APPEAL NO.112,163,164/2020

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

BETWEEN:

MICHAEL SINGOGO	**1ST APPELLANT**
YOTAM MBEWE	**2ND APPELLANT**
FREDERICK BANDA	**3RD APPELLANT**
V	
THE PEOPLE	**RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 11th August, 2020 and 20th August, 2020

For the Appellants : Mr P. Chavula, Senior Legal Aid Counsel

For the State : Mrs Tembo-Weza, State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Peter Yotamu Hameenda v The People (1977) ZR 184**
2. **Martin Mupeta and John Musonda Chola v The People, SCZ/137/2012**
3. **George Nswana v The People (1988-1989) ZR 174**

In this appeal we must point out that the purported 3rd appellant is not an appellant at all. He was a co-accused during trial in the court below. However, he was acquitted of the charge. We must point out further that although the appeal was of the 1st and 2nd appellants, it turned out, when the matter came for hearing, that the 1st appellant has since received a Presidential pardon; and was not desirous of pursuing his appeal. We therefore deemed his appeal to have been abandoned. We dismissed it. In the end, this appeal is with respect to the 2nd appellant only; and is argued on the issue of possession of recently stolen property.

The case before the trial court was that on the 22nd June 2014, the deceased, Ester Mwenda, was found to have been killed in Katete by unknown people. Two of her phones were also found to be missing. The prosecution alleged that one of those phones was traced to the 2nd appellant; and that that is why the 2nd appellant was charged, together with the two others, with one count of murder and another of aggravated robbery.

The testimony that was adverse to the 2nd appellant was from the fiancé of the deceased, PW4, and the arresting officer, PW8. PW4 told the court that, on some day after the murder, the police told him that they had traced the deceased's other phone, which

had a blue tooth function and operated by touch-screen. Together with the police, he went to Chadiza. There, the police called a number which they had traced. It was answered by the 2nd appellant. According to PW4, they met the 2nd appellant and found that the phone on which he had answered the call was not the one that belonged to the deceased. The 2nd appellant was asked whether he had used a touch-screen phone at some point and he responded that he had. When he was asked where that phone was, the 2nd appellant replied that it was at his uncle's place. PW4 said that that is where they went and found it.

The arresting officer's testimony was that he had requested a printout of information regarding the activities on the deceased's phones. He told the court that on the activities for the touch-screen phone a certain number, 0975-085374, appeared. When he called it, the person who answered was the 2nd appellant. According to PW8, he met the 2nd appellant, in the company of PW4. PW8 said that the 2nd appellant said that he had given the phone to his uncle but that, when they went to retrieve the phone, it was found hidden in a shop at the uncle's place.

In his defence, the 2nd appellant said that he had once used his uncle's phone before. He said that when the police approached

him over the same phone, he took them to his uncle's house where the phone was recovered.

The learned trial judge held that the 2nd appellant was linked to the murder and aggravated robbery because he led the police to the recovery of the said phone which, according to the judge, was in the 2nd appellant's uncle's possession and was given to the police by the uncle's wife. We must state here that, earlier in her judgment, the learned judge said that it was not clear who had used the number 0975-085374.

On behalf of the appellant two arguments were advanced: The first is that it had clearly been established that the phone was in the possession of the 2nd appellant's uncle and that the 2nd appellant had told the police that he had merely used it at one point. Learned counsel, Mr Chavula, pointed out that the police, however, did not interview or take any statement from the 2nd appellant's uncle. Counsel, therefore, argued that this was a dereliction of duty on the part of the police which, on the authority of the case of **Peter Yotamu Hameenda v The People**[1], should be resolved in favour of the 2nd appellant because, by that dereliction, the 2nd appellant was prejudiced by the absence of evidence from his uncle which would have been favourable to him.

The second argument is based on our decision in the case of **Martin Mupeta and John Musonda Chola v The People**[2]. In that case, we explained that for any period, within which a person comes into possession of stolen property, to be said to be recent it will depend on the nature of the article and the ease with which such article changes hands. In the case of a cell phone, we said that one month would be long while seven days would be recent.

In view of that holding, it was argued for the 2nd appellant that, in his case, he only used the phone fifteen days after the murder and robbery, meaning that his alleged possession thereof could not be said to have been recent.

We were urged to allow the appeal.

The State's only response was that, because the 2nd appellant led the police to the recovery of the phone from his uncle, the only inference that could be drawn was that he participated in the murder and theft. The State supported the learned Judge's holding on this point.

We think that the defence, the prosecution and the court misunderstood the testimony of the arresting officer (PW8). He did not say that the phone was recovered from the 2nd appellant's uncle, or indeed the uncle's wife as stated by the trial judge. The

arresting officer's testimony was that the 2nd appellant led the police to his uncle's place, but that the phone was recovered from a shop where the appellant had hidden it. The shop was at his uncle's place. If the phone had been hidden by the uncle, the 2nd appellant would not have been able to lead the police to where it was hidden. The implication, therefore, is that the 2nd appellant is the one who hid it there. In those circumstances, it cannot be said that the phone was recovered from the 2nd appellant's uncle. And this explains why the police did not interview the uncle.

PW8's testimony on this issue was supported by his earlier testimony that the activity report on the phone showed that, although the number, 0971-726404, had earlier used the phone, there was a subsequent number, 0975-085374, appearing on the report; and that when the police called it, the person who responded was the 2nd appellant. So it was not correct for the learned judge to say that it was not clear who had used the number 0975-085374.

With regard to the second argument, we held in the case of **George Nswana v The People**[3] as follows:

> **"where suspicious features surround the case that indicate that the appellant cannot reasonably claim to have been in innocent possession, the question remains whether the**

appellant, not being in innocent possession, was the thief or a guilty receiver or retainer"

In this case, the fact that the 2nd appellant hid the phone at a shop at his uncle's place shows that he was not in innocent possession thereof. Given that this was only fifteen days after the murder and theft of the phone, and that no other explanation as to how he could have come into possession of the phone is easily discernible, the only inference that could be drawn in the circumstances was that the 2nd appellant participated in the murder of the deceased, and the theft of the phones; and not that he was merely a guilty receiver or retainer.

We consequently find no merit in this appeal. We dismiss it.

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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