IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 89 OF 2009

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E E N:

**BONASI MWANDILA** 1ST APPELLANT

**SAM SAKALA** 2ND APPELLANT

-VS-

**THE PEOPLE** RESPONDENT

CORAM: **MWANAMWAMBWA, WANKI AND MUYOVWE, JJS**

 On the 4th October, 2011 and 7th February, 2012

For the Appellants: Mrs. A.N. SITALI, Senior Legal Aid Counsel of Directorate of Legal Aid

For the Respondents: Mrs. R.N. KHUZWAYO, Deputy Chief State Advocate of Directorate of Public Prosecutions

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASE REFERRED TO:

1. **Chabala -Vs- The People, (1976) ZR 4.**
2. **David Zulu -Vs- The People, (1977) ZR 151.**

LEGISLATION REFERRED TO:

1. **Penal Code Chapter, 87 of the Laws of Zambia, Section 4.**
2. **Penal Code of the Laws of Zambia, Section 294(2) (b).**
3. **Penal Code of the Laws of Zambia, Chapter 87, Section 294(1).**
4. **Penal Code of the Laws of Zambia, Chapter 87, Section 201.**

The Appellants were convicted on two counts and sentenced to 30 years Imprisonment with hard labour, by the High Court, Lusaka.

The first count was for AGGRAVATED ROBBERY, contrary to **Section 294 of the Penal Code, Chapter 87 of the Laws of Zambia**. Particulars were that on 14th March, 2007 at Lusaka, the Appellants, jointly and whilst acting together with other persons unknown, and whilst being armed with a knife, did steal from Nikayi MUNJANJA, 2 laptops computers, 1 floppy drive, 1 JVC Digital Camera, 10 Video tapes, 1 cordless telephone base, 1 Siemens mobile phone, 1 bag, 1 radio, and a telephone receiver all valued at K54,090,000.00 the property of Olive KOPOLO and at or immediately before or immediately after stealing did use actual violence to Nikayi MUNJANJA in order to obtain or overcome resistance to the said property being stolen.

The second count was for murder, contrary to **Section 200 of** **the Penal Code**. Particulars were that, on 14th March, 2007, at Lusaka, the Appellants jointly and whilst acting together, did murder Nikayi MUNJANJA

The Prosecution called 18 witnesses at the trial.

The gist of the Prosecution case was that on 14th March, 2007 at 14.00 hours, the deceased, Nikayi MUNJANJA, who was aged 16 years was left at her parents’ home. When her mother, PW2, returned at 18.00 hours, she was found dead, with multiple stab wounds on her body. A kitchen knife was found near her body.

Items in the house, which included laptop computers, Nokia cell phones and JVC Camera, were missing. Later, in the same month the Appellants started selling some of the stolen items to various people, who included PW3; PW5; PW6; PW13 and PW14. The Appellants were subsequently arrested by PW18 for the subject offences. Under warn and caution, they denied the offences.

The Appellants elected to give evidence on oath.

In his evidence, the 1st Appellant while admitting to have sold the items, denied stealing them and murdering the deceased. He contended that he was given the items he sold, by Ben ZULU. He further contended that, he told the Police about the said Ben ZULU, who was even arrested by the Police, but later escaped.

The 2nd Appellant in his evidence admitted to have sold the items but contended that the items were given to him by the 1st Appellant, who told him that the said items had been sent to him by his sister-in-law in Denmark. He believed the 1st Appellant since he knew him very well and also knew that he had a relative who was staying in Denmark. He denied committing the offences.

The Court below after considering the evidence adduced before it, found that the Prosecution had proved both counts against the Appellants beyond any reasonable doubt and found them guilty on both counts and accordingly convicted them as charged. Thereafter it sentenced each of the convicts to 30 years Imprisonment with hard labour.

The Appellants have appealed against their conviction and have advanced only one ground of the appeal:-

1. **The Court below erred in law and in fact when it convicted the Appellants solely on circumstantial evidence and disregarded the explanation given by the Appellants as to how they came into possession of the property that was stolen from the home of the deceased.**

Further, to the sole ground of appeal, the Appellants filed arguments on which they relied.

In support of the sole ground of appeal, Mrs. Sitali argued that of all the witnesses who testified for the prosecution none of them saw the Appellants kill or steal from the house where the deceased was found dead.

It was pointed out that as the Court below noted, the evidence adduced by the prosecution was circumstantial and for the Court to safely rely on it, such evidence should take the case out of the realm of conjuncture, so that it attains such a degree of cogency which can only permit an inference of guilt.

It was submitted that from the evidence adduced in the Court below, the inference of guilt is not the only inference that could be arrived at.

Mrs. Sitali argued that the Court below misdirected itself when it disregarded the explanation given by the Appellants as to how they came into possession of the property stolen from the home where the deceased person was murdered. In support, the Court was referred to the case of ***CHABALA -VS- THE PEOPLE*** (1) in which the Court held that:-

**“If the explanation is given, because guilt is a matter of inference, there cannot be a conviction if the explanation might reasonably be true, for then guilt is not the only inference. It is not correct to say that the accused must give a satisfactory explanation.”**

It was submitted that it would appear that the Court below wanted to be satisfied with the explanation given and did not address its mind to the aspect that the explanation may reasonably be true.

 It was further submitted that the Court below erred in law and in fact by inferring that the postmortem report was conclusive evidence of the fact that the deceased was killed by more than one person and since the Appellants were friends they murdered the deceased together. Mrs. Sitali pointed out that the postmortem examination report, exhibit **P17**, was evidence to show the cause of death and not the number of persons who killed the deceased.

 The Respondent cross-appealed and filed an amended ground of appeal, namely:-

“**The learned trial Judge erred in law when he sentenced the Appellants to a term of 30 years Imprisonment after convicting them of the offences of Aggravated Robbery and Murder.”**

 Other than the amended ground of cross-appeal, the Respondent filed Heads of Argument which were augmented by submissions at the hearing of the appeal.

 Mrs. Khuzwayo pointed out that the Appellants were both charged with one count of Aggravated Robbery, and one count of Murder. She referred us to **Section 201**(6) which provides that:-

 **“(1) Any person convicted of murder shall be sentenced-**

1. **To death; or**
2. **Where there are extenuating circumstances, to any sentence other than death;**

**Provided that paragraph (b) of this Section shall not apply to murder committed in the course of aggravated robbery with a firearm under** **Section 294.**

 **(2) For the purpose of this Section -**

**(a) An extenuating circumstances is any fact associated with the offence which would diminish morally the degree of the convicted person’s guilty:**

**(b) In deciding whether or not there are extenuating circumstances; the Court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.”**

She submitted that upon conviction of the Appellants of the offence of murder, the Court should have imposed the mandatory death penalty, unless it found that there were extenuating circumstances. Since the Court did not find any extenuating circumstances, the imposition of a sentence of 30 years Imprisonment was wrong in law. That a scrutiny of the record indicates that even if the Court had considered the issue of extenuating circumstances, the Court could have not found any. She argued that there is no evidence or were there any facts proved that would have diminished the Appellants’ degree of guilt. Killing in the course of a robbery is neither acceptable nor tolerated in any community in Zambia.

She pointed out that further, **Section 294(2) (b)** (4) provides as follows:-

**“Notwithstanding the provisions of Subsection (1), the penalty for the felony of aggravated robbery under Subsection (1) shall be death-**

1. **Where the offensive weapon or instrument is a firearm, unless the Court is satisfied by the evidence in the case that the accused person was not armed with a firearm and-**
2. **that he was not aware that any of the other persons involved in committing the offence was so armed, or**
3. **that he dissociated himself from the offence immediately on becoming aware, or**
4. **Where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offence, unless the Court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably, have contemplated that grievous harm might be inflicted in the course of the offence.”**

She pointed out that, the evidence on record shows that grievous harm was inflicted during the course of the robbery that resulted in death. That according to Felix MWEEMBA (PW12), he saw a big knife next to the deceased body with multiple injuries. That this observation was confirmed by the findings of the Pathologist in the postmortem examination report, (exhibit **P17**) which indicates that death was due to “multiple stab wounds.”

She submitted that, the definition of an offensive weapon as set out in **Section 4**(3) includes a knife.

She contended that, the trial Judge erred in law when he imposed a 30 years sentence for aggravated robbery when there was evidence before the Court that an offensive weapon had been used to cause grievous harm during the robbery. That the Court should have imposed the mandatory sentence of death because there was no evidence before it indicating or suggesting that both Appellants could not have contemplated that grievous harm might be inflicted during the course of the robbery.

Mrs. KHUZWAYO further, pointed out that, the case hinges on recent possession. She submitted that there was sufficient evidence to support the finding of the Court below. That items that were stolen were sold by the Appellants who did not deny being in possession or selling the items and they gave an explanation as to how they came to be in possession. That, their explanation, cannot be said to be reasonable. In his explanation to the Police, the 1st Appellant said he got the items from a relative in Sweden. In Court he said he got the items from a Ben ZULU, which was a contradiction. The Police did investigate the explanation. They then could not investigate the Ben ZULU story as it only came up in Court.

As for the 2nd Appellant, he explained that he was helping the 1st Appellant. However, he participated fully and got the same share of the proceeds of the sale. Further, his evidence that he only met the 1st appellant was contradicted by the witnesses who in their evidence explained that in March, 2007 the two were seen together. The only inference is that both committed the offence.

In reply, Mrs. SITALI submitted that most of the issues have been adequately covered.

She further submitted that from the record there is nowhere, where it is shown that the 1st Appellant said he got the items from a relative in Sweden. It was the 2nd Appellant who said he was told that the items came from the 1st Appellants’ relative in Sweden.

The learned Counsel pointed out that, there is no contradiction between the Appellants in their explanation as to how they got the items.

We have considered the sole ground of appeal; the Heads of Argument in support; and the submissions by Counsel. We have also examined the Judgment of the Court below.

The evidence as it stands, being that the Appellants sold the items that were stolen during the aggravated robbery and murder of the deceased and the Appellants having failed to give a reasonable explanation as to how they came in possession of the items, the Court below cannot be faulted for having held in respect of the 1st Appellant that:-

**“I cannot find anything else apart from stating that Accused 1 was part of the people who stole the electrical appliances he was selling and killed the deceased-.”**

And for holding in respect of the 2nd Appellant that:-

**“He also failed to impress the Court about his testimony and the Court’s inference was that he too was telling lies and tried to mislead the Court. He was part of the people who robbed and killed the deceased.”**

The circumstantial evidence in the case has taken the case out of the realm of conjecture and it attained such a degree of cogency which would permit only an inference of guilt as per our guidelines in the case of ***DAVID ZULU -VS- THE PEOPLE***. (2)

In light of the foregoing, we find no merit in the sole ground of appeal and it is, accordingly, dismissed.

In relation to the cross-appeal, we have considered the amended ground of appeal and the supporting argument.

The Appellants were convicted for Aggravated Robbery and Murder and sentenced to 30 years Imprisonment with hard labour.

In the Aggravated Robbery count, the Appellants were said to, ‘have acted jointly and whilst armed with a knife.’ The evidence on record shows that a big knife was found beside the deceased and that the deceased had multiple cuts and wounds all over her body. The evidence therefore shows that a knife was used.

The definition of offensive weapon in **Section 4**(3) reads:-

**“Offensive weapon means any article made or adapted for use for causing or threatening injury to the person, or intended by the person in question for such use, and includes any knife, spear, arrow, stone, axe, axe handle, stick or similar article.”**

**Section 294(2) (b)** (4) provides:-

**“(2) Notwithstanding the provisions of Subsection (1), the penalty for the felony of aggravated robbery under Subsection (1) shall be death-**

**(b**) **Where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offence, unless the Court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offence.”**

 As would be noted from the definition, offensive weapon includes a knife. Further, from the findings of the Pathologist, there could be no doubt that grievous harm was done to the deceased in the course of the offence. We note that the information in count one reads, contrary to **Section** **294(1)**(5) and it was not amended so as to include **Subsection (2)** **(b)**.(4) However, since the Appellants were aware that part of the allegation against them in the information was that, “whilst being armed with a knife –,” there can be no prejudice against them.

 In the circumstances, we have found that the Court below erred in convicting the Appellants under **Subsection (1)** instead of **Subsection (2)**.

As for the murder count, **Section 201(1)** (6) provides that:-

**“201(1) Any person convicted of murder shall be sentenced-**

1. **To death; or**
2. **Where there are extenuating circumstances, to any sentence other than death.”**

From the foregoing, death sentence is mandatory unless there are existed extenuating circumstances.

The Court below when sentencing the Appellants stated:-

**“Upon hearing the mitigation on your behalf by the Counsel that both of you are young people still in your early stage of life, and married, you are first offenders and remorseful to what had happened, the Court will be lenient with you when imposing sentence on you.**

**The Court as said will be lenient with you and sentence you to 30 years Imprisonment with Hard Labour.”**

As would be noted from the foregoing, the Court below did not consider the existence of extenuating circumstances to justify the imposition of the 30 years Imprisonment with hard labour. It considered the age of the Appellants, and other factors which are not relevant.

The imposition of the 30 years Imprisonment with hard labour by the Court below was not within the law.

In the light of the foregoing, we have found merit in the cross-appeal which is allowed. The sentence of 30 years Imprisonment with hard labour that was imposed on the Appellants is, accordingly, set aside. In its place, the Appellants are sentenced to death on each of the two counts.

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M. S. Mwanamwambwa,

**SUPREME COURT JUDGE**

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 M. E. Wanki, E.N.C. Muyovwe,

**SUPREME COURT JUDGE**  **SUPREME COURT JUDGE**