

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

APPEAL NO.165,166/2020

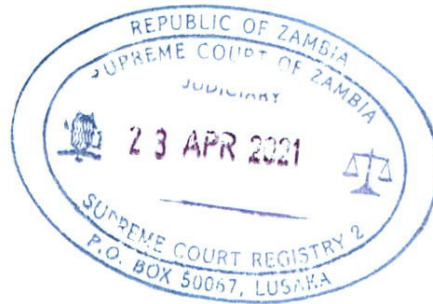
BETWEEN:

CHANCY MTAMBALIKA
THOMAS MAKINA

1ST APPELLANT
2ND APPELLANT

and

THE PEOPLE



RESPONDENT

Coram: Hamaundu, Malila and Kaoma, JJS

On 13th April, 2021 and 23rd April, 2021

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

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

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court

Cases referred to:

1. **Simon Malambo Choka v The People (1978) ZR 243**
2. **Wilson Mwenya v The People (1990/1992) ZR 24**
3. **Kambarage Mpundu Kaunda v The People (1990/1992) ZR 91**
4. **Yokoniya Mwale v The People, Appeal No. 285 of 2014**
5. **Chabala v The People (1976) ZR 14**

This appeal is against conviction for the charges of aggravated robbery and murder. When the appeal came for hearing before us on 13th April, 2021, the prison authorities presented to us documents which proved that the 2nd appellant, Thomas Makina, died in prison on 28th January, 2016. For that reason, his appeal abated, while that of the 1st appellant proceeded.

The two appellants were charged before the High Court sitting at Chipata, presided over by Sichinga, J, as he then was. One count was for aggravated robbery contrary to **Section 294(1)** of the **Penal Code, Chapter 87** of the **Laws of Zambia**; It was alleged in this charge that on 15th December, 2012, the two appellants, whilst armed with a pistol robbed Derrick Simasiku Ling'umbwa of a motor vehicle, a Toyota corolla whose registration number was ALF 7106. The other count was for murder contrary to **section 200** of the said **Penal Code**. It was alleged that, on the same day, the two appellants murdered the said Derrick Simasiku Ling'umbwa.

The 1st appellant did not deny being found in possession of the motor vehicle. However, his explanation was that he had bought the vehicle from Billy Mawelela (PW1), a person that he had had business dealings with previously.

The facts before the trial court were these: The 1st appellant is a Malawian national who at the material time lived in Mzimba, a town in Malawi which is not so many kilometres distant from the Zambian town of Lundazi. On 15th December, 2012 the two appellants were given a lift from Mzimba to Lundazi in an ambulance belonging to Embangweni Hospital in Mzimba. The agreement was that they would go back to Mzimba in the same vehicle. The appellants however did not show up at the place where it was agreed that they would meet the vehicle for them to go back to Mzimba in the ambulance. The vehicle went back without them. The 1st appellant later took possession of the Toyota corolla, which is the subject of the charge and went to Mzimba with it. In Mzimba, he parked the vehicle at a guest house known as Kanjinga.

The prosecution's version of the facts was that the motor vehicle belonged to Brighton Nalishuwa Ling'umbwa (PW6), the deceased's father. PW1 told the court that the two appellants, on the 15th December, 2012 booked the vehicle, which was being driven by the deceased, to take them to the border. Around 18:00 hours, the witness accompanied the deceased to take the passengers to Lusunta Border Post. PW1 said that they picked the two appellants from

Gomatemwa guest house within Lundazi. Enock Tembo (PW5), the manager of Gomatemwa guest house confirmed seeing PW1, the deceased and the two appellants getting into the vehicle and leaving the guest house. PW1 said that the deceased had barely driven some five kilometres along the road to the border when the two appellants stopped the vehicle in order to answer the call of nature. When they came back, the 1st appellant told the deceased that the front tyre was deflating. The deceased came out to check the tyre, the 1st appellant, however, then took out a gun. PW1 screamed to the deceased that the appellants had a gun, and told him to run. PW1 immediately ran towards a village close by. Behind him, he heard two gunshots. And then he heard the vehicle being driven away. He sought help from the people at the village. A witness from that village, Emmanuel Mvula (PW8), confirmed hearing two gunshots and the sound of the vehicle. He confirmed seeing PW1 coming to the village, in distress. PW1 and PW8 went back to the scene where they found the deceased lying down, dead. The vehicle had gone.

PW8 then called the police, who came to the scene. The police took the body and PW1 back to Lundazi. The following morning the

police came back to the scene. And, from there, two spent cartridges were picked.

On 17th December, 2012, in Mzimba, the owner of Kanjinga guest house went to report to the police that a motor vehicle without registration number plates or licence discs had been abandoned at his guest house. On the same day, the police in Mzimba received an inquiry from their Zambian counterparts about a stolen motor vehicle. The police in Mzimba invited their counterparts to go to Mzimba and take a look at the abandoned motor vehicle. The arresting officer (PW11), in the company of a team of officers from Lundazi, went to Mzimba where they confirmed that the abandoned motor vehicle was the one which was taken from the deceased. At that time, information gathered thus far was beginning to point at the two appellants. The 1st appellant was immediately apprehended and, together with the motor vehicle, taken to Lundazi where he was placed in custody. The 2nd appellant was also apprehended about two days later, and handed over to the Zambian police.

A few days later, the police in Mzimba received information that the 1st appellant had told his wife to dispose of a gun. They approached the appellant's wife who took them to a pit latrine, at the

1st appellant's residence. A pistol with seven rounds of live ammunition in its magazine was retrieved from the latrine. This was also handed over to the Zambian police.

PW11, the arresting officer, then sent the pistol with its live ammunition, as well as the two spent cartridges that were picked at the scene of crime, to Lusaka for ballistic examination. The ballistic expert (PW9) confirmed that the two spent cartridges which were picked at the scene of crime were fired from the pistol that was retrieved from the 1st appellant's residence, in Mzimba.

The arresting officer then put the two appellants on an identification parade. PW1 identified the 1st appellant as the one who took out the gun. PW5, the manager of Gomatemwa guest house, identified both appellants as the people that he saw getting into the vehicle with the deceased and PW1. The appellants were then charged for the offence.

The 1st appellant's defence, as we have said, was that he bought the vehicle from PW1. He said that PW1 went with him up to the border where they then parted company. He suggested that PW1 may have killed the deceased. He further said that, in Mzimba, he parked

the vehicle at Kanjinga guest house because at his residence the ground was so wet that the vehicle would have been stuck.

The learned trial judge found the prosecution's evidence overwhelming. He convicted the two appellants on both counts. However, the judge only pronounced one sentence for both counts—the sentence of death.

The appeal is on two grounds. These read as follows:

1. **The trial court erred in law and fact when it found that PW1 was not a witness with a possible interest of his own to serve**
2. **The trial court erred in law and fact when it found that the appellant was the man that pulled out the firearm and pulled the trigger to fire the shots that killed the deceased.**

In the first ground of appeal, Mrs Liswaniso, for the appellants, referred us to the case of **Simon Malambo Choka v The People**⁽¹⁾, where we held that a witness with a possible interest to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration. Counsel also referred us to the case of **Wilson Mwenya v The People**⁽²⁾, although the holding that she quoted does not match those that are in the law report.

On this ground, Mr Bako, for the State, responded that, at the very least, the only basis upon which the trial court could have been expected to consider PW1 as a witness with an interest to serve was the fact that he was a friend of the deceased: and this is on the authority of the case of **Kambarage Mpundu Kaunda v The People**⁽³⁾. Mr Bako, however, pointed out that, on the authority of the case of **Yokoniya Mwale v The People**⁽⁴⁾, the fact that PW1 was a friend of the deceased was not, of itself, a ground for considering PW1 as a witness with an interest of his own to serve: there had to be other circumstances present which tended to show that the witness would be predisposed to bias. Mr Bako then submitted that the trial court had considered the possibility and, at length, had gone on to show that PW1 was corroborated in a material particular by evidence of other independent witnesses, so that the possibility was discounted.

We agree with Mr Bako's submission on this ground. Indeed, the testimony of PW1 was corroborated in so many aspects that the possibility that he could have been falsely implicating the 1st appellant was excluded. For example, PW5 corroborated PW1's testimony that the 1st appellant was in the company of the 2nd appellant when he got into the deceased's vehicle. PW8 also

corroborated PW'1 testimony that, about five kilometres towards the border, the deceased was shot dead and the vehicle was taken away, while PW1 survived and ran to seek help from a nearby village. Then there were odd pieces of evidence which supported PW1's assertion that the 1st appellant did not take possession of the motor vehicle by way of a sale: For example, by the time the vehicle was seen in Malawi, the 1st appellant had removed the registration number plates and licence discs from the vehicle. Again, when he arrived in Malawi, the 1st appellant parked the vehicle at Kanjinga guest house without informing the owner of the guest house; as such, the vehicle appeared to have been abandoned. We, therefore, find no merit in this ground.

In the second ground, Mrs Liswaniso argued that independent evidence was not adduced to prove that the firearm was truly retrieved from the 1st appellant's pit latrine. She pointed out that the arresting officer did not visit the place where it was recovered. Counsel contended that the 1st appellant was merely being falsely implicated. She further argued that the explanation that the 1st appellant gave that he did not know anything about the gun, and that he did not shoot the deceased was a reasonable one. She referred us to the case of **Chabala v The People**⁽⁵⁾ for the last submission.

The gist of the holding in that case is that where an accused person's explanation might reasonably be true then guilt is not the only inference that can be drawn from the facts of the case.


Mr Bako, in response, argued that the sum total of the evidence in this case proved that it was the appellant who killed the deceased. He pointed out for example that the spent cartridges were proved to have been fired from the gun that was retrieved from the 1st appellant's residence. He further pointed to the 1st appellant's association with the vehicle, and other odd coincidences which we have referred to above and argued that all these were pieces of evidence that proved the fact that the appellant killed the deceased.

Again, we agree with Mr Bako's submission. We may point out that the evidence against him was that of identification. PW1 told the court that he saw the 1st appellant take out a gun and shortly thereafter he heard two gun shots. The police from Mzimba told the court that they retrieved a gun from a pit latrine at the 1st appellant's residence. Subsequent ballistic examination proved that the gun was the one that fired the bullets that killed the deceased. That evidence went to show that PW1 was telling the truth when he said that he saw the 1st appellant take out a gun, and then shortly thereafter he

heard two gun shots. The two pieces of evidence proved that it was the 1st appellant who shot the deceased. For the foregoing reasons, we find no merit in the second ground, either.

It follows that the entire appeal must be dismissed. As we have observed, the trial judge only applied one sentence for both counts. To set the record straight, we enter a sentence of death against the appellant for the conviction for the offence of aggravated robbery. We further enter another sentence of death against the appellant for the conviction for the offence of murder. We, however, hasten to say that if the President of the Republic of Zambia has hitherto exercised his prerogative of mercy and commuted the death sentence to life imprisonment, or any other sentence, that commutation is deemed to have applied on both counts, so that it is that commuted sentence which remains effective.

This appeal stands dismissed.

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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