

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

Appeal No. 145,146/2021

BETWEEN:

CLEARSON CHILENGI

1ST APPELLANT

DENSON MUSONOYI

2ND APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Makungu and Muzenga, JJA
On 18th May 2022 and 27th December 2023

For the Appellants: Mrs. M. K. Liswaniso, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. Cynthia Mungochi-Lungu, State Advocate, National Prosecution Authority

J U D G M E N T

MUZENGA JA delivered the Judgment of the Court.

Cases referred to:

- 1. Simon Malambo Choka v. The People (1978) ZR 243**
- 2. Kenmuir v. Hattingh (1974) ZR 162 (SC)**
- 3. Musipe v. The People (1978) ZR 2**
- 4. Guardic Kameya Kavwana v. The People – Appeal No. 84 of 2015**

5. Davison Matafwali and Another v. The People – CAZ Appeal No. 118, 119 of 2022

Legislation referred to:

- 1. The Penal Code, Chapter 87 of the Laws of Zambia.**
- 2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

- 1.1 The appellants were sentenced to death by Pengele, J, following a conviction of murder.
- 1.2 The particulars of the offence alleged that on a date unknown but between 11th August 2019 and 12th August 2019 at Mwinilunga in North Western Province of the Republic of Zambia, the appellants murdered one Philimon Nsawana Kalenga.

2.0 THE EVIDENCE BEFORE THE TRIAL COURT

- 2.1 The prosecution relied on the evidence of five prosecution witnesses to prove the case against the appellant. The gist of the prosecution evidence, in a nutshell, is that on 11th August 2019 around 17:00 hours, while on her way home from town, PW1, the deceased's aunty heard the deceased screaming and shouting for help, that some people

wanted to kill him. She followed where the voice was coming from and found the appellants and two other people beating the deceased.

2.2 She noticed that the deceased was tied on both legs and hands while the appellants and two others were beating him with sticks. She tried to intervene but the appellants told her to go away as they were disciplining the deceased. The deceased was found dead the following morning at the farm where he was last seen being beaten. PW2, the grandmother of the deceased, confirmed PW1's evidence. When she reached home, she narrated to her that she had found the deceased being beaten by the appellant. The post-mortem examination report revealed that the cause of the deceased's death was trauma and that his body and limbs had multiple bruises.

2.3 This marked the end of the prosecution case. The appellants were found with a case to answer and they were put on their defence.

3.0 DEFENCE

3.1 In their defence, the appellants opted to give sworn evidence and called no witnesses. Each of the appellants denied having taken part in beating or assaulting the deceased. They told the trial court that the deceased was beaten by the named two persons who were not

before the court. They added that the named persons were farm workers at the farm where the deceased was caught stealing a bag of maize.

3.2 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence before him, the learned trial judge found that the deceased was beaten at Mr. Chilengi's farm on 11th August 2019 and that his body was found at the said farm the following morning. The learned trial judge also found that the owner of the Chilengi farm was the father to the first appellant and that the two appellants were at the said farm on the 11th of August 2019. It was the trial judge's further finding that there were two other farm workers at the said farm on the said day.

4.2 He also found that the only direct evidence on the record was the testimony of PW1 who saw the appellants assaulting the deceased. The trial court concluded that the prosecution had proved its case beyond reasonable doubt. The appellants were later sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Embittered with the conviction and sentence, the appellants filed three grounds of appeal couched as follows:

- (1) **The trial court erred in law and in fact, when the court did not warn itself on the danger of convicting on the evidence of PW1 who was an aunty to the deceased was a witness with a possible interest of her own to serve.**
- (2) **The trial judge erred both in law and in fact when the court did not make any finding of fact with regard to the reason the deceased herein was being assaulted.**
- (3) **The trial judge erred in law and fact when the court convicted the appellants of the charge of murder and sentenced them to death.**

6.0 THE APPELLANT'S ARGUMENTS

6.1 The gist of the appellants' argument in support of ground one of the appeal is that the trial court relied on the evidence of PW1, an aunty to the deceased without warning itself on the danger of convicting the accused on the evidence of a suspect witness. We were referred to the case of **Simon Malambo Choka v. The People**¹ in which the Supreme Court guided 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."

- 6.2 It was learned counsel's contention that PW1 being a relative to the deceased and looking at the circumstances of this case fell into the category of a witness with a possible interest of her own to serve and may have had a motive to give false evidence against the appellants. According to counsel, it was not sufficient for the trial court to believe in the truthfulness of PW1 by observing her demeanour and the plausibility of her evidence but rather that the trial court should have satisfied itself that the danger that the appellants were being falsely implicated had been excluded and it was safe to rely on the evidence of PW1.
- 6.3 We were urged to allow ground one of the appeal and quash the murder conviction.
- 6.4 In support of the second ground of appeal, it was the learned counsel's contention that the trial court erred when it failed to make a finding of fact with regard to the reason the deceased was being assaulted. We

were urged to make a finding of fact with respect to this issue. In support of this, we were referred to the case of **Kenmuir v. Hattingh**² where it was held that:

"An appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of facts if the findings were conclusions based on facts which were a common cause or on items of real evidence when the appellate court is in as good a position as the trial court. 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."

- 6.5 In support of the last ground of appeal, it was learned counsel's contention that the deceased's presence at the 1st appellant's father's farm stealing maize was provocative and thus negated intent to kill. It was also contended that the only eyewitness did not state in her evidence who delivered the fatal blow that caused the death of the deceased. According to counsel, this case falls under the cases of mob instance justice and a sentence of death was too excessive.
- 6.6 We were urged to allow the appeal, set aside the conviction of murder and substitute it with that of manslaughter and give him an appropriate sentence.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, learned counsel in responding to ground one of the appeal supported the conviction of the appellants and contended that even if PW1 was related to the deceased, she testified according to the way the incident occurred or the way she perceived the incident. It was contended that the trial judge was on firm ground when he held that there was no evidence to show that PW1 made up the story to implicate the appellants. We were referred to the case of **Musipe v. The People**³ where it was held that:

"The critical consideration is not whether the witness does not 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."

7.2 In responding to the second ground of appeal, it was submitted that the appellants did not challenge PW1's direct evidence on the record that she saw them beating the deceased. According to learned counsel, it is absurd for the appellants to come on appeal and claim that no finding of fact was made by the trial court on why the

appellants were beating the deceased. We were urged to dismiss this appeal.

- 7.3 In responding to the last ground of appeal, learned counsel for the respondent called into aid the provisions of **Section 22 of the Penal Code Chapter 87 of the Laws of Zambia** which provides that:

"Where 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 purposes, each of them is deemed to have committed the offence."

- 7.4 It was contended that it is clear from the evidence on the record that the appellants formed a common design for the purpose of unlawfully assaulting the deceased.
- 7.5 In summation learned counsel called upon us to take into consideration the trial judge's observation that the second appellant's demeanor was manifestly unstable and shaky making it apparent that he was not telling the truth.
- 7.6 We were urged to dismiss the appeal for want of merit and uphold the judgment of the trial court.

8.0 THE HEARING

8.1 At the hearing of this appeal, the learned counsel for the appellant Mrs. Liswaniso informed the Court that she would rely on the filed heads of argument and learned counsel for the respondent informed the Court that the state would equally rely on the filed arguments.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on record, the heads of argument filed by counsel and the judgment appealed against. As we see it, the question that the trial court was faced with was whether the offence the appellants committed was murder.

9.2 In ground one, the appellants take issue with the judgment of the lower court on the point that the trial court relied on the evidence of a suspect witness. From the evidence on the record, it is true that there is unquestionable consanguinity between PW1, PW2 and the deceased person. PW1 is the deceased's aunty while PW2 is the deceased's grandmother.

9.3 In the case of **Guardic Kameya Kavwana v. The People**⁴ the Supreme Court guided that:

"There is no law which precludes a blood relation of the deceased from testifying for the prosecution. Evidence

of a blood relation can be accepted if cogent enough to rule out any element of falsehood or bias.”

- 9.4 We hold the view that the trial court properly addressed its mind to the possibility of false implication and discounted it on the basis that there was no evidence on the record that they had a motive to falsely implicate the appellants. On this score, we find no merit in ground one.
- 9.5 With respect to ground two of the appeal, we note that from the evidence on the record, the deceased died as a result of the beating he sustained from the appellants and two other named individuals. We note that there is direct evidence on the record from PW1 who saw the appellants and two others when they were assaulting the deceased. The post-mortem examination also confirmed that the deceased died from trauma as a result of the beatings.
- 9.6 We agree with Mrs. Liswaniso that indeed the trial court did not make a finding as to what exactly precipitated the assault. However, we opine that in the circumstances of this case, such a finding of fact was unimportant in determining whether the offence is murder or manslaughter. We hold this view in the light of the appellants' denial of having assaulted the deceased. So whether or not the trial court

found that as a fact, what caused the beating would not have been helpful in the circumstances. We equally find no merit in ground two of this appeal.

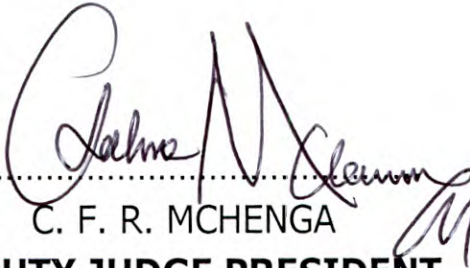
- 9.7 With respect to ground three of the appeal, learned counsel argued in the alternative that the deceased's presence at the first appellant's father's farm was provocative to the appellants and that the appellants' actions were of a mob instance of justice. On the other hand, the respondent contended that the appellant and two others formed a common design for the purpose of unlawfully assaulting the deceased.
- 9.8 From the evidence on the record, it is clear that a group of 4 people all armed with sticks were determined to discipline the deceased for reasons well known to themselves. This is clearly in line with **section 22 of the Criminal Procedure Code** as the appellants had formed a common intention to prosecute an unlawful purpose. In our view, their actions show that they were determined to assault the deceased which resulted in death. The appellants acted jointly in assaulting the deceased and the severity of their actions discloses intent on their part to cause grievous harm or death. See the case of **Davison Matafwali and Another v. The People**⁵.

9.9 Death was a probable consequence of the assault and it does not matter that it was done by four persons. We cannot fault the trial judge in convicting the appellant and we find no merit in this ground of appeal.

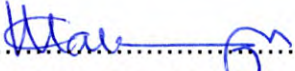
9.10 All in all, we find no merit in this appeal and we accordingly dismiss it.

10.0 CONCLUSION


10.1 Having found no merit in the three grounds of appeal, we dismiss them. The convictions and sentences imposed on the appellants are upheld.



 C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT



 C. K. MAKUNGU
COURT OF APPEAL JUDGE



 K. MUZENGA
COURT OF APPEAL JUDGE