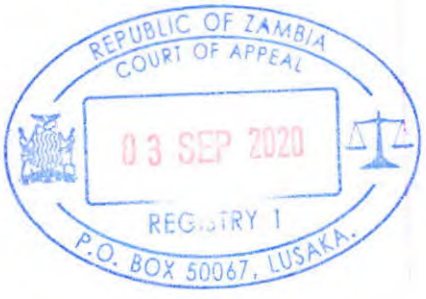
FILE COPY.

IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 135-136/2019**

HOLDEN AT NDOLA

(Criminal Jurisdiction**)**

BETWEEN:



MICHAEL CHOONYA **1ST APPELLANT**

GUNDU MULEYA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: KONDOLO SC, MAKUNGU, SIAVWAPA JJA

On 22nd May 2020 and on 3rd September, 2020

For the Appellants : Mr. S Mweemba of Messrs Mweemba & Switz Associates

For the Respondents : Mrs. S. C. Kachaka Senior State Advocate – National Prosecution Authority

---

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Donald Fumbelo v The People SCZ/476/2013**
2. **Davis Chiyengwa Mangoma v The People SCZ/217/2015**
3. **Dorothy Mutale & Richard Phiri v The People (1997) SJ 51 (SC)**
4. **R v Mumenga [1954] High Court Northern Rhodesia**
5. **James Mulenga v The People CAZ Appeal No.139/2018;**
6. **Peter Yotamu Hameenda v The People (1977) ZR 184 (SC)**
7. **Mushemi v The People (1982) ZR 71**

8. **Malawo v Bulk Carriers of Zambia Limited (1989) ZR 185**
9. **Yokoniya Mwale v The People SCZ/640/2013**
10. **Freeman Chilao Chipulu v The People CAZ Appeal No.37-38/2016**
11. **Shawaza Fawaz and Prosper Chelelwa v The People (1995) S.J. (S.C)**
12. **Yoani Manaongo v The People (1981) ZR 152 (S.C)**

LEGISLATION REFERRED TO:

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

OTHER TEXT REFERRED TO

1. **Archbold: Pleadings, Evidence and Practice, 43rd Edition, Sweet & Maxwell,**

The Appellants A1 Michael Choonya and A2 Gundu Muleya stood jointly charged with the offence of murder contrary to **section 200 of the Penal Code**. They were alleged to have murdered Pride Hanzakale on 30th July, 2018, in Mazabuka in the Southern Province of the Republic of Zambia. They were found guilty of murder without extenuating circumstances and sentenced to death by Mr. Justice Kenneth Mulife.

The brief facts are that on 29th July, 2018 there was a football match at Chikondola ground within Upper Kaleya area in Chikankata District between Chikondola and Nadezwe. The football match started around 16:00hours and while the match

was in play, Oswald Chiloya (DW4) a player from the Nadezwe team, sustained an injury.

As can be gathered from the prosecution's evidence, the reason behind the fight was that the deceased was beaten up by the two Appellants as they felt that he was disrupting the football match which was almost coming to an end with their team, Nadezwe, leading by 1 goal to nil. They both said they were on good terms with the deceased and the three of them supported the same team and therefore had no reason to beat the deceased.

PW1, Vanny Cholola, a spectator at the football match, testified that as the game progressed, a player suffered an injury and fell down and a man named Pride rushed onto the pitch to help him. Two other men, one known as Teacher (A2) and the other named Mike (A1) followed Pride and Teacher told him that he was disturbing the game. The two men then attacked Pride with fists and kicks and Pride fainted. PW2, Victor Kandunda's evidence was similar, save that he said he only saw A2 beating the deceased.

Unfortunately, the deceased died the following day 30th July, 2018. PW3 Milandu Hansakali testified that the night before, the deceased told him that he had been beaten by A1 and A2 at the football match earlier that day and again at the shops that same evening. PW4 Teggy Mweene testified that, shortly before he died,

he told her that A1 and A2 had beaten him the day before. Constable Luckson Lombanya (PW5) testified that the post mortem report indicated that the deceased had been beaten and he arrested both Appellants who denied the charge.

A1 Michael Choonya, and A2 Gundu Muleya's evidence was similar. They testified that they did not beat the deceased but only went onto the pitch to attend to the injured player and they carried him off the pitch. A1 stated that after the game, the deceased travelled with them in the same truck as the players and some supporters and the deceased was even singing songs and pumping water for the players. That PW1 and PW2 were lying because they were on good terms with the deceased and they were supporting the same team and therefore had no reason to beat him.

The Appellants called 4 witnesses who gave similar evidence vouching for both Appellants saying that they did not beat the deceased but only took the injured player off the pitch and attended to him. They further stated that the deceased was in good health after the game and they travelled with him in the same truck and he was the one pumping water for the players.

In his judgement, Mulife J, found a number of undisputed facts, namely;

i) *The two Appellants, PW1 and PW2 were present during the match on 29th July, 2018;*

ii) *That in the course of the match DW4 was injured and the two Appellants went onto the Pitch;*

iii) *The deceased died on 30th July, 2018 as a result of severe head injuries; and*

iv) *The beating was an unlawful act without justification and shrouded with malice aforethought.*

The trial Court noted that PW1 and PW2 were the Prosecution's key witnesses who testified that they saw the Appellants beat the deceased on the football pitch. The Court noted that PW1 saw both the Appellants beat the deceased whilst PW2 only saw A2 beat him but found that, that fact did not lower their credibility with regard to the involvement of the two Appellants in the beating because they both testified to the events not in dispute, thus making them credible witnesses.

The learned trial Judge further held that there was no possibility of mistaken identity because the events took place during the day. He stated that he had found no evidence on record suggesting that the two witnesses watched the game from the same position and which could explain why PW2 only saw A2 beat the

deceased. He further observed that PW1 and PW2 were strangers to each other and there was thus no basis for suspecting that they had concocted their stories to falsely implicate both Appellants.

With regard to the evidence of PW3 and PW4, the lower Court found that the statement made by the deceased to them that he was beaten at the match and the shops constituted *res gestae*. He was alive to the fact that the evidence of witnesses with an interest to serve ought to be corroborated and as such, found that the evidence of PW3 and PW4 was corroborated by that of PW1 and PW2.

The trial Judge considered the defence advanced by the two Appellants and found that it was an afterthought because it was contradicted by credible independent evidence. Lastly, the Judge found that the defence witnesses all had an interest to serve because they belonged to the same football team as the Appellants. After analysing the evidence, the trial Judge arrived at the conclusion that the Appellants not only beat the deceased at the football match but also at the shops. He subsequently convicted them of murder and sentenced them to death.

Dissatisfied with the Judgment, the Appellants advanced 7 grounds of appeal as follows;

1. **The trial court erred in law and fact when it held that the Appellants' denial of ever attacking the deceased was an afterthought.**
2. **The trial court misdirected itself both in law and fact when it held that the Appellants' witnesses were persons with an interest to serve because they all belonged to one team as the Appellants', when there was evidence that the deceased belonged to the same team as the Appellants.**
3. **The trial court misdirected itself both in law and fact when it made an inference that the reason for the attack was that the deceased attempted to interfere with an occasion which could have served as a delaying tactic for the Appellants' football team.**
4. **The trial court misdirected itself both in law and fact when it held that the statements made by the deceased to PW3 and PW4 qualified to be res gestae.**
5. **The trial court misdirected itself both in law and fact when it failed to find that there was dereliction of duty on the part of the prosecution by failing to interview and or call any of the players present during the match.**

6. **The trial court misdirected itself both in law and fact when it held that PW1 and PW2 were credible witnesses when their credibility was impeached in court.**
7. **The trial court erred in law and fact when it relied on the evidence of PW3 and PW4 who were suspect witnesses.**

The Appellants argued grounds one and two together: That in dismissing the defence of the two Appellants as an afterthought, the learned trial Judge only analysed the evidence of the prosecution witnesses and omitted to do the same to the defence evidence. The Appellants testimony that they were on good terms with the deceased was brought up at the earliest opportunity and could not be said to have been an afterthought. It was further argued that the Court erred by ignoring the detailed evidence of DW3 to DW5 purely on the basis that they were witnesses with a possible interest to serve.

The Respondent conceded to both arguments and in respect of the latter cited the case of **Donald Fumbelo v The People** [1] and in respect of the former, the case of **Davis Chiyengwa Mangoma v The People** [2]. Grounds one and two therefore succeed.

Under ground three learned Counsel for the Appellants submitted that there was absolutely no evidence on record to support the trial Judge's finding that the Appellants beat up the deceased because he was denying the duo's football team of a delaying tactic that resulted from the injury of DW4. It was pointed out that if they wanted to delay the game, the Appellants would have just taken a long time to go on the pitch to assist the injured player. Further, that there was no evidence on record that the duo beat the deceased at the shops. Counsel concluded that the trial Judge should have opted to infer that the Appellants had no reason to beat the deceased rather than make an inference that was not supported by evidence. The case of **Dorothy Mutale & Richard Phiri v The People** [3]was cited.

Counsel for the Respondents responded by saying that the trial Judge arrived at the correct inference after evaluating the evidence of PW1 and PW2 which was that there was confusion on the pitch as people were eager to see the game continue and the deceased seemed to be the one delaying the game and that's what could have led the Appellants to beat up the deceased. It was opined that in the absence of direct evidence, a court can draw inferences or make conclusions by applying logic to the evidence presented in court.

The Respondent equally cited the case of **Dorothy Mutale & Richard Phiri v The People** [3] in which it was stated that; **where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference (emphasis ours).** It was submitted that the evidence of PW1 and PW2 stating that they saw the Appellants beat the deceased coupled with the evidence of PW3 and PW4 of the deceased's dying declaration was sufficient to secure a conviction.

We note that the Respondents argument is the complete opposite of the trial Judge's finding because the Judge said the deceased was probably beaten because he was helping to get the game to resume quickly whilst the Respondent states that he was beaten because he was delaying the game. At pages 14 and 22 of the Record of Appeal, PW1 said the Appellants accused the deceased of disturbing the game and causing confusion and as shown on page 28 of the Record this was repeated by PW2 who said that the appellants told the deceased that he was causing confusion as that was the time to delay the match.

In any event, the trial Judge's conclusion was therefore based on the evidence of PW2. The argument that the Appellants could have delayed the game by just delaying to go onto the pitch is weak because delaying the game was not totally dependent on them as the deceased could have asked for help to get the injured player off the pitch. The trial Judge correctly inferred that the Appellants beat the deceased because he was interfering with the Appellants team's opportunity to delay the game. The inference arrived at by the Judge was strengthened by his finding that the Appellants did in fact beat the deceased. Ground three is therefore dismissed.

Under ground four, learned Counsel for the Appellant forcefully argued that the trial Judge erred when he held that the statement made by the deceased to PW3 and PW4 qualified as *res gestae* and proceeded to admit the evidence on that basis. The Respondent's Counsel conceded that the trial Judge had erred because too much time had elapsed between the occurrence of the alleged beating and the communication of the statement to PW3 and PW4 by the deceased such that the said statement could not fall within the *res gestae* exception to the rule against hearsay.

Counsel however opined that, the deceased's statement to PW3 and PW4 qualified to be admitted into evidence as a dying

declaration. He distinguished *res gestae* from a dying declaration and cited the case of **R v Mumenga** (4)

We note that Counsel for the Appellant did not address the issue of whether or not the deceased's statement could be admitted as a dying declaration. We addressed the issue of dying declarations in the case of **James Mulenga v The People** (5)**;**

> ***"Notwithstanding, we agree with Ms. Mumba's submission that a statement by a deceased person, on the circumstances leading to her death, though not contemporaneous to the act causing death, can be admissible as a dying declaration. According to Eyre C.B. in the case of R v Woodcock, cited with approval in R v Perry, at 701, dying declarations are admissible because:***
>
> > ***"The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at a point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so***

solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice"

Further, the editors of **Archbold: Pleading, Evidence and Practice, 43rd Edition, paragraph 11-17,** have pointed out that dying declarations are admissible where the judge is satisfied that the deceased was conscious of being in a dying state at the time they were made and she was aware of her awful situation.

In *casu*, PW3 and PW4 said they found the deceased in a very weak state such that they had to go and hire a ox cart to rush him to hospital. It was during this period that he told them that he had been beaten by the two Appellants and he died within an hour of naming them. The Appellants both testified that they were on good terms with the deceased meaning that, whilst in the throes of death, there would have been no basis for the deceased to falsely implicate them.

As we held in **James Mulenga v The People (supra)**, we so hold *in casu* that properly directing himself, the trial Judge would still have admitted the statement as a dying declaration. We accept that the deceased's statement that he was assaulted by the

Appellants, though not made contemporaneous to the attack, was admissible as a dying declaration. We therefore find no merit in this ground of appeal.

Under ground five, the Appellant advanced the argument that the prosecution neglected to call any of the football players who were actually on the pitch as witnesses. The argument went further and alleged that the referee DW3 was interviewed by the police but was not called as a prosecution witness because he did not have the evidence the police were looking for. The police were accused of targeting their investigation to find evidence on which to convict the Appellants and not to help the court arrive at a just decision.

It was submitted that the failure to carry out extensive investigations prejudiced the Appellants and the Prosecution had not adduced any overwhelming evidence to offset the prejudice suffered by the Appellants. This was married to their argument under ground one and Counsel submitted that the conviction should be quashed on this score. They referred to the case of **Peter Yotamu Hameenda v The People** (6)

The Respondent's Counsel submitted that dereliction of duty did not arise in this case because there was no need to call any of

the football players as the Prosecution had called two independent witnesses who were present during the match and witnessed the fight, and who proved credible and steadfast during cross examination. That in any event, the defence managed to call the said players as their own witnesses and had not shown how they suffered prejudice in that regard.

We agree with Counsel for the Respondent that the defence was not prejudiced at all because they called the same witnesses whom they felt should have been called by the Prosecution. Ground five consequently fails.

In ground 6, the Appellants' main argument was that the trial Judge preferred the evidence of the two prosecution witnesses against the evidence of the two Appellants and their four witnesses. It was submitted that the Judge's finding was contrary to the holding in **Mushemi Mushemi v The People** [7] in which it was held that;

> ***"The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgement of the trial court faced with such conflicting evidence should show on the face of it why a witness***

who has been seriously contradicted by others is believed in preference to those others."

Counsel pointed out that the evidence of PW1 and PW2 was lacking in many respects such as the fact that they were both unable to state which part of the deceased's body was beaten by the Appellants, their departure from the football ground without following up what happened to the deceased after he fainted and their failure to report the matter to the police shortly after the incident. That had the trial Judge properly assessed the opposing versions of evidence given by the defence and the prosecution, he would not have found the evidence of PW1 and PW2 as being credible and would not have relied on it to convict the Appellants. That on the strength of **Malawo v Bulk Carriers of Zambia Limited** [8], this court has power to interfere with the trial Judge's findings on the credibility of PW1 and PW2 and quash the conviction.

The Respondent's stance on ground 6 was that the evidence of PW1 and PW2 did not conflict simply because PW1 saw both Appellants beating the deceased whilst PW2 only saw A2 beat him. The two witnesses were standing at different positions and testified as to what they perceived. It was submitted that the Judge

analysed the Prosecution's and the Defence's evidence evenly but found the evidence of PW1 and PW2 more credible because it was the only independent evidence.

The Respondent's Counsel further submitted that even though it was conceded that the trial Judge had erred when he dismissed the Appellant's evidence as an afterthought as well as the testimonies of their witnesses for being suspect witnesses, the Court also stated that the evidence of PW1 and PW2 was corroborated by the deceased's dying declaration made to PW3 and PW4. That the trial Judge therefore did not assess the evidence of PW1 and PW2 in isolation and the conviction should be sustained.

As submitted by both parties, we agree that the learned trial Judge made some glaring errors, such as holding that the defence was an afterthought; that the defence witnesses were suspect witnesses just because they were all friends of the Appellants; and, that the deceased's statement to PW3 and PW4 was *res gestae.*

We do, however agree with the Respondent's submission that PW1 and PW2 gave unwavering evidence which withstood the test of cross examination. The shortcomings highlighted in the Appellants' Counsel's submissions were no shortcomings at all and most of all, PW1 and PW2 were unknown to each other and

had no relationship with the Appellants, the Deceased, the football players, the referee nor with PW3 and PW4. The dying declaration by the deceased to PW3 and PW4 corroborated the evidence of PW1 and PW2. We note that the defence did not produce an independent witness and on the evidence before the trial Judge, we cannot fault him for believing the prosecution witnesses over the defence witnesses. Ground six therefore fails.

Ground seven was argued by the Appellants' Counsel to the effect that PW3 and PW4 were suspect witnesses because they were relatives of the deceased and because PW3, in particular was the last person to be seen with the deceased and his conduct at the deceased's house was suspicious. Whilst he said he found the deceased's children at home, PW4 said they found nobody at home. That the trial Court should have excluded the evidence of PW3 and PW4 instead of accepting it as having been corroborated by the evidence of PW1 and PW2 which was so unreliable that the Court should not have relied on it.

Counsel for the Respondent submitted that PW3 and PW4 could not be considered as suspect witnesses simply because they were related to the deceased. Something more was required to have them classified as suspect witnesses and, in that regard, the case

of **Yokoniya Mwale v The People** [9] was cited. It was further argued that there was no evidence establishing that PW3 was the last person seen with the deceased and further that there was no evidence of ill motive against the deceased by PW3.

We addressed the law regarding suspect witnesses in the case of **Freeman Chilao Chipulu v The People**[10] in which we said the following;

> ***"The consideration by courts in respect of witnesses with a possible interest or purpose of their own to serve is whether because of the particular category of persons they fall into or circumstances of the case, the witnesses may have a motive to give false testimony. We refer to the case of Misupi V. The People (1978) ZR 271 in which the Supreme Court held that***
>
> > ***"The tendency to use the expression, 'witness' with an interest to serve or (purpose) carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or 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, he may have a motive to give false evidence"

We are of the view that the mere fact that a witness is a relative does not entail that he or she must be regarded as a suspect. From the evidence adduced we do not see any motive by PW3 and PW4 to give false testimony against the appellant. In the case of Boniface Chanda Chola vs. The People (1988/89) ZR 163 the Supreme Court held that;

"....the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and must be excluded before a conviction can be held to be safe....."

It is therefore evident that ground seven is misconceived and is consequently dismissed.

It was in conclusion submitted by Counsel for the Appellants that their convictions should be quashed because the prosecution had failed to prove its case to the required standard and the cases of **Shawaza Fawaz and Prosper Chelelwa v The People** [11] and **Yoani Manaongo v The People** [12] were cited. It was further submitted that according to PW1 and PW2 the fight between the Appellants and the deceased arose as a result of confusion on the pitch which did not signify an intention to commit murder. That the Appellants did, however, commit an unlawful act by beating the deceased person thereby causing his death. The Respondent prayed that if this Court was not satisfied that the intention to kill had been proved, then the Appellants be convicted of manslaughter.

The Respondent on the other hand concluded that the appeal be dismissed.

Having dismissed the majority of the grounds of appeal, we accept that the Appellants did indeed cause the death of the deceased. All that falls to be determined is whether the Appellants intended to kill the deceased or whether there was a mere unlawful act on their justifying a conviction on a reduced charge of manslaughter.

We have considered the Appellants argument on this point as well as the alternative argument by the Prosecution that should we hold the view that *malice aforethought* (the intention to kill) was not proved, the Appellants should be convicted of manslaughter because they unlawfully killed the deceased.

The offences of manslaughter and murder are defined by **Sections 199 and 200 of the Penal Code** respectively and the definition of malice aforethought is found in **Section 204** as follows;

> ***199. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "man-slaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.***
>
> ***200. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.***

204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

The Judge accepted the evidence of PW1 and PW2 that A1 and A2 assaulted the deceased on the football pitch the day before he died. PW1 testified that he saw both A1 and A2 beating the deceased with fists and kicks (see page 15 of the record of appeal). PW2 testified that he saw the deceased fall to the ground after being beaten by A2 (page 29 of the record of appeal). We have no

reason to interfere with the learned trial Judge's finding that both A1 and A2 assaulted the deceased.

The Post Mortem Report at page 186 of the record of appeal indicates the cause of death as severe head injuries, the details of which include the following;

1. Hematoma on occipital area.
2. Hematoma in subdural espace.
3. Bruises on the face with blood from nose.
4. Mobile right upper incisive tooth.
5. Blood in the mouth.
6. Cerebral Haemorrhage on both ventricle.

This corroborates the evidence of PW1 that he saw the Appellants punching and kicking the deceased. Punching and kicking a person on the head is an act which could probably cause the death of or grievous harm to some person and according to **Section 204**, such an act amounts to *malice aforethought* although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused, or by a wish that it may not be caused. The assault visited on the deceased by the two Appellants falls squarely within the definition of murder as the Prosecution proved malice aforethought beyond reasonable doubt.

The conviction of murder with no extenuating circumstances is upheld and the sentences of death meted on A1 Michael Choonya and A2 Gundu Muleya are upheld.

.....

M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

M.J. SIAVWAPA
COURT OF APPEAL JUDGE