Legal Aid

IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO.40/2022**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MBINJI MBINJI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Hamaundu, Kaoma, Chisanga, JJS**

On 12th July, 2022 and 11th June, 2024.

For the appellant: *Mr. M. Mankinka Senior Legal aid Counsel*
Legal Aid Board
For the respondent: *Mr. K. I. Waluzimba Deputy Chief State Advocate*
National Prosecution Authority

J U D G M E N T

CHISANGA, JS delivered the Judgment of the Court.

Cases referred to:

1. *The People v Njobvu (1968) ZR 132*
2. *R v Katunzi (1946) Caea 217*
3. *Nondo v Director of Public Prosecution (1968) ZR 83.*
4. *R v Roberts (2000) Crim L.R 183, Ca.*
5. *R v Turnbull (1977) Qb 224*
6. *Miyoba v The People (1977) Z.R 218*
7. *Fumbelo v The People (SCZ Appeal No. 476/2013)*
8. *Kavwana v The People (SCZ Appeal No.84/2015)*
9. *Nyambe v The People (2011) ZR 246*
10. *Phiri v The People (SCZ Judgment No. 171/2015)*
11. *Ngula v The Queen (1963-64) N.R.LR*
12. *Mwale v The People (SCZ Appeal No.285/2014)*
13. *Kunda v The People (1990-92) ZR 215*

14. *Mwambona v The People (1973) ZR*
15. *Musenge v The People (Appeal No.68/2006)*

Other works referred to:

1. *Archbold criminal pleading, evidence* and *practice 2006 edition, page 1463*
2. *Powell's Principles and Practice of The Law Of Evidence, Tenth Edition 1921 Butterworth & Co London at page 116*

INTRODUCTION

1. Mbinji Mbinji, the appellant in this appeal, was charged with, and convicted for the offence of murder contrary to section 200 of the Penal Code CAP 87 of the laws of Zambia by Chashi J, as he then was. The particulars of offence were that Mbinji Mbinji murdered one Akatama Nyambe at Mongu in the Mongu District of the Western Province of the Republic of Zambia on the 22nd day of June 2011.

EVIDENCE AT TRIAL

2. The prosecution called six witnesses whose evidence was that the appellant was heard hurling insults at some residents of Namapa village. He claimed that the land on which PW1 Lubasi and Sumbwa Nyambe, her husband, the deceased, lived, belonged to his grandfather. He threatened that he would teach the person who had cleared a portion of the said land a lesson.

He specifically addressed Akatama Nyambe, the victim of the crime, accusing him of being a wizard who had eliminated his own children. He threatened to beat him with bottles, or failing that, shoot him, and if that failed as well, set his house ablaze, so that he perishes in the inferno.

3. He concluded the tirade of insults by announcing that he was Mbinji and dared whoever wished to follow him.

4. Aggrieved with Mbinji Mbinji's utterances, the deceased spoke to PW4, Bernard Kazuma, about the incident, asking him whether he had heard the insults Mbinji had directed at him. PW4's response was that he had. Akatama felt that he should take the matter up with Mbinji's father, and requested PW4 to escort him on this mission later.

5. However, the deceased did not pick up PW4 as agreed, but instead, went to Mbinji's father's home with Sibeso, his daughter, and one Mubita Sinyama. According to Sibeso, who was PW2, Mbinji's father was not surprised at the report that his son had hurled insults at the deceased.

6. About two weeks later, on the 21st of June 2011, a fire broke out in the house of PW1 and the deceased, whilst they slept.

This house was constructed of reed walls while the roof was of asbestos sheets. PW1 and the deceased came out of the house, but the deceased only had a pant on. A cry for help to their daughter, PW2 had been made, and, realising that she would see the deceased in a state of undress, PW1 urged him to cover himself up. So he entered into the burning house, but came out without clothes. A second attempt was unfruitful. When he entered the house a third time, he never managed to exit, but perished in the inferno. PW1, who had entered the house the third time, managed to escape through the hole that Sibeso had made in the reed wall. Unfortunately for the deceased, this exit was engulfed in flames just when he got there.

7. According to PW2, she saw Mbinji at the scene during the inferno. She was surprised to see him, so soon at the scene. He lived in the plains, further than the neighbours who had not yet arrived. She accused him of killing her father, pointing out that he should be celebrating elsewhere, and not right there before her. It was suggested to PW2 that Mbinji went to the scene out of concern, when he saw the fire.

8. Of those who heard Mbinji insulting and threatening the deceased was PW3, Inambao Katambo, Mbinji's cousin. Upon hearing this individual, Inambao came out of his house fearing that his house might be set on fire. He had heard Mbinji Mbinji say, *"you wizard Akatama you are busy killing your children. This year we will kill you. I will make sure that you are burnt in the house, or I will shoot you with a gun."*

9. Bernard Kazuma, PW4, also heard Mbinji Mbinji say *"Ndate Nyambe, you are a wizard, you have finished your children, now starting from your own children don't extend to other people's children. This year I am going to kill you. I am either going to kill you by burning you in the house or I will just kill you because where you have settled, you have settled in my grandfather's field."*

10. Mbinji Mbinji's unsworn version was that he was asleep in the garden where he was guarding crops, when he heard screams for help from the village. He saw a fire, and being a member of the village, went there and found Akatama Nyambe's house ablaze. He informed the court that he found people at the site of the burning house. The record indicates that PW2's assertion

that Mbinji Mbinji was the first person at the scene was not challenged in cross-examination. Equally unchallenged were the words PW2, allegedly uttered to him at the scene. However, Mbinji Mbinji denied the allegations levelled against him by the prosecution.

HIGH COURT DECISION

11. Upon considering the evidence, the learned trial judge found malice established on the evidence. It was his view that the witnesses had no interest of their own to serve, and their evidence was corroborative. They were able to recognise Mbinji Mbinji's voice, having known him from childhood, and he also mentioned his name. The trial judge accepted PW2's assertion that she peeped from her house and saw the accused, and that PW3 went outside when he heard Mbinji Mbinji insulting. The learned judge, premised on the foregoing, made a finding that it was Mbinji Mbinji who hurled insults at Nyambe Akatama, and threatened him with death by means which included fire. He anchored this finding on the fact that Sibeso and her father,

Akatama Nyambe, went to complain to Mbinji Mbinji's father who confirmed that his son had gone home whilst insulting.

12. It was the trial judge's view that had Mbinji Mbinji called his father to testify to the contrary, the case would have taken a different dimension. The learned judge took note of the fact that Mbinji Mbinji arrived early at the scene, despite that his abode was in the plains.

13. The judge observed that Mbinji Mbinji attempted to hide from PW5 and his father when they met him on their way to the scene. When asked where he was coming from, he said he was coming from Nalisila village and had not heard anything that had happened in the lower land. He noted that the explanation by the accused person, his father and PW5 was at variance with his unsworn evidence. He had informed PW6 that he had been at Mukolo, drinking. PW6 confirmed this with Katungu Sililo, who however stated that the accused left at 20:00 hours, and it would have taken him thirty minutes to Namapa village. That PW6 found it surprising that the accused was found near the crime scene around 02:00 hours by PW2.

14. It was the learned judge's view that it was not a mere coincidence that the life of the deceased would be threatened on the 4th of June 2011, and he meets his death on the 21st day of June 2011 in the same manner prophesied by the accused, and this, on the day he had made up his mind to go and report the matter to the police, so that they could come and pick the accused person up. According to the learned judge, there were a number of unexplained odd coincidences arising from the conduct of the accused on account of which the explanation offered, in discharge of the evidential burden resting on him, could not reasonably be true. The glaring coincidences could only point to the inference that he committed the offence. The trial judge was satisfied that only an inference of guilt was permissible on the evidence. In arriving at this decision he followed **The People v Njobvu,**[1] and **R v Katunzi.**[2]

THE APPEAL

15. Mbinji Mbinji was dissatisfied with the judgment of the trial court, and appealed against conviction on five grounds as follows:

(i) **The trial court erred in law and fact in relying on R v Nyansio Katunzi which was distinguishable;**

(ii) **It was an error in law and fact to convict the appellant despite the failure by the prosecution to rule out accidental fire in the absence of eye witnesses;**

(iii) **It was an error in law and fact to fail to apply the Turnbull guidelines on the voice recognition of the appellant, thereby failing to properly address the issue;**

(iv) **It was an error in law and fact to hold that PW5 were not suspect witnesses when evidence on record showed that they had motives to falsely implicate the appellant.**

(v) **It was a misdirection in law and in fact to convict the appellant on circumstantial evidence when the inference of guilty was not the only reasonable inference that could be drawn from the facts.**

16. The argument with respect to the first ground is that the Nyansio Katunzi case is distinguishable from the instant case. This is because there appeared to be direct evidence of the setting of the hut on fire in the Katunzi case, as opposed to this case, where no one saw the appellant set the house in issue on fire. Another difference, according to learned counsel, is that in the Katunzi case, the deceased returned to the hut in the mistaken impression that one of his children was still in the burning hut. In the instant case, there was no such impression.

The deceased went back into the house to dress up as he had come out of the house in his pants only.

17. It is learned counsel's contention that even assuming the appellant set the house on fire, the multiple returns to the burning house intervened between the unlawful act and the death. There was no evidence that the appellant held the deceased back on those occasions. Even were the appellant the culprit, he would not be guilty of murder, but of some other lesser offence.

18. In response to these arguments, the state contends that the learned judge's reliance on **R v Nyansio Katunzi** was not misplaced. The principle to be distilled from that case is that whoever set fire to the deceased's house must have intended to cause death or grievous harm to the occupants of the house, and that this fact established malice aforethought. According to learned counsel, the principles applicable to the case are the same, although the facts are different. Therefore, the number of times the deceased re-entered the house is immaterial.

19. It is argued that the reason the deceased re-entered the house thrice was reasonably justified, considering African customs

and taboos. The deceased's wife, PW1, advised him to dress up, so as not to be found naked by others. The number of times the deceased entered the house is immaterial as the unlawful act was still operative. Therefore, it cannot be said there was an intervening event or act. According to learned counsel, the facts do not support conviction for a lesser offence.

20. The argument with respect to the second ground is that in the absence of an eye-witness account as to how the fire started, the prosecution was required to disprove any possibility of accidental fire, as held in **Nondo v Director of Public Prosecution.**[3] Learned counsel submits that there was no evidence that the occupants of the house had put out the cooking fires, nor was the absence of grass fires from which sparks might have come from established. Moreover, no forensic evidence with respect to the cause of the fire was led. Therefore, the felonious crime of arson was not proved as having been committed by the appellant.

21. In resisting this ground, learned counsel for the state argues that the fire was not accidental because there was no evidence to suggest this. Instead, the fire was noted around 01:00 hours

after the family had retired for the night. Moreover, it is argued, it was not put to PW1 that the fire could have started accidentally or by natural agency. In addition to this, none of the prosecution witnesses testified that they had engaged in any activities as suggested by the appellant, nor were they cross-examined on the issue. Other than the fact that a kitchen was near the gutted house, it was not established that the said kitchen was also gutted. Therefore, the accidental fire theory was far-fetched. The *Nondo* case does not obligate the prosecution to embark on a frolic of speculative evidence, and is of no assistance to the appellant's case.

22. The appellant argues, through learned counsel, with respect to ground three, that the conviction was mainly premised on recognition of the appellant's voice, as that of the person who was heard insulting the deceased 18 days before the fire. Counsel argues that special caution is necessary when evidence of voice identification is placed before the court. This argument draws support from *Archbold criminal pleading, evidence* and *practice 2006 edition, page 1463*, where this excerpt is found:

> **"Where voice identification is in issue, the jury should be given the full Turnbull warning, appropriately modified: R v Hersey (1998) Crim L.R 281, Ca. there is some academic evidence that accurate voice identification is more difficult than visual; accordingly a warning to the jury should be even more stringent than that given in relation to visual identification: R v. Roberts[4]"**

23. Learned counsel also refers to the case of **R v Turnbull,**[5] which has been cited with approval by this court. Relying on that case, this court stated that recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognise someone whom he knows, the trial court should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

24. It is argued on the appellant's behalf that the prosecution did not address the essential elements required to be met when relying on the purported voice recognition attributed to the appellant. That the trial court fell into error in not warning itself that mistakes in recognising voices of close relatives and friends are sometimes made. Learned counsel contends that given that a voice may easily be disguised, the prosecution led no evidence as to how often they had heard the appellant's voice when in a

drunken stupor. It is submitted that neither PW1 nor PW2 stated for how long they heard the person who was hurling insults in the night.

25. In countering these arguments, learned counsel for the respondent submits that the learned trial judge did not fall into error. The basis of this argument is that PW1, PW2, PW3 and PW4 all heard the appellant hurling insults which he concluded by mentioning his name. PW2 and PW3 actually saw the appellant at the material time. PW3 was related to the appellant, whereas PW4 was not related to the deceased, or the appellant. The evidence was that these witnesses knew the appellant from childhood. Therefore, according to counsel, the trial court's failure to warn itself of the danger of mistaken voice recognition was not fatal to the prosecution's case.

26. With respect to ground 4, it is argued that PW1, PW2, PW3, PW4 and PW5 were all suspect witnesses with motives to falsely implicate the appellant. PW1, PW2 and PW5 were close relatives of the deceased. According to learned counsel, PW1's motive lies in her statement that she wished to see someone punished for the deceased's death. As for PW2, this witness contradicted

herself about the appellant's presence at his father's home when they went to complain to his father about the insults. Counsel also points to PW2's failure to inform the police that she peeped and confirmed that it was Mbinji who was hurling insults at her father. PW3 is said to have a motive to falsely implicate the appellant on account of his assertion that Mbinji was fond of setting houses on fire, when he had never seen him do so. He also said he had a sight problem and was not on good terms with the appellant.

27. With respect to PW4, learned counsel argues that this witness did not see the appellant, but heard him mention his name. The possibility that he could have mistakenly identified the appellant was not ruled out.

28. As for PW5, his omission to inform the police that the appellant hid behind the shrubs when they met him on the way to the village, but his father identified him, demolished his credibility. Counsel referred to **Miyoba v The People**[6] and **Fumbelo v The People**[7] among other judgments in his arguments.

29. The opposing arguments on this ground are that PW1, PW2 and PW5 did not exhibit elements of falsity against the appellant.

Learned counsel refers to several cases on the subject of friends' and relatives' testimony, including **Guardic Kameya Kavwana v The People**[8] where this court stated the following:

> **"There is no law which precludes a blood relation of the deceased from testifying for the prosecution. Evidence of a blood relative can be accepted if it is cogent enough to rule out any element of falsehood or bias"**

30. In addition, learned counsel referred to **Miyoba v The People,**[6] where this court said, inter alia, the following:

> **(i) It is necessary for the trial court to have before it formally the previous statement so that it can compare it with the evidence given in court and assess for itself the seriousness of the alleged discrepancies.**
>
> **(ii) We cannot overstress that unless the previous statement has been made part of the record in one or other of the ways indicated above, an appellate court has no basis on which to assess how serious the alleged discrepancies are and what weight to attach to the evidence of the witness.**

31. In learned counsel's view, the witness did not meet the criteria for suspect witnesses.

32. The argument pertaining to ground five is that the inference of guilt was not the only inference that could be drawn from the facts. Reference is made to **Nyambe v The People**[9] where this court held the following:

> **"Where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may be reasonably possible cannot be condemned as speculation"**

33. According to learned counsel, the voice heard on the material night could have been for another person. It was not proved that it was Mbinji's, or that the footprints were his. The prosecution did not rule out accidental fire. Moreover, the threats against the deceased were reported late. Had the report been made early, the police would have investigated the threats in time. The failure to report diminished the credibility of the witness.

34. Responding to these arguments, learned counsel for the respondent argues that the only inference that could be drawn on the evidence was one of guilt. It was an odd coincidence that a person identified as the appellant insulted the deceased on 4th June 2011, threatening that he would eliminate him by means which included fire, and the deceased met his demise in an inferno. It was learned counsel's view that the period of the threats and the death were proximate. Moreover, the appellant was at the scene of crime, and yet he lived in the plains. He

claimed, in his unsworn statement, that it would take a person 25 minutes to reach the deceased's house from the garden where he allegedly was. Yet he was the first to be seen at the scene of crime. This evidence led to one inference, that he set the house on fire. Interference with the trial courts findings by the court was not warranted.

35. To further support the trial judge's decision, learned counsel argues that the appellant's explanation could not be reasonably true. This is because on the night the deceased was threatened, and when his house was set on fire, he claimed he was at his garden, and not near the deceased's house. No suggestion was made to the prosecution witnesses that the appellant was at his garden. Instead, he informed PW6 that he was coming from Mukolo village, where he had gone to drink beer. His line of defence was that he saw a big inferno at Namapa village his place of abode, on his way home from Mukolo village. Therefore, the unsworn statement was an afterthought, and rightly dismissed by the trial court. Learned counsel relies on **Phiri v The People**[10] and **Ngula v The Queen**[11] for these arguments, and urges us to dismiss the appeal.

DECISION OF THE COURT

36. We have duly considered the grounds of appeal, the arguments as well as the record on which the appeal arises. We propose to address the grounds as we find convenient. We will start with grounds four and three, which respectively assert that all the witnesses were suspect in that the evidence revealed motives to falsely implicate the accused person, and that the voice identification evidence was not properly addressed.

37. The basis of the alleged bias against PW1 is her statement that she wished to see someone punished for the arson, as a result of which her husband met his death. PW2's bias is allegedly revealed by the inconsistencies that learned counsel has pointed out. As for PW3, the disquiet is that he lied that the appellant had a tendency of setting houses on fire, and also admitted not being on good terms with the appellant. Turning to PW4, it is pointed out the witness said he did not see the appellant on the 4th June, but only learnt his identity when he mentioned his name.

38. We have observed that PW1, in addition to the evidence that she heard the appellant uttering insults on the 4th June, 2011 testified that she knew Mbinji's voice, and that it was hoarse. It is noteworthy that although the appellant denied hurling insults at the deceased as alleged, he did not challenge PW1's description of his voice as hoarse.

39. PW3's testimony was that when he heard the insults that were hurled by the appellant in the night, he became worried. This is because the appellant had a bad attitude, and a tendency of setting houses on fire. When cross-examined, he admitted that he did not see the appellant set his own house on fire. We note however, that PW1 testified, in cross-examination, that she had seen the appellant set his house on fire. This statement was not challenged by the appellant when he gave his unsworn evidence. Moreover, PW3 said the appellant was his cousin, whom he had known from childhood.

40. The argument that some friends and relatives of the deceased may be witnesses with an interest to serve, and should be treated as suspect witnesses is correct. Our decision in **Mwale v The People,**[12] clarified that a witness is not a suspect witness

merely on account of being related to the victim of the crime. The conclusion that bias exists must be evidence-based. See also **Kunda v The People**[13] and **Mwambona v The People.**[14] In dealing with this category of witnesses a court should make a special finding that a witness will be regarded as one with a possible bias or interest of their own to serve. However, this finding will only be necessary where the evidence consigns a witness to the category of suspect or biased witnesses.

41. Having pondered on the evidence before the trial court, our considered view is that PW1's testimony does not suggest bias. She testified that she identified the person who was insulting the occupants of the village, not only from the name but from the hoarse voice. Although she said she would like to see someone punished, she readily stated that she did not see how the fire started, nor did she see the appellant set fire to the house. This evidence in fact favoured the appellant. In addition to this, the failure to address the testimony that the appellant's voice was hoarse entitled the trial judge to believe PW1 on the quality of the appellant's voice. He was, therefore, on the state of the evidence, entitled to reach the conclusion that it was the

appellant who was heard insulting the deceased on the 4th day of June, and not someone else. We find no merit in grounds 3 and 4.

42. We will now address grounds 5 and 2. Ground 5 asserts that the inference of guilt was not the only reasonable inference that could be drawn, while ground 2 attacks the learned trial judge's failure to disprove the possibility of accidental fire.

43. The evidence led in this case indicates that the prosecution set out to secure a conviction for the charge of murder on events that occurred before and after the arson. There was no eyewitness to the arson as a result of which the deceased perished. This being the case, a recap of the nature of circumstantial evidence is appropriate. This type of evidence does not directly prove matters that are in issue in a case. What it does is that it proves facts which are not in issue. It is indirect evidence from which, by way of reasoning, an inference can be drawn, to connect it to a conclusion of fact. Because of the nature of this evidence, the danger of drawing wrong inferences is ever present. Conjecture is a pitfall many a trier of fact encounters.

44. The caution for vigilance against this pitfall was sounded in **Musenge v The People.**[15] We held that the circumstantial evidence must be so cogent as to permit an inference of guilt only. Conjectural reasoning is impermissible, and renders a conviction unsafe.

45. The evidence on the record is that the appellant insulted the deceased on 4th June, threatening to eliminate him. One of the means he announced he would employ to achieve this diabolical desire was fire. PW1, during cross-examination, testified that she had seen the appellant set his house on fire in the past. Learned counsel for the appellant, Ms. Mukuluwamutiyo, asserted, in cross-examining PW3, that the appellant's house caught fire accidentally. Yet, as noted above, the appellant did not address this issue in his testimony, nor did he refute PW1's evidence that she had seen him set his own house on fire.

46. ODGERS and ODGERS have said, in *Powell's Principles and Practice of the Law Of Evidence, Tenth Edition 1921 Butterworth & Co, London at page 116* as follows:

> **".....in cases of arson, evidence may be properly given of previous fires that the prisoner has experienced on his premises (R v Gray) and of any suspicious**

circumstances attending such previous fires if such evidence shows the state of mind at the time the alleged offence took place upon a trial for arson with intent to defraud an insurance company. Evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not accident."

47. In the present case, the issue of the appellant's state of mind does not arise. At most, what can be said is that setting a house on fire came easily to him. The question however is, 'Does the evidence reveal that he set the house in question on fire?' Our considered view is that the evidence does not so prove. It is true as found by the learned judge that the appellant issued threats against the deceased on 4th June, 2011, and that he subsequently perished in the fire on 21st June, 2011. The learned judge viewed the death as an odd coincidence, connected to the threats issued 17 days earlier. However, we do not agree with this finding because a number of days elapsed before the deceased's house was set on fire. In the absence of any eye witness, it cannot be said with certainty that the

appellant set the house ablaze on account of the threats he had issued 17 days earlier.

48. Moreover, the evidence does not address the absence or presence of cooking fires or candles or other sources of fire in the house. It is unfortunate that PW1 shed no light on this issue. The burden to address this aspect lies on the prosecution. It cannot be foisted on to the defence. It remains unknown whether on retiring to bed, all sources of fire were eliminated on the fateful night.

49. The necessity to call evidence on this aspect of a case of arson was underscored in **Nondo v Director of Public Prosecutions**[3] as follows:

> **"when one actually sees a person set fire to a house it is clear that this can be proved by the act itself. When however one merely sees a person standing near a burning house, one has to disprove any possibility of accidental fire. Normally, this is done by calling persons in the house to give evidence that they put out their cooking fires, that there were not any grass fires from which sparks might come, etc. No such evidence was called in the case, so that the state never overcame the first hurdle to say that this fire was arson."**

50. This authority reiterates that the inference that a person seen standing near a burning house was the culprit who had committed the arson will not be readily made if accidental fire has not been ruled out, as in the present case.

51. Therefore, it was unsafe to convict the appellant on the evidence on record, because guilt could only arise if the fire was traceable to the appellant.

52. Having found merit in the appeal, it is otiose to consider ground one. We allow the appeal, and set the sentence aside.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE

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F.M. CHISANGA
SUPREME COURT JUDGE