IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

SCZ APPEAL NO. 125 of 2020

(Criminal Jurisdiction)

BETWEEN:

MWANGELWA AKUSHANGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd November, 2020 and 11th November, 2020

For the Appellant: *Mr. P. Chavula, Senior Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mr. S. Simwaka, Senior State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **George Musupi v The People (1978) ZR 271**
2. **Kambarage Mpundu Kaunda v The People (1990-1992) ZR 215**
3. **Yotam Hamenda v. The People (1976) ZR 184**
4. **Yudah Nchepeshi v The People (1978) ZR 362**
5. **Marcus Kapumba Achiume v The People (1983) ZR 1**
6. **Webster Kayi Lumbwe v The People (1986) ZR 93**
7. **George Lipepo and Others v The People SCZ Judgment No. 20 of 2014**
8. **Yokoniya Mwale v the People, SCZ Judgment No. 205 of 2014**
9. **Manyepa v The People (1975) ZR 24**
10. **The People v Ernest Moore and Hassel Shanaline, SCZ Judgment No. 1 of 2010**

The appellant was convicted in the Mongu High Court (Sitali J, as she then was presiding) for the murder of his cousin Stephen Mungolo at Kabalu 2 village in Sioma, Shangombo district on 24th October, 2012. He was sentenced to death.

As found by the trial judge there was no dispute that the deceased died on the fateful day from injuries sustained after he was assaulted. The issue in contest was whether it was the appellant or someone else who murdered the deceased.

The evidence from the prosecution was that two prosecution witnesses, PW1 the wife to the deceased and PW2, mother to the deceased saw the appellant go after and hit the deceased with a pounding stick on the body and on the head. This, according to the witnesses, was shortly after the deceased with others had intervened in a fight involving the appellant, his wife, DW2, and a woman called Mwangala Kakumbo with whom the appellant had a child. The deceased fell to the ground and died where he had fallen. The appellant was apprehended by members of the neighbourhood watch who later handed him over to police. The incident occurred around 15:00 hours to 16:00 hours.

The appellant's defence was that it was his wife DW2 who struck the deceased with the pounding stick when she resisted sexual advances from the deceased on the material day. He was surprised that he was the one apprehended and accused of killing the deceased. The wife, DW2 however, gave testimony confirming the evidence of PW1 and PW2 that she found her husband with Mwangala and when she asked him what he was doing, he started beating her until the deceased intervened and separated them. She then ran off and only learnt later that the appellant had killed the deceased. The witness denied having fought the deceased or that he had made sexual advances to her on the day.

The learned trial judge noted that the incident occurred in the afternoon in broad day light which enabled PW1 and PW2 to observe what was happening. Further, that the appellant was (well) known to them and was a relative of the deceased to whom PW1 was married and that PW2 was the mother to the deceased. She concluded, therefore, that the question of mistaken identification of the appellant could not arise. The learned judge ruled out the possibility of false implication of the appellant by PW1 and PW2 who were related to the

deceased on the ground that there was no possible motive shown by evidence why they could falsely implicate him and that she had the opportunity to observe their demeanour and they impressed her as being truthful witnesses, they were also unshaken unlike the appellant whom she found not to be forthright in his testimony and prevaricated in answering questions in cross-examination. Further that DW2 had confirmed their testimony.

Taking into account the size of the pounding stick, the learned judge was convinced that by hitting the deceased on the head with it, the appellant intended to cause death or, in the least, grievous bodily harm. Therefore that malice aforethought as required in **section 204(a)** of the **Penal Code** was established. She accordingly found the offence of murder proved beyond reasonable doubt against the appellant and convicted him accordingly.

In sentencing the appellant, the learned judge noted that although the appellant stated that he had drunk some beer at the time of the incident, he did also state that he was not drunk. The judge was, as such, unable to find any extenuating circumstances and sentenced the appellant to the ultimate death sentence.

Dissatisfied with the conviction the appellant has appealed to this court setting down two grounds of appeal as follows:

1. The learned trial court erred both in law and fact when it relied on the evidence of DW2 as a basis of eliminating the danger of false implication by PW1 and PW2.
2. The learned trial court erred both in law and fact when it held that the prosecution had proved its case beyond all reasonable doubt when in fact there was dereliction of duty by (the) arresting officer when he failed to fully investigate the explanation given to him by the appellant that the deceased was assaulted by his wife.

Heads of Argument in support of the grounds of appeal were filed by Mr. Chavula on which he relied entirely.

Mr. Chavula's submission in the first ground of appeal was that the learned trial judge in the court below should not have relied on the evidence of DW2 to exclude the danger in the evidence of PW1 and PW2 to falsely implicate the appellant. It was argued that DW2 was a witness with an interest to serve as the appellant who had called her to testify on his behalf, testified that she was in fact the

one who had assaulted the deceased with a stick resulting in his death. That this position had earlier on been brought to the attention of the arresting officer, PW3, before the trial who at the trial confirmed having been told so by the appellant. It was submitted accordingly that the evidence of DW2 was unsafe and could not be relied on to exclude the danger of false implication by the two prosecution witnesses because her evidence was tainted with suspicion. The case of **George Musupi v The People**[1] was cited for the principle that a witness may have a motive to give false evidence because of the category in which they fall or because of the particular circumstances of the case. It was contended, that the learned trial judge having properly applied the case of **Kambarage Mpundu Kaunda v The People**[2] should have gone further to ensure that the danger of false implication was eliminated. It was observed in any case that DW2 did not state that she saw the appellant assault the deceased. It was Mr. Chavula's prayer that we allow the appeal on this ground, quash the conviction and acquit the appellant.

In the heads of argument relating to the second ground of appeal Mr. Chavula's argument was that there was dereliction of duty

on the part of PW3 who having been told by the appellant when warned and cautioned, that it was DW2 who assaulted the deceased, should have investigated the matter. Relying on the case of **Yotam Hamenda v. The People**[3], it was submitted that the failure to investigate the matter seriously prejudiced the appellant and that this dereliction should operate in favour of the appellant who should be acquitted. It was submitted that the appeal be allowed, the conviction quashed, the sentence set aside and the appellant be set at liberty.

Responding to the submission in the first ground of appeal, Mr. Simwaka submitted that DW2 did not fall in the category of a witness with an interest to serve. It was argued that the accusation by the appellant that it was DW2 who assaulted the deceased was not enough to put her in the category of a witness with an interest to serve. The case of **Yudah Nchepeshi v The People**[4] was cited for the holding that:

> **"A court cannot be called upon to address its mind to the question whether or not a witness falls into the category of witnesses whose evidence it is dangerous to accept without corroboration or support unless there is some evidence 'fit to be left to a jury' which raises that issue. The mere assertion by the accused that it was the witness**

and not the accused who was the culprit is not sufficient without more to raise the issue.

(ii) Once the issue is properly raised it is incumbent upon the court to consider it and rule upon it, the court should make a positive finding whether or not the witness is one whose evidence it is dangerous to accept without corroboration or support.

(iii) The mere raising of the issue does not render the case a corroboration case as distinct from a straightforward issue of credibility; even though the issue has been raised it is still perfectly proper for the court, having considered all the evidence and circumstances of the case, to conclude that the witness is not one who falls into the category of witnesses whose evidence it is dangerous to accept without corroboration or support."

It was submitted, therefore, that the trial judge was on firm ground when she received and believed DW2's evidence and treated her evidence as corroborating the evidence of PW1 and PW2.

It was submitted, in any case, that it is the appellant who deemed DW2 a fit and proper witness to call so that the trial judge was entitled to consider her evidence as there was nothing on record to make her a suspect witness. It was pointed out that the learned trial judge had found that it was the appellant who caused the serious head injuries from which the deceased died. Therefore, that in line with the holding in **Marcus Kapumba Achiume v The**

People[5], the finding of fact cannot be reversed as it is anchored on the evidence on record.

It was submitted that the trial court found that the danger of false implication had been excluded on the totality of the evidence and not only that of DW2. Further that the court found PW1, PW2 and DW2 to be credible witnesses while the appellant was not credible and disbelieved him. The case of **Webster Kayi Lumbwe v The People**[6] was cited in which it was held that:

> **"An appeal court will not interfere with a trial court finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous."**

It was submitted that the finding by the trial court cannot now be interfered with. We were urged to dismiss the first ground and uphold the conviction and sentence imposed by the lower court.

Mr. Simwaka's response to the second ground of appeal was that the dereliction of duty did not go to the core of the prosecution's evidence to result in an acquittal as contemplated in the case of **George Lipepo and Others v The People**[7] when it was held that:

> **"If the dereliction of duty goes to the core of the prosecution evidence, such dereliction will operate in favour of the accused and may result in an acquittal. It is our view however, that it is not every**

dereliction of duty that will affect the core of the prosecution's case, if there is other overwhelming evidence, in the prosecution's case, the court can competently convict notwithstanding the dereliction of duty".

And further that:

"It is our view that this alleged dereliction of duty herein would have affected the prosecution's case if the evidence not gathered on account of the dereliction of duty was the only evidence establishing the case."

It was argued that the offence was committed during the day in the presence of the eye witnesses, PW1 and PW2 who knew the appellant before. DW2 confirmed the material aspects of the evidence of the two witnesses. The appellant was therefore not prejudiced by the alleged dereliction of duty and the trial judge was on firm ground when she convicted him. We were urged to uphold the conviction and the sentence and dismiss the appeal.

We have considered the grounds of appeal and the arguments. We have also taken into account the evidence in the lower court as well as the judgment of the court.

Pertaining to the first ground of appeal we would like to point out that the court below did not rely only on the evidence of DW2 as a basis for eliminating the danger of false implication of the appellant

by PW1 and PW2. At page J17, the learned trial judge considered the credibility of the two witnesses including DW2. The learned judge noted the following:

> **"These witnesses struck me as truthful witnesses as they were categorical and forthright in giving their testimony in court and they did not prevaricate in answering questions in cross-examination. Their testimony was not discredited in any way."**

Further at page J18 to J19 after referring to the guidance in the case of **Kambarage Mpundu Kaunda v The People[2]**, the learned judge noted that from the evidence, both PW1 and PW2 had not shown any possible motive to falsely implicate the accused in the commission of the offence. In the case of **Yokoniya Mwale v the People[8] SCZ Judgment No. 205 of 2014** we held that:

> **"A conviction will ... 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 is for the court to satisfy itself that there is no danger of false implication."**

Having assessed the evidence of PW1 and PW2 based on the court's observation of their demeanour, the learned trial judge was entitled to rely on the evidence. The court, was not obliged to look for

evidence that corroborated the two witnesses. It was sufficient that she was satisfied that the witnesses were not led by any motive or bias in giving their testimony.

Mr. Chavula's argument is, however, that DW2 could not corroborate PW1 and PW2 because she was a witness with a possible interest of her own to serve having been accused of killing the deceased herself. Bearing in mind that DW2's evidence was unfavourable, we are of the view that this argument is not well taken. The position at law is that the credit of a witness is ordinarily at issue when it is intended to show that the evidence of the witness is not reliable to support the case of the party calling the witness. Therefore it is inconsistent for a party that called the witness to turn around and accuse its own witness of being unreliable.

The correct approach is to have the witness declared hostile so that the party calling the witness has an opportunity to discredit the witness through cross-examination. When this is not done and the evidence of the witness remains on record, the other party and, of course, the court is at liberty to make whatever adverse conclusions that can properly be made from the evidence. It must however be

noted, as we held, in the cases of **Manyepa v The People**[9] and **The People v Ross Ernest Moore and Hassel Shanaline**[10], that:

> **"It is not only when a witness is formally declared hostile by the court that the party calling him is entitled to lead other evidence which contradicts the unfavourable evidence but even where the witness has not been declared hostile. It is for the court to decide where the truth lies after considering the whole of the evidence."**

Clearly, it is wrong to seek to discredit a party's own witness through the means adopted by Mr. Chavula. The correct way was to have DW2 declared a hostile witness. Other than that the defence was at liberty to lead other evidence that would have contradicted the unfavourable evidence. This was not done in this case with the result that DW2's evidence was not discredited to the extent that it seriously compromised the appellant's defence while confirming the prosecution's witness. As pointed out by Mr. Simwaka, it is the appellant who called DW2 and trusted that she was going to give evidence that was to her knowledge. She did so, unfortunately implicating the appellant. We find no merit in the ground of appeal and dismiss it.

Turning to the second ground of appeal, Mr. Chavula's argument is that the police and in particular PW3 acted in dereliction

of duty when he did not investigate the appellant's pre-trial assertion that it is DW2 that killed the deceased when she resisted sexual advances by the deceased. To confirm the submission, Mr. Simwaka has offered the case of **George Lipepo and Others** in which it was held to the effect that if there is other overwhelming evidence in the prosecution's case, the court can convict.

It is clear from PW3's evidence in cross-examination that he was told by the appellant when he interviewed him that it is DW2 who killed the deceased. PW3 admitted that he did not verify the assertion because of what he had been told by PW1 and PW2 regarding what had happened and how the deceased got killed. Now, it is obvious that PW3 should have followed up the allegation to rule out the possibility that DW2 had indeed killed the deceased. His failure to do so amounted to dereliction of duty. However, as has already been noted the learned trial judge had accepted the evidence of PW1 and PW2 and rejected the appellant's defence on the ground that he did not impress the trial judge as being truthful. As we have already observed the learned trial judge was entitled to find as he did based on her assessment of the witnesses whom she had the opportunity to

see and observe their demeanour. As was held in the case of **Webster Kayi Lumbwe**[6] already cited above, an appeal court will not interfere with a trial court's finding of fact on the issue of credibility unless it is clearly shown that the finding was erroneous. The evidence of PW1 and PW2 as found by the learned trial judge was overwhelming and was not displaced. The second ground of appeal cannot succeed on this basis and we dismiss it.

All in all we find no merit in the entire appeal and dismiss the appeal. We uphold the conviction.

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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