

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 62/2021

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

MOSES ZWAU

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM:

Mchenga DJP, Sichinga and Muzenga, JJA

On 19th January, 2022 and 22nd April, 2022

For the Appellant : Ms. M. Nguluwe of Messrs Kabesha and Company

*For the Respondent: Mrs. C. Simwetachela-Mwila - State Advocate- National
Prosecutions Authority*

JUDGMENT

Sichinga, JA, delivered the judgment of the Court.

Cases Referred to:

- 1. Mwewa Murolo v The People (2004) ZR 207***
- 2. Roberson Kalonga vs. The People (1988 – 1989) Z.R. 90***
- 3. Simon Malambo Choka v The People (1978) ZR 243***
- 4. Chipango and Others v The People v The People (1978) Z.R. 304***

5. *Woolmington vs. DPP (1935) AC 462*
6. *Yokoniya Mwale vs. The People (2014) SCJ Appeal No. 285*
7. *DPP v. Kilbourne (1973) A.C 729*
8. *Donald Fumbelo v. The People (2013) S.C 476*
9. *Benwa and Another v The People (1975) ZR 1*

Legislation Referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

1.0 Introduction

1.1 This appeal is an appeal against the Judgment of the High Court (Kamwendo J.) delivered at Kabwe on 20th June, 2020. The appeal is against conviction. The appellant was convicted on one count of the offence of murder contrary to **Section 200 of the Penal Code¹** and was sentenced to 20 years imprisonment with hard labour.

2.0 The prosecution's case

2.1 In brief, the evidence in support of the prosecution's case was that according to Wezi Maambo (PW4) who is a businessman, on 25th September, 2019 between 20:00 hours and 21:00 hours, he received a phone call from the appellant, Moses Zwau, who informed him that he was on his way to Chirundu to see his child who was ill and hospitalized. The appellant requested some beer which he would collect. He stopped over at PW4's bar and collected four bottles of water instead of the beer before returning to his vehicle. A moment later PW4 received a call from the appellant. PW4 went outside to meet him.

2.2 The appellant complained that his firearm was missing from his vehicle, which he had left unlocked. He told PW4 that he suspected a young man he pointed at who was near his car. PW4 knew the young man. He was Xavier Chisoko. Xavier was apprehended by the appellant and questioned in public. This attracted some attention from members of the public who

started beating Xavier. The appellant in the company of PW4 then took Xavier to Prospect Police Station for interrogation.

2.3 PW5, Inspector Frederick Mayaba, testified that he was on duty when the appellant arrived at the station with Xavier. He saw the appellant withdraw a short baton from the mini armory and using it to repeatedly beat Xavier, demanding the return of his firearm as Xavier screamed for his life denying knowledge of the whereabouts of the missing firearm. At the station, the appellant and PW5 were joined by PW2, Constable Kapambwe Mulenga. He too equally testified to seeing Xavier being beaten by the appellant.

2.4 According to PW2, Xavier was taken outside the station by the appellant who threatened to shoot him if he did not reveal where his firearm was. Using a shot gun that PW2 had supplied to him, the appellant fired on the ground once. Xavier did not say anything. He fired a further three rounds. Still Xavier had nothing to say.

2.5 The gunshot sound attracted other officers residing in the police camp to come to the station. These included PW6 –

Constable Muziya Malambo, PW7 – Constable Julius Mumba, PW8 – Detective Constable Emmanuel Masanga and one Constable Masali. These witnesses gave a similar account, that they accompanied the appellant to Liteta in search of the deceased, George Bwembya. They were led by Xavier. They narrated to the court that when they got to Bwembya's house they remained in the vehicle guarding Xavier whilst the appellant went in the house. He emerged after a few minutes and returned in the house with a firearm.

- 2.6 The witnesses, PW2, PW6, PW7 and PW8 told the court that they heard three gunshots fired in the house. They returned to Prospect Police Station with Xavier and Bwembya, who were placed in the C.I.O's office. PW2 said the suspects were then made to lie in the corridor by the appellant before he began beating them. PW5 said the appellant beat them for a good 30 minutes. Thereafter, the suspects were limping to the C.I.O.'s office where they were made to lie on the table as the appellant went out. At this point PW2 and the other officers asked Xavier and Bwembya to reveal where they placed the gun.

They told them they would find the gun at Bwembya's house at Liteta behind the fridge. The officers went back to Liteta with the suspects and did not recover the firearm. They returned to Prospect Police Station with Xavier and Bwembya who were then placed in custody.

- 2.7 The following morning around 06:20 hours PW1 – Assistant Superintendent Cosmas Banda, the Officer-in-Charge at Prospect Station received a call from the appellant. He reported to him that the missing firearm had been found in his house at Kabwe. The appellant had forgotten where he had placed it. The appellant then revealed to PW1 that the two suspects were slightly injured. PW1 advised him to take them to the hospital. PW1 received a report that the suspects were not in good shape. He personally went to the station to check on them. They were unable to talk, walk or sit. PW1 then personally took Xavier and Bwembya to the hospital. The latter was pronounced dead on arrival. PW1 then went to the appellant's house. He recovered the appellant's firearm and

had him detained for the subject offence pending further investigations.

3.0 The defence

3.1 The appellant in his defence narrated how he found his firearm missing from his motor vehicle. He denied beating Xavier and stated that he was initially beaten by a crowd after he had apprehended him. He said he took Xavier to the Police Station. Then Xavier led police officers to the deceased's house.

3.2 The appellant said the deceased was pushed by a mob. He said he fired warning shots in order to disperse the unruly crowd. Thereafter, he took him to the police station.

3.3 The appellant denied beating the deceased or handling any firearm on the material day. He said he noted that the deceased was bleeding on the forehead whilst at the police station. His defence was that the deceased was beaten by the mob.

4.0 The decision of the court below

4.1 Upon analysing the evidence before him, the learned trial Judge found that the appellant had contact with the two suspects in his quest to recover the firearm which was allegedly stolen from him but found in his house. The lower court found that the appellant assaulted the two suspects and never took them to receive medical attention. He found that the appellant caused the deceased's death. He accordingly convicted the appellant and sentenced him to 20 years imprisonment with hard labour.

5.0 The appeal

5.1 The appellant was dissatisfied with the decision of the trial court, and seeks to assail the Judgment of the court below on the following grounds:

1. The trial Judge misdirected himself in law and fact in convicting the appellant of the offence of murder on insufficient evidence;

2. The nine police officers who were witnesses must be treated as witnesses with an interest to serve as they

were with the appellant at the given time and were in contact with George Bwembya; and

3. The trial court erred in law and in fact when it omitted to consider the discrepancies in evidence.

6.0 Appellants submissions

6.1 Ms Nguluwe, learned counsel for the appellant, relied on heads of argument filed on 12th January, 2022. Under the first ground of appeal it was submitted that the evidence on record did not demonstrate the appellant's alleged beatings or implicating injuries described on the postmortem report at pages 233-236 of the record of appeal. The appellant was convicted on the premise of the injuries sustained by George Bwembya.

6.2 It was submitted that the deceased, George Bwembya, died due to ***"sudden death due to ruptured brain aneurysm"*** as per post-mortem report. Counsel then invited us to consider the following questions:

1. What caused the death of George Bwembya?

2. *Was the cause of death consistent with the alleged beatings inflicted on George Bwembya by the appellant?*
3. *Was the lower court on firm ground convicting the appellant for the offence of murder?*

6.3 It was argued that in the lower court, the appellant was found to have caused the death of George Bwembya by inflicting beatings on him as per testimony of most prosecution witnesses. Reference was made to **section 200 of the Penal Code** *supra* which provides that:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

6.4 It was submitted that the standard of proof in criminal matters has been well and clearly established. The case of ***Mwewa Muroso v The People***¹ where it states that:

“.....the standard of proof must be beyond all reasonable doubt.”

6.5 Counsel submitted that the law does not provide for any possibilities, but clearly states all doubt a court can possibly have must be removed before it convicts.

6.6 It was argued that the postmortem report clearly gives the cause of death of George Bwembya as '*sudden death due to ruptured brain aneurysm*' which in simple terms means a sudden or unexpected brain rupture or sudden or unexpected brain bleed. That the said report further states that the deceased had external bruising on the upper and lower limbs, chest wall and trunk, a position PW10 confirmed in his testimony. Counsel contended that the report did not indicate and/or suggest that the deceased had died from the said external injuries nor did it indicate that the external injuries caused internal causation of death.

6.7 It was submitted the record clearly states and suggests that there was a mob or group of people that had gathered and participated in an assault on the now deceased. That the evidence led in the lower court as to the assault by the appellant was to mostly indicate that he was seen with P1 and

P3. We were urged to note that no finger prints were lifted from the exhibits that were purported to be used by the appellant in the alleged assault, which amounts to a dereliction of duty on the part of PW11. Reference was made to the case of ***Roberson Kalonga vs. The People***².

6.8 It was submitted that if the appellant had assaulted the deceased, that assault could not be distinguished from the assault inflicted on the deceased by the crowd or any other person. Therefore, it is unfair, unjust to generally conclude that the appellant caused the injuries which can neither be distinguished nor the time frame indicated as past events may have occasioned the same.

6.9 On the second ground of appeal, it was submitted that from the evidence produced in the lower court 9 witnesses who are all police officers gave evidence implicating the appellant even though contradictory at some points. Each of the 9 police officers were with the appellant at a given time and were in contact with the deceased. Therefore their evidence may be suspect and should have therefore been treated as evidence of

that witnesses with an interest to serve as they could have beaten the deceased. We were referred to the case of **Simon Malambo Choka v The People**³ the Supreme 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.”

6.10 And the case of **Chipango and Others v The People**⁴ where it was held that:

“Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once

a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded."

6.11 It was submitted that no independent evidence was brought forth to corroborate the evidence of the 9 suspect witnesses. From the questions posed to the court counsel contended that the answers are all be in the negative as evidence produced was purely conjecture. Reliance was placed on the case of ***Woolmington vs. DPP***⁵ which states when dealing with murder the prosecution must prove that the death was as a result of a voluntary act of the accused and of malice aforethought which in this instance the cause of death was nothing related to the appellant's acts.

6.12 On the third and final ground it was submitted that the evidence adduced by PW11 differed from the majority of evidence that was before the trial court apart from a major and important key evidence which was that Xavier Chisoko was with the deceased from the time of his apprehension. It was

argued that PW11's failure to produce Xavier Chisoko as a witness or giving a feasible explanation as to why this key evidence was not brought to court begs more questions than answers. Counsel was of the view that the omission of Xavier Chisoko's testimony would have brought independent evidence to the 9 witnesses who seemed to attest that the appellant assaulted the deceased and caused his death.

6.13 Counsel submitted that the standard of proof in criminal matters must be beyond all reasonable doubt.

6.14 We were urged to uphold the appeal, squash the conviction, and set the appellant at liberty.

7.0 Respondent's submissions

7.1 Mrs Simwatachela-Mwila relied on the respondent's heads of argument filed on 14th January, 2022. In response to the first ground of appeal it was submitted that the record shows that the appellant got a short button and started beating the deceased person. Further, that the record shows that the appellant inflicted injuries on the deceased person. That the

appellant stated that he did not witness members of the public beating the deceased. Therefore, the contention that the deceased was beaten by members of the public are misleading and must be dismissed.

7.2 The state submitted that the evidence available is that the appellant, and not the members of the public inflicted injuries on the deceased person. With reference to the evidence which the appellant referred to, it was submitted that the person who was beaten was Xavier Chisoko and not Bwembya, the deceased herein. It was submitted that the assertion by the appellant was misleading.

7.3 Counsel submitted that the trial court was on firm ground when it convicted the appellant on the grounds that the state had discharged its duty of proving the case beyond all reasonable doubt. Reliance was placed on the case of **Mwewa Muroño v The People** *supra* in which the Supreme Court held that:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and

consequently the guilty of the accused lies from the beginning to the end with the prosecution. The standard of proof must be beyond all reasonable doubt."

7.4 It was submitted that ground one should be dismissed for lack of merit.

7.5 With respect to the second ground of appeal the state submitted that this ground must equally fail and be dismissed. Reliance was placed on the case of ***Yokoniya Mwale vs. The People***⁶ where the Supreme Court held that:

"a conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim, provided the court satisfies itself that the witnesses before it could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve."

7.6 Further, the case of ***DPP v. Kilbourne***⁷ was referred to where Lord Hailsham pointed out that:

“The principles regarding the categories of suspect witnesses must be applied to a witness with a possible bias such as a relative. The question in every such case is whether the danger of relying on the evidence of the suspect witness has been excluded.”

- 7.7 It was submitted that the issue of a witness with an interest to serve does not arise in this case, as there is no bias of any kind. Counsel submitted that this ground should equally fail and be dismissed for lack of merit.
- 7.8 The appellant contends that the trial court erred in law and in fact when it omitted to consider the discrepancies in evidence. Further, that PW11 differed from the majority of evidence that was before the court apart from a major and important key evidence which was that Xavier Chisoko was with the deceased from his time of his apprehension.
- 7.9 In response to the final ground of appeal we were referred to the case of ***Donald Fumbelo v. The People***⁸, in which the Supreme Court stated that:

"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 consistency of the testimony. Hence, a lot of weight will be attached to the testimony of the witness if the witness starts showing at the earliest opportunity his version of the issue. In the case of a witness who is an accused person, it is 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 his version is an afterthought, and therefore less weight will be attached to such a version. Therefore, in a contest credibility against other witness, the accused is likely to be disbelieved."

7.10 It was submitted that the witnesses were all consistent on who inflicted the injuries on the deceased person and all pointed at

the appellant as the one who inflicted the injuries on the deceased person. The witnesses should therefore be treated as credible witnesses and not as contended by the appellant.

7.11 We were urged to dismiss the grounds of appeal for lack of merit.

80 The decision of the Court

8.1 We have carefully considered the judgment appealed against, the grounds of appeal, and the written and oral arguments advanced by both parties herein. We shall address the three grounds of appeal together as they are interrelated. The main issue to be determined in this matter, as we see it, is whether it can be said on the basis of the evidence on record that there was sufficient evidence to convict the appellant for the offence of murder.

8.2 In addressing the main issue, we will consider whether the appellant's violent assault on the deceased amounted to the legal definition of the offence of murder as set out in **section 200 of the Penal Code¹** and if not, whether this is a proper

case where the facts lend themselves to a lesser offence under ***the Penal Code*** *supra*.

8.3 In her oral submissions, Ms. Nguluwe stated that the appellant appealed against conviction only. However, should the justice of the case demand, we shall be duty bound to interfere with the sentence.

8.4 Counsel further submitted that death could not be caused by beating. She added that the final postmortem report was being awaited.

8.5 We have examined the postmortem report and it clearly gives the cause of the deceased's death as "*sudden death due to ruptured cerebral vascular aneurysm: 1. Intra-cerebral haemorrhage leading to respiratory failure; 2. Subarachnoid haemorrhage; 3. Stress syndrome.*" From our examination of the report these findings are inconclusive as to the cause of death since further results are awaited from blood samples and the deceased's stomach content.

8.6 According to the postmortem report the external injuries that the deceased suffered were bruising on the upper and lower

limbs, chest wall and trunk. In our view these injuries as highlighted by the postmortem report and the assault on the deceased with a short baton as seen by PW2 and PW5 in and of themselves demonstrate that the appellant did assault the deceased. However, the cause of death is not attributed to the assault that the deceased suffered.

8.7 Turning to the second question posed by the appellant's counsel, the appellant claims that the deceased was hit by members of the public. The learned trial court rejected this explanation and instead found that the deceased was not attacked by a crowd but was beaten by the appellant in his quest to recover a revolver allegedly stolen from him but which was subsequently recovered from his home.

8.8 In coming to the conclusion that it did, the learned trial court relied on the direct evidence from PW2 and PW5 who both witnessed the appellant beating the deceased and the other suspect with a short baton at Prospect Police Station. In cross-examination PW2 was hardly asked about the beatings he saw. Instead he was asked if he saw the crowd beat the

deceased and his response was in the negative. His evidence remained unchallenged. PW5 testified that he saw the appellant withdraw a short baton from the mini armory after he availed him the keys to it. Thereafter, he saw the appellant beating Xavier Chisoko. After the deceased was apprehended and brought to the station he heard the appellant beating the two suspects in the C.I.D general room. After thirty minutes he saw the appellant leading the two suspects who were limping. The witness testified that their condition had deteriorated. PW2 narrated to the court that after the beatings the suspects appeared weak. PW5 told the court that the appellant took the suspects to the C.I.D general room where he beat them for about thirty minutes. When they emerged from there the suspects were limping and appeared worse than before.

8.9 We note from the Judgment of the lower court that the learned Judge did not place reliance on the evidence of other witnesses. There is also evidence on record from the testimonies of PW7 and PW8. They heard the two suspects screaming as the appellant shouted at them in annoyance.

They both confirmed that the appellant was alone with the suspects at the time.

8.10 There is no doubt from the evidence we have highlighted that when the deceased and the other suspect were being beaten there were with appellant. In our view, the appellant's explanation that the deceased was assaulted by the crowd is not supported by the evidence on record. In addition, the postmortem report reveals the external injuries that the deceased suffered including bruising on the upper and lower limbs, chest wall and the trunk. We cannot fault the learned trial court for finding that the appellant is the one that assaulted the deceased.

8.11 The final question asked by the appellant's counsel was whether the trial court was on firm ground to convict the appellant of the offence of murder. We are alive to the provision of **section 181(2) of the Criminal Procedure Code²** which provides as follows:

"When a person charged with an offence and facts are proved which reduce it to a minor offence, he

may be convicted of the minor offence although he was not charged with it."

8.12 In the case of ***Benwa and Another v The People***⁹ the Supreme Court held:

"The test to be applied by the court in considering the exercise of its discretion to substitute a minor offence is whether the accused can reasonably be said to have had a fair opportunity to meet the alternative charge."

8.13 *In casu* having considered the evidence on record, we have no doubt that the appellant did have a fair opportunity to meet an alternative charge. We have already found from the evidence on record that the appellant assaulted the deceased and occasioned him actual bodily harm as revealed by the postmortem report. We accordingly find the appellant guilty of assault occasioning actual bodily harm contrary to **section 248 of the Penal Code**.

9.0 Conclusion

9.1 In view of the forestated, we have found merit in this appeal and we allow it. We therefore set aside the conviction of murder contrary to *section 200 of the Penal Code* and quash the sentence imposed on the appellant by the court below. Instead, we find the appellant guilty of assault occasioning actual bodily harm contrary to **section 248 of the Penal Code**. We have taken into account the fact that he is a first offender, a police officer who should uphold human rights and the circumstances of the case. The offence attracts a maximum sentence of five (5) years. We thus impose a sentence of twenty-four (24) months imprisonment with hard labour, effective from the date of arrest.



C.F.R. Mchenga

DEPUTY JUDGE PRESIDENT



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE



K. Muzenga
COURT OF APPEAL JUDGE