IN THE SUPREME COURT FOR ZAMBIA **APPEAL 51/2013**
HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MODESTAR MULALA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Mumba, Ag.DCJ, Muyovwe, JS, and Hamaundu, AJS**
On the 7th May, 2013 and 11th July, 2014

For the Appellant: **Mrs. C.K. Kabende, Legal Aid Council**
For the Respondent: **Ms. M.M. Bah, Senior State Advocate**

J U D G M E N T

HAMAUNDU, AJS, delivered the Judgment of the Court

Cases referred to:

1. ***Saluwema v The People[1] [1965] ZR 4***
2. ***Kambarage Mpundu Kaunda v The People[2] [1990/1992] ZR 215,***
3. ***Simon Malambo Choka v The People[3] [1978] ZR 243.***
4. ***Attorney-General v Kakoma[4] [1975] ZR 212***
5. ***Nkhata & Ors v Attorney-General[5] [1966] ZR 124,***
6. ***Boniface Chanda Chola and Ors V The People[6] [1988/1989] ZR 163***

When we head this appeal we sat with the Honourable Mrs. Justice F.N. Mumba who has since retired. This judgment is, therefore, by majority.

This is an appeal against both conviction and sentence.

The appellant, together with one Masidi Maybin Chama, was charged with the offence of aggravated robbery in the High Court. The particulars of the offence were that in the night of the 18th April, 2005, at Nchelenge in the Luapula Province of Zambia, the appellant and his co-accused, in the company of some unknown persons and being armed with a firearm did steal from Richard Chiwele a sum of K1,000,000 (old currency).

The prosecution's evidence in the High Court was as follows:

Richard Chiwele, who was PW1 in the High Court, and his wife Barbara Musonda, who was PW2, went to sleep in the evening of the 18th April, 2005. Around midnight, the two witnesses were wakened by the sound of a gunshot outside their home. Shortly thereafter, the door to their house was forced open. The appellant and his co-accused entered. The appellant pointed a firearm at Richard Chiwele and demanded money. Richard Chiwele took out a sum of K1,000,000 (old currency) which the appellant's co-accused took. At this point, Barbara Musonda started shouting.

In the meantime, Richard Chiwele's brother, Jonas Mukandwa, PW3, who was also wakened by the sound of the gunshot, heard his sister-in-law shouting. He started going towards their house. Near the house, he saw someone running away. His brother and sister-in-law were pursuing that person. He joined the chase until

that person fell in a ditch. Jonas Mukandwa apprehended that person who turned out to be the appellant. The appellant had a firearm. Richard Chiwele went to call the police at Nchelenge who picked up the appellant and the firearm. The police searched around Richard Chiwele's house and found a spent cartridge. The firearm magazine had about eight live rounds. The appellant was detained in police custody. During that period, the appellant's co-accused was also apprehended by the police. The firearm and the spent cartridge were subjected to forensic examination. The firearm was found to be capable of firing ammunition. The spent cartridge was found to have been fired from the same firearm. The appellant and his co-accused were, then, charged with aggravated robbery.

The appellant's defence in the High Court was that he had taken 450 grams of gold to sell to Richard Chiwele at the price of K6 million (old currency). He had also taken two radio cassettes and two bicycles. The defence was, further, that Richard Chiwele had left the house on the pretext of going to collect money but had, instead, come back late at night with a group of people, claiming that the appellant had stolen his money.

The defence of the appellant's co-accused was that in March, 2005, the appellant had bought fish worth K300,000 (old currency). The defence was further that the appellant had not collected the fish but had, instead, left for Congo, promising to

collect the fish on his return. It was the co-accused's further defence that in April, 2005, he was summoned to the police on the ground that the appellant had reported him as having stolen the sum of K300,000 (old currency). At the police station, the police informed him that the appellant had committed an offence and that the co-accused had been with the appellant during the commission of that offence.

The learned trial judge found that the only evidence against the appellant's co-accused was:

(i) the statement by the appellant and

(ii) the evidence of identification.

The learned trial judge held that the appellant's statement was extra-judicial and was not evidence against the co-accused. The learned trial judge also held that the evidence of identification was weakened by the fact that the identifying witness had had an opportunity to see the appellant's co-accused at the earlier trial that had been discontinued. The learned trial judge, further, held that the appellant's co-accused had raised an alibi which the prosecution had not negatived.

On those grounds, the learned trial judge acquitted the appellant's co-accused.

As regards the appellant, the learned trial judge made the following findings of fact;

(i) that both Richard Chiwele and his wife had ample opportunity to see him.

(ii) that when the appellant ran away from the house, Richard Chiwele and his wife gave chase.

(iii) that Richard Chiwele and his wife never lost sight of the appellant until he was apprehended.

(iv) that the appellant's testimony placed him at the scene of crime.

The learned trial judge rejected the appellant's explanation that he had gone to Richard Chiwele's house to sell gold on the ground that the learned judge found it unreasonable that, on this particular occasion, Richard Chiwele could raise alarm for the arrest of the appellant when the appellant's own testimony suggested that Richard Chiwele had been a customer of the appellant.

The learned trial judge, then, held that, on the fateful night the appellant and another person did rob Richard Chiwele using a firearm.

The learned trial judge convicted the appellant and sentenced him to death.

Before this court, the appellant attacked the lower court's judgment on three grounds:

The first ground was that the court below erred in fact and in law when it found that there was an unbroken chain of events leading to the apprehension of the appellant and concluded that the appellant had been correctly identified.

The second ground was that the court below erred in fact and in law when it found that the appellant's explanation was not possible.

The third ground was that the court below misdirected itself by failing to warn itself of the danger of false implication of the appellant by the three prosecution witnesses, PW1, PW2 and PW3 who were related to each other.

At the time that this appeal was scheduled for hearing, the appellant had not filed any ground of appeal. Neither had he filed the heads of argument. We, then, asked the appellant and the State to file their heads of argument and reserved the matter for judgment. The appellant has since filed his heads of argument. It is in those heads of argument that the above grounds of appeal are contained. The State have not filed any heads of argument.

In the first ground, it was argued on behalf of the appellant that the witnesses PW1, PW2 and PW3 did not identify the appellant on the strength of the unbroken chain of events leading to the

appellant's apprehension but because the witnesses knew the appellant and had conspired to rehearse the version of the testimony that they gave in court.

To support the foregoing arguments, it was submitted that the conspiracy was borne out by the inconsistencies in the testimony of the three witnesses with regard to; the date and day of the incident, the duration of the incident and the chase. It was pointed out that PW1 stated in examination in chief that the incident took place on the 18th April, 2005, while, in cross-examination, he stated that the incident occurred on the 15th April, 2005. It was pointed out that PW2 said that the incident took place on the 18th April, 2005, on a Sunday, when in actual fact Sunday was the 17th April. It was also pointed out that, while PW1 and PW2 stated that the incident lasted forty minutes, PW3 said that it lasted fifteen minutes. The appellant's argument on that inconsistency was that a difference of twenty-five minutes was very big. It was also argued that the incident, as narrated by PW1 and PW2, could have lasted only five minutes and not forty minutes.

It was, also, pointed out that while PW2 said that she, too, gave chase, PW1 did not say that PW2 had joined in the chase. It was also pointed out that while PW1 stated that he was the one who had taken the gun from the appellant, PW2 stated that PW1 apprehended the appellant while PW3 took the gun from the appellant. It was, then, argued on behalf of the appellant that the

inconsistencies pointed to the fact that the three witnesses had concocted the story. It was, further, argued on behalf of the appellant that if the appellant was able to fire the gun in order to threaten PW1 and his family, it was improbable that the appellant would, thereafter, became cowardly and ran off with his gun when he could easily have shot his pursuers.

It was also pointed out that while PW1 stated that they had a new baby, PW2 did not say anything about the baby. It was argued that it was strange that a mother could run off in pursuit of a criminal leaving a baby unattended to when there were other people who could give chase. It was submitted that the gun belonged to one of the witnesses and that they were the ones who had *"planted"* the spent catridge.

In the second ground, the appellant relied on the decision in the case of ***Saluwema v The People***[1] which is that, if the accused's case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.

It was argued on behalf of the appellant that reasonable doubt existed in this case on the following grounds: There was consistency in the story of the appellant and his co-accused that the appellant had given a sum of K300,000 to the co-accused as the price for fish. The appellant's version was confirmed by PW5, the arresting officer as being what the appellant had said in his

warn and caution statement to the police. The appellant had denied any knowledge of the gun. There was no evidence that the appellant's finger prints were found on the gun. Consequently, it was argued that the appellant's case was possible though it may not have been probable.

In the third ground, the appellant's argument was that PW1, PW2 and PW3 were witnesses whose testimony required to be corroborated by independent evidence.

To support the foregoing argument, it was pointed out on behalf of the appellant that PW1 and PW2 were husband and wife while PW3 was PW1's brother and PW2's brother-in-law. It was submitted that, in those circumstances, the trial court should have treated the evidence of the three witnesses with caution and should have satisfied itself that the danger that the appellant was being falsely implicated had been excluded.

We were referred to the cases of ***Kambarage Mpundu Kaunda v The People***[2] and ***Simon Malambo Choka v The People***[3].

Those were the arguments on behalf of the appellant.

We have considered the arguments advanced on behalf of the appellant.

In the first ground, the appellant's contention is that the witnesses conspired and concocted the story against the appellant. We wish to point out that the trial court made the following findings of fact;

(i) that the appellant ran away from the house of PW1 and PW2;

(ii) that PW1 and PW2, joined by PW3, gave chase and;

(iii) that these witnesses never lost sight of the appellant.

In the case of ***Attorney-General v Kakoma***[4] we held:

> ***"(iii) A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence..."***

In the case of ***Nkhata & Ors v Attorney-General***[5], the Court of Appeal, the predecessor of this court, held;

> ***"A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the judge erred in accepting evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the Judge did not take proper advantage of having seen and heard the witnesses or (4)***

the evidence of the witnesses which the Judge accepted is not credible as, for instance, where the witnesses have on some collateral matter deliberately given an untrue answer."

In this case, the trial court heard the evidence of PW1, PW2 and PW3 on one hand and that of the appellant on the other. The trial court evaluated that evidence. In the end, the trial court rejected the appellant's version of the story as being unreasonable in the circumstances of the case. It is after that evaluation process that the trial court arrived at those findings of fact. Clearly, there is no evidence that the trial court took into account something which it should have ignored or failed to take into account something which it should have considered. Again, other than the usual discrepancies in the testimonies of witnesses which arise as a result of differences in re-collection among witnesses, there is no evidence that PW1, PW2 and PW3 had deliberately lied on a collateral matter before the trial court. Therefore, the trial court's findings cannot be disturbed. It follows that, as the findings of fact clearly show, the appellant was caught red-handed. The question of identification did not even arise. Therefore, the first ground of appeal fails.

In the second ground, the appellant contends that his explanation before the trial court was reasonably possible and, as such, the prosecution had failed to discharge its burden of proof. As we have

said in the first ground, the appellant's explanation before the trial court was evaluated as against the story of PW1, PW2 and PW3, resulting in the findings of fact that the court made. Those findings of fact, which we have decided not to disturb, show that the prosecution had discharged its burden of proof. Therefore, the second ground of appeal also fails.

In the third ground, the appellant's contention is that the court should have treated PW1, PW2 and PW3 as witnesses with a possible interest to serve and whose evidence needed to be corroborated by something more.

We wish to cite a passage in the case of ***Kambarage Mpundu Kaunda v The People***[2], which has been referred to us by the appellant. The passage is as follows:

"firstly, it was argued that all the prosecution eyewitnesses were either relatives or friends of the deceased and that, as such, they were witnesses with a possible interest of their own to serve. He (Mr Ngenda) referred to the case of *Chimbo and others v The People* ***where this court held that a court faced with evidence of an accomplice or a suspect witness, should warn itself against the danger of false implication of the accused and go further to ensure that the danger has been excluded.***

Although the above aspect of the third ground of appeal was equally argued in the court below it was clearly not dealt with by the learned trial Judge. In our opinion, it is feasible for relatives or friends of a victim to have a possible bias against an accused person. We would agree with Mr. Ngenda that the prosecution eyewitnesses in this case were friends or relatives of the deceased and, therefore, could well have had a possible bias against the appellant, and as they, and in particular PW11, Andrew Kaonga, were themselves the subject of the initial complaint by the appellant as having attacked him and his friends, there was a possible interest of their own to serve. Failure by the learned trial Judge to warn himself and specifically to deal with this issue was a misdirection."(p.224)

In the case of ***Boniface Chanda Chola and Ors V The People***[6] we held;

> ***"in the case where the witnesses are not necessarily accomplices, the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of***

false implication is present and it must be excluded before a conviction can be held to be safe. Once this is a reasonable possibility, the evidence falls to be approached on the same footing as for accomplices."

We wish to emphasize that the motive to give false evidence on the part of the witnesses must be a reasonable possibility. We have stated in the first ground that the trial court evaluated the testimonies of the three witnesses and that of the appellant in order to arrive at its findings of fact. In the process of the evaluation it became clear that it was not reasonably possible that the three witness may have had a motive to give false evidence against the appellant. Therefore, the need for the trial court to warn itself of the danger of convicting the appellant on the testimony of those three witnesses did not arise. Therefore, the trial court did not misdirect itself when it did not warn itself on the danger of convicting the appellant on the uncorroborated testimony of PW1, PW2 and PW3.

The third ground of appeal also fails.

Since all the grounds of appeal have failed, this appeal stands dismissed.

(RETIRED)

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F. N. M. MUMBA

ACTING DEPUTY CHIEF JUSTICE

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E. C. MUYOVWE

SUPREME COURT JUDGE

.....

E. M. HAMAUNDU

ACTING SUPREME COURT JUDGE