

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 91/2023

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

KENNY FIGO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.

On 13th August, 2024 and 19th August, 2024.

For the Appellant: *Mr. E. Mazyopa – Senior Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mrs. Muyoba - Chizongo – Senior State Advocate, National Prosecutions Authority*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Kalebu Banda vs The People (1997) Z.R. 169 (S.C)*
2. *Haonga & Another vs The People (1976) Z.R. 200*
3. *Wilson Mwenya vs The People - SCZ Judgment No. 5 of 1990.*
4. *Joe Banda vs The People - SCZ Appeal No. 183 of 2013.*

5. *Saluwema vs The People* (1965) Z.R. 4.
6. *Chileshe vs The People* (1982) Z.R. 22
7. *Donald Fumbelo vs The People – SCZ Appeal No. 476/2013*
8. *Joseph Mulenga & Another vs The People* (2008) Z.R. 1
9. *Peter Yotamu Hamenda vs The People* (1977) Z.R. 184
10. *Taylor vs Chief Constable of Cheshire* [1986] 1 WLR 1479
11. *Mwansa Mushala vs The People* (1978) Z.R. 58
12. *Ilunga Kabala and John Masefu vs The People* (1981) Z.R. 102 (S.C.)

Legislation referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia.*

Works referred to:

1. *The Oxford Dictionary, 13th Edition (Oxford University Press)*

1.0 INTRODUCTION

- 1.1 The appellant appeared before the High Court (Kamwendo, J.), on an information containing two counts of the offence of murder and one count of aggravated robbery contrary to **Sections 200 and 294(1) of the Penal Code, Chapter 87 of the Laws of Zambia.**
- 1.2 The particulars of the offence in counts one and two are that on 18th June 2019, at Mumbwa, the appellant murdered Yan Jinrong and Hu Zuming (hereinafter called the deceased persons). The

particulars of offence in count three are that the appellant while acting together with others unknown did steal from the deceased persons cash amounting to K30,000.00 the property of Sunshare Enterprises and at or immediately before or immediately after such stealing did use or threaten to use actual violence to the deceased persons in order to obtain, retain or prevent or overcome resistance to the property being stolen.

- 1.3 The appellant denied the charges and the matter proceeded to trial. At the end of the trial, the appellant was convicted on all the counts and condemned to suffer capital punishment in the first two counts and sentenced to 35 years imprisonment with hard labour in the third count. The appellant appealed against conviction.

2.0 CASE BEFORE THE TRIAL COURT

- 2.1 The evidence of the prosecution was centred on seven (7) prosecution witnesses. The evidence before the trial Judge was that on 18th June 2019, PW1 reported for work at Choppies Supermarket where he worked as a security guard. In the early hours of the morning on 19th June, 2019 around 04:00 hours, he went behind the deceased persons' shop where he normally did some piece work

of collecting garbage. He discovered the deceased persons' bodies and reported the matter to the police.

2.2 PW2 who was the deceased persons' employee, reported for work after the deceased persons were reportedly murdered. He was among the people who viewed the CCTV footage and observed that the person in the footage was the appellant, also a former employee of the deceased persons. PW2 had worked with the appellant for about eight months. He stated that he observed from the CCTV footage how the appellant emerged from the rear door of the deceased persons' shop. That he also observed the appellant chase around the deceased persons and scare them with a piece of metal he picked up in the shop. That he observed the appellant pick an object and hit the deceased persons, one after the other, who fell to the floor. That after the appellant killed the deceased persons, he got the money from the cash box.

2.3 PW2 stated that he received a phone call from his colleague (PW3) who informed him that the appellant allegedly left his wallet in the deceased persons shop the previous day. The wallet contained his National Registration Card (NRC) and a Voters Card. The appellant was not seen in the shop on the material day before the incident occurred.

2.4 PW3 was also the deceased persons' former employee and had worked with the appellant. She stated that on 19th June 2019, around midnight, the appellant called her and informed her that he had dropped his wallet in the deceased persons' shop the previous day. The following morning around 06:00 hours she received a report that the deceased persons had been murdered. She informed PW2 that the appellant had informed her that he dropped his wallet in the deceased's shop the previous day.

2.5 PW5, a Digital Forensic Expert, extracted the CCTV footage of the deceased persons' shop from the Digital Video Recorder (DVR). He explained that while analyzing the footage he observed three figures of human beings captured from three different cameras, two of whom were Chinese nationals. He also observed that the third was a vivid image of an indigenous black Zambian. That the footage showed the image of the Zambian national getting keys from the Chinese nationals who were lying on the ground and he later axed them. He stated that the incident occurred between 19:45 hours and 20:05 hours on 18th June, 2019. He authored a report containing information of how he extracted the video footages. The CCTV footage from the three different cameras in the shop was also produced in the Court below.

2.6 PW6 stated that on 19th June 2019, the appellant called him and informed him about the death of the deceased persons. When he arrived at the crime scene, he was one of the people who viewed the CCTV footage for the material night and identified the appellant as the person who entered the deceased persons' shop and hacked the deceased persons to death. That PW3 also informed her about the wallet which the appellant left in the deceased persons' shop. He stated that he, PW2 and PW3 searched for the appellant's wallet and found it in the shop. It contained the appellant's NRC and voter's card. The witness assisted the police in apprehending the appellant in Lusaka. He stated that the appellant stopped working for the deceased persons in April, 2019 and his wallet was discovered in their shop after the murders on 19th June, 2019.

2.7 PW7 confirmed that when the deceased persons were found murdered, there was money which was missing from their cash box. He also confirmed that PW3 and PW6 found the appellant's wallet in the shop which contained the appellant's NRC. He also viewed the CCTV footage and saw how the deceased persons were hacked with an axe. He heard PW3 and PW6 say that the suspect seen hacking the deceased persons in the CCTV footage was the appellant and he was among those who apprehended him with the help of PW6. That

the appellant was apprehended with a bag containing old and new clothes, a new wallet and a new ATM card. Investigations revealed that the appellant had made money transactions in his Airtel mobile money account and his Zanaco account during the material time.

2.8 The postmortem examination conducted on 22nd June, 2019 attributed the deceased's death to multiple chop injuries on the head inflicted by a sharp object, multiple open skull fractures, brain damage, large epidural and subdural hematomas in relation to count two while the cause of death for the deceased person in count one was multiple open skull fractures, brain damage, large epidural and subdural hematomas.

2.9 In his defence, the appellant denied having committed the offences and that he was not the person seen on the CCTV footage. He stated that he was in Lusaka on 19th June 2019 when he was apprehended for the subject offences. He denied that his wallet was found at the crime scene and alleged that the police got it from him at the time of his apprehension. He stated that the objects allegedly used to commit the offences were not recovered from him. He denied having informed PW3 that he dropped his wallet in the deceased's shop. He stated that he did not have a cordial relationship with PW3 because he ended the romantic affair he had with her. He stated that he also

did not have a cordial relationship with PW6 because PW6 had romantic interest in his wife.

2.10 On the cash transactions he made during the material time, he stated that he had sold 30 bags of soya beans on 19th June 2019 and the receipt was in the wallet he was with when he was apprehended. He stated that he deposited the sum of K14,000.00 in his account and did not know where the other money in his account came from.

3.0 FINDINGS BY THE LOWER COURT

3.1 After reviewing the evidence, the lower Court found that the deceased persons' deaths were caused by the appellant and that he stole the sum of K30,000.00. The Court found that the CCTV footage documented the whole incident and showed the appellant attacking the deceased persons and taking their money. That this was also corroborated by the phone call made by the appellant to PW3 and the subsequent finding of the appellant's wallet containing his NRC and voters card at the crime scene. That further, the fact that the appellant opened a bank account at Zanaco a day after the murders, and made several cash transactions in his mobile money account also pointed to his guilt.

4.0 THE APPEAL

4.1 Dissatisfied with the judgment of the lower Court, the appellant appealed to this Court against conviction, advancing his sole ground of appeal-

1. ***The learned trial Judge misdirected himself in law and fact in convicting the appellant when the prosecution did not prove the case against him beyond all reasonable doubt.***

5.0 HEADS OF ARGUMENT

5.1 Counsel for both sides filed Heads of Argument which were entirely relied on at the hearing. Counsel for the appellant submitted that the lower Court heavily relied on the evidence of PW2, PW3, PW6 and the CCTV footage but this evidence did not prove the case against the appellant beyond reasonable doubt. It was argued that the identification of the appellant was not proper as he was not the image seen on the CCTV footage since it was not clear. That PW2 and PW6 did not state how they were able to identify the appellant from the footage.

5.2 Counsel argued that the evidence of PW3 concerning the wallet was also questionable because her evidence was not clear as to how she came to know that the appellant dropped his wallet. That further,

the police did not obtain evidence of the call the appellant allegedly made to PW3 concerning the wallet despite making frantic efforts to obtain records of the appellant's mobile money transactions.

5.3 Counsel argued further that there was dereliction of duty on the part of the police officers for failure to obtain the call records between the appellant and PW3. We were referred to the case of ***Kalebu Banda vs The People***¹ where the Supreme Court of Zambia held that where evidence available to the police is not placed before the Court, it should be assumed that had it been produced, it could have been favourable to the accused person.

5.4 It was submitted that there was also conflicting evidence relating to the wallet because PW2 stated that he never saw the wallet in the shop. That PW6's evidence that PW2 and PW3 were involved in the search of the wallet was untruthful and unreliable and the weight to be attached to this evidence should be reduced. To buttress this argument, Counsel referred us to the case of ***Haonga & Another vs The People***.²

5.5 Further, that it is surprising that while PW6 and PW7 wanted the Court to believe that the appellant called PW3, no evidence was led as to whether the appellant asked any of his former colleagues for the wallet.

- 5.6 Counsel found fault with the lower Court's finding that the calls made by the appellant to PW3 and PW4 corroborated the evidence of the CCTV footage because there was no evidence of the call being made. That no witness apart from PW6 accepted having found the appellant's wallet at the crime scene. That further PW5 never mentioned that he was present when the search for the wallet occurred.
- 5.7 It was Counsel's argument that PW6 and PW7 knew very well that the wallet was not recovered from the scene but that they brought it to the scene. That therefore, there was no evidence linking the appellant to the commission of the offence. To support this argument, reference was made to the case of ***Wilson Mwenya vs The People***.³
- 5.8 With regard to the lower Court's finding that the appellant's defence that he realized the sum of K14,000.00 from the sale of soya beans was an afterthought, Counsel referred the Court to the case of ***Joe Banda vs The People***.⁴ It was held in that case that an accused person is entitled to bring up any issue relevant to his defence and the appropriate time is when he is giving evidence in his defence. Reference was also made to the case of ***Saluwema vs The People***.⁵

5.9 Counsel urged the Court to allow the appeal and quash the conviction of the lower Court.

5.10 Counsel on behalf of the respondent submitted that while there was no eye witness when the offence was committed, the CCTV footage clearly showed the image of the appellant brutally killing the deceased persons and stealing their property. That PW2 and PW6 identified the appellant as the image in the CCTV footage and their evidence as to identification was not inconsistent.

5.11 In relying on the **Oxford Dictionary** definition of the word 'image' Counsel submitted that seeing an image of a person generally implies seeing a visual representation that includes recognizable features such as the face. That therefore, the failure by PW2 and PW6 to mention that they saw the face of the appellant cannot be fatal. That in fact the identification of the appellant by PW2 and PW6 was reliable because they worked with the appellant for a period of about nine (9) months and that he was PW6's neighbour.

5.12 Further, that the CCTV footage was played in Court and there was no indication from either the appellant or the Court that the CCTV footage was unclear. It was argued that during cross examination of PW7, the appellant placed himself at the crime scene when through his Counsel he asked the witness if he knew that it was self-defence

and the deceased persons owed him money. That the appellant later changed his line of defence during his testimony and stated that he was nowhere near the scene on the material day. That these inconsistencies negatively affected the appellant's credibility.

5.13 In considering the appellant's defence, we were urged to consider whether the inconsistencies in his defence were minor or fatal and go to the core of his defence. To support this argument, we were referred to the cases of ***Chileshe vs The People***⁶ and ***Donald Fumbelo vs The People***.⁷

5.14 With regard to the wallet that the appellant allegedly left at the crime scene, it was submitted that PW3 had no motive to falsely implicate the appellant when he stated that the appellant called her concerning his wallet. That further, the failure to produce call records between PW3 and the appellant is not fatal because it does not imply that the appellant did not leave his wallet at the crime scene. It was also argued that the fact that the search for the appellant's wallet was not shown on the CCTV footage cannot be fatal because PW3 only mentioned the wallet after viewing the CCTV footage. The inconsistencies about who found the wallet do not mean that the wallet was not found at the crime scene. It was argued that there were no reasons why PW6 and PW7 would lie about the wallet.

PW6 found the wallet and handed it over to PW7 and that PW6 would not have been able to do so without the information from PW3.

5.15 Counsel submitted that the appellant's evidence as to why PW3 and PW6 would have a reason to falsely implicate him was an afterthought as it only came out during examination in chief. In arguing that the accused must cross examine on every material particular relevant to the issue, we were referred to various authorities which include the cases of **Joseph Mulenga & Another vs The People**,⁸ **Donald Fumbelo vs The People (supra)** and **Joe Banda vs The People (supra)**.

5.16 It was argued that even if this Court were to find that there was dereliction of duty because of the failure to obtain call records between PW3 and the appellant, there is still overwhelming evidence to offset the supposed dereliction of duty. To buttress this argument, Counsel referred us to the case of **Peter Yotamu Hamenda vs The People**⁹ where it was held that the dereliction of duty will operate in favour of the accused unless the prosecution's evidence is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty.

5.17 It was submitted that the appellant's explanation as to how he obtained the money is not believable as it is an odd coincidence that

he was seen on the CCTV footage taking money and then opened a new bank account and mobile money account which had numerous transactions at the material time.

5.18 Lastly, Counsel prayed that the appeal has no merit and should be dismissed.

6.0 CONSIDERATION AND DECISION OF THE COURT

6.1 We have considered the evidence on record, the judgment appealed against and the parties' arguments. The pertinent question for consideration in this appeal is whether the prosecution had proved the case against the appellant beyond all reasonable doubt.

6.2 The evidence which linked the appellant to the commission of the offence came from the CCTV footage and the testimony of his former co-workers who identified him as the image shown on the footage. Another key piece of evidence was the alleged discovery of the appellant's wallet at the crime scene.

6.3 Counsel for the appellant raised the following three issues with regard to the evidence relied on by the learned trial Judge: firstly, that the identification of the appellant on the CCTV footage was not proper because the prosecution witnesses could not tell how they were able to identify the appellant from the footage; secondly, that

the evidence of the wallet recovered from the crime scene was questionable because it is not clear how PW3 came to learn that the appellant had dropped his wallet, as she is the one who asked him if he had dropped his wallet at the crime scene; and thirdly, that it was erroneous for the lower Court to make a finding that the appellant's defence as to how he obtained the money was an afterthought.

6.4 With regard to the issue of the CCTV footage, it was argued that the images of the CCTV footage were not clear and therefore the identification of the appellant on the footage was not proper.

6.5 The evidence of PW5 who was a digital forensic expert, was that he extracted the CCTV footage from a DVR. He stated that it depicted live images from three cameras and it showed images of two Chinese nationals and one Zambian national. He stated that camera 13 had a vivid image of the Zambian national. PW5 was able to observe from the footage that the Zambian national got some money from the safe and hacked two Chinese nationals to death. He was also able to observe that the Zambian national got keys from the pocket of one of the deceased persons who were lying on the ground.

- 6.6 Further, it was not disputed that the appellant was known by PW2, PW3 and PW6 before the incident as they all worked for the deceased persons.
- 6.7 We had occasion to view the CCTV footage and it is our considered view that the footage had vivid images. It could not have been difficult for PW2, PW3 and PW6 to recognise the appellant, whom they previously worked with, as the assailant.
- 6.8 In the case of **Taylor vs Chief Constable of Cheshire**¹⁰ the Court of Appeal of England had occasion to comment on the value of video evidence. This is a matter in which there was a video recording of the theft perpetrated by the accused in a shop. **Ralph Gibson L.J** stated that-

“For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of those activities on a recording of what the camera recorded. He who saw may describe what he saw because, as Ackner L.J said in the case of Kajala v Noble [(1982) 75 CrAppR 149] [...] it is relevant evidence provided that that which is seen on camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with

him who viewed a display or recording, the weight and reliability of his evidence will depend upon assessment of all relevant considerations, including the clarity of the recording, its length, and, where identification is in issue, the witness's prior knowledge of the person said to be identified, in accordance with well-established principles. Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident."

6.9 From the foregoing authority, a video recording of an incident can be as reliable as eyewitness testimony in identifying a suspect, if not more so. It is our considered view that the CCTV footage in this case provided clear and compelling evidence of the appellant's identity and actions. The prosecution witnesses' identification from the footage was sufficient to establish the appellant's guilt.

6.10 Further, the case of ***Mwansa Mushala vs The People***¹¹ guides as follows with regard to recognition-

"Although recognition may be more reliable than identification of a stranger, even when the witness is purporting to recognise someone whom he knows, the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake."

6.11 The lower Court was aware that even in cases of recognition, there is a possibility of an honest mistake. That is why the learned trial Judge considered whether there was corroboration in this case. He found that the evidence of the CCTV footage was corroborated by the evidence of PW3 who testified that the appellant called her around midnight after the incident and the appellant's wallet, containing his NRC and voters card was found at the crime scene. This brings us to the second issue raised by the appellant.

6.12 It was argued that the evidence of the wallet recovered from the scene was questionable because there was no evidence of the call made by the appellant to PW3 around midnight after the incident. Further that while PW6 stated that he was with PW2 and PW3 when the wallet was recovered, PW2 and PW3 did not mention having participated in the search for the wallet.

6.13 As to the reason why he would falsely be implicated, the appellant told the Court that he did not have a cordial relationship with PW2 and PW3 because PW2 was romantically interest in his wife while PW3 was in a romantic relationship with him but that he ended it. PW3 denied having been in a romantic relationship with the

- appellant. Further, the appellant stated that the police got the wallet from him when he was apprehended and not from the crime scene.
- 6.14 The appellant's assertions as to why he would falsely be implicated by PW2 and PW3 were not substantiated. Further, he did not state why the police would choose to falsely implicate him instead of going after the real perpetrator.
- 6.15 Additionally, the prosecution adduced evidence to show that the appellant was in possession of a new wallet when he was apprehended and it was produced during the trial. The appellant did not dispute that he was in possession of a new wallet when he was apprehended. This evidence supports the assertion that the appellant's wallet was left at the crime scene and that is why he had a new wallet. The issue raised relating to the wallet being found at the crime scene cannot therefore stand.
- 6.16 Further PW3 clearly stated that the appellant called her and informed her that he dropped his wallet the previous day. There is therefore no gap in the evidence as to how PW3 came to learn of the appellant's wallet at the crime scene as she clearly stated that the appellant called her. There was evidence from the prosecution that there was no CCTV footage of the appellant going to the deceased persons' shop before the commission of the offence. This evidence

therefore places the appellant at the crime scene during the time the offences were committed.

6.17 Lastly but not the least, the appellant contended that the lower Court's finding that the appellant's defence that he realized money from the sale of soya beans was an afterthought. We agree with this finding by the lower Court. The appellant stated that he realized the sum of K14,000.00 from the sale of soya beans but his money transactions amounted to more than this sum. The amount the appellant is alleged to have stolen is K30,000.00. As seen during cross examination at page 91 of the record of appeal, there were various money transactions in the appellant's Airtel mobile money account in the sums of K5,000.00, K7,000.00, K7,000.00 and K9,000.00. This came to the total sum of K28,000.00. Apart from the sum of K14,000.00 the appellant could not explain the source of the other money in his account. This is an odd coincidence which amounts to supporting evidence against the appellant.

6.18 This is in accordance with the guidance of the Supreme Court of Zambia in the case of ***Ilunga Kabala and John Masefu vs The People***¹² where it was held that-

“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”

6.19 We therefore do not find fault with the finding of the lower Court that the appellant’s defence was an afterthought.

6.20 Further, we are satisfied that the prosecution proved the appellant’s guilt beyond all reasonable doubt.

7.0 CONCLUSION

7.1 In light of the foregoing, we find no merit in the appeal and it is accordingly dismissed. The conviction and sentences of the lower Court are upheld.



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE