IN THE COURT OF APPEAL OF ZAMBIA **APP NO. 201/2022**
HOLDEN AT KABWE
(Appellant Jurisdiction)

BETWEEN:

SAMUEL MAKUMBI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Mchenga, DJP, Banda-Bobo and Sharpe-Phiri, JJA
On 10th October, 2023 and 14th November, 2023.

For the Appellant: **Mrs. A. Chisala Mwaba, Legal Aid Counsel, Legal Aid Board**

For the Respondent: **Mr. B. Siafwa – Acting Senior State Advocate, National Prosecutions Authority**

JUDGMENT

Banda-Bobo JA, delivered the Judgment of the Court.

Cases referred to:-

1. George Misupi v. The People (1978) ZR 171(SC)
2. Director of Public Prosecution v. Kilbourne (1973) AC 729
3. William Muzala Chipango and Others v. The People (No. 36 of 1978)
4. Malambo Choka v. The People (1978) ZR 243
5. Chimbo and Others v. The People (1982) ZR 20 (SC)
6. Emmanuel Phiri and Others v. The People (1978) ZR 79 and 81
7. Wilson Mwenya v. The People (1990) SCZ Judgment No. 5
8. King v Job Whitehead (1929) KB 99
9. Chizonde v. The People (1975) ZR 66
10. Haonga and Others v. The People (1976) ZR 200 9
11. Dorothy Mutale and Richard Phiri v. The People -
12. Nsofu v. The People (1973) ZR 287

Legislation and Other Works referred to:-

- The Penal Code Act Chapter 87 of the Laws of Zambia

1.0. INTRODUCTION

1.1 This is a judgment on an appeal against the judgment of Hon. Mr. Justice Muma, delivered at Mongu on 7th December 2022, wherein he convicted the Appellant of the offence of Murder and ultimately sentenced him to death.

2.0. BACKGROUND

2.1 The Appellant was charged with the offence of Murder, contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia.

2.2 In the particulars of the offence, it was alleged that the Appellant murdered one Musiyebo Makumbi Mate. Initially, the Appellant had been jointly charged together with Sungwa Matebele. However, the proceedings against Sungwa Matebele were discontinued and he was set at liberty. He later turned state witness and testified as PW2.

2.3 The Appellant vehemently protested his innocence and denied the charge laid against him. The matter thus proceeded to trial.

3.0. The State's case rested on six witnesses.

4.0. **PW1**, **Matongo Chifwendo** testified that he had attended a meeting with the Appellant on 27th November 2021. The meeting ended at 12:00 hours and they walked back together to their homesteads and arrived around 14:00 hours. He had known the Appellant prior to this date, and he had chaired the meeting they both attended.

5.0. **PW2** was **Sungwa Matebele**. He testified that sometime in November, 2021, the Appellant had solicited for help from him to help kill the deceased over a land dispute. That he had been offered K3,000 to carry out the deed, but he refused. Thereupon the Appellant told him not to reveal what had transpired to anybody.

5.1 He testified that on 27th November, 2021, while at the river, he had observed the Appellant hit the deceased on the head with a paddling stick four times until the deceased fell into the matter.

5.2 That the Appellant had noticed him, and went to him, stating that he had killed the person who had been troubling him. That he asked the witness what he had seen, and when he told him that he had seen what the Appellant had done, he was warned not to say anything otherwise he would see.

5.3 Having been so warned, the witness went home and did not say anything to anyone. The following day, a search party was constituted to search for the missing person. Even though PW2 was part of the search party, he did not say anything.

5.4 It was only on 8th January 2022, that he revealed to Mate Mate, that the person who had killed Mate's brother was the Appellant. At that time, rumours had abound that infact it was PW2 himself who had killed the deceased. It was upon this revelation that he, together with the Appellant were apprehended by the neighbourhood watch, and later both were handed over to the Police. He stayed in Police cells for two months. He was later released while the Appellant's case proceeded to the High Court for trial.

5.5 He admitted in his evidence that he was the one who led the police to the place where the body was retrieved. Further, that despite knowing what transpired, he kept quiet about it for two months. He told Court that he kept quiet due to the threats on him by the Appellant, though he did not report the said threats to anyone.

5.6 He confirmed having been detained together with the Appellant for the same offence for two months. He conceded that there had been rumours in the area that that he was suspected of having killed the deceased.

6.0. **PW3** was **Mate Mate**, the brother to the deceased. He testified that on 27th November 2021, he had learnt that his brother had gone missing after having gone fishing. Later the body of his brother was found and brought home. He had observed a broken neck and that his brother had been bleeding from the mouth and nose. That is how the matter was reported to the police

6.1 That on 8th January 2022, Sungwa Matebele (PW2) told him that people in the area suspected that he, (Sungwa) had killed Mate's brother. However, that he knew the Appellant was the culprit. The witness then relayed the information to the neighbourhood watch, whereupon both Sungwa and the Appellant were picked up and conveyed to the police.

6.2 He told Court that PW2 did not attend the funeral, nor did he go to the funeral house. However, that the Appellant was with them during the whole period of mourning up to burial.

7.0. **PW4** was **Kayombo Mukonda**, the Chair of the neighbourhood watch and who assisted in the apprehension of the duo. His evidence was to the effect that PW2 had run away when they first went to apprehend him, but they had managed to apprehend him when they went to his house on the second occasion. He stated that PW2 had led them to the Appellant, who they apprehended as well.

7.1 That as the duo were apprehended, PW2 kept saying that the Appellant was the one who had killed the deceased, an allegation which the Appellant denied.

7.2 In cross examination, PW4 testified that he arrested PW2 because he wondered how he knew that it was the Appellant who killed the deceased. That this revelation by Sungwa (PW2) came after two months.

8.0. **PW6** was **Detective Chief Inspector Malesu Chiyoyo**, who investigated the case after being given a docket of murder. He stated that he had found the two accused persons already in police custody. It was his testimony that PW2 implicated the Appellant by stating that he had killed the deceased by hitting him on the head, with a paddling stick four times.

8.1 PW6 further testified that upon interviewing the Appellant, he was told that on the material date, the Appellant had chaired a meeting at Nanjeko. Later he interviewed PW1 who confirmed that indeed they had been at that meeting, but that it had ended at 12:00 hours, and they reached home about 14:00 hours. That this was contrary to what the Appellant had told him, namely that after the first meeting ended, he had attended another meeting for FISP which ended at 15:00 hours and he arrived home at 18:00 hours.

8.2 PW6 further stated that on the other hand, PW2 had told him that he had seen the Appellant murder Musiyebo at around 18:00 hours on the material day. He then charged the Appellant with the subject offence, which he denied under Warn and Caution.

8.3 It was also his evidence that other than a discrepancy in the movements between PW1 and the Appellant, he had found no other evidence in the case.

8.4 Under cross examination, PW6 conceded that the only person who alleged that he had seen the Appellant kill the deceased

was Sungwa Matebele, PW2. He also admitted that Sungwa, was detained with the Appellant over the same offence.

8.5 He admitted that he had interviewed Kelvin Sililo Nalwange, who had denied having been with PW2 on the material date.

8.6 PW6 also accepted that he had been told that the Appellant had attended a cooperative meeting at which PW1 had been the Secretary, but that he had not obtained the minutes of the meeting which would have indicated when the meeting started and ended.

8.7 He further testified that he believed what PW1 had told him rather than the Appellant, as to when the meeting ended, because he looked at the time the deceased was killed. He said he did that so that he could connect the Appellant to the crime.

8.8 He also agreed that prior to PW2's apprehension, according to Sungwa, there was a rumour that PW2 had murdered the deceased. That accordingly he investigated the rumour so as to exclude Sungwa from being a suspect.

8.9 However, he had not shared the result of that investigation which eliminated Sungwa from being a suspect, with the court.

He also agreed that it took Sungwa two months to disclose his knowledge of the murder.

8.10 The court found the Appellant with a case to answer and put him on his defence.

8.11 In his defence, given on oath, the Appellant recounted the meeting he had on 27th November 2021, adding that after the first meeting he had had another meeting and only got home around 18:00 hours. That he never left home thereafter until the following day when he was called to help look for the missing person.

8.12 That a search party was organised to go to the river to search, and it was there he found PW2. He said that PW2 denied seeing the deceased, when asked. Ultimately the body of the deceased was found, and it was taken home, where it was discovered that the deceased had a broken neck. The matter was reported to the police. Due to the state of the body, they were advised to bury after the police conducted an examination.

8.13 He recounted that on 23rd January 2022, he was at home when he saw PW2 with people from the neighbourhood. He was apprehended and learnt that PW2 was a suspect and that infact

he was the one who implicated him in the case. That he was interrogated, but denied any knowledge of the case.

8.14 He said they were conveyed to the police, where they were both detained. That five months later, Sungwa was released.

8.15 When questioned about PW1's evidence, he responded that he had no problems with it, save that PW1 did not mention that there had been a second meeting; and that he was wrong concerning the time that they arrived at home.

8.16 He denied differing with the deceased over land, but that he had differed with PW2 as he had refused to give him cattle. He also went further to mention the names of the people with whom had attended the second meeting, as well as those he walked home with on the material date.

9.0. **Decision of the Lower Court**

9.1 The learned Judge found as a fact that the deceased was found dead in the shallow waters of the river; with blood oozing from the eyes, nose and mouth; and a broken neck. He also noted the absence of a post mortem report, but determined that the absence of expert evidence would not be detrimental to the prosecution's case.

9.2 In coming to his decision, the learned Judge recognized that PW2 fell into the category of a witness with an interest to serve. He recognized that PW2 was the only eye witness to the commission of the crime that the Appellant was alleged to have committed.

9.3 In dealing with a witness with an interest to serve, the lower court relied on the cases of **George Misupi v. The People**[1] and **Director of Public Prosecution v. Kilbourne**[2], where it was stated in the later case that:-

> **"The principles regarding the categories of suspect witnesses must be applied to a witness with a possible bias, such as a relative or co accused. The question in every such case is whether the danger of relying on the evidence of the suspect witness has been excluded."**

9.4 He cautioned regarding the evidence of PW2, since he had been a co-accused and suspect in the matter. He took notice of the fact that PW2's testimony was recounted with precision and very much unperturbed by cross examination. He found his testimony credible.

9.5 The lower court noted that the Appellant had raised an alibi, but he did not believe the Appellant's account of the meeting,

but chose to believe the version by PW1, and stated that the Appellant had failed to discharge the burden to prove the alibi.

9.6 The learned Judge found, based on the evidence of PW2, that the Appellant had pre-determined the murder, beginning with the offer of K3,000 to PW2 to help him kill the deceased. He thus found that the prosecution had proved its case against the Appellant. He thus convicted him and sentenced him to death.

10.0. **The Appeal**

10.1 Alarmed by the turn of events, the Appellant launched this appeal, fronting one ground of appeal couched thus:-

> **"The trial Judge erred in law and fact when the court convicted the Appellant based on uncorroborated testimony of a witness with an interest to serve."**

11.0. **Hearing**

11.1 Both parties filed heads of argument on which counsel relied at the hearing.

11.2 In her arguments, Counsel, Mrs. Chisela Mwaba, submitted, and set out the several reasons why PW2 would have had an interest of his own to serve, vis:-

(i) **that he had been a suspect together with the Appellant before trial. That being the case, he would say anything to exonerate himself. Further that it took him two months to report what he claimed to have witnessed;**

(ii) **That he had been suspected of having been the one who committed the crime and he said so himself, as appear at page 68 of the record of proceedings. That the suspicion by the villagers that he was the one who killed the deceased made it possible for PW2 to do anything to make others believe that it was not him who had killed the deceased,**

(iii) **That according to the evidence at pages 89 – 90 of the record of proceedings reveals that when they went to apprehend him at first, he had run away. That it was not possible for an innocent person to run away; but he did because he knew what he had done,**

(iv) **That page 87 of the record of proceedings reveal that the body was found near where PW2 started his canoe when entering the water. That that was reason enough for him to want to implicate someone else,**

(v) **That he lied that he was with a Mr. Kelvin Sililo Nalwange when the Appellant committed the crime, and yet according to P1, appearing at page 105, that was a lie. That it was upon noting this that the state did away with that witness. However, his statement was admitted into evidence, but the court did not consider P1. That had it been considered, the court would have arrived at a conclusion that the weight attached to PW2 should have reduced.**

11.3 Submitting on how the evidence of a suspect witness/a witness with an interest to serve should be treated, our attention was

called to the cases of **William Muzala Chipango and Others v. The People**[3] and **Malambo Choka v. The People**[4].

11.4 Counsel submitted that since PW2 falls in this category, his evidence needs to be corroborated. To that extent, the case of **Chimbo and Others v. The People**[5] was adverted to, where it was held that:-

> **"The evidence of suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons."**

11.5 Counsel also referred to the case of **Emmanuel Phiri and Others v. The People**[6] where Baron DCJ, pronounced on **"principle of something more",** which must be circumstances which though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger that the accused is being falsely implicated has been excluded.

11.6 The case of **Wilson Mwenya v. The People**[7] was relied upon, where the court hold that:-

> **"Evidence on corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. It may be evidence which implicates him, that is, which confirms in some material particular not only the**

evidence that the crime has been committed, but also that the prisoner committed it ..."

11.7 Counsel reiterated that PW2 had an interest to serve; and the court rightly found so, but then misdirected itself when it accepted his evidence without looking for corroboration and relied on how PW2 meticulously narrated the turn of events.

11.8 Counsel went on to submit on the principle of corroboration and to that end placed reliance on the cases of **King v Job Whitehead[8],** and **Wilson Mwenya[7],** where the court held in the later that:-

"Where a witness is detained in connection with the same incident, or does not report the incident to the police, the evidence needs corroboration."

11.9 Counsel submitted that in *casu,* there was no other evidence produced by the prosecution other than that of PW2 that implicated the Appellant. That thus, the "something more" was missing. That there was need for proof that the Appellant murdered the deceased. Further, that it is legally not tenable to substitute corroboration with how good a suspect witness is able to narrate the events.

11.10 That the trial court did not state why it preferred PW2's testimony over that of the Appellant, considering that there was evidence pointing to the fact that PW2 had been unfaithful on who was present when the incident happened. To that effect, the case of **Chizonde v. The People**[9] was relied upon regarding an adverse finding as to credit from a decision on an issue of credibility, as well as the case of **Haonga and Others v. The People**[10].

11.11 That the court had not handled the issue of credibility of PW2 properly, as the weight attached to his evidence should have been greatly reduced after it was shown that he had lied.

11.12 We were urged to find that the danger of false implication was present and had not been excluded. That the conviction was unsafe.

11.13 Finally, counsel submitted on the issue of several inferences that could be drawn in the case. To that effect, our attention was drawn to the case of **Dorothy Mutale and Richard Phiri v. The People**[11] and that in *casu,* the only inference the court should adopt is the one favourable to the Appellant, as there was no corroboration in this matter.

11.14 We were urged to uphold the appeal and set the conviction aside.

11.15 In responding to the appeal, counsel, Mr. Siafwa, conceded that the State's case was predicated mainly on the evidence of PW2, Sungwa Matebele, as he was the only witness who connected the Appellant to the murder. He also conceded that Sungwa Matebele had been a suspect witness, and his evidence needed to be taken with great caution.

11.16 He also conceded that the position of the law was clear that the evidence of the suspect witness needed to be corroborated as per the **Simon Malambo Choka v. The People[4].** That at pages J14 – J15 the court had acknowledged this, but despite being alive to this fact, failed to point out the corroborative evidence; on record which supported the testimony of PW2.

11.17 Our attention was drawn to the case of **Emmanuel Phiri v. The People[6]** where it was held that:-

"A conviction may be upheld in a proper case, notwithstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something as excludes the dangers referred to ..."

11.18 It was submitted that despite the trial court having not addressed its mind to the need for corroboration of PW2's evidence, the evidence of PW1 was corroborative evidence in so far as the opportunity to commit the offence is concerned. To that effect, we were referred to the case of **Nsofu v. The People**[12] where it was held that:-

"Opportunity to commit an offence amounts to corroboration."

11.19 We were urged to dismiss the appeal for lack of merit.

12.0 **Analysis and Decision**

12.1 We have carefully considered the record of appeal, judgment of the lower court being impugned, and the submissions by counsel for each party.

12.2 The question for resolution is whether, the evidence of PW2, the only eye witness to the commission of the crime, and who had been detained together with the Appellant was corroborated.

12.3 In arguing the sole ground, counsel for the Appellant's contention is that PW2, the only one who claims to have seen

the Appellant commit the crime, is an accomplice whose evidence requires corroboration.

12.4 Learned counsel for the respondent concedes that the State's case rested on the evidence of PW2. Further, counsel agrees that PW2 had been a suspect witness, and therefore his evidence needed to be taken with caution.

12.5 Counsel for the respondent also agrees that the law requires that the evidence of a suspect witness needed to be corroborated. That although the court had been alive to this fact, it failed to point out the corroborative evidence, which supported the testimony of PW2. It was Mr. Siafwa's contention that PW2's evidence was corroborated by that of PW1, in so far as the opportunity to commit the offence was concerned.

12.6 To start with, it is clear from the record that PW2 was arrested together with the Appellant herein. Prior to his arrest, he himself had told PW3 that people in the area were suspecting him of being the one who murdered the deceased. Upon being arrested, he led the neighbourhood watch to the house of the Appellant and had him arrested. Thereupon both of them were remanded

in police cells. He infact stayed in cells for five months before he was discharged and turned state witness.

12.7 An accomplice is a person who takes part in the commission of an offence, abets, conceals, aids or procures the commission of an offence, an accessory before or after the fact, or any other person found in similar circumstances.

12.8 All the above would apply to PW2.

12.9 According to the evidence on record, PW2 only revealed that the Appellant herein was the one who killed the deceased two months after the whole incident happened. It was then that he was arrested together with the Appellant and kept in custody for five months. It would not therefore be far-fetched to state that he would want to save himself.

12.10 In view of the above, our view is that PW2 was a witness with an interest to serve; as rightly found by the court. We take guidance from the case of **Chipango and Others v. The People,** where it was stated inter-alia that:-

> **"...once a witness may be an accomplice or have an interest, there must be corroboration or**

support for his evidence before the danger of false implication can be said to be excluded."

12.11 Further, the case of **Choka v. The People**[4] is clear where it states that:-

> **"A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof, based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded, and that it is safe to rely on the evidence of the suspect witness."**

12.12 The lower court rightly categorized PW2 as a witness with an interest to serve, when he said at page 148 of the Record of Appeal, that:-

> **"caution must therefore be given to the evidence adduced by PW2 being a witness with an interest to serve as he was a co-accused and suspect in the matter."**

12.13 We are of the view that the trial Judge departed from the guidance given in the **Choka v. The People**[4] case when he stated on the same page 148 of the record of appeal that:-

> **"I took notice of the fact that PW2's testimony was recounted with precision and very much unperturbed by cross examination."**

12.14 We agree with counsel for the Appellant that this was indeed a misdirection by the lower court, when it accepted his evidence without looking for corroboration or rule out the possibility of false implication in the absence of there being corroborative evidence. He instead based his judgment on the fact that PW2 clearly narrated the events of that day.

12.14 Other than the evidence of PW2, a witness with an interest to serve, there was no other independent testimony which connected the Appellant herein to the crime. The case of **Wilson Mwenya v. The People,** clearly guides on the nature of corroboration, where it was stated that:-

"evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. It may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it"

12.15 Our perusal of the record does not reveal that there was any other evidence, apart from that of PW2 that implicated the Appellant.

12.16 We therefore find no corroborative evidence or something more, which would rule out the danger of false implication. Had the trial Judge properly directed himself in respect of the evidence of PW2, after accepting that he was a witness with an interest to serve, he would have treated his evidence as such. His failure to do so was a serious misdirection.

12.17 We have noted the argument by Mr. Siafwa that the evidence of PW1 is corroborative in so far as the opportunity to commit the offence is concerned. We are of the view that the evidence of PW1 does not go anywhere near to being corroborative. In the case of **Nsofu**[12] the court guided that for the evidence of

opportunity to amount to corroboration must depend on the circumstances of the particular case. The court went on to quote, with approval the case of **Credland v. Knowler (1951) 35 Cr. App, R 48,** at page 55 where Lord Goddard, CJ said:-

> **"mere opportunity alone does not amount to corroboration, but ... the opportunity may be of such a character as to bring in the element of suspicion. That is, the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration."**

12.17 Mr. Siafwa did not state in what way the evidence of PW1 was corroborative evidence in so far as the opportunity to commit the offence is concerned. All that PW1 attested to was that he had been at a meeting with the Appellant, walked with him to their destination and left him at his house at 14:00 hours. How that presented an opportunity to commit a crime is not apparent from his evidence. In the cited **Nsofu** case, the court dismissed the appeal, after finding that **" in the present case, the circumstances and the time of opportunity, which fits precisely within the time when according to the medical**

evidence, the offences must have been committed afford corroboration of the evidence of the girls."

12.18 There was no such evidence before the learned Judge in this matter.

12.19 Further, the learned Judge did not reveal his mind as to why he chose to believe PW1 and not the Appellant as regards the time they reached home after the meetings. The Appellant clearly stated that after the initial meeting, he had attended a second meeting. This alibi was not investigated.

12.20 In the view we hold, there is merit in the appeal. The conviction was unsafe. We therefore set it aside and acquit the Appellant, and set him at liberty forthwith.

.....

C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

.....

A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

.....

N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE