APPEAL NO. 188, 189, 190/2012

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

BETWEEN:

RONALD MUSONDA	**1ST APPELLANT**
ESAYA MUSONDA	**2ND APPELLANT**
FRANCIS MULENGA	**3RD APPELLANT**
And	
THE PEOPLE	**RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 1st December, 2020 and 14th April, 2021

For the Appellants : Ms. E. I. Banda, Senior Legal Aid Counsel

For the State : Mrs M. Hakasenke – Simuchimba, Senior State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Case referred to:
Simon Miyoba v The People (1977) ZR (reprint) 292

Legislation referred to:

1. **The Criminal Procedure Code, Chapter 88** of the **Laws of Zambia, Sections 235 to 245**
2. **The Penal Code, Chapter 87** of the **Laws of Zambia, Section 22**

When we heard this appeal we sat with Mrs Justice Elizabeth Muyovwe. Sadly, in the intervening period, Mrs Justice Muyovwe has since passed away. This judgment is, therefore, by majority.

This appeal is by the 2nd and 3rd appellants. The 1st appellant's appeal abated after it was proved to the court that he died in prison before the appeal was heard.

The appellants were charged before the High Court (presided by Siavwapa, J,(as he then was) held at Kasama in 2012 on three counts of murder. It was alleged that on 21st August, 2010, the appellants, acting together with other unknown persons, murdered three people named Peter Lubula, Joel Mwale and Kabwe Palicha. They were convicted of the counts relating to the murder of Peter Lubula and Joel Mwale, but were acquitted of the count relating to the murder of Kabwe Palicha.

The prosecution's evidence was based on eye-witness accounts of two people, namely, the wife of the deceased (Peter Lubula) named Abigail Kayemba (PW1) and the deceased's son named Peter Lubula, junior, (PW2). Their combined testimony was this: On 20th August, 2010, in Changwa village of Mporokoso District, a person named

Robert Chileshe was found dead in circumstances which suggested a ritual killing. Believing that the three deceased were behind that ritual killing, a group of villagers went to the homes of the three deceased and beat them to death. The two eye-witnesses only testified as to the killings of Peter Lubula and Joel Mwale which they had witnessed. That is the reason why the appellants were acquitted of the charge relating to the killing of Kabwe Palicha.

The two witnesses narrated to the court how they saw the two appellants and their colleague (1st appellant) participate actively in the beating of the two deceased, Peter Lubula and Joel Mwale. The appellants were convicted on that testimony. The appeal by the appellants, however, is on a technical point. For that reason we wish to point out the following: The appellants were committed to the High Court for trial through a preliminary inquiry that was held by the subordinate court before which the appellants were first taken. At the hearing of that preliminary inquiry, Abigail Kayemba testified that the 1st and 2nd appellants did not participate in beating her husband, Peter Lubula. However, she said that the 3rd appellant was the one who tied up her husband although he did not beat him. Peter Lubula junior also said that although the three appellants were

among the group of people that beat the deceased, he did not see them participating in the beating.

At the trial before the High Court, however, Abigail Kayemba, who was then PW1, said that the 3rd appellant during the incident forcibly took the child that was on the deceased Peter Lubula's laps, and threw it to the ground; and that he then wrestled the deceased to the ground as well, and tied him up. The witness went on to say that the 1st and 2nd appellants then joined in beating her husband. She emphatically said that all the three appellants took part in beating her husband and Joel Mwale to death.

Peter Lubula, junior, who gave his name to the court as Peter Mulenga, also named the three appellants, and three other people, as the ones who beat Peter Lubula and Joel Mwale to death.

Obviously, except perhaps in the case of the 3rd appellant, the statements that the two witnesses had given to the subordinate court during the preliminary inquiry were inconsistent with their statements before the High Court. That is the point on which this appeal is based.

The appellants' sole ground of appeal reads:

> **"The honourable court below erred in law and fact by not bringing to the attention of defence counsel the existence of the record of preliminary inquiries which exonerated the appellants"**

On behalf of the appellants, Ms Banda, the learned Senior Legal Aid counsel, charges that the record of proceedings of the subordinate court did not contain, as part thereof, the depositions of the witnesses who appeared before the preliminary inquiry. By this submission, we assume that counsel is referring to the separate recorded statement of each witness which was signed by them and the magistrate. Counsel also says that the magistrate's record of proceedings reveal that, upon committing the appellants to the High Court, the magistrate did not inform them of their entitlement to request a copy of the depositions of witnesses that were bound over.

Ms Banda makes further charges: She claims that, at the trial before the High Court, both the court and the prosecution had in their possession the record of proceedings of the subordinate court's preliminary inquiry while the defence did not have that record at all. She accuses the prosecution of *"shamelessly"* (to use her own words)

burying the contents of the preliminary inquiry to the detriment of the appellants. As for the trial court, she accuses it of failing in its duty to inform defence counsel of the existence in the proceedings of the preliminary inquiry of testimony which was favourable to the appellants. The testimony referred to is of-course the one that we have referred to earlier in which the key witnesses for the prosecution seem to have exonerated some of the appellants in their testimony during the preliminary inquiry.

According to Ms Banda, the effect of all this is that, at the trial, counsel for the appellants was unable to test the credibility of the key prosecution witnesses, who had by now completely changed their story and were totally incriminating the appellants; this, according to counsel, effectively prevented the appellants from mounting a solid defence. Ms Banda submits that this was a serious violation of the appellants' right to a fair trial.

Now, Ms Banda makes these submissions with the full knowledge of our holding in the case of **Simon Miyoba v The People**[1]. In that case we held as follows:

"1. The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.

2. It is necessary for the trial court to have before it formally the previous statement so that it can compare it with the evidence given in court and assess for itself the seriousness of the alleged discrepancies.

3. Neither the depositions taken at a preliminary inquiry nor statements to the police, which in summary committal proceedings are furnished to the court and the defence, are formally before the court and the court is not entitled to have regard to the contents of such depositions or statements.

4. Unless the previous statement has been made part of the record in one or other of the methods available, an appellate court has no basis on which to assess how serious the alleged discrepancies are and what weight to attach to the evidence of the witness."

In that case, we did set out some procedure that can be followed in order to introduce previous statements into the record. We shall refer to those in the course of the judgment. For now, we are still on the submissions by Ms Banda. She charges that our guidance in that case was of no use to the appellants because they were not availed of those previous inconsistent statements.

Ms Banda therefore asks this court to expand the law by interpreting it in such a way that it should provide that the record of the preliminary inquiry must be given to the defence. Otherwise, it is counsel's prayer that we do find that there was a miscarriage of justice and that we either order a re-trial or set the appellants at liberty.

We feel compelled to immediately comment on the submission that the law should specifically state that an accused person should be given the proceedings of the preliminary inquiry. By this submission, we take it that Ms Banda is referring to the fact that, under **Section 241** of the **Criminal Procedure Code, Chapter 88** of the **Laws of Zambia**, once an order of committal for trial is made, the written charge, the depositions, the accused's statement, recognizances and other documents are transmitted by the committing court to the Registrar of the High Court; and then an authenticated copy of the depositions are also transmitted to the Director of Public Prosecutions. On the other hand, under **Section 235** of the same **Act** the accused is merely informed of his entitlement to a copy of the depositions, at a small fee. According to Ms Banda, this is what is unjust on the part of an accused person.

We think that that submission is not correct. To start with, it is clear from **Section 241** and the provisions that follow that, ultimately, the duty finally rests on the Director of Public Prosecutions to initiate the trial in the High Court by drawing up and filing the information. This is under **Section 245**. However, the significance of transmitting an authenticated copy of the depositions to the Director of Public Prosecutions can be clearly seen in the provisions between **Section 242** and **244**. Under those provisions, if, upon reading the depositions, the Director of Public Prosecutions is of opinion that further investigation before the committing court is required, he can direct that the original depositions be remitted to that court for it to reopen the case and deal with it. Again, if the Director of Public Prosecutions is of opinion that there is a witness either for the prosecution or the defence who has not been bound over to give evidence, he may require the committing court to take the depositions of such witness and bind him over. Finally, if the Director of Public Prosecutions, upon reading the committal proceedings, is of opinion that that case may suitably be tried by a subordinate court, he will cause the depositions to be returned to the committing court and thereupon the case shall be tried by the subordinate court.

So, it is very clear to see why the law requires that copies of the depositions be transmitted to the Director of Public Prosecutions.

As for the Registrar of the High Court, the reason for the transmission of originals of the depositions to that office is obvious: It is the High Court which prepares the record which shall be used by the judge, the prosecution and the defence during the trial.

So, there is obviously a good reason for the way the law is. There is nothing unjust about it. We cannot, therefore, accept the appellants' submission that we should stretch its interpretation in their favour. In any event, we shall demonstrate in a moment that on the facts of this case the allegation of injustice is unfounded.

We now turn to the part raised by the sole ground of appeal. The material significance of the ground is that the appellants are saying that, had they used the statements that the key witnesses had given to the committing court in order to discredit their testimony before the High Court, the judge may not have convicted them on that testimony. We must point out that the ground of appeal and the argument that supports it are only beneficial to the 2nd appellant: They do not help the 3rd appellant, at all. This is because, in his case,

the key witnesses incriminated him both at the preliminary inquiry before the subordinate court and at the trial before the High Court. So, for him there is no ground before us that has any merit in his favour. For that reason, we dismiss his appeal forthwith.

As for the 2nd appellant, We must first point out that learned counsel for the State drew our attention to the fact that, when this matter first came up for plea before the High Court, the defence counsel applied for an adjournment on the ground that both the defence and the prosecution were not in possession of *"the depositions"*. (We take it that counsel was referring to the record compiled by the Registrar's office). The matter was adjourned. When it came up again plea was taken, and the trial proceeded. Counsel for the state argued that this meant that the defence now had the record with them.

We concur with counsel for the State on this observation. However, the appellants seem to be referring to the copies of the depositions signed by the witnesses. We have said that the High Court, through the Registrar's office, compiles the record to be used during the trial. Whether an accused person is committed by way of

a certificate issued by the Director of Public Prosecutions or by way of a preliminary inquiry, it is the subordinate court that orders his committal for trial in either case. This is what competently places the matter before the High Court for trial. So, any record that is compiled for use at the trial will always contain the proceedings of the subordinate court, leading up to the order of committal. A transcript of the proceedings before the subordinate court is, therefore, always an integral part of the record that is used by the court, the prosecution and the defence. The allegation advanced on behalf of the appellants is that, because they were not given the separate statements that the witnesses signed, they were unable to use those statements to challenge the testimony of the key witnesses before the High Court. Yet the record that was compiled by the High Court contains an authenticated, almost verbatim, transcript of the proceedings in the subordinate court. This included a transcription of the testimony which the two key witnesses gave to the subordinate court. So, what these two witnesses had said to the subordinate court was within the knowledge of counsel who represented the appellants before the High Court because it was right there in his copy of the record.

At this point we will refer to what we said in the **Miyoba** case with regard to the procedure to be used when challenging the testimony of a witness on the basis of their previous inconsistent statement. We said:

> **"If therefore it is proposed to challenge a witness on the basis that he said something else on another occasion, what he said on that other occasion must be put to him and any one of the alternative methods available must appear on the record.**
>
> **The proper procedure is this: counsel should first direct the witness' mind to the occasion when the previous statement was made and ask him whether on that occasion he did not say so and so. If the witness agrees, the previous statement, either in question and answer form or at least in narrative, is then in the record. The witness may explain the discrepancy, and the explanation is a matter for the court to consider in assessing his credibility, or the court may regard the discrepancy as by comparison minor. If on the other hand the witness denies that he said what has been attributed to him (and it is in these circumstances that the error is almost invariably made), counsel must then either read verbatim into the record the relevant portion of the previous statement or put the whole of it to the witness and apply to have it introduced through him as an exhibit; (in the unlikely event of the witness denying his signature or thumbprint it will be necessary to introduce the statement by the evidence of the person to whom it was made, or in the case of a deposition in terms of the relevant Section of the C.P.C). Of these two methods probably the more**

> **satisfactory in most cases is the introduction of the whole deposition or statement as an exhibit. Counsel will then be in a position to deal more expeditiously and neatly with the particular inconsistency alleged and, if they are thought to exist, others also"** (page 293-294).

In this case, counsel for the appellants had a transcription of the whole of the previous testimony of the key witnesses in his record. As a first port of call, counsel could have put those statements to the witnesses, and the said statements would have immediately become part of the record of the trial in the High Court. The witnesses would have reacted to those statements, and it would then have been a matter for the trial judge to assess the weight to attach to the current testimony of the witnesses, having regard to those previous statements. If it meant going as far as introducing the depositions onto the record, counsel would simply have applied that they be produced considering that these were documents that were generated and authenticated by the court. So, it is wrong for the appellants to blame the trial court for an omission whose cause lay squarely on their counsel. In fact, there was an attempt by counsel, albeit a feeble one, to bring to Abgail Kayemba's attention a previous statement by her. This was the statement that she had made to the

police. Counsel however abandoned that line of cross-examination, after only two questions. We therefore do not see the injustice that the appellants are alleging. It is for this reason that we said earlier that the said allegation is unfounded.

So, the position of this case is that, as far as we are concerned, and going by the guidance that we have given before, none of the alleged previous inconsistent statements were formally introduced on the trial court's record. We will quote what we said in the **Miyoba** case:

> **"we cannot overstress that unless the previous statement has been made part of the record in one or other of the ways indicated above, an appellate court has no basis on which to assess how serious the alleged discrepancies are and what weight to attach to the evidence of the witness"**

This is precisely the position that we are in. The only testimony properly on record is that which the key witnesses gave at the trial in the High Court. That testimony incriminated the appellants. So, one cannot fault the trial judge for having convicted the appellants on it. In any event, even if one were to cast doubt on the key witnesses' testimony that the appellants participated in beating the deceased

person, it is an irrefutable fact that the appellants were part of the group of people that went to violently confront the deceased persons at their homes. From this alone, one can say that the appellants were not mere by-standers. It is not in dispute that the group had set out to prosecute an unlawful purpose. It is also not in dispute that, in the course of that violent confrontation, the deaths of the two deceased persons resulted. It is a fact also that, while none of the appellants may have intended death to occur, yet grievous harm on, or death of, the deceased persons was a probable consequence of the violent confrontation which the appellants had associated themselves with. And we say that the appellants associated themselves with that violence because there was no evidence to show that the appellants dissociated themselves from it at any time during the assaults. There was only testimony that the 1st appellant had tried to dissuade the group from setting the deceaseds' households on fire; but this was only after the assaults which caused the deaths had already been committed. For the foregoing reasons, the appellants were caught up by the provisions of **Section 22** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, which provides:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

Therefore, in this case, the appellants were deemed to have committed the murders of the deceased. We, in the circumstances, find no merit in the 2nd appellant's appeal either.

All in all, the appeals by the two appellants stand dismissed.

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E.M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE