APPEAL NO.30,31,32,33,34,/2020

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

JACKSON KAMANGA	**1ST APPELLANT**
ALIDE MAPOLONGA	**2ND APPELLANT**
PRISMA MUTINTA	**3RD APPELLANT**
GERSHOM CHANDA	**4TH APPELLANT**
MUTAKILA AMUKOTE	**5TH APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 11th August, 2020 and 19th August, 2020

For the Appellants : Mr. K. Muzenga, Acting Director of Legal Aid

For the State : Mrs M. Bah – Matandala, Deputy Chief State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred:

1. **Liswaniso v The People (1976) ZR 277**
2. **Maketo & 7 others v The People (1979) ZR 23**
3. **Shamwana & 7 others v The People (1985) ZR 41**
4. **Edward Kunda v The People (1971) ZR 99**
5. **Hamfuti v The People (1972) ZR 240**
6. **Lumangwe Wakilaba v The People (1979) ZR 74**
7. **Elias Kunda v The People (1980) ZR 100**
8. **Ambrous Mudenda v The People (1981) ZR 174**
9. **Kasuba v The People (1975) ZR 274**
10. **Tapisha v The People (1973) ZR 222**

This appeal is against conviction.

The appellants were charged with murder. They appeared before the High Court at Ndola, presided over by Chanda, J, on the 2nd November, 2015. They were alleged to have killed Bestone Kapalali in Ndola on 10th January, 2015 .

The facts presented to the court below were these: At about 05:00 hours on 10th January, 2015, the body of the deceased was found in Mushili compound in Ndola. It was in the boot of the car that he used to drive as a taxi, a Toyota Corolla in make. Some parts from the car, such as the radio, were missing.

A witness named Abel Mwansa, PW5, told the court that, earlier around 02:00 hours on 10th January, 2015, he had been

approached, at a taxi rank in Kabushi township, by the 1st appellant, known to him also as Peter Stoga, whom he had met during his time in prison. It was the witness's testimony that the 1st appellant, in the company of three other people, had wanted to book the witness's taxi to some place; that, however, they had failed to reach agreement on the fare; that the 1st appellant had then gone to the taxi driven by the deceased; and that the deceased had left with the 1st appellant and his friends. The witness said that when he heard later in the morning that the deceased had been killed, he went to the nearest police post and reported that the 1st appellant was the last person that he had seen leaving with the deceased.

The arresting officer, Sergeant Simangolwa, PW6, told the court that during the morning of 10th January, 2015, after the body of the deceased had been found, PW5 came to see him. PW5 informed him that the 1st appellant, Jackson Kamanga, was the suspect in the murder. The witness went on to say that he started looking for the 1st appellant, until the latter was apprehended by members of the public. The witness then told the court that, upon being interviewed, the 1st appellant named all the other four appellants as the people that he was with when the offence was

committed. The witness caused all the four other appellants to be apprehended by members of the public.

Another witness, PW4, told the court that on the day that the body of the deceased was discovered, a police officer (PW6) came to ask the witness and his friends whether they knew Jackson Kamanga, (1st appellant). When they said that they knew him, PW6 told them to apprehend him. That is how the witness and his friends went to the place where the 1st appellant was usually found, they apprehended and took him to the police. The witness went on to say that the following day PW6 came to ask them about Prisma Mutinta (3rd appellant) and that the witness and his friends apprehended him as well.

The appellants gave various individual explanations, distancing themselves from the murder. The 1st appellant, in particular, told the court that he mentioned the other appellants to the police not as a confession that they had committed the offence together but that the police, after beating him very much, had asked him to tell them who his friends were so that they could also ask them about the murder. The other appellants, too, alleged that

they were subjected to beatings by the police during the said interviews.

The learned judge found that the 1st appellant had been properly identified by PW6 as the last person whom he had seen in the company of other people leaving with the deceased around 02:00 hours in the latter's taxi. It was the judge's view that between 02:00 hours and about 05:00 hours, when the body was found, there was very little time; and, as such, the circumstantial evidence in this case was strong that it was the 1st appellant and his friends who had killed the deceased.

When it came to the other appellants, the learned judge relied on the arresting officer's testimony that, when they were apprehended, they admitted involvement in the murder and started pointing fingers at each other as regards who took the spare parts. The judge went on to treat the alleged incrimination by the 1st appellant of his co-appellants as evidence against them. In the process, the judge treated the 1st appellant as an accomplice witness against the others; he went on to find that the danger of false implication had been excluded and held that the co-appellants must be the people that PW5 had seen in the company of the 1st

appellant. Regarding the allegations by the appellants that they were beaten in order to extract those admissions, the judge held that the case of **Liswaniso v The People**[1] holds that illegally obtained evidence is admissible and, therefore, it was immaterial that the admissions were obtained through beatings. Consequently, all the appellants were convicted of murder, and sentenced to death.

We must immediately comment on two issues; first, the treatment by the trial court of the 1st appellant as a witness against his co-appellants, the 2nd, 3rd, 4th and 5th appellants. Secondly, the introduction on to the record, through the arresting officer, PW6, of alleged admissions by all the appellants without establishing the voluntariness of the said admissions.

Regarding the first issue, it is clear that the learned trial judge proceeded on the footing that the 1st appellant had given testimony which was incriminating his co-appellants. Hence the judge went to some lengths to treat the 1st appellant as an accomplice witness, and to ensure that the danger of false implication had been excluded. Yet, the record shows that the 1st appellant, at the trial, did not give any testimony that incriminated his co-appellants.

What prompted the learned judge to proceed as he did is a statement made by the arresting officer alleging that the 1st appellant at the police station had admitted the offence and alleged that he had committed the offence together with the co-appellants. As we shall discuss shortly, that statement was admitted in evidence in circumstances where the voluntariness of the alleged admission was not properly established. But, even assuming that the alleged admission was admissible, it could only be defined as an *extra-curial* confession as we defined it in **Maketo & 7 others v The People**[(2)].

The appellants have raised arguments on this issue in their first ground of appeal which is couched as follows:

> **"the learned trial judge erred in law and in fact when he found the 2nd, 3rd, 4th and 5th appellants with a case to answer when the evidence adduced at the close of the prosecution case did not establish a prima facie case against each one of them to the required standard"**

This ground was argued on two limbs. In the first limb, the contention by the appellants is that the judge's ruling on case to answer was defective as he did not make findings of case to answer against each individual appellant, but merely made a collective

ruling that he had found them with a case to answer. We must dismiss this argument right away because the ruling is very clear that all the appellants had been found with a case to answer.

It is, however, the second limb which is on point. On behalf of the appellants, Mr Muzenga, the learned Acting Director of Legal Aid quoted our holding in **Maketo & 7 others v The People**[2]. The holding says:

> **"An extra-curial confession made by one accused person incriminating other co-accused is evidence against himself and not the other persons unless those other persons or any of them adopt the confession and make it their own"**

Counsel also cited the case of **Shamwana & 7 others v The People**[3] where we acknowledged that rule of evidence. He then submitted that, since it was the 1st appellant who led to the apprehension of the rest of the appellants, whatever he said was not evidence against the rest of them. In Mr Muzenga's view, there was thus no evidence against the 2nd, 3rd, 4th and 5th appellants, and, as such, they should have not been found with a case to answer.

From the prosecutions submissions, there is no discernible counter-argument to the rule stated in **Maketo & 7 Others v The People**[2] cited above. Instead the prosecution simply supports the

learned judge's approach that the 1st appellant revealed to the police the names of the other appellants as his confederates in the crime, and that the judge had properly warned himself against the danger of convicting the other appellants on the evidence of the 1st appellant. We must say that this position is untenable in the light of the very clear holding in **Maketo & 7 Ors v The People**[2].

We therefore agree with Mr Muzenga that the 1st appellant's alleged implication, at the police station, of his co-appellants was not evidence against them, unless the alleged admissions on their part, which we are about to delve into, are admissible in evidence; in which case the said admissions could be said to have been some form of adoption by the other appellants of the 1st appellant's confession. We do not, however, agree with Mr Muzenga's submission that, because of the said rule, the judge should have found the 2nd to 5th appellants with no case to answer. This is because, at that stage, the court is not required to delve into the merits of the evidence presented by the prosecution. The merit of the 1st appellant's alleged implication in this case was supposed to be considered at the end of the trial and not at case to answer stage

We now come to the second issue; the admissibility of the alleged admissions by all the appellants. The appellants have argued this issue in their second and third grounds of appeal which are on the need for adherence to the judge's rules and the holding of a trial within a trial. On these, Mr Muzenga raises pertinent points, namely; first, that the arresting officer, PW6, was introducing them as verbal admissions; secondly that PW6, prior to divulging the alleged admissions, did not inform the court that he had warned and cautioned any of the appellants; thirdly, that, upon receiving that evidence, the trial court did not make any inquiries as to the voluntariness of the alleged admissions; and, fourthly, that, even when the issue of voluntariness was raised by the defence, during cross-examination of PW6 and during the appellants' testimonies on oath, the trial judge omitted to hold a trial within a trial.

Applying some decisions on the admissibility of confessions, Mr Muzenga argued that all the above points revealed some glaring misdirection on the part of the trial court warranting the exclusion of the alleged admissions. Coming to the case of **Liswaniso v The People**[1] which the trial court relied on to accept the alleged

admissions, Mr Muzenga argued that that case does not apply to confessions, but to other illegally obtained real evidence.

Again the prosecution supported the learned trial judge, arguing that the case of **Liswaniso v The People**[1] was authority for the acceptance of alleged confessions, notwithstanding evidence of beatings attendant upon the obtaining of such confessions. We must immediately disagree with this proposition and associate ourselves with the submission by Mr Muzenga. Indeed, the case of **Liswaniso v The People**[1] holds that illegally obtained evidence is admissible in our jurisdiction. But, as rightly pointed out by Mr Muzenga, this applies to real evidence and not confessions. As regards confessions and admissions, there are a number of other authorities that lay down rules for their admission into evidence.

All the points raised by Mr Muzenga revolve around the issue of establishing the voluntariness of an accused's confession statement before it can be admitted in evidence, or before a court can rely on it; and use it against him.

As we have said, a line of authorities lay down the rules regarding various aspects of confessions. There is the rule that the question of the voluntariness of an alleged confession is not

restricted to confessions that are written. Thus, in **Edward Kunda v The People**[4], a case which has been cited by the appellants, we held:

> **"The question of voluntariness applies to both written and verbal confessions"**

Then there is the rule that a confession is not properly admissible unless the accused is given the opportunity to object to its production in evidence. To that end, we held in **Hamfuti v The People**[5] as follows:

> **"Whether or not an accused person is represented, a trial court should always, when the point is reached at which a witness is about to depose as to the content of a statement, ask whether the defence has any objection to that evidence being led"**

We applied this holding again in **Lumangwe Wakilaba v The People**[6] and **Elias Kunda v The People**[7]. This rule enables an accused person to raise the issue of voluntariness of his alleged admission or confession at an opportune time; so that once that issue is raised, an inquiry is then conducted and the voluntariness of the alleged admission or confession is either proved or not proved before a statement can be admitted in evidence.

In this case, this approach was not adopted. Instead the arresting officer, PW6, was allowed to divulge alleged admissions by the appellants without any check as to the voluntariness of those admissions. This was an error on the trial court's part.

The point raised by Mr Muzenga that the learned judge should have held a trial within a trial when the issue of voluntariness subsequently arose, either during cross-examination of PW6 or at the defence stage is also, a valid one. In **Lumangwe Wakilaba v The People**[6] we said the following:

> **"Appellant in his unsworn statement from the dock stated that he was beaten up and forced to admit the charge. No trial within a trial was ordered and the learned trial magistrate gave the following reasons:**
>
> > *'when the accused denied that he had made the statement to the police freely and voluntarily after the prosecution had closed its case, it was therefore not possible to have a trial within a trial'*
>
> **In the case of** *Tapisha v The People* **we stated**:
>
> > *'where any question arises as to the voluntariness of a statement or any part of it, including the signature, then because voluntariness is, as a matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as a preliminary one by means of a trial within a trial'*
>
> **It was therefore mandatory that, a preliminary issue of voluntariness having been raised by the appellant, the learned magistrate should have conducted a trial within a trial**

> **notwithstanding that the issue was raised after the close of the prosecution case"**

We followed this holding in **Ambrous Mudenda v The People**[8], an appeal from a decision of the High Court. Clearly, from the foregoing authorities, the trial court, in the instant case, was again in error on this point.

What then is the effect of the two errors? In **Kasuba v The People**[9] we held that failure to inquire whether an accused objects to the admission into evidence of a confession is an irregularity which can be cured if it can be shown that no prejudice has arisen as a result of that failure. In **Tapisha v The People**[10] we similarly held that the failure to conduct a trial within a trial is an irregularity which is curable if there has been no prejudice to the accused. But what constitutes prejudice? In **Tapisha v The People** [10] we had this to say:

> **"Prejudice to an accused person may arise not so much because the content of the alleged confession is placed before the court before a decision on its admissibility has been made, this prejudice would be more serious in a trial before a jury; the major prejudice arises because where a trial within a trial is held an accused person is entitled to give evidence on the issue of voluntariness without exposing himself to the danger that his evidence on that issue will be used in the trial of**

> **general issues. Hence the failure to conduct a trial within a trial may face the accused with a serious dilemma"**

After considering some authorities, we went on to say:

> **"In the present case, had a trial within a trial been conducted and the alleged confession excluded as a result, the remainder of the evidence was nevertheless of such weight that, if left unanswered, it would unquestionably have resulted in a conviction. The appellant cannot therefore argue that he was placed in the position where he was obliged to go into the witness box in order to meet the allegation that he had made a voluntary confession, when without the irregularity he might have elected not to give evidence on the general issues"**

The *rationale* here is that an accused person has a right not to give testimony in his defence. However, when a confession is allowed in evidence without a trial within a trial, that right is interfered with because the accused is compelled to go into the witness box to show that the confession was not a voluntary one; by so doing, however, he exposes himself to cross-examination on the general issues, which he could have avoided by remaining silent had his confession statement been excluded earlier. Hence, therein lies the prejudice.

In the instant case such prejudice was very apparent because the only reason that the 2nd to 5th appellants opted to go into the witness box was to defend themselves against the alleged admissions. And as it turned out they were cross-examined on general issues such as their friendship and dealings with the 1st appellant. Without those admissions, they might as well have remained silent because even the admission by the 1st appellant implicating them would have been excluded, leaving the whole case without any evidence pointing at the 2nd to the 5th appellants. So, in our view, the errors in this case were not curable. The alleged admissions ought to be excluded.

As we have said, once the admissions are excluded, the 1st appellant's alleged admission and implication of the other appellants ceases to be operational: And because the admissions of the other appellants are also excluded, there remains absolutely no evidence that links the 2nd, 3rd, 4th and 5th appellants to the offence. Therefore, they are entitled to be acquitted.

The 1st appellant, on the other hand, is in a different position. There was evidence from PW5 that the 1st appellant was the last person to be seen with the deceased, around 02:00 hours on the fateful

morning. That leads us to the fourth ground of appeal. This ground states:

> **"The learned trial judge erred in law and in fact when he convicted the 1st appellant for the subject offence when the circumstantial evidence had not taken the case outside the realm of conjecture in order to attain such a degree of cogency so as to permit only an inference of guilty"**

In this ground the 1st appellant has dwelt on what he termed inconsistencies in the testimony of PW5. He points out, for example, that, at some point, PW5 said that he did not know where a place called Kansengu was (a place to which the 1st appellant had wanted to be taken), and yet later he even explained that the road to Kansengu was not good, an indication that he knew where it was. Again the 1st appellant points out that PW5 said that he left the taxi rank and went home: And that around 05:00 hours, while at home, he received the news of the death of the deceased. The 1st appellant notes, however, that PW5, when later asked as to the time he left the taxi rank, replied that it was around 06:00 hours. The 1st appellant argues that, by these inconsistencies, PW5 was shown to be an unreliable witness.

We must say that PW5's testimony on the material issues was very straightforward and unwavering. The inconsistencies pointed

out by the 1st appellant are very minor; and in some cases, such as the issue of the place called Kansengu, it appears that it is the translation which seems to bring out what seems to be an inconsistency.

The 1st appellant finally submits that a period of three hours between 02:00 hours to 05:00 hours was long enough for the deceased to have been killed by other people on his way back from dropping the 1st appellant; so that it cannot be said that the inference of guilty was the only one that could be drawn in the circumstances.

The prosecution have submitted that at around 02:00 hours traffic is not expected to be much. They have also submitted that PW5 said that business was particularly difficult that night.

The court in this case found that the deceased was found barely three hours after the 1st appellant had hired him; and held that this was too short a period to allow for any other inference to be drawn.

Our view is this: When circumstantial evidence is in issue, the prevailing circumstances must be carefully examined. In this case, we can safely say that there is generally a distinction between

daylight and night time, especially the hour at which the death of the deceased occurred. Whilst, during the day, there is generally a lot of activity, such that in a space of about three hours a person running a taxi business could be hired several times, the same cannot be said of the night, particularly such early hours as 02:00 hours. It is common knowledge that at that hour there are very few people that are up and about. In this case sight must not be lost also of the fact that 05:00 hours was only the time that the deceased's body and motor vehicle were found. This means that the time which is in contemplation here is for much less than three hours. Therefore considering such duration of time, and the odd hour at which the 1st appellant hired the deceased, there is no room for any inference other than that it was the appellant and the people that he jumped with in the taxi who killed the deceased. The trial judge was, therefore, on firm ground when he so held. Consequently, we find no merit in the appeal as regards the 1st appellant.

The net result is that we allow the appeal with respect to the 2nd, 3rd, 4th and 5th appellants. For them, we quash the conviction

and sentence; they now stand acquitted. As for the 1st appellant, however, his appeal is dismissed.

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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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J. Chinyama
SUPREME COURT JUDGE