LEGAL AID

THE SUPREME COURT FOR ZAMBIA **APPEAL No. 10/2024**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

KALALUKA MUSHOKE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Malila CJ, Hamaundu and Chisanga JJS**

on 5th June, 2024 and 10th June, 2024

For the Appellant: *Ms. M. L. Nzala, Senior Legal Aid Counsel – Legal Aid Board*

For the Respondent: *Mr. V. Choongo, State Advocate – National Prosecution Authority*

J U D G M E N T

Malila, CJ delivered judgment of the Court.

Cases referred to:

1. *Simon Malambo Choka v. The People*
2. *Shamwana and Others v. The People*
3. *Andrew Mwenye v. The People SCZ Appeal No. 640 of 2013*
4. *George Musupi v. The People (1978) ZR 271*
5. *Malambo Choka v. The People (1978) ZR 243*
6. *Kambarage Mpundu Kaunda v. The People (1990/ 1992) ZR 215*
7. *Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v. The People (1988-1989) ZR 163*
8. *Joseph Mulenga v. The People SCZ Appeal No. 128 of 2017*

Other work referred to:

1. *Bryan A. Garner (Ed.), Black's Law Dictionary, 8th Edition, 2004*

1.0 INTRODUCTION AND BACKGROUND FACTS

1.1. The appellant had been indicted and convicted for the offence of murder. The offence was committed sometime in February, 2012. At trial, in the High Court, the prosecution marshalled four witnesses to discharge the onus incumbent upon it to prove the appellant's guilt for the murder of Litia Sikute ("the deceased") beyond all reasonable doubt.

1.2. In an effort to defend himself, the appellant gave unsworn testimony on his own behalf and called no witnesses.

1.3. The facts that culminated into his conviction and sentence as presented by the prosecution are these.

1.4. Milupi Litia (PW1), the deceased's son, gave evidence at trial and recalled that on 4th February, 2012 his father had left his home to cultivate his field within Senanga District in Western Province.

1.5. He testified that when the deceased did not return home some two days later, a call for his search was made. During the course of the search on 6th February, 2012, the deceased's

lifeless body was discovered about a kilometer away from the field that he had set out to cultivate two days prior.

1.6. Milupi told the court that the death of his father was reported to the police immediately after his body was found. The police arrived at the scene on the same day. According to Milupi, as the police inspected the body, he saw two cuts on his father's body. One cut was on the neck and the other at the back of his head.

1.7. With regard to the identity of the offender, Milupi testified that he suspected that the deceased was killed by the appellant whom he had known for about 20 years.

1.8. It was Milupi's testimony that the appellant had been involved in land wrangles with the deceased. This fact was well known to the village headman.

1.9. When quizzed under cross examination as to whether he was aware that his family had been suspected of bewitching the appellant's father who had died earlier Milupi denied.

1.10. PW2 was Nyambe Songiso, the appellant's half-brother. His recollection of how the deceased had gone to the field and how he did not return was not any different from Milupi's. He testified that the deceased's body had been found on 6th February, 2012 and later taken to Senanga.

1.11. Nyambe told the court that Milupi had informed him that the appellant had been on the run. Further, that if the appellant was not found Nyambe would be detained in connection with his father's death until the appellant either returned or was apprehended.

1.12. It was Nyambe's testimony that he was apprehended and detained for a day before he was released. He added that he was again detained and informed that the appellant had implicated him in the murder. He was soon transferred to Senanga Police station where he was placed in the same holding cell as the appellant for five days.

1.13. Nyambe recalled that when the appellant saw him, he was gobsmacked. The appellant asked why he had been detained when the appellant was the one that killed the deceased.

According to Nyambe, the appellant told him that no one assisted him kill the deceased.

1.14. Nyambe recounted that the appellant had told him that he had consulted a witchfinder in the past. According to the witchfinder, the deceased was responsible for killing the appellant's uncle. Subsequently, the appellant followed the deceased and attacked him with an axe while the deceased was returning from the field.

1.15. With regard to how he had related with the appellant, Nyambe told the court that he had enjoyed an affable relationship with him. He also told the court that he was aware of the fact that the deceased and the appellant had some land disputes and the same had been reported to the village headman.

1.16. It was Nyambe's testimony that he was not aware of the allegations of witchcraft against the deceased but he was aware that the appellant had consulted a witchfinder.

1.17. Mushokabanji Kuwanu was PW3. His narration of how the deceased had gone missing and how his body was eventually found was similar to that of Milupi and Nyambe. However, he added that he had been apprehended, together with other persons, in connection with the murder of the deceased. He had initially been held at Moyo Police Post before being transferred to Senanga Police Station.

1.18. He told the court that when the appellant was apprehended, the appellant admitted that he had killed the deceased on account that a witchfinder had told him that the deceased had killed his uncle. According to Kuwanu, the appellant stated that he had used an axe to kill the deceased.

1.19. Kuwanu also testified that he had a pleasant relationship with the appellant. He denied being aware of any wrangles between the deceased's family and that of the appellant. He stated that he had heard the allegations of witchcraft made by the appellant against the deceased from the police.

1.20. The last prosecution witness was the arresting officer, Constable Pumulo Mubita. He told the Court that on 6th February, 2012, he received a call from Milupi informing him that the deceased had been found dead in an uncultivated field.

1.21. When he visited the scene of the crime, he found the lifeless body of the deceased lying in the grass not too far from the village. When he examined the body, he found that there was a deep cut on the neck and another at the back of the head. Following his ocular examination of the deceased's body, it was taken to Senanga for post-mortem examination.

1.22. Constable Mubita told the court that the appellant was apprehended on 7th February, 2012 and taken to Moyo Police Station. He added that his investigations revealed that an axe was recovered from the accused's house by Milupi. At the conclusion of his investigations, Constable Mubita charged the appellant for the offence of murder. According to him, under warn and caution, the appellant denied the charge.

1.23. During cross examination, Constable Mubita stated that his investigations revealed that the appellant's family harboured suspicions of witchcraft practiced by the deceased's family.

1.24. In his defence, the appellant denied having anything to do with the murder of the deceased. He told the court that on the day that the deceased went missing, he had gone to Chetu Village to look for food. He told the court that it was whilst he was away in search of food that he was apprehended in connection with the murder of the deceased.

1.25. The appellant testified that Milupi had been apprehended earlier in connection with his father's death. According to the appellant, it was Milupi that implicated him.

1.26. He told the Court that when he was taken to Senanga Police Station he was beaten, threatened and coerced into confessing that he killed the deceased. It was his testimony that it was only after the beatings that he admitted killing the deceased in the hope that he would be released as promised.

1.27. The trial court found that it was not in dispute that the deceased had been murdered but the only unresolved questions related to the identity of the offender and whether the killing was done with malice aforethought.

1.28. The trial Judge found that the gravity of the cuts showed that the offender meant to cause grievous harm or even death therefore the killing was done with malice aforethought.

1.29. The Court also noted that the appellant offered an unsolicited oral confession to Nyambe and Kuwanu. The Court noted that the confession was admitted without undergoing a trial within a trial owing to the fact that counsel for the appellant had indicated to the Court during trial that his instructions were that the appellant did not make any confession statement at all.

1.30. It was the trial court's observation that the appellant did not ask any questions during cross examination as to whether the admissions were made voluntarily to Nyambe and Kuwanu. Consequently, the trial Judge rejected the appellant's evidence that he was beaten by the police leading to his confession as

being an afterthought. He accordingly accepted the oral confessions as having been made to Nyambe and Kuwanu.

1.31. Having been satisfied that the prosecution's case had been made out against the appellant beyond all reasonable doubt, the trial court convicted the appellant and sentenced him to death.

2.0 GROUND OF APPEAL AND APPELLANT'S CASE

2.1. Dissatisfied with the decision of the trial court, the appellant has appealed to this Court raising a solitary ground of appeal couched in this fashion:

> **The learned trial Judge misdirected himself in both law and fact when he relied on evidence of suspect witnesses.**

2.2. Counsel for the appellant, Ms. Nzala, filed brief heads of argument dated 31st May, 2024. Learned counsel argued that the trial court relied heavily on the evidence of Nyambe and Kuwanu. According to counsel, the two witnesses fell in the category of suspect witnesses. In her view, the trial court ought to have warned itself against relying on that evidence and excluded the danger of false implication.

2.3. To support this line of argument, Ms. Nzala called in aid our decision in **Simon Malambo Choka v. The People**[1] (where) we stated that a witness with an interest to serve must be treated like an accomplice and, therefore, that their evidence must be corroborated in order to be relied on.

2.4. Counsel forcefully argued that there was no evidence of something more to exclude the danger of false implication on the part of the two prosecution witnesses. According to the learned counsel, the evidence given by both Nyambe and Kuwanu regarding the admission was the same, therefore, the evidence by one of them could not corroborate the evidence of the other.

2.5. Ms. Nzala drew our attention to the case of **Shamwana and Others v. The People**[2] (where) we stated that accomplices of a particular class may corroborate each other where they give independent evidence of separate incidents and where the circumstances exclude the possibility of fabrication.

2.6. Ultimately, the learned counsel argued that the evidence before the trial court fell short of the requisite standard to warrant the conviction of the appellant.

2.7. At the hearing of the appeal, Ms. Nzala made oral submissions. She argued that Nyambe and Kuwanu were suspect witnesses on account that the two were in police custody with the appellant in respect of the same offence. She went on to argue that the two witnesses ought to have been treated as accomplices.

2.8. It was learned counsel's view that apart from the admission evidence given by the two witnesses there was nothing more to corroborate their evidence. To illustrate this point, she contended that Nyambe merely spoke to the fact that the appellant suspected the deceased's family as having been responsible for a death in the appellant's family. She added that Constable Mubita claimed that an axe was recovered from the appellant's house by Milupi when Milupi did not speak to this fact at trial.

2.9. When asked whether or not Nyambe and Kuwanu were indeed accomplices, she submitted that Nyambe could be considered an accomplice because he was the appellant's half-brother and also because of the allegations of witchcraft. She stated that Kuwanu, on the other hand, could be considered suspect and, therefore, a witness with an interest of his own to serve.

2.10. Ms. Nzala added that what engulfed Nyambe and Kuwanu into the category of suspect witnesses is the fact that there was a desire on their part to secure their freedom since they both had been in custody in connection to the murder and were thus prone to say anything to that end. She added that there is evidence that Nyambe had been warned by Milupi that if the appellant was not arrested, he would be arrested instead.

3.0. THE RESPONDENT'S CASE

3.1. Counsel for the State, Mr. Choongo, also filed concise heads of argument and made oral submissions at the hearing of the appeal. Counsel contended that whilst Nyambe and Kuwanu fell in the category of suspect witnesses, the danger of false implication was excluded by other evidence on the record.

Learned counsel referred us to our decision in **Andrew Mwenye v. The People**[3] where we held that in order for a witness to be labelled suspect, a motive to give false evidence on the part of the witness has to be revealed otherwise a court need not treat the witness with caution.

3.2. Counsel pointed out the fact that the trial court did not label Nyambe and Kuwanu as suspect witnesses because there was no motive revealed as to why the two witnesses would give false evidence implicating the appellant. To buttress his point, Mr. Choongo referred us to the case of **George Musupi v. The People**[4] where we stated that the question is not whether a witness has an interest to serve but whether the circumstances reveal that the witness has a motive to give false evidence. With regard to how witnesses with an interest to serve ought to be treated, we were referred to the case of **Malambo Choka v. The People**[5] as authority.

3.3. Counsel for the State argued that there was corroborative evidence supporting the evidence of Nyambe and Kuwanu. Learned counsel argued that there was evidence on record

given by Milupi that the appellant killed the deceased because they had some land wrangles.

3.4. Further, that Constable Mubita in his investigation revealed that the appellant suspected the deceased of witchcraft. In addition, that there was no evidence of ill motive on the part of Milupi. Thus, counsel contended that both Milupi's and Constable's evidence corroborated that of Nyambe and Kuwanu. He concluded that the danger of false implication had been eliminated.

3.5. He further contended that Constable Mubita's evidence that an axe was found at the appellant's house was not disputed by the appellant. In counsel's view, this piece of evidence provided something more that would exclude any possibility of falsely implicating the appellant.

3.6. Counsel also argued that the appellant did not lead any evidence of ill motive on the part of the three civilian witnesses. Further that both Nyambe and Kuwanu described their relationship with the appellant as being genial.

Ultimately, the respondent argued that the appeal ought to be dismissed for lack of merit.

3.7. At the hearing, Mr. Choongo made oral submissions which were materially the same as the written arguments. He however added that the evidence on the record only pointed to the appellant as the one that killed the deceased.

4.0. ANALYSIS AND DECISION

4.1. We have carefully considered the appeal by the appellant as well as the arguments filed by both parties. The sole ground of appeal proffered by the appellant asks us to overturn the decision of the High Court to convict the appellant for the offence of murder on account that the trial Judge unwarrantedly relied on evidence tendered by suspect witnesses.

4.2. We note from the arguments by both parties that they seem to be in agreement that Nyambe and Kuwanu were both suspect witnesses. Their point of departure appears to be the question of whether or not, because they are suspect witnesses, the

danger of them falsely implicating the appellant had been averted.

4.3. Counsel for the appellant argued that the trial Judge ought to have warned himself on the dangers of convicting on evidence given by suspect witnesses. In her oral arguments, she went as far as stating that the two witnesses were in fact accomplices and their evidence ought to have been discounted. She later reneged on this argument but maintained that only Nyambe was an accomplice.

4.4. On the other hand, counsel for the respondent argued that there was other evidence that corroborated the evidence of Nyambe and Kuwanu to rule out the possibility of false implication.

4.5. Before we delve into the main question before us, we feel compelled to dispel the notion suggested by Ms. Nzala in her oral arguments that Nyambe and Kuwanu could be considered accomplices only because they had been detained, at some point, in connection with the subject offence. That because of this, their evidence must be treated with caution.

4.6. This argument, though somewhat peripheral to the ground of appeal, impels us to address it. Otherwise, this line of argument, if accepted, would mean that every individual arrested or detained in connection with an offence during initial police investigations may be treated as an accomplice.

4.7. In our view, an accomplice is someone who assists or participates in the commission of a crime, either before or during the act itself. This could involve aiding, abetting, or encouraging the perpetrator in some way. An accomplice is defined in Black's Law Dictionary 8th Edition in the following terms:

> **a person who is in any way involved with another in the commission of a crime...**

4.8. Therefore, while an accomplice may have their own interest to serve, a witness with an interest to serve may not necessarily be an accomplice. In certain circumstances, a friend, relative or other category witnesses may have an interest of their own to serve.

4.9. In **George Musupi v. The People**[4] we made this distinction aptly when we stated that:

> **There is of course a distinction between a witness with a purpose of his own to serve and an accomplice; the accomplice certainly may have such a purpose, but the converse is not true - a witness with purpose of his own to serve is not necessarily an accomplice. But this is an irrelevant distinction; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded...**

4.10. Therefore, our view is that Nyambe and Kuwanu cannot be considered accomplices only because they had been detained in connection with the subject offence. The two having their own interest to serve is another issue altogether. In the context we have highlighted above, Nyambe and Kuwanu were not accomplices.

4.11. In relation to the main question before us, Ms. Nzala put up an argument suggesting that these two witnesses should still be treated as suspect witness on account that they had been detained together with the appellant for some time. In her view, they fell in the category of witnesses whose evidence should be treated with circumspection by the trial court.

4.12. In **Kambarage Mpundu Kaunda v. The People**[6] we held the view that it was incumbent upon a court when evaluating testimony from suspect witnesses, to caution itself about the risks of falsely incriminating the accused based on their testimony. Furthermore, we urged courts to take additional steps to mitigate and eliminate this risk of false implication.

4.13. In **Boniface Chanda Chola v. The People**[7] we stated in regard to witnesses with their own interest to serve and those with a motive to give false evidence, that:

> **once this is a reasonable possibility, their evidence falls to be approached on the same footing as for accomplices... and it is necessary to examine the circumstances to see if the danger of a jointly fabricated story was excluded...**

4.14. We must state here that the emphasis in all these authorities is that the evidence before a trial court must show that a particular witness may or in fact has a bias or an interest of their own to serve, or a motive to falsely implicate the accused. Once this is apparent from the evidence, and only in those circumstances, should the court treat those witnesses in the

manner we suggested in **Kambarage Mpundu Kaunda v. The People** [6] and **Boniface Chanda Chola v. The People**[7] above.

4.15. We have painstakingly perused the judgment of the trial Judge and are of considered view that there was no evidence before the court suggesting that Nyambe and Kuwanu appeared to connive or had in fact connived to implicate the appellant. The only argument by the appellant is that the two witnesses had been detained together with the appellant. The detention on its own cannot render the evidence of the witnesses doubtful.

4.16. We agree with the contention by counsel for the respondent that the prosecution witnesses, particularly Nyambe and Kuwanu had both testified that they had a friendly relationship with the appellant. This evidence remained unchallenged. In the case of **Joseph Mulenga v. The People** [8] we put the position this way regarding unchallenged evidence:

> **...the case in casu, the appellant cross-examined the aunt to the prosecutrix but left the mother's evidence unchallenged... Surely, the trial court or indeed this court cannot be expected to ignore the uncontroverted evidence which without a doubt gave support to the prosecutrix's evidence...**

4.17. Similarly, we cannot ignore the unchallenged evidence on record showing that Nyambe and Kuwanu had an affable relationship with the appellant. There is nothing on record to suggest otherwise.

4.18. Even if we were to assume that the two witnesses indeed had an interest of their own to serve warranting the need for corroboration of their evidence, the record shows that there was no motive revealed from the record on the part of the two witnesses to falsely implicate the appellant. In **Yokoniya Mwale v. The people**[9] we had this to say about a conviction based on witnesses with a possible interest to serve:

> **Our view is that a conviction will be safe if it is based on the uncorroborated evidence of witnesses who may appear to have an interest to serve, provided the record clearly shows that those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve.**

4.19. As we have indicated earlier, our review of the record reveals that there is no danger of false implication on the part of Nyambe and Kuwanu to upset the decision of the High Court. In any case, there was other evidence by Milupi and constable

Mubita that corroborated the version of events given by Nyambe and Kuwanu.

4.20. We, therefore, find no merit in this appeal and we dismiss it.

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Mumba Malila
CHIEF JUSTICE

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E. M. Hamaundu
SUPREME COURT JUDGE

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F. M. Chisanga
SUPREME COURT JUDGE