IN THE COURT OF APPEAL OF ZAMBIA **APP. No. 51/2022**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

JONES MUTALE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Muzenga JJAs
On 12th October, 2022 and 25th January, 2023

For the Appellant : Mr. H. M. Mweemba, Acting Director – Legal Aid Board

For the Respondent : Mrs. M. P. Lungu, Deputy Chief State Advocate National prosecution Authority

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J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Machipisa Kombe v The People (2009) ZR 282
2. Ilunga Kabala & Another v The People (1981) ZR 102.
3. David Zulu v The People (1977) ZR 151
4. Peter Yotamu Haamenda v The People (1977) Z.R. 184
5. Saluwema v The People (1965) Z.R. 4
6. Green Museke Kuyewa v The People (1996) ZR 8
7. Andrew Mwenya v The People SCZ Appeal No. 640 of 2013
8. Lubinda v The People (1973) Z.R. 43
9. Kenmuir v Hattingh (1974) Z.R. 162
10. Donald Fumbelo v The People SCZ Appeal No. 476 of 2013

11. George Musupi v The People (1978) ZR 271
12. Yokoniya Mwale v The People SCZ Appeal No. 285 of 2014

LEGISLATION CITED:

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

1.0 INTRODUCTION

1.1 The appellant was convicted of the offence of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars alleged that Jones Mutale, between 13th and 14th August, 2019, at Chingola, did murder Andrew Mwape Samukanga.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The summary of the evidence is that the deceased and the appellant lived together in a one-roomed house. On 13th August, 2019, the deceased was in the company of the appellant, Blessings Bwalya (PW2), Nathan Choolwe (PW3) and Emmanuel Chishala (PW4). They spent the day drinking alcohol from different bars which included Kalis and D4 Bar. The appellant left the group for home while they were at Kalis bar.

2.2 PW2, PW3, PW4 and the deceased proceeded to D4 Bar where the deceased met Mirriam Bwembya (PW5) who was in the

company of her brothers. At around 23:00 hours, the deceased in the company of Mirriam and his friends, left the bar. PW2, the deceased and PW5 walked together. However, on the way, PW2 went to his home leaving PW5 with the deceased. The duo proceeded to the home of the deceased.

2.3 According to PW5, when they got to the home of the deceased, they found the appellant asleep. PW5 and the deceased sat on the edge of the bed where the appellant lay. According to PW5, the appellant, described as having dreadlocks on his head at the time, was unhappy that the deceased had brought a girl into their single room home. The deceased and appellant argued about her presence.

2.4 Being uncomfortable with the argument between the two men, PW5 asked the deceased to escort her to her home. The deceased escorted her to the road side and they parted.

2.5 The following morning, she learnt that the deceased had been killed and that she had been implicated in the murder. Further that the police were looking for her. PW5 run away to Misenga area near Chambishi, where she stayed for seven months until

her mother called her to come back. That is when she returned and made a statement at the police station.

2.6 PW3 testified that at around 05:00 hours the next day, the appellant came to his home with a plastic bag containing a pair of brown Timberland boots which had blood stains on them, and then left.

2.7 PW4 testified that the same morning, he went to the home of the deceased so they could go for work but that he found the door open. On looking inside, he saw the body of his friend lying on the ground while holding a knife resting on his chest.

2.8 Owing to allegations that the people who worked with the deceased could have killed him, PW4 went to the home of PW2's parents and stayed there. He was later detained in police custody for four days before being released.

2.9 PW6, Sergeant Mandele Sydney confirmed finding the body of the deceased lying face upwards with a deep cut on the left side and some cuts on his forehead with a knife placed on the chest. At the back of the body, four more deep cuts were found. The postmortem conducted on the body of the deceased, concluded that the cause of death was due to a penetrating wound to the

heart. The appellant was arrested and charged with the death of the deceased.

2.10 In his defence, the appellant denied killing the deceased stating that at around 23:00 hours, the deceased came home in the company of PW5. The two were very drunk and powerless. He then left them to go for work at the mine where he packed 30 sacks while the other men packed 190.

2.11 At 05:00 hours, he knocked off but knowing that the deceased was with a girl at their home, he decided to go to PW3's house. After PW3 left for the mine, the appellant also later left for his parent's home. On the way, he learnt that the deceased had died at their house and that the police were looking for him.

2.12 The appellant also learnt that people had started destroying the cabin stating that they would kill him. He proceeded to Chiwempala Police Station where he met PW2 and PW4. While at the station, PW3 was brought in. PW2, PW3 and PW4 were detained in custody with him for about eight days.

3.0 **DECISION OF THE LOWER COURT**

3.1 The trial court in respect of the alibi raised, found that the appellant had failed to lead evidence in support of his alibi as

he did not call any witness. She found that the evidence of PW3 that the appellant left after leaving the plastic bag containing shoes had not been successfully challenged. Similarly, the evidence of PW6 that PW3 handed him the bloodstained shoes was also not challenged.

3.2 The court found these to be odd coincidences amounting to something more and to be supporting evidence in line with the cases of **Machipisa Kombe v The People** [1] and **Ilunga Kabala & Another v The People** [2].

3.3 The trial court found the evidence of PW5 to be credible as she stated that the appellant had dreadlocks at the time, which evidence was supported by that of PW4 who also told the court that the appellant had dreadlocks.

3.4 The court further found that though the appellant, PW3, PW4 and PW5 were friends, they had no motive to falsely implicate the appellant. The appellant was convicted and sentenced to death.

4.0 **GROUNDS OF APPEAL**

4.1 The appellant has advanced one ground of appeal couched as follows:

The learned trial court erred both in law and fact by convicting the appellant on insufficient circumstantial evidence.

5.0 **ARGUMENTS BY THE APPELLANT**

5.1 The appellant, submits that the circumstantial evidence on record does not meet the threshold set in the case of **David Zulu v The People** [3] of taking the case out of the realm of conjecture to attain a degree of cogency that leaves only the inference of guilt as the reasonable inference.

5.2 Where there could be more than one inference other than that of the accused's guilt, then the burden cannot be said to have been discharged. It was argued that the evidence on record mainly comes from suspect witnesses whose evidence requires corroboration in the sense that though they were friends to the deceased, they were also suspected of having murdered him. These witnesses were once in time, all kept under police custody and as such, their evidence should have been received with caution as it is suspect evidence.

5.3 The evidence on record being that appellant left all his friends at the bar and nobody saw him with the deceased apart from

PW5. It was contended that PW5 is a highly suspect witness with her own interest to protect. PW5 remained with the deceased and that the evidence on record has not ruled out the possibility of her being the perpetrator of the offence.

5.4 Counsel argued that the behavior of PW5 going into hiding for a long time does not conform with that of a person who is innocent. It was therefore necessary to lift finger prints on the knife in question to determine whether it was the appellant or PW5 that stabbed and killed the deceased. Citing the case of **Peter Yotamu Haamenda v The People** [4], it was argued that the failure to lift finger prints on the knife by the police is a dereliction of duty going to the root of an important question which can lead to a miscarriage of justice.

5.5 The appellant drew our attention to the case of **Saluwema v The People** [5], and submitted that the explanation given by the appellant was reasonably possible, though not probable, and on that basis, the knife ought to have been tested for finger prints.

5.6 As regards odd coincidences and disparities that the trial court referred to justify the conviction, it was argued that these do meet the required standard for circumstantial evidence to

suffice. That the facts and issues raised in cross-examination of the prosecution witnesses raised many doubts, such that a reasonable tribunal ought to have considered and given the appellant the benefit of doubt.

5.7 We were urged to allow the appeal, find the appellant not guilty, set aside the conviction and acquit him forthwith.

6.0 **ARGUMENTS BY THE RESPONDENT**

6.1 In response, the State submitted that the circumstantial evidence in this case took the case out of the realm of conjecture leaving only an inference of guilt on the part of the appellant. In support thereof, several pieces of evidence were highlighted.

6.2 The first was that while it was not in dispute that the appellant left the deceased, his friends and PW5 and went to another bar, there is evidence that he in fact went to the house he shared with the deceased. This was confirmed by the appellant himself and PW5, thereby placing him at the crime scene on the material night which gave him the opportunity to commit the crime.

6.3 The second is the evidence of PW3 that early in the morning, the appellant went to his place and left two pairs of shoes, one

of which was blood stained. The appellant confirmed going to PW3's home though he denied leaving the shoes there.

6.4 The third piece of circumstantial evidence was the testimony of PW4 that the following day he went to the appellant and deceased's place so they could go together for work as per their usual practice. This makes the appellant's assertions that he was working in the night highly unbelievable especially that he was with PW3 the previous night who would have known if indeed he was working in the night.

6.5 Our attention was also drawn to the fact that as opposed to the appellant's testimony that he left for work when the deceased and PW5 arrived, in cross-examination, the appellant conceded that he was lying on the bed when PW5 sat on it as per her testimony.

6.6 In this regard, it was submitted that it is the appellant who murdered the deceased and later took the two pairs of shoes to PW3's place. In as much as it was not clearly ascertained as to which pair belonged to the deceased, it was not disputed that one of the said pairs of shoes belonged to the appellant and one to the deceased.

6.7 The assertion by the appellant that he left the deceased with PW5 because he was working in the night cannot reasonably be true in light of the evidence of PW3 and PW4. Counsel cited the case of **Green Museke Kuyewa v The People** [6] where it was held that:

> ***"The circumstantial case had attained such a degree of cogency (such that) the inference could not be resisted that the appellant was guilty of the murder."***

6.8 As regards PW2, PW3 and PW4 being friends of the deceased, it was contended that there is no indication that they had any motive to falsely implicate the appellant, more so that they were also the appellant's friends. There being no motive to falsely implicate the appellant, there was no need for the trial court to warn itself as regards their evidence. For authority, we were referred to **Andrew Mwenya v The People** [7] where it was held as follows:

> ***"Something has to be presented that would warrant the court to classify a witness as one with an interest of his own to serve; a motive to give false evidence against the accused on the part of the witness has to be revealed, in the absence of this, there is no need to treat a witness with caution."***

6.9 As regards the credibility of the witnesses, it was submitted that the trial court had the opportunity to observe the witnesses and found the prosecution witnesses to be credible as evidenced by the observations the court made with respect to PW3. In support of this, reliance was placed on the case of **Lubinda v The People** [8] that:

> ***In a proper case and on a proper direction it is open to any court to find that they believe witnesses and do not believe other witnesses. But where the whole evidence for the defence has been prejudiced by a dereliction of duty on the part of investigating officers the prosecution evidence should be so overwhelming as to offset the prejudice to justify conviction.***

6.10 We were also referred to **Kenmuir v Hattingh** [9] that:

> ***Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.***

6.11 Lastly, it was submitted that the appellant having only raised the aspect of him having gone for work when he was giving his defence, and having at no time raised it during cross-examination of the prosecution witnesses, means that the alleged defence is an afterthought for which the trial court was

on firm ground to have disbelieved. For authority, we were referred to the case of **Donald Fumbelo v The People** [10] where the court stated as follows:

> ***"In the case of a witness who is an accused person, it is indeed very important that he must cross-examine the witnesses whose testimony contradicts his version on a particular issue. When an accused person raises his version for the first time only during his defence, it raises a strong presumption that the version is an afterthought and less weight will be attached to such version. Therefore, in the context of credibility, the accused is likely to be disbelieved."***

6.12 Therefore, it was submitted that the trial court acted within the law when it chose to believe the prosecution's evidence and convicted the appellant on the circumstantial evidence adduced before it. The respondent prayed that the appeal be dismissed and that the conviction and sentence be upheld.

7.0 ORAL ARGUMENTS

7.1 At the hearing of the appeal, we asked the learned Deputy Chief State Advocate, Mrs. Lungu for her views on the credibility of the prosecution witnesses considering that some were detained together with the appellant while others ran away for some months.

7.2 She contended that the appellant was convicted on the totality of the evidence adduced and not merely on the credibility of the witnesses. That the defence of having gone for work was only raised during his defence. She argued further that there is also the evidence of PW3 who said the appellant brought boots belonging to the deceased and himself at around 05:00 hours. That the only reasonable inference to be drawn from these facts is that the appellant is guilty.

8.0 **DECISION OF THIS COURT**

8.1 We have considered the evidence on record, the written and oral arguments advanced by the learned counsel. It is not in dispute that there is no eye witness to the killing of the deceased. Therefore, the conviction of the appellant was based on circumstantial evidence. We will not rehash the principle of law as regards circumstantial evidence because both parties have correctly cited the law.

8.2 In our view, the central issue the appeal raises for determination is whether the trial court ought to have relied on the evidence of prosecution witnesses whose credibility has been questioned.

8.3 We agree with the guidance in the case of **Lubinda v The People** [8] cited by the learned Deputy Chief State Advocate that it is open to any court to find that it believes some witnesses while disbelieving others. The rationale for this discretion only reserved for a trial court was given in **Kenmuir v Hattingh** [9] that a trial court, as opposed to an appellant court, has the advantage of seeing and hearing the witness and thereby assess his demeanour.

8.4 In this case, it is not in dispute that PW2, PW3 and PW4 were detained together with the appellant during the course of investigations. This means that they were suspected of having murdered the deceased and thus can be classified as witnesses with an interest of their own to save. They may have a motive to falsely implicate the appellant so as to exonerate themselves.

8.5 There is also the evidence of PW5 whom at page 15 of the record of appeal, the learned trial judge observed ***"... appeared distraught, nervous and scared".*** This is the witness who went home with the deceased as confirmed by the appellant. Her version was that she left the appellant at the house, after he showed was displeasure to the deceased about her presence

there. The deceased escorted her to some point. The next day, she fled to Misenga area after learning of the killing of the deceased fearing she might be apprehended, and only returned seven months later.

8.6 There was no other witness to confirm the story of PW5 that she left the deceased in good health after he escorted her from his home. This makes her the last person to have seen the deceased alive and thus, a witness with an interest of her own to serve.

8.7 As regards suspect witnesses, the Supreme Court guided in **George Musupi v The People** [11], that:

> ***(i) Although there is a distinction between a witness with a purpose of his own to serve and an accomplice, such distinction is irrelevant so far as the court's approach to their evidence is concerned; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded.***
>
> ***(ii) The tendency to use the expression "witness with an interest (or purpose) of his own to serve" carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact 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.***

(iii) Once in the circumstances of the case it is reasonably possible that the witness has motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe.

8.8 Further, in **Yokoniya Mwale v The People** [12], a recent decision, the Court stated as follows:

> ***"We ought however, to stress, that these authorities did not establish, nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This, in our view, would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witness may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernable, and only in those cirumstances, should the court treat those witnesses in the manner we suggested in the Kambarage' case. 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 on the evidence before***

it, those witnesses 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. <u>What is key in our view, is for the court to satisfy itself that there is no danger of false implication.</u>" (emphasis added)

8.9 The record shows that the trial court relied on the demeanour of the witnesses to find that their evidence was reliable. However, the evidence on record is to the effect that PW2, PW3 and PW4 were detained in police custody on suspicion of murdering the deceased. PW5 was the last person seen with the deceased and went into hiding for seven months upon learning of his death. This shows that these category witnesses in the particular circumstances, may have an interest of their own to serve and that the danger of false implication was present, which ought to have been discounted. Their evidence was not corroborated by independent evidence.

8.10 In our view, the danger of relying on the evidence of suspect witnesses, in this case, PW2, PW3, PW4 and PW5 had not been excluded for the trial court to safely rely on their evidence and convict the appellant. There was need for corroboration of their evidence before the court could proceed to safely convict. In the

absence of corroboration, we find that the conviction against the appellant is unsafe. The prosecution did not prove the case beyond all reasonable doubt.

8.11 We accordingly allow the appeal and set aside the conviction and sentence by the lower court. The appellant is hereby set at liberty forthwith.

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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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K. Muzenga
COURT OF APPEAL JUDGE