

IN THE COURT OF APPEAL OF ZAMBIA CAZ APPEAL NO. 77-78/2020
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

AUSTIN MWANAMUNGALU
MORRIS KAANA



1ST APPELLANT

2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: KONDOLO SC, CHISHIMBA, SICHINGA, JJA

On 10th November, 2020 and on 19th November, 2020

For the Appellants : Mr. K. Tembo, Legal aid Counsel – Legal Aid Board

*For the Respondents : Mrs. M.P. Lungu Deputy Chief 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. Kambarage Mpundu Kaunda v The People (1990-1992) ZR 91**
- 2. Daddly Fichite v The People SCZ/21/2017**
- 3. Haonga and Others v The People (1976) ZR 200**
- 4. Maseka v The People (1972) ZR 9**
- 5. Donald Fumbelo v The People SCZ/476/2013**
- 6. Mwape v The People (1967) ZR 151 (SC)**



7. **David Zulu v The People (1977) ZR 151 (SC)**
8. **Dorothy Mutale & Another v The People (1997) ZR 51**
9. **Mbinga Nyambe v The People (2011) ZR (SC).**
10. **Mutale v Phiri (1995-1997) ZR 227**
11. **Green Museke Kuyewa v The People (1996) ZR 8**
12. **Ilunga Kalaba and John Masefu v The People (1981) ZR 102**
13. **Haamenda Vs. The People [1977] ZR 184 (SC)**
14. **Machipisha Kombe v The People (2009) ZR 282**
15. **Ezious Munkombwe and Others v The People CAZ Appeal No. 7,8,9 of 2017**
16. **Bright Katontoka Mambwe v The People SCZ/8/2014**

LEGISLATION REFERRED TO

1. **The Penal Code, Chapter 87, Laws of Zambia**
2. **The Electronic Communications and Transactions Act No. 29 of 2009, Section 8(4)**

The Appellants, **A1 Austin Mwanamungalu and A2 Morris Kaana** stood charged with the offence of murder contrary to **Section 200 of the Penal Code**. They are alleged to have murdered Bryson Mwanamungalu on 18th November, 2018, in Namwala District of the Southern Province of the Republic of Zambia. They were both found guilty of murder without extenuating circumstances and sentenced to death.

According to PW1 Alfred Sibanda, A1 Austin Mwanamungalu phoned him around 01:00 hrs and asked to meet outside PW1's

house. PW1 went outside and A1 asked him to take a gun to A2 Morris Kaana Mulamfu. PW1 declined saying he could not take it at that time of the night whereupon A1 asked PW1 to give him a hoe which he did. A1 then dug a hole and buried the gun together with a white bullet and a pair of pink slippers which were tied up with wig mesh near a tree, not far from PW1's house. A1 then left without saying a word.

PW1 decided to go to A2's house but he met him on the way there and PW1 explained that A1 had buried a gun at his place. A2 informed PW1 that he was actually on his way to PW1's house. PW1 and A2 went to where the things were buried and A2 unearthed them. PW1 said they should take the things to the headman but A2 refused. He instead buried them in his own field in the presence of PW1.

The following morning A1 phoned PW1 to tell him that his elder brother Bryson Mwanamungalu had died. A1 went to the deceased's house and found him lying in a pool of blood with a wound at the back of his head. He looked like he had been shot and PW1 went and reported the matter to headman Insana and later to the police.

PW1 led the police to A2's house and it turned out that he had moved the gun and reburied it in PW1's field where it was recovered together with pink slippers. A1 and A2 were apprehended by the police. PW1 identified A1 & A2 in Court and said he had known the two of them since childhood. PW1 identified the gun, the pink slippers and the hoe. PW1 was not shaken during cross examination.

PW2 Shuren Hamungala, the deceased's wife, testified that on 17th November, 2018, A1 paged her husband's phone around 21:00hrs and later called around 23:00hrs, the two were brothers. The phone was on speaker and she heard A1 ask the deceased to go out to the barn to collect his money. The deceased told her that A1 wanted to give him some money and he was outside. PW2 heard a gunshot nearby around 01:00 hrs. She was terrified and waited for sunrise and for her husband to come back home. She woke around 06:00 hrs only to find her husband lying on the ground with a hole in the back of his head and his brains scattered all over the place. She screamed for their neighbour Given Hasulwe for help and he came.

She showed Given her husband's phone and showed him the last number that called him. PW2 identified the phone in Court.

She confirmed that A1 was apprehended by the police and she heard that A2 had also been apprehended.

Under cross examination she insisted that the last person to call her husband was A1 but agreed that she did not see them together when her husband went outside. She further confirmed that the two brothers were in good terms and that she did not see any firearm. It was put to PW2 that A1 did not owe the deceased any money from a transaction involving a bull but she insisted that he did. PW2 denied an assertion that she was on bad terms with A1 because he was encouraging the deceased to take another wife saying that they were never on bad terms.

PW3, Given Hasulwe confirmed that he saw the deceased's body after PW2 called out to him saying that her husband Bryson Mwanamungalu had been murdered. He confirmed that PW2 showed him the deceased's phone and the last caller was shown as "Austin Airtel". Since A1 was at the scene, PW3 asked him if he had lent his phone to anybody during the night and he said he had not. He identified the phone in Court. He said he witnessed A1 being apprehended by the police. The phone was switched on in Court and it showed "Austin itel". He identified Austin as A1.

PW4 was Detective Sergeant Manchisi Christopher, the scenes of crime officer. He took photographs of the deceased's body. He explained that A1, who was already in custody, informed the police that he had buried the firearm which was used to shoot the deceased and he led the police to where it was buried but they did not find it there. He then led them to A2 who then led the police to where he, A2, had buried a live ammunition and the firearm. PW4 took photographs of the entire process and the photo album was produced in evidence.

The arresting officer was PW5 Detective Constable Mweemba whose testimony was similar to PW4's in relation to the recovery of the firearm. He also explained how PW1 had contacted the police with information about the firearm which led to A1 being apprehended.

PW5 told the Court that he checked the deceased's phone and found that he received a call from A1 at 22:51 on 17th November, 2018. He added that A1's phone also showed that he phoned A2 around 17:00 hours on the 17th November, 2018 and at 01:00 hrs, 02:00hrs and 06:00hrs on the 18th November, 2018.

PW5 further testified that when A2 led to the recovery of the firearm, he told the police that he gave it to A1 who had told him

that he needed to hunt some animals which were eating his chickens at home. PW5 produced some call records from the phone operator, Airtel, in respect of phones belonging to PW1, PW2, A1 and A2. The defence objected to their production but the trial Judge overruled the objection and allowed them to be admitted. PW5 also produced the Ballistics' Report which indicated that the shotgun was in good working order.

Both accused persons were put on their defence. A1 testified that on 18th November, 2018 he heard people mourning at the deceased's house who was his elder brother. The police came around 09:00 hrs and asked him who had murdered the deceased and when he told them that he did not know, they took him into custody and locked him up in the cells. Around 16:00 he was asked to lead them to A2's house but he was not told why. When they got there, they handcuffed A2 and asked him where the gun was. He told them that he had no gun and they searched his house but found nothing and the two of them were taken to Namwala police station.

A1 stated that in the evening they were put in a vehicle in which they found PW1 and were driven to a bush where they were asked to pick and hold up a bullet which was on the

ground. They only agreed to do it after the police beat them up and photographs were taken of them holding the bullet. They were then taken to another place where they found a gun which they were forced to hold and photographs taken. A1 stated that PW1 was present when all this was happening and that PW1's entire testimony against him was full of lies because they were enemies as he had proposed to A1's wife.

A1 stated that he had no idea who the owner of the gun was and A2 said the same. He denied telling PW5 that he borrowed the gun to go and kill animals that were eating his chickens. He had no idea why PW5 lied against him. A1 totally denied calling the deceased on the night he was murdered. When told that the phone record showed that he had called him and that the deceased's wife said he called him, A1 insisted that he never called the deceased to come out of the house. He said during that period he was actually at his home sleeping and that's what he told the police but they would not listen to him.

A1 said he had a good relationship with his elder brother and he was not involved with him in any cattle transaction. A1 stated that PW3 lied when he said he had asked A1 if he had given his

.. phone to anyone on the night the deceased was shot but he did not know why he lied.

A2's testimony from the point when he was apprehended to the alleged recovery of the ammunition and gun was similar to A1's testimony. He denied that the firearm was his and denied that he gave it to A1 and said he knew nothing about its existence and that all the witnesses who tried to connect him to the gun were lying. He said he was at home during the material periods and the evidence against him by PW1 was a pack of lies as he had no contact with him at all on the night the deceased was shot.

The trial Judge analysed the evidence presented by the prosecution and found that the evidence was circumstantial because nobody saw who shot the deceased. The trial Judge also found that the shooting of the deceased was committed with malice aforethought and whoever shot him was guilty of murder. The learned trial Judge accepted the evidence of the deceased's wife PW2 that A1 phoned her husband on 17th November 2018, between 21:00 hrs and 23:00 hrs and asked that he meets him outside the house.

The trial Judge ruled out the possibility of false implication and cited the case of **Mwansa Mushala v The People (no**

citation). He further considered the fact that being the deceased's wife, the evidence of PW2 required corroboration as she was a witness with a possible interest to serve. That her evidence should be approached with caution to discount the danger of false implication and he accordingly warned himself as provided in the case of **Kambarage Mpundu Kaunda v The People**⁽¹⁾ and **Daddly Fichite v The People**⁽²⁾.

The lower Court found that PW2's testimony that A1 phoned the deceased on that fateful night was corroborated by the call records contained on the deceased's phone which the Court had an opportunity to see. That this was reinforced by the fact that A1 told PW3 that he had not given his phone to anybody else that night. The Court cited the cases of **Haonga and Others v The People**⁽³⁾ and **Maseka v The People**⁽⁴⁾ which states that where a witness is found to have lied on a material fact the weight to be attached to the remainder of their evidence is reduced.

The trial Court observed that PW2 heard a gunshot around 01:00 hrs which was about the same time that PW1 testified that A1 phoned him. The Court accepted the evidence of PW1 that A1 brought a gun to his house around 01:00 hrs. The trial Judge noted that the occurrence of events was quite "*contemporaneous*

and strikingly coincidental". A1's assertion that PW1 was his enemy was rejected as an afterthought because he did not cross examine PW1 on that point. The case of **Donald Fumbelo v The People**⁽⁵⁾ was cited. The trial judge concluded that A1 shot and killed the deceased.

With regard to A2, the learned trial Judge found that PW2 had no reason to falsely implicate A2 and accepted the evidence that he took the firearm to A2 who refused PW2's suggestion that they inform the chief about the gun and opted to bury it. The Court stated that the call records from Airtel showed that A1 had communicated with A2 at 01:00 hrs. 02:00 hrs and 05:00 hrs and further that it was no coincidence that when PW1 was on his way to A2's house to inform him about the firearm, he met A2 heading to PW1's residence. That the only logical conclusion from such a striking coincidence of events, is that A1 was communicating with both A2 and PW1 at the same time during the material night and the firearm was the subject of discussion.

The learned trial Judge further noted that despite A2's denial of knowing anything about the firearm, his Counsel's cross examination of PW4 and PW5 insinuated that he was the owner of the firearm. This was when it was put to PW4 and PW5 that A2

allegedly told them that A1 asked to borrow a firearm and A2 lent him his firearm so that A1 could kill wild animals that were eating his chickens. It was also put to the witnesses that the firearm was recovered from the place where A2 stored it for safekeeping as it was a dangerous weapon.

The Court found that A2 was the owner of the firearm and that he lent it to A1 for the purpose of assassinating the deceased. That the two acted with a common purpose and were thus captured by the doctrine of common purpose enunciated under **sections 21 and 22 of the Penal Code** and in terms of the case of **Mwape v The People**⁽⁶⁾ A1 and A2 were properly jointly charged for the murder of the deceased. The learned trial Judge found A1 and A2 guilty of murder and found no extenuating circumstances and sentenced each one of them to death.

A1 and A2 wish to impeach the verdict and have appealed advancing only one ground as follows;

The trial Court erred in law and in fact when it convicted the Appellants based on circumstantial evidence in the absence of corroborative evidence.

At the hearing both parties filed written arguments. The Appellants submitted that the evidence in this case was circumstantial and the conviction did not meet the standard set out in the case of **David Zulu v The People**⁽⁷⁾. That the evidence led by the Prosecution had not taken the case out of the realm of conjecture such that it attained a degree of cogency which could only permit an inference of guilt.

It was argued that despite the alleged phone call to the deceased, there was no evidence that A1 and the deceased actually met on the night he was murdered. That the only thing that connected A1 to the murder was the fact PW1 alleged that he met him that night. With regard to A2 it was submitted that the only evidence against him was that PW1 alleged that he met him that night and that A2 recognised the firearm allegedly given to him by A1 and accepted that it belonged to him. However, A2 denied PW2's testimony and said he did not own any firearm.

The Appellants submitted that a conviction on circumstantial evidence could not stand where more than one inference was possible and to that effect referred to the case of **Dorothy Mutale & Another v The People**⁽⁸⁾ and **Mbinga Nyambe v The People**⁽⁹⁾ It was submitted that there was lingering doubt

with regard to A2 as he had no contact with the deceased and he had denied owning the firearm which was allegedly used to murder the deceased. That apart from the assertion of PW1 and A1 there was no other evidence connecting A2 to the commission of the crime. The case of **Mutale v Phiri**⁽¹⁰⁾ was cited.

The argument was advanced that whilst it might be undisputed that the 1st Appellant did call the deceased, the call itself does not suffice as malice aforethought especially where the evidence is circumstantial. That the Prosecution had failed to prove its case beyond reasonable doubt and that the two Appellants be acquitted.

The Respondent commenced its argument by quoting from the case of **Green Museke Kuyewa v The People**⁽¹¹⁾ as follows, *“the circumstantial case attained such a degree of cogency such that the inference could not be resisted that the accused in the case committed the murder”*.

It was submitted that there were a number of odd coincidences in this case. PW2 heard a gunshot after A1 called the deceased to meet outside and then A1 asked PW1 to take a firearm to A2 that same night and upon his refusal A1 buried the

firearm. That the Appellants were communicating throughout the night. That PW1 decided to go and tell A2 about the gun A1 had buried, and along the way he met A2 who was going to PW1's house. The Appellants simply made bare denials and did not explain these odd coincidences. The case of **Ilunga Kalaba and John Masefu v The People**⁽¹²⁾ was cited.

The Respondent further submitted that even though the Appellants distanced themselves from the firearm, the line of cross examination adopted against PW4 and PW5 suggested that A2 was the owner of the firearm, and he had lent it to A1, for the alleged purpose of hunting some wild animals that were eating his chickens.

It was submitted that the only inference was that A1 and A2 acted together in the commission of the murder. That A2 provided the firearm which A1 used to shoot the deceased. They both tried to distance themselves from the firearm and in the absence of a reasonable and credible explanation, it can reasonably be inferred that the Appellants acted with a common purpose making both Appellants principal offenders as provided by **sections 21 and 22 of the Penal Code**. That malice aforethought was established because the Appellants knew or

ought to have known that shooting the deceased with a firearm would result in grievous harm or death. It was prayed that the appeal be dismissed.

We have considered the Record of Appeal and the submissions of both Counsel for the Appellant and the Prosecution. We note from the onset that the Prosecution has not presented any direct evidence to support the charge of murder against the two Appellants. There is no eye witness testimony placing them at the crime scene. The State's case is based purely on circumstantial evidence which raises the long-established principle that a conviction based on circumstantial evidence can only be sustained where the inference of guilt is the only possible inference. This was echoed by the Supreme Court in the case of **Mbinga Nyambe v The People (supra)** in which it abided the test for circumstantial evidence set out in the landmark case of **David Zulu v The People (supra)** and repeated that;

“a trial Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.”

The trial Judge considered separate strands of evidence which he put together and arrived at the conclusion that sufficient circumstantial evidence had been adduced against A1 and A2 to sustain a conviction for the offence of murder.

We have dissected the separate strands of evidence as follows;

1. The trial Judge accepted the evidence of the deceased's wife PW2 that A1 phoned the deceased around 23:00 hrs and asked to meet him outside the house. The phone's speaker was on and she heard A1's voice and she saw his name flash on the screen. A1 denied having made the call despite the phone being produced in Court and showing that he had called the deceased.
2. The trial Judge accepted the evidence of PW3 who confirmed that when the deceased's body was found the following morning, PW2 showed him the deceased's phone which indicated that A1 had phoned the deceased around 23:00 hrs.
3. The lower Court accepted the evidence of PW1 who said that A1 phoned him around 01:00 hours and shortly thereafter turned up at his house and asked PW1 to

take a firearm to A2. PW1 refused and A1 buried the firearm.

4. The trial Judge accepted the evidence of PW1 that he decided to go and tell A2 about the firearm but whilst on the way there, he met A2 who was on his way to PW1's house. PW1 explained what had happened and advised that they report the matter to the chief and hand over the gun to him but A2 refused. A2 then buried the gun.
5. The trial Court accepted the evidence that A1's phone showed that he communicated with A2 around 01:00 hrs which was about the time A1 phoned PW1 and about the time that PW2 heard the gunshot.
6. The Court accepted the evidence of PW4 and PW5 that A2 led the police to recovering the firearm. The Ballistics' Report showed that the recovered firearm was in good working condition and capable of firing cartridges.
7. The injuries sustained by the deceased are the type of injuries consistent with those caused by a shotgun such as the firearm recovered from A2.

The trial judge in part arrived at his conclusion on the basis that the call records obtained by the police from the mobile phone operator, Airtel, corroborated the evidence that at the material times, A1 called the deceased and he called PW1 and was in constant communication with A2. The defence Counsel objected to the production of the phone records obtained from Airtel because they were produced by the scenes of crime officer PW4 without having laid a proper foundation. It was argued that **section 8 (4) of the Electronic Communications and Transactions Act** requires that data messages be certified before production in Court. The section provides as follows:

(4) A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of such person, shall on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law, be admissible in evidence against any person and

rebuttable proof of the facts contained in such record, copy, printout or extract.

PW5 admitted that the call records he sought to produce were not certified. The trial judge therefore erred when he overruled the objection to the production of the call records because they were not certified as required by the cited law. We shall thus not consider the call records obtained from Airtel.

The trial judge noted that even though A2 tried to distance himself from the firearm, the line of cross examination assumed by the defence Counsel insinuated that the firearm belonged to him. It must be noted that even though the questions were from Counsel engaged by the Appellants, the questions do not amount to evidence and cannot on their own establish that A2 owned the firearm and lent it to A1. The questions do however raise eyebrows when the same Appellants, in their defence distance themselves from the firearm that they were attempting to establish as having been used for a particular purpose.

We agree with Counsel for the Prosecution that this case is fraught with odd coincidences, particularly that A1 phoned the deceased and asked to meet him outside and that A1 phoned PW1 and A2 at about the same time that the deceased's wife PW2

heard the gunshot. Another odd coincidence was that when PW1 decided to go and tell A2 about the firearm, he met A2 who was on his way to PW1's house at around 03:00hrs in the morning.

When considered together, these odd coincidences can be perceived as a series of events and provide compelling circumstantial evidence. In the case of **Haamenda v The People**⁽¹³⁾ the Court held that odd coincidences may be deemed as corroborating evidence this position was echoed in **Ilunga Kabala & John Masefu v The People (supra)** where the Court said that *"It is trite law that odd coincidences, if unexplained may be supporting evidence."* Yet again in **Machipisha Kombe v The People**⁽¹⁴⁾ it was held that odd coincidences constitute evidence of something more and represent additional evidence that the Court is entitled to take into account.

We have decided to not consider the call record evidence from Airtel as well as the cross examination of PW4 and PW5 by defence Counsel in respect of the firearm. However, we cannot fault the trial Judge for accepting the evidence presented on the actual phones belonging to the deceased and to A1.

There was no reason for the judge to disbelieve the evidence of PW1 who was a credible and robust witness. We further do not

fault the learned trial judge for accepting that A2 led the police to the recovery of the firearm after PW1 told them that A2 had unearthed the firearm from where A1 had buried it and A2 re-buried it in a different location but as it later turned out, A2 had moved it to a different location from where he initially buried it in the presence of PW1.

In the case of **Ezious Munkombwe and Others v The People**⁽¹⁵⁾ this Court opined that

“...when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individually.”

When we consider the various strands of evidence in their totality it is quite clear that only one inference can be drawn and it is that A1 shot the deceased in the early hours of 18th November, 2018 and that he acted in concert with A2. The trial Judge correctly applied the principles governing circumstantial evidence set out in the case of **David Zulu v The People (Supra)** and we agree that *in casu*, “the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.”

We further find that the trial Judge correctly applied the law of common purpose, common design and joint enterprise enshrined in sections 21 and 22 of the penal code. In the case of **Bright Katontoka Mambwe v The People**⁽¹⁶⁾ the Supreme Court elucidated as follows;

“In criminal law, the doctrine of common purpose, common design or joint enterprise refers to the situation where two or more people embark on a project with a common purpose which results in the commission of a crime. In this situation the participants are jointly liable for all that results from the acts occurring within the scope of their agreement. Each of the parties to an arrangement or understanding is guilty of any crime falling within the scope of the common purpose which is committed in carrying out that purpose.”


In his defence, A2 completely distanced himself from the firearm and denied having been in contact with A1 and PW1 during the material periods. This was in the face of robust evidence to the contrary. He thus failed to provide any reasonable

explanation as to why he gave A1 the firearm and the only inference from his behaviour on the night is that even though the actual shooting was carried out by A1, A2 embarked with A1 on a common purpose, common design and joint enterprise to murder the deceased. The trial Judge was thus on firm ground when he found A1 and A2 guilty of murder with no extenuating circumstances.


This appeal is consequently dismissed and the convictions for murder and sentences of death inflicted on A1 and A2 are upheld.



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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE



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F.M. CHISHIMBA
COURT OF APPEAL JUDGE



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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE