IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 073/2020**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

TRYWELL HACHAALA CHEELO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Chisanga JP, Mulongoti and Siavwapa, JJA**

On 10th November and 18th November, 2020

For the Appellant:	*Mr. P.K. Chavula, Senior Legal Counsel, Legal Aid Board*
For the Respondent:	*Mr. R.L. Masempela, Deputy Chief State Advocate-National Prosecution Authority*

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. ***Ernest Mwaba and others v The People (1987) ZR 19***
2. ***Haonga and five others v The People (1976) ZR 200***
3. ***Kambarage Kaunda v The People (1990-92) ZR 215***
4. ***Wilson Mwenya v The People (SCZ Judgment No 5 of 1990)***
5. ***Yokoniya Mwale v The People SCZ Appeal No. 285 of 2014***
6. ***Patford Mwale v The People CAZ Appeal No. 8 of 2016***
7. ***Bwalya v The People (1976) ZR 125***

8. ***Nzala v The People (1976) ZR 221***

1.0 **Introduction**

1.1 Trywell Hachaala Cheelo, the appellant herein was convicted of murder and sentenced to death by her Ladyship Maka-Phiri, J, sitting at Livingstone. The trial Judge found that the prosecution witnesses, although they were related to the deceased and appellant were credible witnesses, whose testimonies were safe to rely on.

1.2 The particulars of the offence alleged that on 23rd July, 2017 at Chikankata in Southern Province of Zambia, the appellant jointly and whilst acting with others unknown murdered Ranger Mweete (referred to as the deceased in this Judgment).

1.3 The appeal discusses whether the prosecution witnesses were suspect witnesses with an interest of their own to serve and whether the danger of false implication was eliminated. And, whether the defence of *alibi* was properly raised.

2.0 **Evidence adduced in court below**

2.1 The case for the prosecution was founded on the evidence of PW1, PW2 and PW3 who testified that on 27th July, 2017 they saw a group of six men (including the appellant) attack the deceased who they accused of killing someone through witchcraft. This was around 09:00 hours at the deceased's house in Chikankata. The three, who were eye witnesses, are related to the deceased. PW1 was the wife, PW2 the son and PW3 the young brother.

PW1 and PW2 were present at the deceased's house while PW3 initially watched the attack from his house which was three metres away but later walked over to the scene. The evidence of the three implicated the appellant and five others as having locked the house where the deceased was in hiding and then set it on fire.

2.2 The hostile men who were armed with a pounding stick, axe and plank attacked the deceased after he jumped out of the burning house.

2.3 The appellant hit him with a plank, while another axed him. Afterwards they broke a fuel tank of a motorbike,

where they got the petrol, poured it on the deceased, put the motorbike on his body and set him ablaze. The postmortem report revealed severe head injuries and burns as the cause of death.

2.4 PW4 the investigating officer testified in chief that, when he interviewed him, the appellant, told him that he was present at the scene but did not participate in attacking the deceased. He only watched from a distance. However, when it was put to him in cross-examination that, he recorded in the warn and caution statement that the appellant told him that he was not there when the deceased was attacked, PW4 reiterated that the appellant told him he was watching from a distance.

PW4 denied the defence counsel's assertion that the appellant told him that he was in Kanyama compound in Lusaka at his in-laws, during the time of the deceased's attack.

2.5 The appellant's evidence was a complete denial of the allegations. He raised an *alibi* saying he was at home with his wife in Chawama Compound, Lusaka, when the incident happened. He said PW1 implicated him

because he acted as a go between for the deceased and his mistress. While PW2 implicated him because he had reported PW2 to the deceased for misusing money raised from the deceased's hammer mill.

3.0 **Consideration of the evidence and decision of the lower court**

3.1 After analysing the evidence, the trial Judge found the three witnesses to be credible and dismissed the appellant's testimony that PW2 and PW1 falsely implicated him. She stated that the three witnesses testified in a forthright manner and their evidence remained unshaken in cross-examination. She accepted their testimony that the appellant attacked the deceased when he escaped from the burning house.

3.2 The trial Judge noted that since the attack happened in the morning around 09:00 hours and lasted for some considerable time, the three witnesses were able to observe and sufficiently identify the assailants, who were known to them prior to the incident.

3.3 The Judge found that direct evidence of identification was so strong as to even counteract any *alibi*. Thus, the

possibilities of a mistaken identity were completely ruled out.

3.4 Noting the conflicting evidence, as regards the colour of the appellant's clothes on the material day, the Judge opined that the same was not fatal to the identification of the accused. This is so because people ascribe different colours to the same article based on their knowledge of colours and also sight.

3.5 Regarding the warn and caution statement on the *alibi*, the Judge observed that it was recorded that the appellant said that ***"he did not know anything about the matter because he was not there at the time he was being killed."*** The Judge reasoned that the accused (appellant) did not mention that he was at his home in Chawama compound in Lusaka and that no names were given from whom the arresting officer could have confirmed this *alibi*. The *alibi* was therefore not worth investigating. The Judge concluded that it was a fabricated lie and dismissed it with the contempt it deserved.

3.6 Guided by the Supreme Court decision in **Ernest Mwaba and others v The People**[1] in which it was illuminated that:

> "(i) **Where joint adventurers attack the same person then, unless one of them suddenly does something which is out of line with the common scheme and to which alone the resulting death is attributable, they will all be liable.**
>
> (ii) **Where the evidence shows that each person actively participated in an assault then they were all *crimines participles*. The fact that other person may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative effect overcame the deceased**.

3.7 And in **Haonga and five others v The People**[2] that if death results from the kind of act which was part of the common design, then if the offence is murder in one then it is murder in all, the Judge found that the appellant with others unknown did unlawfully assault the deceased with the common scheme to cause grievous harm or death. That together with others unknown, they all had the requisite malice aforethought. The appellant was found guilty of murder and convicted accordingly. He was sentenced to death.

4.0 **The Appeal**

4.1 Dissatisfied with the conviction, the appellant has appealed to this Court, raising two grounds as follows:

1. ***The learned trial Judge erred and misdirected herself both in law and fact when she convicted the appellant in absence of evidence beyond all reasonable doubts that he participated in committing the subject offence.***
2. ***The learned trial Judge misdirected herself both in law and fact when she placed reliance on the warn and caution statement which never formed part of the record, thereby erroneously dismissing the appellant's alibi.***

5.0 **The Arguments**

5.1 In support of the grounds of appeal, the appellant's counsel filed heads of argument dated 10th November, 2020. On ground one it is argued that PW1, PW2 and PW3 are suspect witnesses or witnesses with an interest to serve whose evidence required corroboration. It is contended that although the learned trial Judge found that their evidence was sufficiently corroborated she did not state the nature of such corroboration.

5.2 The case of **Kambarage Kaunda v The People**[3] was relied upon wherein the Supreme Court held that:

"Prosecution witnesses who are friends or relatives of the prosecutrix may have a possible interest of their own to serve and should be treated as suspect witnesses."

5.3 According to the appellant's counsel, PW1, PW2 and PW3 were not only related to the deceased but they also demonstrated the desire to ensure the appellant was put behind bars. For instance PW2 admitted in cross-examination that he would like to see the appellant behind bars for killing his father.

5.4 It was the further submission of counsel that as suspect witnesses the three prosecution witnesses could not corroborate each other. As such the dangers of false implication were not completely excluded. Additionally, that they did not give independent evidence of separate incidents regarding the participation of the appellant in assaulting the deceased. The Supreme Court decision in the case of **Wilson Mwenya v The People**[4] was cited in support of this argument. That Court observed:

> ***"From the authorities cited above we are satisfied that PWs 2, 3 and 5 do not fall in a class of accomplices who may be mutually corroborative because they do not give independent evidence of separate incidents. The danger of a jointly fabricated story in this case has not been excluded."***

5.5 Learned counsel concluded that there was no independent evidence to prove the case against the appellant beyond reasonable doubt. We were also urged to note the inconsistencies in their evidence regarding the type and colour of clothes the appellant allegedly wore on the material day.

5.6 On ground two, it is submitted that the trial Judge erred when she referred to the warn and caution statement which was never produced in evidence during trial. Thus, the finding of fact that the appellant never mentioned in his warn and caution that he was either in Kanyama or Chawama was erroneous and should be reversed as it was not supported by any evidence.

5.7 The trial Judge rejected the appellant's *alibi* as a fabricated lie. Yet, PW4 the investigating officer was exposed to be untruthful during cross

examination because he changed what he had recorded in the warn and caution that the appellant told him he was not there. Then at trial he said appellant told him he was watching from a distance.

5.8 **Haonga v The People**[2] was relied upon which holds that:

> ***"Where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his testimony is reduced."***

5.9 According to counsel it could be true that the appellant disclosed to PW4 that he was either in Kanyama or Chawama when the deceased was attacked. We were urged to allow the appeal, quash the conviction set aside the sentence and acquit the appellant forthwith.

5.10 The respondent's counsel also filed heads of argument, in response to the appeal. It is argued on ground one that the prosecution proved its case against the appellant beyond reasonable doubt. The prosecution witnesses, the deceased and the

appellant are all related and their evidence did not need corroboration. Thus, the case of **Kambarage Kaunda v The People**[3] cited by the appellant's counsel is inapplicable.

5.11 Learned counsel relied on the Supreme Court decision in **Yokoniya Mwale v The People**[5] which holds that:

> "***The consistent position of this Court has been that in criminal proceedings, relatives and friends of the deceased may well be witnesses with an interest to serve or may be merely biased. In Kambarage Mpundu Kaunda v The People we stated that as relatives and friends of the deceased may be witnesses with an interest to serve, it was incumbent upon a Court considering evidence from such witnesses, to warn itself against the dangers of false implication of the accused by the evidence of such witnesses and that the Court should go further to exclude the danger'...Were this to be the case, crime that occurs in family environments were not witnesses other than 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 want 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 have an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernible and only in those circumstances, should the Court treat those witnesses in the manner we suggest in the Kambarage case."

5.12 Counsel maintained that PW1, PW2 and PW3 do not need corroboration as the offence was committed within family environments. Our decision in **Patford Mwale v The People**[6] wherein we observed in relation to the **Yokoniya Mwale v The People**[5] case that:

"The Supreme Court then went on to conclude that a conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased or the victim provided 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. That, what was key was for the Court to satisfy itself that there was no danger for false implication."

5.13 It is the respondent's contention that the appellant's insistence that PW1, PW2 and PW3 are suspect witnesses and that they expressed motive to falsely implicate the appellant is unfounded.

The three are simply eye witnesses without motive to falsely implicate the appellant. Although PW2 stated in cross-examination that he would do anything to ensure the appellant was placed behind bars, his testimony was corroborated by PW1 and PW2.

5.14 The inconsistencies of the three prosecution witnesses' as to the colour of the appellant's clothes did not go to the root of the case as held by the trial Judge.

5.15 On ground two it was submitted that once the appellant raised an *alibi*, it was the duty of the prosecution to negative it.

5.16 Furthermore that, the police cannot guess an accused's *alibi* unless it is expressly raised in writing or verbally. It was counsel's contention that in the case of **Bwalya v The People**[7] the Supreme Court stated that:

> ***"The law relating to the onus of proof of an alibi is that once evidence thereof fit to be left to a jury has been adduced the onus is on the prosecution to negative the alibi...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 and 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".

5.17 And in **Nzala v The People**[8] that:

"Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi it is the duty of the police to investigate it".

5.18 Thus, in *casu*, the trial court was on firm ground when it dismissed the appellant's *alibi* as he did not give the police detailed information as to the address or witnesses to support his *alibi.*

5.19 The trial Judge therefore correctly referred to the warn and caution as the defence counsel placed it on the record through cross-examination of PW4, the investigating officer. It was put to the prosecution witnesses that the appellant was not

at the scene of crime but in Lusaka. However, no address was given.

5.20 Furthermore, the appellant suggested through PW4's cross-examination that he was in Kanyama. Then in his defence he said he was in Chawama actually Kuomboka, which is a total contradiction. Clearly, the *alibi* was a fabricated lie as found by the trial Judge.

5.21 At the hearing Mr. Chavula who appeared for the appellant relied on the heads of argument. Mr. Masempela who appeared for the respondent equally relied on the respondent's heads of argument.

6.0 **Considerations and decision of this court**

6.1 The appeal before us has raised issues of when to properly raise an *alibi* and whether the evidence of the prosecution witnesses who are related to the deceased as well as the appellant was corroborated as found by the trial Judge. We will consider the two grounds of appeal simultaneously because they are interlinked.

6.2 The trial Judge accepted and relied on the evidence of the three prosecution witnesses that the appellant and five others attacked the deceased and later set his body on fire. The appellant raised an *alibi*, contending that he was in Lusaka (Chawama Compound) at the time the deceased was attacked in Chikankata in Southern Province.

6.3 It is well settled that an *alibi* is a defence and when successful would result in acquittal of an accused. The essence being that the accused was not at the scene and therefore not in a position to have committed the offence.

6.4 Authorities abound that the evidence of an *alibi* should be pleaded or raised at the earliest opportunity upon apprehension and not at trial. This is undoubtedly because the information is within the personal knowledge of the accused. See **Nzala v The People**[8] at paragraph 5.17 of this Judgment.

6.5 The burden to raise the *alibi* is therefore on the accused. In *casu*, the appellant raised the *alibi* at

the earliest opportunity when he was warned and cautioned. He simply said he was not there. The onus was on him to adduce evidence which sufficiently contained the particulars of the *alibi* - the address in Chawama, the name of his wife or phone number so that the police could investigate and negative the *alibi.* See **Bwalya v The People**[7] paragraph 5.16 of this judgment.

6.6 We note the appellant's argument that the warn and caution statement was not produced in evidence and it was wrong for the trial Judge to rely on it. As argued by Mr. Masempela, the defence counsel first referred to the warn and caution at trial during cross- examination of PW4. Furthermore, the issue of the appellant's *alibi* was also raised albeit belatedly and wrongly at trial, when he said he was in Chawama in Lusaka with his wife. Asked if his wife would be called to attest to this *alibi*, the appellant said no.

Therefore, the trial Judge cannot be faulted for referring to the warn and caution and to find that

the *alibi* was not worth investigating as details were not given to the police. At trial he simply said he was in Chawama which was still insufficient apart from being raised at the wrong time. The *alibi* was therefore, properly rejected as a fabricated lie.

6.7 The Prosecution witnesses who are all related to the deceased and the appellant testified that they saw the appellant around 09:00 hours attacking the deceased. The appellant was with five others. The trial Judge properly reasoned and analysed the evidence of the three who are eye witnesses. Just because they are related to the deceased does not make them witnesses with an interest to serve. As illuminated in **Yokoniya Mwale v The People**[2] (cited at paragraph 5.12) the Supreme Court commenting on its earlier decisions on witnesses with an interest to serve, stated:

> ***"We ought to however, 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..."***

That court observed that were this to be the case, crime that occurs in family environments where no witnesses other than the near relatives, would go unpunished for lack of corroboration.

6.8 We reviewed the evidence on record. There is nothing ascertainable on the evidence or facts of this case which would place the three prosecution witnesses in the category of suspect witnesses or witnesses with an interest of their own to serve. The three were never apprehended or questioned by the police in relation to the murder of the deceased. The deceased was attacked from his home in the morning at 09:00 hours. PW1 was at the time home with her husband (deceased), when the hostile six men (appellant included) angrily accosted her as to the whereabouts of her husband, she lied and said he was not home. But, they disbelieved her and locked the house where her husband was in hiding, and set it on fire. PW1 called PW2 and told him of the presence of the hostile six men attacking the deceased. PW2 who

was on his way to work rushed back home. He found the six men as reported by PW1. He said he found the six breaking window panels, then they locked the house where his father was and set it on fire. PW3 was seated at his home when he heard noises at the deceased's house. He walked there about 3 meters walk and found the six men asking PW1 about her husband. They accused the deceased of killing their cousin Beatrice Hamoonga through witchcraft.

Like PW2 and PW1, PW3 testified to seeing the men setting the house on fire, deceased jumping out and then beaten with a plank, and then set ablaze with petrol from the motor bike tank. The said motorbike was put on his body and he was burnt with it.

6.9 It is clear that the attack occurred within family or home environment. The prosecution witnesses were at home where the deceased was as well and where he was attacked from. They testified as to what they perceived. The attack did not happen in

a public place for others to corroborate them or for other independent witnesses to have testified. We therefore find the appellant's counsel's argument that there was no independent evidence to prove the case beyond reasonable doubt, to be meritless and seriously flawed.

6.10 If anything, the evidence of the three was corroborated by the medical evidence which revealed the cause of death as severe head injuries and burns. Even though the appellant did not hit the deceased on the head or set him ablaze, he acted jointly with others.

Their common motive when they went to the deceased's house was to kill him. The trial Judge was on *terra firma* when she found him culpable as a joint adventurer with a common intention to cause the death of the deceased in line with **Ernest Mwaba and others v The People**[1].

6.11 The prosecution witnesses identified him as a relative and friend of the deceased. There is no question of mistaken identity to arise on the facts.

The incident happened in broad daylight. We cannot fault the trial Judge for finding that the prosecution witnesses were credible witnesses who properly identified the appellant. The issue of the colour of his clothes was equally properly handled by the trial court.

In light of the foregoing, we find no merit in both grounds. We confirm the conviction and death sentence. The appeal is devoid of merit and accordingly dismissed.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAWVAPA
COURT OF APPEAL JUDGE