

IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO 18 -22/2023  
HOLDEN AT LUSAKA  
(Criminal Jurisdiction)

BETWEEN

JOSEPH PHIRI	1 <sup>ST</sup> APPELLANT
GIVAS PHIRI	2 <sup>ND</sup> APPELLANT
AUGUSTINE PHIRI	3 <sup>RD</sup> APPELLANT
BORNFACE BANDA	4 <sup>TH</sup> APPELLANT
TRESFORD PHIRI	5 <sup>TH</sup> APPELLANT
JABES GWEREGWEDE PHIRI	6 <sup>TH</sup> APPELLANT
AND	
THE PEOPLE	RESPONDENT



CORAM : DJP, MUZENGA AND CHEMBE JJA

on 16<sup>th</sup> January 2024 and 28<sup>th</sup> February 2024

For the Appellants : Mrs. A. Banda – Chimimba – Legal  
Aid Counsel  
For the Respondents : Mrs. A. Kennedy Mwanza –  
Principal State Advocate

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## JUDGMENT

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Chembe J delivered the judgment of the court.



**Cases referred to:**

- 1. *Peter Yotum Haamenda v the People (1977) ZR 184 (SC)***
- 2. *Mbinga Nyambe v The People (2011) ZR 246 (SC)***
- 3. *David Zulu v The People (1977) ZR 151 S.C.***
- 4. *Saidi Banda v The People Appeal No. 144 of 2015***
- 5. *Ndango v Moses Mulyango and Another SCZ judgment No 4 of 2011***
- 6. *Machipisa Kombe v The People (2009) Z.R. 282.***
- 7. *Mutambo and 5 others v The People (1965) ZR 15***
- 8. *Donald Fumbelo v the People SCZ Appeal No. 476 of 2013***

**1.0 INTRODUCTION**

1.1 The Appellants were charged and convicted of one count of murder contrary to section 200 of the Penal Code and one count of aggravated robbery contrary to section 294(1) of the Penal Code by Lombe-Phiri J.

1.2 The particulars of offence in count one alleged that the Appellants jointly and whilst acting together did murder Roderick Chibojela Banda on 24<sup>th</sup> June 2020 at Vubwi. In the second count, the particulars of offence were that the Appellants jointly and whilst acting together stole K20,000.00, 1 laptop bag, 1 bomber jacket, 1 trousers, 7 sacks, 2 black pens,

1 T shirt, 1 scale and two hard cover books all together valued at K22, 360.00, the property of Rodrick Chibojela Banda, and at or immediately before or immediately after such stealing did use or threaten to use actual violence to the said Rodrick Chibojela Banda in order to obtain or prevent resistance to the property being stolen.

1.3 The Appellants were convicted on both counts and sentenced to death. They have all appealed against the conviction.

## **2.0 EVIDENCE BEFORE THE TRIAL COURT**

2.1 The prosecution led evidence from 8 witness. The evidence was that the deceased (who lived in Chipata) had gone to Vubwi to buy groundnuts and soya beans.

2.2 After collecting money from Chipata on 20<sup>th</sup> June 2021, the deceased proceeded to Thenje village on 24<sup>th</sup> June 2021 and never returned.

2.3 There was evidence that when the deceased left for Thenje village, he was wearing a black bomber jacket and carrying a black laptop bag, empty sacks and a scale.

- 2.4 The deceased met the 1<sup>st</sup> Appellant, Joseph Phiri who accompanied him on his mission. When the deceased failed to return to the village where he was staying, his host went to look for him at Thenje village.
- 2.5 He was directed to the 1<sup>st</sup> Appellant who informed him that the deceased had gone to Chipata to collect money. When he failed to locate the deceased, Mr. Phiri reported the matter to the police.
- 2.6 The 1<sup>st</sup> Appellant was apprehended and detained. During the investigations, the police recovered the deceased's black laptop which contained a hard cover note book, a pen, a face mask, a motorbike and K50, 000 Malawian kwacha from the 5<sup>th</sup> Appellant's house.
- 2.7 A yellow and red weighing scale was recovered from the 6<sup>th</sup> Appellant's house together K900.00 and 5000 Malawian kwacha. From the house of the 3<sup>rd</sup> Appellant, Augustine Phiri, the police recovered the deceased's black bomber jacket and a belt.

- 2.8 The police also recovered an Itel phone from the 2<sup>nd</sup> Appellant's house and 7 empty grain 90kg bags from the 4<sup>th</sup> Appellant's house. 14 corrugated iron sheets and a six inch mattress were recovered from the 1<sup>st</sup> Appellant's house.
- 2.9 There was evidence from the investigating officer that the 2<sup>nd</sup> Appellant led him to the place where the deceased body was disposed of on a mountain covered with grass about 10 kilometers away from Thenje village.
- 2.10 A hammer was recovered about 3km from where the body was found.
- 2.11 In defence, the 1<sup>st</sup> Appellant admitted having met with the deceased on 24<sup>th</sup> June 2020 and introduced him to Jabes Phiri, Augustine Phiri, Givas Phiri, Bornface Banda, Lloyd Phiri and Tresford Phiri. He testified that the deceased left for Chipata the same day to collect more money. He explained that the iron sheets which were recovered from his house were bought in September 2023.
- 2.12 The 2<sup>nd</sup> Appellant denied having present at Thenje village on 24<sup>th</sup> June 2020 as he had gone to Malawi to sell groundnuts.

He explained that the Itel phone that was taken by the police was bought in March 2020. He denied having confessed to killing or robbing the deceased.

2.13 The 3<sup>rd</sup> Appellant told the Court that on 24<sup>th</sup> June 2020, the 1<sup>st</sup> Appellant took the deceased to his house looking for groundnuts. As he did not have any groundnuts, the deceased left with the 1<sup>st</sup> Appellant. He denied having participated in the killing of the deceased.

2.14 The 4<sup>th</sup> Appellant's evidence was that he could not recall what he did on 24<sup>th</sup> June 2020 but was arrested on 3<sup>rd</sup> July 2020. He denied having seen the deceased at all or having led the police to the deceased's body.

2.15 The 5<sup>th</sup> Appellant denied having been in Thenje village on 24<sup>th</sup> June 2020 as on that date he was in Mozambique visiting his aunt. He explained the K50, 000.00 which was taken from his home had come from the sale of some pigs. He told the Court that the motorbike which the police took had not moved since May 2020.

2.16 The evidence of the 6<sup>th</sup> Appellant was that on 24<sup>th</sup> June 2024, the 1<sup>st</sup> Appellant went to his house with the deceased who was looking for groundnuts to buy. The duo left as he did not have any groundnuts. He mentioned that the cash that was recovered from his house came from the sale of maize. He denied having killed or stolen from the deceased as he had a swollen leg.

### **3.0 FINDINGS OF THE TRIAL COURT**

3.1 The trial Judge found that the doctrine of recent possession applied in relation to the deceased's property which was recovered from the homes of some of the Appellants.

3.2 She also found that the odd coincidences (such the fact that the deceased was last seen with the 1<sup>st</sup> Appellant who led the police to the other Appellants from whom some of his property was recovered; the 2<sup>nd</sup> Appellant led the police to the site where the deceased's remains were found) pointed to the Appellants' guilt.

### **4.0 GROUNDS OF APPEAL AND ARGUMENTS**

4.1 Dissatisfied with the decision of the trial court, the Appellants lodged this appeal advancing the following grounds:

1. The trial Court misdirected itself in law and in fact when it convicted the Appellants on circumstantial evidence when the inference of guilt was not the only reasonable inference that could be drawn from the case at hand.
2. The trial Court misdirected itself in law and in fact when it convicted the Appellants that they acted in concert or with a common design to rob and murder the deceased.

4.2 In the arguments in support of the appeal, it was submitted (in relation to the first ground) that the trial judge relied on odd coincidences to connect the Appellants to the offences. It was argued that there was no conclusive evidence that the deceased's property was recovered from the Appellants' homes as there was no independent evidence to that effect. It was also argued that nothing was recovered from the 1<sup>st</sup> Appellant.

4.3 The Appellants also criticized the Prosecution's failure to obtain telecommunication records from the mobile service providers to clarify whether the deceased had travelled to Chipata after



receiving a phone call. Our attention was drawn to the case of **Peter Yotum Haamenda v the People**<sup>1</sup> on dereliction of duty.

- 4.4 A further argument by the Appellants was that there was no evidence that the mattress and roofing sheets which were recovered from the 1<sup>st</sup> Appellant were purchased from the money stolen from the money stolen from the deceased as the 1<sup>st</sup> Appellant was a business man.
- 4.5 Regarding the evidence on the discovery of the deceased's body, the Appellants denied that there was any evidence that the 2<sup>nd</sup> Appellant led the police to the body. It was argued that police failed to produce a picture showing the Appellants leading them to the scene.
- 4.6 On the basis of the foregoing, the Appellants contended that the circumstantial evidence adduced by prosecution could lead to other reasonable inference. The Appellants referred us to the case of **Mbinga Nyambe v The People**<sup>2</sup>.
- 4.7 It was also argued that the Appellants gave reasonable explanations or rebuttals to the prosecution evidence which the trial court ignored.

4.8 In relation to ground 2, the Appellants submitted that there was no evidence that they had a common purpose to rob and murder the deceased and it was therefore erroneous for the trial court to make such a finding. It was argued that the finding was based on the questionable assumption that the Appellants shared the deceased's property. We were urged to allow the appeal and set aside the convictions.

## 5.0 **RESPONDENT'S ARGUMENTS**

5.1 The Respondent filed skeleton arguments in which they addressed the two grounds of appeal together. It was submitted that the evidence adduced before the trial Court when viewed as a whole connected all the Appellants to commission of the offence. It was contended that the evidence had attained a degree of cogency that permitted only an inference of guilt. We were referred to the cases of **David Zulu v The People**<sup>3</sup> and **Saidi Banda v The People**<sup>4</sup> in support of the argument.

5.2 The Respondent countered the Appellants' argument that there were no independent witnesses to support the evidence that items were recovered from their homes by stating that facts were

established which when combined with other facts pointed to the appellants' guilt. It was submitted that the facts did not have to be proved beyond reasonable doubt. The Respondent's position was the fact that the deceased's items were found in the Appellants' homes who had interacted with him and led to the recovery of his body pointed to the Appellant's guilt and the trial court was entitled to draw conclusions from the facts.

5.3 Regarding the argument that the trial judge grouped the Appellants' explanations, the Respondent referred to the acquittal of Lloyd Phiri as proof that the Appellants' were dealt with individually in the court below.

5.4 On the assertion that the lower court misapplied the facts with regard to the finding that he led the police to the apprehension of his co accused, the Respondent submitted that the findings were not perverse. We were referred to the cases of **Ndango V Moses Mulyango and Another**<sup>5</sup> where Appellate courts were cautioned not to interfere with findings of fact by the trial Court. We were urged not to interfere with the trial court's findings.

5.5 The Respondent submitted that there were a number of odd coincidences which when viewed as a whole constituted evidence as held in the case of **Machipisa Kombe v The People**<sup>6</sup>.

5.6 A further argument by the prosecution was that the evidence showed that the Appellants acted with a common purpose as provided by section 22 of the Penal Code. We were referred to the case of Macklin Murphy and others (1838) 2 Lewin 225 on the definition of common purpose. Reference was also made to the case of **Mutambo and 5 others v The People (1965) ZR 15**. We were urged to uphold the convictions.

## **6.0 CONSIDERATION AND DECISION**

6.1 We have carefully considered the record of appeal together the arguments by both sides. We note that the Prosecution's case in the lower court rested entirely on circumstantial evidence. The issue we need to determine is whether there was sufficient circumstantial evidence which only allowed an inference that it was the Appellants who had jointly and whilst acting together murdered and robbed the deceased.

6.2 The evidence that the deceased met with the 1<sup>st</sup> Appellant at Thenje village on 24<sup>th</sup> June 2020 was not disputed. During cross examination, it was confirmed that the 1<sup>st</sup> Appellant had escorted the deceased to the other Appellants to buy groundnuts. The 1<sup>st</sup> Appellant admitted in his defence that he took the deceased to his co Appellants.

6.3 He also confirmed that the deceased did not buy any groundnuts because they were not available. His story that the deceased went back to Chipata to collect money could not be true as the evidence of the prosecution was that he collected the money on 20<sup>th</sup> June 2020 before going to Thenje Village. Further, his evidence suggested that the deceased was ready to buy the groundnuts but none of his co Appellants had any. Although none of the deceased's property was recovered from him, the police found the deceased's possessions with most of the people he had led them to.

6.3 The evidence that the body of the deceased was only discovered after the Appellants had been apprehended was not disputed. This lends credence to the Prosecution's evidence it was the 2<sup>nd</sup> Appellant who led them to body. It was not disputed that the

body was discovered hidden in the mountain a great distance away from the village. In our view, the Police could not have discovered the deceased's body without help from the killers.

6.4 Regarding the third Appellant, there was evidence that the deceased's black bomber jacket was recovered from his house. He did not offer any explanation as to how the jacket found itself in his house. The only logical inference in the absence of an explanation is that he stole it from the deceased.

6.5 There was evidence that 7 empty 90kg bags were recovered from the 4<sup>th</sup> Appellant's house. The sacks bore the label from the deceased's employer. The deceased had been in possession of similar bags before his demise. The 4<sup>th</sup> Appellant failed to proffer any explanation on how he obtained them.

6.6 According to PW8, a back laptop bag belonging to the deceased together with a motor bike used to transport the deceased were recovered from the 5<sup>th</sup> Appellant's home. The 5<sup>th</sup> Appellant denied that the laptop was recovered from his house. He also denied having met the deceased on 24<sup>th</sup> June 2020 as he was in Mozambique. He admitted that he had not informed the police that

he had been in Mozambique. This evidence contradicted the 1<sup>st</sup> Appellant's testimony that he took the deceased to his house.

6.7 We also note that the evidence of having been in Mozambique was raised for the first time during the defence case and can be regarded as an afterthought. We refer to the case of **Donald Fumbelo v the People SCZ Appeal No. 476 of 2013** in which it was held that:

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

6.8 The red and yellow scale which was in the deceased's possession was recovered from the 6<sup>th</sup> Appellant's house and he failed to explain how it got there.

6.9 In our view on the facts established by the evidence, the trial court cannot be faulted for having arrived at the conclusion that the Appellants killed the deceased. The case of **Saidi Banda v The People** (supra) is instructive on findings based on circumstantial evidence. In that case the Supreme Court held as follows:

*“Where the prosecution’s case depends wholly or in part on circumstantial evidence, the court is in effect being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that those further*



***facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find another fact or facts proved, clearly involves a logical and rational process of reasoning. It is not a matter casting any onus on the accused, but a conclusion of guilt is entitled to draw from the weight of circumstantial evidence adduced before it.”***

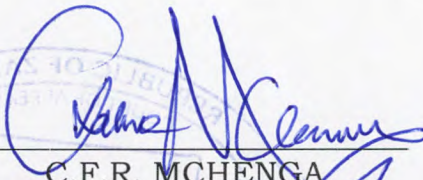
6.10 The trial judge accepted the evidence that the deceased was seen in the company of the Appellants before he was killed, the 1<sup>st</sup> Appellant led to the apprehension of his co Appellants from whom items that had been in the deceased's possession were recovered, the Appellants led to the recovery of the deceased's body about 10 kilometres away from the village and the Appellants had no reasonable explanation for how they came to be in possession of the items. In our view, the court below was entitled, on the basis of the above facts, to conclude that the pointed to the fact that the Appellants murdered the deceased.

6.11 The Appellants have argued that there was dereliction of duty on the part of investigating officer who failed to obtain


telecommunication information to show that deceased was speaking to someone in Chipata where he went or lift finger prints from the hammer. We do not accept that the failure to investigate these issues prejudiced the Appellants in any way in view of the other evidence.

## 7.0 CONCLUSION


7.1 In view of the foregoing, we find no merit in the appeal and uphold the convictions for all the Appellants. The appeal is dismissed.



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



K. MUZENGA  
**COURT OF APPEAL JUDGE**



Y. CHEMBE  
**COURT OF APPEAL JUDGE**