**IN THE SUPREME COURT FOR ZAMBIA Appeal No. 143,144/2011**

**HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

**BETWEEN**

**INONGE ANAYAWA 1ST APPELLANT**

**AND**

**LUBINDA SINJAMBI 2ND APPELLANT**

**VS**

**THE PEOPLE RESPONDENT**

**Coram: CHIRWA AG/DCJ, MWANAMWAMBWA AND MUYOVWE JJS**

**On 20th March, 2012 and 15th August, 2012**

For the 1st Appellant: Mr. K. Muzenga, Principal Legal Aid

Counsel

For the 2nd Appellant: Captain Nanguzgambo, Messrs F.B.

Nanguzgambo and Associates

For the Respondent: Mr. P. Mutale, Acting Chief State Advocate

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

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

**Cases referred to:**

1. **R vs. Baldrey (1852) 2 Den.Cr. 120**
2. **Chisha vs. The People (1980) Z.R. 36**
3. **DPP vs. Hester (1972) 3 All ER 1056**
4. **Zulu vs. The People (1977) Z.R. 151**
5. **Zeka Chinyama and Others vs. The People (1977) Z.R. 426**
6. **Katebe vs. The People (1975) Z.R. 113**
7. **Chrispine Soondo vs. The People (1981) Z.R. 302**

**Legislation referred to:**

1. **Section 122 of the Juveniles Act.**

The Appellants were convicted of the offence of murder contrary to Section 200 of the Penal Code. The particulars allege that the Appellants, between 14th and 15th January 2009 at Mongu in the Mongu District of the Western Province of the Republic of Zambia jointly and whilst acting together did murder ANAYAWA INONGE.

The prosecution evidence was to the effect that PW1, the wife of the 1st Appellant left home on the morning of 14th January, 2009 leaving all her children at home with the their father, the 1st Appellant. As she worked in the field her son Mwangala Inonge came to inform her that the 1st Appellant wanted her to return home. She did as requested and on arrival home, the 1st Appellant asked her for K5000 which she gave to him and returned to the field. That very morning, Siluka Inonge one of her children came to the field to inform her that the 1st Appellant had left for Limulunga taking with him the deceased child. According to PW1 the 1st Appellant returned home around 1800 hours without the deceased and he denied that he had taken the deceased with him. A search was launched for the deceased but to no avail and the 1st Appellant who is a traditional healer resorted to using his gadget called *taula* made from wood and made in the form of a human being to assist him in locating the deceased. This failed and people began mourning. The *taula* later pointed to the eastern direction where a canal is located. She stated that the 1st Appellant and his father later reported the matter to Limulunga Police Station. Eventually, the deceased’s body was found near Liamutinga Canal. PW1 observed that the deceased had suffered a deep cut on the side of his body.

PW2 was Sianga Inonge aged 14 years who gave evidence on oath after a voire dire was conducted. He stated that he had spent a night at his uncle’s house and when he returned home, he found his father (1st Appellant) at home with the 2nd Appellant and his brothers and sisters were present at the time. Later that morning, he went to fetch water and when he returned he found that his father, the 2nd Appellant and the deceased were not at home. The witness went to school and came back and there was no sign of the deceased. The rest of his evidence was substantially the same as that of PW1as to how the 1st Appellant consulted the *taula* and that later the body of the deceased was discovered in the eastern direction where the *taula* had indicated. He maintained that when he went to fetch water he left his father, the 1st Appellant, with the 2nd Appellant.

PW3 testified that on 9th January 2009 he was at his kraal skinning an animal when the 1st Appellant arrived. According to PW3 the 1st Appellant told him that he was wasting time as there was a white man who was willing to pay K40 billion for the fat of a child. That to get the fat of a child one had to kill the child by opening its stomach and he advised him not to kill the children of his in-law as he would eliminate him by sending lightening to strike him. The 1st Appellant suggested that they kill Kalaluka’s children as he was poor. At the time of this discussion, the deceased had already been killed. PW3 informed others about the 1st Appellant’s proposed scheme but the plan to apprehend the 1st Appellant did not materialise because it was revealed to him.

PW 4 testified that on the 14th of January he was informed that some women had found the body of the deceased and that he rushed to Limulunga Police Station where he reported the discovery. PW4 stated that the police went to the scene and picked up the body. He stated that he observed that the body of the deceased had a big cut on the area around the stomach and it was found near the Liamutinga canal.

PW5 was Mcfallen Mwansa the investigations officer who testified that he had received the docket relating to this matter. He told the court that he had interviewed the 1st Appellant who confessed that he committed the offence.

However, Counsel for the 1st Appellant objected to the admission of the confession and the Court then held a trial-within–a-trial to determine the voluntariness of the confession. After a trial-within-a-trial the Court ruled that the confession was free and voluntary and admitted it.

It was PW5’s evidence that the confession statement was made in the presence of the relatives of the 1st Appellant who included his parents. Suffice to note that in his confession statement the 1st Appellant implicated the 2nd Appellant stating that they connived to kill the deceased in order to obtain fat from his body for sale to a white man for the sum of K40billion. PW5 testified that on 8th March 2009 the 1st Appellant led him to an uncompleted building in the airport area where he alleged that the human fat which was extracted from the deceased was buried. However, they did not find the human fat. PW5 testified that he apprehended the 2nd Appellant on the same day. After recording the warn and caution statement from the 1st Appellant, PW5 charged him jointly with the 2nd Appellant of the subject offence. He stated that the 1st Appellant admitted the charge while the 2nd Appellant denied the charge.

At the close of the prosecution case, the learned trial Judge found the Appellants with a case to answer and put them on their defence. They elected to give evidence on oath and called no witnesses.

The 1st Appellant, who is a traditional healer, testified that on 14th January, 2009 he informed his wife that he was going to Mongu to deliver herbs to the 2nd Appellant for him to use on his child. He stated that after delivering the herbs to the 2nd Appellant he passed through some shop in Mongu and returned home but that when he arrived home around 19:00 hours he was informed that the deceased was missing. According to the 1st Appellant he had left the deceased playing with his siblings at the time he left the village. The 1st Appellant blamed his two wives for failing to ensure that the children remained home and he almost beat them. He stated that they searched for the deceased at his school and that eventually he decided to consult the *taula* to assist him to locate the whereabouts of the missing child. According to the 1st Appellant the *taula* did not point to a specific direction and he was unable to ascertain where his missing child was and that on the 15th January he decided to report the matter to Limulunga Police Station. That it was while he was at Limulunga Police station that his friend Pony Mulemwa informed him and his father that the body of the lost child had been located. The 1st Appellant testified that the warn and caution was administered by the police but that they did not explain his rights to him and he denied having discussed with PW3 about the prospect of killing a child in order raise K40 billion from the sale of human fat.

In cross-examination the 1st Appellant denied that the *taula* had pointed to the eastern direction where the deceased’s body was found the following day. He maintained that he had left the deceased at home with his two wives when he left for Mongu on the material day.

The 2nd Appellant who is a Police officer testified that on 10th January 2009 his wife had a new born baby. He said his mother gave him directions to the 1st Appellant where he procured traditional medicine for the baby. That the 1st Appellant gave him medicine worth K500,000 and he made a part payment of K250,000 and that the balance was to be paid at the end of January 2009. He testified that prior to this transaction he did not know the 1st Appellant. The 2nd Appellant said that on the 16th February 2009 he was arrested by the police and was charged for murder. He testified that on the day when the deceased allegedly went missing he was not with the 1st Appellant. According to the 2nd Appellant, the 1st Appellant implicated him in this matter because he had not settled the balance of K250,000 for the medicine which he had obtained for his newly born baby. The 2nd Appellant stated that on the 14th of January he was at home with his wife in Limulunga.

After summing up the evidence, the trial Judge found that the confession made by the 1st Appellant was sufficient evidence against him in this matter. He relied on the case of **R. vs. Baldrey¹** in which **Erlye J** stated:

**“I am of the opinion that where a confession is proved, it is the best evidence that can be produced.”**

The learned trial Judge warned himself that the 1st Appellant’s confession could not on its own implicate the 2nd Appellant. However, the trial Judge found that the 1st Appellant confirmed in his confession that he was the principal actor in the commission of the murder of his son and that on the basis of his confession, he was satisfied beyond reasonable doubt that the 1st Appellant was guilty of the subject offence.

As regards the 2nd Appellant, the learned trial Judge relied on the evidence of PW2 the son to the 1st Appellant who testified that the 2nd Appellant had visited his father’s village on the material day and that when he went to draw water, he left him at home with his father. In relation to the evidence of PW2 the learned trial Judge examined various authorities relating to the evidence of children. After considering various authorities including the case of **Chisha vs. The People²,** and **DPP vs. Hester³** he reached the conclusion that PW2’s evidence needed corroboration. He warned himself of the danger of relying on PW2’s evidence. The learned trial Judge found that the 2nd Appellant was not truthful especially in the face of PW2’s evidence that he knew the 2nd Appellant as a friend to his father. The learned trial Judge believed the evidence of PW2 that he had seen the 2nd Appellant with his father on the material day and he rejected the evidence of the 2nd Appellant who stated that he did not go to the 1st Appellant’s home as alleged. In his judgment the learned Judge concluded that the reason why the 2nd Appellant denied having being present at the 1st Appellant’s residence on the material day was merely to avoid being implicated in this matter. The learned trial Judge found it odd that the 2nd Appellant did not call his wife to testify that he was with her on the day in question having regard to seriousness of the offence that he faced.

The learned trial Judge relying on **David Zulu vs. The People** convicted the 2nd Appellant on the basis of circumstantial evidence and sentenced the Appellants to the mandatory death sentence and they have now appealed against their conviction.

On behalf of the 1st Appellant Mr. Muzenga filed Heads of Argument in which he advanced two grounds of appeal namely:

1. **The learned trial court erred in law and in fact when it admitted the confession statement in the absence of proof beyond all reasonable doubt that it was obtained voluntarily.**
2. **In the alternative, the learned trial court misdirected itself in law and in fact in its failure to exercise its discretion on the balance of probabilities to exclude the confession statement notwithstanding the fact that it was obtained voluntarily in the light of the unfair circumstances on the record surrounding its being obtained.**

Mr. Muzenga submitted in relation to ground one that looking at the evidence on record and the Ruling relating to the trial-within-a-trial, it is not clear who bore the burden of proving the voluntariness of the confession statement and the standard of proof applied.

Mr. Muzenga submitted that from PW4’s evidence, the 1st Appellant denied the allegation against him on two occasions when he was interviewed. This was on the 7th and 8th March 2009 and that he only confessed on the 11th March 2009. He argued that there were glaring inconsistencies in the evidence of some prosecution witnesses during the trial-within-a-trial which the learned trial Judge failed to resolve. Mr. Muzenga pointed out that the evidence of PW1 (in the trial-within-a-trial) was that the 1st Appellant stayed in police custody for 5 days as they were waiting for his relatives to come. That PW1 stated that when the 1st Appellant was warned and cautioned he admitted the charge.

However, PW4 told the Court below that when warned and cautioned the 1st Appellant denied the charge. That PW2 (in the trial-within-a-trial), when asked what the 1st Appellant said, after being warned and cautioned, he said that the 1st Appellant remained quiet. Counsel also pointed out that PW2 (in the trial-within-a-trial) said that the 1st Appellant was detained in police custody for about 2 weeks.

Counsel submitted that these inconsistencies in the evidence of PW1, PW2 and PW4 ought to have been resolved by trial Court in its Ruling on the trial-within-a-trial and that the Court should have indicated which of the witnesses’ account it believed and why. Mr. Muzenga argued that failure to do so was a misdirection. He submitted that despite the failure by the trial Court to state who bore the burden of proof and to what standard, it is clear from the trial Court’s focus on DW1’s credibility in the trial-within-a-trial and also the 1st Appellant’s evidence that the burden appeared to have been placed on him.

Mr. Muzenga argued that the learned trial Court’s failure to analyze the evidence of the prosecution and satisfy itself beyond reasonable doubt that the prosecution had proved that the confession was free and voluntary was a serious misdirection to the extent that the confession statement cannot, therefore, stand. He, further, argued that had the trial Court addressed its mind fully to the inconsistencies of the prosecution witnesses; resolved them and also considered the evidence given by the 1st Appellant together with his witness, the Court would not have found the confession statement to have been free and voluntary.

He submitted that on this ground alone this Court should exclude the confession statement since it is the only evidence against the 1st Appellant and acquit him.

Turning to ground two, Mr. Muzenga submitted, inter alia, that it is clear from the evidence of PW1, PW2 and PW4 in the trial-within-a-trial that the 1st Appellant was in police custody for at least five days before the confession statement was recorded. That it is clear from the evidence of PW1 and PW4 that they had interviewed the 1st Appellant on two occasions before he made the confession. That the 1st Appellant stated that he was being beaten while in custody before the confession statement was recorded from him. Mr. Muzenga submitted that such circumstances considered together amount to unfair circumstances and invited us to exercise our discretion to exclude the confession statement notwithstanding the fact that it was freely and voluntarily given. Counsel relied on the case of **Zeka Chinyama and Others vs. The People** where we held that:

**“The Court is not required in every case to make a decision whether or not in the exercise of its discretion to exclude a confession; where every circumstance which might conceivably be regarded as indicating unfairness has been considered in the very decision that the confession was voluntary the question of the exercise of the Court’s discretion does not arise.**

**The question of the discretion to exclude a confession made to a police officer falls to be considered when such confession has been held to have been voluntarily made, but there has been a breach of the Judges ‘Rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to a judge that there is danger of unfairness”.**

Mr. Muzenga contended that the circumstances were unfair and as such the trial Court should have exercised its discretion to exclude the confession statement. Counsel prayed that the appeal be allowed and that his client be set at liberty.

On behalf of the 2nd Appellant Captain Nanguzgambo filed Heads of Argument and advanced three grounds of appeal namely:

1. **The learned trial Judge erred at law in convicting the 2nd Appellant for murder on circumstantial evidence that was not beyond reproach.**
2. **The learned trial Judge erred at law by placing the onus of proving the defence of alibi on the 2nd Appellant.**
3. **The learned trial Judge erred in relying on the evidence of PW2, a suspect witness without anything more.**

In relation to ground one, Captain Nanguzgambo submitted that in cross examination, the 2nd Appellant stated that on 14th January 2009 he did not go for work and he was with his wife the whole day. Captain Nanguzgambo pointed out that the trial Court in its judgment stated that it was rather odd that whilst the 2nd Appellant was facing a serious charge he did not call his wife to testify that they were together the whole day. He submitted, relying on **Katebe vs. The People6**,that there is no onus on the Appellant to establish his alibi and that failure to investigate the alleged alibi constituted a dereliction of duty on the part of the police.

Captain Nanguzgambo further submitted that the position of the law is that even if the alibi is proved to be a deliberate lie on the part of the Appellant, an inference of guilt cannot be drawn. In support of this argument Counsel cited the case of **Chrispine Soondo vs. The People7.**

In relation to ground two, Captain Nanguzgambo submitted, inter alia, that the cogency of the evidence against the 2nd Appellant comes into question when it is weighed against the evidence of PW2. He submitted that according to PW2, the 2nd Appellant was seen at the 1st Appellant’s home on the morning of 14th January, 2009. However, he pointed out that the 1st Appellant in his warn and caution statement, which was admitted in the Court below after a trial-within-a-trial, stated that the 2nd Appellant was by the road side at about 0600 hours on the same date. Captain Nanguzgambo questioned who between the 1st Appellant and PW2 was telling the truth. He submitted that on this basis the Court below should have acquitted the 2nd Appellant. Learned Counsel argued that the Court below relied on the authority of **David Zulu vs. The People4** to convict the 2nd Appellant on circumstantial evidence but that the authority urges the trial Judge to satisfy himself that such evidence has taken the case out of the realm of conjecture so that it attains the degree of cogency which can permit only an inference of guilty.

In relation to ground three, Captain Nanguzgambo submitted that the lower Court recognised and accepted that PW2 was a suspect witness by virtue of both his age and relationship to the deceased. That, therefore, his evidence needed collaboration. Counsel submitted that PW2’s testimony stands out alone in connecting the 2nd Appellant to the commission of the crime and that no tangible grounds were advanced as to why PW2 should be believed without ‘something more’.

Captain Nanguzgambo submitted that it is unsafe to uphold the conviction of the 2nd Appellant when the 1st Appellant’s confession only worked against himself while the evidence of PW2 was suspect and lacked ‘something more’.

He argued further that the Court below ought to have attached some weight to the 2nd Appellant’s explanation as to why the 1st Appellant implicated him. And this was that he owed the 1st Appellant K250,000.00 for dispensed drugs for his newly born baby which has not been paid up to date. He submitted that, therefore, this Court should allow the appeal and quash the conviction.

On behalf of the State Mr. Mutale supported the conviction. He submitted in respect of ground one that there is no basis in the Appellants’ argument that the Court did not state who bore the burden of proving the voluntariness of the confession. Mr. Mutale submitted that the law is clear that he who asserts must prove. He submitted that the prosecution sought to introduce the confession and, therefore, bore the burden of proving that the statement was freely and voluntarily given. He contended that this is what the police tried to do in arranging for the presence of the relatives of the 1st Appellant. Further, that there is no substance in the argument that there were glaring inconsistencies in the prosecution evidence. Mr. Mutale submitted that when PW1 said on being warned and cautioned the 1st Appellant admitted the charge, while PW4 said he denied the charge, the two witnesses were describing what the 1st Appellant said at different stages of the case. Mr. Mutale submitted that PW4 was describing what the 1st Appellant said at the charging stage. Mr. Mutale said PW1 (in the main trial) explained how the Appellant lured his own son and had him killed. He submitted that the record will show that there are no inconsistencies and that if what appears to be inconsistencies exist, then they can be explained. Regarding the confession, he argued that there was no credible evidence adduced by the 1st Appellant to show that he was treated in an unfair manner. He argued that there was no evidence of breach of the Judges Rules nor was there evidence of any brutal treatment as regards the 1st Appellant. Mr. Mutale submitted that the police explained that the warn and caution statement was not recorded immediately as they wanted the relatives of the 1st Appellant to be present. Counsel argued that there is no basis for the argument that the confession should have been excluded on account of unfairness.

Turning to the 2nd Appellant, Mr. Mutale submitted that he was not convicted on circumstantial evidence but the result of incriminating evidence in the confession of the 1st Appellant which was collaborated by the testimony of PW2 who placed the 2nd Appellant on the scene. Mr. Mutale contended that the trial Judge did not place the onus of proving the alibi on the 2nd Appellant but that he merely wondered why the 2nd Appellant did not call his wife to counter the alibi. He conceded that PW2’s evidence can be considered as suspect evidence since he was a relative. However, Mr. Mutale argued that the evidence of PW2 was credible in that he could not have had any motive to implicate the 2nd Appellant in this matter. He submitted that this appeal has no merit and must fail.

In response to the submissions of Mr. Mutale, Mr. Muzenga argued in respect of ground one that the inconsistencies existed in relation to the warn and caution statement and that they were not addressed by the trialCourt. He argued that had they been addressed, the warn and caution statement would have been thrown out. He maintained that the Court below should have stated who bore the burden of proof and should have stated the standard of proof required and that this is not in the Ruling.

According to Mr. Muzenga the ruling in the trial-within-the- trial shows that the burden of proof was placed on the 1st Appellant and that the lower Court concentrated on the 1st Appellant’s evidence and this shows an unbalanced approach.

On behalf of the 2nd Appellant Captain Nanguzgambo responded in respect of ground three that PW2 who was the brother to the deceased was a witness with an interest to serve. He maintained that the contradiction between the evidence of PW2 and the 1st Appellant disqualified the evidence of PW2. He prayed that the appeal be allowed as there is nothing of substance to implicate the 2nd Appellant to this case.

We have considered the evidence on record, the judgment of the Court below and the submissions by learned Counsel.

We will first deal with the 1st Appellant. In relation to ground one, which questions the admission of the confession by the trial Court. Mr. Muzenga contended that the confession was admitted in absence of proof beyond reasonable doubt that it was obtained voluntarily. The second ground is that the trial Court should have used its discretion to exclude the statement notwithstanding that it was obtained voluntarily in the light of the unfair circumstances as regards its extraction from the 1st Appellant. We propose to deal with both grounds simultaneously as they are inter-related.

The Ruling by the learned trial Judge in the trial-within-a-trial considered the evidence from the prosecution and the defence in its totality. We agree with Mr. Mutale from the outset that quite obviously the burden of proving the voluntariness of the confession beyond reasonable doubt lay on the prosecution and this is the position of the law and the trial Judge was alive to this. On Page J9 the learned trial Judge had this to say:

“**It is trite law that whenever the State seeks to put in a confession as part of their evidence, the burden rests on the State to establish beyond reasonable doubt, that the confession was made freely and voluntarily and that it was not induced by any promise of favour or any menace or undue terror to confess (See Zonde and Others vs. The Queen (1963-64) Z.R. 97 and Chigowe vs. The People (1977) Z.R. 21.) It is also trite law that a judge has a discretion to exclude a statement even though freely and voluntarily made if he considers, that it was taken in circumstances unfair to the accused or if there has been a breach of the Judges Rules.”**

We, therefore, find no basis for the argument that the learned trial Judge did not consider who bore the burden of proof and the standard of proof required.

Mr. Muzenga also raised the issue of what he termed as ‘glaring inconsistencies’ in the evidence of specifically PW1, PW2 and PW4 in the trial-within-a-trial and he argued that the learned trial Judge failed to resolve the inconsistencies. Looking at the evidence of the prosecution in the trial-within-a trial we note that, indeed, there was a contradiction as to the number of days that the 1st Appellant stayed in police custody prior to the warn and caution statement being recorded from him. PW1 said he was kept for five days while PW4 said it was for two weeks. Be that as it may, it is a fact that the 1st Appellant was in custody before the warn and caution statement was recorded from him. The police ensured that the 1st Appellant’s close relatives were present during the recording of the warn and caution statement. In our view, this was a very prudent move aimed at depicting the fact that it was obtained without duress. While we agree that the trial Judge should have addressed the contradiction relating to how long the 1st Appellant was in custody before the statement was recorded, we take the view that the contradiction did not go to the core of the prosecution case. Clearly, the Court was more interested in the circumstances that prevailed during the recording of the warn and caution statement than the length of days that he stayed in custody. In any case, the 1st Appellant’s father who was PW3 in the trial-within-a-trial testified how he took food to his son while he was in police custody. And he testified to the fact the 1st Appellant did not complain to him during this period and neither did he observe any injuries on his body. The learned trial Judge believed the evidence of his relatives that he was not coerced into giving a statement and we cannot fault him since he had the opportunity to observe the demeanour of the witnesses from both sides.

Mr. Muzenga again pointed out that there was some contradiction in the evidence of PW1 and PW 4 during the trial-within-a-trial. Whereas PW1 stated that on being charged the 1st Appellant denied the charge, PW4 said he admitted the charge. Taking into consideration our holding in **Zeka Chinyama5** we cannot say that this is evidence of unfairness and that, therefore, the trial Judge properly directing himself should have excluded the confession. We take the view that this contradiction does not alter the fact that the 1st Appellant gave a detailed confession in the presence of his relatives. Although the learned trial judge failed to resolve the contradiction, our view is that this cannot be a ground for the acquittal of the 1st Appellant. Further, as argued by Mr. Mutale there was no breach of the Judges Rules and we said in the case of **Zeka Chinyama5** (citing with approval the case of **Sekeleti vs. The People**) that:

**"In the present case no question of discretion arises; the only improprieties alleged were the assaults, and once the court expressed itself to be satisfied that these alleged assaults did not take place there was no basis for the exercise of its discretion."**

This is precisely our view in this case. Indeed, what better confession can be presented before Court other than the one obtained in the presence of one’s relatives.

As regards the evidence of DW1 in the trial-within-a-trial, the trial Judge was entitled to examine the credibility of his evidence. DW1 told the Court that he was in police custody when the 1st Appellant was being interviewed and yet it was established that at the time, he was in prison and could not, therefore, have observed the police beating the 1st Appellant. The learned trial Judge believed the evidence of the prosecution witnesses during the trial-within-a-trial and rejected that of the 1st Appellant and his witness. It was certainly not necessary for the learned trial Judge to specify witness by witness why he believed or disbelieved the evidence. Suffice to state that the Ruling is comprehensible and leaves no doubt that the learned trial Judge addressed his mind to the totality of the evidence presented before him by both sides in the trial-within-a-trial.

We find that learned Counsel’s spirited arguments cannot assist the 1st Appellant and we hold that there was no unfairness which can lead us to exclude the confession.

In the circumstances, we find no merit in the 1st Appellant’s appeal and we dismiss it.

We now turn to consider the 2nd Appellant’s appeal.

We have considered the arguments advanced by Captain Nanguzgambo. We shall deal with grounds one and three together.

In grounds one and three the gist of Counsel’s argument is that the learned trial Judge erred in convicting the 2nd Appellant based on circumstantial evidence and that he should not have relied on the evidence of PW2 who was a suspect witness. That the evidence required ‘something more’. Captain Nanguzgambo strongly relied on **Zulu vs. The People** and submitted that the cogency of the evidence comes into question on examining the evidence of PW2 and the 1st Appellant’s confession. It is not in dispute that in his confession the 1st Appellant stated that he met the 2nd Appellant at the road on the material day as he proceeded to Mongu. However, PW2 a juvenile and son to the 1st Appellant said the 2nd Appellant was at his father’s house the morning when the deceased went missing. It would appear to us that in resolving this conflict the learned trial Judge took into consideration the fact that the 2nd Appellant was not a stranger to PW2. He accepted PW2’s evidence that he knew the 2nd Appellant as a friend to the 1st Appellant. The learned Judge did not see any reason for PW2 to tell a lie that he had seen the 2nd Appellant and that he was known to him. In our view, the trial Court believed the evidence of PW2 on this point rather than the 1st Appellant who said the 2nd Appellant was at the road. The learned trial Judge was entitled to do so as he had the opportunity to observe the demeanour of the witnesses. In our view, when all is said and done both versions confirm that the 1st and 2nd Appellant met on the day the child went missing. In fact the 1st Appellant confirmed this in his defence. In fact the 2nd Appellant claimed that the 1st Appellant implicated him in this case due to the fact that he owed him K250,000 for the medicine which he prescribed for his baby. This issue was not raised in cross-examination of the 1st Appellant and even of the arresting officer and it clearly stands out as an afterthought.

Further, the learned trial Judge warned himself against the danger of relying on the evidence of PW2 who was 16 years old. We wish to state that it was not necessary for the Court below to conduct a voire dire having regard to the fact that PW2 was 16 years old. Although PW2 was a juvenile, he should not have been considered as a child of tender years in terms of **Section 122 of the Juveniles Act.** In this regard, Captain Nanguzgambo’s argument that PW2’s evidence required ‘something more’ cannot stand. The learned trial Judge considered the evidence of PW2 and he believed his evidence that the 2nd Appellant was at his father’s place the morning the child disappeared. We have taken into account that in the warn and caution statement the 1st Appellant said he met the 2nd Appellant at the road while in his evidence he said he went to Mongu on the material day to give medicine to the 2nd Appellant. Be that as it may, the learned trial Judge did not find any motive as to why PW2 should create a story that the 2nd Appellant was actually at his father’s house and more so PW2 said he knew the 2nd Appellant as a friend to his father.

We do not agree with Captain Nanguzgambo’s submission that the 1st Appellant’s confession worked against him alone as PW2’s evidence is suspect and lacks support. As we have stated herein, PW2’s evidence required no support. It is the 1st Appellant’s evidence that needed corroboration against the 2nd Appellant and in our view PW2’s evidence sufficed. We take the view that the circumstantial evidence against the 2nd Appellant was cogent and the learned Judge was on firm ground when he came to the conclusion that there could have been no other inference other than an inference of guilt on the part of both Appellants.

Turning to ground two which relates to the issue of the alibi raised by the 2nd Appellant, it is trite that the onus is on the prosecution to negative the defence once raised. In **Katebe vs. The People6** we held that:

**(iv) Where a defence of alibi is set up and there is some evidence of such an alibi it is for the prosecution to negative it. There is no onus on an accused person to establish his alibi; the law as to the onus is precisely the same as in cases of self-defence or provocation.**

**(v) It is a dereliction of duty for an investigating officer not to make a proper investigation of an alleged alibi.**

On examining the evidence before the lower Court, we find that the issue was not raised by the defence. The 2nd Appellant claimed that he told the police that on the material day he was with his wife. However, we find that this issue was not raised in cross-examination of the investigating officer. It was not sufficient for the 2nd Appellant to merely state in his defence that he was with his wife the whole day on the material day. The defence should have been raised earlier in order to give the prosecution a chance to address it. As it is, we can only conclude that it was an afterthought. The question of dereliction of duty is, therefore, not an issue in this case. And as Mr. Mutale submitted, the fact that the learned Judge commented on the fact that the 2nd Appellant did not call his wife as a witness cannot amount to shifting the burden of proof to him. Indeed, this was a mere observation which the learned Judge was entitled to make in view of the seriousness of the charge the 2nd Appellant was facing.

In the circumstances, we find no merit in the three grounds of appeal advanced by the 2nd Appellant.

In sum, we find that the learned trial Judge was on firm ground when he convicted the Appellants. We find no merit in both appeals and we dismiss the appeals.

**……………………………………..**

**D.K. CHIRWA**

**ACTNG DEPUTY CHIEF JUSTICE**

**…………………………………. ……………………………………**

**M.S. MWANAMWAMBWA E.N.C. MUYOVWE**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**