

**IN THE COURT OF APPEAL  
OF ZAMBIA HOLDEN AT KABWE  
(Criminal Jurisdiction)**

**APP. No. 45, 46 & 47/2022**

BETWEEN:

**KINGSLEY TAMBA  
KAWESHA NGOVI  
SINDILA KABASO**



**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
3<sup>RD</sup> APPELLANT**

AND

**THE PEOPLE**

**RESPONDENT**

**CORAM : Mchenga DJP, Chishimba and Muzenga JJAs  
On 12<sup>th</sup> October, 2022 and 23<sup>rd</sup> February, 2022**

For the Appellant : Mr. E. Mazyopa, Senior Legal Aid Counsel –  
Legal Aid Board

For the Respondent : Mr. D. Mbao, State Advocate – National  
Prosecution Authority

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**J U D G M E N T**

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**Chishimba JA, delivered the Judgment of the Court.**

**CASE AUTHORITIES CITED:**

1. Ernest Mwaba & Others v The People (1987) Z.R. 19
2. Katebe v The People (1975) ZR 13
3. James Kape v The People (1977) ZR 192
4. Michael Njovu v The People (2011) 2 ZR
5. Adam Bweupe & Another v The People SCZ Appeal No. 251/252 of 2014
6. James Mwango Phiri v The People SCZ Judgment No. 171 of 2015

7. Nzala v The People (1975) ZR 221
8. Bwalya v The People (1975) Z.R. 125

**LEGISLATION CITED:**

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

**OTHER WORKS CITED**

1. Black's Law Dictionary. 8<sup>th</sup> Edition.

**1.0 INTRODUCTION**

- 1.1 The appellants were charged with one count of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars were that Kingsley Tamba (A1), Kawesha Ngovi (A2) and Sindila Kabaso (A3) on 19<sup>th</sup> December, 2018, at Chambishi in the Chambishi District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together did murder one Francis Sepa Junior.
- 1.2 The court below acquitted A3 of the offence and convicted A1 and A2, who being dissatisfied, have appealed against the judgment.

**2.0 EVIDENCE IN THE COURT BELOW**

- 2.1 The summary of the evidence is that on the 19<sup>th</sup> of December 2018, Justin Sepa (PW1), Collins Salukunga (PW2) and Francis

Sepa Junior (the deceased) went to Kennedy Katai's (PW3) bar called Roadside Bar, at around 20:00 hours. PW3 was being assisted in the bar by Warren Mubisha (PW4).

- 2.2 According to PW1 and PW2, the appellants were also in the bar with Paul Daka, Phallon Daka, Elias Siwale, Phil Lubumbula and others. The group for the appellants numbered about ten individuals. The bar was well lit with electric bulbs both inside and on the veranda.
- 2.3 When Paul and Phallon Daka saw PW1, they confronted him about their past differences. Realizing that there was a possibility of a bar room brawl, PW3 assisted by PW4 urged the two groups to go outside the bar. When they got outside, PW1 asked Paul Daka whether the issue they had was over but were instead insulted by Phallon Daka. When PW2 asked Phallon why he was insisting on an issue that ended a long time ago, he was punched by A1 in the mouth.
- 2.4 PW1 told the court that A1 and A2 were armed with chains while A3 had a short baton. The rest of the group were armed with golf sticks.

- 2.5 As the deceased moved to the aid of PW2, he was struck by Paul Daka on the head using a short baton. PW1 could not go to Daka's assistance because he was being attacked by A2, A3 and Elias Siwale.
- 2.6 At the same time, Phil Lubumbula, Paul Daka and others descended on the deceased with short batons, golf sticks and chains. The deceased fell down and was beaten until he stopped moving. On seeing that the deceased was motionless, his assailants ceased the attack and left. Those beating PW1 also ceased and left.
- 2.7 PW1 ran to his vehicle and drove to where the deceased lay. He sought the help of a passerby to put him in the vehicle and then drove to where PW2 lay. PW2 got up on his own, entered the vehicle and they drove to the police station where medical reports were issued to the deceased and PW2.
- 2.8 PW1 then took them to Chambishi Hospital and were referred to Kitwe Central Hospital. The condition of the deceased worsened and he eventually died on 19<sup>th</sup> December, 2019.
- 2.9 PW2 told the court that after they were sent out of the bar by PW3, he told Paul Daka that the issue he was raising against

the deceased was not new. However, Paul struck him on the mouth and Phallon Daka joined in beating him. A group allied to the Dakas appeared armed with chains, short batons and golf sticks.

2.10 A1 joined the group and beat PW2 with a chain on his back and he fell to the ground. PW2 was kicked and beaten with chains until he passed out. When he regained consciousness, all his assailants had left the scene.

2.11 In his testimony, PW3 identified A1 as being in the group that he chased from his bar while PW4 identified A1 during an identification parade held on 7<sup>th</sup> January, 2019 based on the description he gave to the police.

2.12 PW5 conducted an identification parade on 7<sup>th</sup> January, 2019 at which PW2 and PW4 identified A1.

2.13 PW6 conducted investigations leading to the arrest of the appellants. In cross-examination, PW6 stated that A1 told him that he was with his girlfriend, Annette Zulu in the bar but that he failed to tell him where to locate the said woman. As for A2, PW6 was told that he was at home at 20:00 hours on the material day.

2.14 PW7, Dr. Olga Sadkovska produced the report of the postmortem he conducted on the body of the deceased. The cause of death was due to the fracture of the left temporal bone with intracranial haemorrhage and brain damage.

2.15 In his defence, A1 testified that he was in the bar with his girlfriend, Annette Zulu, Phil, Paul Daka and Phallon Daka. PW1 approached Paul Daka saying: "*You see. You thought we would never meet*" to which Paul responded that the issues were long gone and passed. There was an exchange of words that led to PW3 asking the two groups to leave the bar. A1 remained with his girlfriend in the bar playing pool while the others went outside. He denied seeing A2 and A3 during that night.

2.16 Later, he heard that there was a fight outside. When he went outside to check, he found the deceased seated having been beaten. PW1 came, and with the help of onlookers, put the deceased in a vehicle and drove off. On 27<sup>th</sup> December, 2018, he was apprehended.

2.17 A1 and A3 were later identified by PW1 together with other suspects during an identification parade. Later, PW4 was brought and detained in the same cell with him but was

released the same day. On a date he could not recall, PW4 identified him during an identification parade.

2.18 A2 denied committing the offence stating that on the material date, he was in the company of friends drinking from a bar until around 18:00 hours when he went home to be with his mother and nephew. A few days later he learnt that there was a fight involving the children of Daka and Sepa at which one of Sepa's children was severely beaten.

2.19 On 19<sup>th</sup> December, 2018 he learnt of the death of the deceased and was apprehended on 27<sup>th</sup> December. During an identification parade, PW1 identified him and the appellants, while PW4 identified A1.

2.20 A3 testified that that on 15<sup>th</sup> December, 2018 he spent the day at home with his mother until he went to bed. On 27<sup>th</sup> December, 2018, he was apprehended by the police who were led by PW1. During an identification parade, PW1 failed to identify the persons that attacked them. However, after a few minutes, PW1 identified A1 and A3. A day later, PW4 was detained in custody with A3 and the others but was released the same day.

2.21 DW4, Edah Mpondela is the aunt to A2. She testified that on 15<sup>th</sup> December, 2018, A2 was at home from 18:00 hours and that he spent the night in the house. DW5, Brenda Nalukwi Sindila told the court that her son, A3 spent the day at home on 15<sup>th</sup> December, 2018 and that she locked the gate at 21:00 hours.

### **3.0 DECISION OF THE COURT BELOW**

3.1 In his judgment, Judge Katanekwa stated that he was impressed with the demeanour of PW1 and PW2 and accepted their version of what transpired on 15<sup>th</sup> December, 2018 as truthful. He rejected the version of A1 that the deceased was seated when he went outside. He accepted the evidence of PW1 and PW2 implicating A1 and A2 in the attack on the deceased and themselves, and held that the appellants had a common purpose.

3.2 In regards to A3, the trial court found that A3 had an alibi, as supported by DW5, which the police were informed of but did not investigate. Having entertained doubt in its mind, the court acquitted A3.



#### **4.0 GROUNDS OF APPEAL**

4.1 One ground of appeal has been advanced as follows that:

***The learned trial judge erred in law and fact to convict the two appellants herein when the prosecution did not prove the case against them beyond all reasonable doubt.***

#### **5.0 ARGUMENTS BY THE APPELLANTS**

5.1 On behalf of the appellants, it was submitted that the case was not proved beyond reasonable doubt. The trial court heavily relied on the evidence of PW1 and PW2. PW2 did not see what really brought down the deceased and occasioned the injuries he sustained because (PW2) too was hit, fell down and lost consciousness.

5.2 Reference was made to the evidence by PW2 that Paul Daka hit the deceased in the head with a short button. This evidence was supported by the postmortem report indicating the cause of death to be brain injury. The case of **Ernest Mwaba & Others v The People** <sup>(1)</sup> was cited which held that:

***Where joint adventurers attack the same person then, unless one of them suddenly does something which is out of line with***

***the common scheme and to which alone the resulting death is attributable, they will be liable.***

- 5.3 In that regard, counsel argued that while the evidence in *casu* is to the effect that the deceased was hit by others, the only clear blow is the one unleashed by Paul Daka. The appellants clearly indicated that they did not participate in the beating.
- 5.4 It was further argued that A1 was with his girlfriend, Annette Zulu at the time of the attack. The trial court found that A1 did not give the police the address of the said woman to investigate the alibi. However, there was nothing on the record to show that A1 refused to lead the police to where the said woman was living as he was in custody. Therefore the prosecution failed to negative the alibi. As authority, we were drawn to the attention of the case of **Katebe v The People** <sup>(2)</sup> to show that the alibi having been set up and there being evidence of it, the prosecution had to negative it as there is no onus on an accused to establish his alibi.
- 5.5 With respect to A2, it was argued that he too gave an alibi but that the trial court found that his evidence differed with that of his aunt, DW2 with respect to the time he was in and out of the

home. The court also found that A2 spent part of the day with the Dakas and that he never left them during the attack.

5.6 Counsel contended that the trial court ought to have believed A2 who did not deny having been with the Daka brothers at some point in time during the day. That the court should have considered that his identity could have been mistaken, like it did for A3. It was argued that merely leaving home for some time and returning later, or being found with persons who later commit a crime after leaving them, does not entail involvement in a crime.

5.7 In support of these arguments, reliance was placed on the case of **James Kape v The People** <sup>(3)</sup> that:

*The lie told by the accused, where it is reasonably possible that he is lying for a motive which is consistent with his innocence, does not lead inevitably to an inference of guilt, and does not remove the necessity to consider whether the explanation he gave to the police could reasonably be true.*

5.8 Our attention was also drawn to the findings of Dr. Olga Sadkovska (PW8) who, in cross-examination responded that during the postmortem examination, he found a fresh-5cm-sutured-wound on the body of the deceased which was a day

old. Considering that the deceased was attacked on 15<sup>th</sup> December, 2018 while the postmortem was done on 20<sup>th</sup> December, 2018, the trial court should have inquired as to who occasioned the said wound. Counsel submitted that this raises the possibility of some *actus interveniens*.

5.9 It was argued that it is not possible that the assault of 15<sup>th</sup> December, 2018 caused the death of the deceased in the face of evidence of a fresh wound on 20<sup>th</sup> December, 2018. In support thereof, the case of **Michael Njovu v The People** <sup>(4)</sup> was cited where it was held that:

***“Where there is evidence of assault, followed by death, without the opportunity for a novus actus interveniens, a Court is entitled to accept such evidence as an indication that the assault caused the death.***

## **6.0 ARGUMENTS BY THE RESPONDENT**

6.1 Counsel for the respondent submitted that the gist of the appeal by the appellant is that they raised *alibis* which were not investigated by the police. We were referred to **Black’s Law Dictionary, 8<sup>th</sup> edition, page 79** for the definition of alibi which is as follows:

***“Alibi –***

1. *A defence based on physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.*
2. *The fact or state of having been elsewhere when an offence was committed."*

6.2 A1 argued that he was with his girlfriend, Annette Zulu at Roadside Bar and that he gave the police her names but that they did not interview her. The learned Senior State Advocate contended that the Roadside Bar being the scene of crime, A1 cannot claim that he raised an alibi as he did not claim to have been 'elsewhere' to make it physically impossible for him to have been at the scene at the material time.

6.3 For this reason, no alibi was raised by A1 as it is a fact that he was at the scene before and after the incident as per his testimony. The trial court noted that the issue of Annette Zulu was neither raised during the cross-examination of the prosecution witnesses nor was her residential address given in his statement to the police.

6.4 In support thereof, learned counsel relied on the cases of **Adam Bweupe & Another v The People** <sup>(5)</sup> and **James Mwango Phiri v The People** <sup>(6)</sup> that where there is no evidence to support an

alibi or where insufficient details are given to the police, there is no obligation by the police to investigate such alibi.

6.5 With respect to A2, it was submitted that he neither raised any alibi for the police to investigate nor did it arise during the prosecution case. That no evidence was shown to suggest that the alibi was raised at the time that A2 was apprehended or arrested.

6.6 That the **Adam Bweupe case** and **Nzala v The People** <sup>(7)</sup> guide that the onus is on the appellant to raise his alibi by giving the police sufficient details for them to investigate the alibi. The trial court found the evidence of DW4 to be insufficient to support the alleged alibi of A2 because he failed to account for his movement. Consequently, A2's alibi is an afterthought.

6.7 As regards the suggestion by the appellants that there was a *novus actus interveniens* to the cause of death of the deceased, it was submitted that there was no such opportunity in view of the notorious fact that the deceased was admitted to the intensive care unit of the hospital.

6.8 Counsel submitted that there was no opportunity for a *novus actus interveniens* and that it cannot be over emphasized that

the deceased died due to the injuries he sustained from the assault by the appellants. To buttress this argument, we were referred to the case of **Michael Njovu v The People** <sup>(4)</sup> cited by the appellant. The trial court cannot be faulted in its finding having considered the medical evidence together with all other evidence before the court.

6.9 We were urged to dismiss the appeal and uphold the conviction and sentence of both appellants.

## **7.0 DECISION OF THIS COURT**

7.1 We have considered the appeal, the authorities cited and the arguments advanced by the learned counsel. The thrust of this appeal is that it is not known who struck the fatal blow on the deceased and that each of the appellants had an alibi which was not investigated by the police to the detriment of the appellants.

7.2 With respect to the alibi, A1 said that he remained in the bar with his girlfriend, Annette Zulu when the two factions were sent outside by PW3. A perusal of the record shows that A1 mentioned to PW6 that he was with his girlfriend in the bar at the time. PW6 on the other hand testified that he was not given the details for Annette Zulu to enable him to interview her.

7.3 In the case of **Bwalya v The People** <sup>(8)</sup>, the court guided that:

*“Simply to say “I was in Kabwe at the time” does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says “I was not there” he puts forward an alibi which it is the duty of the police to investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been the duty of the police to investigate; but the appellant not having done so, there was no dereliction of duty on the part of the police.”*

7.4 A duty is placed on the police to investigate an alibi when the accused gives the names or addresses of the people in whose company he alleged to have been at the material time. By providing that information, the police are duty bound to investigate and establish the whereabouts of the accused.

7.5 In this case, A1 simply gave a name of the person he alleged to have been with at the material time. When asked where the police could find her, the appellant could not provide any further details. Therefore, there was no dereliction of duty on the part of the police in not investigating the alibi any further.

7.6 We also agree with the learned Senior State Advocate that A1 cannot claim to have had an alibi as he was not ‘elsewhere’ to



make it physically impossible for him to have been at the crime scene at the material time.

7.7 The learned authors of **Black's Law Dictionary 8<sup>th</sup> edition** cited by counsel for the respondent, define an alibi as a defence based on the physical impossibility of an accused's guilt by placing the accused in a location other than the scene of the crime at the relevant time. To constitute an alibi, the accused must have been elsewhere when an offence for which he is charged was committed.

7.8 In this case, A1 was at the crime scene and not elsewhere. For this reason, no alibi can be said to have been raised by A1. In any case, he was identified by PW1, PW2 and PW3 as having been at the scene and taking part in assaulting the deceased.

7.9 As regards A2, he claimed to have been at home with DW4 from around 19:00 hours during the night of 15<sup>th</sup> December, 2018. PW6 confirmed having been told by A2 at the time of his arrest that he was at home at the relevant time. While PW1 and PW2 placed him at the crime scene, PW3 and PW4 never made reference to him.

7.10 We accept the difference in time of one hour in the evidence of A2 and DW4 as it does not change the fact that he was at home during the material night. Further, the fact that A2 spent part of the day with the fugitive Dakas would not of itself be conclusive evidence that he was involved in the assault on the deceased. There is evidence by A2 in Chief that between 20: 00 hours he went to the market and came back at 21:00 hours. This is contrary to the evidence by his mother that locked the gate at 20:00 hours. The court discussed the discrepancies in their evidence. Further the court found PW1's evidence more credible in his identification of A2 as he had the opportunity to observe him and knew A2 very well.

7.11 We, therefore, on the evidence adduced, are of the view that A2 was part of the group that attacked the deceased causing his death.

7.12 We now address our minds to the issue of who struck the fatal blow that led to the death of the deceased. We have found that A1 was at the crime scene when the deceased was attacked. We are also satisfied that A1 was part of the group that descended

on the deceased, beating him savagely, the injuries causing the death.

7.13 As properly argued by Mr. Mazyopa, there was no clear evidence of who dealt the fatal blow on the deceased as the altercation arose from a bar room brawl with several participants. What is evident to us is that A1 and the others that were present had a 'bone to chew' with the deceased and his colleagues. There was a common intention to descend on the deceased by A1 and those allied with him.

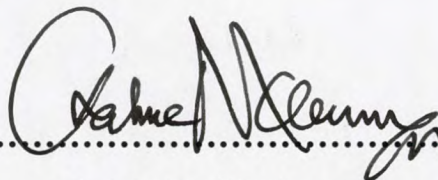
7.14 **Section 22 of the Penal Code** provides that:

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

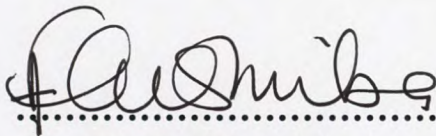
7.15 The evidence shows that a common intention was formed by A1, A2 and the others to assault the deceased, PW1 and PW2 over past differences. Having found that it is not clear who dealt the fatal blow but that there was a common intention, we are of the view that the conviction for murder cannot stand. We hold the

view that the evidence on record discloses the offence of manslaughter.

7.16 In that regard, we hereby set aside the conviction for murder, and the sentence of death. We accordingly substitute it with that of manslaughter contrary to **Section 199 of the Penal Code**. We impose a sentence of ten years imprisonment with hard labour with effect from the date of arrest on the 1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively.



**C. F. R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**



**F. M. Chishimba**  
**COURT OF APPEAL JUDGE**



**K. Muzenga**  
**COURT OF APPEAL JUDGE**