IN THE SUPREME COURT OF ZAMBIA **APPEAL NOs.15,16/2021**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

DAVIES CHISHALA **1ST APPELLANT**
TONY NYEMBA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Malila, CJ, Hamaundu and Kaoma, JJS
On 15th April, 2021 and 16th January, 2025

For the Appellants: Mrs M. K. Liswaniso, Senior Legal Aid Counsel

For the State : Mrs M. Chilufya-Kabwela, Senior State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Edward Sinyama v The People (1993-94) ZR 16, 18-19**
2. **Nkonde and Another v The People (1975) ZR 99**
3. **Choka v The People (1978) ZR 243**
4. **Chimbo and Others v The People (1982) ZR 20**
5. **Munalula v The People (1982) ZR 58**
6. **Yokoniya Mwale v The People, Appeal No. 285/2014, P.J17**
7. **Samuel Mwaba Mutambalilo v The People, Appeal No. 47 of 2015**
8. **Nkonde and Another v The People (1975) ZR 98, 100**
9. **Miyoba v The People (1977) ZR (Reprint) 292, 293**
10. **Ratten v R (1972) App. Cas. 378, 391, 389**
11. **Saluwema v The People (1965) ZR (Reprint) 5, 6**

Legislation referred to:

1. **The Penal Code, Chapter 87** of the **Laws of Zambia, S. 207**
2. **The Supreme Court of Zambia Act, Chapter 25** of the **Laws of Zambia, S.15**

1.0 Introduction

1.1 We wish to first express our deepest regret for the delay in delivering this judgment. This was caused by a number of unforeseen events which occurred after the matter was heard.

1.2 This is an appeal against the judgment of the High Court (Chali, J) by which the two appellants were convicted of the offence of murder and sentenced to death. When the appeal came up for hearing, we received evidence from the prison authorities showing that, by the exercise of the powers vested in him under the **Prisons Act**, the Minister of Home Affairs released the 2nd appellant, Tony Nyemba from prison on medical grounds on the 13th August, 2015. Since, on the date of hearing, the appellant had not given any indication that he was still desirous of prosecuting his

appeal, we decided to deem his appeal as having been abandoned; and for that reason, we dismissed it. However, the 1st appellant, Davies Chishala, proceeded with his appeal.

1.0 The Case

2.1 On 3rd February, 2014, the 1st appellant and Tony Nyemba, who were residents of neighbouring villages in Luwingu District, appeared before the High Court sitting at Kasama on a charge of murder, contrary to **section 200** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. It was alleged that the duo, together with other persons unknown, had murdered Mulamba Fredrick on 5th December, 2012.

2.2 The testimony of Anthony Mulenga (PW2) and James Chama (PW3), both of Andala village in Luwingu, was that on the 4th December, 2012 the two men, together with the deceased, also of the same village, went to Nsombo village within Luwingu to drink locally brewed beer at the home of PW4. At that place, there was also a group consisting of

the 1st appellant, Tony Nyemba and another man named Yotamu Mwansa.

2.3 At some point, while the two groups were drinking, the deceased went to the appellant's group where he sought to drink beer from their tin. That group chased him; and then an altercation arose between them and the deceased. According to the two witnesses, during the altercation, the 1st appellant hit the deceased once in the ribs with a stick; and then also in the back with a brick. Other people then intervened and ended the quarrel. There was a slight discrepancy in the versions of the witnesses in that PW2 said that Tony Nyemba did not beat the deceased at all, while PW3 said that Tony Nyemba kicked the deceased in the leg. This point is no longer of any significance since Tony Nyemba's appeal was abandoned. We must add here that both witnesses were very certain that the deceased was hit on the right side of the ribs.

2.4 The two witnesses went on to say that, when the quarrel was stopped, the deceased then came back to sit with them. They said that the deceased did not appear to be in

any discomfort; and that he had no visible injuries. The witnesses then suggested to the deceased that they all go back to their village; but the deceased responded that if the two did not have money to drink beer they should just go; and leave him to continue drinking. That is how PW2 and PW3 then left the deceased drinking on his own, at that place. According to them, they left him because he was looking well, and there was nothing to show that he would die. The time was around 16:00 hours.

2.5 PW4, Bernadette Nkandu, the one who was selling the beer, however, contradicted the testimony of PW2 and PW3. According to her, the house from which she was selling the beer belonged to her mother. The testimony of the witness was that, on that day, the deceased and his group were drinking beer at the premises; and so was the 1st appellant with another friend of his, not Tony Nyemba. She said that no confrontation took place, and that the 1st appellant and his friend left around 15:00 hours; leaving the deceased's group behind. The deceased's group also

left around 16:00 hours, and then no patron was left at the house.

2.6 PW4 denied having made any statement to the police. She said that on 5th December, 2012, after the deceased had died, the police picked her from her home in the evening, and went with her to the clinic. She said that, at the clinic, the police interviewed her about what had happened when she was selling beer. According to her, she told the police that there had been no fight at the premises. She also denied signing any written statement. PW4 was, however, declared a hostile witness; this permitted the prosecution to cross-examine her. During the cross-examination that ensued, her previous statement to the police, which was inconsistent with her testimony in court, was placed on record and read to her. In that statement, PW4 had implicated the appellant and his friends in the assault on the deceased. She had told the police that the deceased was left unconscious by 1st appellant's group, and that she was the one who ferried the deceased to the clinic where she found not a single member of staff present. PW4 had

gone on to tell the police that she left the deceased at the clinic and went home; and that she heard the following day that the deceased had died.

2.7 The arresting officer (PW5) told the court that on 6th December, 2012, he received a phone call from Chief Chabula, the local chief of the area where the 1st appellant's village, and that of the deceased, are situated. According to PW5, the Chief told him that there had been a murder in Nsombo village; and that the suspects were Davies Chishala (1st appellant), Tony Nyemba and Yotam Mwansa. The Chief told PW5 that the three suspects had fled the village. PW5 compiled a docket and sent messages to all police stations to look out for the three suspects who had fled the area.

2.8 On 25th December, 2012, the officer in charge of Mwewa Police Post in Samfya District informed PW5 that Davies Chishala (1st appellant) had surrendered himself to police officers at the police post. The 1st appellant was then picked from Samfya and brought to Luwingu on 3rd January, 2013.

2.9 PW5 further told the court that on 12th January, 2013 information was received that Tony Nyemba had resurfaced from where he had been hiding. The witness and other officers went to apprehend him from his house. When the police approached Tony Nyemba's house, the latter ran away. However, he was quickly apprehended. PW5 then charged the duo for the murder of the deceased.

2.10 PW5 also produced the postmortem report. The injuries that the doctor, who conducted the postmortem examination on the deceased's body, recorded read as follows:

" – Deep bruises on the left chest wall and left hip
- **Laceration on the left side of forehead about 3 cm**
- **Fractured left third, fourth and fifth ribs**
- **Bruises on the left lung**
- **Multiple bruises on the omentum mesentery and large intestines**
- **Ruptured spleen and haemoperitoneum of about 3000ml".**

In the doctor's opinion, these injuries combined to bring about chest and abdominal trauma which was the cause of death.

2.11 There was also the testimony of Paulina Mwaba (PW1), the wife of the deceased. She told the court that on the 4th December, 2012, the deceased left home with his friends, PW2 and PW3, to go and drink beer in Nsombo village. According to PW1, the deceased did not come back home that day, but that the following morning she received information that her husband was seriously ill at Nsombo clinic. The witness said that she rushed to the clinic where she found the deceased lying in agony. She saw a wound on the back, and another on the forehead of the deceased. PW1 told the court that she asked the deceased what had happened, and he replied that he had been severely beaten She then asked him if he knew the people who had inflicted those injuries on him. When the witness started narrating the response that she received from the deceased, counsel for the defence objected to that evidence; saying that it was inadmissible. The learned trial judge, however, allowed the evidence because, according to him, the 4th December 2012 on which the drinking took place and the 5th December, 2012, when the deceased

revealed the identity of those who assaulted him to his wife were not far apart. PW1 then went on to tell the court that the deceased told her that the people who had inflicted the injuries on him were the 1st appellant, Tony Nyemba and Yotamu Mwansa. It was PW1's testimony that at 13:00 hours, on the same day, her husband died.

2.12 The 1st appellant told the court that on the 4th December, 2012, he was indeed drinking beer at PW4's house in Nsombo village. He said that he did notice the presence of the group in which PW2 and PW3 was, but that the group was drinking a little distance away from him. According to the 1st appellant, no confrontation took place between him and anyone from the group of PW2 and PW3. It was his testimony that he left the drinking place around 15:00 hours, and that the group of PW2 and PW3 was still drinking when he left.

2.13 The 1st appellant then told the court that the following day, he heard that the deceased had died; and that he was being suspected of killing the deceased. He also heard that the relatives of the deceased were seeking revenge. So,

being afraid that the deceased's relatives might kill him, he decided to report himself at Mwewa Police Post which was across the Bangweulu River. He said that it took him many days to report himself because, after fleeing across the river to the other side, he went to a friend's house where he fell ill; therefore, he had to wait to recuperate before he reported himself at the police post.

3.0 The Trial Judge's Decision

3.1 The defence filed final submissions with a view to persuade the trial court to acquit the 1st appellant and Tony Nyemba. In those submissions, the defence argued that PW2 and PW3 should be treated as suspect witnesses with a possible interest of their own to serve. According to the defence, this was because the two witnesses left Andala village together with the deceased but went back without him. The defence argued that the two witnesses were suspect because they were the last people to be seen with the deceased in Andala village. Counsel for the two accused went on to argue that the position of the two witnesses was compounded by the fact that; first, they did

not report the assault to the police, or anyone else; secondly, they did not inform the deceased's wife about what had happened in Nsombo village; thirdly, they did not take the deceased to the clinic; and, fourthly, they did not even visit him at the clinic.

3.2 The trial judge, however, rejected that argument and instead accepted the evidence of PW2 and PW3 that they left Nsombo village without the deceased because of the hostility of the 1st appellant's group and the deceased's refusal to accompany them. According to the learned judge, this was confirmed by PW4's statement to the police. The judge also said that PW2 and PW3 left the deceased behind because, at that time, they had not seen any visible injuries on the deceased to arouse any suspicion in them that anything was amiss, apart from the statement by the deceased that he had been severely beaten. For those reasons, the judge declined to treat PW2 and PW3 as suspect witnesses.

3.3 Again, in their submissions, the defence raised the issue that PW1's testimony of what she had been told by the

deceased was inadmissible hearsay evidence. The defence argued, on the authority of **Edward Sinyama v The People** [(1)], that for the statement made by the deceased to PW1 to have been admitted it should have been shown that it was made, at least, in conditions of approximate contemporaneity. It was the defence submission that the deceased's statement was not made in such conditions because; first, it was made seventeen hours after the alleged assault; and, secondly, there was also evidence from the two eye witnesses (PW2 and PW3) that the deceased got over the assault within minutes and continued drinking beer.

3.4 The trial judge rejected that submission as well for the following reasons; that he did not think that a considerable period of time had passed between the assault and the making of the statement since the assault happened in the late afternoon of the 4th December, 2012 and the statement was made to PW1 around 08:00 hours of the following morning; and, that he did not think that there was opportunity for concoction or distortion because the

deceased remained in the throes of that assault up to the time when PW1 arrived. Further, according to the judge, the deceased was merely repeating what PW2, PW3 and PW4 had also witnessed.

3.5 Evaluating the rest of the evidence, the judge found as a fact that PW2, PW3 and the deceased were drinking beer at PW4's home on the 4th December, 2012; and that this was confirmed by PW4 even before she was declared hostile. The judge then turned to the testimony of PW4 and said that he had come to the conclusion that the witness was not telling the truth when, in her testimony in court, she denied knowledge of the violence that was *"unleashed"* by the 1st appellant's group against that of PW2, PW3 and the deceased. Citing the case of **Nkonde and Another v The People** [(2)], the judge said that this Court held in that case that, once a previous inconsistent statement of a witness has been made part of the record, the trial court may examine it to see what weight, if any, to attach to it. The judge then examined PW4's previous inconsistent statement to the police, whose contents we have already

set out, and said that he could not accept that all the details therein, including PW4's personal particulars, were written purely from the fertile imagination of the person who recorded the statement, a Detective Inspector Chilufya. The judge, accordingly, found as a fact that PW4 did make the previous inconsistent statement to the police which was produced and read to her in court and, therefore, accepted PW4's statement to the police as the truth of what happened at PW4's home on the 4th December, 2012. He then said that that statement was corroborative of the testimony of PW2 and PW3 that the 1st appellant and Tony Nyemba had assaulted the deceased on the 4th December, 2012.

3.6 Then, the judge commented on the conduct of the appellant and Tony Nyemba after the assault on the deceased. Referring specifically to the 1st appellant's explanation that he fled the village in order to go and surrender himself at another police station, the judge rejected that explanation because the 1st appellant only surrendered himself at Mwewa police post after about

three weeks. The judge concluded that the 1st appellant just meant to run away, altogether; and that such conduct betrayed the guilt of the 1st appellant and his co-accused, Tony Nyemba. Finally, the judge was satisfied that the findings in the postmortem report which were said to be the cause of death were consistent with the assault that the deceased had suffered at the hands of the 1st appellant's group. Consequently, the 1st appellant and Tony Nyemba were convicted; and sentenced to death.

4.0 The appeal

4.1 This appeal is on two grounds: these read as follows:

> **"Ground One**
>
> **The trial Court erred in law and fact when the Court found that PW4's statement to the police corroborated the evidence of PW2 and PW3 that the 1st appellant and the 2nd appellant assaulted the deceased in this matter on 4th day of December, 2012.**
>
> **Ground Two**
>
> **The trial Court erred in law and fact when the Court found that PW1's evidence that the deceased herein told her he was assaulted by the 1st appellant and the 2nd appellant was admissible".**

4.2 In the first ground of appeal, the 1st appellant has repeated the same submission that the defence made at the trial,

and which the trial judge rejected, that PW2 and PW3 should have been treated as suspect witnesses whose evidence needed to be corroborated because they were the last people who were seen with the deceased in Andala village where they resided, and never went back to the village with him. To support the submission, Mrs Liswaniso, learned counsel for the 1st appellant, has referred us to the case of **Choka v The People** [(3)] which is one of the cases in which this Court has held that a witness with a possible interest to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration, or something more than a mere belief in the truth of what he has said.

4.3 Mrs Liswaniso also argues that, in this case, PW2 and PW3 could not have corroborated each other because they were suspect witnesses for the same reason. For that submission, counsel has referred us to the case of **Chimbo and Others v The People** [(4)] where this Court held to that effect.

4.4 Then Mrs Liswaniso has addressed PW4's previous inconsistent statement to the police: She submits that the trial judge should have disregarded that statement, and not used it to corroborate the evidence of PW2 and PW3. For that submission, counsel has referred us to this Court's decision in the case of **Munalula v The People**[5]. The holding in that case reads:

> **"(i) where on an application to treat a witness as hostile, the court after sight of the inconsistent statement, decides to grant the application, it should then direct itself not to place any reliance on the contents of the statement and so record in the judgment**
>
> **(ii) Before, with leave of the Court, adducing evidence to prove a witness's inconsistency, the previous statement and its circumstances must be mentioned to the witness so that he may say whether or not he has made such a statement.**
>
> **(iii) it is in the court's discretion to determine a witness's hostility in that he does not give his evidence fairly and with desire to tell the truth; he is not hostile simply because his evidence contradicts his proof or is unfavourable to the party calling him. Much is dependent on the nature and the extent of the contradiction; but under common law the court may treat as hostile, even a witness who has not made a prior inconsistent statement, on the basis of his demeanor.**
>
> **(iv) The inconsistent statement of a hostile witness is completely inadmissible as evidence of the truth of the facts stated therein".**

4.5 In the second ground of appeal, the 1st appellant has again repeated the arguments that the defence advanced before the trial court in objecting to the admission of the deceased's statement to PW1 on the ground that it was hearsay. We have already set out those arguments. Relying on those arguments, it is Mrs Liswaniso's submission that the trial court was wrong to have admitted that statement in evidence, and to have held that it corroborated what PW2, PW3 and PW4 had witnessed.

4.6 Mrs Liswaniso therefore urges us to allow the 1st appellant's appeal.

4.7 In response, the State begin by conceding the 1st appellant's argument that the trial judge erred when he relied on PW4's previous inconsistent statement to the police. Mrs Chilufya-Kabwela, the learned Senior State Advocate, agrees with the appellant that, on the authority of the case of **Munalula v The People**, it was a misdirection on the part of the trial judge to have proceeded the way he did.

4.8 However, the State do not agree that PW2 and PW3 ought to have been treated as suspect witnesses. Mrs Chilufya-Kabwela argues that the trial court rightly found as a fact that the two witnesses left the deceased behind because of three factors; the hostility of the group in which the appellant was, the deceased's insistence on remaining at the drinking place and the fact that they did not see any injuries on the deceased that aroused suspicion in them as to the seriousness of his condition. Counsel has gone on to cite the case of **Yokoniya Mwale v The People** [(6)] to support her submission that it is not merely the category that a witness belongs to which will make them suspect witnesses. We shall cite the relevant passage in that case later.

4.9 Mrs Chilufya-Kabwela concludes on this point by submitting that, in any event, the evidence of PW2 and PW3 is corroborated by the statement which the deceased made to his wife; and which, in counsel's view, was rightly admitted by the trial court as being part of the *res gestae*.

4.10 Responding to the second ground of appeal, Mrs Chilufya-Kabwela argues that the deceased's statement to his wife, PW1, was properly admitted in evidence because it was part of the *res gestae*. According to counsel, the statement was made while the deceased was till in agony from the injuries that were inflicted on him, and therefore the deceased had no opportunity to concoct, or distort, the story. Counsel argues that the number of hours that elapsed between the assault and the making of the statement is immaterial; what was important was the fact that, when PW1 went to see the deceased at the clinic, she found him rolling on the floor in agony; meaning that he was not in a position to concoct or distort the story. In addition to the case of **Edward Sinyama v The People**[1], Mrs Chilufya-Kabwela has referred us to the case of **Samuel Mwaba Mutambalilo v The People**[7].

4.11 With those arguments, Mrs Chilufya-Kabwela urges us to dismiss the appeal.

5.0 Our Decision

5.1 We begin by addressing the 1st appellant's argument that PW2 and PW3 ought to have been treated as suspect witnesses. A short while ago in this judgment, we said that we shall cite a passage from the case of **Yokonia Mwale v The People[6]** which Mrs Chilufya-Kabwela referred to us. We now do so. In that case, this Court said this:

> **"We ought however to stress that these authorities did not establish, nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This, in our view, would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witness may, in particular circumstances, <u>ascertainable on the evidence</u>, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused. <u>Once this was discernible and only in those circumstances</u>, should the court treat those witnesses in**

the manner we suggested in the *Kambarage* **case".** *(underlining supplied for emphasis)*

5.2 What this passage means is that, for a witness to be treated as one with an interest to serve, there must be circumstances within the evidence that is before the court from which it can be said that the witness may have a motive to falsely implicate the accused.

5.3 In this case the 1st appellant argues that, because PW2 and PW3 went to Nsombo village with the deceased but never came back with him, this raised a suspicion that they were the ones who inflicted those injuries on him; and consequently, they should have been treated as suspect witnesses. However, there was no evidence showing that PW2 and PW3 had had any issue with the deceased from which one might suspect that they could have a motive to beat the deceased. Further, there was also nothing in the evidence to suggest that the same two witnesses had issues with the 1st appellant and Tony Nyemba that would motivate them to falsely implicate the two co-accused. Clearly, there were no grounds upon which PW2 and PW3

should have been treated as suspect witnesses, so that their evidence would need to be corroborated. Therefore, the trial judge was on firm ground when he declined to treat them as such.

5.4 We now come to PW4's previous inconsistent statement to the police. We have already quoted the holding in the case of **Munalula v The People**[5]; and that case clearly holds that the inconsistent statement of a hostile witness is completely inadmissible as the evidence of the truth. But we shall go a little further in order to show where the learned trial judge went wrong. The holding in the case of **Nkonde and Another v The People**[8], which the trial judge relied on for the erroneous approach that he adopted, reads:

> **"Held:**
> **Where a witness's evidence is challenged on the basis of a previous inconsistent statement, either the statement must be put in as an exhibit and form part of the record or the particular portions which are alleged to be inconsistent with the evidence then being given in court must be recorded in full".**

5.5 However, the full passage from which this holding was adapted reads like this:

> **"This court has frequently pointed out that where a witness's evidence is challenged on the basis of a previous inconsistent statement, either the statement must be put in as an exhibit and form part of the record or the particular portions which are alleged to be inconsistent with the evidence then being given in court must be recorded in full. In the absence of the basis of the challenge an appellate court is in no position to <u>test the witness's evidence at the trial</u> and make a finding as to what weight, if any, should have been attached to that evidence".** (*underlining provided for emphasis*)

The position is explained more clearly in the case of **Miyoba v The People**[(9)] where we said:

> **"Perhaps we should not leave this matter without stressing the proper procedure to be adopted when challenging a witness on the basis of a previous inconsistent statement. This court has made frequent reference to this subject (see in particular** *Nkonde v The People***), but nevertheless the courts and practitioners continue to deal with the matter inadequately and incorrectly. The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof. <u>They are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at trial; they can be used only to destroy the</u>**

credibility of the witness or to reduce the weight to be attached to his evidence. To do this 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".

5.6 So when, in the above cases, we referred to the weight to be attached to evidence, it was with regard to the testimony that a witness has given in court, and not the statement that the witness may have previously made elsewhere. Hence, the following is how the trial judge should have approached the issue: he should have recognised the fact that he was faced with two conflicting versions of the question whether the 1st appellant did beat the deceased at PW4's home on the material day; there was the testimony of PW2 and PW3, on one hand, which stated that the 1st appellant beat the deceased. On the other hand, there was the testimony of PW4 which stated that the 1st appellant did not beat the deceased. The crucial issue that the trial judge needed to resolve, therefore, was the question, which version should be believed? And this inexorably required the judge to disbelieve either the

testimony of PW2 and PW3, and accept that of PW4; or vice versa. Now, since PW4's credibility had been destroyed by her previous inconsistent statement, the judge should then have used that ground to disbelieve her version of the events; and then gone on to believe that of PW2 and PW3 in order to make a finding of fact that the 1st appellant did hit the deceased with a stick and a brick at PW4's home on the 4th December, 2012. That, indeed, is the proper approach which the trial judge should have adopted with regard to PW4's testimony in court in view of her previous inconsistent statement to the police that had been brought to his attention.

5.7 Therefore, as properly conceded by the State, PW4's previous statement was wrongly relied on by the trial judge.

5.8 With regard to the second ground of appeal, we begin by noting that when the trial judge dealt with this issue in his judgment, he had, at the back of his mind, the contents of PW4's previous inconsistent statement. The said contents were purporting to provide information as to what

happened at PW4's house, and how the deceased ended up at Nsombo clinic. Using the facts provided by the previous inconsistent statement, the trial judge readily came to the conclusion that the deceased's statement was made in approximate contemporaneity.

5.9 However, had the trial judge directed himself properly on the statement, and not taken it into account, he probably would not have arrived at that conclusion because, once the contents of that statement are excluded, the only evidence that remained was that of PW2 and PW3 who said that after the assault the deceased went back to drinking beer without appearing to be in any discomfort.

5.10 In the case of **Edward Sinyama v The People**[(1)], the following is what we said on this issue:

> **"We have considered the submissions. The issue of** *res gestae* **has been considered by our courts in a number of cases the leading one at the High Court level being that of the** *The People v John Nguni* **which we approved in Chisoni Banda v The People. We have also considered the res gestae principle as elaborated in cases like** *Ratten v R* **and** *R v Andrews* **and the discussion to be found in** *paras 11 – 23* **to** *11 – 25 of Archbold Criminal Pleadings, Evidence and Practice, 43th ed.* **It is apparent from the authorities that**

the test of admissibility is not that the statement must have been made in conditions of the exact contemporaneity as part of the transaction or event causing harm, as argued by Mr Mwanamwambwa. It is also not correct that a statement will be ineligible to be treated as part of the *res gestae* **if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate, though not exact, contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should actually be disregarded in the particular case. The possibility has to be considered against the circumstances in which the statement was made. In the case at hand the event was certainly unusual or dramatic or traumatic".**

5.13 In this case, Mrs Chilufya-Kabwela submits that PW1 found the deceased rolling in agony on the floor of Nsombo clinic. Counsel argues that it must be deduced from this piece of evidence that the deceased was still in the throes of the event and, therefore, had had no opportunity to concoct or distort the story to his advantage or to the disadvantage of the 1st appellant and his group.

5.14 In response to Mrs Chilufya-Kabwela's argument we wish to quote a passage from the decision of the Privy Council in the case of **Ratten v R[10]**, delivered by Lord Wilberforce. The passage reads:

> **"These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.**
>
> **Before applying it to the facts of the present case, there is one other matter to be considered, namely the nature of the proof required to establish the involvement of the speaker in the pressure of the drama, or the concatenation of events leading up to the crisis. On principle it would not appear right that the necessary association should be shown only by the statement itself. Otherwise, the statement would be lifting itself into the area of admissibility. There is little authority on this point. In** *Reg. v Taylor [1961(3)] S.A.L.R. 616* **where witnesses said they had heard scuffles and thuds during which the deceased cried out** *'John, please don't hit me anymore, you will kill me'*, **Fannin J. said that it would be unrealistic to require examination of the question (sc. of close relationship) without reference to the terms of the statement sought to be proved.** *'Often the only evidence as to how near in time the making of the statement was to the act*

it relates to, and the actual relationship between the two, will be contained in the statement itself. **Facts differ so greatly that it is impossible to lay down any precise rule: it is difficult to imagine a case where there is no evidence at all of the connection between statement and principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge. Their Lordships would be disposed to agree that, amongst other things, he may take the statement itself into account".**

5.15 We will cite another passage from the same decision: It reads:

> **"The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognized and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely,**

> **if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it".**

5.16 Having, in previous decisions of this Court, cited with approval the decision of the Privy Council in the case we have just cited, we agree and associate ourselves with what the Privy Council said in the two passages that we have just quoted.

5.17 In this case as we have already said, once the contents of PW4's previous statement are excluded, the only evidence of assault that was before the trial court was that of the incident narrated by PW2 and PW3. It is very important to note from their testimony that after the altercation, which was brief, the deceased continued to drink beer and appeared not to be in any discomfort. We say this is important because, from the passages that we have quoted, a statement can only be said to be part of the *res gestae* if there has been no opportunity for concoction. In this case, the deceased made the statement when he had long since been disengaged from the assault. It is not

known when and how the agony that he was found in started, but the relatively calm condition that PW2 and PW3 left him in suggests that he was so composed as to be able to construct, or adapt a story. Therefore, the deceased's statement to PW1 was not part of the *res gestae*. Consequently, it was inadmissible hearsay and was wrongly admitted in evidence by the trial judge.

5.18 Now, where does that leave the prosecution evidence? To answer that question, we wish to address the trial judge's finding that the injuries which were revealed in the post-mortem report as having caused the death of the deceased were consistent with the assault suffered at the hands of the 1st appellant and his group. This finding, again, can only be attributed to the fact that the trial judge was influenced by the inadmissible contents of PW4's previous statement to the police. Otherwise, the assault that was witnessed by PW2 and PW3 appears, from a medical lay-person's view, to be far less in extent than the injuries suggest. For instance, both PW2 and PW3 said that the 1st appellant hit the deceased with a stick once on the right

ribs, and that he then hit the deceased again with a brick on the back. PW3 added that Tony Nyemba also kicked the deceased on the side of the thighs. Yet, the findings in the post-mortem report which we have set out earlier in the judgment reveal injuries even in areas in which the deceased was not assaulted; such as bruises in the intestine area, ruptured spleen and a laceration on the forehead. Notably also, there is no finding of an injury that could be said to have been caused by the brick that hit the deceased's back. As for the other injuries, such as the fractured left third, fourth and fifth ribs; the deep bruises on the left chest wall and left hip; and the bruises on the left lung, there was need for the prosecution to adduce further *viva voce* expert medical evidence to explain whether one strike to the ribs of the deceased would have caused all that injury. And even then, there was still the evidence of PW2 and PW3 who consistently said that the deceased was hit on the right side of the ribs, and not the left side on which the injuries found by the doctor were located. This only further worsened the discrepancy

between the assault that PW2 and PW3 witnessed and the injuries that were found on the deceased.

5.19 So, we will not engage in any speculation, or theories, as to how the deceased suffered those other injuries. However, what is clear is that there was doubt as to whether the assault which PW2 and PW3 described to the trial court was responsible for the injuries that caused the death of the deceased. In other words, there was doubt whether the assault by the 1st appellant on the deceased which was witnessed by PW2 and PW3 caused the death of the deceased.

5.20 To address that situation, we refer to the case of **Saluwema v The People**[11] which was decided by this Court's predecessor, the Court of Appeal. As in this case, that was a case of murder resulting from an assault. In that case, the appellant was said to have caused the death of the deceased by kicking him in the head at a dance and beer drink. The deceased had suffered a fractured skull which had caused his death. There was evidence that the deceased had earlier, during the beer party, been involved

in a fight during which he received two fist blows to the head. In a judgment with which Conroy, C.J. and Charles, J, agreed, Justice Blagden, J.A. said:

> **"The learned trial judge expressed himself as satisfied beyond reasonable doubt that it was the kick which the appellant administered to the deceased on his head which fractured his skull and caused his death. He may have given consideration to the possibility of the fatal injury having been inflicted during the course of the first fight. If he did so he must certainly have rejected it. But nowhere in his judgment does he make any reference to this possibility......**
> **Then it is clear that the deceased received at least two blows in the first fight and one or both of them was of sufficient force to knock him down. I have already referred to Dr Swain's evidence as to how the fatal blow might have been struck. She said;** *'I would think it unlikely that the blow would be caused by a fist'*. **I do not consider that that observation rules out the reasonable possibility that this was how the fatal blow was inflicted. It may not be probable, but if it is only reasonably possible, as I think it is here, then there must be a reasonable doubt as to whether it was the kick administered by the appellant which caused the deceased's death. In these circumstances the prosecution cannot be said to have discharged the burden of proof upon it of proving the accused's guilt beyond reasonable doubt; and that is fatal to this conviction".**

5.21 This case lays down the principle that, if there is reasonable doubt on any point which requires to be proved in a criminal matter then the prosecution has not discharged its burden of proof on that point; save, of-course, if it is a point on which the burden of proof has shifted to the accused.

5.22 In this case, because of the discrepancies between the assault that was witnessed by PW2 and PW3, on one hand, and the medical evidence, on the other hand, there was a serious doubt as to whether the assault by the 1st appellant was the cause of death. It therefore, could not be said that the prosecution had discharged its burden of proof, beyond reasonable doubt, that it was the 1st appellant who caused the death of the deceased.

5.23 We have also considered what bearing the 1st appellant's flight from the village, after the deceased's death, could have had on the inference to be drawn regarding his guilt. We think that no adverse inference can be drawn against him because he knew that he had assaulted the deceased, but he, however, could not have known that his assault

was not the cause of the deceased's death. That situation can certainly motivate a suspect to run away. So, in this case, there was a reasonable explanation as to why the 1st appellant initially ran away from the village.

6.0 Conclusion

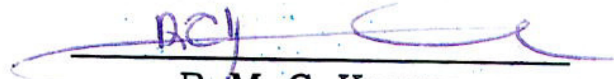
6.1 In conclusion we hold that the prosecution did not prove beyond reasonable doubt that the 1st appellant's assault was the one that caused the death of the deceased; consequently, the prosecution failed to prove the case of murder against him. Now, we know that **Section 15** of the **Supreme Court of Zambia Act**, **Chapter, 25** of the **Laws of Zambia** empowers us to substitute a *"guilty"* verdict for such other offence as the trial court could have entered; and, in this case, the offence of assault was clearly proved against the 1st appellant. However, we do not see what practical difference it would make in view of the fact that the 1st appellant has been in custody for a period that far exceeds even the maximum sentence provided for that offence - that is five years imprisonment. We think that, in

the circumstances, the 1st appellant should just be absolved of the murder of the deceased, and set free.

6.2 Consequently, we find merit in this appeal and we allow it. We quash the conviction for murder and the sentence of death. The 1st appellant is hereby acquitted.

M. Malila
CHIEF JUSTICE

E. M. Hamaundu
SUPREME COURT JUDGE



R. M. C. Kaoma
SUPREME COURT JUDGE