

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT KABWE  
(Criminal Jurisdiction)

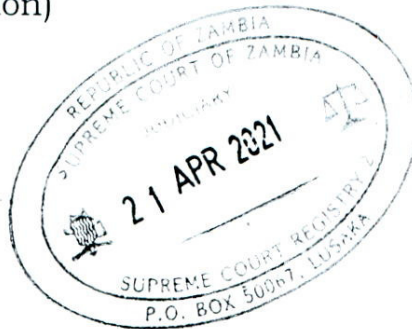
Appeal No. 11/2021

BETWEEN:

**JAMES SICHIMBA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

Coram: Hamaundu, Malila and Kaoma, JJS

On 13<sup>th</sup> April, 2021 and 21<sup>st</sup> April, 2021

For the Appellant: Mrs. M.K. Liswaniso, Senior Legal Aid Counsel

For the Respondent: Mr. C. Bako, Deputy Chief State Advocate

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## J U D G M E N T

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Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. Chimbo and others v The People (1982) Z.R. 20
2. Nachitumbi and another v The People (1975) Z.R. 285
3. MwansaMushala and others v The People (1978) Z.R. 58
4. Muvuna Kambanja Situna v The People (1982) Z.R. 115
5. John Ng'uni v The People (1977) Z.R. 376
6. Edward Sinyama v The People (1993-94) Z.R.16
7. Kambarange Mpundu Kaunda v The People (1990-1992) Z.R.215
8. Nyambe v The People (1973) Z.R. 228
9. Kateka v The People (1977) Z.R. 35
10. Fawaz and Chelelwa v The People (1982) Z.R. 14
11. Benson Phiri and Another v The People – SCZ/25/2002
12. David Zulu v The People (1977) Z.R.151
13. The People v Antifellow Chigabba (2017) 3 Z.R.187

Legislation referred to:

1. Penal Code, Cap 87 of the Laws of Zambia, sections 200, 204

## **1. Introduction**

- 1.1 This appeal is against conviction only. In the first paragraph of her heads of argument, Mrs. Liswaniso, counsel for the appellant stated that the appeal is against both conviction and sentence. However, there is no ground of appeal or argument that attacks the sentence.
- 1.2 The High Court sitting at Kasama tried and convicted the appellant of the offence of murder contrary to section 200 of the Penal Code, Cap 87. It was alleged that on 12<sup>th</sup> January, 2009 at Mbala in the Mbala District of the Northern Province of Zambia, the appellant murdered Joshua Simutowe. He denied the charge.

## **2. Evidence in the High Court**

- 2.1 The prosecution based its case mainly on the testimony of Derrick Simutowe (PW1), an elder brother to the deceased and an uncle to the appellant. In brief, the prosecution evidence was that on the material night, around 21:00 hours, PW1 was at home, in Kakonde village when he heard a gunshot and the deceased scream that he was dying; that he had been shot by Chalimbana. As PW1 came out of the house to go to his brother, he saw the appellant rush past, coming from the direction of the deceased's screaming, carrying a gun that was about a metre long. PW1 did not make out the specific type of gun but he was able to see the gun because there was light coming from a full moon.

- 2.2 When PW1 shouted in reference to the appellant that "here he is", the appellant who was about two metres away from him, continued running away. However, PW1 recognised the appellant because of the light from the full moon.
- 2.3 When PW1 found his brother, he was talking although he was weak and was bleeding from gunshot wounds to the right hand, right side of the chest and abdomen. The deceased told PW1 that Chalimbana had shot him. The shooting of the deceased was attributed to an adulterous association between the appellant and the deceased's wife, which occurred in July 2008 and for which the appellant was fined a sum of K3,000,000 by a village court as compensation. He was alleged to have admitted the adultery and paid K1,000,000 to the deceased, leaving a balance of K2,000,000 and he had tendered an apology to the deceased. It seems the appellant was not happy with the hefty fine and that rumour was circulating in the village.
- 2.4 The deceased was taken to Mbala police station where PW1 reported the shooting to PW3, who immediately issued a medical report form to allow the victim receive treatment. The victim was taken to Mbala General Hospital. Sadly, he died about 03.00 hours in the morning.
- 2.5 PW3, who was the arresting officer, launched investigations and went in search of the appellant but he was not in the village. During his investigations, he discovered that the relationship between the deceased and appellant was strained due to the alleged adultery.

- 2.6 A postmortem examination was conducted on the deceased's body after the deceased's father PW2 identified the body to the doctor. The doctor's finding was that the deceased died because of trauma, severe bleeding and injuries on the liver.
- 2.7 On 17<sup>th</sup> October, 2010, the appellant was spotted in a compound called Maraundi in Mbala and he was apprehended. PW3 attempted to get a warned and cautioned statement from him but he chose to exercise his constitutional right to remain silent.
- 2.8 In his defence, he denied attending any traditional court or paying any compensation for the alleged adultery with the deceased's wife. He said he only heard about the allegation in court during trial. He also denied that he was in the village when the shooting occurred. He said he went to Lusaka in 2007 and returned in October 2010, after receiving information that the police were looking for him in connection with the deceased's death and the police apprehended him when he was on his way to Kakonde village. He conceded that he did not tell the police upon arrest that he was in Lusaka from 2007 to 2010 and that he did not state the residential address or the name of the uncle he was allegedly staying with in Lusaka.

### **3. Consideration of the matter by the High Court**

- 3.1 There was no dispute in the court below as regards the death of the deceased. As to who caused his death, Ngulube, J (as she then

was), after warning herself that PW1 was a suspect witness and a single identifying witness, accepted his evidence that he recognised the appellant when he rushed past him with a gun. The judge cited the case of **Chimbo and others v The People**<sup>1</sup> and was convinced that PW1's recognition of the appellant was reliable as he had a good look at him assisted by the light from a full moon.

- 3.2 The learned trial judge noted that the evidence against the appellant was circumstantial but found that hearsay evidence was admissible provided the statement was made in such conditions of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or to the disadvantage of the accused.
- 3.3 She found that the utterance by the deceased that Chalimbana had shot him was forced from him by the pressure of the contemporary event and carried intense involvement as to exclude the possibility of concoction or distortion. She found PW1 to be credible, accepted his evidence and concluded that the appellant shot the deceased.
- 3.4 Further, the judge referred to the cause of death in the postmortem examination report, which was Intro abdominal and Intra thoracic hemorrhage due to a gunshot and found that the circumstantial evidence had taken the case out of the realm of conjecture to permit only an inference of guilt. She also observed that by shooting the deceased in the manner that he did, the appellant acted with malice aforethought as defined in section 204 of the Penal Code.

3.5 Based on all the foregoing, the learned trial judge found that the prosecution had proved its case beyond all reasonable doubt; she convicted the appellant and sentenced him to death.

#### **4. Appeal to this Court and arguments by the parties**

4.1 Disgruntled by the decision, the appellant has appealed to this Court on two grounds framed as follows:

- i. **The trial Court erred in law and fact when the Court found that PW1's recognition of the appellant as the person he saw pass by him from where the deceased Joshua was found injured was reliable.**
- ii. **The trial Court erred in law and fact when the Court found that the deceased's utterances were forced from him by the pressure of the contemporary event and carried intense involvement as to exclude the possibility of concoction or distortion**

4.2 Mrs. Liswaniso, counsel for the appellant filed heads of argument on which she relied. She augmented the same with oral arguments. The gist of her submissions in the first ground is that the possibility of honest mistake by PW1 in identifying the appellant as the person he saw coming from the direction the deceased was heard shouting that Chalimbana had shot him, had not been excluded. She referred to the evidence of PW1 in cross-examination showing that he did not know the direction the appellant came from but they met since that was the only route to use when passing by his house.

4.3 Further, counsel submitted that PW1 failed to describe the gun he saw with the appellant, no gun was recovered and no evidence was led to establish that the appellant owned a gun. She also argued

that PW1 agreed that he had poor sight and could not see from afar and on the material night, he relied on moonlight. That even if the appellant was his nephew mistakes in recognition of close relatives and friends are sometimes made and other than the identification, there was nothing else to connect the appellant to the offence.

- 4.4 In her verbal augmentation, in relation to the second ground, Mrs. Liswaniso urged us to be mindful, when considering the utterance by the deceased, that there was a possibility of concoction because the appellant and deceased were not in good terms because of the allegation of adultery and the attendant fine.
- 4.5 At the hearing of the appeal, Mr. Bako, counsel for the respondent sought leave to file heads of argument out of time. We granted him leave. He indicated that he would rely on the heads of argument and that the State was supporting the conviction. In response to ground one, he submitted that the trial judge was mindful of the guidance that this court gave in the cases of **Nachitumbi and another v The People**<sup>2</sup>, **Mwansa Mushala and others v The People**<sup>3</sup> and **Muvuna Kambanja Situna v The People**<sup>4</sup> on the approach to take when dealing with the evidence of a single identifying witness.
- 4.6 Counsel argued that the learned judge was aware of the need for corroboration or 'something more' that is required to support the evidence of identification and after considering the evidence of PW1,

regarding the opportunity he had to observe the appellant the trial judge accepted PW1's recognition of the appellant as reliable.

- 4.7 Counsel also argued that the evidence disclosed that the appellant disappeared from Kakonde village immediately after the shooting of the deceased and only returned to Mbala in October 2010. Counsel referred to the evidence of PW1 and PW3, which he argued was supported by exhibit P3, admitted in evidence at the instance of the defence. The said exhibit showed that the appellant had appeared at the village court on accusations of adultery with the deceased's wife, a few months before the shooting of the deceased.
- 4.8 Counsel submitted that the appellant disappeared from the village because of fear of prosecution as he realised that PW1 had seen him and reported to the police who launched a manhunt and that the disappearance provided evidence of 'something more' to support the recognition evidence despite the non-recovery of the gun.
- 4.9 Counsel also argued that the claim that PW1 had poor sight as he failed to tell time on a clock in the courtroom was irrelevant because PW1 identified the appellant. That the court can take judicial notice that a human figure is greater than a wall clock, especially that the witness said he was unable to see something beyond fifty metres but the distance between PW1 and the appellant was only about two metres.



4.10 With regard to the second ground of appeal, Mr. Bako argued that the trial judge was right to receive PW1's evidence concerning what he heard the deceased say after being shot as *res gestae*. That the utterance was contemporaneous to the shooting and was in keeping with the guidance of the court in **John Ng'uni v The People**<sup>5</sup> and **Edward Sinyama v The People**<sup>6</sup>. He emphasised that the deceased screamed out the appellant's name immediately he was shot and did not reveal the identity of his assailant at the police as wrongly indicated in the appellant's arguments.

4.11 Mr. Bako submitted that on the totality of the evidence, the trial judge correctly found that the appellant was the person who killed the deceased. That he offered no reasonable explanation about his whereabouts on the fateful night or give details of who he was with and what he was doing in Lusaka or show why PW1 who had no personal issue with him and who he was living in harmony with would falsely implicate him.

4.12 In his oral answer to the argument by Mrs. Liswaniso that there was a possibility of concoction or distortion by the deceased when he made the utterance, Mr. Bako submitted that when someone makes a statement that is contemporaneous to an event, the belief ought to be that it is true. Counsel added that the deceased had no time to reflect, to mention falsely the name of the appellant if he was not the shooter, or to mention any other name out of spite.

4.13 In her reply, Mrs. Liswaniso insisted that the possibility of honest mistake was not excluded and that this was compounded by PW1's poor sight and the fact that the person PW1 saw was fleeing from the scene of crime and PW1 was rushing to his brother. In relation to the alibi raised by the appellant, she submitted that if the police had persisted in probing him, he could have given them details of where he was staying whilst in Lusaka.

## **5. Consideration of the appeal and decision by this Court**

5.1 We have considered the record of appeal and the arguments by learned counsel from both sides. It was not in dispute in the court below that during the night of 12<sup>th</sup> January, 2009, around 21:00 hours the deceased was shot with a gun and that he sustained fatal injuries to the chest and abdomen, which caused his death. It is common ground that at the time of the shooting, the deceased screamed that "Chalimbana has shot me" and that PW1, heard both the gunshot and the distressed scream of his brother.

5.2 Further, it was not in dispute that when PW1 got to his brother he found him alive but injured, weak and bleeding but still talking and the deceased disclosed to PW1 that the appellant had shot him. The deceased died six hours later at Mbala General Hospital.

5.3 The key issue in the case centred on the identification by PW1. The question the trial judge had to answer was whether the appellant

caused the death of the deceased. We accept that the burden of proof as regards the identity of an accused lies on the prosecution and the burden should be discharged beyond all reasonable doubt.

5.4 In resolving the above issue, as submitted by Mr. Bako, the trial judge considered that the evidence against the appellant was that of PW1, the deceased's elder brother. Hence, she warned herself, that PW1 was a suspect witness and must be treated as such as held in the case of **Kambarange Mpundu Kaunda v The People**<sup>7</sup> and that he was a single identifying witness and she was required to exclude the possibility of honest mistake. In that regard, she referred to the cases of **Nyambe v The People**<sup>8</sup>, **Kateka v The People**<sup>9</sup> and **Fawaz and Chelelwa v The People**<sup>10</sup>.

5.5 We accept, as was submitted by Mrs. Liswaniso that the shooting happened in the night; that PW1 saw a person run past him as he rushed to the deceased; and that PW1 admitted that he had poor sight. We also agree with her that mistakes are sometimes made even in the recognition of close relatives and friends.

5.6 However, as submitted by Mr. Bako, PW1 said he could not see far, beyond a distance of fifty metres; that he saw the appellant from a short distance of about two metres; and that he recognised him since he was his nephew and they had met earlier in the village and had a chat. He also said there was sufficient light because there was a full moon and that evidence remained unchallenged. In view of the

above facts, the learned trial judge considered the evidence of PW1 as regards the question of identity to be reliable.

- 5.7 The learned trial judge made a finding of fact with respect to the evidence before her that PW1 did not merely glance at the person he recognised to be the appellant. He saw the appellant coming from the same direction he had heard the deceased screaming, had a good look at him and recognised him as he ran past him and when PW1 shouted 'here he is' the appellant continued running away.
- 5.8 PW1 also observed that the appellant was carrying a gun even if the gun was not recovered from him. Suffice to add that the appellant disappeared from the village for one year nine months; he only went back to Mbala in October 2010 when he was apprehended. As the court held in the case of **Benson Phiri and Another v The People**<sup>11</sup> the testimony of a single witness who knew the accused prior to the incident in question is adequate to support the conviction.
- 5.9 The learned trial judge was also alive to the fact that the evidence against the appellant was circumstantial and in that regard she made reference to the case of **David Zulu v The People**<sup>12</sup>. On the totality of the evidence before her, she found that the circumstantial evidence had taken the case out of the realm of conjecture to permit only an inference of guilt and concluded that the appellant was the one who shot the deceased. We do not fault the learned trial judge for coming to that conclusion.

- 5.10 In his defence, which we alluded to in paragraph 2.8, the appellant denied the adultery or attending any village court or being fined or paying any compensation to the deceased. However, Mrs. Liswaniso admitted before us that according to the evidence on record there was an allegation of adultery; that what the appellant did was taboo in their custom and tradition; and that he was fined and he paid part of the fine, leaving a balance.
- 5.11 The learned trial judge made a finding of fact that was supported by the evidence that the appellant had a motive for killing the deceased because of the K3,000,000 he was fined for committing adultery with the deceased's wife. Again, we find no basis for disturbing this finding of fact by the learned trial judge. We, therefore, find no merit in the first ground of appeal.
- 5.12 Coming to the second ground of appeal, there was no dispute that the deceased was shot around 21.00 hours or that immediately he shouted that Chalimbana had shot him, which made PW1 to rush to where the deceased was. He found the deceased in a distressed condition but the deceased repeated to him that Chalimbana had shot him. As rightly submitted by Mr. Bako, the deceased did not make the utterances for the first time at the police station when a statement was recorded or when he died in hospital at 03:00 hours.
- 5.13 The learned trial judge made a finding that the utterances by the deceased were forced from him by the pressure of the contemporary

event and carried intense involvement as to exclude the possibility of concoction or distortion. Therefore, the judge properly accepted that the appellant shot the deceased on the fateful night.

5.14 Mrs. Liswaniso spiritedly argued that there was still a possibility of concoction or distortion given that there was bad blood between the appellant and the deceased and that we should not believe PW1 for the same reason. We do not believe that a person who has suffered a fatal gunshot wound to the chest and abdomen could mention the appellant's name because of the alleged adultery if the appellant was not the shooter. We agree with Mr. Bako that the deceased mentioned the name of the person who shot him. There could have been no room for concoction or distortion.

5.15 As regards PW1, as Mr. Bako rightly submitted, there is no evidence on the record to show that PW1 falsely implicated the appellant when he said he saw and recognised him on the fateful night or when he said that he heard the utterance by the deceased that the appellant had shot him. The trial judge was satisfied that PW1 was a reliable and credible witness and thus accepted that he recognised the appellant and heard the deceased utter the above words.

5.16 In the case of **The People v Antifellow Chigabba**<sup>13</sup> we stated that in general, where witnesses are both related to the victim, the need for corroboration does not arise unless there is evidence that the witness demonstrate a motive to falsely implicate the accused.

5.17 In this case, we do not find any misdirection in the conclusion reached by the learned trial judge to admit the utterances by the deceased as the *res gestae* or part of the *res gestae*. The evidence was concerned with the words spoken by the deceased at the time of the shooting, which not only conveyed the truth of what was said but also tended to establish the identity of the murderer.

5.18 The learned trial judge rejected the alibi that the appellant was in Lusaka from 2007 and returned in October 2010. She pointed out that when the appellant was apprehended he did not raise the alibi to the police for it to be tested, he could not even give details of where he lived in Lusaka and he did not know his uncle's name who hosted him in Kabanana. The judge found that he was on the run, moreover, that his disappearance from the village soon after the shooting of the deceased supported PW1's evidence of identification and the utterance by the deceased that the appellant had shot him.

5.19 Given a different scenario, perhaps we could have accepted that the appellant's disappearance from the village was not evidence of guilt but on the totality of the evidence on record we agree with the learned trial judge that it was evidence of guilt.

5.20 We reject the proposition by Mrs. Liswaniso that if the police had persisted in probing the appellant, he could have given them details of where he was staying in Lusaka. That responsibility was on the appellant and not on the police. Thus, the second ground also fails.

**6. Conclusion**

- 6.1 As we end, we are satisfied that the learned trial judge correctly found that the circumstantial evidence had taken the case out of the realm of conjecture to permit only an inference of guilt and that the prosecution had proved the identity of the killer of the deceased to the required standard of proof beyond all reasonable doubt.
- 6.2 In the event, we dismiss the appeal and uphold the conviction by the lower court.



**E. M. HAMAUNDU**  
**SUPREME COURT JUDGE**



**M. MALILA**  
**SUPREME COURT JUDGE**



**R. M. C. KAOMA**  
**SUPREME COURT JUDGE**