

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 197/2020
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

KAHALU MUSHE
CHINGUMBE CHINGUMBE
CHINGUMBE KAYOMBO



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

and

THE PEOPLE

RESPONDENT

Coram: Hamaundu, Malila and Kaoma, JJS

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

For the Appellant : Mrs S.C. Lukwesa, Principal Legal Aid Counsel

For the State : Ms C. Soko, Deputy Chief State Advocate and
Ms O. Muvwende, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court

Cases referred to:

- 1. David Zulu v The People (1977) ZR 151**
- 2. Dorothy Mutale & Another v The People (1995-1997) ZR 227**

1.0 INTRODUCTION

1.1 The appeal before us is that of the 1st appellant, and he appeals against his conviction for murder by the High Court, presided over by Kondolo, J, as he then was, at a session held at Mongu in August, 2012. The 2nd appellant has no appeal before us since he died in custody before trial was held. He was the grandfather of the 3rd appellant. And for the purpose of clarity we shall continue to refer to him as the 2nd appellant.

1.2 The 3rd appellant, however, was convicted of the offence, together with the 1st appellant. Having been a juvenile at the time the offence was committed, the 3rd appellant was sentenced to detention at the President's pleasure.

1.3 At the hearing of the appeal on 13th April, 2021, we established that the 3rd appellant was pardoned by the President in 2013, and was released from detention. Since he had not shown any desire to pursue the appeal, we deemed the same to have been abandoned. We, therefore, dismissed his appeal there and then.

1.4 The appellant appeals on the sole ground that the trial court erred when it convicted him on circumstantial evidence which had not taken the case out of the realm of conjecture.

2.0 The case in the High Court

2.1 As already stated, before the High Court the 1st appellant was jointly charged with the 3rd appellant. It was alleged that on 7th September, 2010, in Senanga District the appellant and his co-accused had murdered one Boswell Mukitwa Musiwa.

2.2 The prosecution's case was that on 7th September, 2010 in the evening the deceased was seated by a fire with his family within the yard of his homestead. He later stood up in order to retire to his hut. The deceased had barely covered two steps from the fire place when a gun shot was heard. He fell to the ground immediately, having been shot in the head. His family held vigil over his body until the next morning. It is then that two sets of footprints were observed at one rear corner of the deceased's hut.

2.3 The crowd that had gathered mobilized itself. A group of people, including Mukitwa Mukitwa (PW3), the deceased's son, started following the footprints. The trail passed right through the yard of the 2nd appellant's homestead. The footprints continued onwards into the bush where the two appellants were found crouching. The first appellant was holding a gun. Upon seeing the group, the two appellants fled the place. After a short pursuit, the 3rd appellant was apprehended while the 1st appellant evaded capture, on account mainly (according to the witnesses testimony) that he threatened his pursuers with the gun. The group, however, recognized him as the person who owned a shop at the local school.

2.4 The 3rd appellant was then taken back to the deceased's homestead where, in front of the crowd, he confessed to have been sent by his grandfather, the 2nd appellant to kill the deceased. While this was going on, the 2nd appellant came. We must say that the witness accounts on this issue differed. One account was that, upon hearing the 3rd appellant's confession some people went to pick the 2nd

appellant. Another account was that the 2nd appellant came on his own when he heard that the crowd was holding his grandson.

2.5 According to the prosecution's story, though, the 2nd appellant also confessed that it was he who had instigated the killing of the deceased because of a dispute over land. He further implicated one John Mwiya, of Lusaka, in the plot. The 2nd appellant and the 3rd appellant were then arrested.

2.6 The 1st appellant was only apprehended in January, 2011. It was said that he was found hiding under a bed, in his brother's house. The gun that he had been seen with was not recovered.

2.7 It should be noted that it was established through cross-examination that the deceased's family had at that time an outstanding dispute over land with the 2nd appellant, a fact which placed PW2 and PW3, the daughter and son respectively of the deceased, in the category of witnesses with an interest to serve. However, that point was only

relevant with regard to the evidence against the 3rd appellant, who is no longer pursuing the appeal.

2.8 In his defence on oath, the 1st appellant told the court that earlier during the day, on the 7th September, 2010, he had left the deceased's village and gone to his village. He said that he left the 3rd appellant to take charge of the shop while he was away. He said that, up to the day of his arrest, he was living in his village, which was five hours walking distance from the deceased's village; and that nobody ever came looking for him, until in January, 2011. He confirmed that he was apprehended from his brother's house but said that he was found playing a game of draughts, and not hiding under the bed.

2.9 In view of the turn of events, it is now not necessary to recount the third appellant's defence.

3.0 The Judge's decision

3.1 Kondolo, J, warned himself of the possibility of bias on the part of PW2, Namakau Mukitwa and PW3, Mukitwa Mukitwa, on the ground that they were both children of

the deceased. As we have pointed out, that was only relevant with regard to the 3rd appellant. As regards the 1st appellant, the appeal before us does not turn on that point.

3.2 Kondolo, J, however, went on to consider other aspects of the evidence, such as; the manner in which the 1st appellant was apprehended and also that he never returned to check on his business in the village of the deceased. With this evidence, the learned judge disbelieved the 1st appellant's testimony and convicted him. He was sentenced to death.

4.0 The arguments on appeal

4.1 The appeal is on the cogency of the circumstantial evidence in this case. Mrs Musonda relied on the case of **David Zulu v The People (1977) ZR 151** where we said that a judge should convict on circumstantial evidence only where he is satisfied that such evidence has attained such a degree of cogency which permits only an inference of guilt. Counsel further relied on the case of **Dorothy Mutale & Another v The People (1995-1997) ZR 227** where we held that where two or more inferences are

possible the court will adopt the one that is more favourable to an accused if there is nothing to exclude that inference.

4.2 Mrs Musonda then submitted that the circumstantial evidence before the trial court had not taken the case out of the realm of conjecture. To support that submission, she pointed out that there was no eye witness to the shooting and that no gun was ever retrieved. She also argued that the land dispute which was the alleged motive for the murder was not properly introduced in evidence. Counsel, therefore, urged us to allow this appeal and acquit the 1st appellant.

4.3 Mr Zulu, for the State, on the other hand, argued that the circumstantial evidence in this case permitted only an inference of guilt. He pointed out the trail of footprints which led to where the 1st and 3rd appellants were found. He pointed out also that the 1st appellant was recognized by those who followed the trail, particularly, PW3. Mr Zulu further submitted that there was something odd about the appellant not coming back to the village to check on his

business and the appellant being found hiding under the bed when he was apprehended.

4.4 We were therefore urged to uphold the conviction.

5.0 Our Decision

5.1 There was testimony before the court which stated that; two sets of footprints led to a spot in the bush where the 1st appellant was found holding a gun whilst in the company of the 3rd appellant. It was also said that the 1st appellant fled that spot while the 3rd appellant was immediately caught. Then, there was testimony from another witness that at the time of his apprehension the appellant was found hiding under the bed. There is also the observation by the trial judge that the 1st appellant went away for some months, without bothering to come to check on his shop; this was a shop in which the 1st appellant had left stock worth a substantial sum of money.

5.2 All these were odd pieces of evidence which the learned trial judge took into account in finding that the prosecution had proved their case. The argument about the retrieval of the gun that the appellant was seen holding

cannot stand. What matters is that he was seen with it and there was no motive for PW3 to falsely claim that he had seen the 1st appellant with a gun. This is because the 1st appellant was not involved in the land dispute which PW3's family had with the 2nd appellant and his family.

5.3 We therefore concur with the learned judge that these aspects of the evidence removed the case out of the realm of conjecture. For this reason, we find no merit in the ground of appeal advanced by the 1st appellant.

5.4 This appeal therefore stands dismissed.



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E. M. Hamaundu
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE



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M. Malila
SUPREME COURT JUDGE