IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 22/2019**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

EVANS SIKANYIKA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Mambilima, CJ, Hamaundu and Kajimanga, JJS
On 14th January, 2020 and 22nd January, 2020

For the Appellants : Ms M. Marebesa, Legal Aid Counsel

For the State : Mrs L. Siyuni, Director of Public Prosecutions

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Boniface Chanda Chola & Others v The People (1988-89) ZR 163**
2. **Wilfred Kashiba v The People (1971) ZR 95**
3. **Edward Kunda v The People (1971) ZR 99**

When we heard this appeal on 14th January, 2020, we allowed it and set the appellant free. We said then that we would give our reasons later. We now give those reasons.

The appellant's appeal is against his conviction for the offences of murder and aggravated robbery.

The appellant and seven others were arraigned before the learned Judge C. Chanda at a session of the High Court held at Kasama on the 2nd March, 2015 on the said two charges. It was alleged that between the 5th and 6th May, 2013, in Isoka, the appellant and his co-accused murdered one Patson Simbeye and that, in the process, they stole some 50 tins of polished rice. The facts that emerged at the trial were these: The deceased used to work as a watchman at a milling plant. It was owned by a man named Niza Sikombe. On the morning of the 6th May 2013, an employee named Malachi Simukoko, PW1, discovered the body of the deceased in a room in which the deceased used to sleep. The body was buried beneath a heap of rice husks. The matter was reported to the police, who commenced their investigations. More than a month later, on

28th June, 2013, the appellant was taken into custody for questioning with regard to an offence of breaking into a building and committing a felony. The appellant was also questioned about the offences in this case. According to the arresting officer, PW5, who provided this part of the evidence, the appellant confessed to having participated in the commission of the two offences; and that he then implicated the other co-accused. At this point, we wish to show how that evidence was introduced in court. The arresting officer said that he warned and cautioned Evans Sikanyika (the appellant) in Bemba language, who then revealed that he had committed the offence together with his co-accused; and that they had gained access to the building by jumping over the boundary wall. At that point, defence counsel objected to the introduction of that confession on to the record, saying that it was not obtained voluntarily. Counsel for the prosecution then said that they had not decided yet whether they intended to rely on the confession statement. The court, consequently, overruled the objection. As it turned out, the prosecution did not subsequently make any attempt to produce the formal written confession.

The arresting officer continued with his testimony. This time, he dwelt on the confession of Bervin Simbeye, the 1st accused. He said

that Bervin Simbeye told him that he had taken an axe from the house of his sister named Nambeye, and that he had used the said axe to hack the deceased to death. The defence objected to that evidence again. This time, the objection was sustained.

Continuing with his testimony, the arresting officer then said that all the suspects, thereafter, led him to the scene of crime. He said that the appellant took a leading role in the said outing. The arresting officer narrated what the appellant told him at the scene of crime; he said that the appellant told him where he had stood; and where the others had stood; and that the appellant said that the deceased only cried out once upon being struck with the axe. He said that the appellant went on to say that, after the deceased was killed, they broke into one of the rooms and stole the rice; and that Bervin Simbeye ordered that the deceased be buried under the rice husks.

After the scene visit, the appellant and his co-accused were charged for the offences and taken to court.

The appellant and his co-accused opted to remain silent in their defence.

The learned judge, correctly in our view, avoided the confession evidence which the arresting officer had improperly introduced. Therefore, the only incriminating evidence that was available was that of the second visit to the scene, which was allegedly spearheaded by the suspects, with the appellant taking a leading role. The defence were quick to bring to the learned judge's attention the case of **Boniface Chanda Chola & Others v The People**[1] where we held:

> **"(2) The leading by an accused of the police to a place they already know and where no real evidence or fresh evidence is uncovered cannot be regarded as a reliable and solid foundation on which to draw an inference of guilt."**

The learned judge took cognizance of this holding; and so, the case was further narrowed down to the single question whether or not the second visit to the scene yielded real or fresh evidence. The learned judge was, however, of the view that, on the second visit, the suspects led the arresting officer to a different part of the premises which he had hitherto not visited. The judge was of the further view that new evidence was yielded from the second visit in that the arresting officer was able to obtain further information about how the offences were committed, namely, that the deceased was killed with an axe; that he was buried using a shovel; and, that the rice which

was stolen was conveyed in the 8th accused's motor vehicle. For that reason, the learned judge convicted the appellant of the two offences. As for his co-accused, the learned judge found that they were only linked to the case by information given by the appellant. The judge could not find any evidence corroborating that of the appellant. Consequently, he acquitted them.

The appellant was sentenced to death for the offence of murder and life imprisonment for the offence of aggravated robbery.

The appellant has now appealed on the following ground:

> **That the court below erred in law when it relied on the confession evidence improperly introduced by the arresting officer to convict the appellant.**

The State does not support the conviction.

Ms Marebesa, learned counsel for the appellant argued that the appellant's confession statement could not be relied on for the following reasons; first, that the confession was objected to by the appellant; secondly, that the prosecution had said that they would not rely on that evidence and, to that end, they did not produce the formal written statement, and; thirdly, that no trial within a trial was held to determine the voluntariness of that confession. We were

referred to the case of **Wilfred Kashiba v The People**[2] which was decided when this court was referred to as the Court of Appeal. The holdings in that case are as follows:

> "(i) **It is the duty of the trial court in all cases, even if the question is not raised by the defence, to satisfy itself as to the admissibility of an incriminating statement. The court must satisfy itself, before evidence as to the content of the statement, that it was free and voluntarily made, and where an accused is unrepresented, the court must take particular care that the accused is made fully aware of his rights and, if necessary, to test the evidence on this issue.**
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> (ii) **Whether or not an accused person is represented, the record should state whether the allegedly free and voluntary character of a statement was challenged, the subsequent proceedings on the issue and the ruling of the court. These steps are not mere formalities; failure to take them is a serious irregularity which will lead to the setting aside of the conviction unless the appellate court is satisfied that, on the remainder of the evidence, the trial court must inevitably have come to the same conclusion".**

Ms Marebesa further argued that the evidence that the appellant led the police to the scene of crime should not carry much weight because the facts on which the court below relied to consolidate that evidence emanated from the same confession.

Mrs Siyuni, State Counsel, the learned Director of Public Prosecutions, said that she could not support the conviction for two reasons; first, that the evidence that the appellant led the police to the scene was weakened by the fact that that visit arose from a confession that was improperly adduced by the arresting officer, and; secondly, that no real or fresh evidence was discovered during the said visit. The learned Director of Public Prosecutions argued that, for example, the axe could not be said to have been discovered as a result of the second visit because the arresting officer had earlier said that he had discovered the axe as a result of information that he had gathered from his interview with the 1st accused, Bervin Simbeye.

Those were the arguments.

In addition to the case of **Kashiba v The People**, which has been cited by the appellant, we wish to cite another case. In **Edward Kunda v The People**[3] which was decided in the same year as the case of **Kashiba v The People**, Doyle, C.J. on behalf of the court said:

> **"We would draw the attention of police officers and magistrates to this. The question of the voluntariness of a confession is not restricted to confessions that are written down. It applies to all confessions. Where the accused is alleged to have made a**

confession the trial magistrate should ask him; does he object and then proceed in accordance with his reply"

We must say from the outset that the learned judge, as we have pointed out, did not want to take into consideration the initial incriminating statements that the arresting officer divulged with regard to the appellant. That is why the case was decided only on the evidence regarding the second visit to the scene. However, we tend to agree with both learned counsel when they suggest that the incriminating statements seem to have permeated and tainted that evidence. Shortly, we shall show that the learned judge unwittingly used improperly admitted incriminating statements of the appellant in order to strengthen the evidence of the second visit. We will adopt the approach which the learned judge employed to resolve the matter.

As we have said, this appeal turns on one question: Whether the second visit to the scene of crime yielded new or fresh evidence from which a court might draw an inference of guilt on the part of the appellant. The learned judge resolved that question using a two-pronged approach. First, the learned judge's view was that the suspects led the arresting officer to an area which he had not been to during the initial investigations. According to the learned judge,

because of that difference in the facts, the holding in the *Boniface Chanda Chola* case was not applicable to this case.

We must say that we do appreciate that the learned judge had the advantage of seeing and hearing the witnesses, and so he was in a better position to know what the witnesses said. However, we have thoroughly gone through the testimony of the arresting officer, PW5, on record; from examination in chief right through to cross-examination (there was no re-examination). We do not find any testimony which suggests that he was led to a place that he had not been to before. Indeed, there are instances when a witness may say something which is not captured properly in the transcripts. In this case, we do not see any sign of such mishap. So, we can only say that the learned judge's view was not supported by the evidence on record.

Secondly, the learned judge said that, in the event that he was wrong in his conclusion that the suspects had led the arresting officer to a new place, he was still of the view that the second visit yielded new, or fresh, evidence in the form of; (i) information as to how the offences were committed and (ii) what the axe and the shovel were used for during the commission of the crime.

We concur with the learned Director of Public Prosecutions in her observation that the axe was not recovered as a result of the second visit. It was recovered from the 1st accused's sister, earlier in the investigations, through information obtained from the 1st accused himself. As for the shovel, the arresting officer said that he recovered it from the room where the deceased's body was found. It goes without saying that the arresting officer must have recovered it during the earlier part of the investigations; even before the suspects were apprehended. As such, it was not recovered as a result of the second visit. Therefore, the only *"new"* evidence that emerged on the second visit to the scene of crime were statements by the appellant explaining that the axe was used to strike the deceased and that the shovel was used to bury him; and further that, during the assault, the deceased cried out only once. When one examines that evidence carefully, it is clear that the appellant was being alleged to have been making verbal incriminating statements, or a confession, at the scene of crime. This is the confession which we have said was unwittingly used by the learned judge to find weight and substance in the evidence of the second visit to the scene. Going by the authorities that we have considered, that statement should not have been

allowed on to the record before its voluntariness had been established. Consequently, when that evidence is discounted it becomes clear that there is no new or fresh evidence that was yielded during the second visit. It is therefore our view that there was nothing in this case that seriously linked the appellant to the two offences; hence, it is unsafe to uphold the conviction. It is for the foregoing reasons that we allowed the appeal, quashed the conviction and sentences; and acquitted the appellant.

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I.C. Mambilima

CHIEF JUSTICE

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E.M. Hamaundu

SUPREME COURT JUDGE

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C. Kajimanga

SUPREME COURT JUDGE