**APPEAL No.104,105/2011**

**IN THE SUPREME COURT FOR ZAMBIA**

**HOLDEN AT NDOLA**

(Criminal Jurisdiction)

**BETWEEN:**

**OBED CHANDA 1ST APPELLANT**

**CHARLES CHISANGA 2ND APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CHIRWA Ag/DCJ, MWANAMWAMBWA AND MUYOVWE JJS**

**On the 20th March 2012 and 6th June, 2012**

For the Appellants: Mr. N.M. Chomba, Acting Deputy Director, and

Mrs. M.T. Weza, Legal Aid Counsel, Legal Aid Board,

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. **Kambarage Mpundu Kaunda vs. The People (1990/92) Z.R. 91**
2. **Bornface Chanda Chola and Others vs. The People (1988/89) Z.R.163**
3. **Mushala vs. The People (1978) Z.R 62**
4. **Chimbo and Others vs. The People (1982) Z.R 20**
5. **Katebe vs. The People (1975) Z.R.13**
6. **Emmanuel Phiri and Others vs. The People (1978) Z.R. 79**
7. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R 124**
8. **Christopher Nonde Lushinga vs. The People SCZ Judgment No. 15/2011**

The Appellants were convicted of the offence of murder contrary to **Section 200 of the Penal Code Cap 87 of the Laws of Zambia**. The particulars allege that on 17th December, 2007 at Mpika in the Mpika District of the Northern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown they murdered Peter Mwila.

Initially, the Appellants were charged with one Michael Mutale Mwaitunga and Helen Mulenga. Michael Mutale Mwaitunga was acquitted at the close of the prosecution case, while Helen Mulenga was convicted together with the Appellants of the subject offence but was sentenced to seven (7) years imprisonment with hard labour.

In sum, the facts of this case are that Bernard Tambatamba, the elder brother to Helen Mulenga, fell ill on 14th December, 2007. His grandfather (PW1) in the company of other relatives took him to the hospital. However, on 17th December, 2007 he was discharged and he died as they proceeded back home. The funeral of Benard Tambatamba, was held at PW1’s house. During the funeral, Helen Mulenga attacked PW1 alleging that he was a wizard and that he was keeping the deceased in the village who was also a wizard.

PW2, the daughter to the deceased, Peter Mwila, testified that the Appellants went to the deceased’s house with burning bundles of grass and they threatened to kill her as she refused to show them where the deceased was. As the Appellants searched for the deceased, they tried to demolish his house but they failed and instead, they set the house on fire. PW2 said the Appellants discovered where her deceased father was hiding, apprehended him and started beating him with fists and other weapons. When it started raining, they took the deceased into the funeral house at PW1’s place. PW2 did not go into the funeral house but went back there the following morning to find that her father had died. She observed several wounds on his swollen head.

PW3 went to the funeral house on hearing of the death of Benard Tambatamba. As she left the funeral house, she met the 1st Appellant who slapped her and some people intervened. However, as she proceeded home, she met Helen Mulenga who was coming from her house who also accosted her. The Appellants, Helen Mulenga and others were searching for the deceased. PW3 went into hiding for fear of her life but she was following the group who had burning bundles of grass in their hands as it was getting dark. According to PW3, she identified the Appellants and Helen Mulenga as being among those who beat the deceased when they found him where he was hiding. PW3’s evidence was that the Appellants used hoe-handles, axe -handles in beating the deceased and they also kicked him and punched him with fists. PW3 said she then fled to her brother’s village to go and inform him of the developments. She only learnt of her husband’s death the following day. She also stated that the Appellants and Helen Mulenga threatened her and burnt her house.

PW4 was Detective Sergeant Patrick Musialela who apprehended the Appellants together with Helen Mulenga and Michael Mutale Mwaitunga in connection with the death of the deceased. The Appellants were later charged and arrested by PW5 Detective Sergeant Chileshe for the offence of murder which they denied.

On this evidence, the Appellants were found with a case to answer and put on their defence. They elected to give evidence on oath and called no witnesses.

In his defence, the 1st Appellant stated that on the material day, when he heard of the death of Bernard Tambatamba, he went to the funeral house where he found a lot of people inside the house. He remained outside the funeral house and he heard some noise coming from between the deceased’s house and the funeral house. He rushed there and found many young people assaulting the deceased. The 1st Appellant said he warned them that he would identify them. However, he lamented that when the police arrived, they apprehended him instead of those who had been assaulting the deceased.

In respect of the 2nd Appellant, his defence was that when Bernard Tambatamba died, he was informed of his death and he went to the funeral house. According to the 2nd Appellant, he stayed at the funeral house for sometime and then later, he went home. Due to heavy rains, he did not go back to the funeral house until the following morning only to find the deceased’s body lying outside the funeral house. He was arrested by the police on 19th December, 2007 after the deceased was buried. He denied taking part in murdering the deceased.

On this evidence, the learned trial Judge convicted the Appellants of the offence of Murder and sentenced each one to the mandatory death sentence and they have now appealed against conviction and sentence.

On behalf of the Appellants, Mr. Chomba and Ms. Weza, filed written heads of argument which they augmented with oral submissions. They have advanced two grounds of appeal namely:

1. **The learned trial Judge erred in law and in fact when he convicted the 1st and 2nd Appellants based on the suspect evidence of PW2 and PW3.**
2. **The learned trial Judge misdirected himself in law and in fact in his failure to find extenuating circumstances so as to impose any other sentence than the mandatory death penalty on the facts of this case.**

In support of ground one, it was submitted that PW2 and PW3, who are the daughter and widow of the deceased respectively, were prone to tell lies against the Appellants. The cases of **Kambarage Mpundu Kaunda vs. The People¹** and **Bornface Chanda Chola and Others vs. People²** were cited. It was submitted that in her evidence, PW2 stated that the night of 14th December, 2007 was dark and that she followed a group of about 10 people and observed while in hiding how the group apprehended and beat up her father. She said there was moonlight and also that it rained heavily that night. It was pointed out that although the evidence of PW3 was substantially the same as that of PW2, the evidence of PW3 was that she made her observations from a distance of 30 metres and that there was partial moonlight that night although it was dark and rainy.

It was contended that it is impossible to have moonlight on a dark rainy night and hence, PW2 and PW3 could have made an honest mistake in identifying the Appellants. It was submitted that the Court below ought to have taken judicial notice of the fact that moonlight cannot exist before or during a dark rainy night. That in fact, PW3 stated that she did not know where the deceased was hiding and this should have raised suspicion in the mind of the Judge to entertain the possibility of an honest mistake. That the circumstances surrounding the events that night did not provide an opportunity for PW2 and PW3 to make reliable observations. The cases of **Mushala vs. The People³** and **Chimbo and Others vs. The People** were cited in support of this argument.

It was argued that PW2 and PW3 were suspect witnesses and that the greatest danger to be guarded against in such cases is the danger of false implication or honest mistake and that greatest care should be taken to ensure that, that danger had been excluded. It was contended that PW2 and PW3’s evidence was not corroborated, and, therefore, it would be unsafe to uphold such conviction.

On the evidence of the arresting officer (PW5), it was contended that he did not carry out any independent investigation in this case as he relied on what he was told by his fellow officer and the relatives of the deceased who pointed out the Appellants to him. That had PW5 carried out independent investigations, he would have found that the 1st Appellant had not taken part in the killing of the deceased but that he had gone to the scene to rescue him from an angry mob and that the 2nd Appellant was not at the scene of crime as alleged. In support of this argument the case of **Katebe vs. The People** was cited where this Court held that:

**“it is a dereliction of duty for an investigating officer not to make a proper investigation of an alleged alibi.”**

In his oral submissions on ground one, Mr. Chomba argued that the learned trial Judge ought to have warned himself of the danger of false implication by PW2 and PW3 and that he should have set out the compelling reasons that convinced him that the dangers had been excluded. That by failing to do so, the trial Judge misdirected himself. To buttress his argument, Mr. Chomba relied on the case of **Kambarage Kaunda vs. The People¹.** He submitted that the evidence of PW2 and PW3 should have been treated on the same footing as that of accomplices. Counsel also referred to the case of **Emmanuel Phiri and Others vs. The People6** where it was held that:

**(iv) The "something more" must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused. This is what is meant by "special and compelling grounds" as used in Machobane (1).**

Counsel argued that the trial Judge should not only have relied on the demeanour of the witnesses but rather whether there was ‘something more’ to exclude the dangers of false implication. Mr. Chomba conceded that one of the Appellants put himself on the scene of crime only to the extent that he was there to rescue the deceased from the mob. That in this case, it was an error on the part of the trial court to convict the Appellants on the evidence of PW2 and PW3.

In support of ground two, in their written heads of argument, Counsel submitted that the evidence of PW1, PW2 and PW5 confirmed that there were witchcraft accusations against the deceased by the Appellants. It was contended that this amounted to extenuating circumstances in terms of **Section 201 (1) of the Penal Code** adding that in the case of **Jack Chanda and Kennedy Chanda vs. The People** this Court dealt with this issue. That, therefore, the learned trial Judge ought not to have sentenced the Appellants to death and hence, this Court should quash the sentence and allow the appeal.

In her oral submissions on ground two, Mrs. Weza argued that the evidence of PW1, PW2 and PW5 indicated that there were witchcraft allegations by the Appellants against the deceased. Citing the case of **Jack Chanda and Kennedy Chanda vs. The People** Counsel submitted that the trial Judge misdirected himself when he found extenuating circumstances only in respect of Helen Mulenga (the 3rd Accused in the Court below).She urged us to set aside the sentence and allow the appeal.

On behalf of the State, Mr. Mutale supported the conviction. He argued that the Appellants were properly identified by the two key witnesses. He conceded that the witnesses can be considered as suspect witnesses as they were related to the deceased. However, that on the authority of **Emmanuel Phiri and Others vs. The People6**  although the lower Court did not address its mind to the dangers of accepting the evidence of PW2 and PW3, there existed ‘something more’ in that the two witnesses had no motive to falsely implicate the Appellants. He submitted that the Appellants were properly convicted and that the appeal must fail for lack of merit.

In response to ground two, Mr. Mutale agreed that the trial Court misdirected itself in holding that there existed no extenuating circumstances when he imposed the death sentence. He submitted that there is evidence on record to show that there were speculations of witchcraft against the deceased.

We have carefully considered the evidence on record, the Judgment of the lower Court and the submissions of both learned Counsel.

Ground one raises the issue of suspect witnesses or witnesses with an interest to serve and that the trial Judge erred, therefore, in convicting the Appellants in absence of corroboration. In dealing with a similar issue, although the Appellant in that case was charged with defilement, we said in the case of **Christopher Nonde Lushinga vs. The People** that:

“… **the critical consideration must not be whether they did in fact have interests or purposes of their own to serve, but whether, as we said in the Chola case, they were witnesses who, because of the category into which they fall or because of the particular circumstances of the case, may have had a motive to give false evidence. In the instant case, this was reasonable possibility. Thus PW1, PW2 and PW3’s evidence fell to be approached on the same footing as for accomplices, namely; that the evidence needed corroboration.**

**However, although the trial magistrate did not warn herself of the fact that the prosecution witnesses were witnesses who had their own interest to serve, from our conclusion in ground one that there was corroborative evidence or “something more” in this case, we are satisfied that the danger of false implication was excluded.”**

In the present case, the 1st Appellant stated that the deceased was his grandfather and that when he found him being beaten by a mob he observed them and announced that he had identified them and would report them to the authorities.

It has been argued that since it was raining the witnesses may have made an honest mistake in identifying the Appellants. The trial Judge accepted that there was sufficient lighting for the witnesses to have identified the people who attacked the deceased. In fact, the 1st Appellant confirmed that although it was raining, he had no difficulty in identifying the people who were present at the scene of crime. Therefore, for Mr. Chomba to argue that PW2 and PW3 could not make proper observations due to heavy rains and that it was dark, is not fair. Quite obviously, if the 1st Appellant was able, as he claimed, to see clearly that night, so was PW2 and PW3. In our view, in spite of the rainy weather both PW2 and PW3 had the opportunity to observe the goings on, on that fateful night. And if the 1st Appellant was at the scene of crime to rescue the deceased, then as a reasonable person, he would have reported the culprits to the authorities. Certainly, had he done so, the police would not have apprehended him. Notably, the trial Judge did not believe his evidence because his demeanour was unimpressive and he was entitled to so find. Further, the 1st Appellant was the grandson to the deceased and we do not believe that this is a case of an honest mistake. As a grandson to the deceased, he was obviously well known to PW2 and PW3 and as the trial Judge noted, the assailants had burning grass in their hands which they used to burn the deceased’s house. Our understanding of the facts is that the chain of events started before the heavy rains began pouring. In fact, the events of that night as described by the witnesses are such that it is clear that the Appellants were the main players from the beginning of the search for the deceased up to the time he was discovered from where he was hiding and when the beatings started. PW1 explained that Helen Mulenga, (the sister to late Bernard Tambatamba) who was among the ring leaders in assaulting the deceased, confronted him alleging that he was harbouring the deceased who was a wizard. PW2 and PW3 were both threatened by the Appellants before the rains and they were seen with burning grass and they burnt the deceased’s house. The lower Court rightly found that the Appellants acted in collusion with Helen Mulenga and convicted her along with the Appellants.

Looking at the facts of this case, where the arresting officer maintained that as police they faced challenges in their investigations as it was a case involving relatives, we do not find any motive (and neither did the trial Judge) for PW2 and PW3 to create the story that the Appellants were among those who assaulted the deceased. There is no evidence to indicate that the Appellants had a bad relationship with the two witnesses prior to this incident. It is clear to us that the learned trial Judge did not find any reason to disbelieve PW2 and PW3. We have also held before that simply because witnesses are related to the deceased is not a reason to discount their evidence. In our view, the danger of false implication was eliminated.

It has also been argued on behalf of the 2nd Appellant that his alibi was not investigated by the arresting officer as he merely relied on information from his colleagues and the deceased’s relatives. In his testimony the 2nd Appellant alleged that he was at home throughout that night and did not participate in assaulting the deceased. We have examined the evidence in the Court below and there is no evidence to show that the 2nd Appellant informed the police about this. In fact this defence was not put to the arresting officer. The line of cross-examination adopted by the defence centered on whether the witnesses properly identified the Appellants as being among those who participated in assaulting the deceased that night. In our view, after perusing the evidence before the Court below, the defence of alibi was raised too late in the day by the 2nd Appellant to the extent that there can be no question of dereliction of duty on the part of the arresting officer. **See Katebe vs. The People.** The plea by the 2nd Appellant that he was not at the scene of crime was an afterthought and it cannot be sustained in view of the overwhelming evidence from the prosecution.

We, therefore, find no merit in ground one and we hereby uphold the conviction of the Appellants by the lower Court.

In ground two, we are being called upon to find extenuating circumstances on the basis that there were allegations of witchcraft against the deceased. Indeed, we have held in numerous cases that the belief in witchcraft in our communities is rampant and must be held to be an extenuating circumstance. In this case, PW1, PW2, PW3 and PW5 confirmed that the deceased was killed under suspicion of being a wizard. In fact, PW1 was beaten on the allegation that he was harbouring the deceased who was a wizard. The trial Judge should have taken this into consideration and should have found that extenuating circumstances existed. Had he properly directed himself, the learned trial Judge ought not to have pronounced the death sentence in this case.

In the circumstances, we set aside the death sentence and in its place, we sentence each Appellant to 20 years imprisonment with hard labour with effect from the date of arrest.

To this extent, ground two succeeds.

**……..…………………………**

**D.K. CHIWRA**

**ACTING DEPUTY CHIEF JUSTICE**

**………………..……………….. ...……………………………..**

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

**SUPREME COURT JUDGE SUPREME COURT JUDGE**