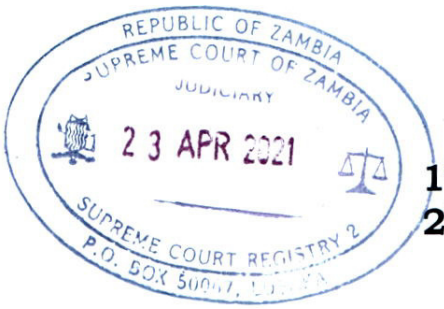
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.07,08/2021**
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

MWIYA ZUNGA ZUNGA **1ST APPELLANT**
MULEMWA MULEMWA **2ND APPELLANT**

and

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Malila and Kaoma, JJS
On 14th April, 2021 and 23rd April, 2021

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

For the State : Mr S. Zulu, State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court

Cases referred to:
1. **Haonga & Others v The People (1976) ZR 200**
2. **David Zulu v The People (1977) ZR 151**
3. **Yokonia Mwale v The People, SCZ Appeal No. 285 of 2017**
4. **Boniface Chanda Chola and Another v The People (1988/1989) ZR 163**
5. **Emmanuel Phiri and Others v The People (1978) ZR (reprint) 112**
6. **Simon Malambo Choka v The People (1978) ZR 344**

The appellants appeal against their conviction for the offence of murder. The appellants appeared before the High Court (presided over by Sikazwe, J) at sessions held at Mongu in December, 2014 on the said charge. It was alleged that on 15th June, 2012, the two murdered a woman named Nalucha Ngenda in the Senanga District of the Western Province of Zambia.

The facts before the trial court were, to a large extent, not in dispute and were these: On 15th December, 2012 the deceased, in the company of relatives, went to attend a ceremony at a neighbouring village named Libuta. On their way back to their village, named Imbula, around 19:00 hours, they met the two appellants. It was not in disputed, even by the appellants, that after a brief chat between the appellants and that party of relatives, the deceased remained behind with the appellants. That was the last time that her relatives saw the deceased alive.

The deceased did not come back to Imbula village, and was not seen the whole of the day that followed. After two days a search for the deceased was mounted, involving the neighbouring villages. It yielded no fruit. The deceased remained unseen for almost three

months. Then on 6th September, 2012, the body of the deceased was discovered in a swamp, on the banks of a river named Luwe. It was partially naked and had wounds on the head. Subsequent postmortem examination found that the deceased had died from those wounds. On the day that it was discovered, the deceased's body was in a decomposed state.

The police were called in. The deceased's family suspected the two appellants to be behind the killing of the deceased since they were the only people known to the deceased's family members who were last seen with her. At this point in time, the arresting officer (PW6) left word at the village of the two appellants that they should report to the police. PW6 told the court that the 2nd appellant reported as requested, and that he (PW6) recorded a statement from the 2nd appellant, without warn and caution, because at that time the 2nd appellant was merely a witness. PW6 admitted though that he kept the 2nd appellant in custody until the 1st appellant and another person were apprehended. PW6 then told the court that in that statement the 2nd appellant implicated the 1st appellant and two other persons as having been the ones who killed the deceased, while exonerating himself. According to PW6, the 1st appellant and another

person were apprehended. It was then that the 2nd appellant was released and became a witness for the prosecution. However, when the matter came for trial the 2nd appellant refused to give adverse testimony against the accused. PW6 said that it was decided to withdraw the case and then charge the 2nd appellant for the offence as well. And that is what happened.

PW6 produced the statement that he recorded from the 2nd appellant.

We should state here that the evidence on which the appellants were convicted, as will be seen later, was entirely from two witnesses; namely, PW1 Maimbolwa Kayiwala, the elder sister to the deceased and PW4, Mwiya Kakungu, an elder brother to the deceased. The two witnesses told the court that when the deceased disappeared, the two appellants were asked about her whereabouts, and they replied that they had gone with her back to the home where the ceremony was taking place since she wanted to go back there to drink. The witnesses then said that when Christine Pumulo (PW3), the owner of the home at which the ceremony had taken place, was asked if the deceased had gone back to the home, the said Christine Pumulo refuted that suggestion in the presence of the two appellants.

According to the witnesses, the two appellants then changed their story and; first said that they parted company with the deceased at a church; and then later said that they parted with the deceased at a tree which was about 100 metres away from Christine Pumulo's yard. The witnesses also said that, when a search for the deceased was mounted, the two appellants did not take part.

It was clear that the desired effect of this testimony was for the court to conclude that in view of the constantly shifting positions in the explanations by the appellants, they did posses a guilty knowledge of what happened to the deceased.

In their defence, the two appellants maintained their position that although they went with the deceased to Libuta village, they did not reach the home of Christine Pumulo, but parted company with the deceased at a point where the path going to their village was: and that, they then took that path and went to their village, leaving the deceased to cover the last 100 metres to Christine Pumulo's home.

In a judgment containing no findings of fact, the learned judge was clearly swayed by the testimony of PW1 and PW4. Hence, he said this:

"Taking into consideration the evidence of the prosecution witnesses and the two accused, I am inclined to accept the evidence of the prosecution witnesses. I do believe without any doubt the prosecution witnesses' evidence. I was impressed with their demeanour and they were telling the court the truth. They were not shaken during cross-examination. I do not believe the accused evidence, because their narration of what they knew on the matter is at variance and does not corroborate each other. They had given many and different stories of how they allegedly moved with the deceased and where they left her in Libuta village. Their explanation is left hanging and does not impress this court. There were before the court to mislead it and I am not impressed with their demeanour. There are before this court to save their skins. I do not believe their evidence. I am satisfied that taking into account all the circumstances, an inference of guilty had been established against the two accused persons."

The judge then went on to hold that the two accused had participated in a common design, as a result of which both were liable for the murder. He relied on the case of **Haonga & Others v The People**[1].

Before us, the appellants have two grounds of appeal. The first ground is against the holding by the trial judge that an inference of guilt had been established against the two appellants. The second

one is with regard to the trial judge's holding that the appellants participated in a common design.

Mrs Liswaniso, for the appellants, citing a leading case on the subject, namely **David Zulu v The People**[2], argued that on the evidence before the court, it could not be said that the only inference to be drawn was that the appellants killed the deceased. She pointed to the testimony from some witnesses who said that at that time of the year, that is in the month of June, the area where the body was found used to be flooded, and then argued that no evidence was adduced to show how the appellants could have moved the deceased's body to the flooded area where it was found. Mrs Liswaniso submitted that on the facts before the court another inference could be drawn that the deceased could have met her fate on her way to Christine Pumulo's home, after parting with the appellants.

Mrs Liswaniso then observed that the prosecution were relying on the evidence of witnesses who were relatives of the deceased. We think that this is a valid point which deserved a separate ground of appeal; no ground has been advanced. However, in the interest of justice we shall consider the argument.

In the second ground, Mrs Liswaniso referred to the testimony of the arresting officer about the statement which the 2nd appellant gave to the police before he became an accused in the case (which was, of course, not under warn and caution). Mrs Liswaniso argued that there was no common purpose, common design or joint enterprise between the appellants which resulted in the killing of the deceased. She pointed out that the 2nd appellant denied his earlier statement, and that that is what led him to being charged for the offence. Counsel submitted that now that the 2nd appellant was an accused person, his statement, in so far as it incriminated the 1st appellant, needed to be corroborated.

We do not appreciate why Mrs Liswaniso is advancing these arguments, or why the second ground was mounted at all because the trial judge clearly ignored, not only PW6's testimony on this aspect, but the 2nd appellant's statement as well. Those two pieces of evidence do not form part of the judge's *ratio decidendi.* It would appear to us that it ought to be the prosecution who should be aggrieved by the trial judge's approach because they are the ones who needed that evidence in order to strengthen their case, at least even as against the 2nd appellant. But there is no cross-appeal from

the prosecution on the issue, and therefore there is no ground on the issue to move us to discuss whether or not that piece of evidence was properly ignored by the trial judge. Our view, in the circumstances, is that the second ground of appeal is misconceived, and must be dismissed.

In response, Mr Zulu, for the State, submitted that the series of circumstances in this case had taken it out of the realm of conjecture. Mr Zulu pointed out, for example, that the deceased went missing for 52 days. He argued that this was enough time for a person to make arrangements to move the body by canoe, so that even though the area was flooded it was possible to access it.

Mr Zulu also submitted that, although the witnesses were relatives of the deceased, they had no motive to give false evidence, and were credible. Counsel referred us to some authorities, particularly to the case of **Yokonia Mwale v The People**[3], where we have held that a witness should not be said to be a witness with an interest to serve merely because they are relatives of the victim, and that there should be something in the evidence that tends to show that such a witness would be inclined to falsely implicate the appellant.

We shall start with the basis upon which the trial judge accepted the testimony of the witnesses: He said that he was impressed with their demeanor and that they were telling the truth.

In the case of **Boniface Chanda Chola and Another v The People**[4] we held:

> **"(3) in the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices"**

In the case of **Emmanuel Phiri and Others v The People**[5] we held:

> **"(3) As a matter of law those reasons (i.e the reasons for finding that the danger of false implication has been excluded) must consist in something more than a belief in the truth of the evidence of the accomplices based simply on their demeanor and the plausibility of their evidence– considerations which apply to any witness. If there be nothing more, the court must acquit".** *(underlined words supplied for completeness)*

In the case of **Simon Malambo Choka v The People**[6] we put the position more clearly when we held:

> **"(1) A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a mere belief in the truth thereof based simply on his demeanor and the plausibility of his evidence. That** *"something more"* **must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness".**

In this case, we have pointed out that the damning evidence against the appellants came from PW1 and PW4, relatives of the deceased. The following must be noted about their testimony. The learned counsel representing the two appellants at the trial, in cross-examination, managed to show that, in her statement to the police, PW1 did not tell the police that she had asked the appellants concerning the whereabouts of the deceased, and that they had told her that they had left the deceased at Christine Pumulo's home. Similarly, in cross-examination of PW4, counsel for the defence put it to the witness, and the latter conceded, that in his statement to the police he had not told them about his having interviewed the appellants. Particularly, he conceded that contrary to his evidence in

court, he did not tell the police that the appellants were taken to Christine Pumulo's home where, upon her denial of their explanation, the appellants changed stories. This went to show that the two witnesses seemed to be motivated by a desire to strengthen the case against the appellants. Therefore, there were circumstances which showed that, apart from the fact that they were related to the deceased, the two witnesses had a possible interest of their own to serve. That aspect of their testimony needed to be corroborated before a conviction on it could be said to be safe. Now, from the evidence, the only independent witness who could have provided that corroboration was Christine Pumulo (PW3). However, her testimony did not support the two witness's testimony that the two appellants were taken before her and questioned; and that when she refuted their explanation, they changed their story. In fact, Christine Pumulo in cross-examination denied that the appellants were brought before her. In the circumstances, that aspect of the testimony of PW1 and PW4, which was the most incriminating of the evidence which the trial judge relied on, was uncorroborated. Once that testimony is excluded, what remains is the appellants' explanation that they parted with the deceased at a spot which was about 100 metres from

Christine Pumulo's home. We agree with Mrs Liswaniso's argument that from there anything could have happened to the deceased as she covered the last 100 metres to Christine Pumulo's home. We take note especially that this was in the early part of the night, around 19:00 hours to 20:00 hours, when a chance encounter with residents of other villages, or even other people who had attended the ceremony, could not be ruled out. We therefore do not accept the argument that the circumstantial evidence in this case only permitted an inference of guilt on the part of the appellants. We, consequently, find merit in the appeal.

We allow this appeal, quash the conviction by the High Court and acquit both appellants.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE