

BETWEEN:

MASTONE SIMWEENE

1<sup>st</sup> APPELLANT

MUYUNDA MUFUNGULWA

2<sup>nd</sup> APPELLANT

AND



THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Sichinga, JJA

On 24<sup>th</sup> March 2021 and 23<sup>rd</sup> March 2022

For the Appellant: M. Makinka, Senior Legal Aid Counsel, Legal Aid Board

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

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## J U D G M E N T

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Mchenga DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Shawaz Fawaz v Proper Chilekwa v The People [1995-1997] Z.R. 3
2. Barrow and Young v The People [1966] Z.R. 43

3. Yokonia Mwale v The People SCZ Appeal No. 285 of 2017
4. Saluwema v The People [1965] Z.R. 4
5. Chabala v The People [1976] Z.R. 14
6. Phiri and Others v The People [1973] Z.R. 4
7. The People v Phiri [1968] Z.R. 132

### LEGISLATION REFERRED TO:

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

### 1. INTRODUCTION

- 1.1. The appellants, appeared before the High Court (Maka-Phiri, J.), jointly charged with the offence of murder, contrary to **section 200 of the Penal Code**. The allegation was that on 16<sup>th</sup> March 2018, at Choma, they murdered Lemmy Mapeke.
- 1.2. They denied the charge, and the matter proceeded to trial. At the end of the trial, they were both convicted for the offence, and condemned to suffer capital punishment.
- 1.3. They have appealed against the conviction.

## 2. CASE BEFORE THE TRIAL JUDGE

- 2.1. On 8<sup>th</sup> March 2018, members of the neighbourhood watch group, visited Remmy Mapeke Muleya's house, in Choma. They informed him that they were looking for his son, Lemmy Mapeke, in connection with a theft at Macha Hospital.
- 2.2. On 11<sup>th</sup> March 2018, Remmy Mapeke Muleya, approached the police and led them to where his son was hiding. He was apprehended, after being flashed out of a house where he was hiding, with tear-smoke. The apprehension, was without incident, and he was taken to Macha Police Station.
- 2.3. Obvious Muleya, a member of the neighbourhood-watch group, and a relative of Lemmy Mapeke, heard of the apprehension, and went to Macha Police Station the following day (on 12<sup>th</sup> March 2018). He found him in the 1<sup>st</sup> appellant's office crying, in the company of the 2<sup>nd</sup> appellant and two others. Also present, was

Maliya Mukaza, Lemmy Mapeke's girlfriend. He saw the 2<sup>nd</sup> appellant beating Lemmy Mapeke with a metal rode.

2.4. The fact that Lemmy Mapeke was beaten by the 2<sup>nd</sup> appellant with a metal rode, was confirmed by Maliya Mukaza. She also saw the 1<sup>st</sup> appellant assault him. The 1<sup>st</sup> appellant used a short-button and he was beating him while he was lying on a table, handcuffed. She also suffered beatings at the hands of the appellants.

2.5. On the 15<sup>th</sup> of March 2018, Ezekiel Muchimba was detained and placed in the cells at Macha Police Station. He found Lemmy Mapeke in the cells. He observed marks on his legs and hands. He also observed bruises on his body.

2.6. Lemmy Mapeke, died the following morning while in the cells. On being alerted of the death, the 1<sup>st</sup> appellant and other police officers took his body to Macha Hospital, where they claimed that he was very ill, but alert hospital officials noticed that he was dead.



- 2.7. A postmortem, conducted by Dr Taras on 21<sup>st</sup> March 2018, established that Lemmy Kapeke died after suffering a ruptured spleen. The doctor, also observed bruises and abrasions on the backside of his body, torso and both arms and legs.
- 2.8. Both appellants denied assaulting Lemmy Mapeke. They claimed that he looked tired when they apprehended him. They also denied using tear-smoke, when they apprehended him.

### 3. GROUNDS OF APPEAL

- 3.1. Three grounds of appeal have been advanced in support of the appeal. It is contended that:
- 3.1.1. The trial judge erred when she convicted the appellants on the uncorroborated evidence of Maliya Mukazo and Obvious Muleya, who were suspect witnesses;
- 3.1.2. The trial judge erred when she rejected the appellants' defence that Lemmy Kapeke could have suffered a ruptured spleen, from a fall during his apprehension; and
- 3.1.3. The appellants should not have been convicted of murder because *malice aforethought* was not proved.

3.2. At the hearing of the appeal, we gave the parties timelines within which to file written submissions. At the time of writing this judgment, the only submissions that were brought to our attention, were those filed on behalf of the appellant.

#### 4. ARGUMENTS IN SUPPORT OF THE 1<sup>ST</sup> GROUND OF APPEAL

4.1. In support of the first ground of appeal, Mr. Makinka pointed out that although the trial judge rightly found that Maliya Mukazo and Obvious Muleya, were suspect witness, she erred when she convicted the appellants, on their uncorroborated evidence.

4.2. He referred to the case of **Shawaz Fawaz v Proper Chilekwa v The People**<sup>1</sup> and submitted that since Maliya Mukazo exaggerated the level of injuries she suffered and falsely claimed that the 1<sup>st</sup> appellant also assaulted Lemmy Mapeke, her evidence should not have been found to be credible.

4.3. Mr. Makinka also submitted that the trial judge, should have accepted the evidence of Obvious Muleya, a credible witness, that it was only the 2<sup>nd</sup> appellant, who beat Lemmy Mapeke. Based on the case of **Barrow and Young v The People**,<sup>2</sup> he urged us to accept the evidence of Obvious Muleya and find that only the 2<sup>nd</sup> appellant assaulted Lemmy Mapeke.

## 5. CONSIDERATION OF THE 1<sup>ST</sup> GROUND OF APPEAL

5.1. The first issue we will deal with, under the 1<sup>st</sup> ground of appeal, is the argument that Maliya Mukazo should not have been believed because she lied. It was pointed out that, while she claimed that both appellants assaulted Lemmy Mapeke, obvious Muleya, who was present at the time, said, only the 2<sup>nd</sup> appellant assaulted him.

5.2. It is not difficult to see why Maliya Mukazo's version of the event, was different from that of Obvious Muleya. Obvious Muleya found both Maliya Mukazo and Lemmy Mapeke in the 1<sup>st</sup> appellant's office, where they were being interrogated. These two witnesses

where not in that office, together, throughout the incident, for one to expect that they should have seen the same thing.

- 5.3. This being the case, it cannot, in our view, be said that Maliya Mukazo was not a credible witness, because her testimony was different from that of Obvious Muleya.
- 5.4. We will now deal with the argument that both Obvious Muleya and Maliya Mukazo, were witnesses with a possible interest of their own to serve, and that their evidence, required corroboration.
- 5.5. In the case of **Yokonia Mwale v The People**<sup>3</sup>, it was held that the mere fact that a witness is a relative, does not render them suspect. It is the particular circumstances of a case, that may render such witnesses suspect.
- 5.6. In this case, the trial judge noted the possibility that they could be witnesses with a possible interest of their own to serve, and ruled



it out after considering the circumstances of the case. We find no basis on which we can fault her for arriving at that conclusion.

- 5.7. This being the case, we find no merit in the 1<sup>st</sup> ground of appeal, and we dismiss it.

## 6. ARGUMENTS IN SUPPORT OF 2<sup>ND</sup> GROUND OF APPEAL

- 6.1. Coming to the 2<sup>nd</sup> ground of appeal, Mr. Makinka referred to the cases of **Saluwema v The People**<sup>4</sup> and **Chabala v The People**<sup>5</sup> and submitted that the appellant's claim that Lemmy Mapeke raptured his spleen, after falling, should have been accepted because it could reasonably have been true.

## 7. CONSIDERATION OF THE 2<sup>ND</sup> GROUND OF APPEAL

- 7.1. In her judgment, the trial judge noted that the apprehension of Lemmy Mapeke, was incident free and concluded that he could not have suffered a raptured spleen during his apprehension. We gave examined the evidence and find that that conclusion cannot be faulted, because it is supported by the evidence.

7.2. That being the case, there is no possibility that Lemmy Mapeke could have suffered a ruptured spleen during his apprehension, because of falling. In turn, the appellant's claim that it was the case, cannot reasonably be true.

7.3. Consequently, we find no merit in the 2<sup>nd</sup> ground of appeal and we and dismiss it.

## 8. ARGUMENTS IN SUPPORT OF 3<sup>rd</sup> GROUND OF APPEAL

8.1. The argument in support of the 3<sup>rd</sup> ground of appeal, was that in arriving at the conclusion that *malice aforethought* had been proved, the court should have gone beyond just considering that the appellants had severely assaulted Lemmy Mapeke. The case of **Phiri and Others v The People**<sup>6</sup>, was referred to, and it was submitted that, in the absence of evidence that the appellant's knew that the assault was likely to cause grievous harm, the trial

judge, should not have found that the appellants, had *malice aforethought*.

## 9. CONSIDERATION OF THE 3<sup>rd</sup> GROUND OF APPEAL

9.1. *Malice aforethought* is defined in section 204 of the Penal Code.

It is defined as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

9.2. In the case of *The People v Njobvu*<sup>7</sup>, it was held, *inter alia*, that:

“To establish “malice aforethought” the prosecution must prove either that the accused had an actual intention to kill or

to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.”

9.3. In this case, there was evidence, which the trial judge accepted, that Lemmy Mapeke, was beaten by the 1<sup>st</sup> appellant using a short-button, and the 2<sup>nd</sup> appellant was using a metal rode. At the time of the beatings, he was handcuffed to a table.

9.4. The trial judge found that the appellants had *malice aforethought*, because they should have known, that the beatings, were likely to cause death or grievous harm.

9.5. In the face of the evidence we have just recounted, it is our view that the trial judge was entitled to conclude that the appellants, had *malice aforethought*. We find no basis, on which we can fault her, for arriving at that conclusion.

9.6. We equally find no merit, in the 3<sup>rd</sup> ground of appeal, and we dismiss it.



10. VERDICT

10.1. Having dismissed all the three grounds of appeal, this appeal fails  
and we dismiss it.

10.2. We also uphold the sentences imposed on the appellants by the  
court below.



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C.F.R. Mchenga

DEPUTY JUDGE PRESIDENT



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F. M. Chishimba

COURT OF APPEAL JUDGE



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D.L.Y. Sichinga

COURT OF APPEAL JUDGE