IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.8,9,10/2023**
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)

BETWEEN:

KENNETH HAMUGUYU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kabuka and Chisanga, JJS

On 4th April, 2023 and 14th April, 2023

For the appellant: Mrs S.C. Lukwesa, Chief Legal Aid Counsel

For the State: Ms M.G. Kashishi, Principal State Advocate

JUDGMENT

HAMAUNDU, JS delivered the judgment of the court

Cases referred to:

1. **Phiri & Others v The People (1973) ZR 47**
2. **Mutale & Phiri v The People (1995/1997) ZR 227**
3. **Saluwema v The People (1965) ZR 4**
4. **Kombe v The People (2009) ZR 282**
5. **Ilunga Kabala and John Masefu v The People (1981) ZR 102**
6. **Situna v The People (1982) ZR 115**
7. **Kape v The People (1977) ZR (Reprint) 257**
8. **R v Turnbull (1976) 3 All. E.R. 549**
9. **Chola v The People (1988/1989) ZR 163**

1.0 INTRODUCTION

1.1 This appeal is against conviction. The appellant was charged with two other people in the High Court with the offence of Murder contrary to **Section 200** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. It was alleged that the trio, jointly and whilst acting together, murdered Abraham Musowe.

1.2 The two fellow accused named Funwell Musowe and Emmanuel Musowe, who are children of the deceased, have since abandoned their appeals. The appellant has, therefore, proceeded alone with his.

1.3 The appeal is being determined by way of review of the judgment only since the record of the proceedings could not be found.

2.0 THE FACTS

2.1 The appellant was at the material time a resident of Kabwe District in the Central Province of Zambia. The appellant used to keep, and look after, cattle that belonged to Maxon Nkausu, PW1. Some time in December, 2014, the appellant borrowed a shot gun from PW1 in order to

protect the cattle that was being harassed by a hyena: This is what the appellant told PW1. Together with the shot gun, the appellant was given two shot gun cartridges.

2.2 On 22nd December 2014, around midnight, in Topolo Village, the deceased was woken up by the constant barking of dogs. He went outside to investigate the cause of the commotion; he was then shot by an unknown person. He died from the gunshot wound shortly thereafter. When the police came to the scene, later that morning, they picked a plastic wad of a shot gun cartridge. The body of the deceased was subsequently taken for post-mortem examination where seventeen shot gun pellets were removed from the body. The plastic wad and the pellets were submitted for ballistic examination which later confirmed that both had come from a shot gun cartridge which had been fired from a shot gun of 12 bore calibre.

2.3 The deceased was buried on 25th December, 2014. Shortly thereafter, the deceased's son, Christopher Musowe (PW3), disclosed to his mother (PW2) that he had earlier overheard his two elder brothers, Funwell Musowe and

Emmanuel Musowe, expressing intentions of kiling their father. This information was relayed to the police, who went and picked the two brothers: Funwell Musowe was picked from the deceased's home, and he then led the police to Kampumba village where Emmanuel Musowe lived. The two were then detained. Emmanuel Musowe later led the police to the appellant's home, but they did not find him on that occasion. Then they went to inquire from PW1 about the whereabouts of the appellant and left PW1 with an instruction that he should call them when the appellant showed up. The police, however, rounded up the appellant's wife and children, whom they detained.

2.4 On 31st December, 2014, around 01:00 hours, the appellant took back the shot gun; this was two weeks after he had borrowed it. The appellant is said not to have returned the two cartridges. In the morning, PW1 accompanied the appellant to town (presumably Kabwe). Before they left, PW1 informed the police that the appellant had shown up. Along the way, they met the police at a place called Likumbi. The police apprehended the appellant, while PW1 proceeded to town alone. After a

short while, the police called PW1 to ask for his shot gun. PW1 called his wife at home to give it to them. The police then picked the shot gun and four live cartridges from PW1's home. These were then sent for ballistic examination.

2.5 Upon ballistic examination, PW1's shot gun was found to be functioning properly, and was of 12 bore calibre, the same as the live cartridges. It was found that the plastic wad and the pellets could have been discharged from PW1's shot gun. In the end, however, the ballistic expert said that he could not conclusively say that PW1's shot gun fired the pellets: This was because they could have been fired by any other shot gun of the same calibre.

2.6 On 6th January, 2015, a scenes of crimes officer (PW4), after interviewing the appellant and his fellow suspects, and verbally warning and cautioning them, went to the scene of crime with all the three suspects. There, he took photographs of them (presumably giving demonstrations); and later compiled a photographic album. This officer produced the album in court, but the judgment does not

show what explanations he gave about each of the photographs.

2.7 The appellant and his fellow suspects were then charged with the offence of murder.

2.8 In their defence, all the three accused denied killing the deceased. Funwell Musowe said that, on the night that his father was killed, he was at his home in Kampumba village. He agreed that he led the police to his brother's house, but said that he did not know where the appellant lived. He denied giving the appellant K2,000 to kill his father.

2.9 Emmanuel Musowe also said that he was at home on the night that his father was killed. He denied paying money to the appellant. He also denied receiving a sum of K2,000 from his brother, Funwell, to pay anyone. He said that he had never met the appellant before.

2.10 The appellant said that, on the night that the deceased was killed, he was at his home. He said that the police came to his home and, having not found him, they picked his wife and children. He heard from PW1 and also from a neighbour's child that the police had been to his home,

looking for him. He agreed that he had been in possession of PW1's shot gun for two weeks. He said that he returned the shot gun, together with the two cartridges that PW1 had given him. In cross-examination, he admitted that PW1 had told the court that he did not return the two cartridges. The judgment does not state what comment, if any, the appellant made in reaction to that discrepancy. He said, however, that after taking back the shot gun to PW1, he stayed on up to 03:00 hours, after which time he and PW1 started off for Kabwe (presumably for the appellant to follow up his wife and children who were detained by the police in Kabwe). However, they met the police at Likumbi. The appellant said that he never knew the deceased, his co-accused or their family. He denied receiving the sum of K2000, or having any agreement with the Musowe brothers, to kill their father. He finally said that he did not know how the police got to know where his house was.

3.0 THE TRIAL COURT'S DECISION

3.1 The trial judge (Sichinga, J, as he then was) convicted the appellant and the two Musowe brothers on the foregoing evidence. With particular reference to the appellant, the judge found it to be an odd coincidence that the plastic wad that was found at the deceased's home was discharged from the same type of shot gun as the one that had been in the possession of the appellant at the material time. However, the evidence on which the learned judge really relied on to convict the appellant was the testimony of the arresting officer (PW6). This witness had told the court that he had investigated the deceased's murder, and that his investigations had revealed that the appellant was the gunman that was hired by the two Musowe brothers to kill the deceased. In his judgment, the learned trial judge said that he accepted that evidence as there was no other evidence to dispel the notion that the gunman was the appellant, as hired by the two Musowe brothers. The judge, therefore, found that the appellant and the two Musowe brothers had collectively plotted to kill the deceased.

3.2 The judge, however, found that in the case of the Musowe brothers, there were extenuating circumstances because of their belief that their father was practicing witchcraft on them. But, in the case of the appellant, the judge found no extenuating circumstances; and so, the judge sentenced him to death.

4.0 THE APPEAL

4.1 The appeal is only on one ground, which reads as follows:

> **"The court below erred in law and in fact when it convicted the appellant in the face of evidence on record which raised doubt as to the guilt of the appellant".**

4.2 The main argument by the appellant in this appeal is directed at the learned trial judge's reliance on the testimony of PW6 in order to convict the appellant.

4.3 Mrs Lukwesa, learned counsel for the appellant, submits that that piece of evidence should not have been taken into account by the trial judge because, to use her own words, it was a misapplication of the law and a misapprehension of facts. She argues that that piece of evidence should have come from a witness of fact, who should have attested that they saw or heard the Musowe brothers hire the appellant

to kill their father or that they even saw them paying money to him. Counsel argues that the evidence, to the extent that it was given by PW6, was hearsay, and should therefore not have been used to connect the appellant to the offence; and neither should it have been used to corroborate the testimony of PW1.

4.3 Learned counsel goes on to argue that, in the absence of PW6's testimony, there was a gap in the prosecution evidence; and that the trial judge was wrong to fill that gap by relying on PW6's testimony to the detriment of the appellant. We have been referred to the case of **Phiri & Others v The People**[1] for that submission.

4.4 Learned counsel, also, goes on to discount the other pieces of evidence. She points out that, to start with, the firearm was given to the appellant for the purpose of protecting PW1's cattle against hyenas. She argues that there was nothing suspicious about the awkward hour at which the appellant returned the shot gun because he gave an explanation that he was intending to leave for Kabwe very early the same morning. Counsel adds that, in any case, the appellant was not even aware that there were people

who were looking for him in connection with the death of the deceased, for him to want to get rid of the shot gun.

4.5 Coming to the ballistic examination, counsel points out that the ballistic expert (PW5) actually admitted that he could not conclusively say that PW1's shot gun fired the pellets that were removed from the body of the deceased. It is counsel's argument that it is also possible to draw an inference that the pellets were not fired from PW1's shot gun, in which case our decision in the case of **Mutale & Phiri v The People**[2] should apply, namely that the inference which is more favourable to the appellant should be the one adopted.

4.6 In conclusion, Mrs Lukwesa argues that there was no evidence to prove beyond reasonable doubt that the appellant was hired by the Musowe brothers to kill their father; and that, because there were lingering doubts, the case of **Saluwema v The People**[3] applied. She has urged us to allow this appeal.

4.7 Ms Kashishi, on behalf of the State, supports the conviction and argues that the circumstantial evidence in this case had taken the case out of the realm of

conjencture. She submits that the strength of the prosecution's case lay in the several odd coincidences that were present in the facts.

4.8 Counsel submits that there were odd coincidences that rendered the explanation by the appellant that he had borrowed the shot gun to protect PW1's cattle from a hyena as not being reasonably true. She also points out that even the appellant's own inconsistencies in his evidence discounted that explanation. We have been referred to the case of **Kombe v The People**(4) and that of **Ilunga Kabala and John Masefu v The People**(5) on the submission that odd coincidences may point to the guilt of an accused person. Ms Kashishi points out that the appellant's return of the shot gun to PW1 at such an awkward hour as 01:00 hours was suspicious because this was after he had heard from a neighbour's child that some people had come looking for him.

4.9 She also points at the discrepancy between PW1's and the appellant's testimony as to whether or not the two cartridges that were given to the appellant were returned.

She submits that the appellant said that he returned them and yet PW1 said that he did not.

4.10 On the ballistic examination, it is Ms Kashishi's position that although the ballistic expert selected his words carefully when he said, under cross-examination, that any similar firearm could have fired the pellets it was still a very odd coincidence that the appellant was in possession of a shot gun during the same period that the deceased was killed, and that the plastic wad that was picked from the scene was fired from the type of cartridges that were given to the appellant, and which he did not return. Counsel argues that all these odd coincidences led to only one logical inference, and that is that the pellets were discharged from the shot gun which the appellant had, and not from any other similar firearm.

4.11 On the testimony of the arresting officer (PW6), it is Ms Kashishi's submission that the court did not consider PW6's testimony in isolation, but considered it together with the evidence of other witnesses.

4.12 All in all, Ms Kashishi submits that the prosecution's

case was proved conclusively without any gaps left. She, therefore, urges us to dismiss the appeal.

5.0 OUR DECISION

5.1 We agree, without hesitation, with the appellant's contention that the aspect of PW6's testimony where he told the court that his investigations had revealed that the two Musowe brothers had hired the appellant to kill their father was inadmissible in evidence. In the case of **Situna v The People**[6] a similar situation arose: A police officer was allowed to tell the court what two witnesses, who were not brought before court, had allegedly told him. This is what we said:

> **"The learned trial Commissioner also considered that he could rely on the evidence of Detective Sergeant Sitaka as to what the two prospective witnesses had told him concerning the appellant on 26th November, 1979, when they allegedly led the police officer to Kamatipa compound where they allegedly identified the appellant to be one of the four men who were in the stolen car which was used in the robbery at Kalulushi on 25th October, 1979. Evidence of a statement made to a witness by a person who is not himself called is hearsay and inadmissible where the object of the evidence is to establish the truth of what is contained in the statement".**

5.2 In this case, the arresting officer (PW6), did not disclose who had given him the information; but that is immaterial because in so far as the arresting officer received it from somebody else, and he was giving that information as the truth of its contents, it was hearsay. And so, the learned trial judge should not even have admitted it in evidence; let alone rely on it.

5.3 Now, when that part of the arresting officer's testimony is excluded, the conviction of the appellant depends on whether or not the rest of the evidence points to his guilt. It is the prosecution's argument that, in fact, that is the case.

5.4 We would like to look at what the prosecution have pointed out as odd coincidences. There is first the discrepancy as to whether the appellant returned the cartridges that he was given by PW1 or not. It is probable that the appellant lied when he said that he returned them. In the case of **Kape v The People**[7] we said that whatever the reason, the lie by an accused in court does not inevitably lead to an inference of his guilt. We would like particularly to

quote from a passage in the case of **R v Turnbull**[8], which we had quoted in the case of **Kape**. It reads:

> **"Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his evidence will not be enough"** (*underlining ours for emphasis*)

5.5 The underlined words in the passage above can apply to the suspiciously awkward hour at which the appellant returned the shot gun to PW1: It was clear from the evidence that the police, at that time, were looking for him, and they had even picked up his wife and children. It was also clear, even to the appellant, that he was being suspected of involvement in a murder that involved a shooting; and so, as stupid, or suspicious, as the course of action that the appellant took might appear to be, he could well have been trying to distance himself from the suspicion as much as possible for fear that he might not be able to convince the police as to the reason for his possession of PW1's shot gun.

5.6 As for the ballistics evidence, it is clear that, although PW5 at first attempted to show that the plastic wad and the pellets were fired from PW1's shot gun, he admitted in the end that they could have been discharged from any other shot gun of the same calibre. Therefore, it cannot seriously be argued that ballistic examination proved that it was definitely PW1's shot gun that fired the plastic wad and the pellets.

5.7 We have then considered another piece of evidence. This came from PW4, the scenes of crime officer, who said that he took photographs of the appellant and his fellow suspects at the scene of crime. In the case of **Chola v The People**[9], the following is what we said about still photographs of accused persons which are taken at the scene of crime:

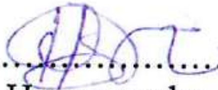
> **"In the instant case, there was, of course, no video film but still photographs, the incriminating purport of which had to be supplied verbally by the police officer....The resulting photographs were meaningless unless accompanied by the oral explanation of the police, such as, that the accused then said** *'This is where I stood and that is where the vehicle was parked when I committed the offence'* **and son on".**

5.8 In this case, as we have said, the judgment does not reveal whether PW4 adduced such kind of evidence. If indeed he did, then we are surprised that the learned trial judge could have overlooked such vital piece of incriminating evidence. Otherwise, as the evidence stands on this record, those photographs were meaningless.

5.9 Finally, we have considered PW6's testimony that Emmanuel Musowe (who was 2nd accused at the trial), upon being apprehended, led the police to the house of the appellant. First, it was not clear in what context Emmanuel Musowe was leading the police to the house of the appellant since the witness did not produce Emmanuel Musowe's confession statement in court. Secondly, it cannot be assumed that because Emmanuel Musowe led the police to the appellant then that meant that the appellant killed the deceased; this is because Emmanuel Musowe could well have shot the deceased himself, and had only borrowed the shot gun from the appellant (with the appellant not being given the true reason why it was being borrowed). So, the leading by Emmanuel Musowe to

the appellant's house could well have been in the context that he was leading the police to the person from whom he had borrowed the gun to kill his father. That inference cannot be ruled out: And as we held in the case of **Mutale & Phiri v The People**, which the appellant has cited above, where there are two or more inferences that can be drawn, the court should adopt the one that is more favourable to the accused.

5.10 And so, having discounted the other pieces of evidence, for one reason or the other, we are of the view that, once that particular testimony of PW6 was excluded, there was no evidence that proved beyond reasonable doubt that the appellant killed the deceased. For that reason, we allow the appeal. We hereby quash the conviction and sentence of death. Instead, the appellant stands acquitted.



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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE

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F. M. Chisanga
SUPREME COURT JUDGE