IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 144/2019
HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

GEORGE CHIBENDA MUKAAMONI

VS

THE PEOPLE

Mchenga DJP, Chishimba, and Majula, JJA
On 20th May 2020 and 26th August, 2020

For the Appellant: *Mr. E. Mazyopa – Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent: **Mrs.** *S. C. Kachaka – Senior State Advocate, National Prosecution Authority.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Simon Malambo Choka vs The People (1978) ZR 243*
2. *Fawaz and Chalwe vs The People (1995 – 1997) ZR 3*
3. *Muwowo vs The People (1965) ZR 91*
4. *Benson Phiri & Another vs The People (SCZ Judgment No 25 of 2002)*
5. *George Musupi vs The People (19 78) ZR 271*
6. *Muuuma Kambanja Situna vs The People (1982) ZR 155 (SC)*

7. *Mwansa Mushala vs The People (1978) ZR 58*
8. *Phiri vs The People (2002) ZR 107*
9. *R vs Balding (1852)2 Den CR 120*
10. *Chitalu Musonda vs The People SCZ Appeal No. 38 of 2014*
11. *Yokoniya Mwale vs The People SCJ, Appeal No. 285 of 2014*
12. *Bwalya vs The People (1975) Z.R. 125 (S.C.)*
13. *Simusokwe vs The People (SCZ Judgment No 15 of 2002)*

Legislation referred to:

1. The Riii1 Code, Chapter 87 of the Laws of Zambia

1.0 Introduction

1.1 George Chibenda Mukaamoni (the appellant herein) was on 25th March 2019, arraigned before the High Court (before Mulife J.) charged with the offence of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The appellant denied the charge and the matter proceeded to trial.

2.0 Evidence before the trial court

2.1 The evidence that was adduced on behalf of the prosecution in the court below was solicited from the three witnesses. The undisputed evidence from Harold Munzuba was that on the material day he was with Kizwell Katanga Milimo (the deceased) at a tavern in Chikwato area drinking alcohol. The appellant who was in the company of his brother Baya Chibenda went to where they were seated and got their beer.

He then drunk-some and poured the remainder on their heads and challenged them to do whatever they wanted. A fight broke out. It was however separated by the owner of the bar by the name of Effie who also told the appellant and his brother to leave the place.

2.2 A few minutes later, as the deceased and Harold were walking home, they were attacked by the appellant and his brother. According to Harold, he saw the appellant pull out a knife which he then used to stab the deceased in the back protruding to the chest. The deceased cried, "Mother!" and then fell to the ground.

2.3 In the course of the fracas, the appellant tried to stab Harold with a knife. He was however kicked in the chest and in the process ended up piercing his thigh. Harold later managed to escape the scene and went to report the incidence to his grandfather, Best Mwemi. He stated that he has known the appellant since childhood and was able to recognize him at the scene of crime because there was light as the attacked happened around 19.00 hours.

2.4 Best Mwemi confirmed being notified by Harold of the fatal attack on his grandson (the deceased herein). Upon being informed, he immediately rushed to the scene of crime and found the deceased lying in a pool of blood facing upwards. He then alerted the Police who subsequently picked the body

and deposited it at the mortuary. He also attended a postmortem examination on the deceased's body.

2.5 The police officer who carried out investigations into the report of murder involving the deceased herein was Detective Inspector Emmanuel Mbokoshi. His investigations led to the appellant being apprehended and charged for the subject offence. It is necessary to point out at this stage that while Detective Inspector Emmanuel Mbokoshi was giving his evidence in the court below, defence counsel objected to the introduction of a confession statement on the basis that it was not voluntarily made by the appellant at the time it was recorded. This resulted in a trial within a trial being conducted. The ruling by the learned trial Judge was that the confession statement was freely and voluntarily made.

2.6 The appellant in his defence gave a sworn statement. He stated that on the material day he was at home in Shimukopole village, repairing an ox cart with his father. He denied knowing Harold and Baya (his bother).

3.0 Findings of fact in the **Court below.**

3.1 The learned trial Judge analysed the evidence and the authorities that were put before him in relation to the offence the appellant was charged with. He found that the deceased died from stab wounds on 27th September 2017 as indicated in the post-mortem report.

3.2 He was able to safely find malice aforethought from the stab wounds inflicted in that the assailant was able to foresee that stabbing another with a knife would result in either grievous bodily harm or death to the victim. The learned trial Judge heavily relied on the evidence of Harold Munzuba and stated that although he was a single identifying witness, his identification was credible.

3.3 He disbelieved the appellant's evidence of an ***alibi*** reasoning that the appellant did not call his father to corroborate this evidence. The learned trial Judge further discounted any motive on the part of Harold Munzuba to falsely implicate the appellant. This is notwithstanding the fact that Harold is a brother to the deceased. As a consequence, the trial Judge was satisfied that the State had proved its allegation of murder beyond reasonable doubt. He then proceeded to convict and sentence the appellant to life imprisonment.

4.0 Ground of Appeal

4.1 It is this conviction and sentence that agitated the appellant to appeal to this court asserting that:

> *"The learned trial Judge misdirected himself in convicting the appellant when the prosecution did not prove the case against him beyond reasonable doubt."*

5.0 Appellant's arguments

5.1 At the hearing of the appeal, Mr. Mazyopa relied entirely on the heads of argument which were earlier filed in support of the appeal. The gist of his submission was that considering the fact that Harold Munzuba was a brother to the deceased, he fell in the category of a witness with an interest to serve. Mr. Mazyopa argued that there was therefore need for 'something more' to corroborate the testimony of Harold in order for the conviction to be safe. To support this proposition, Counsel referred us to the case of *Simon **Malambo Choka vs The People***' where the apex court held 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 demeanour 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."*

5.2 With respect to the identification of the appellant, the short argument of Mr. Mazyopa was that Harold Munzuba failed, in cross examination, to tell the lower court the colour of clothing that the appellant wore. That this was despite the fact that he

claimed the incident happened when there was still sufficient light. Counsel went on to submit that the observations of this single identifying witness were doubtful considering that the incident happened around 19.00 hours and the witness was scared for his life. To support his exertion, Counsel drew our ***attention to the case of Fawaz and Chaiwe vs The People***[2] where it was held that:

> *"**In** single witness identification, corroboration or something more is required. It is not sufficient for a trial court to find that prosecution witness probably spoke the truth. The evidence of the witness must be accepted beyond reasonable doubt."*

5.3 The learned Counsel then moved on to submit that the trial Judge erred when he found that the confession statement was made voluntarily by the appellant. This was against the background that he had been in cells for 4 days before the warn and caution statement was administered. That he was further beaten and denied access to medical services. On this proposition, we were referred to the case of ***Muwowo vs The*** People[3] where it was held:

> *"The prosecution must prove beyond all reasonable doubt that a confession was made voluntarily."*

Mr. Mazyopa accordingly urged us to disregard the confession statement all together.

5.4 Learned counsel concluded by submitting in the alternative that the lower court should have found extenuating circumstances from the fact that there was a failed defence of provocation.

6.0 Respondent's arguments

6.1 For her part, Mrs. Kachaka, the learned counsel for the State also filed written heads of argument in response to the appellant's appeal. At the hearing, counsel confirmed her reliance on those arguments.

6.2 In relation to the appellant's exertions on identification, Mrs. Kachaka submitted that it is always competent for a trial court to convict on the evidence of a single witness, if that evidence is clear and satisfactory in every respect. In support of this proposition, she called in aid the case of ***Benson Phiri & Another vs The People***[4] where it was held:

> *"The testimony of a single witness who knew the accused prior to the incidence in issue is adequate to support a conviction."*

Counsel posited that in the circumstances of this particular case, the possibility of an honest mistaken identity was therefore eliminated.

6.3 On the aspect of the assertion that Harold could have had a possible interest of his own to serve, Mrs. Kachaka quoted

from the case of ***George Musupi vs The People***[5] and submitted that there is nothing from the record suggesting that Harold could have had a motive to give false evidence. She further asserted that there was no evidence suggesting poor relations between Harold and the appellant.

6.4 Regarding the confession statement that was admitted in evidence, it was submitted that the trial court was on firm ground considering that there was no evidence to the effect that police officers induced or intimidated the appellant into making the statement.

6.5 In closing, the learned Senior State Advocate submitted that the purported ***alibi*** was properly discounted as it was an afterthought brought in defence. We were urged to uphold the conviction and sentence of the lower court.

7.0 Our Decision

7.1 We have carefully considered the evidence on record, the heads of argument filed by counsel and the judgment appealed against. In our view, although one ground of appeal was proffered by the appellant, our examination of the arguments reveal that the appeal is anchored on the following legal issues that we have identified, namely:

1. *Identification;*
2. *Confession statement;*
3. *Witness with an interest to serve;*

4. Alibi; and

S. Failed defence of provocation.

In answer to the ground of appeal, we shall deal with the above issues that we have identified.

Identification

7.2 There is no doubt that evidence of identification was from Harold Munzuba who testified that he saw the appellant stab the deceased in the back with a knife which protruded to the chest in the front. The question that arises is, whether the evidence of this single identifying witness was evaluated with care by the trial Judge to exclude the possibility of an honest ***mistake. In the case of Muvuma Kambanja Situna vs The*** People[6] it was held:

(i) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and the basis upon which the witness claims to recognise the accused.

(ii) If the opportunity for a positive and reliable identification is poor then it follows that the possibility of an honest mistake has not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence.

7.3 The foregoing holding of the Supreme Court expresses the need for trial courts to evaluate the evidence of a single identifying witness with care so as to remove the issue of honest mistake. To achieve this objective, a trial Court must, *inter alia,* consider the particular circumstances in the case and the basis upon which the witness claims to have recognized the appellant.

7.4 In *casu* the learned Judge in his judgment relied on the following conditions before accepting the evidence of Harold: firstly, the appellant was well known to Harold from childhood. Harold testified that the appellant had been a resident of Shimukopola village which is situated not too far from Mwemi village where he resides. This therefore means the identification of the appellant was more of **recognition of a** known person than that of a stranger. In the case of ***Mwansa Mushala vs The People***[7] it was held as follows:

> *"Although recognition may be more reliable il-ian identification of a stranger, even when the witness is purporting to recognise someone whom he knows, the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made, and of the need to exclude the possibility of honest mistake."*

7.5 Secondly, the evidence on record reveals that there was a prior encounter at Effie's bar between the appellant and Harold where the appellant initially confronted them. The learned

trial Judge also considered the case of *Phiri vs* ***The People***[8] where the Supreme Court stated thus:

> *"The testimony of a single witness who knew the accused prior to the incident at issue is adequate to support a conviction."*

In the Judge's view, the fact that the attack took place around 19.00 hours before it was very dark made the identification of the appellant, who was known prior to the incident, more credible.

7.6 With these factors, we are satisfied in *casu* that the possibility of an honest mistake was properly discounted by the learned trial Judge. We accept that the circumstances under which the appellant was identified were convincing and it was therefore safe for the trial Court to convict based on this evidence. For the avoidance of doubt, we cannot fault the trial Judge's finding that the evidence of identification was credible.

Evidence **of a confession statement**

7.7 It will be recalled that during the course of trial, a confession statement was admitted by the court below after a trial within a trial was conducted to ascertain the voluntariness and circumstances surrounding its issuance. Our examination of the record reveals that there was no unfairness that was demonstrated to warrant the trial Judge to exclude the confession statement that was admitted at trial. The crucial

question that arises is whether the conviction can still stand even without the said confession statement. The answer is in the affirmative considering that the trial Court did not even rely on the confession statement although this was the best evidence to provide a connecting link of the appellant to the offence. We are persuaded on this point by the holding of the Court in the case of ***R vs Balding***[9] where it was held:

> *"I am of the opinion that where a confession is proved it is the best evidence that can be produced."*

7.8 Therefore, although the trial Judge did not entirely rely on the confession statement, we hold that there was sufficient evidence upon which the conviction cannot be assailed. The appeal on this basis should accordingly fail.

Witness with an interest to serve.

7.9 It is not in dispute that Harold Munzuba was a brother to the deceased who could fall in the category of witnesses with an interest to serve. The law on this subject is well settled. In ***the case of Chitalu Musonda vs The People***[10] this Court stated that:

> *"A relative is not automatically a suspect witness, it is the circumstances of the case that can render a relative to be a suspect witness."*

Further in the celebrated case of ***Yokoniya Mwale vs The*** People" (also considered by the trial Judge) it was held:

"....We ought however, to stress, that these authorities did not establish, nor were they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than the near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of independent corroboration. This, in our view, would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused. Once this is discernable, and only in these circumstances, should the court treat those witnesses in the manner we suggested in the ***Kambarage case. A*** *conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim, provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive*

to falsely implicate the accused, or any other interest of their own to serve. What is key in our view, is for the court to satisfy itself that there is no danger of false implication."

7.10 What we discern from these authorities is that by merely being a relative or friend to the deceased, one does not automatically become a witness with an interest of his own to serve thereby requiring his evidence to be routinely corroborated. In casu, the learned Judge properly analysed the evidence of Harold and Best, and was of the view that there was no motive to falsely implicate the appellant. We equally find no basis upon which we can upset this finding of fact.

Evidence of ***Alibi***

7.11 The appellant in his sworn statement asserted that he was not at the scene of crime on the material day but was with his father at home in Shimukopole village repairing an ox cart. In order for the defence of ***alibi*** to succeed, it must be raised at the earliest opportunity, preferably at the police station to enable the police gather evidence which can exonerate the appellant. In the case of ***Bwalya vs The People***[12] the apex court held as follows:

"Simply to say 'I was in Kabwe at the time' does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says 'I was not there' he puts forward an alibi which it is the duty of the police to

investigate. If the appellant had given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been *the duty of the police to investigate, but the appellant not having done so there was no dereliction of duty on the part of the police."*

7.12 We align ourselves to the observations of the Supreme Court. We have also considered the reasons advanced by the trial Judge for disregarding the alibi that was advanced. The reasons given by the trial Judge for discounting the alibi were that the appellant had an encounter with Harold on the material day at Effie's bar and subsequently at the point at which the horrific stabbing of the deceased took place. Based on this, the Judge did not believe that the appellant was with his father fixing an ox cart as alleged.

7.13 He further expressed the view that had this been the case, the appellant would have brought his father to aid him in his defence. He rejected the excuses given by the appellant for the non-availability of his father to come and testify. The reasons advanced were lack of resources and opportunity to access his father. The reasoning by the Judge was that these reasons did not hold water. Long story short, the appellant was placed at the scene on the material day by the star witness Harold. Therefore the *alibi* is not tenable as he could not magically be in two places at the same time. We could not agree more with

the reasoning of the trial Judge and hold that the purported *alibi* was properly disregarded.

Failed defence of provocation

7.14 Whilst we accept that the principle at law is that a failed defence of provocation affords extenuation on a charge of ***murder as was held in Simusokwe vs The People[13].*** It is however imperative that we look at the facts of this particular case. The appellant is contending that the trial Court should have found extenuating circumstances after accepting evidence that revealed hostilities. It has been argued that when the trial court declined to accept that the appellant was provoked, the same should have been extenuating. Having looked at the record, it is clear that the hostilities referred to were ones at the scene of crime. The trial court stated at page 143 of the record as follows:

> *"That during the hostilities, Baya was under attack by the deceased who was armed with a knife and thus accused acted under provocation or in defence of Baya".*

7.15 The Judge found that the insinuation corroborated the appellant's confession statement. He dismissed the appellant's subsequent defence to be bare denials. We see no basis upon which we can assail the findings of the trial Judge in this regard that there were no extenuating circumstances looking at the totality of the evidence on record.

8.0 Conclusion

8.1 The net result is the appeal has no visible legal leg to stand on and we accordingly dismiss it. The conviction and sentence of the court below is upheld.

C.F.R. Mchen
DEPUTY JUDGE PRESIDENT

F. M. Chishimba
COURT OF APPEAL JUDGE

B. M' Maju1a
COURT OF APPEAL JUDGE