**IN THE SUPREME COURT FOR ZAMBIA SCZ/239/240/2011**

**HOLDEN AT KABWE**

(Criminal Jurisdiction)

**BETWEEN:**

**BRIGHTON SAKUBITA 1ST APPELLANT**

**MUNGULO MUNGULO 2ND APPELLANT**

**VS**

**THE PEOPLE RESPONDENT**

***Coram:*  CHIBESAKUNDA, MUYOVWE and MUSONDA, JJS**

**On the 1ST November, 2011 and 8th May, 2012**

For the Appellant: Mr. K. Phiri, Senior Legal Aid Counsel

For the Respondent: Mrs. R. N. Nkhuzwayo, Deputy Chief State

 Advocate

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

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

**Cases referred to:**

1. **Wilfred Kashiba vs. The People (1971) Z.R. 95**
2. **Kashenda Njunga and Others vs. The People (1988/1989) Z.R. 1.**

 The Appellants were initially charged with the offence of murder contrary to **Section 200 of the Penal Code**. The particulars were that the Appellants, between 24th and 27th December, 2001 at Muyambango Plains in Kalabo District of the Western Province of the Republic of Zambia jointly and whilst acting together with other persons unknown did murder Ngunga Chimwaso. The Appellants were, however, acquitted of the offence of murder and instead convicted of the lesser offence of manslaughter contrary to Section 199(1) of the Penal Code.

Briefly, the prosecution evidence was that, following the theft of PW1’s oxen, PW1 accompanied by his son Naliyeya, the deceased, PW2 who had an air gun and Kalyala Mwanaumo left in search of the stolen animals. This was on 24th December, 2001. As they proceeded, Naliyeya took the air gun from PW2 and later, the deceased got it from him. The deceased was left behind as the rest of the group proceeded and PW1 took a different route to Kalabo as he continued his search. On 27th December, 2001 PW1 also received a message that the deceased had gone missing. Later, PW1 also received information that his animals were recovered from the Appellants and the animals were at Kalabo Police Station. When he went to the Police Station he was detained by police and while in cells he met the 2nd Appellant who told him that the 1st Appellant knew about the death of the deceased. The 2nd Appellant confessed to stealing PW1’s animals. PW1 was released from custody on 1st January, 2002. The 1st Appellant was apprehended by the neighbourhood watch at Musasa village in March 2002. According to PW1, he was present when the 1st Appellant confessed to the neighbourhood watch chairman that he had killed the deceased.

There was also evidence from PW3, a traditional healer that the 1st Appellant approached him for traditional medicine for protection ‘because he was involved in cattle rustling during which they killed a person’. After hearing his story, PW3 alerted the neighbourhood watch with a view to apprehending the 1st Appellant but he did not return as arranged.

PW4 a member of the neighbourhood watch team which was searching for the deceased was informed by Aggrey Mwendabai Mundanda that he had met the Appellants and that at the time they had 4 oxen and an AK 47 rifle. He explained how they searched for the Appellants until they apprehended them on 27th December, 2001. According to PW4, the 2nd Appellant revealed that they did not use a gun on the deceased but an axe-handle which he (2nd Appellant) handed over to neigbourhood watch. PW4 said that the axe-handle was blood stained and he handed it over to the police. PW4 explained that somehow, the 1st Appellant escaped from their custody and they proceeded to convey the 2nd Appellant to the police. That the 1st Appellant was only apprehended in March 2002 and handed over to the police.

According to PW5 the deceased’s body was discovered in the Libala plains in a decomposed state, but with visible multiple injuries. Due to the decomposed state of the body PW5 advised the relatives to bury, whilst awaiting a postmortem examination. However, no postmortem examination was conducted. PW5 also found an air gun and some keys on the deceased’s body.

PW6 arrested and charged both Appellants who denied the charge.

At the close of the prosecution case, the trial Judge acquitted both Appellants of the charge of murder due to lack of evidence on the cause of death as no postmortem examination was conducted on the body of the deceased. Both Appellants were put on defence on the lesser offence of manslaughter and elected to give evidence on oath.

The 1st Appellant denied that he knew the deceased and stated that he did not commit the offence. He denied that he approached PW3 for medicine for protection. He told the Court that PW3 had eloped with his sister and that he was charged one animal and that he (the 1st Appellant) took his sister back. That this was the reason why PW3 told lies against him.

 The 2nd Appellant explained how he was apprehended by the neighbourhood watch on 27th December 2001. He was tortured with fire until he became unconscious and that the people who were torturing him collected the exhibited axe from his house and took it to the police. He stated that he was initially jointly charged with the 1st Appellant for the offence of stock theft and was acquitted, but only to be arrested for murder. His defence was that he was merely implicated in this case.

After reviewing the evidence, the learned trial Judge found that the deceased died a violent death going by the evidence of PW1, PW2, PW3, PW4 and PW5. That the deceased was in good health when he parted company with PW1 and PW2. That PW3’s evidence provided proof of the death of the deceased in that the 1st Appellant confessed to him when he sought protection herbs from him. The trial Judge believed the evidence of PW3. He accepted the evidence from PW1, PW2, PW3 and PW4 that the deceased met his death as he searched for the stolen animals which were recovered from the Appellants within the vicinity of the crime scene. He found that it was an odd coincidence that the Appellants were found in possession of the stolen animals shortly after the deceased went missing and was found dead. The trial Judge found that the circumstantial evidence was cogent and that the only inference to be drawn from the facts was that the deceased died from injuries inflicted on him by the Appellants as they tried to prevent him from recovering the stolen animals in their custody.

The trial Judge found that the prosecution had proved its case beyond reasonable doubt and convicted the Appellants of the offence of manslaughter contrary to **Section 199(1) of the Penal Code.** The Appellants were both sentenced to 25 years imprisonment.

On behalf of the Appellants, Mr. Phiri filed written Heads of Argument advancing two grounds of appeal, namely:

1. **The learned trial Court erred both in Law and in fact in drawing a guilty inference when there are other inferences which can be drawn.**
2. **The learned trial Court erred in law in sentencing the Appellants to 25 years in prison with hard labour.**

In support of ground one Mr. Phiri submitted that this case was based on circumstantial evidence. That the allegation that the Appellants were seen with the stolen animals is hearsay evidence and is inadmissible. He pointed out that the people who had allegedly seen the Appellants with the stolen animals were known, but did not testify. According to Counsel, the only direct evidence is the blood stained axe and in the absence of forensic tests to ascertain that the blood was that of the deceased, this amounted to a dereliction of duty on the part of the police which should operate in favour of the Appellants. Relying on **Wilfred Kashiba vs. The People¹** he argued that the admission of the confession made to the herbalist (PW3) was irregular. Mr. Phiri submitted that the unfairness in this case was that it was the word of the 1st Appellant against that of the herbalist. From the defence, it was revealed that PW3 lied to the Court on account of the fact that the 1st Appellant had eloped with his sister and he had not paid the damages. In addition, PW3 was a brother to the deceased.

Turning to ground two, he submitted that 25 years imposed by the lower Court should come to this Court with a sense of shock for first offenders who deserve leniency.

In her oral response, Mrs. Nkhuzwayo submitted that she supported the conviction. She argued that both Appellants were linked to the subject offence by their unsolicited confessions to PW1 in respect of the 2nd Appellant and to PW3 in respect of the 1st Appellant. Counsel argued that evidence showed that while in cells, the 2nd Appellant confessed that his brother knew about the death and her argument was that if he did not know how the deceased met his death, he would not have mentioned anything about his brother. She argued that PW1 and PW3 were not persons in authority and there was no need for the lower Court to satisfy itself as to the admissibility of the confessions. Mrs. Nkhuzwayo contended that the 1st Appellant went to PW3 to seek medicine for protection as he had killed the deceased. She submitted that the recovery of the animals goes to show that both Appellants had something to do with the deceased. She argued that the Appellants were guilty as they were found with the stolen animals and they made unsolicited confessions.

Mrs. Nkhuzwayo urged this Court to confirm the sentence of the Court below and dismiss the appeal.

 We have considered the evidence on record, the Judgment appealed against and the submissions by both learned Counsel.

 Before we delve into the grounds of appeal, we wish to comment on the fact that at the close of the prosecution’s case, the trial judge acquitted the Appellants of the charge of murder on the ground that the prosecution had failed to produce evidence as to the cause of death. This was in spite of evidence from PW5 a police officer who visited the scene of crime and testified that the deceased had multiple injuries on his body. Certainly, the trial Judge fell into error when he made such a Ruling. We dealt with this aspect in **Kashenda Njunga and Others vs. The People².** Indeed, medical evidence is important, but is not always necessary in cases where the cause of death is not in dispute. And in any case, medical evidence is part of the prosecution evidence which must be considered by the trial Court in arriving at the final decision. In this case, the trial Judge proceeded to put the Appellants on defence for the lesser offence of Manslaughter. This was a misdirection as we have stated herein. However, we will not interfere for the simple reason that this would prejudice the Appellants whose defence was obviously based on the lesser charge of Manslaughter.

Turning to ground one, Mr. Phiri conceded, and rightly so, that this case was based on circumstantial evidence to the extent that no eye witness was called by the prosecution. Certainly, it is not clear why the prosecution did not call the named people who saw the stolen cattle in the hands of the Appellants. Bearing this in mind, it is again clear to us that the trial Judge saw no reason to disbelieve the evidence of PW1 and PW4 who were told that the Appellants were seen with the stolen cattle which were later handed over to the police. In fact this evidence remained unchallenged by the defence. In any case, the 2nd Appellant admitted to PW1 that he had stolen the cattle in issue and that his brother the 1st Appellant knew about the death of the deceased. This confession was made in the hearing of PW2.

According to PW2, after the 1st Appellant was apprehended, he confessed to the Chairman of the neighbourhood watch that he had killed the deceased. PW2 stated that the 1st Appellant was not coerced into making the confession. PW4 also confirmed that the 2nd Appellant confessed to the fact that they used the axe handle to beat the deceased to death. There is also the confession made to PW3 from whom the 1st Appellant sought traditional medicine for protection since he had killed a person. We tend to agree with Mrs. Nkhuzwayo that there was nothing irregular about these confessions because the people, to whom they were made, were not persons in authority. The trial Judge found no cause to disbelieve the evidence of PW1, PW2, PW3 and PW4. Indeed, as the trial Judge observed, the deceased died in pursuit of the animals recovered from the Appellants within the locality where the killing of the deceased occurred. He rightly found that it was an odd coincidence that the Appellants were found with the stolen animals after the deceased who was a member of the search party went missing and later found dead. In our view, the fact that the blood stained axe handle was not taken for forensic examination cannot be of any assistance to the Appellants. We do agree, however, that it would have been helpful to both the prosecution and the defence to have the blood stained axe handle examined to determine the source of the blood.

Counsel for the Appellant also attacked the evidence of PW3 who admitted that he was a cousin to the deceased and whom the 1st Appellant claimed had eloped with his sister. The gist of Counsel’s argument is that PW3 was a witness with an interest to serve. Notably, the issue of PW3 having eloped with the 1st Appellant’s sister was not raised in cross-examination and it is clear to us that it was an after thought which did not deserve consideration. From the Judgment, it is clear that the trial Judge observed the demeanour of this witness and believed his testimony.

In conclusion, we find that having regard to the circumstances of the case, there was only one inference which could be drawn from the facts and this was that the Appellants were guilty as charged. We cannot fault the trial Judge’s findings.

We, therefore, find no merit in ground one. We dismiss it and we uphold the conviction of both Appellants.

We now turn to the second ground of appeal, which is against sentence. Mr. Phiri argued that the sentence is on the high side having regard to the fact that the Appellants are first offenders. We have considered Counsel’s arguments. It must be borne in mind that the offence of Manslaughter carries a maximum sentence of life imprisonment. Therefore, taking into account the circumstances of this case, we cannot say that the sentence of 25 years comes to us with a sense of shock.

We find no merit in the appeal against sentence and it is also dismissed.

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**L.P. CHIBESAKUNDA**

**SUPREME COURT JUDGE**

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**E.N.C. MUYOVWE P. MUSONDA**

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