IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.244/2017**
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)

BETWEEN

KELVIN LUBONA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Malila, C.J, Hamaundu and Kaoma, JJS
On 14th April, 2021 and 14th May, 2024

For the Appellant: Mrs S.C. Lukwesa, Principal Legal Aid Counsel

For the State: Ms C. Soko, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Wilson Mwenya v The People (1990/1992) Z.R. 24**
2. **Emmanuel Phiri & Others v The People (1978) Z.R. 79.**
3. **Nalumino v The People (1986) Z.R. 102**

1.0 Introduction

1.1 We deeply regret the delay in delivering this judgment. The delay has come about due to a number of intervening circumstances that arose after the hearing of this matter, and which were beyond the control of the court.

1.2 The appellant appeals against his conviction for the offence of murder by the High Court (presided by Mwikisa, J), sitting at Kabwe.

1.3 In June 2016, the appellant was taken before the High Court on the charge aforesaid, together with a co-accused named Howard Mwaanga. The particulars of the offence stated that the duo, on the 11th September, 2014 in Mumbwa, did murder a person named Best Katila.

1.4 At the end of the trial, the learned judge acquitted Howard Mwaanga while the appellant was convicted of the offence.

2.0 The Undisputed Facts

2.1 The undisputed facts in this case are these: On 11th September, 2014, Best Katila of Kalemba village in Mumbwa District left his home to go and bath in a stream which was some two kilometres away. He never returned

home that day. The following morning some family members went to the stream in search of him. They found his body lying on a rock, with what appeared to be gunshot wounds on the legs. The family reported their discovery to the police, who came and collected the body.

2.2 The deceased's family held a funeral gathering at which the appellant became the immediate suspect over the killing on account of the alleged differences that he had had with the deceased. The family also noticed the conspicuous absence of Howard Mwaanga, who was not only a relative of the deceased but also lived in the neighbouring household. He, too, became a suspect in the killing of the deceased. A search for the two suspects was then mounted.

2.3 The appellant was found, and apprehended, at a traditional healer's home, in a game management area, where he was receiving treatment for his swollen feet. Howard Mwaanga was also found and apprehended from the same place, although this occurred a few days

subsequent to the apprehension of the appellant. Both suspects were taken into custody.

2.4 During investigations, the police sent members of the village neighbourhood watch to go and collect a home-made firearm from a man named Austin Muleya who lived in the game management area as well. The firearm was retrieved and, in the barrel thereof, was found an unfired shot gun cartridge. Both items were taken to the police station, together with Austin Muleya whom the police detained.

2.5 The police did establish that the gunshot wounds on the deceased's body were caused by pellets from a shot gun cartridge. They then sent the home-made firearm, and the cartridge therein, for ballistic examination. That examination revealed that the firearm was capable of firing shot gun cartridges and that it had gun powder residue, an indication that it had been fired previously. The examination, however, was unable to reveal exactly when the firearm was last fired. The examination was also unable to establish whether the firearm was the one which

deceased's body because the empty cartridge from which the pellets had come out was not found at the scene.

2.6 While the three suspects were in custody, Howard Mwaanga took the police to the game management area in search of the empty cartridge; but it was never found. Austin Muleya was released from detention to become a witness for the State, while the appellant and Howard Mwaanga were taken to the High Court for trial.

3.0 The Evidence

3.1 Out of all the evidence that the prosecution adduced, three pieces of evidence tended to incriminate the appellant in a material particular: First there was the testimony of Mirriam Mwiinga (PW1) and Victor Katila (PW2), the wife and son respectively of the deceased. The two witnesses said that the appellant had had differences with the deceased which started in 2012 when the appellant accused the deceased of having put a charm in the appellant's maize field in order for the appellant to record a poor yield. The witnesses said that, on that occasion, the appellant threatened to kill the deceased. The two

witnesses again told the court that, two years later, the appellant came to confront the deceased at the latter's home where he accused the deceased of being responsible for the swelling of his body. According to the witnesses, the appellant on this second occasion again threatened to kill the deceased. The witnesses said that this second incident took place on the 3rd September, 2014, which was about eight days before the deceased was killed.

3.2 The second piece of evidence was from Austin Muleya (PW6), the person from whom the firearm was retrieved. This witness told the court that, on 14th September, 2014, he was drinking beer with the appellant and Howard Mwaanga at a village. He said that when he left for his home, the appellant and Howard followed him. According to the witness, along the way, Howard entered some bushes and then re-emerged with the said firearm which both the appellant and Howard now asked him to take and hide at some place. When he refused, Howard threatened to shoot him. The witness said that at this point, Howard removed a bullet from his pocket and pushed it into the

gun. According to the witness, Howard and the appellant said that the gun was the one that was used to kill the deceased, and that it was Howard who had shot him. The witness said that the two told him that the gun belonged to the appellant.

3.3 The third piece of evidence was from the arresting officer (PW8). He told the court that, when the appellant was brought to the police station, he warned and cautioned him in Tonga language; and then proceeded to interview him. According to the witness, the appellant said that the gun which was used to kill the deceased was with Austin Muleya who lived in the game park. The witness then said that he sent members of the neighborhood watch to go to Austin Muleya's place and bring him; and that the following morning Austin Muleya was brought to the police station, together with the gun.

3.4 In his defence, the appellant said that in 2012 he found the deceased squatting in his field; and, when he got closer, he discovered that the deceased had dug a hole in which he had placed some nshima which had a charm.

The appellant said that he threw away the nshima and chased the deceased from his field. He denied threatening to kill the appellant on that occasion.

3.5 The appellant further told the court that, about two years after throwing away that nshima, he became ill. When conventional medicine from the hospital failed to cure him, he went to seek treatment from a traditional healer in the game management area. He denied going to the appellant's home to confront him over the illness and threatening to kill him.

3.6 The appellant denied conspiring with Howard Mwaanga to kill the deceased. He denied being the owner of the gun, and also denied telling Austin Muleya to go and hide it. He disputed Austin Muleya's testimony that he and Howard Mwaanga threatened to kill him if he did not take the gun. He denied having told the arresting officer that the gun was being kept by Austin Muleya and said that he did not know how the police came to know that the gun was in the possession of Austin Muleya.

4.0 The trial court's decision

4.1 Without carrying out an evaluation revealing why she preferred the testimony of PW1 and PW2 over that of the appellant, the learned trial judge adopted the testimony of the two witnesses, and found that the appellant believed that the deceased was bewitching him. She said that was the reason behind the appellant's threats to kill the deceased, which the two witnesses saw.

4.2 In a clear misapprehension of Austin Muleya's (PW6) testimony, the learned judge found that the said Austine Muleya had told the court that the appellant was the one who told him that the gun had been used to kill the deceased and that the appellant again was the one who specifically threatened to kill him if he refused to hide the gun. Of-course, Austine Muleya's testimony on record shows that it was Howard Mwaanga who was said to have uttered those words and threat.

4.3 Belatedly, the learned judge realised that PW1 and PW2, being related to the deceased, could be witnesses with an interest to serve and that their testimony required

corroboration. According to the judge, that corroboration was provided by the fact that the gun that was used to shoot the deceased was a home-made gun belonging to the appellant. The learned judge said that this fact could be deduced from the sum effect of the testimony of PW4, PW6 and possibly PW7.

4.4 As a result of the misapprehension that we have referred to above, the learned judge then went on to find that, other than the fact that Howard Mwaanga did not attend the funeral, there was no good reason why he was suspected of having killed the deceased. The only evidence that the judge could find against him was the testimony of the arresting officer that Howard Mwaanga was married to the appellant's daughter and that the appellant had hired him to kill the deceased which would then enable him to get back his wife who, at that time, was estranged. However, the learned judge dismissed that evidence on the ground that, according to her, it was not corroborated by any of the prosecution witnesses.

4.5 Summarising her *ratio decidendi*, the learned judge said that there was enough evidence linking the appellant to the commission of the offence, namely; that, he admitted that he suspected the deceased of practicing witchcraft on him, thereby causing him to be ill; that, he admitted that he was not happy with the deceased having placed a charm in his field; and, that the gun that was used in the commission of the crime belonged to the appellant.

4.6 The trial judge therefore convicted the appellant of murder and, having found extenuating circumstances in his belief in witchcraft, sentenced him to life imprisonment.

5.0 The appeal

5.1 The appellant's grounds of appeal read as follows:

> **"1. The trial court erred in law and fact when it convicted the appellant in the face of lingering doubts which resulted in the entire prosecution case not to be proved beyond all reasonable doubt.**
>
> **2. The trial court erred in law and fact when it convicted the appellant with murder despite the existence of another inference rather than the appellant's guilt that could have resulted in the acquittal of the appellant"**

5.2 The arguments by Mrs Lukwesa, learned counsel for the appellant, raised a myriad of points; most of them, however, were not really on point with the real issues in this case. We shall therefore consider those that tend to speak to the three incriminating pieces of evidence that we have identified earlier.

5.3 With regard to the evidence of the deceased's relatives, PW1 and PW2, Mrs Lukwesa submitted that, contrary to the trial judge's view, the testimony of these two witnesses was not corroborated by that of PW4, PW6 and PW7. Counsel pointed out that PW4, for instance, was merely asked to report the matter to the police. With regard to PW6, Mrs Lukwesa submitted that his testimony could not be relied on for the sole reason that he himself was a suspect witness whose evidence ought to have been received with caution. As for PW7, counsel submitted that this witness's testimony was in fact to the effect that there was no proof that the gun that he examined was the one which discharged the bullet which killed the deceased.

5.4 While still on the testimony of PW1 and PW2, Mrs Lukwesa said that the two witnesses gave different statements as to what transpired when the appellant is alleged to have gone to their home. Counsel pointed out that, according to PW1, the appellant is alleged to have uttered the words to the effect that the appellant was provoking him, while, according to PW2, the appellant spoke with him (PW2) and then left. Counsel also pointed out that PW1 and PW2 did not witness the incident of 2012, but were merely told by the appellant about it.

5.5 Coming to the second incriminating piece of evidence, that is, the testimony of Austin Muleya, (PW6), Mrs. Lukwesa submitted that this witness was a questionable witness with an interest to serve for the following reasons: that he, too, was apprehended by the police, and was only released after implicating the appellant; that even his demeanour in the witness box did not impress the trial judge who, at some point, asked him why he was avoiding to look at the court; and that, the witness did not report the alleged threats made to him either to the police or a headman or

anyone at all, even after the appellant and Howard Mwaanga had left him alone.

5.6 As for the third piece of evidence, that is the arresting officer's testimony, counsel for the appellant submitted that the witness did not produce the alleged appellant's confession statement before the court; and that the same witness conceded that he had no proof to show that the appellant was the owner of the gun in issue.

5.7 On behalf of the State, there are heads of argument on record which were filed by the learned State Advocate Mr. Waluzimba in 2019, in which the State was essentially not supporting the conviction. However, when the matter was heard *de novo* two years later Ms. Soko, the learned Deputy Chief State Advocate, informed us that she did not agree with the position that her colleague had earlier taken. Her attempt to file fresh heads of argument failed on the ground that by **rule 35(2)** of the **Supreme Court Rules, Chapter 25** of the **Laws of Zambia** she should have done so seven days prior to the date of hearing, and also

that she did not give us a good reason upon which we could allow her to file them out of time.

6.0 Our Decision

6.1 We will begin with the evidence of the deceased's relatives, PW1 and PW2. The testimony of the two witnesses was about two incidents, namely the one of 2012 and that of 2014. Regarding the incident of 2012, it is clear from their testimony that both witnesses were not present at the field where the confrontation between the appellant and the deceased took place, as confirmed by the appellant in his testimony. They were only told about it by the deceased when he came home. The trial judge therefore ought to have realised that that portion of the testimony was inadmissible on the ground that it was hearsay.

6.2 As for the incident of 2014, both witnesses said that they were present at home when the appellant allegedly came to confront the deceased. As correctly pointed out by the trial judge, their testimony needed to be corroborated because they were related to the deceased: or, if there was no evidence which corroborated their testimony, there

should have been something in the evidence which satisfied the judge that the danger that the witnesses could be falsely implicating the appellant had been excluded.

6.3 In this case, the trial judge found corroboration in the testimony of PW4, PW6 and PW7. Now, when we exclude the inadmissible testimony about the incident of 2012, the only admissible testimony of PW1 and PW2 that remains is the one about the incident of 2014, when the appellant is alleged to have gone to the deceased's home and confronted him. The testimony of PW4, PW6 and PW7, as rightly submitted by Mrs Lukwesa is on different issues. For instance, PW4's testimony was that he was the one who reported the death of the deceased to the police. PW6 testified only as to how he came to be in possession of the gun in issue. PW7 was a ballistics expert whose testimony was about the examination that he conducted on the gun and cartridge that were handed to him. Clearly, none of these witnesses was in a position to confirm that the

incident alleged by PW1 and PW2 took place, let alone that the appellant threatened to kill the deceased.

6.4 In our view, since PW2 told the court that the alleged threats by the appellant were reported to the headman, it is the headman who could have provided corroboration by telling the court that he had received such a complaint at the time. Otherwise, as matters stand, there was nothing that corroborated the testimony of the two witnesses on that issue.

6.5 However, that is not the end of the matter because the judge could still have relied on the testimony of the two witnesses if she was satisfied that the danger of false implication had been excluded. In this case, the trial judge did not consider the testimony from this angle because she wrongly found corroboration in the evidence of PW4, PW6 and PW7.

6.6 We have looked at the evidence and find that the appellant confirmed to the court that he had had an issue with the deceased over an act of witchcraft which he found the deceased doing in his (appellant's) field in 2012. This is a

fact which was known to PW1 and PW2. And so, once the deceased was found to have been killed the immediate person the two would suspect was the appellant: and, from there, it would not be difficult for the two witnesses, being related to the deceased, to exaggerate the extent of the dispute. For these reasons, we do not think that the danger of false implication had been excluded.

6.7 It is our view therefore that the trial judge should not have relied on the testimony of the two witnesses regarding the alleged confrontation between the appellant and the deceased.

6.9 We now turn to the second incriminating piece of evidence given by Austin Muleya, (PW6). We are mindful that this is a witness from whom a gun was recovered, and that the witness was also detained over the same incident. In the case of **Wilson Mwenya v The People**[1] we held:

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

6.10 In this case, the learned trial judge was not at all alive to the fact that Austin Muleya was a witness whose testimony needed to be corroborated because of the circumstances that we have stated above. Consequently, the learned judge just accepted his testimony without observing any of the cautionary rules to be applied to such witnesses as laid down in a number of decided cases, chief among them being the case of **Emmanuel Phiri & Others v The People**[2]

6.11 So, whether or not the testimony of Austin Muleya can be allowed to stand depends on whether there was other evidence which corroborated his testimony, or whether, overall, there was something in this case which would have satisfied the trial judge that the danger of false implication had been excluded. In our view, this can only be determined after we have dealt with the third incriminating piece of evidence, namely the testimony of the arresting officer (PW8).

6.12 We have outlined the portion of PW8's testimony that was inculpatory of the appellant. It consists entirely of what

the appellant is alleged to have told the arresting officer during the interview whilst in custody. As we have stated above, the arresting officer said that it was during the interview that the appellant said that the gun that was used to kill the deceased was with Austin Muleya. It is important to note that, according to the arresting officer's testimony, it is not the appellant who led him to recover that gun from Austin Muleya. There being no evidence of leading on the part of the appellant means that the incriminating evidence from the arresting officer consisted entirely of an alleged confession by the appellant.

6.13 Regarding the alleged confession, we have observed from the record that when the arresting officer delved into it, no objection was raised by defence counsel. Counsel only came to rise on a point of objection when the same witness delved into the alleged confession of Howard Mwaanga. In the case of **Nalumino v The People**[3], we dealt with a somewhat similar situation. In that case, there was evidence given verbally by the appellant's superior, a Mr. Nkhoma, that the appellant, during an interview with the

superior, had broken down and confessed. The superior told the trial court details of that confession. Regarding that confession, this is what we said:

> **"Further, the defence at the trial were never asked if they wished to object at the time when Mr. Nkhoma gave evidence of the appellant's apparent confession during interrogations. Mr. Chalanshi's reaction to this omission was that a court has a duty to ask an unrepresented accused if he wishes to raise an objection to the admission of a confession, but that where an accused is represented by counsel, it must be presumed that counsel has no objection to raise. We wish to reiterate what we said to Mr. Chalanshi then that it is immaterial whether or not an accused is legally represented and that, in all cases, the court must ask the defence – represented or unrepresented-whether they wish to object to the admission in evidence of a confession. In this case, the learned trial judge's omission was, therefore, a misdirection.**
>
> **As a result of the misdirections referred above, Mr. Nkhoma's evidence of the appellant's purported confession must completely be disregarded".**

6.14 In the case before us, when the arresting officer divulged the alleged confession arising from his interview with the appellant, the learned trial judge did not ask the defence whether or not they wished to

object to its admission in evidence. So, in line with what we said in the case of **Nalumino v The People**[3], the testimony by the arresting officer that the appellant confessed to him that he was the owner of the gun that was used to kill the deceased, and that it was at that moment in the custody of Austin Muleya must be disregarded.

6.15 This brings us back to the testimony of Austin Muleya. The only evidence that seemed to have provided corroboration to Austin Muleya's testimony is the alleged confession by the appellant as testified to by the arresting officer. Since that portion of the arresting officer's testimony has been disregarded, the testimony of Austin Muleya remains uncorroborated. The question now, therefore, is whether there is something in the whole of this case which would have satisfied the trial judge that the danger that Austin Muleya could be falsely implicating the appellant had been excluded. We do not see any because this is a person who, even going by his own testimony, had a

lot of opportunity to report the alleged commission of the crime by the appellant and Howard Mwaanga to the police, but he did not. Instead, he was the one who was in possession of the gun until it was taken from him by the police. Additionally, the ballistic examination did not connect the firearm to the gun shot wounds sustained by the deceased and there was no independent evidence or proof that the firearm belonged to the appellant. In the circumstances, our view is that the portion of Austin Muleya's testimony implicating the appellant should have been disregarded for lack of corroboration.

7.0 Conclusion

7.1 In conclusion, we find merit in this appeal on the ground that all the three key pieces of evidence against the appellant did not meet the requirements regarding the admissibility of evidence: in the case of the first two pieces, they lacked corroboration while that of the arresting officer was wrongly admitted in evidence.

7.2 We, therefore, allow this appeal, quash the conviction and sentence that was imposed on the appellant. The appellant now stands acquitted.

Mumba Malila
CHIEF JUSTICE

E. M. Hamaundu
SUPREME COURT JUDGE

R. M. C. Kaoma
SUPREME COURT JUDGE