IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 146 OF 2011

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

B E T W E E N:

**AMUKUSANA MUKULEKA** APPELLANT

-VS-

**THE PEOPLE** RESPONDENT

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

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

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

For the Respondent: Mrs. M. MWALUSI, Senior 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.**

CASES REFERRED TO:

1. **Simon Malambo Choka -VS- The People, (1978) ZR 43.**
2. **Ilunga Kabala and John Masefu -Vs- The People, (1981) ZR 102.**

The Appellant, Amukusana MUKULEKA, was sentenced to ten years imprisonment with hard labour, following his conviction on one count of CONSPIRANCY TO MURDER, contrary to **Section 219 of the Penal Code, Chapter 87 of the Laws of Zambia.** The particulars of the offence were that he on the 6th day of October, 2006 at Kaoma, in the Kaoma District of the Western Province in the Republic of Zambia, jointly and whilst acting together with another person, did conspire to kill one MUTEMWA NAMAKANDO. He was tried by the High Court, Mongu.

The Appellant’s conviction was based on the evidence of PW1 Chishinga CHIKAPO, PW2 Richard Mukumbi CHIPIPA; PW3 Kebby CHIPISA; PW4 Precious WAMUNYIMA; PW5 Florence Mutukwa NAWA; PW6 Number 36609 Constable Brian MWANZA; and PW7 Bisesa LUYAKO.

The gist of the Prosecution evidence was that the Appellant was the husband to PW4. Because he was suspecting PW4 of infidelity and flirting with seven men, who included MUTEMWA a Teacher at Mulamatila Basic School, the Appellant told PW5 to whom he vowed to deal with the men starting with the Teacher.

Later, the Appellant gave PW4 a letter asking her to go on leave for four years because she was a prostitute. After giving her the letter of suspension, PW4 reported the matter to the Police Victim Support Unit on 9th October, 2006.

Later, PW6 acting on the complaint, summoned the Appellant and counseled them. As PW6 was counseling them, the Appellant said there was a Teacher, MUTEMWA of Mulamatila Basic School who was flirting with PW4 and he said he would start with him and the other six and he would use Karavinas.

Meanwhile, on 6th October, 2006 the Appellant and Langson SHAMANGA approached PW1 and told him that there was a need to eliminate a Teacher who was flirting with the Appellant’s wife. They then agreed to meet on the 9th October, 2006. PW1 then told PW2.

On 9th October, 2009 before going to meet the Appellant PW1 and PW2 went to report to the Police. After that, they went to Maseka to meet the Appellant. When they met the Appellant, PW1 told the Appellant that he would pay him K500,000.00 for the job. Following negotiations, PW1 reduced the amount to K400,000.00. Thereafter, the Appellant paid PW1 K100,000.00. The Police then apprehended the Appellant and took him to Kaoma Police Station where he was interviewed and arrested for the subject offence by PW7. Under warn and caution he denied the charge.

In his defence, the Appellant stated that on 6th October, 2006 he reported for work at Nalile Local Court at 08.00 hours. He worked up to 15.00 hours when he knocked off and came home. He stayed up to the time he retired to bed. On 7th October, 2006 he received a notice from the Victim Support Unit because of his wife who had complained. By then, he did not know what her complaint was.

On Monday 9th October, 2006 he went to the Victim Support Unit and arrived at 08.00 hours and waited up to 10.00 hours when the dealing officer MWANZA arrived. He attended to him and his wife in the presence of a Police Officer LWENDO and the grandfather to his wife. After his wife gave her statement he was also asked to give his side of the story. His wife complained that he had locked the house. The second issue was that he had written her a letter. The Police asked him for reasons.

The Appellant further stated that, the first reason he gave was that she had no respect for him and the second reason was that she insulted him now and again.

The third reason was that, his wife being his helper, he found it not proper for him to be struggling with her each time he wanted to make love to her. The fourth reason was that his wife was a prostitute. Later, he told the Police that it was going to be better for her to go to her parents and only come to rejoin him after she changed. That he never threatened to murder anyone and he was surprised that when the letter was received by Brian MWANZA he understood it to mean that he threatened to kill someone. Officer MWANZA lied to the Court that he threatened to kill MUTEMWA. After the counseling session, officer LWENDO asked him and his wife to shake hands which they did. Thereafter, all of them came out of the office and no one uttered threatening words. He did not think that he was going to gather such courage to threaten someone in the presence of Police Officers. He does not drink and was not drunk. Later, they parted company. He went home and his wife went to her grandfather’s home.

On 10th October, 2006, he reported for work but left at 10.00 hours when the Court adjourned. He went to Kaoma Town. Upon arrival he went to Maseka Guest House where he took a drink. Around 11.40 hours, Police came to the Guest House and apprehended him. Thereafter, he was taken to Kaoma Police Station where he was interviewed about the allegation.

The Court below after considering the evidence that was adduced, found that the Appellant did conspire with PW1 to kill MUTEMWA and accordingly, found him guilty and convicted him as charged. The Appellant was thereafter sentenced to ten (10) years Imprisonment with hard labour.

The Appellant has appealed against both his conviction and sentence. He has advanced two grounds of the appeal, namely:-

 **GROUND ONE:**

**The Court below erred in law and in fact when it convicted the Appellant on the uncorroborated evidence of witnesses with an interest to serve.**

**GROUND TWO:**

**The Court below erred in law and in fact when it sentenced the Appellant to ten years Imprisonment with hard labour. The sentence is excessive.**

Further, to the grounds of the appeal, the Appellant filed Heads of Argument which were augmented by oral submissions at the hearing.

In support of Ground One of the appeal, it was pointed out that the Court below relied on the testimony of PW1, PW2 and PW3, who were witnesses with interest to serve, to convict the Appellant. With regard to PW1, Counsel stated that the Court below noted that he was an accessory before the fact and, therefore, required his evidence to be corroborated. That the Court also noted that, the evidence of PW2 and PW3, also required to be corroborated.

It was submitted that the Court below misdirected itself in holding that the testimony of PW2 and PW3 supported the testimony of PW1. That, PW2’s testimony was mostly based on what he was told by PW1, the brother. In his testimony, he did not disclose, in detail, the contents of the alleged discussion between the Appellant and Accused two, who was acquitted at no case to answer, and PW1 in relation to the plans to murder MUTEMWA. In his evidence in examination in chief, PW2 testified that, “before the discussions, I was introduced as a witness to whatever would happen,” (page 36 lines 10 to 11 of the Record). That at no point did PW2 in his evidence during examination in chief, elaborate on any plans to kill MUTEMWA that were discussed in his presence. During cross-examination, PW2 testified that when the Appellant was handing over some money to PW1, he heard him tell PW1 that the money was for the purpose of killing MUTEMWA.

However, PW3 whose testimony the Court relied on, denied having heard the Appellant utter those words. In fact, PW3 stated that, “he did not say anything at the time the money was given.”

It was further submitted that, PW3 on whose evidence the Court relied, did not give any testimony indicating that he heard the Appellant instruct PW1 to kill MUTEMWA. His testimony was based on what he was told by PW1 and PW2. PW3 never heard the Appellant and PW1 plan on killing MUTEMWA.

It was pointed out that there was no independent evidence to support the evidence of PW1, as a suspect witness cannot corroborate the evidence of another. In aid, the Court was referred to the case of ***SIMON MALAMBO CHOKA -VS- THE PEOPLE*** (1) in which it was stated that:-

**“In the circumstances of the case, the evidence of one suspect witness cannot be corroborated by the evidence of another suspect witness.”**

It was submitted that it is not safe to uphold the conviction on that basis.

 It was argued that the Court below erred when it relied on the evidence of PW4, the wife to the Appellant, to convict the Appellant. That the evidence of PW4 was to the effect that her husband was suspecting her of dating several men amongst whom, was MUTEMWA. In her narration of what transpired, at the Police Station where PW4 and the Appellant were being counseled, PW4 did not mention of the Appellant making utterances to the effect that he would kill MUTEMWA, as claimed by PW5, a sister to PW4, and PW6 the officer counseling them. [She further testified that the Appellant wrote her a letter of suspension from marriage]. In her evidence in examination in chief, PW4 never testified that her husband threatened to kill MUTEMWA. In her evidence in cross-examination, PW4 testified that she came to testify against her husband because of the beatings she used to receive and further she admitted that she was not happy with the suspension letter.

 It was submitted that in view of the foregoing testimony, PW4 was a biased witness whose testimony ought to have been received with caution. That her evidence was motivated by anger towards the Appellant and for that reason the Court ought not to have heavily relied on it.

 It was further submitted that the Court below erred in holding that exhibit P1, the letter of suspension from marriage written by the Appellant to PW4, was corroboration of the evidence of PW4. That the testimony of PW4 was that her husband was suspecting her of having an affair and not that he was planning on killing the men he was suspecting.

 Secondly, exhibit P1 the letter of suspension only mentions the number of men PW4 was allegedly dating, not their names. It does not in anyway disclose intent on the part of the Appellant to harm any of the men. That while exhibit P1 can be said to have shown the Appellant’s state of mind with regards his wife’s perceived infidelity, it cannot be said to reveal any intent to kill.

 In support of ground two of the appeal, it was pointed out that the offence with which the Appellant was found guilty carries a maximum sentence of fourteen years.

 It was submitted that the Court below did not take into account the mitigatory factors advanced on behalf of the Appellant and that in the circumstances the sentence of 10 years was harsh.

 Mrs. SITALI submitted that, the Court below erred to convict on uncorroborated evidence of the witnesses. Further, the Court would have treated the evidence of PW4 who was the Appellant’s wife with caution as she was a biased witness since she admitted in cross-examination that she was testifying because she was angered.

 On behalf of the Respondent, Miss MWALUSI informed the Court that they supported the conviction.

 The learned Counsel submitted that PW1, who was the main witness, was found to be an accessory before the fact whose evidence required corroboration. That, PW2 and PW3’s evidence required corroboration. It was argued that there was corroboration. In finding corroboration, the trial Court placed corroboration on odd coincidences. She submitted that the Court below also found odd coincidences in the evidence of PW6 and in the evidence of threats. That it was an odd coincidence that the Appellant wrote a letter exhibit P1 to his wife because, among other reasons, she was said to be going out with 7 men.

 The other odd coincidence was that, the Appellant was seen by PW2 and PW3 at Maseka Guest House. He was also apprehended by the Police there which supported the evidence of PW1 that he went to the Police to report the offence that the Appellant was going to commit. It is trite that odd coincidences, if not explained, is supporting evidence. The odd coincidences were not explained.

 The learned Counsel further submitted that, PW4 was not a witness with bias, as the trial Court found her to be an honest, hard-working and successful rural woman whose testimony was credit worth. That she was not motivated to give false evidence, although she said she wanted a divorce. That the Court below had, the opportunity to observe the demenour of the witnesses.

The learned Counsel finally submitted that the trial Court did not misdirect itself for convicting the Appellant.

In relation to ground two of the appeal, Mrs. MWALUSI informed the Court, that, since sentence is at the discretion of the Court below, she would leave it to the wisdom of the Court.

We have considered the grounds of the appeal; the Heads of Argument; the submissions in support and against; and we have examined the judgment of the Court below.

In ground one of the appeal, the Appellant has attacked the Court below when it convicted him on uncorroborated evidence of witnesses with interest to serve.

We note from the judgment of the Court below that, the said Court recognized that the five witnesses namely, PW1, PW2, PW3, PW4 and PW5 were, for the reasons given in the judgment, witnesses with interest whose evidence needed to be treated with caution or corroborated. The trial Court then proceeded to look for the corroboration, and found that the letter that the Appellant admitted writing corroborated the evidence of PW4. Thereafter, the Court below proceeded to identify some odd coincidences in the case.

The Court below cannot be faulted for adopting that process, as this Court in the case of ***ILUNGA KABALA AND JOHN MASEFU -VS- THE PEOPLE*** (2) held *inter alia* that:-

**“(iv) It is trite law that odd coincidences, if unexplained, may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”**

It was after considering the unexplained odd coincidences that the Court below found as a fact that ‘the Appellant had with him all the propensity to plot to kill any other man whom he perceived to be a competitor over this tormented wife’, and chose to believe the testimony of PW1, PW4 and exhibit P1, as supported by other witnesses, and proceeded to find that the Appellant did conspire with PW1 to kill MUTEMWA and accordingly, found him guilty and convicted him.

It is, therefore, not correct as argued that, the Court convicted the Appellant based on the uncorroborated evidence of the witnesses with interest to serve.

In the circumstances, we have found no merit in ground one of the appeal.

In ground two of the appeal, the Appellant has attacked the sentence of the Court below which Counsel argued was too severe.

We have noted from the Record that the Court below considered what was submitted before it, in mitigation. We find that the sentence of ten years Imprisonment with hard labour that was imposed on the Appellant does not come to us with a sense of shock.

In the circumstances, we have found no merit in ground two of the appeal.

In the light of the foregoing, we have found no merit in the appeal. It is, accordingly, dismissed. The conviction and sentence are confirmed.

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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**