IN THE SUPREME COURT FOR ZAMBIA **APPEAL NO. 196 AND 197/2018**

CRIMINAL APPEAL

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
24 JUN 2020
SUPREME COURT REGISTRY 2
P.O. BOX 50067, LUSAKA

BETWEEN:

EDGAR SIBUPIWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram : Muyovwe, Hamaundu and Mutuna JJs

On 14th January 2020, 4th February 2020 and 24th June 2020

For the Appellant : Mr. M. Kapukutula, Legal Aid Counsel

For the Respondent : Mrs. M. Chipanta - Mwansa, Deputy Chief State Advocate, National Prosecutions Authority

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JUDGMENT

MUTUNA JS, delivered the judgment of the Court.

Cases referred to:

1) **George Misupi v The People (1978) ZR 437**
2) **Nevison Minkili Mundanga and another v The People, Appeal No. 112 and 113 of 2009**
3) **Yudaj Nchepeshi v The People (1978) ZR 362**
4) **Benson Phiri and Sanny Mwaanza v The People (2002) ZR 107**
5) **Shawaz Fawaz and Prosper Chelewa v The People (1995) ZR 3**
6) **Valentine Shuula Musakanya v The Attorney general (1981) ZR 14**

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7) **Mutambo and Five (5) others v The People (1965) ZR 15**
8) **Kambarange Mpundu Kaunda v The People (1990-1992) ZR 215**
9) **Chimbo and others v The People (1982) ZR 20**
10) **Simon Malambo Choka v The People (1978) ZR 344**
11) **Emmanuel Phiri and others v The People (1978) (reprint) ZR 112**
12) **Jack Chanda and Kennedy Chanda v The People SCZ (2002) ZR 124**
13) **Sakala v The People (1987) ZR 23**
14) **Mbomena Moola v The People SCZ judgment No. 35 of 2000**
15) **Njunga and others v The People (1988-1989) ZR 1**
16) **Ernest Mwaba and Four others v The People (1987) ZR 19**
17) **Mwambona v the People (1973) ZR 38**
18) **John Mwansa and Simon Mwansa v The People Appeal No. 170/11 of 2014**
19) **Benson Phiri and Sanny Mwanza v The People (2002) ZR 107**
20) **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (1988/1989) ZR 163**
21) **Yokoniya Mwale v The People Appeal number 285 of 2014**
22) **Machobane v The People (1972) ZR (reprint) 136**

Legislation referred to:

1) **Penal Code, Cap 87**

Introduction

1) This is an appeal against the decision of the Learned High Court Judge, Chashi J, (as he then was) sentencing the Appellant to death following his conviction.

2) The appeal questions the Appellant's conviction on the ground that the prosecution evidence leading to the conviction required to be corroborated.

3) The Appellant had been charged along with one Mazao Kasweka, a juvenile, who was ordered to serve a sentence of 10 years imprisonment. He has since received a Presidential Pardon and has been freed.

Background

4) The facts of this case are fairly undisputed. The Appellant had approached the deceased, one Jobest Kawaile, for a loan of K600.00. The understanding was that upon receipt of the money, the Appellant would give to the deceased one of his head of cattle as collateral security.

5) The deceased gave the Appellant the K600.00 but he, the Appellant, neglected to provide the collateral security. Later the Appellant defaulted in payment of the K600.00, prompting the deceased and his wife (PW1) to persistently call on him to pay back the money.

6) The persistence by the deceased and his wife in demanding for the money aggravated the Appellant leading to his making threats against the deceased's life. However, later, the deceased recovered his money, plus an extra sum of K300.00, from the Appellant after seizing one of his head of cattle.

7) On 19th February 2013, the Appellant, Mazao Kashweka and one other person called Chibinda Kashweka raided the deceased's house in the night. The deceased and his wife were alerted of the presence of the three by noise from the chicken run and cattle kraal. They went outside to investigate and in the process, Mazao Kashweka shot the deceased dead.

8) After the deceased was shot, the Appellant kicked his body to ensure that he was dead, while the deceased's wife shouted that the trio had killed her husband. The shouts prompted the trio to flee while a crowd of neighbours to the deceased gathered at the deceased's house in response to the shouts by his wife. One of these neighbours, PW4, by the name of Luhamba Nduna,

noticed the trio running away from the scene of the crime. As they did so, Mazao Kashweka discharged a round from his firearm.

9) The neighbours who had gathered attempted to revive and nurse the deceased and removed a pellet from his body. They also reported the matter to the police who advised them to bury the deceased because they were unable to travel to the scene of the crime due to impassable roads in the area which were flooded. The deceased was, therefore, buried without a post mortem being conducted on his remains.

Charges against the Appellant and proceedings before the High Court

10) The Appellant and Mazao Kashweka were later apprehended and charged with the offence of murder contrary to Section 200 of the ***Penal Code***. The particulars of the offence were that on 19th February 2013, at Liyoka village in Lukulu District of Western Province, the two did murder Jobest Kawaile.

11) After the two were charged and pending committal to the High Court for trial, a preliminary inquiry was conducted by a Magistrate but the proceedings were terminated before they were concluded after the DPP issued a certificate for summary trial by the High Court. On the strength of that certificate the Magistrate committed the Appellant and Mazao Kashweka to the High Court. In the High Court a number of witnesses were called beginning with the deceased's wife who testified as PW1. Her evidence revealed the background to the financial transaction between the deceased and the Appellant. She also explained how the trio raided the home she shared with the deceased leading to Mazao Kashweka shooting the deceased to death

12) The other crucial witnesses were PW2 and PW4. PW2's evidence revealed how he lent his firearm to Mazao Kashweka which was confirmed to have discharged the pellet retrieved from the deceased's body. This fact was confirmed by PW6, Chief Inspector Reuben Sam Simulyala, based at Lukulu Police station, who narrated

how Mazao Kashweka led him to PW2 from whom he retrieved the firearm.

13) The evidence of PW4 was that he heard PW1's shouts after the deceased was shot and he quickly went to the scene of the crime. On the way there he met the trio fleeing the scene and Mazao Kashweka discharged a shot from the firearm.

14) The Appellant testified at the trial in his defence. He denied having been at the scene of the crime or knowing Mazao Kashweka. He also denied having transacted with the deceased or making threats against him.

Consideration and decision by the Learned High Court Judge

15) The Judge considered the evidence and arguments by the prosecution and the Appellant. He then acknowledged the fact that counsel for the parties had properly identified the necessary ingredients to prove the offence of murder under Section 200 of the ***Penal Code*** and what constitutes malice aforethought under Section 204.

Consequently, he saw no reason to repeat the position of the law in that area.

16) The Learned High Court Judge then reflected on the absence of a post mortem report proving that the death of the deceased was as a consequence of the gunshot wound. His consideration was with reference to the evidence of PW1, PW4 and PW6 which explained the shooting of the deceased and why he was buried before a post mortem examination was conducted on his remains.

17) This fact notwithstanding, the Judge found that the Appellant did not dispute that the deceased is dead and that he died as a result of the gunshot wound. He went on to find that the evidence of PW1 revealed that a firearm was used to kill the deceased and that it was shot at close range. This, according to the Judge, was a callous act meant to cause the death of the deceased or do grievous harm to the deceased and was an act calculated to commit a felony.

18) The Judge found that the act falls squarely in the realms of Section 204 of the ***Penal Code*** and established malice

aforethought. He accordingly, made a finding of fact to that effect.

19) Having established malice aforethought, the Learned High Court Judge proceeded to determine who caused the deceased's death. In determining this issue he considered the evidence of the key prosecution witnesses. He found the evidence of PW1 very credible and believable. In so doing, he found that even if the portion of her story showing the background leading up to the shooting were to be disbelieved, it did not discredit the other portion of her testimony because it proved motive which is not an essential ingredient for the offence of murder under Section 200 of the ***Penal Code***.

20) The Judge also considered three other issues raised by the Appellant in an effort to discredit the evidence of PW1. The first was that she is related to the deceased and as such, her evidence is that of a person with an interest to serve and may thus be biased. The Judge noted that this allegation was applicable to PW4's evidence as well although the Appellant did not raise it

because PW4 was a brother to the deceased. He accepted the case cited by the Appellant in support of the contention of ***George Misupi v The People***[1] and referred to our decision in ***Nevison Minkili Mundanga and another v The People***[2] as more appropriate on the issue. In that case we made a distinction between a witness with a purpose of his own to serve and a witness with a possible bias and how the evidence of the two types of witnesses should be dealt with by a court.

21) The Judge concluded that the issue was being raised too late in the day and inappropriately in the final submissions. According to the Judge, the issue should have been put to PW1 and PW4 by the Appellant under cross examination. He referred to our decision in the case of ***Yudah Nchepeshi v The People***[3] and dismissed the contention by the Appellant.

22) Taking the matter further, the Judge found that even if the issue had been raised in an appropriate manner and stage in the proceedings, it would have been untenable because PW1's evidence had been corroborated as the

determination of the third issue would show. Further, no motive had been established which would prompt PW1 to give false or biased evidence. He applied the same reasoning to PW4's evidence.

23) The second issue the Judge considered was the possibility of honest mistake in respect of identification of the Appellant by the key witnesses. He quickly dismissed the contention on the ground that PW1's evidence revealed that the night in question was bright and clear due to the moon. She was, therefore, able to see and identify the Appellant and other two persons he acted in concert with. The evidence revealed further that PW1 called out Mazao Kashweka's name prior to his firing the fatal shot and those of all the three as they fled the scene of the fatal shooting.

24) The Judge also found that PW4's evidence supported the evidence of PW1 in terms of the state of visibility on the night in question and that she had indeed called out the names of all three suspects. This, according to the Judge, was sufficient corroboration if the evidence of PW1 was

questionable. In addition, the Judge discounted the contention of mistaken identity based on the fact that PW1 was related to Mazao Kashweka and Chibinda Kashweka while she had a history with the Appellant. According to the Judge, since these were people known to PW1, the question of mistaken identity cannot arise in accordance with our decision in the case of ***Benson Phiri and Sanny Mwaanza v The People***[4]. He concluded by reiterating the impressive demeanour of PW1 which negated the possibility of mistaken identity as per our decision in the case of ***Shawaz Fawaz and Propser Chelewa v The People***[5].

25) Moving onto the third issue of corroboration of PW1's evidence, the Judge restated that the evidence was corroborated by PW4's evidence and the identification of the Appellant at the identification parade. He found further that, although the evidence of the key witnesses PW1, PW2, PW4 and the Appellant revealed that they came from different villages, these villages were all in Lyalala area and appeared to be within a radius of a

kilometer of each other. The villages were accessible to each other and the likelihood of all the witnesses knowing each other was high.

26) Concluding his determination on the question of who committed the murder, the Judge found, beyond reasonable doubt, that the Appellant and Mazao Kashweka were at the scene of the crime and that Mazao Kashweka was in possession of a firearm as confirmed by the evidence of PW1 and PW4. He also found as a fact that Mazao Kashweka shot the deceased.

27) In the last stage of his judgment, the Learned High Court Judge considered three more questions of: whether the firearm used in the death of the deceased was the one borrowed from PW2; the defence of *alibi*; and, whether or not the Appellant is complicit in the offence given the fact that it was not he who shot the deceased.

28) In relation to the first issue, the Judge had no difficulty finding that the firearm Mazao Kashweka borrowed from PW2 was the same one used in the commission of the crime because of the pellet found in the body of the

deceased and the nature of the wounds on the deceased's body pointed to the use of a shotgun. He declined to accept the evidence by Mazao Kashweka that he borrowed the firearm for and on behalf of his father and found the conflicting evidence given by Mazao Kashweka as to the date he borrowed the firearm to work against him.

29) As regards the second issue of *alibi*, the Judge found that, although the police had a duty to investigate an alleged *alibi* and the prosecution to negate such evidence, an accused person also has the evidential burden to adduce evidence of an *alibi*. He found, in this regard that an accused person needs to call witnesses to prove that he was not at the scene of the crime. The Appellant in this case had not done so, consequently, the defence of *alibi* collapsed.

30) Lastly, on the issue of the Appellant's complicit in the death of the deceased, in view of PW1's evidence which revealed that it was Mazao Kashweka who shot the deceased, the Judge found the Appellant equally guilty by

virtue of Section 22 of the ***Penal Code***. This section states as follows:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence ."*

The Judge also referred to a decision of the High Court in the case of ***Mutambo and Five others v the People***[7] in which the Judge explained the principle and ingredients of common intention, arising from a section similar to Section 22 of the ***Penal Code***, and concluded that the acts of the Appellant fell squarely in the provisions of the section and ingredients of the principle.

31) The Judge found the Appellant guilty and convicted him of murder. He sentenced him to the mandatory death sentence.

Grounds of appeal to this Court and arguments by counsel

32) The Appellant has launched this appeal on four grounds as follows:

32.1 *The Learned trial Court erred in law and in fact when it convicted the Appellant of murder and sentenced him to death on the evidence of PW1 and PW4 who were suspect witnesses with interest of their own to serve as such their evidence required corroboration so that it was an error of the Court to reject the defences' submissions on the issue when same was raised;*

32.2 *The Learned trial Court erred in law and fact when it convicted the Appellant for the offence of murder in the absence of proof beyond reasonable doubt as to the actual cause of death and proof of the death of the alleged victim in this case;*

32.3 *The Learned trial Court erred at law and in fact when it held that the alleged assailants had formed a common purpose to commit the offence of murder in the circumstances of this case;*

32.4 *The Learned trial Court erred in law and fact when it convicted the appellant on the identification evidence on record which evidence required corroboration.*

33) In relation to ground 1 of the appeal, counsel for the Appellant, Mr. Kapukutula, quoted passages from our decisions in the cases of ***Nevison Minkili Mundanga and another v the People***[2], ***Kambarange Mpundu Kaunda v the People***[8] and ***George Misupi v The People***[1]. In these cases we set out the guiding principles on how evidence of witnesses who are relations to a

victim and or, with an interest to serve, should be dealt with by a Court.

34) Counsel argued that PW1 had a history with the Appellant involving the loan which the Appellant had obtained from the deceased. That she was also a spouse to the deceased such that she had a motive to give false evidence. The Learned High Court Judge was, as a result, obliged to exclude the danger of PW1 falsely implicating the Appellant. He quoted a passage from our decision in the case of ***Chimbo and others v The People***[9] where we held that evidence of a suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspects for different reasons.

35) In addition, counsel argued that the evidence of PW4 suffered the same fate as he was also related to the deceased. There was, in this regard, need for the Court to treat his evidence as that of a witness with bias or having motive to give false evidence. As a consequence of this, his evidence could not corroborate the evidence of PW1. Counsel relied on our decision in the case of ***Simon***

Malambo Choka v The People[10] where we applied the principle in the case of ***Emmanuel Phiri and others v The People***[11] as follows:

> *"A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanor and the plausibility of his evidence. That "something more" must satisfy the Court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness."*

36) Counsel took his arguments further by submitting that the evidence of PW1 and PW4 is unreliable because it was conflicting as to who and when the fatal shot was fired. As regards, identification of the Appellant and other assailants, counsel questioned the findings of fact made by the Learned High Court Judge in relation to PW1's evidence. His argument was that PW1's evidence did not specifically state which of the three assailants was carrying the firearm or the order in which they were walking as they approached the deceased and PW1. Further, the evidence is compromised because the events

in issue took place at night as PW1 and the deceased walked to the cattle kraal. She was, according to counsel, in a frightened state.

37) Counsel also questioned the evidence which was held to corroborate PW1's evidence on identification. He argued that the evidence of PW4 could not corroborate PW1's evidence because his evidence was suspect and required corroboration. Further, he took issue with the manner in which the identification parade was conducted by PW5 and the photographs of the parade tendered into evidence as a photo album. Counsel's misgiving with the photo album was that the pictures in it were photocopies rather than originals.

38) The thrust of the arguments by counsel under ground 2 of the appeal was that there was insufficient evidence led at the trial to prove that the firearm used in the fatal shooting was the one Mazao Kashweka borrowed from PW2. It was argued that the evidence led revealed that this particular firearm was returned to PW2 before the deceased was shot.

39) Mr. Kapukutula argued further that there was no conclusive evidence to prove that the deceased died as a consequence of the gunshot. He contended that there was need for a medical expert to certify the cause of death as being the gunshot wound in view of the circumstances of this case. According to counsel, the deceased's death could equally have been as a result of the operation conducted upon him to remove one of the pellets from his body especially that the witnesses were not clear as to the nature and extent of his wounds. Further, the evidence of PW1 on the description of the firearm was not sufficient to prove that it was a firearm capable of causing death. This, he argued, was compounded by the fact that the ballistics report states that the projectile removed from the deceased's body was fired from an unknown firearm.

40) In support of his arguments on the need for a medical report to prove death, counsel referred to various decisions of this Court on the issue as follows: ***Jack Chanda and Kennedy Chanda v The People***[12]; ***Patrick***

Sakala v The People[13], ***Mbomena Moola v The People***[14] and ***Njunga and others v The People***[15].

41) Concluding arguments under ground 2 of the appeal, counsel contended that there is no evidence that the deceased actually died or that he was buried. Consequently, there is a presumption that the deceased is still living because there has not yet been a ten year lapse which would invite the presumption of death

42) In ground 3 of the appeal, counsel set out the provisions of Section 22 of the ***Penal Code*** and the principles relating to common intention and *novus actus interveniens* by reference to our decisions in the cases of ***Mutambo and Five others v The People***[7] and ***Ernest Mwaba and Four others v The People***[16]. He concluded that the questionable evidence of PW1's identification of the assailants and the firearm negated common intention. Further, the operation carried out by Spenser Liyungu on the deceased was sufficient *novus actus interveniens* to bring into doubt the cause of death.

43) Counsel argued further that the only factor which brought the three assailants together was the treatment of Mazao Kashweka's mother. The fact that the Appellant was alleged to have borrowed money from the deceased was in no way a connecting factor between him and Mazao Kashweka as the person alleged to have pulled the trigger. This was re-emphasized by the fact that the firearm was borrowed for purposes of hunting birds and was returned long before the deceased was killed.

44) Counsel argued further that even the evidence that the Appellant allegedly kicked the deceased after he was shot does not prove common intention. He contended that there was no clear evidence in respect of whether or not the deceased was still alive at the time the kicks were administered or how violent they were. Further, the kicking could have been administered for purposes of the Appellant checking to see if the deceased was still alive so that he could render assistance.

45) In regard to ground 4 of the appeal, counsel repeated the arguments advanced in the other grounds of appeal on identification of the assailants.

46) In response ground 1 of the appeal, counsel for the Respondent, Mrs. Chipanta - Mwansa, argued that PW1 and PW4 were not witnesses with an interest to serve or witnesses with a possible bias, therefore, the Learned High Court Judge was on firm ground to convict on their evidence. She contended that her argument was reinforced by the fact that the Appellant neglected to raise the issue of the status of the witnesses in the Court below at the appropriate time being, during cross examination.

47) Counsel went on to argue that the two witnesses fall into the category of witnesses with a possible bias by virtue of their relationship to the deceased. The evidence of such witnesses, she argued, can be relied upon as long as the Court excludes the danger of false implication. She referred to our decisions in the cases of ***Mwambona v The People***[17] and ***George Misupi v The People***[1].

Concluding arguments on the issue, counsel submitted that the record of appeal reveals that there was no evidence led of false implication on the part of the two witnesses and there was sufficient corroborating evidence.

48) In regard to ground 2 of the appeal, Mrs. Chipanta - Mwansa argued that the cause of death being as a consequence of the gunshot wound was not in dispute at the trial Court. That the evidence led shows that the deceased was shot and died from the gunshot wound. Further, the Appellant did not dispute this fact in the Court below by way of raising it as a defence.

49) Counsel argued that this Court has put the law in its proper context in relation to proof of death by use of medical evidence in the cases of ***Mbomena v The People***[14] and ***Kashenda Njunga v The People***[15]. She argued that in this case there was sufficient evidence of the events pointing to the cause of death of the deceased such that the testimonies of laymen could be relied upon.

50) Coming to ground 3 of the appeal, counsel drew our attention to the interpretation we gave to Section 22 in the cases of ***Patrick Sakala v The People***[13], ***Mutambo and Five others v The People*** and ***John Mwansa and Simon Mwansa v the People***[18]. She argued that the facts of the case clearly reveal a common intention by the Appellant and the other two assailants.

51) Lastly, in respect of ground 4 of the appeal which sought to challenge the evidence identifying the Appellant, counsel argued that mistaken identity was eliminated because: the night in issue was a bright night due to the moon; PW1 knew the Appellant and the other assailants; PW1 shouted out the names of the Appellant and other two assailants which shouts were heard by PW4; and, the Appellant was identified by PW1 at the identification parade. That evidence was not challenged during trial and though it is the evidence of a single identifying witness it can be relied upon to convict the Appellant because he was known to the witness in line with our decision in the case of ***Benson Phiri and Sanny***

***Mwaanza v The People*[4]**. In addition, counsel submitted that the Learned High Court Judge examined the demeanor of PW1 and found her to be a credible witness.

52) We were urged to dismiss the appeal.

Consideration and decision by the Court

53) We have considered the record of appeal and arguments by counsel. In determining this appeal, we will deal with grounds 1 and 4 of the appeal together as the issues they raise are similar. Thereafter we shall deal with grounds 2 and 3 in that order.

54) Grounds 1 and 4 of the appeal seek to assail the judgment of the Learned High Court Judge on the ground that the Appellant's conviction was based on the evidence of PW1 and PW4 who were both related to the deceased and as such suspect witnesses with an interest to serve. In relation to PW1, she also allegedly had a history with the Appellant in view of the debt he obtained from the deceased. Their evidence, according to the Appellant, required to be corroborated. Further, the evidence on

identification of the Appellant by the two witnesses was questionable for the same reason.

55) The trial Judge's decision on this issue is at pages 22 and 23 of the record of appeal which state as follows:

55.1 *"... I should state here that although the Defence has not taken issue, the same applies to PW4 who is the brother to the deceased. I wholly acknowledge the case of George Misupi v The People, which has been cited by the Defence, the holding therein and the observation of the Court. I also wish to bring to the fore the more appropriate case of Minkili Mundanga and Another v The People[9] where it was stated that close relatives and associates of victims or accused persons are held as clear cases of witnesses with a bias whose evidence should be treated in the same manner as that of witnesses with their own purpose, to serve. Indeed that is the position at law.*

55.2 *However, I note that the issue of PW1 being a person with an interest of her own to serve is being brought up by the Defence for the first time by way of submissions. This was rather too late in the day. This is an issue which ought to have been put to PW1 as well as PW4 in cross examination. The Supreme Court was emphatic on this subject matter in the case of Yudah Nchepeshi v the People[3] when it held that:*

> *"A Court cannot be called upon to address its mind to the question whether or not a witness falls into the category of a witness whose evidence it is dangerous to accept without corroboration or support unless there is some evidence fit to be left to the jury (in this case the Court)."*

55.3 *In short, the issue of PW1 being a witness with an interest of her own to serve was never at all canvassed by the defence. Therefore it should not arise now. However, even if it was raised, all that it would require is the corroboration of the evidence of PW1 which I shall address in due course as I deal with the second and third issues which takes care of the issue of corroboration . In the view that I have taken, no motive to give false evidence or bias had been established against PW1 so as to categorize her as a witness with an interest to serve. This would also extend to PW4."*

56) The effect of the passages we have reproduced is that the Judge took the view that the contention of PW1 being a suspect witness or witness with a motive to give false or biased evidence should have been raised by the Appellant during her cross examination and not in the final submissions. Since the Appellant failed to raise the issue at the appropriate stage, he could not consider it because the issue had not been established.

57) The Judge's reasoning revealed further that even if the issue had been raised at the appropriate stage, PW1's evidence would have required corroboration which in any event, had been given by the evidence of PW4.

58) To begin with, we wish to dispel the suggestion raised by Mrs. Chipanta-Mwansa's argument that PW1 and PW4 were merely witnesses with a possible bias, whose testimony could be relied upon as long as the court excludes the danger of false implication. What learned counsel's argument implies is this: for witnesses who fall in the category of accomplices, their testimony needs to be corroborated; on the other hand, for witnesses who may only have a possible bias, the court merely needs to exclude the danger of false implication. This argument suggests that the court should approach the testimony of the two categories of witness differently.

59) While the case of ***Mwambona* v *The People***[14] it seems to support the position taken by counsel, the correct position was settled by our decision in the subsequent case of ***George Musupi* v *The People***[1]. Two passages in that case put the position very clearly. In the first passage at page 390 we said:

> *"There is of course a distinction between a witness with a purpose of his own to serve and an accomplice; the accomplice certainly may have such a purpose, but the converse is not*

true – a witness with a purpose of his own to serve is not necessarily an accomplice. But this is an irrelevant distinction; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded. And as ***Lord Hailsham*** *pointed out, the categories are not closed; for instance, today the same principles must be applied to the approach to a witness with a possible bias, such as a relative or an employee"*

60) We further went on to say at page 390 to 391:

"We must comment also on the tendency to use the expression ***'witness with an interest (or purpose) of his own to serve'****. This is perhaps simply a shorthand version of the proper formulation, but it carries with it the danger – and the present may be a case in point – of losing sight of the real issue. This court in* ***Machobane v The People****, and so far as we are aware in all cases in which the matter has been discussed, has been careful to refer to* ***'a witness with a possible interest'*** *or* ***'a witness who may have a purpose of his own to serve'****. And* ***Lord Hailsham*** *in* ***Kilbourne****, in the passage above used the expression* ***'where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence';*** *All these extracts make it clear that the critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence. Once, in the circumstances of the case this is reasonably possible, or in the words of* ***Lord Hailsham 'can reasonably be suggested'*** *the danger of false implication is*

> *present and must be excluded before a conviction can be held to be safe. One does not hold such witnesses to be accomplices; one approaches the evidence of such witnesses in the same way as one approaches that of accomplices".*

61) We re-affirmed this position in the subsequent case of ***Boniface Chanda Chola and Others v The People***[20]. It is important that there must be a reasonable possibility of the existence of a motive to give false evidence before the court can treat the evidence of a witness with a possible bias on the same footing as that of an accomplice. Hence in the more recent case of ***Yokoniya Mwale v The People***[21] we emphasized the point that the fact that witnesses are relatives of the victim should not, of itself, require the court to look for corroboration of their testimony; the circumstances of the case should show that there is a reasonable possibility that the witnesses may have a motive to give false evidence before the court can embark on that approach.

62) What comes out from the two passages is this: whether it be the case of an accomplice or that of a witness in a different category, the court is primarily concerned with

guarding against the danger that such witness might be falsely implicating the accused. Therefore, in either case the court's duty is to ensure that the danger of false implication has been excluded before it can rely on the testimony of such witness. Here we would like to pose and reflect and ask ourselves the question: how does the court satisfy itself that the danger of false implication has been excluded? The first port of call for the court is to examine whether there is other evidence which corroborates, as a matter of strict law, that of the suspect witness. Such evidence might be the testimony of other eye witnesses which is similar to that of the suspect witness; or it might be circumstantial evidence which supports the witness's story.

63) Where, however, such evidence is lacking it is still competent for the court to convict on the uncorroborated testimony of such witness if there are special and compelling grounds. This was the holding in ***Machobane v The People***[22]. In ***Emmanuel Phiri and Others v The***

People[11] we had occasion to explain what the special and compelling grounds are, when we held:

> *"(4) The* ***'something more'*** *must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded, and that it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by* ***'special and compelling grounds'*** *as used in Machobane".*

64) By way of conclusion on the issue, the position, therefore, is this: the testimony of an accomplice, or that of a witness in any other category, if the circumstances of the case disclose a reasonable possibility for a motive to give false evidence, requires to be corroborated. However, if corroboration as a matter of strict law is lacking, the court may still convict on that testimony if there are special and compelling grounds.

65) Both PW1 and PW4 were witnesses with a possible bias because they were both related to the deceased. In the case of PW1, she was also privy to the threats issued by the Appellant against the deceased. This latter point related to PW1 is important because if the deceased had

met his death by some unknown means, PW1 would have suspected the Appellant as the perpetrator in view of the threats. We can therefore say that there was a reasonable possibility for a motive to give false evidence. Since the two witnesses were in this category, as correctly pointed out by counsel for the Appellant, their evidence could not corroborate each other. This, however, is only for purposes of determining whether or not the danger of false implication had been removed. Once the Judge had, by some other evidence found, a compelling ground or determined that they are not falsely implicating the accused, their testimonies could complement each other.

66) In the case with which we are engaged, the Judge would not have been faulted for finding special and compelling grounds in that, although the acrimonious history was only between the deceased and the Appellant, PW1 mentioned two other persons as having participated in the murder of her husband. These two other persons were not involved in the acrimony which the Appellant and deceased had, such that PW1 had no motive

whatsoever to falsely implicate them. In other words, if PW1 had motive to falsely implicate the Appellant as a result of the threats he made against the deceased, why would she drag two other people along with him? This is the special and compelling ground that eliminates the danger of false implication.

67) In addition, there was evidence which sought to eliminate the possibility of false implication by PW1 and PW4 in that one of the persons implicated, Mazao Kashweka, led PW6, (the investigating officer) to PW2 where the firearm used in the offence was recovered. This additional evidence compliments the evidence of both PW1 and PW4 that the Appellant and others committed the offence.

68) Arising from what we have said in the last two preceding paragraphs, once, the Learned High Court Judge had satisfied himself that the danger of false implication had been eliminated from the two fronts mentioned in the two paragraphs, he would have been at liberty to treat the evidence of PW1 and PW4 like that of any other witness who is not in the category they fell. Hence, their evidence

would have been considered as complementing each other.

69) These principles we have set out in the preceding paragraphs are not only applicable in respect of ground 1 of the appeal which challenges the conviction but also ground 4 of the appeal on identification of the Appellant. In the case of the latter, the Appellants contentions are negated further by the Judge's finding:

69.1That PW1's evidence was unquestionable on account of her demeanour, which demeanour only he had opportunity to examine;

69.2 That the possibility of mistaken identity was eliminated by the fact that the night in question was bright due to the moon; and

69.3 The Appellant and other two witnesses were known to PW1 and PW4, due to the fact that the villages they all come from were in close proximity.

70) Our decision in the preceding paragraph is reinforced by the fact that the evidence of PW1 and PW4 was uncontroverted during trial. Further, it negates the Appellant's contest against his identification based on the

identification parade and the photo album complied thereafter.

71) To the extent, therefore, that the Learned High Court Judge found that the evidence of PW1 (and indeed that of PW4) needed to be corroborated, he was on firm ground. However, he fell into grave error when he declined to treat that evidence with caution, as is required, on the ground that the Appellant had raised the issue rather late in the day. We say so for, the following reasons:

71.1 The Judge placed the burden on the Appellant to raise the issue and yet it is not an issue an accused person can raise as a defence. The Judge should have examined the evidence showing category of a witness in the evidence which the prosecution have presented; and

71.2 The fact that PW1 and PW4 were both related to the deceased was never in dispute and came out clearly in their evidence. This fact, in and of itself, put them in the category of witnesses with a possible bias. There was therefore, no need for the Appellant and his co-accused to lead further evidence to prove an already proven fact.

72) Grounds 1 and 4 of the appeal, consequently, fail.

73) The second ground of appeal challenges the Appellant's conviction on the ground that there was no post mortem report to prove the actual death of the deceased and the cause. Counsel for the Appellant argued that there is no evidence proving that the deceased is actually dead or by what means he died.

74) In response, counsel for the Respondent argued that the fact that the deceased is dead and that he died of a gunshot wound had not been disputed by the Appellant. Further, it is not always necessary to produce medical evidence to prove the death of the deceased.

75) We are in agreement with the argument advanced by counsel for the Respondent that it is not always necessary to produce medical evidence to prove the cause of death. In the case of ***Jack Chanda and Kennedy Chanda v The People***[12] referred to us by counsel for the Appellant, we stated this position in the following terms at page 124

> *"Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased"*

Our decision in that case arose from a situation where, the deceased in that case was badly beaten by the two Appellants resulting in a broken jaw and injuries all over her body. The deceased died on the third day while being taken to the hospital and following her death no post mortem was conducted on her body because there was no pathologist to conduct it.

76) On appeal, the Appellants sought to challenge the conviction on the ground that there was no post mortem conducted to establish the cause of death. The argument being that anything could have happened to the deceased between the day she was beaten and the day she was taken to the hospital.

77) In deciding the appeal our reasoning was that the evidence that the Appellants brutally assaulted the deceased was overwhelming. Further, the evidence revealed that from the time the Appellants left the

deceased lying on the ground after the savage assault on her, she was never the same. Therefore, the only reasonable hypothesis to account for the deceased's death is that she died of the injuries inflicted upon her by the Appellants.

78) Applying the test we have set out in the two preceding paragraphs to the case with which we are confronted, we agree with the finding by the Learned High Court Judge that *"... using a fire arm to shoot someone at close range ... is a callous act meant to cause the death of the person being shot or to at least do grievous harm ... it is indeed an act with intent to commit a felony ..."* (See page 195 of the record of appeal). This finding by the Learned High Court Judge, which arose from the evidence of PW1, reveals that the Appellant's co-accused shot the deceased with a firearm at close range. The consequences of such an act are death or grievous harm. The only reasonable hypothesis to account for the deceased's death is that he died as a result of the gunshot. This decision negates the incredible hypothesis by the Appellant that the deceased

might still be alive especially that at trial, there was no dispute that the deceased was actually dead and as a result of the gunshot wounds.

79) In arriving at the foregoing decision we have also considered the argument by the Appellant that there is insufficient evidence as to the type of firearm used in shooting the deceased and dismissed it. The finding by the Learned High Court Judge on this issue was that the nature of the deceased's wounds were consistent with a shotgun. We are inclined to agree with the finding by the Learned High Court Judge in view of the evidence of PW1 which revealed that the deceased's wounds comprised several holes from which blood was oozing. This evidence is consistent with gunshot wounds inflicted by a shotgun which discharges several pellets as the Learned High Court Judge correctly found.

80) The third ground of appeal contests the finding by the Learned High Court Judge that the Appellant and Mazao Kashweka had formed a common intention to commit the offence of murder. The finding arose from the fact that

the evidence revealed that it was Mazao Kashweka and not the Appellant who shot the deceased.

81) Counsel for the Appellant challenged the finding of fact by the Learned High Court Judge on the ground that PW1's evidence was questionable and that there was an intervening event that followed the shooting which could have caused the deceased's death. This was in reference to the fact that the persons who were at the scene of the murder extracted a pellet from the deceased's body. Lastly, there was no common intention that existed between the Appellant and Mazao Kashweka to commit murder.

82) Counsel for the Respondent argued that it was clear from the circumstances of the case that a common intention had been formed. She reiterated that after Mazao Kashweka shot the deceased, the Appellant kicked his body to confirm that he was dead.

83) We have already set out the provisions of Section 22 of the ***Penal Code***. The effect of that section is that it renders all the persons acting in concert in the

commission of an offence liable for the offence committed as long as it was a probable consequence of their coming together. This is the meaning we gave to the section in the case of ***Patrick Sakala v The People***[13] referred to us by counsel for the Respondent when we said the following at page 23

> *"Section 22 of the Penal Code contemplates that liability will attach to a person for the criminal acts of his confederates which will be considered his act also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common purpose or design."*

84) Another important feature of the principle of common intention was set out in the case of ***Mutambo and Five others v The People***[5] that it need not be by express agreement or otherwise pre-meditated. In other words, in proving common intention one need not lead evidence to show that there was agreement by the assailants.

85) The facts of this case show that the Appellant and two other persons stormed the residence of the deceased while one of them was armed with a shotgun. Immediately upon the deceased appearing at the scene of the crime, he was shot by Mazao Kashweka. After the shooting, the Appellant kicked the deceased's body in an effort to confirm that he was indeed dead. Following the

shooting, PW1 called out for help, prompting the Appellant and his confederates to flee from the scene. These facts clearly show a common intention by the Appellant and the two others to commit the murder or do grievous bodily harm to the deceased. The deceased died as a consequence of this misadventure, which death was foreseeable. The Appellant, as the Learned High Court Judge found, is culpable for the murder and was correctly convicted. Ground 3 must also fail.

Conclusion

86) All four grounds of appeal having failed, we dismiss the appeal and in doing so uphold the conviction and sentence by the Court below.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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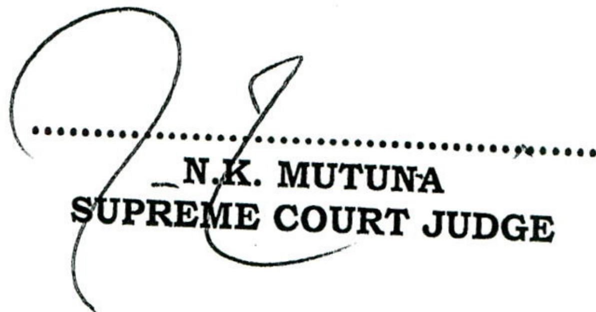
E.M. HAMAUNDU
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE