

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

APPEAL NO. 59/2021

BETWEEN:



HENRY HUMPHREY DAKA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Hamaundu, Mutuna and Chinyama, JJS

On 13th July, 2021 and 10th May, 2022

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

For the State : Ms C. Soko, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Ilunga Kabala and John Masefu v The People (1981) ZR 102**
2. **Kenneth Mtonga and Victor Kaonga v The People (2000) ZR 33**
3. **Nyambe v The People (1973) ZR 288**

The appellant appeals against his conviction on two counts of murder on the sole ground that the identification evidence on which he was convicted was weak.

1. The undisputed facts

1.1 On 27th August, 2011, a farmer, Mark John Jellis, was attacked and shot by three assailants in the State Lodge area of Lusaka. The attack was in full view of two women passers-by, one of whom was named Priscah Chiti, (PW7 during trial).

1.2 According to this woman, she and her friend picked up some stones to try and fend off the attack, whereupon one of the assailants turned to them and said words to the following effect: *"I am Americano, you cannot defeat me"*.

1.3 The assailants then sped away in a Toyota Corolla motor vehicle, but abandoned it shortly thereafter and fled into the bush. Mark John Jellis was taken to the hospital, and later evacuated to South Africa where he died from his wounds about a month later.

1.4 On the day of the attack, however, two motor vehicles responded to the report of the attack: one vehicle was for the area neighbourhood watch group (of which Mark John

Jellis had been a member). It was driven by a driver, Bestwell Siyatali (PW9 at the trial). In the vehicle, there was also a police officer, Gilbert Kasanda (the deceased in the second count of murder). The other motor vehicle was from the police anti-robbery squad, carrying officers from that unit.

- 1.5 During the search, the two vehicles split up. Shortly afterwards, the vehicle belonging to the neighbourhood watch came upon three people who appeared suspicious in the manner in which they were walking. According to Bestwell Siyatali (PW9), two of the three people were walking a few metres ahead of the third person. When the vehicle stopped besides these people, the third person who was behind shot into the vehicle, killing the police officer, Gilbert Kasanda, instantly. PW9 got out of the vehicle and crawled to the front while the other two assailants laughed, mockingly, at him. He managed to dash into the bush from where he saw the man who had been behind his two colleagues take the police officer's rifle and use it to shoot several bullets into the officer's body. He also saw another of the assailants rummaging in the cabin of the

motor vehicle in search of something. The assailants then fled that scene.

1.6 A short while later, Alick Chipeta (PW2 during trial), who lived at a farm nearby, saw two people jump over a fence. They proceeded in a particular direction. Then he saw three other people coming towards his house. All this happened after he had heard several gunshots from the direction in which these people were coming. He described one of the three people as being tall, while the other two were short. The three people were carrying two guns— a long one and a short one. According to Alick Chipeta, he talked to the three people. They told him that they were police officers pursuing thieves. They also said that the other two people that he had seen earlier were also police officers on the same assignment. The three people then left.

1.7. Moments later, someone came to tell Alick Chipeta that a police officer had been killed in the direction from which he had heard the gunshots. Alick Chipeta ran to the scene.

1.8 In the meantime, PW9, Bestwell Siyatali, had contacted

the other motor vehicle and reported the second attack. The other vehicle then rushed to the new scene of crime. There, the officers learnt from Alick Chipeta that he had met the suspects. The officers took Alick Chipeta along with them and went in search of the suspects, in the direction in which the latter had taken. They came upon three people whom Alick Chipeta immediately recognized as the people that he had spoken with. There was an exchange of gunfire between the police and the suspects. In the process, one of the suspects was shot and apprehended; the other two escaped.

1.9 The police officers asked the suspect some questions and were able to learn that he was known as "*Americano*", and that his colleagues were Henry Daka and Kalusa. The suspect died on the way to the hospital.

1.10 About a year later, on 12th August, 2011, the appellant was apprehended at a scene of an aggravated robbery in Kanyama township of Lusaka. He was severely beaten by an instant justice mob at the scene before he was rescued by the police. When his particulars were taken down for the robbery in Kanyama, the name that the appellant gave

alerted the police to the fact that he could have been involved in the State Lodge murders. The appellant was therefore handed over to the anti-robbery unit.

- 1.11 An identification parade was held. Both Alick Chipeta, PW2, and Bestwell Siyakatali, PW9, identified the appellant as a person whom they had seen on the day of the two murders. The appellant was then charged with the two offences.

2.0 The trial

- 2.1 Before the High court, the facts that we have set out above were adduced in evidence by the prosecution.
- 2.2 The appellant denied having been involved in the Kanyama robbery. He also denied having been involved in either of the State Lodge murders, at all. Explaining why the two witnesses had identified him, he said that they had seen him in an office at the police station immediately before the identification parade was conducted.
- 2.3 The learned trial judge convicted the appellant mainly on the evidence of identification by the two witnesses. He concluded that, because the murders were committed in

the same locality and in relatively quick succession, the appellant was certainly involved in both of them. The judge then sentenced the appellant to the mandatory death penalty.

3.0 The Appeal

- 3.1 In this appeal, the appellant raises two main issues about the identification evidence: first, it is with regard to the holding of the identification parade itself. Secondly, it is with regard to the reliability of the actual identification.
- 3.2 At the hearing of the appeal, Mr Makinka, the learned Senior Legal Aid Counsel, on behalf of the appellant, submitted that the manner in which the identification parade was held in this case was flawed in that the appellant was put on the parade when the injuries that he had sustained at the hands of the instant justice mob were still very visible. For this submission, counsel relied on a passage in our judgment in the case of **Ilunga Kabala and John Masefu v The People**⁽¹⁾. The passage reads:

“There is force in the argument that Maganbhai’s and Alfred’s identification of the appellants was weakened by the fact that when the appellants were placed on the parade, their faces were

slightly swollen. To put suspects with visible injuries on their bodies on an identification parade consisting of other persons having no such injuries, as was the case here, is tantamount to providing identifying witnesses with a clue”.

- 3.3 In response, Ms Soko, the learned Deputy Chief State Advocate, argued that the facts in the *ILunga Kabala* case can be distinguished from those in this case because, in the earlier case, the appellants were caught soon after the crime, and the circumstances leading up to their arrest, namely that they had been assaulted by a mob and hospitalized, may well have been known to the identifying witnesses.
- 3.4 Counsel went on to argue that, in the case at hand, the identifying witnesses were clear on the circumstances of observation, that is in broad daylight, and the physical features of the appellant. She pointed out that the witnesses insisted in their testimony that they had identified the appellant based on his features, as opposed to the injuries. She further pointed out that, notwithstanding the fact that almost one year had elapsed,

the two witnesses, who encountered the appellant in very different circumstances, still managed to identify him.

- 3.5 Counsel argued also that, since this was not a case of a single identifying witness, our holding in the case of **Kenneth Mtonga and Victor Kaonga v The People**⁽²⁾ should prevail.

4.0 The Decision of this court

- 4.1 Before we resolve this issue, we shall consider and resolve the second one first, and then come back to this one.
- 4.2 On the second issue, the argument is that because almost a year had elapsed before the witnesses were called to identify the appellant, their recollection could not have been good. Mr Makinka submitted that the opportunity that PW9, for instance, had had to observe his assailants could not be said to have been ideal because the encounter itself was stressful and traumatic, given that there was on-going shooting by one of the assailants.
- 4.3 This argument was responded to by Ms Soko in the arguments that we have just reviewed above.

- 4.4 The learned trial judge did not specifically address the conduct of the identification parade, but instead focused on the opportunity that the witnesses had had to observe the assailants. Dealing with PW2 (Alick Chipeta), the judge said; that this witness saw the assailants in a serene atmosphere; that he was able to describe what the assailants were wearing, and was even able to say which assailant was carrying the long firearm and which one was carrying the short one; that he even spoke to them; and, that this was during broad daylight.
- 4.5 As regards PW9 (Bestwell Siyatali), the judge said that this witness, too, had seen the assailants in broad daylight.
- 4.6 In the judge's view, the case had been taken out of the realm of single identification witness and placed on a better footing because there were two identifying witnesses. The judge rejected the appellant's contention that the two witnesses had seen him in an office at the police station shortly before he was placed on the identification parade because there was no evidence to support that contention.

- 4.7 While the judge accepted that the appellant had visible injuries on the parade, the judge was nevertheless convinced that the appellant was not identified simply because of his injuries, but because of the opportunity that the identifying witnesses had had on the fateful day.
- 4.8 Upon examination of the testimony on the record, we are unable to fault the trial judge for holding that the quality of the identification by the two identifying witnesses was very good. In the case of **Nyambe v The People**⁽³⁾, we held:

“(3) The greatest care should be taken to test the identification. The witness should be asked, for instance, by what features or unusual marks, if any, he alleges to recognize the accused, what was his build, what clothes he was wearing and so on; and the circumstances in which the accused was observed— the state of the light, the opportunity for observation, the stress of the moment— should be carefully canvassed”.

- 4.9 Looking at the testimony of the two identifying witnesses, we see that this process was followed. Alick Chipeta (PW2) said that the appellant was the assailant that was wearing what the witness referred to as a “*blue long bomber*”, and that he was the one who carried the short gun. The witness also said that the appellant was the one who said that the

other two people that the witness had seen jumping over the fence earlier were also police officers, and further said that he and his friends would head to the other side of the stream to look for the thieves.

4.10 PW9 said that the appellant was one of the two assailants who were laughing at him when he crawled to the front of the motor vehicle, and that the appellant was again the assailant that went about searching the cabin of the motor vehicle.

4.11 We may add that what further enhances the reliability of the identification, as correctly noted by the trial judge, is that there were, not one, but, two identifying witnesses. In the case of **Kenneth Mtonga and Victor Kaonga v The People**⁽²⁾ which was cited by Ms Soko, we made the following observation:

“Obviously when more than one witness identifies and even if it can be said that two or more witnesses can make the same mistake, the case is nonetheless taken out of the realm of single witness identification and is on a better footing”. (page 36)

4.12 We therefore uphold the judge’s finding that the quality of the identification by the two witnesses was very good.

4.13 We now go back to the first issue; that is the conduct of the identification parade. As we have already said, the trial judge rejected the contention that the appellant was seen by the two witnesses immediately prior to the setting up of the identification parade. We agree with the trial judge because it is clear on the record that there was no evidence from which such a suggestion could arise.

4.14 The cardinal issue, however, is the fact that the appellant was placed on an identification parade on which he was the only participant with visible injuries. We have said in a number of cases, the case of *ILunga Kabala* cited by counsel for the appellant being one of them, that it is improper for officers conducting identification parades to place accused persons on parades where they are the only ones with visible injuries. In the case of **Kenneth Mtonga** cited above we went on to hold:

“(i) The police or anyone responsible for conducting an identification parade must do nothing that might directly or indirectly prevent the identification from being proper, fair and independent. Failure to observe this principle may, in a proper case, nullify the identification”

4.15 However, it does not mean that the improper conduct of a parade should invariably lead to the nullification of the identification. In the **Kenneth Mtonga** case, notwithstanding that the identification parade was flawed we did not nullify the identification itself because the witnesses had given very good quality evidence of identification.

4.16 Therefore, even in this case, we would say that, even though there was an irregularity committed in placing the appellant on an identification parade while he had visible injuries on his face, this is not a proper case for the nullification of the identification, given that the identification itself was very good.

4.17 There is one other point that we wish to address. The issue was raised, almost in passing, on behalf of the appellant; and this was to the effect that the trial judge should not have accepted the evidence of the information that the police obtained from the dying assailant. We agree, to a great extent, that that information was inadmissible because, quite apart from the fact that the information was obtained without any warn and caution

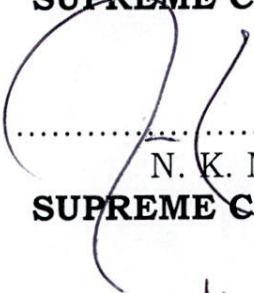
being administered to the suspect, it was not admissible as against the appellant because it was an extra-judicial statement made by a co-suspect.

4.18 However, this does not improve the appellant's prospects because, even though that evidence was inadmissible, the fact still remains that the appellant was subsequently identified by other witnesses as having been one of the assailants.

5. Conclusion

5.1 In conclusion, we find no merit in the ground advanced by the appellant, and indeed in the appeal. We dismiss it.


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E. M. Hamaundu
SUPREME COURT JUDGE


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N. K. Mutuna
SUPREME COURT JUDGE


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J. Chinyama
SUPREME COURT JUDGE