IN THE SUPREME COURT OF ZAMBIA **Appeal No. 209/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

MUMBULA KATEMBO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe, and Chinyama, JJS
on 2nd April, 2019 and 23rd September, 2020

For the Appellant: Mr. J. Zulu, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. F. L. S. Siyunyi, S.C., Director of Public Prosecutions

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Kambarage Kaunda vs. The People (1990-1992) Z.R. 215**
2. **Edward Sinyama vs. The People (1993-1994) Z.R. 16**
3. **Kashenda Njunga and Others vs. The People (1988-1989) Z.R. 1**
4. **Mutambo and 5 Others vs. The People (1965) Z.R. 24**
5. **Ratten vs. R (1972) A.C. 378**
6. **Edward Sinyama vs. The People (1993-1994) Z.R. 16**
7. **David Zulu vs. The People (1977) Z.R. 151**
8. **Dorothy Mutale and Another vs. The People (1995 -1997) Z.R 227**
9. **R vs. Andrews (1987) 1 All ER 513**

This is an appeal against conviction. The appeal is against the decision of Mulongoti J (as she then was) sitting in the High Court at Mongu. The judgment was delivered on the 19th August, 2015.

The prosecution evidence was anchored on the evidence of PW1, PW2 and PW3. We must state from the outset that the evidence from the three witnesses was somewhat confusing. Regarding PW1 it appears that he initially gave evidence in Lozi and changed to Kwamashi. This is mentioned in the learned trial judge's judgment but there is nothing to this effect on record.

The brief facts were that on the 24th October, 2013 from 08:00 hours there were Independence Day celebrations taking place at Kayumbwa Community School in Senanga District of Western Province where the learners entertained members of the community. After the celebrations, some members of the community remained at the school. PW1 stated that at 19:00 hours, he went to pick up the deceased, but he did not find him. It was dark at the time and he found the appellant (his nephew) drinking beer in the company of other people. As PW1 joined the group, the appellant informed him that 'there was an argument and he almost got beaten' and it involved the appellant, the deceased, and his wife. According to PW1 he

picked up the deceased later although it is not clear where he picked him from. They went to another place where they continued drinking. PW1 stated that he went home at 21:00 hours and returned to the drinking place to find the deceased unable to stand. The deceased informed PW1 that the appellant injured him. He took him home. The following day, PW1 went to check on the deceased who requested him to accompany him to go and see the person who had assaulted him the previous night. PW1 took the deceased to the appellant's place. When the deceased asked the appellant why he had assaulted him, the appellant denied the allegation. PW1 heard of the demise of the deceased a few days later and the appellant was apprehended by the police.

The evidence from PW2 was that the following day after the celebrations, it was discovered that the deceased had sustained an injury and he alleged that the appellant was responsible. However, in cross-examination PW2 stated that the deceased did not mention who had assaulted him. He mentioned that PW1 had witnessed the assault on the deceased by the appellant.

PW3, the arresting officer explained that no post-mortem examination was conducted because the health care facility was very

far from the crime scene. According to his investigations, the deceased informed PW1 and PW2 that it was the appellant who attacked him, and this was the basis for charging the appellant with the murder of the deceased.

PW4 was the deceased's widow who stated that the deceased informed her that he had been assaulted by the appellant who was her grandson. The deceased sustained a deep cut on the forehead. The following day she said they went to the appellant's house to confront him over the issue, but they did not find him. They went back the following day and he denied having attacked the deceased as alleged.

In his defence, the appellant denied assaulting the deceased although he admitted that he attended the independence celebrations and was in the company of the deceased and other people who included his sister.

The learned trial judge found that PW1, PW2 and PW4 were related to both the deceased and the appellant and on the authority of **Kambarage Kaunda vs. The People**[1] she classified them as witnesses with a possible interest to serve whose evidence required

corroboration. She found that none of the witnesses saw the appellant assault the deceased but that each one of them testified that the deceased told them that he was assaulted by the appellant. According to the learned trial judge, the witnesses had no motive to falsely implicate the appellant as they all simply repeated what the deceased told them which was confirmed by the appellant.

The learned trial judge accepted the deceased's statement that it was the appellant who attacked him to be part of the *res gestae* in terms of the case of **Edward Sinyama vs. The People.**[2] That although no one witnessed the attack, there was strong circumstantial evidence pointing to the appellant as the perpetrator especially in the light of the fact that the deceased was consistent on this fact and even accused the appellant to his face. Although no post-mortem examination was conducted on the body of the deceased, the learned trial judge sought guidance from the case of **Kashenda Njunga and Others vs. The People**[3] where we held that the absence of a post-mortem report is not fatal where there is evidence of an assault as in the case in *casu*. Looking at the serious head injuries suffered by the deceased, she found that malice aforethought was established.

The appellant was convicted of extenuated murder on the ground of drunkenness and sentenced to 30 years imprisonment with hard labour.

Before us Counsel for the appellant has raised two grounds of appeal couched in the following terms:

1. **The learned trial court misdirected itself in law and in fact when it relied on the inadmissible statement of the deceased as the basis for convicting the appellant.**

2. **The learned trial court misdirected itself when it convicted the appellant for the offence of murder in the absence of a post-mortem.**

Counsel argued the two grounds together. We were referred to the cases of **Mutambo and 5 Others vs. The People**[4], **Ratten vs. R**[5] and **Edward Sinyama vs. The People.**[6] The argument by Counsel for the appellant is to the effect that the deceased was intoxicated; none of the prosecution witnesses witnessed the attack and therefore, the statement by the deceased should have been considered as hearsay. That had the trial judge considered the inadmissibility of the deceased's statement, she would not have relied on it to convict the appellant. It was submitted that there was time and opportunity for the deceased to fabricate a statement to the

disadvantage of the appellant. Further, that PW1 being a key witness should have established the circumstances under which the alleged statement was made. That because the deceased had been drinking, he was not in a state to give an accurate account of what transpired.

It was submitted that since the deceased had been drinking, there is a possibility that he injured himself through a fall or hitting into an object. Counsel argued that the case of **Njunga and Others vs. The People**[3] can be distinguished from the case in casu. Citing the cases of **David Zulu vs. The People**[7] and **Dorothy Mutale and Another vs. The People**[8] Counsel argued that the trial court should not have merely relied on circumstantial evidence especially that there was more than one inference. Counsel submitted that the prosecution failed to prove its case and conviction should be quashed, the sentence of 30 years be set aside, and the appellant should be set at liberty.

In response, the learned Director of Public Prosecutions informed the court that the State was not supporting the conviction. She submitted that she had difficulty in supporting the conviction as it was not proved beyond reasonable doubt that it was the appellant who caused the injuries which led to the death of the deceased. She

opined that the learned trial judge erred in law and fact when she found that the statement made by the deceased qualified as *res gestae*. She pointed out that in this case the appellant and the deceased had been drinking most of the day and that at one point, PW1, the key witness left the deceased with others including the appellant at the drinking place. She noted that it was alleged that there was an argument between the appellant and the deceased which was not witnessed by PW1. The learned DPP pointed out that there was a discrepancy between the evidence of PW1 and PW2. Mrs. Siyunyi submitted that it was possible that the deceased may have injured himself because he was intoxicated as he had been drinking since morning. There was also the question of visibility as it was dark that night and it was unknown when the alleged attack took place. The learned DPP submitted that this case is a borderline case in terms of **Njunga vs. The People**[3] whereby the death should have been thoroughly examined to rule out accident or any other cause of death.

We have perused the record of appeal; the judgment of the lower court and we have considered the arguments advanced before us in this appeal.

The fundamental issue raised in ground one of this appeal is whether the statement made by the deceased to PW1, PW2 and PW4 qualified as *res gestae* in terms of the threshold set in the case of **Ratten vs. R**[5] and in our own case of **Edward Sinyama vs. The People.**[2] Should we find that the statement did not qualify to be part of the *res gestae*, it means that ground two becomes otiose.

In her judgment, the learned trial judge held that it was safe to rely on the evidence of PW1, PW2 and PW4 as they had no motive to falsely implicate the appellant "as they all simply repeated what the deceased told them". While it is not in dispute that the deceased told the witnesses that it was the appellant who assaulted him, it is important to look at the evidence of the witnesses and the circumstances under which the said statement was made. As we have already stated earlier, the evidence from PW1 and PW2 was confusing. According to PW1 he found that the appellant and the deceased had an argument. The place was dark and he did not find the deceased and only heard this from the appellant. He left the place with the deceased to go and drink at another place. It is not clear from the evidence whether the appellant also went with PW1 and the deceased to that other place to continue drinking. PW1

merely stated that he left the deceased at the drinking place and returned at 21:00 hours to find the deceased was injured and he told him it was the appellant who injured him. The deceased did not state what weapon the appellant used to assault him. At that time, the deceased could not walk.

In contrast, the evidence from PW2 was that there was an argument between the deceased and Sikulupeto, and the appellant intervened. PW2 stated that:

> **.....Then Mwiya came to pick the late. After people had drunk beer, around 2100 hours, me as a vice chairperson at school I said "there was no one who came to report that there was a fight".**
>
> **Q. Restrict yourself to what you saw. After Mwiya and Kapuka left what happened?**
>
> **A. Me and my wife we left and went home.**
>
> **Q. Then what happened?**
>
> **A. The next day around 08hours 4 people came. Kapuka and his wife and the father to Kapuka and Nyanyisi. They found he had sustained a wound here.**
>
> **Court. Where was the wound?**

A. **(Witness shows the court). Then the late said where is Mumbula Katembo? Then we asked him where did you sustain this from did you have a fight. He said yes at school. Then we asked, "who is your witness at the time you sustained the wound? Then he said the name Mwiya.** (Emphasis ours)

The witness who PW2 was referring to here is PW1 who did not witness any argument or fight between the appellant and the deceased or between the deceased and Sikulupeto. PW1's evidence is very clear. He found the deceased injured. A scrutiny of the evidence of PW2 gives the impression that he was present when PW1 went to pick the deceased, yet he did not mention that the deceased could not walk at the time or that he was injured. In fact, PW2's evidence is to the effect that there was no argument or a fight. He simply stated that they parted company with the deceased and PW1. This is why we have stated from the outset that the evidence is confusing because one cannot tell whether the deceased was injured at the school or at another place and in what circumstances. Therefore, the learned trial judge ought not to have relied on the evidence of PW1 and PW2 when there were glaring inconsistencies and contradictions in their evidence.

The deceased may have stated that it is the appellant who assaulted him but the question is, having regard, to the evidence before the trial court, did the statement qualify to be considered as part of the *res gestae*? We agree with the learned Director of Public Prosecutions that it did not. The cases of **Ratten vs. R, Andrews vs. R**[9] and **Edward Sinyama vs. The People** are instructive to trial courts in deciding if a statement qualifies to be part of the res gestae or not. In the case of **R vs. Andrews**[9] the House of Lords stated:

> **"The primary question which the judge must ask himself is: can the possibility of concoction or distortion be disregarded? To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection....."**

In **Edward Sinyama** we cited with approval the cases of **Ratten vs. R**[5] and **R vs. Andrews**[9] and we held that:

> **A statement is not ineligible as part of the res gestae if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case.**

From the above authorities, the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case and whether the deceased had no real opportunity for reasoned reflection. The possibilities should be considered against the circumstances in which the statement was made. We take the view that the learned trial judge should not have disregarded the possibility of distortion or the opportunity for reasoned reflection because it is real in this case. It is not clear at what point PW1 arrived at the scene to find that the deceased had allegedly been attacked by the appellant and was unable to walk. PW1 did not witness anything and his evidence of what happened before he arrived at the place where he found the deceased is hearsay and, therefore, inadmissible. PW2 had no knowledge that the deceased was injured or by whom and PW4 was informed by the deceased that the appellant had injured him. Even if one had to believe there was a quarrel between the deceased and Sikulupeto, why should the appellant attack the deceased if the quarrel did not involve him? In this case, there was the question of visibility that night; the deceased, and others had been drinking and the evidence of PW1 the key witness, does not show that the

statement was made in the throes of the event that there was no opportunity for concoction or distortion to the disadvantage of the appellant or the deceased. We hold that the learned trial judge erred when she accepted the statement as part of the *res gestae* as the opportunity for reasoned reflection by the deceased existed. Further, the evidence that she relied upon to arrive at that conclusion was inconsistent, contradictory, and unreliable. Simply because the deceased told PW1 that the appellant had assaulted him and repeated it the following day could not lead to the conclusion that the deceased's statement was part of the *res gestae*. This is a case where strong suspicion suggests that the appellant may have assaulted the deceased, but we have stated time and again that strong suspicion is not enough. The investigations in this case left much to be desired. The burden was on the prosecution to prove beyond reasonable doubt that the appellant murdered the deceased and in this case, the learned Director of Public Prosecutions rightly did not support the conviction as there were lingering doubts as to the guilt of the appellant. We find merit in ground one of the appeal.

As we stated from the outset, ground one having succeeded it means ground two becomes otiose.

The appeal has merit. The conviction and sentence is set aside and the appellant is acquitted accordingly.

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G.S. PHIRI

SUPREME COURT JUDGE

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E.N.C. MUYOVWE

SUPREME COURT JUDGE

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J. CHINYAMA

SUPREME COURT JUDGE