IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 49, 50 /2021**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

PATRICK CHITALU **1ST APPELLANT**

JOHN KAYOMBO **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sichinga and Muzenga JJA
On 18th January, 2022 and 25th July, 2022.

For the Appellant: Ms K. Chitupila – Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. Kapambwe-Chitundu – Deputy Chief State Advocate, National Prosecution Authority

---

J U D G M E N T

MUZENGA, JA, delivered the Judgment of the Court.

Cases referred to:

1. **David Zulu v The People (1977) ZR 151**
2. **Dorothy Mutale & Another v The People (1997) SJ 51 (SC)**
3. **Musupi v The People (1978) ZR 385**
4. **Chrispin Nsondo v The People (1981) ZR 302**
5. **Saidi Banda v The People – Selected Judgment No. 30 of 2015**

6. **Elias Kunda v The People (1980) ZR 100**
7. **Mbuyi Jean v The People (1971) ZR 82**
8. **Yotam Manda v The People (1988 – 1989) ZR 129**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellants were convicted of one count of murder contrary to **Section 200 of the Penal Code**[1] and one count of aggravated robbery contrary to **Section 294(1) of the Penal Code**[1]. They were subsequently sentenced to death by the High Court (before Mr. Justice E. M. Sikazwe).

1.2 The particulars of offence were that in the first count the appellants on 13th January, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did murder Juma Kapeta.

1.3 The particulars in the second count are that the two on 13th January, 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did steal a

Techno Cell phone, a car battery and a car stereo the property of Juma Kapeta and at or immediately before or immediately after the time of such stealing did use or threaten to use actual violence to the said Juma Kapeta in order to obtain or retain the said property or prevent or overcome resistance to it being stolen.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The prosecution called a total of twelve witnesses.

2.2 A summary of the evidence of PW1 Lazarus Mukupa is that in the early hours of 13th January, 2016, as he was driving through the road together with a taxi driver Gilbert, they noticed a Station Wagon in the middle of the road and saw someone crawling underneath the station wagon vehicle. The driver stopped the taxi about six to seven metres away. They saw a man lying in a pool of blood. They asked him what happened and he told them that he had been beaten and that the assailants failed to grab his vehicle. The victim gave them a number for someone who could come to his rescue. PW1 called the number and informed the person who happened to be the victim's father of what they had witnessed. It was his testimony that a while later, he called the said number and he was informed that they had located the

victim, rushed to University Teaching Hospital and seemed to have died. It was his testimony that a month later he reported to Lusaka Central Police Station to give a statement.

2.3 Gilbert Chikoti Kapeta PW2 testified that in the early hours of 14th January, 2016, he received a call from an unknown person, who told him that a person who had been attacked by thieves gave him his number to call for help. He was given directions of where the victim was by the caller. PW2 stated that he called his son Jimmy Kapeta and other security guards to accompany him. They found the victim lying in the back seat with blood exuding from his body. They rushed him to UTH and upon arrival, the victim was pronounced dead. The victim's car was a black Terrano Nissan Station Wagon Registration Number ABZ 2495.

2.4 The cardinal part of the evidence of Jimmy Kapeta, PW3, the brother to the deceased was that he identified the body of the deceased to the pathologist at the time of the post-mortem examination. He observed some big cuts on his face and the belly.

2.5 Andrew Tembo PW4 testified that on 14th January 2016, between 07:00 am and 08:00 am he received a call from his cousin James Phiri

who asked him if he had managed to buy a car battery for his vehicle. He told him that there was someone who was selling a car battery. He went to his cousin and found him with two people named Chitalu and Gift. It was his testimony that Chitalu showed him a car battery, a car radio and a Nissan DVD player which were attached. They negotiated the price for the items and he bought them at K500.00. It was his testimony that on 16th January, 2016 he tried putting the battery in his IST Toyota car, but it was too big. He later sold it to his friend named Maeque at K400.00.

2.6 It was his continued testimony that after a few days he received a call from Lusaka Central Police Station, Homicide Department to report. Reporting there, he found his cousin James Phiri. The police told him that his cousin informed them that he bought the car battery, car radio and a Nissan DVD player from people he had introduced to him. He told the police that he had sold the battery and that he was still in possession of the car radio and a Nissan DVD player. He led the police to Panganani Market Town Centre where Maeque was found. They retrieved the battery and he led the police to his house where they recovered the car radio and a Nissan DVD player.

2.7 After this, the police asked him if he could lead them to the person he bought the items from. He accepted as he knew Chitalu very well. Two weeks later, while with his two friends, he met Chitalu and Gift in a shop in Chaisa area. PW4 managed to contact Inspector Moola who arrived within a short time and the two were apprehended.

2.8 Kent Chipenda PW5 gave evidence to the effect that he witnessed the sale of a car battery between PW4 and Maeque.

2.9 James Phiri PW6 told the trial court that on the morning of 14th January, 2016, four men approached him at his stand at Chaisa Market. Two of them told him they were selling a Techno phone black in colour. These were John Kayombo and Chitalu. He bought the phone at K25.00 from Kayombo and immediately put in his sim card. That Chitalu asked him if he was interested in a car battery, a car radio and a DVD player. He refused and told them that he could find out if his cousin Andrew Tembo (PW4) would be interested. Days later, he sold the phone to his friend at K25.00.

2.10 Mwansa Chanda testified as PW7. He stated that on 1st February, 2016, he bought a Techno double sim phone from PW6 at K25.00 and he immediately put in his sim cards. After a few days, he exchanged

the same Techno phone with Arnold's Nokia phone, his workmate. On 16th February, 2016 while at work he received a text message from Police Officer Moola of Emmasdale Police Station that they should meet at Chaisa. He was picked by the officer. They then went to Kalonga School in Mandevu where they found his workmate Arnold, after which they went together to Central Police Station. He identified the Techno phone.

2.11 Arnold William Mbomba testified as PW8. He led evidence about how he exchanged phones with PW7.

2.12 Albert Kapeta PW9, a brother to the deceased identified the deceased's car, car radio, the DVD player and the RB black super battery engraved on the side **"JK"** and a Techno small black cell phone.

2.13 Detective Sergeant Conrad Andeleki gave evidence as PW10. His evidence was to the effect that on 9th February, 2016 he received information that one of the criminals who had terrorised Matero and surrounding compounds by the name of John Kayombo was spotted in Marrapodi and Mandevu compounds. John Kayombo has been on Emmasdale Police Station's wanted list since 2005 for burglary and theft offences. He booked out with other police officers to Mandevu

shopping area. They managed to capture him and as they were interviewing him, he received a call from Detective Inspector Moola of the Homicide Lusaka Division that they were also looking for John Kayombo. He handed him over to Detective Inspector Moola.

2.14 In cross-examination, he stated that John Kayombo specialised in stealing from cars and homes. The informer only talked of having seen the 2nd appellant only in Mandevu area. He told the trial court that when he was stationed at Marrapodi Police Post, the 2nd appellant was once arrested and was convicted of burglary and theft.

2.15 Isaac Musadabwe Banda a Subscriber Information Analyst with Airtel PLC was PW11. He testified that he received a search warrant from officer Lipimile requesting a report on some phones and furnished him with sim cards which had been used in the provided handsets. On 15th February, 2016, he printed out an Airtel Confidential Report for a phone serial number 03503 as was indicated on the warrant and handed it over to Officer Lipimile. He identified the report in court.

2.16 The arresting officer, Detective Chief Inspector Lipimile Moola of Lusaka Central Homicide Division testified that on 25th January, 2016 he received information from an informer that Mr. James Phiri of

Chaisa Compound was approached by two people who were selling a motor vehicle battery, a DVD player and a car radio. A manhunt for James Phiri was instituted and was later apprehended in Mandevu Compound. After interviewing him, he accepted that he was approached by two people who he knew very well who were selling a car battery and two car radios.

2.17 As he could not afford to buy the DVD player and the radio, he introduced them to his cousin by the name of Andrew Mwaba Tembo. He led the police to his cousin who confirmed buying the car battery and the two car radios and they recovered the two car radios from Andrew's home. Thereafter, Andrew led them to Macque, whom he had sold the car battery and recovered the battery.

2.18 On 7th February, 2016, he received information that Patrick Chitalu had been spotted in Chaisa Compound and was with Andrew Mwaba Tembo. He rushed to the area and apprehended Patrick Chitalu. When he interviewed him in relation to the recovered items, Patrick Chitalu told him that the said items were for John Kayombo. After that, he came to learn that John Kayombo had been apprehended by

Detective Sergeant Andeleki for the offence of burglary and theft and was in cells.

2.19 He told the trial court that he later got a search warrant to trace the people who had used the Techno phone and the printout showed which number was using the Techno phone. This number led them to the apprehension of Arnold William Mbomba (PW8). Arnold led them to Mwansa Chanda (PW7) who also led them to Andrew Tembo (PW4). Upon interviewing Andrew Tembo, they were able to trace the whereabouts of James Phiri (PW6).

2.20 The appellants were later warned and cautioned and after interviewing them, he charged them with the offences of murder and aggravated robbery and they both denied the charge.

2.21 In cross-examination, he stated that the appellants were identified by James Phiri who said he knew them very well.

2.22 That generally marked the close of the prosecution evidence. The appellants were found with a case to answer and were placed on their defence. Each of them opted to give evidence on oath and called no witnesses.

3.0 THE DEFENCE

3.1 In his defence, the first appellant stated, that on a day he could not remember in February 2016, he decided to go home and bath. While on his way, he passed through a shop at Mandevu/Matero junction. Immediately after he entered the shop, he saw a police officer he knew as Mwaba. The officer was talking about plasma television sets he had ordered at K1,200.00 and sold at K1,500.00.

3.2 Suddenly another person entered the shop and ordered all the people in the shop to sit down, but pointed at him to stand up and everyone was made to leave the shop. He asked officer Mwaba what offence he had committed, and officer Mwaba told him that he sold a phone to James. He was later arrested and taken to Emmasdale Police Station where he found Mwaba Tembo who he knew. Later he was taken to Lusaka Central Police Station where he found a person he knew by the name of James Phiri.

3.3 During his interview, he denied knowing James Phiri and he denied knowing any man who had been killed. He told the trial court that he was neither found in possession of any of the recovered stolen items, nor did he sell any items to anyone.

3.4 In cross-examination, he denied knowing anything relating to this matter. He maintained that he was merely a taxi driver employed by Simon and that he did not know the whereabouts of his employer.

3.5 In his defence, the second appellant stated that he could not remember where he was on the 13th of February and he could not recall what happened on that day as he was in prison at Lusaka Central serving a seven year prison sentence from 2010. All he remembered was that he was released from prison on 28th January, 2016 and was rearrested on 5th February, 2016 at Buseko Market. He was taken to Garden Compound Police Post where he was told that on 2nd January, 2016 he had two plasma TV which he denied.

3.6 In cross-examination, he stated that he came to know the co-accused whilst in the cells.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence presented before it by both parties. He noted that the evidence was solely circumstantial and therefore an inference of guilt can only be drawn if it is the only inference that can reasonably be drawn from the facts before it. The trial court found that the appellants were connected to the offence by

the evidence of PW4, PW5, PW6, PW7 and PW12. The trial court also noted that all the prosecution witnesses were not shaken as they did not contradict each other. He found that according to the central prison file record the second appellant served his 18 months sentence in full by 2012. The trial court, therefore, had one inference to draw from the possession of the recently stolen articles a few hours after the deceased was attacked. Based on this, the court convicted the appellants and later sentenced them to death.

5.0 GROUND OF APPEAL

5.1 Disconsolate with the decision of the court below, the appellants filed one ground of appeal couched as follows:

(i) The learned trial Judge erred in law and fact when he convicted the appellants based on circumstantial evidence when an inference of guilt was not the only inference which could reasonably be drawn from the facts.

6.0 APPELLANTS' ARGUMENTS

6.1 In support of the lone ground of appeal, Counsel for the appellant argued that the evidence herein linking the appellants to the commission of the offence was purely circumstantial, as no one saw the appellants committing the offences charged. Counsel submitted

that an inference that the appellants were involved in the commissions of the offence is not the only inference that can be drawn in the case. In support of this argument, we were referred to the case of **David Zulu v The People.**[1]

6.2 It was counsel's further submission that the prosecution did not prove that the items recovered were from the motor vehicle and belonged to the deceased. Further that no fingerprints were lifted on the motor vehicle found at the scene of the crime. Counsel contended that there are several possible inferences as the witnesses may have bought items from the people they cannot identify or the appellants may have gotten the items they are allegedly accused of selling from other people who may have been perpetrators of the crime. We were also referred to the case of **Dorothy Mutale & Another v The People**[2] where it was held that:

> **"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to the accused and if there is nothing in the case to exclude such inference. There was nothing in this case to exclude an inference favourable to the accused."**

6.3 It was submitted that the evidence of the prosecution witnesses should be treated with caution as the witnesses have their possible interest to serve as some were once apprehended by the police in connection with the same offence. It was submitted that the court below should have warned itself of the dangers of false implication by these witnesses and ensured that the danger is excluded. We were referred to the case of **Musupi v The People**[3] where the Supreme Court held that:

> **"The critical question is not whether the witness does have an interest or a purpose of his own to serve but whether he is a witness who because of the category into which he falls or because of the particular circumstances of the case may have a motive to give false evidence."**

6.4 With regards to the second appellant's defence that he was in prison at the time the offence was committed, it was submitted that even when the said defence turned out to be a lie, does not warrant an inference of guilt. In support of this, we were referred to **Chrispin Nsondo v The People**[4] where the Supreme Court stated that: **"even if an alibi was a deliberate lie on the part of the appellant the inference cannot be drawn that he did it because he had been involved in the offence. A man charged with an offence may**

seek to exculpate himself on a dishonest basis even though he was not involved in the offence." We were urged to allow the appeal, quash the conviction, set aside the sentence and set the appellants to liberty.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondent, Counsel supported the convictions. It was argued that the trial court was on firm ground when it held that the circumstantial evidence in the instant case was so overwhelming that it attained such a degree of cogency to take it out of the realm of conjecture to only leave one inference, and one inference only, that the appellants not only robbed the deceased but also brutally and mercilessly murdered him.

7.2 Counsel contended that the trial court weighed all the evidence which was laid before it and considered other possible inferences and rightly discounted them before it arrived at the only logical conclusion that it was the appellants who committed the nefarious crimes. We were referred to the case of **Saidi Banda v The People**[5] where the Supreme Court restated the law as regards circumstantial evidence by adding that **"this form of evidence notwithstanding its**

weaknesses as alluded to in the case of David Zulu v The People, is in many instances probably as good as, if not even better than direct evidence."

7.3 According to counsel for the respondent, even though there was no direct evidence on what happened that fateful day, there is proof of facts not in issue which are relevant to the facts in issue and from which an inference of the fact in issue may be drawn that the appellants were responsible for them. We were urged to dismiss the appeal.

8.0 THE HEARING

8.1 At the hearing of this appeal, learned Senior Legal Aid Counsel, Ms. Chitupila, on behalf of the appellants, sought leave to file the ground of appeal and heads of argument out of time. Leave was granted and she placed reliance on the filed heads of argument. Learned Deputy Chief State Advocate, Mrs. Kapambwe-Chitundu, on behalf of the Respondent equally sought leave to file the respondent's arguments out of time. Leave was equally granted and she also placed reliance on the said arguments.

9.0 DECISION OF THIS COURT

9.1 We have ploddingly considered the evidence on the record, the judgment of the trial court and the arguments by Counsel for both parties. As rightly observed by the learned trial judge, the gist in this appeal is anchored on circumstantial evidence.

9.2 The question before us is whether the circumstantial evidence herein has taken the case outside the realm of conjecture to allow only an inference of guilt?

9.3 The circumstantial evidence in this case is basically that the deceased was attacked, left with injuries at his motor vehicle in the early hours of the morning. A car radio, a techno cell phone and battery are stolen from him. The deceased was rushed to the hospital upon which he was pronounced dead. The appellants turned up selling the stolen items about 3 hours later to PW6 the Techno cell phone and to PW4 the rest of the items.

9.4 The circumstantial evidence thus hinges on recent possession of stolen property. The Supreme Court in the case of **Elias Kunda v The People**[6] held that:

> **"In cases where guilt is found by inference, as for instance, where the doctrine of recent possession is**

applied, there cannot be conviction if an explanation given by the accused, either at an earlier stage (such as the police) or during the trial, might reasonably be true."

9.5 The court of appeal, the precursor to the Supreme Court, in the case of **Mbuyi Jean v The People**[7] held that:

"The correct direction for the magistrate to give himself in such cases is: the accused was found in possession of property recently stolen and guilty knowledge may be inferred if the court is satisfied that the explanation given to account for his possession is untrue. The court cannot be so satisfied if the explanation is one which might reasonably be true even if the court does not believe it."

9.6 Learned counsel for the appellants submitted that there are a number of inferences that could be drawn from the facts, namely that the witnesses could have possibly bought the items from people they did not know or that the appellants may have gotten the items from people who are the actual perpetrators.

9.7 We agree from the cases of **Mbuyi** and **Kunda** *supra* that a conviction is not tenable at law if the explanation given by the accused at an earlier time (i.e. to the police) or one given in court could reasonably be true, even if the trial court does not believe in its truth.

9.8 In this case, the appellants distanced themselves from the stolen items. They denied ever possessing or selling these items. We do not see how the learned trial court could have considered their explanations. In fact there was absolutely no explanation given by the appellants relating to possession. What thus remained was a credibility issue which the learned trial court resolved. The trial court after considering the evidence, did not believe the appellants. We cannot fault the trial court on this finding and we find no reason to interfere with it.

9.9 It now remains for us to consider whether there is anything on the record to exclude a less severe inference. In the case of **Yotam Manda v The People**[8] the Supreme Court held that:

> **"The trial court is under a duty to consider various alternative inferences which can be drawn when the only evidence against the accused person is that he was in possession of stolen property. Unless there is something in the evidence which positively excludes the less severe inferences against the accused person (such as that of receiving stolen property rather than guilty of a major case such as aggravated robbery or murder) the court is bound to return a verdict on the less severe case."**

9.10 We note that the learned trial court did not address its mind to the guidance by the Supreme Court. This was a misdirection. We have

however combed through the evidence on the record. The appellants turned up selling stolen items 3 hours after the deceased was brutally attacked and left for dead.

9.11 We hold the view that this time frame is too short for the items to have changed hands. We have also considered the fact that they were selling all the items stolen from the deceased. It is our considered position that an inference of guilt on more severe charges is the only one which can reasonably be drawn from the facts. We are satisfied that a lesser inference is not reasonably possible, more so in the light of the defence proffered.

9.12 Learned counsel for the appellants also argued that PW4 to PW7 were apprehended by the police and hence are witnesses with a possible interest to serve, as such the trial court should have warned itself against the dangers of relying on their evidence. We have checked the record and no evidence suggests that any of these witnesses were detained. No questions were put to the witnesses as to whether they were detained by the police. What is clear is that they were summoned to the police in respect of the items they bought. We are unable to

hold that they were in detention in the absence of evidence. We cannot thus fault the trial court on this score.

9.13 We therefore find that the sole ground of appeal lacks merit and we dismiss it. We note that the trial court only sentenced the appellants on the count of Murder. We uphold the sentence of death. We have considered the circumstances in which the offences were committed and thus impose a sentence of 25 years' imprisonment with hard labour with effect from the date of arrest in respect of the offence of aggravated robbery. The sentences will run concurrently.

.....

C. F. R. MCHENGA

DEPUTY JUDGE PRESIDENT

.....

D. L. Y. SICHINGA, SC

COURT OF APPEAL JUDGE

.....

K. MUZENGA

COURT OF APPEAL JUDGE