

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL No. 110,111/2018

B E T W E E N:

ZONDANI MTONGA
NCHIMUNYA NG'ANDU



1ST APPELLANT
2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM : Chishimba, Lengalenga and Siavwapa, JJA
On 20th November, 2018 and 22nd November, 2018

For the Appellant : Mr. C. Siatwiinda Legal Aid Counsel Legal Aid Board
For the Respondent: Mrs G. C. Mulenga Principle State Advocate -NPA

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Muwowo Vs. The People (1965) ZR 91 (CA)
2. Muvuma Kambanja Situna Vs. The People (1982) ZR 115
3. Patrick Kunda and Robertson Muleba Chisenga Vs. The People (1980) ZR 105
4. Steven Mushoke Vs. The People SCZ Judgment No. 31/2014
5. Anayawa and Sinjambi v The People (Appeal No. 143.144/2011)
6. Chigowe Vs. The People (1977) Z.R. 21 (S.C.)

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

This is an appeal against conviction and sentence. The Appellants were charged and convicted of two counts of murder.

The particulars in count one were that the Appellants and two others, on 17th February, 2015 at Lusaka in the Lusaka District of the Lusaka province of the Republic of Zambia jointly and whilst acting together did murder one Nodzi Sibanda.

In Count 2 the particulars of offence alleged that the Appellants and two others on 5th April, 2015 at Lusaka in the Lusaka District of the Lusaka province of the Republic Zambia jointly and whilst acting together did murder Priscilla Felistus Mulinda.

We must point out from the outset that the Appellants were convicted for two separate murders that took place in different locations in Lusaka and on different dates. For reasons that will become apparent in the Judgment, we will not restate in depth the evidence by the witnesses in the lower Court. PW5, PW6, PW7 and PW8 testified with regard to the 1st deceased person. Nodzi Sibanda was murdered in Garden Compound. None of the witnesses saw the persons that murdered the first deceased. They had merely observed that Nodzi Sibanda had been stabbed with a screw driver in the back on the morning of 15th February, 2015.

PW1, PW2, PW3 and PW4 adduced evidence in respect of the 2nd deceased person, Felistus Mulinda. PW1 and the deceased were commercial sex workers. PW1 had been with the late Felistus Mulinda the night she was murdered. Upon receiving a call that her co-worker had been murdered, PW1 informed PW2, the deceased's sister. PW2 identified her sister's body at UTH. She further testified that she was summoned by the police at Emmasdale where she was asked if she knew any of the Appellants. PW2 identified the 1st Appellant a former boyfriend of her sister, who used to threaten the deceased after the relationship ended.

PW3's testimony was to the effect that he saw the Appellants when they were being brought to the scene where the 2nd deceased's body was discovered. According to him, the Appellants led the police and narrated to them how they murdered the 2nd deceased person.

PW4, the 2nd deceased person's brother, attended his sister's post-mortem examination and observed that the deceased had a deep cut and bruises on the neck.

PW8 was the arresting officer. He testified that between the year 2013 and 2015, Emmasdale police station had received several

reports of murder cases. He was assigned to investigate the murders of the deceased persons herein. The 1st deceased's body was recovered on 17th February, 2015 while that of the 2nd deceased's was recovered on 5th April, 2015. Following investigations and interrogations in connection with the two murders, PW8 testified that the Appellants freely and voluntarily admitted the charges.

The Appellants then objected to the admission of the warn and caution statements on account that they were not obtained voluntarily but due to torture. A trial within a trial was held by the Court.

The Appellants denied giving free and voluntary statements to the police admitting the offences. They both maintained that the alleged confessions were only given following severe beatings. Further, that they had been starved before they tendered their 'confessions'.

The trial Court held that the confession statements were given freely and voluntarily. The Court found that the Appellants' allegations/testimonies in relation to the beatings were inconsistent and not supported by any medical evidence. The Court stated that

the Appellants did not report any incidents of beatings to other police officers or the Magistrate when their matter came up for mention. In the ruling subject of the trial within a trial, the Court discounted all the allegations of torture , beatings, threats of death, denial of food and representation by relatives. The learned trial Judge found the evidence of the prosecution as more probable than not and concluded that the warn and caution statements given by the accused persons were free and voluntary and further admitted them into evidence.

The trial Court convicted the Appellants on the basis of the confession statements

Being dissatisfied with the Judgment of the Court, the Appellants now appeal against both conviction and sentence on the following grounds;

- 1. The Court below erred in both law and fact by concluding in its Ruling, after holding a trial within a trial, that the Appellants' warn and caution statements were made freely and voluntarily and therefore admissible, when a proper evaluation of the evidence on the record shows that the Appellants were subjected to severe torture.***
- 2. The trial Court misdirected itself in law and fact by not finding that the failure to subject the screwdriver, P1 for forensic examination was a dereliction of duty on the part of the police.***

