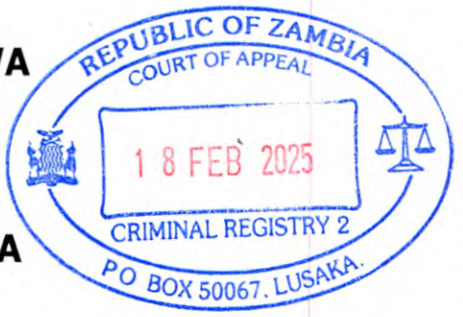
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

Appeal No. 39,40,41/2023

BETWEEN:



WILLARD HAMUNYANGWA	**1ST APPELLANT**
RONAH HIMBONDO	**2ND APPELLANT**
MAJESTY HAMUNYANGWA	**3RD APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

CORAM: Mchenga, DJP, Muzenga and Chembe JJA
On 21st February 2024 and 18th February 2025

For the Appellants: Mrs. M. Mulanda-Banda, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. P. Lungu, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Nyoni v. The People (1987) ZR 99**
2. **Steven Mushoke v. The People – SCZ Judgment No. 31 of 2014**

3. **Chigowe v. The People (1977) ZR 21**
4. **Peter Yotamu Haamenda v. The People (1977) ZR 246**
5. **Abel Banda v. The People (1986) ZR 105**
6. **Michelo Siangumba v. The People – CAZ Appeal No. 180 of 2022**
7. **Obrian Nakwenda v. The People – CAZ Appeal No. 44 of 2022**
8. **Mwiya and Ikweti v. The People (1968) ZR 53**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellants were convicted of the offence of murder contrary to **Section 200** of the **Penal Code Chapter 87 of the Laws of Zambia** and sentenced to death by **Sinyangwe J.**

1.2 The particulars of the offence alleged on the 1st day of December 2021 at Monze in the Southern province of the Republic of Zambia, the appellants jointly and while acting together with other persons unknown murdered one Feance Hamunyangwa.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The evidence of five prosecution witnesses secured the appellants' convictions. A summary of the prosecution evidence was that sometime in March 2021, the second appellant's son died. Her family

suspected the death to have been a homicide given the circumstances of his death. Among the suspects behind the death was Feance Hamunyangwa, the deceased herein.

2.2 On 1st December 2021, the deceased went to a place called Katumba to collect fertiliser. He returned around 20:00 hours and found PW2, one of his wives, in the house sleeping. PW2 heard him speaking with someone outside the house, after which she heard him saying goodbye to the person he was talking to, stating that they would meet the following day. Shortly after that, she heard stamping sounds outside. She never paid much attention to that as she thought maybe the husband was killing a snake outside.

2.3 She later heard Flair, the other wife to the deceased calling out her name and asking if their husband had arrived. She told her that she would go outside to check. When she got out, she found blood on the ground but there was no one. With the help of a touch, she saw her husband's lifeless body on the ground. She called other neighbours and later the police came with the headman. They searched the deceased's pockets and discovered that his phone was missing. The body of the deceased was taken and a postmortem was conducted by Dr. Ngalula who found the cause of death to be severe head injury.

2.4 The 2nd appellant later went to the police and informed them that she was living in fear in the village because the villagers wanted to take her life. When asked the reason, she responded that people were thinking she was behind the death of her son, the deceased (Feance Hamunyangwa). She proceeded to give PW4 (the arresting officer) the names of the 1st and 3rd appellant, who she said would give him more information regarding the death of the deceased.

2.5 PW4 then proceeded to issue callouts to the 1st and 3rd appellants, who later turned up at the police station in the company of the Village Headman (PW1) among other people. The police interviewed the two appellants in the presence of PW1, who recounted at length the confession which the 1st appellant gave to the police. The defence objected to PW1 narrating the confession which was given to the police, the trial court overruled the objection stating that PW1 was a civilian witness and allowed PW1 to recount the entire confession which was being recorded by PW4 and was signed off by the officers, the 1st appellant and PW1 as a witness. PW1 was called in to witness after the officers had already started interrogating the 1st appellant.

2.6 The arresting officer, PW4 recounted the appellants' confessions leading to the defence objecting to their admission on account of not having been voluntary. The trial court conducted a trial-within-a-trial.

2.7 In a trial-within-a-trial, PW1, was PW4, who narrated how conducive the environment was in which the 1st appellant's confession was made. This is the witness who recounted the 1st appellant's confession to the police in the main trial. He was called in to witness the confession after the officers interrogated the 1st appellant in his absence before he was called. PW5 was the officer who translated the confession into Tonga. In his evidence in the trial-within-a-trial he stated that the 1st appellant admitted the charge. He also stated that the environment was okay as no one beat or threatened to beat the 1st appellant. He also identified the warn and caution statement in the trial-within-a-trial and it was **"1D4."**

2.8 PW6 (the arresting officer, who was PW4 in the main trial), identified the various confession statements for the 3 appellants and produced them in evidence during the trial-within-a-trial.

2.9 The appellants each gave evidence and alleged the confessions were not voluntary.

2.10 The trial court rendered a Ruling in which it found that the confessions were free and voluntary and admitted them in evidence the second time. The main trial which was on hold resumed.

2.11 PW4 narrated that the 1st appellant led him to the recovery of the deceased's phone, which he had given to his uncle, PW3, and also led to the recovery of a small log, the suspected murder weapon.

2.12 This marked the end of the prosecution evidence. The appellants were found with a case to answer and were put on their defence.

3.0 DEFENCE

3.1 In his defence, the first appellant opted to give sworn evidence and did not call any witnesses. The version of his evidence was that he was with his father the 3rd appellant, at home when they heard people mourning around 21:00 hours on the material date. He and his father, the 3rd appellant, went there and discovered the deceased had been murdered. His mother the 2nd appellant had remained home as she had a disabled child. On 11th December 2021, when he returned home from collecting herbs for the disabled child, he found that his father the 3rd appellant had been apprehended by the police. He went to the police where he discovered that his father was apprehended in

connection with the murder herein. He denied having given the phone to his uncle, PW3. He denied committing the offence.

3.2 In her defence, the 2nd appellant denied killing the deceased as he was her son. She denied arranging or organising his killing. She stated that she met the deceased at the fertiliser distribution point on 1st December 2021 and that she related very well with the deceased as he was her son. She was saddened by the information that the son had died. She went on to narrate that after the funeral was over, she went to the police to seek help but when she started telling the officers what she had gone there for, she was told to sit down as they had been looking for her because she is the one who killed her son (the deceased). She was detained. She denied killing the deceased.

3.3 The 3rd appellant denied killing the deceased. He told the trial court that the 1st appellant was 18 years old as he was born on 3rd June 2003.

3.4 This marked the end of the appellants' defence.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After carefully considering the evidence before him, the learned trial judge found the evidence against the appellant to be circumstantial. In placing reliance on the admitted confessions, the trial court found

that the prosecution had established the case beyond all reasonable doubt and convicted the appellants. On the issue of the age of the 1st appellant, the trial court at page J26 relied on his ocular observation and found that he was older. The appellants were sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Dejected with the conviction and sentence of the court below, the appellant launched the present appeal fronting three grounds of appeal structured as follows:

(1) The learned trial court erred both in law and in fact when the court tried the first appellant as an adult and sentenced him to death based on ocular observation.

(2) The trial court erred in law and in fact when the court admitted the confession statements of the appellants as having been made freely and voluntarily.

(3) The learned trial court erred in law and fact when the Court convicted the appellants based on circumstantial evidence which did not take the case out of the realm of conjecture to permit only an inference of guilt.

6.0 THE APPELLANT'S ARGUMENTS

6.1 In support of the first ground of appeal, the learned counsel for the appellants submitted that the trial judge misdirected himself when he relied on his ocular observation to determine the age of the first appellant when it was clear from the proceedings that the first

appellant was 18 years at the time the offence was committed. It was the learned counsel's further submission that if the trial court doubted the age of the first appellant, it should have ordered an age determination test.

6.2 According to learned counsel, the court erred in sentencing the first appellant to death when the law which was in force when the crime was committed required that the first appellant to be treated as a juvenile during sentencing. In support of this proposition, we were referred to the case of **Steven Nyoni v. The People**[1] where it was held that:

> **"A person who is no longer a juvenile who had committed an offence when he was a juvenile should be tried as an adult in the appropriate court; but for the purpose of sentencing he should be treated as a juvenile."**

6.3 We were urged to set aside the sentence imposed by the trial court and sentence the first appellant as a juvenile.

6.4 The gist of the appellants' submission in support of the second ground of appeal, is that the trial court erred when it admitted into evidence the alleged confession statements which were illegally obtained. It was submitted that the witnesses for the prosecution were police

officers who were persons in authority with the interest of their own to serve. The first appellant told the trial court that he was beaten and went on to show the court during the trial-within-a-trial, the marks on his hands where he was chained.

6.5 It was stated that the prosecution called PW1 as their witness who is not a neutral person and thus cannot be considered as an independent witness. Further, counsel submitted that the evidence of PW1 should be expunged off the record for reasons that it bordered on a confession made by the 1st appellant to police officers who are persons in authority, despite the objection by counsel for the defence.

6.6 Learned counsel argued that the burden of proving that a confession statement was made freely and voluntarily is on the prosecution and at no point does this burden shift to the accused. We were referred to the case of **Steven Mushoke v. The People**[2] it was held that:

> **"The burden of proof rests entirely on the prosecution and the standard of proof required is beyond reasonable doubt. In other words, the prosecution must prove the voluntariness of the alleged confession beyond reasonable doubt. At the close of the trial-within-a-trial submissions may be made by both sides and the Court is obliged to deliver its ruling. Once the test of**

voluntariness fails, the alleged confession becomes inadmissible."

6.7 Learned counsel referred us to the case of the case of **Chigowe v. The People**[3] in arguing that the within confession statements must be excluded as the State had not established beyond all reasonable doubt that they were voluntary.

6.8 We were urged on this ground to set aside the convictions and sentences, and set the appellants at liberty.

6.9 In support of ground three, learned counsel for the appellants submitted that the trial court relied on the confessions and circumstantial evidence in convicting the appellants. The circumstantial evidence was the phone which was recovered and the log which was allegedly stained with blood. Learned counsel argued that it was not established that the phone belonged to the deceased as no record from the mobile service provider was brought to court. In respect of the log, it was argued that the alleged blood stains were not examined to determine if they were for the deceased or a cow. Learned counsel contended that failure by the prosecution to lay this missing evidence amounted to a dereliction of duty, which must be resolved in favour of the appellants. Reliance for this argument was

placed on the case of **Peter Yotamu Haamenda v. The People.**[4] We were urged to allow the appeal on this ground.

7.0 RESPONDENT'S ARGUMENTS

7.1 Learned counsel for the respondent did not support the 2nd and 3rd appellant's convictions, but they supported the 1st appellant's conviction.

7.2 Regarding the confessions which were admitted into evidence, counsel submitted that the trial court erred when it allowed the confession to grace the record of the court during the main trial. It was submitted that there was an attempt by the defence to object to PW1 placing confessions on the record but the trial court overruled the objection. It was learned counsel's submission that the trial court further erred when it admitted the confessions during the trial-within-a-trial. In the circumstances, learned counsel submitted that the appellants were prejudiced by these lapses and the confession evidence must be excluded.

7.3 Counsel argued that since the 2nd and 3rd appellants' convictions were based on the confessions, they should be acquitted.

7.4 With respect to the 1st appellant, learned counsel argued that despite the exclusion of his confession, there was evidence that he was in

possession of the phone belonging to the deceased, which he handed over to his uncle, PW3, at the time he was being apprehended. Additionally, it was submitted that he also led to the recovery of a log which had blood stains which was admitted into evidence. It was argued that this circumstantial evidence was sufficient to warrant a conviction. With regard to the sentence imposed on the 1st appellant, counsel conceded that he should have been sentenced as a juvenile since he was a juvenile at the time he committed the offence.

8.0 THE HEARING

8.1 At the hearing of the appeal, learned counsel for the appellant, Mrs. Mulanda-Banda, placed reliance on her arguments. Learned counsel for the respondent, Mrs. Lungu, sought leave to make oral submissions, which the Court allowed and have been penned above.

9.0 DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by counsel and the judgment under attack. We shall first consider ground two, followed by ground three and then consider ground one at the end.

9.2 As we see it, the issue in ground two is whether the confession evidence properly graced the record of the court. Learned counsel for

both parties agreed that the learned trial court should not have allowed PW1 to narrate the confessions in the main trial, and that the irregularities around the conduct of the trial-within-a-trial prejudiced the appellants and that the confessions should be excluded on that score.

9.3 We shall first deal with the issue of PW1 being allowed to place on the record confession evidence attributed to the 1st appellant. It is not in dispute that when the 1st appellant was being interrogated by the police, PW1 was called in to witness the confession to the police. At the point when he started narrating what the 1st appellant was telling the police, defence counsel objected to that evidence on grounds that they had instructions to the effect that the confession was not voluntary. The learned State Advocate opposed the objection on grounds that PW1 was not a person in authority. The learned trial court then overruled the objection, stating that PW1 was a civilian witness and placing reliance on the **Abel Banda v. The People**[5], the trial court allowed PW1 to recount the entire confession. This was a serious misdirection by the learned trial court.

9.4 We recently guided in the case of **Michelo Siangumba v. The People**[6], a case in which civilian witnesses, who witnessed the

appellant's confession and leading to the crime scene, were allowed to recount that evidence to the trial court despite an objection by defence counsel. We stated that:

> **"PW2 and PW3 were persons not in authority, who were present when the appellant confessed to the police. In the circumstances, it was wrong for the trial court to have allowed PW2 and PW3 to give confession evidence which was given to the police, notwithstanding the fact that they are not persons in authority. This was obviously an attempt by the State to sneak in a confession through the back door. The confession narrated by PW2 and PW3 must as such be excluded from the record."**

9.5 We therefore have no hesitation in expunging the evidence of PW1 as it materially contained narrations of the 1st appellant's confession to the police.

9.6 We now turn to consider the issue of irregularities around the conduct of the trial-within-a-trial. It is not in dispute that in the trial-within-a-trial, PW4 (who was PW1 in the main trial) was allowed to recount the 1st appellant's confession. Further, during the trial-within-a-trial, the warn and caution statements (confessions) were identified and produced into evidence. This was a serious misdirection and an

irregularity, as that is not supposed to happen during a trial-within-a-trial. The contents of the admission must never be narrated during a trial-within-a-trial. It is worth noting that the trial court in rejecting the appellants' assertion accepted prosecution evidence in the trial-within-a-trial, which included the narrated confessions and the already produced confessions.

9.7 We had occasion to guide in the case of **Obrian Nakwenda v. The People**[7] that admission of confessions during a trial-within-a-trial or recounting of the confessions to the court which are the subject of the enquiry is irregular and leads to the exclusion of the same. We had the following to say:

> **"In *casu,* the trial-within-a-trial took a different tenor, instead of inquiring into the voluntariness of the alleged confessions, the confession statements were published and went onto the record before a finding was made on their admissibility. This, in our view, was highly prejudicial and irregular. Learned counsel for the State correctly conceded that the confession statements should be expunged."**

9.8 The Court of Appeal, the precursor to the Supreme Court, stated in the case of **Mwiya and Ikweti v. The People**[8] that:

> **"The prejudicial nature of a confession is so great that the court is jealous to guard against injustice to the accused by its unfair admission. Therefore the custom has grown up over the years, and now constitutes a well-settled practice, that where the admissibility of a confession is challenged, the court should hold a trial-within-a-trial. This practice grew up in England and other parts of the Commonwealth where trial by jury is normal."**

9.9 A review of authorities around confessions depict that confessions, due to the prejudicial effect they may have, must be guarded carefully and full adherence to the rules must be ensured. In the circumstances, we agree with both counsel that the appellants were prejudiced and their confessions must be expunged from the record and we accordingly expunge them.

9.10 After the confessions are excluded, there is no evidence against the 2nd and 3rd appellant and they must be acquitted.

9.11 As for the 1st appellant, there is evidence that he led to the recovery of the deceased's phone and the suspected murder weapon. Learned counsel for the appellant argued that the failure to bring evidence from the mobile service provider to establish that this phone belonged to

the deceased and the failure to examine the blood on the log, amounted to a dereliction of duty. We must state that in the lower court, there was no dispute as to the ownership of the phone and we do not see how this issue can arise on appeal. The 1st appellant gave the phone to PW3, who was his uncle, and the same phone was identified by PW2, the wife to the deceased as belonging to the deceased. Therefore, this argument is without merit. Turning to the log, an alleged murder weapon, it is not in dispute that the log was not examined and was never found at or near the scene. Therefore, its connection and relevance is tied to the confession. We agree that reliance cannot be placed on it and we shall not take it into consideration in determining the 1st appellant's fate.

9.12 We, however, hold the view that this circumstantial evidence, arising from the possession of the phone is strong to warrant a conviction especially in the light of his bare denial. The 1st appellant offered no explanation of how he came into possession of the deceased's phone. We also find that there is no basis upon which we could consider possible lesser inferences, on the facts of this case. In the circumstances, we cannot fault the learned trial court in convicting him.

9.13 We now turn to consider ground one. The argument by learned counsel for the appellants is that the 1st appellant should not have been sentenced to death as he was a juvenile at the time the offence was committed. The State conceded that the trial court misdirected itself.

9.14 The issue around the age of the first appellant, first arose when he appeared for the first time in the Subordinate Court for mention. The indictment indicated that the 1st appellant was 20 years old, which age the Magistrate amended to 18 years old. When the appellant was giving evidence in the court below, he stated his age as 18, having been born on the 3rd June 2003. The 3rd appellant, who is the mother to the 1st appellant informed the trial court that the 1st appellant was 19 years old, having been born on the 3rd June 2003. The State appeared to take no issue with this age. The learned trial court only commented on the 1st appellant's age in the final judgment at page 283 of the record in the following terms:

> **"..... it was a funeral and being night time, he went there with his 18 year old son, A1. He stated that A1 was born on 3rd June, 2003. That he has no proof of his age as it got burnt.**
>
> **However, my ocular observation is that he is older. The indictment of 31st January, 2022 shows that he was 18**

though initially it reflected 20 as that was cancelled by the Magistrate when explaining the Charge."

9.15 The 1st appellant did not require to provide any other proof for his age. The indictment indicated his age and his mother provided evidence of his age. If the trial court was in doubt, it could have ordered an examination of the 1st appellant to ascertain his age. It was a misdirection on the part of the court below to purport to rely on its ocular observation. We must state that the trial was regular as the 1st appellant was being tried with adults. However, the offence was committed on the 1st December 2021. At that time, the 1st appellant was 18 years old. It was therefore wrong for the trial court to have sentenced him to death.

9.16 We therefore find merit in ground one. We set aside the sentence of death imposed on the 1st appellant. Instead, we make a probation order for one year.

10.0 CONCLUSION

10.1 Having found merit in grounds two with respect to the 2nd and 3rd appellants, we acquit them, set aside the sentences of death and set them at liberty forthwith.

10.2 Having found no merit in ground three in respect of the 1st appellant, we dismiss his appeal and uphold his conviction for murder. Having found merit in ground one, we set aside the sentence of death imposed on the 1st appellant and in its place, impose a probation order for one year. Having been in custody since the 11th December 2021, we order his release from custody forthwith.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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K. MUZENGA
COURT OF APPEAL JUDGE

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Y. CHEMBE
COURT OF APPEAL JUDGE