

IN THE SUPREME COURT FOR ZAMBIA

S.C.Z APPEAL No. 55/2022

HOLDEN AT NDOLA

HL/119/2011

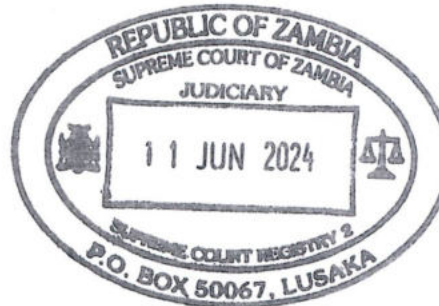
(APPELLATE JURISDICTION)

BETWEEN

GLADSON MOONO

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Malila, CJ, Hamaundu and Chisanga, JJS

On 6th June 2024 and 11th June 2024

For the appellant:

Ms. M. L. Nzala Senior Legal Aid Counsel

For the respondent:

Mrs. M.P. Lungu Deputy Chief State Advocate

J U D G M E N T

CHISANGA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Banda vs The People* (1986) ZR 105
2. *Davison Kunda vs The People* SCZ Appeal No 149/2014/105
3. *Mumpansha and Others vs The People* SCZ Appeal No. 12, 13, 14 /2021
4. *Mordon vs R* (1962) R & N 298
5. *Chinyama and Another vs The People* (1977) ZR 426
6. *Murono vs The People* (2004) ZR 207
7. *Haamenda vs The People* (1977) ZR 184
8. *Masonga vs The People* (2009) ZR 242
9. *Mwiya and Another vs The People* (1968) ZR 53
10. *Donald Fumbelo vs The People* SCZ Appeal No 476/2013
11. *Mate and Others vs The people* SCZ Judgment 11/1996
12. *Chanda and Another vs The People* SCZ Judgment 29/2002

INTRODUCTION

1. Gladson Moono, was tried by Chashi J as he then was, and convicted for the offence of murder. The particulars of the offence were that Timothy Cheembo was murdered by both the appellant and Titus Cheembo on the 23rd day of July 2009 at Itezhi-tezhi, in the Itezhi-tezhi District of the Southern Province of Zambia. Titus Cheembo was acquitted at the close of the prosecution's case, on account of the prosecution's failure to establish a prima facie case against him.
2. The court heard testimony from four witnesses. PW1, Mirriam Cheembo, was one of the deceased's wives. She testified that she heard a gunshot on 23rd July 2009. Her husband, the deceased cried out that he had been killed. She went in the direction of the gunshot, and found him in a chair, with blood oozing from the nose, mouth, and the back, just below the shoulder. Efforts to rouse him were unsuccessful.
3. As fate would have it, sometime in 2010, PW2, Bigson Shamakanda, a neighbourhood watchman, received a complaint from one Bhala that Moono, the accused person, intended to shoot Jose, Bhala's young brother. Upon receiving

this information, PW2 went in search of Moono, the alleged intended assassin, upon learning that the latter had gone to see headman Musefu. He explained his mission to the said headman, who alerted him that Moono had a gun.

4. Headman Musefu accompanied PW2 to his field, where Moono was. They found him loading a gun with his father who had a torch. Upon seeing the gun, the headman and PW2 both retreated. PW2 spent the night at the headman's home. In the morning, he requested the headman to summon Moono and his father, so that they could resolve the issue that Bhala had reported to him, since it was a family issue. The headman acceded to the request. As a result, Moono, his father and other members of the village convened at the headman's house. It was here that PW2 handcuffed Moono and his father.
5. When questioned about the gun, Moono led PW2 and other neighbourhood watch members to a place near a field. A gun was retrieved from this place. Before leaving for Choma Police Station, PW2 passed through his house with Moono. While there he asked Moono if he had just started killing people. Moono's response was that he had started by killing Dengeza.

The said individual, whose full names PW2 did not know, hailed from the same area. In fact, PW2 did not even know when Dengeza died. After a while, a vehicle came to pick them up, to convey them to Choma Police Station.

6. PW2 suggested that they go to senior village headman's place, enroute to the police, so that Moono could repeat what he had just told him. Senior village headman Muzoka, who testified as PW3, interviewed Moono in the presence of PW1 and other people. What he said was written down.
7. Moono informed PW3 that he killed Dengeza, having been hired to do so by Mooya and Taye. The job was to cost K2,000,000, and a down payment of K900,000 was made. When he demanded the balance, the two individuals, who had hired him to eliminate Dengeza, threatened to report him to the police for the offence of murder.
8. Senior village headman Abel Muzoka was PW3. He informed the court that in the night of 11th February 2010, PW2 and other members of the neighbourhood watch brought Moono to his house in a motor vehicle. When he interviewed Moono, the latter informed him that Monze had asked him to kill Jose on his

behalf because he, Jose, never liked him. Consideration for this heinous act was three cows which would be handed over to him if he succeeded. A deposit of K50,000 was made by Monze towards the proposed murder initially. Moono went on to inform PW3 that his job was killing people and that he had killed Dengeza. Taye had asked him to eliminate him because Dengeza was killing his young brothers and sisters and getting all the wealth. He, however, said he had not used the gun they had retrieved, but another one. He also explained that one bullet fell to the ground when he shot Dengeza. This information was written down by Bhala.

9. PW4 was Detective Sergeant Godfrey Musonda. He was, on the 15th February 2011, issued with a docket of murder in which Austern Matimba reported that his brother, Timothy Cheembo, also known as Dengeza had been shot dead, on 23rd July 2009 around 20:00 hours in chief Shezongo's area in Itezhi-tezhi. Moono was handed over as the suspect. Three days later, the second accused was apprehended.
10. PW4 received a document written in the Tonga language from PW3. He read it in court and what he read was translated in

English. PW4 also retrieved a copy of the report on Postmortem Examination. He later received a live cartridge and one round object from sergeant Mwansa who had earlier handled the case. The trial court found Moono with a case to answer, but acquitted A2.

11. Moono's testimony in the court below was that he shifted from Siachitema village to Shambala village on 22nd August 2010. He followed his father in-law, Fanwell Sinambila Monze. Later Monze asked him to shift and start staying with his young brother, Jose Maliki.
12. Jose later informed Moono that he wanted Monze dead. This was said in the presence of Moono's wife. Moono later revealed this to Monze. When Jose discovered that Moono had disclosed what he had told him to Monze, he forced Moono out of his house, and Moono returned to his village where his father was. PW2 and other Neighbourhood watchmen, came to their place of abode and picked them up and took them to PW3. They accused Moono of having run away from Jose because he wanted to kill him. They searched his mother's house and found a gun. Thereafter, they were taken to PW2's house, and later

picked up from there in a vehicle. It was at this juncture that they accused him of wanting to kill Jose and that therefore, he was the one who killed Timothy Cheembo. According to Moono, he only learnt the name of the deceased from the neighbourhood watchmen. PW3 later produced petrol and suggested that they set him ablaze instead of taking him to the police.

13. Moono denied giving any statement, and insisted that he knew nothing about it. He also denied appending his signature to the statement. He claimed he was taken to Choma Police Station in February 2011 and was informed that he had confessed to killing the deceased. That was the first time he saw the 2nd accused who the police alleged had hired him to kill the deceased. He denied knowing Titus and Mooya Cheembo. He was never hired by the said individuals.
14. The judgment reveals that the accused person had referred to a ZAWA officer in his testimony. When cross-examined, he said he did not know the name of the ZAWA Officer, and did not tell his lawyer about him because he had forgotten to do so.

DECISION OF THE HIGH COURT

15. After analysing the evidence led before him, the learned trial

judge found that the accused person confessed to both PW2 and PW3. On the authority of **Banda vs The People**,¹ he held that PW2 and PW3 were not persons in authority, their duty merely being to assist in apprehending suspects and conveying them to the police. Therefore, the Judges' rules did not apply to them. That being the case, there was no strict requirement of authentication of the confession statement recorded from the accused person, by having him sign it.

16. The learned judge also took the view that the oral confessions to PW1 and PW2 were corroborative, acceptable, and sufficient to found a conviction. The trial Judge referred to the accused person's claim that he never confessed to anyone, and that he was beaten by a ZAWA Officer. He found this claim to be an afterthought, reasoning that the issue ought to have been brought up during the prosecution case, so as to raise the involuntary nature of the confession. The judge premised the conviction on the confession, concluding that this was a clear case of a self-confessed assassin.

THE APPEAL

17. Dissatisfied with this outcome, Moono, now appellant,

questions the learned trial judge's judgment on one ground as follows:

"The learned trial judge erred both in law and fact when he relied on evidence of a confession without addressing his mind on the voluntariness of the said confession."

18. This is another one of those appeals where only the judgment of the trial court is available. The record of proceedings has not been found. Be that as it may, the evidence led before the trial court is recounted in the judgment. It is, therefore, possible to perceive the evidence on which the appellant was convicted. We have therefore heard and determined the appeal, in line with **Davison Kunda vs The People.**²
19. Three points are taken to support the appeal. The first point is that the trial court ought to have enquired whether the confession statement received by PW4 from PW3 was voluntary. The failure to do so was an error, more so that unfairness was disclosed on the evidence. According to learned counsel, unfairness is revealed by the fact that the appellant was handcuffed when making the confession, and his prolonged detention by PW2.
20. To support these arguments, learned counsel referred to

Mumpansha and Others vs the People,³ in which this court reiterated that a trial court should always ask whether the defence has any objection to the contents of a statement proposed to be put in evidence by the prosecution.

21. Reliance was also placed on **Mordon vs R**,⁴ where it was held that a court has discretion to exclude a voluntary statement if it was obtained in a manner that was unfair to the accused person.
22. Reference was also made to **Chinyama and Another vs The People**,⁵ where it was held that the discretion to exclude a voluntary confession made to a police officer should be considered where the Judges' rules have been breached. This discretion should equally be considered where unfair conduct by the police or some other person was attendant on the giving of the statement.
23. The second point is that once the confession statement is excluded on account of these flaws, the prosecution case collapses, as there is no other evidence that proves to the required standard that the appellant killed the deceased. Learned counsel relies on **Murono vs The People**⁶ for this

argument.

24. The third point is that although PW4 testified that the postmortem report was handed over to him, he did not produce it, nor did he lead evidence that proved the cause of death. This was a dereliction of duty which should operate in favour of the accused and result in an acquittal, per **Haamenda vs The People**.⁷

25. The appeal is opposed by the state, through written arguments. It is submitted that a confession or an admission made to a person not in authority is admissible. This argument is anchored on **Banda vs The People**,¹ where the Supreme Court expressed the view that a village headman is not a person in authority, for purposes of administering a warn and caution before interrogating a suspect, since his normal duties do not pertain to investigating crime. The court took cognizance that the training of police officers included instructions in administering the warn and caution, but noted that there was no suggestion that the rules were intended to apply to persons other than those whose normal duties pertain to investigating

crime. The court concluded that the Judges' rules did not extend to village headmen.

26. Learned counsel points out that the appellant was not harassed or beaten. He made the admission to PW2, and repeated it to PW3. The admission was written down, and witnessed. There was, therefore, no basis for excluding it as indicated in **Masonga vs The People**,⁸ where the Supreme Court opined that a voluntary confession or admission made in unfair circumstances to a person not in authority can nonetheless be excluded in the discretion of the court.
27. In the present case, counsel argues, the appellant volunteered information that he had shot the deceased. He did so freely. The mere fact that he did so while handcuffed does not warrant the exclusion of the confession. No unfair or improper conduct can be ascribed to the persons to whom he confessed. Therefore, the confession was properly admitted into evidence. Learned counsel submits that a proved confession is the best evidence that can be led.
28. With respect to the arguments concerning the absence of evidence as to the cause of death, learned counsel submits that

PW1, the deceased's wife, testified that the deceased died after being shot. There was no opportunity for a *novus actus interveniens*, nor anything to suggest that he died of any other cause. The deceased was engaged in active duties before the shooting. Therefore, it can reasonably be concluded that he died as a result of the shooting.

29. Moreover, it is argued, the appellant confessed to having shot the deceased, recounting how he was hired, and the amount he was paid. He also had a firearm. These pieces of evidence pointed to nothing but that the appellant shot the deceased, who died as a result. The lower court was therefore on firm ground. We were urged to uphold the conviction.

CONSIDERATION OF THE APPEAL

30. We have considered the arguments for and against the appeal. As noted above, the appellant was convicted on his own admission to PW2 and PW3. The contents of his admission were reduced into writing and the written statement produced in evidence by the arresting officer. It is important to recall that even before this piece of evidence, which the arresting officer

came across during investigations, was put in evidence, PW2 and PW3 had already testified that the appellant informed them that he had killed the deceased.

31. It has long been established that whenever the prosecution proposes to tender a confession statement in evidence, the trial court bears the duty of asking the defence whether they object to such evidence. The objection is made on the premise that the confession was involuntary. This portends coercion or promises of favours and such like. The test is whether any promise of favour or any menace or undue terror was issued to induce the confession. And if so, whether the prisoner was induced as a result to make a confession.
32. It should, however, be borne in mind that the restriction referred to in the previous paragraph on admissibility of confessions is related solely to persons in authority. The restriction is entirely a judge-made rule, which is not applicable to persons not in authority. See **Mwiya and Another vs The People**⁹ to this effect.
33. **Banda vs The People**,¹ is authority for this exception. This court remarked as follows in that case:

“Those rules were designed to guide police officers in dealing with suspects and prisoners in the course of investigating crime... There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime..... On a careful review of the position, we are satisfied that the Judge’s Rules do not contemplate, as persons who should administer the warn and caution to suspects, persons like village headmen because it is not their normal responsibility to investigate criminal cases.”

34. The cited case leaves no doubt that the requirement to warn a suspect against self-incrimination is not imposed on village headmen and neighbourhood watchmen, whose obligation is to merely assist in bringing culprits to the police. The evidence led in this case does not reveal any form of inducement by PW2 and PW3. PW2 was looking for the appellant because of threats to eliminate Jose. Upon asking the appellant whether he had just started killing people, the appellant volunteered that he had killed Dengeza. It is noteworthy that PW2 did not even know the appellant before this, nor did he know when Dengeza died. Similarly, PW3 testified that the appellant informed him that his job was killing people and that he killed Dengeza.

35. Apart from being handcuffed, as required on account of the appellant being a suspect, we have seen no evidence of coercion on record. PW2 suggested that the appellant be taken to PW3's house in the night. This suggestion was made when the vehicle that was to convey them to the police station had come to pick them up. PW2 was in the company of other members of the neighbourhood watch. The number of people with PW2 and the appellant were not many since they were in one vehicle. Apart from this small number of persons, there is no evidence of a mob when the appellant was explaining his career of choice to PW3, and what he had so far accomplished. Similarly, the appellant admitted killing the deceased when PW2 passed through his house with him, before going to the police. The vehicle that was to take them to the police came afterwards, and this is the vehicle that detoured to PW3's home.

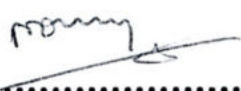
36. We are unable to discern any unfairness on the part of PW2 and PW3 when the appellant made the admission that he killed the deceased. There was thus no material on which the trial judge should have exercised his discretion to exclude the admission made by the appellant that he killed the deceased. As for the

alleged beating by the ZAWA Officers, the learned trial judge discounted this as an afterthought. He was entitled to so find because the appellant did not raise this issue when cross-examining the prosecution witnesses. It is an established rule of evidence that an accused person is expected and required to raise his defence when cross-examining prosecution witnesses. If they fail to do so, the court may well consider their version as an afterthought. Having perused the judgment, which narrates the evidence and cross-examination, we are satisfied that the appellant did not advance this assertion. The learned judge was entitled to dismiss his claim as an afterthought. See **Donald Fumbelo vs The People**.¹⁰

37. We also note that the appellant denied making a confession to anyone. The law is that where an accused person denies making a statement, the issue of voluntariness does not arise. Rather, it is the question of credibility that arises, as a general issue in the trial. There is no need in such a case to hold a trial within a trial. See **Mate and Others vs The people**¹¹ to this effect.
38. Learned counsel for the appellant argued that there was a dereliction of duty on the part of PW4, for failure to produce the

postmortem at trial. As pointed out by learned counsel for the respondent, PW1 testified that she heard a gunshot. Thereafter, the deceased screamed that he had been killed. When she went where he was, she found him bleeding from the nose, mouth and the back, just below the shoulder. She tried to resuscitate him, to no avail. The evidence is that the deceased did not regain consciousness from the time he was shot. **Chanda and Another vs The People**,¹² speaks to this kind of situation. This court held in that case that lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased.

39. On the forgoing discussion, our considered view is that this appeal lacks merit. We uphold the conviction, and dismiss the appeal accordingly.


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MUMBA MALILA
CHIEF JUSTICE


.....
E.M. HAMAUNDU
SUPREME COURT JUDGE


.....
F.M. CHISANGA
SUPREME COURT JUDGE