰ where it was held that:

“(i)Where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence needs corroboration.”

7.8. A perusal of the record of appeal at page 143 line 5 and 10 of the judgment the trial Court had this to say regarding implication:

“I find therefore that the allegation that Mr. Moola told PW2 to implicate the accused to be unfounded.”

7.9. The above statement however reveals that the court did not elaborate why it did not believe the allegation. In our view the learned trial Judge did not address his mind to whether or not PW2 could properly be treated as a witness with her own possible interest to serve. The learned trial Court did not state whether he found something more to corroborate the evidence before him.

7.10. The judge should have been on high alert that PW2 was a witness with a possible interest to serve. It was imperative that PW2's evidence be corroborated because she was a witness who, because of the particular circumstances of the case, may have had a motive to give false evidence. There needed to be something more to exclude the danger of false implication, other than believing PW2's evidence solely. There is nothing on record that shows that her evidence was corroborated.

7.11. Further, the record of appeal reveals that PW2 had been detained at the police station for six days after the apprehension of the Appellant. As per guidance given in the **Wilson Mwenya** case, PW2

was detained in connection with the incident that happened at her house. The record clearly shows that at the point of apprehension, she did not reveal to the police immediately the events that had happened the night before. We have no difficulties in holding that PW2 was a person with a possible interest of her own to serve, as a result of being detained in connection with the same incident. She agreed in cross examination that, she only implicated the accused and told the police the details of what transpired after her uncle, Mr. Moola visited her in the cells, and told her to tell the truth (see page 49, line 22 Record of Appeal). On the other hand, PW3 told the Police immediately they were apprehended, of what had happened and what he had seen in his sister's courtyard (see page 57, line 25 and p 58, line 2 -3). He too said they were only released after his sister revealed her version of the story. PW2 had an opportunity, while in detention, and before her uncle went to persuade her, to tell her side of the story, but failed to do so. She did not proffer any reason for not doing so. She stayed in the police cells for six days during which period she never said anything.

7.12. From the authorities cited above, and our analysis of the evidence adduced in the lower court, we are of the firm view that the danger

of false implication in this case has not been excluded. It is our view, that had the trial Court properly directed its mind to the possibility of PW2 being a witness with a possible interest to serve, in the circumstances of the case, where she was detained for six days, did not report what she knew about the case, but only did so after being prompted, he would not have relied on her evidence alone to convict the Appellant. The fact of her being detained in connection with the offence rendered her a suspect witness. The effect is that a court in those circumstances cannot convict on her evidence alone. Her evidence cannot stand alone, as it is not supported by any other evidence. We find no independent evidence on record corroborating the evidence of PW2. We find merit in this ground

7.13. Ground two was argued in the alternative. Having found as we have in ground one, it is our view that it would be otiose to proceed to consider this ground.

7.14. In ground three, Counsel for the Appellant contends that the learned trial court erred in law and fact when he failed to make a finding that the Appellant was not prejudiced by the failure to investigate his alibi by the arresting officer.

7.15. Counsel for the Respondent vehemently contends that there was no prejudice suffered by the Appellant by the failure of the police to investigate the alibi. She went on to state that the record of proceedings shows that the Appellant did not really put forth an alibi and that in any case the prosecution's evidence was so overwhelming so as to offset any prejudice which might have arisen as a result of the dereliction.

7.16. Once the accused raises an alibi, it is up to the prosecution to negative that alibi. In the case of **Katebe v. The People**³ it was held that:

“Where a defence of an alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on the accused person to establish his alibi; the law as to the onus is precisely the same as in cases of self defence or provocation.”

7.17. PW4 testified in his evidence that he detained PW2 and PW3 for safety purposes following the outrage of the deceased's relatives in the village. He stated that the people in Nasitoko village were very annoyed because their relative had died. It was his testimony that it was difficult to carry out investigations. It is clear from PW4's testimony that he did not go to the village to investigate the alibi raised because the villagers were hostile towards the police. That being the case, it is our considered view that this should not have

stopped the investigating unit from going back once the villagers had cooled down. The law as per the case of **Illunga v The People**¹¹ states that the prosecution takes a serious risk if they do not adduce evidence from witnesses who can discount the alibi, unless the remainder of the evidence is itself sufficient to counteract it.

7.18. In casu, the trial Judge on page 147 of the record of proceedings particularly in lines 25-35 observed that the failure of the investigating officer to investigate the Accused's alibi that he was still at his village at the time PW2 was having a confrontation with the deceased did not prejudice the defence because the accused witnesses conspired to fabricate the story that the accused was on 8th March, 2019 at his village. In other words, the trial judge was stating that this evidence was sufficient to counter the fact of the failure of the investigative officers to investigate the Appellant's alibi.

7.19. We do not agree with the stance taken by the trial judge, because the whole process was marred with dereliction of duty by the police officers. It is our view that the Prosecution failed to remove or eliminate any reasonable possibility that the Appellant was not at PW2's premises at the relevant time because of the manner in

which the evidence before the Judge was presented. It is a serious impediment to the delivery of effective and efficient criminal justice where crimes are not prosecuted because of a lack of credible evidence, mainly as a result of poor investigations carried out by investigative officers. The inconsistencies in the defence's witnesses' testimonies are irrelevant on the issue of an alibi. What is important is to show that the police investigated and discounted the alibi raised. We are of the view that there was dereliction of duty which prejudiced the Appellant. We find merit in this ground.

7.20. We overall, find that the conviction is not safe and cannot be upheld. We find merit in the Appeal. The conviction is therefore quashed; the sentence is set aside, and the Appellant is set at liberty forthwith.

.....
M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

.....
A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

.....
K. MUZENGA
COURT OF APPEAL JUDGE