SCZ SELECTED JUDGMENT No. 13 OF 2016 P. 425

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal Nos. 222, 223, 224, 226/2014

B E T W E E N :

BEATRICE MWALA HANGWENDE	**1ST APPELLANT**
JOSEPH BANDA	**2ND APPELLANT**
JOHN HANGWENDE	**3RD APPELLANT**
CHARLES MWANZA	**4TH APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

Coram: **Wanki, Muyovwe and Malila, JJS**
On 3rd March 2015, 5th May, 2015 and 8th June, 2016

For the Appellants: Ms. B. L. Pizo, Senior Legal Aid Counsel and Ms. S. C. Lukwesa, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C. Bako, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Case refereed to:

1. *Zaloumis and Hill v. The People (1973) ZR 67*
2. *The People vs. Kawandi (1972) ZR 121*

3. *Sydney Zonde and Others v. The People (1980) ZR 337*
4. *Mwambona v. The People (1973) ZR 38 (Reprint)*
5. *Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v. The People (1988-1889) ZR 163*
6. *Kenneth Mtonga and Victor Kaonga v. The People SCZ judgment No.5 of 2000*
7. *Ilunga Kabola and John Masefu v. The People (1981) ZR 102*
8. *Valentine Shula Musakanya v. The Attorney General (1981) ZR 214*
9. *Ali and Another v. The People (1973) ZR 232*
10. *Boniface Chauka Tembo v. The People (1978) ZR 402*
11. *Emmanuel Phiri and Others v. The People (1978) ZR 79*
12. *Adam Berejera v. The People (1984) ZR 19*
13. *Muchabi v. The People (1973) ZR 193*
14. *Nzala v. The People (1976) ZR 221*
15. *Katebe v. The People (1975) ZR 13*
16. *John Musonda Mwanamwenge v. The People (2012)(3) ZR 1*
17. *Jack Chanda and Kenneth Chanda v. The People SCZ No. 29 of 2002*
18. *People v. Gordon (1973) 10 Cal. 3d 460, 469*
19. *Wilson Mwenya v. The People (1990/ 1992) ZR 24*

Legislations referred to:

1. *Halsburys Laws of England 3rd Edition Vol. 10 paragraphs 814 pages 439 and 440*

Our learned brother, Wanki JS, was part of the panel that heard this appeal. Although he expressed his full concurrence with the conclusions that we make in this judgment, we can only treat the judgment as one by majority since he has proceeded to retirement.

The appeal is against the judgment of the High Court given on the 22nd August, 2013 in which the appellants were found guilty on one count of the murder of Monica Chabwera Phiri, and one count of the attempted murder of Ben Banda.

The sequence of events culminating in the murder and the attempted murder were so strange and dramatic that they could be scripted into a play. The events paint a sordid picture of uncontained emotions and blatant disregard for human life. They unfolded like a melodrama of a fusion and explosion of love and hatred; a tale of naivety, deception, sweet talk and betrayal, but also as a story of phenomenal advances in communication technology and its impact on crime investigation in Zambia.

The deceased, a business woman suspected to have been in an illicit affair with the 1st appellant's husband, (then separated from the 1st appellant) was, together with her driver, Ben Banda, abducted in tragicomic circumstances on 22nd April, 2007 around 18:30 hours. The setting: Flat No.1, Weevel Court, Rhodes Park,

Lusaka, the residence of the 1st appellant's estranged husband. Together with her driver, the deceased was bundled into her own Mercedez Benz saloon car, by three male adults and driven away to her death. They were trailed by an unregistered backup car driven by a male adult and carrying at least two female adults, as they were conveyed through the Great East Road and off it to some inconspicuous point in the Kamaila/Chisamba area. There, the deceased was shot three times in cold blood by one of the abductors on the orders of one of the women from the trailing backup car. The deceased's lifeless body was left lying in a pool of blood in the bush, and her Mercedez Benz car was abandoned some twenty-one kilometers away from the scene, near a farm in Chisamba. An attempt to shoot Ben Banda was miraculously unsuccessful as he bravely wrestled and fought his way out of the assailants' grip, amid a blazing gun, and ran away from the assailants into the bush, climbing in the process, a tree for safety; thanks to the altercation among the assailants as to whose turn it was to shoot him. Ben Banda survived the traumatic ordeal with nothing worse than a torn T-shirt, which remained at the scene, a lost left shoe and a gun

shot wound in his left palm. He was later to testify before the trial court as PW2, a key witness for the prosecution.

The case generated considerable public interest. Crime investigators were put to a severe test. The public quite legitimately wanted to know who did the sordid deed.

A detailed summary of the factual and procedural history of this case is to be found in the bravura judgment of the High Court, now subject of this appeal. So far as is relevant for the present purpose, and at the risk of oversimplification, that history is as follows. The four appellants and two others were arrested and charged with the two offences whose particulars were given in the indictment. As regards count one, it was alleged that all the appellants and the two others on the 22nd April, 2007 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together, did murder Monica Chabwera Phiri, contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. On the second count, it was alleged that on the same day and same place in the same district and province,

At the end of the trial, the learned High Court judge, in a prolix judgment covered in 157 pages, was satisfied that the prosecution had discharged the burden of proving beyond reasonable doubt all the appellants guilty as charged on the two counts. The learned trial judge, after a meticulous review of the evidence, declined in forthright language the defences that the appellants sought to construct. Mary Moyo, who was Accused No.4 in the lower court, was acquitted on the ground that there was insufficient evidence linking her to the offences. The learned trial judge subsequently sentenced the 1st, 2nd, 3rd and 4th appellant to death on the first count. He found extenuating circumstances in respect of Jungwe Magula, who was Accused No.5 in the lower court, and sentenced him to 15 years imprisonment with hard labour with effect from the date of his arrest.

On count two, the learned judge sentenced the 1st, 2nd, 3rd and 4th appellant to life imprisonment. Jungwe Magula, got away with the lighter sentence of fifteen years imprisonment with hard labour to run concurrently.

It is from that judgment that the four appellants appealed, fronting three grounds framed as follows:

Ground One

"The trial court erred in law and fact when it convicted the appellants herein on evidence of identification which was not satisfactory in the circumstances of the case.

Ground Two

The trial court erred in law and in fact when it convicted the appellants on the testimony of PW1 only in the absence of corroboration, the witness being in the category of witnesses with an interest of their own to serve or witnesses with a possible bias.

Ground Three

The trial court erred in law and in fact when it convicted the appellants of murder and sentenced them to death by hanging in the absence of proof beyond reasonable doubt that it was the appellants that committed the offence."

As we have stated already, one of the accused persons, Mary Moyo, was acquitted. Jungwe Magula, abandoned his appeal. This did not, in the least, make the appeal any less complex. The appeal documents, including photographic evidence of identification of the appellants and the deceased's dead body, run into four volumes with a total of not less than 1000 folios.

After a previous adjournment occasioned by the appellants, the appeal was finally heard on the 5th of May, 2015. At the hearing, Ms. Lukwesa, Senior Legal Aid Counsel, applied for and was granted leave to formally file grounds of appeal and heads of argument on behalf of the appellants. Mr. Bako, Deputy Chief State Advocate on behalf of the respondent, was allowed 14 days to file the respondent's heads of argument. Both learned counsel indicated that they would rely entirely on the written heads of argument.

We must state that prior to the appellants' counsel's filing in of the heads of argument, the appellants had earlier, on 15th September, 2014, filed in grounds of appeal and heads of argument under the hand of the 1st appellant. Two grounds of appeal were raised as follows:

> **"1. The learned trial judge erred in law and fact when he failed to consider the evidence of *alibi* which stood disproved at the time of the conviction and sentence.**
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> **2. The learned trial judge misdirected himself both in law and fact when he failed to consider that there were extenuating circumstances in this matter."**

These grounds had not been withdrawn at the time the learned counsel for the appellants filed in fresh grounds and arguments. In fact, Ms. Lukwesa urged us to consider them.

We note that, at first blush, the two sets of grounds of appeal and heads of argument talk to totally different grievances against the learned trial judge. Given the significance we attach to the appellants' constitutional right to a fair trial and the need for them to raise any relevant issue in their defence, we would be failing in our responsibility as the apex court if we did not consider the appellants' own self authored, home grown grounds of appeal and heads of argument in addition to those raised by their learned counsel. In order to facilitate a consummate consideration of the issues raised in this appeal, we shall set out in full, the arguments of the learned counsel for the appellants first. Then we shall consider those of the appellants in person before moving on to the responses to all these, as tedious as this may be.

As regards the first ground, the appellants' learned counsel submitted that the 1st appellant was convicted on the evidence of identification which left doubt as to who the police were actually looking for; whether it was the 1st appellant or Pheobe (cousin to the 1st appellant). According to the appellant's learned counsel, this issue was not conclusively resolved, particularly, as it was unclear whether it was the 1st appellant who had been in contact with Roy Mwaboka, PW1 (the garden boy at Mr. Mwala's residence) or "the black woman that appeared on the scene from nowhere and vanished, without being noticed."

It was the learned counsel's further submission that the identification of the 2nd appellant, Joseph Banda, was made by PW1 and could not be relied upon for the reason that PW1 was a suspect witness who had spent time with the appellants in custody before he was released and turned into a State witness.

Furthermore, PW1's evidence of description of the 2nd appellant as a "red-eyed young man" was insufficient description for purposes of evidence of identification, and further that it required corroboration, which was absent in the present case. The learned counsel relied, in this connection, on the case of **Zaloumis and Hill v. The People**[1], and quoted a long passage from that judgment. He also referred to the case of **The People v. Kawandi**[2] and to **Halsburys Laws of England** 3rd Edition Vol. 10 paragraphs 814 and pages 439 and 440 dealing with the requirements for proper identification of an accused person which should not be done with any prompting on the part of the police.

In regard to the 3rd appellant, the learned counsel submitted that it was a misdirection on the part of the trial judge to convict and sentence him to death on the evidence of identification in the dock which was unsatisfactory since the witnesses for the prosecution did not lead evidence to show that the 3rd appellant was ever identified at an identification parade by the witnesses PW1 and PW2. According to counsel for the appellant, evidence had been led

but PW2 never at any one point identified the 3rd appellant, as the person that grabbed his throat. The witness, according to the learned counsel, stated that he was only able to identify two of the assailants, namely, the huge woman and the driver of the car and that the 3rd appellant was not one of them. We were referred for this part of the evidence to the record of appeal. As the trial court relied on the evidence of PW1 to convict the 3rd appellant, which evidence required corroboration and which corroboration was absent, the identification evidence, according to the learned counsel, was weak.

Furthermore, it was contended that PW1 did not, prior to his arrest and incarceration, give any description of the appellants to the police, but did so only after he had been in custody with the appellants for three months and was turned into a State witness. It was, thus, unsafe to rely on this witness' testimony because firstly, he was an accomplice in the matter with an interest to exonerate himself from the charges and, secondly, he had the advantage to

have stayed in custody with the appellants, making the identification by this witness unfair.

The appellants' learned counsel further submitted that the court sought to find evidence of something more to connect the 3rd appellant to the offence by the Siemens phone that was recovered from him. The key prosecution witnesses that identified the phones alleged to have been stolen were PW2, Ben Banda, who said that his phone was a Motorolla 200 and PW18, Suzyo Sara Phiri, sister to the deceased, who told the court that the missing phones that belonged to the deceased were three in number, namely, a Nokia 6280, Samsung D900 and a Motorolla SBL. There was no mention of a Siemens phone to have been owned by either victim. The evidence, according to the learned counsel for the appellants, was thus not conclusive against the 3rd appellant who stated that Exhibit 'P36' was sold to him by Godfrey Shamfwesa.

The 3rd appellant explained that he was not the owner of the phone numbers 099848363 and 099093330 and this evidence was not challenged, and that evidence therefore, was not corroborated

with the prosecution's evidence that this witness was involved in the murder.

As regard the evidence of identification of the 4th appellant, the learned counsel for the appellants contended that the 4th appellant had complained before the court that he was beaten and was swollen at the time the identification parade was conducted. The photograph of himself was taken by one of the police officers and he suspected that it must have been shown to the identifying witnesses. He also stated that he was the only one on the identification parade with a 'potato cut' making him look conspicuously different from the other persons on the identification parade. On this basis, the learned counsel submitted that the identification of the 4th appellant was unfair.

In support of ground two of the appeal, Counsel submitted that the evidence of PW1 was suspect and needed to be treated with caution since he was an accomplice in the murder of the deceased through the role he told the court he played before and during the abduction of the deceased and Ben Banda. The witness also gave

information to Aunty Mary about the deceased's activities at Mr. Mwala's place and how he was constantly in touch with Aunty Mary. According to the learned counsel, the evidence of PW1 shows that PW1 was wholly involved in the syndicate, thus making him a person in the category of an accomplice. PW1 was also in police custody jointly charged with the appellants for the offences.

Turning to the evidence of PW2, counsel for the appellants submitted that that witness was employed by the deceased person and could be placed on the same footing as a friend or relative of the deceased and, therefore, could as well have a possible bias against the appellants. Furthermore, PW2 was himself the subject of the complaint against the appellants as having attacked him, which complaint made up the second count of the charges. There was, therefore, according to counsel, a possible interest on the part of PW2 to serve. His testimony, therefore, should have been treated with caution. PW2 and the appellants were the last persons seen in the company of the deceased when still alive in the evening before the body was found in the bush.

Finally, the learned counsel made a stunning but plausible argument, namely, that PW2 handled the gun which went off at some point when he was in possession of it. It was, therefore, possible that the shots that hit the deceased person could have been fired while the gun was in PW2's possession. PW2 should, accordingly, have been treated as a witness with an interest to serve and, therefore, that his evidence required corroboration. The same, according to the learned counsel for the appellants, could be said about PW3 (Langson Magula) who stated that he lent his motor vehicle to the assailants and that he was the person who went to pick them up with his bus after they got stranded in Chisamba. According to the evidence of the 4th appellant, PW3 and Godfrey Shamfwesa were the persons that handed him the vehicle in April, 2007 and yet, he did not mention his contact and involvement with Godfrey Shamfwesa except to state that he was his uncle.

PW3 claimed that he picked up John, Pheobe, Mary, Beatrice and an unnamed man at Shaka's Kraal, which evidence was not corroborated and did not prove that these people were ever in

Chisamba but at Shaka's Kraal. This, according to the learned counsel, makes PW3 a witness with an interest to exculpate himself and, therefore, an accomplice whose evidence required corroboration.

In regard to PW10 (Mike Tembo) and PW11 (Ernest Habanyama) who were at some point found in possession of the Nokia 6280 handset belonging to the deceased, counsel submitted that the learned trial judge erred in law and in fact when he failed to find these as accomplices or witnesses with a possible interest to serve and whose evidence should have been corroborated. The case of **Sydney Zonde and Others v. The People**[3] was cited as authority for this submission. The learned counsel also submitted that exhibit P5, Nokia 6280, according to the testimony of the prosecution witnesses, was at two different locations within the same period. Various persons claimed to have possessed the phone at about the same time. It is thus difficult to determine at what stage the 4th appellant came in possession of it and which of the prosecution witnesses was telling the truth.

Equally, it was submitted that PW15, who was found in possession of a black Samsung D900 Exhibit 'P7', was a witness with a possible bias in that he claimed that the 4th appellant had earlier on borrowed money from him which he failed or refused to pay back, and as he was found in a possession of the phone, he also had an interest to exculpate himself making his evidence against the 4th appellant suspect. The learned counsel also made the point that although the admission by the 4th appellant that he gave the phone to the witness, may lead the court to find that the danger of accepting the uncorroborated evidence of a witness with a possible bias had been abated, the 4th appellant and the witness were not certain as to whether the phone was the actual phone they originally transacted in respect of.

The learned counsel then made submissions regarding the Motorolla C200. They posited that PW14, Martin Chanda, who was found in possession of the Motorolla phone C200, had an interest to exculpate himself, having been in recent possession of the item. After citing and quoting from the case of **Mwambona v. The People**[4],

the learned counsel submitted that the learned trial judge misdirected himself by basing the confession of the appellants on their own exculpatory statements and holding those statements as corroborating the testimony of the prosecution witnesses which required independent corroboration. It was the learned counsel's further submission that guilt was not the only inference to make in the circumstances.

Under ground three, the appellants' learned counsel argued that the evidence upon which the appellants were convicted did not reach the threshold of beyond reasonable doubt. The learned counsel for the appellants were most dissatisfied with the trial judge's treatment of the evidence relating to the gun and the spent cartridges of a 9mm caliber pistol that were mentioned by the prosecution witnesses. The first point that counsel made in this regard was that there were other persons that had access to similar guns as that alleged to have been in the possession of the 1st appellant, who could have been the attackers in this matter. The learned counsel argued that no mention of a pistol ever being

subject to examination by a ballistic expert was made by any of the witnesses. The gun used in the crime was not placed before the court as part of the prosecution's evidence despite the claim by PW27 that he was led in the company of other officers by the 2nd appellant to the recovery of the same. The only inference that could be made was that no such leading to the recovery of the firearm was done by the 2nd appellant.

Counsel also raised the issue of the absence of finger prints; that despite these having been lifted from the appellants, particularly the 4th appellant, they were not placed before the court. It was counsel's contention that the only inference to be drawn was that such evidence would have vindicated the appellants or would otherwise have been favourable to them.

The learned counsel then focused their submissions on the motor vehicle, Toyota Corolla, TRC 2126, which was allegedly driven by the 4th appellant on the material day, and was said to have gone to the scene as a back-up vehicle and was later recovered at Chitukuko Car Park. According to counsel, the evidence of the

prosecution on this issue introduces considerable uncertainties. The 4th appellant was said to have driven the vehicle belonging to the deceased, being the Mercedes Benz, and identified in this regard by PW1 and PW2, and yet, he also allegedly drove and parked the back-up vehicle to and from a named Car Park. According to counsel for the appellants, the only thing that this evidence does is to prove that at some point, the 4th appellant drove the vehicle to the Car Park and not that it was used in the alleged murder and attempted murder.

The learned counsel referred us to the evidence of the 4th appellant in the record of appeal, and argued that, that testimony, which was unchallenged, shows that PW3 and Godfrey Shamfwesa, gave the 4th appellant the vehicle as it had no fuel, and he parked it at Chitukuko Car Park on 24th April, 2007.

The learned counsel for the appellants also dispelled the evidence of the phone records, arguing that these did not conclusively place the appellants on the scene since, as the court itself found in the case of Mary Moyo, one's phone number could be

used by a different person while the owner was in a different location. On this point the thrust of the learned counsel's argument, as we understood it, was simply that it was unsafe to convict on the basis of phone records.

The learned counsel for the appellants also impugned the evidence of leading, contending that the alleged scene was already known to police officers that were involved in the investigation. According to counsel, the 4th appellant, who allegedly led the police to the scene and demonstrated how the crimes were committed, denied any such leading and alleged that the police instructed him on what to say at every stage of the scene reconstruction prior to the DVD footage being taken and that he had been beaten by the police. After quoting extensively from the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v. The People**[5] the learned counsel submitted that as no new evidence came up as a result of the video footage since the scene was already known to the investigating officers, the evidence of leading added no value to the prosecution's case. According to the learned counsel for the

appellants, on the totality of the evidence before the court, there were significant doubts as to the guilt of all the appellants which should have been resolved in their favour. Counsel, accordingly, prayed that this court upholds the appeal and acquits the appellants.

We turn now to the appellants' self-authored grounds of appeal and home grown heads of argument which, as we have earlier indicated, were drawn by the 1st appellant and filed on behalf of all the appellants. These are focused, according to the grounds, on the 1st appellant's *alibi* and what the appellants perceive as extenuating circumstances which the learned trial judge allegedly did not take into account. The actual arguments, however, took the form of an assault on the credibility of the appellant's key witnesses, namely, PW1 and PW2 with the appellants identifying what they see as gaps in the evidence of these witnesses.

The thrust of the arguments made was to impeach the credibility of the prosecution's witnesses and therefore, that a conviction premised principally on this evidence was unsafe. More

crucially, the appellants spurned the evidence of identification by PW1 who told the trial court that he attended an identification parade at Lusaka Central Police Station whereat he identified A4, Mary Moyo, as the lady who first went to Mr. Mwala's flat to look for accommodation to rent.

PW3 claimed that he attended an identification parade at the police station where he identified some accused persons, namely, Phoebe, Godfrey, Beatrice (then A1) Mary (A4), Jungwe (A5) and Charles (A6). According to the evidence of this prosecution witness (PW3,) A4, Phoebe and Godfrey were identified at the police identification parade and yet, the trial judge stated that Phoebe and Godfrey are still on the run and are on the police wanted list. The appellants also raised in their submissions, what they perceived as contradictions in the evidence of the various witnesses which, in their view, makes it obvious that the prosecution witnesses were not truthful.

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Regarding the issue of the 1st appellant's *alibi*, it was argued by the appellants that the arresting officer failed to investigate thoroughly the 1st appellant's claim that at the time the offence was committed she was out of the country to South Africa. The investigator was accused of dereliction of duty. Even the witness from the Department of Immigration who testified did not, according to the appellants, disprove the evidence of *alibi*. It was on these two bases that the appellants, in their home grown arguments, prayed for an order of acquittal.

In supporting the conviction, Mr. Bako, learned counsel for the respondent, stated that in the view he took the two sets of argument filed into court are similar and, therefore, were to be responded to globally.

Counsel first dealt with the evidence of PW1 and PW2. According to Mr. Bako, these two witnesses identified the appellants closely and their evidence of identification cannot be impeached. PW2 saw the deceased being shot and was himself almost a victim of murder at the hands of the same perpetrators. PW1 witnessed

the abduction of the deceased which ended in her murder. Counsel submitted that the trial judge properly addressed his mind to the identification evidence of the two witnesses. More importantly, according to the learned counsel, the trial judge did not solely rely on the identification evidence, but the totality of the evidence which connected each of the appellants to the crimes. The learned counsel referred us to our judgment in **Kenneth Mtonga and Victor Kaonga v. The People**[6] and quoted a passage on how any irregularity committed in connection with identification should be dealt with. According to counsel, the guidance given in that case was followed by the learned trial judge.

According to Mr. Bako, the 1st appellant was properly identified by PW1 who had known her well, a fact so found by the trial judge. Besides PW1's evidence of identification, the evidence of PW25, Isaac Musadabwe Banda, an expert from Airtel, which PW26, Charity Besa, interpreted showed the connection between PW1 and the 1st appellant. According to the learned counsel, PW1 had come to know the 1st appellant fairly well over time and there was no

room for an honest mistake regarding PW1's identification of the 1st appellant.

Mr. Bako, further submitted that PW2's evidence of identification of the 1st appellant on the night of the attack was supported by the evidence of PW3, Langson Magula, the 1st appellant's cousin, when he told the court that he had on the fateful night received a call from the 1st appellant that she and others were stranded and needed to be picked up along Kabwe Road after Zambia National Service. Counsel submitted that this confirmed the fact that on that day and around the time of the commission of the subject offences, the 1st appellant was in Chisamba area where the deceased was killed. It was, to the learned counsel for the respondent, an odd coincidence that the 1st appellant's phone communication records confirmed that the 1st appellant, around 20:30 hours on the material day, made calls using the Kamaila Cell Site in Chisamba. Citing the case of **Ilunga Kabola and John Masefu v. The People**[7], the learned counsel submitted that this odd coincidence, which was unexplained, supported the evidence of the

identity of the 1st appellant and her whereabouts at the time the offence was committed.

Mr. Bako, supported the findings of the trial court that the 1st appellant's *alibi* was an afterthought. He submitted that the 1st appellant's evidence before the trial court that she gave details of her whereabouts to PW31, Richard Banda, the arresting officer, was found as factually incorrect by the trial judge upon his assessment of the other evidence before him. The other evidence before the trial court weighed against the *alibi* and the trial court properly analysed this evidence in his judgment. The learned counsel then referred us to the case of **Valentine Shula Musakanya v. The Attorney General**[8] and quoted a passage from our judgment as follows:

> **"unless a detainee is able to adduce credible evidence of *alibi* covering the whole of the period stated in the grounds, he cannot be said to have put forward an *alibi*."**

In the present case, according to Mr. Bako, the appellant did not adduce credible evidence to the police and the court for the *alibi* put forward to succeed.

As regards the 2nd, 3rd and 4th appellants, the learned counsel submitted that the identification evidence as well as the other supporting evidence against each one of them was sufficient to link these appellants to the offences for which they were convicted. The 2nd appellant, Joseph Banda, was identified by PW1 as a "red eyed young man" who drove the deceased's car during the abduction. Furthermore, the Exhibit 'P6', a Motorolla C200 phone was traced back to the 2nd appellant through the evidence of PW13, PW14 and PW24. Exhibit 'P6' was the phone which was stolen from PW2 at the time an attempt was made to kill him.

Concerning the 3rd appellant, John Hangwende, the learned counsel submitted that the said appellant though identified only in court, was nonetheless properly identified. Further, that courtroom identification is only of no value if that is the only evidence against the accused. He cited the case of **Ali and Another v. The People**[9] where the Court of Appeal stated, among other things, that:

> **"Although it is within the court's discretion to allow it in appropriate circumstances, a courtroom identification has little or no value, particularly where there is no satisfactory explanation for**

the failure to hold an identification parade and there is no other evidence incriminating the accused."

In the present case, counsel submitted, PW3, Langson Magula who was the nephew of this appellant, knew the 3rd appellant fairly well. He identified the said appellant as one of the persons he picked up on the night of 22nd April, 2007 after the 1st appellant called for assistance. Furthermore, PW1 also identified the 3rd appellant.

According to Mr. Bako, besides the evidence of identification of the 3rd appellant, which was in all respects satisfactory, there was some other evidence that sufficiently links the 3rd appellant to the offences he was charged with. The 3rd appellant disappeared from his work place in Lusaka and was last seen on the day of the killing, i.e. 22nd April, 2007 when the police were looking for the assailants. His phone remained in active communication with the 1st appellant.

In regard to the 4th appellant, Charles Mwanza, the learned counsel for the respondent submitted there was sufficient evidence of identification of this appellant. Although he claimed that he was beaten and had a swollen appearance at the time of the identification parade, the pictures in the photographic album which form part of the record of appeal, show nothing to support this claim. Besides the evidence of identification, there was other evidence that connected the 4th appellant to the crimes. There was evidence of possession by the 4th appellant of exhibit 'P5' and 'P7', the phones belonging to the deceased, stolen from her on the night she was brutally murdered. Furthermore, the call records showed that the 4th appellant was constantly in communication with the 1st appellant, and these records reflected where the 4th appellant was. This appellant also led the police for a crime scene reconstruction where he narrated the abduction, the murder and how they dispersed after the ordeal. It was Mr. Bako's, prayer that ground one of the appeal be dismissed for want of merit.

Turning to ground two of the appeal which impeaches the learned trial judge's findings based on uncorroborated evidence, it was Mr. Bako's submission that the trial judge cannot be faulted. The appellant's argument in regard to this ground was simply that PW1 was a suspect witness and that his evidence should have been treated with caution. Mr. Bako argued that the evidence of PW1 was in fact corroborated in material respects by some other evidence on record. We were referred to the case of **Boniface Chauka Tembo v. The People**[10] for the submission that evidence of an accomplice or a person with a possible interest to exculpate himself needs to be corroborated with something more. In the present case, according to Mr. Bako, reliance on the evidence of PW1 was not total. There was more independent evidence which corroborated that of PW1. The learned counsel then quoted from the case of **Emmanuel Phiri and Others v. The People**[11] on what amounts to "something more." He submitted that the trial court made it abundantly clear in its judgment that the evidence against the appellants came in different forms and from diverse sources. The learned counsel prayed that ground two of the appeal be dismissed.

In relation to ground three of the appeal, the learned counsel for the respondent made a very brief submission. He reiterated the submissions he had made in respect of the first two grounds. He added that another crucial piece of evidence which implicated the appellants had to do with the acquisition of the firearm and ammunition to which Clint Shamiwesa, PW6, Derrick William Ross, PW5 and Teddy Lubinda, PW7 all testified. What transpired in regard to the acquisition and testing of the firearm, coupled with the fact that spend cartridges of the same type as those loaded and discharged from the pistol used to shoot the deceased could not, according to Mr. Bako, be mere coincidence. We were urged to dismiss ground three of the appeal.

Mr. Bako ended his submissions by responding to the claim raised by the appellants in person in their heads of argument that the judge should have found extenuating circumstances on the facts of the case. The learned counsel submitted that there were no extenuating circumstances as all the appellants fully participated with a common purpose of killing the deceased and PW2, and they

did in fact kill the deceased while PW2 survived. Citing the case of **Adam Berejeria v. The People**[12] as authority, the learned counsel submitted that there was no good cause in the present case for the court to interfere with the sentence. The learned counsel ended by urging us to dismiss the appeal in its entirety.

We have carefully considered the judgment of the trial court. We have also perused the record of appeal and have paid the closest attention to the submissions of the learned counsel for the parties, from which submissions we have benefitted immensely.

Under ground one of the appeal, the question we have to determine is whether the evidence of identification upon which the appellants were convicted was sufficient to secure safe convictions. The appellants argue that it was not, while the respondent is of the view that it was. We are not unmindful that inherently unreliable evidence of identification could lead to miscarriage of justice where such identification is mistaken or is otherwise flawed. We propose, therefore, to deal with the evidence of identification as it relates to

each of the four appellants, beginning with the 1st appellant and ending with the 4th appellant.

The evidence of identification of the 1st appellant came in various forms, but principally through the testimony of PW1 and PW2. Roy Mwaboka (PW1), the garden boy at Mr. Mwala's residence, testified that he had come to know the 1st appellant tolerably well. The evidence on record shows that the 1st appellant reposed considerable confidence in PW1 as an informer and a confidant, in a general way, so far as the gathering of information on the deceased's movements was concerned. The 1st appellant occasionally gave money to PW1 and alcohol on diverse occasions, apparently in appreciation for the information which PW1 was volunteering to the 1st appellant in regard to the deceased and her putative lover, the 1st appellant's estranged husband. The 1st appellant conceded in her evidence that she knew PW1 and that they communicated regularly. It is this same witness who identified the 1st appellant and described her to the police and later identified her in court.

At an identification parade at Lusaka Central Police Station, PW1 identified A4 (Mary Moyo) as the lady who first came to Mr. Mwala's flat to look for accommodation for rent. This does not, in our estimation, make PW1's identification of the 1st appellant any less credible. More pertinently perhaps, this witness was detained by the police in connection with the same offences before he was turned into a State witness. We shall deal with this issue anon.

The 1st appellant was also identified by PW2, an eye witness to the murder and himself a survivor. His testimony was that the 1st appellant planned the felonies and gave instructions to the gang members. More significantly, he saw the 1st appellant's face by facilitation of car lights in the Kamaila Forest of Chisamba on the day of the murder. This witness testified that it was the 1st appellant who, immediately prior to the shooting, ordered that the deceased be made to drink poison, and when that failed, the 1st appellant instructed the 2nd appellant to shoot the deceased. The witness described the 1st appellant as "a huge dark woman with a large nose," and proceeded to identify the 1st appellant at a police

identification parade. In addition to PW1 and PW2's evidence of identification, there was further identification evidence of the 1st appellant.

PW3, Langson Magula, gave eloquent testimony as to how he was, in March 2007, instructed by the 1st appellant to pick her up from her salon in Rhodes Park to Northmead Filling Station where she came out to talk to a man before being driven back to the salon. He also narrated how the 1st appellant ordinarily booked his taxi and how, at her instruction, he handed over the unregistered Toyota Corolla to the 4th appellant, Charles Mwanza. PW3 is the same witness who, on the fateful night of 22nd April 2007, received a phone call from the 1st appellant who alleged that she and others were stranded along Great North Road somewhere in the Chisamba area. It was this same witness who, in the company of his brother, Jungwe Magula, (who was Accused No. 5 in the trial court) drove to pick up the stranded members of the gang before driving to Shaka's Kraal. We are of the confirmed view that the 1st appellant was properly identified by not only PW1 but by two other witnesses.

The 2nd appellant, Joseph Banda, was identified by PW1 at the Police Identification parade which was conducted by PW28. According to the evidence of PW1, the 2nd appellant was seen at No. 1 Weevel Court at the time of the abduction of the deceased and PW2. He was the one who drove the deceased's car in which the deceased and PW2 were bundled. He was described by PW1 as "the re-eyed young man," who was one of the three abductors who had laid ambush for the two victims in PW1's toilet. It was PW1 who spoke to the 2nd appellant and other abductors and led them to their hiding place. And yet, this was not all the evidence that connected the 2nd appellant to the crimes. PW13, PW14 and PW15 testified as to the connection of the 2nd appellant to exhibit 'P6', the Motorolla C200 phone handset which the 2nd appellant sold. As it turned out, this phone was one of the three phones stolen from the victims during the abduction and murder.

Moving on to the 3rd appellant, John Hangwende, the evidence on record shows that he was identified by PW1 as one of the people who came to the scene of the abduction of the deceased and PW2.

This was not the first time PW1 was seeing the 3rd appellant. According to the evidence of PW1, he had been earlier on introduced to the 3rd appellant by the 1st appellant as the 1st appellant's brother. PW1 testified that on the day of the abduction, it was the 3rd appellant who grabbed PW2 by his throat and forced him into the deceased's car and made PW2 and the deceased sit between himself (3rd appellant), and Jungwe Magula. There is also unchallenged evidence on record that the 3rd appellant was found to have been in possession of the Siemens phone (which was traceable to the 2nd appellant) at his village in Mwense District of Luapula Province. There was also strong electronic data evidence that the 3rd appellant constantly communicated with the rest of the gang members on the night of the 22nd April, 2007 and used common communication sites and cell site mapping trail.

PW2, the eye witness to the whole crime, gave a vivid description of the events and the roles played by the 3rd appellant in the commission of the felonies. The trial judge accepted the

evidence against the 3rd appellant. We have no reason to interfere with the findings of the learned judge in this respect.

The 4th appellant, was identified at an identification parade conducted by PW22, Detective Sub/Inspector Derrick Kasonde on 22nd June, 2007. The 4th appellant was identified by PW2 (Ben Banda), PW3 (Langton Magula), PW16 (Peter Malama) and PW17 (Clement Maleka). Although the 4th appellant complained that an officer had taken pictures of him using a phone camera, he did not dispute the evidence that he was formally notified of his right to call a lawyer to attend the identification parade, or to change positions in the parade. After appropriate warn and cautions, the 4th appellant led the police to the crime scene.

In the view we take, evidence of identification of all the appellants was satisfactory and cannot be assailed. We are unable to attribute to any of the identifying witnesses, as we have discussed them, any normal or ambiguous fallibilities of the human sense, perception or memory in as far as the identification of any of the appellants is concerned.

As regards the second ground, the appellants complained that the trial court convicted them on the testimony of PW1 which was not corroborated although PW1 falls in the category of witnesses with an interest of their own to serve, or witnesses with a possible bias. Although the ground of appeal appears focused only on the evidence of PW1, the arguments, as we have understood them, have extended to the evidence of PW2.

The main issue taken by counsel for the appellant under this ground of appeal is that PW1, had initially been arrested and jointly charged with the appellants and detained in connection with the two offences before he was turned into a State witness. Having spent three months in custody with the appellants before being turned into a State witness, PW1 had an interest to exonerate himself from complicity in the charges or to purchase the leniency of the State. In any event, the period he spent in remand with the appellants gave him an opportunity to amply acquaint himself with them thus making his identification of them unfair.

It was strenuously canvassed by counsel for the appellants that PW1 was in the position of an accomplice and, therefore, should be treated as a witness with an interest of his own to serve. Consequently, his evidence required corroboration. In our view, this is a fairly decent submission to make, having regard to the role that PW1 played before and during the abduction of the deceased. Besides reporting to the 1st appellant on the movements of the deceased generally to the extent that he knew them, PW1 did, on the day of the abduction of the deceased and PW2, assist the assailants by offering them a hiding place in his toilet as they waylaid the deceased and PW2. He described his further participation in the abduction in the following words as recorded in his testimony:

> **"I went outside the gate and sent a phone call to Mrs. Mwala to send reinforcement because she was with a driver."**

It is well settled that witnesses with an interest of their own to serve or who may have a possible bias, should be treated as if they were accomplices and, therefore, should generally have their evidence corroborated. The number of authorities in support of this

position are legion and it is not our intention to delve into these presently. Suffice it to state that in two of these authorities, namely **Boniface Chanda Chola and Others v. The People**[5] **and Muchabi v. The People**[13] we stated that the evidence of a witness with an interest of his own to serve falls to be approached on the same footing as that of an accomplice, and therefore requires corroboration. It is important to constantly keep in mind that this does not make any witness with his or her own interest to serve, an accomplice in all cases. And we believe that this distinction is important when it comes to corroboration of evidence.

It is abundantly clear to us that PW1 was a witness with his own interest to serve.

In **Wilson Mwenya v. The People**[19], we held that where a witness is detained in connection with the same incident or does not report the incident to the police, his evidence needs corroboration. Sakala, JS stated in that case that:

> **"...we have no difficulties in holding that PW2 was a person with a possible interest of his own to serve for the simple reason that he had been detained in connection with the same incident and did not earlier on report the incident to the police."**

The evidence of PW1 thus required corroboration on this basis unless it is demonstrated that there are compelling reasons for admitting it without corroboration. We shall revert to this point anon.

In regard to PW2, it was argued that he was an employee of the deceased person at the time the offence occurred and this, therefore, made PW2 a witness with an interest of his own to serve, or at the very least, with a possible bias.

We wish to reaffirm what was stated by the Court of Appeal, predecessor to this court, in the case of **Mwambona v. The People**[4] that:

> **"It might be suggested also that PW3, because he is employed by PW2, should be similarly regarded, [i.e. as a witness with an interest of his own to serve] but this would be taking the matter too far. An employee may in appropriate cases, be regarded as a witness with a bias, just as one may so regard a close relative, and in such cases**

one would approach a case with caution and suspicion, but this is not to say that one would not normally convict on such evidence unless it were corroborated."

We do not think, therefore, that the mere fact that PW2 was employed by the deceased made him a witness with an interest to serve, nor did the fact that he was the 'complainant' in respect of the second charge against the appellants.

The submission by counsel that PW2 may have fired the fatal shots at the deceased and is on that basis to be treated as a suspect witness, is to us, plainly incredible, and we reject it. It is not borne out of the evidence before the trial court. To the contrary, we believe that this eye witness gave first hand evidence of identification of the 1st appellant and others which was in those circumstances, impeccable. We thus have serious reservations that PW2 could be labeled as a witness with an interest of his own to serve merely because in the process of trying to repel the assailants from aiming the gun at him, he wrestled with the handler of the gun as a shot was discharged.

In any case, the evidence of a person who could otherwise be an accomplice or have an interest of his own to serve can be accepted if cogent enough to rule out any element of falsehood and bias and if the aggregate of circumstances so warrants. What the court must consider as an abiding factor is the truthfulness of the witness, touching on his or her demeanour and credibility as well as his personal knowledge of the circumstances in respect of which he testifies, together with other surrounding factors or circumstances.

In **Boniface Chauluka Tembo v. The People**[10], a case referred to by the learned counsel for the appellants, we stated that:

> **"The evidence of an accomplice or of a person with a possible interest to exculpate himself needs to be corroborated at least by evidence of "something more" when, though not constituting corroboration as a matter of strict law, yet satisfies the court that the danger that the accused is being falsely implicated has been excluded."**

In our view, therefore, whether corroboration is or is not required, is not a matter that can be prescribed for all cases and for all times. That is why in the case of **Muchabi v. The People**[13] The Court of Appeal, predecessor to this court, guided as follows:

> **"A witness with an interest to serve must be treated as an accomplice and his evidence tested to see whether it was corroborated or whether there was a reason for believing it in the absence of corroboration."** (Underlining ours for emphasis)

What was meant in that case was that uncorroborated evidence of an accomplice or a witness with an interest of his own to serve could, in appropriate circumstances, be accepted provided a reason or reasons exist for believing that evidence.

Coming to the facts of this case, we have already indicated that we do consider PW1, as being a witness with an interest to serve. However, there are many reasons for believing his evidence in the absence of corroboration as a matter of strict law. This is the witness who was befriended by the 1st appellant for the purpose of the 1st appellant extracting useful information on the movements of the deceased. He is the witness who, out of naivety or gullibility, accepted the 1st appellant's offer of friendship intended to facilitate the 1st appellant's execution of a malefaction of unbelievable proportions. In the process, he came to know the other appellants. Over and above all this, the learned trial judge properly explained,

in our view, the reason that justified the reception of PW1's evidence without being humstrung by technical considerations of corroboration. The judge came to the conclusion that there was a plethora of independent evidence all pointing to nothing but the appellants' involvement in the two crimes.

It is easy to appreciate that besides the evidence of PW1 and PW2, there was "something more" to support the guilt of the appellants. In **Emmanuel Phiri and Others v. The People**[11] the "something more" was held to comprise, among other things, of something more than a belief in the truth of the evidence of the accomplices based simply on their demeanour and the plausibility of their evidence.

On the facts of the present case, there was overwhelming electronic evidence which implicated the 1st appellant. The cell phone numbers used in the handsets confiscated by the police from the 1st appellant, showed repeated communication between PW1 and the 1st appellant and also between the 1st appellant and the

rest of the members of the gang who were implicated in the murder. For example, exhibit 'P6' (PW2's cell phone handset stolen from him in the process of the abduction and/or the shooting), was used to communicate with the 1st appellant. The uncontroverted evidence of PW27 was that the said phone was recovered by the police from Charles Mwanza, the 4th appellant.

We have already stated that PW3, Langson Magula, also gave evidence explaining the instructions he received from the 1st appellant before and after the commission of the felonies. This inextricably links the 1st appellant to the crimes. To us, all this evidence amounts to "something more" than the evidence of PW1 and PW2. Without more this evidence sufficiently connected the appellants to the crime.

In our view, therefore, neither PW1 nor PW2's evidence can be impeached in terms of credibility based on the absence of corroboration. We are satisfied that the learned trial judge was on firm ground in convicting the appellants on the testimony of these

two witnesses which formed part of a whole array of cogent and overwhelming evidence against the appellants. Ground two fails.

Under the third ground of appeal the learned trial judge is faulted for finding that the prosecution had proved, beyond all reasonable doubt, the case against the appellants.

We have carefully examined the judgment of the learned trial judge against the evidence on record. For our part, we are satisfied that the judge engaged in a meticulous review of the evidence before him and came to the conclusion that proof beyond reasonable doubt of the appellants' guilt had been attained. We, therefore, have no intention whatsoever of disturbing that finding of the learned trial judge. Ground three is bound to fail.

We turn now to the heads of argument filed by the appellants in person. We revert to the first ground dealing with *alibi*.

It is well settled that an accused person should raise an *alibi* at the earliest opportunity during investigations. In our view, it equally follows that such accused person must provide sufficient

information to the investigating officer regarding the *alibi*. Once such information is given, it is the duty of the police, as stated in the case of **Nzala v. The People**[14], to investigate the *alibi* given by the accused person on apprehension or arrest. In the earlier case of **Katebe v. The People**[15] we stated that:

> **"Where a defence of *alibi* has been raised and there is some evidence of such *alibi* it is for the prosecution to negate it since there is no onus on the accused person to establish his or her *alibi*."**

The 1st appellant had put up an *alibi* to the effect that she was in South Africa on the day the offences were committed, and that she only arrived back into the country on the evening of the 22nd April, 2007 when the offences had been committed. To support her *alibi*, PW31 requested the 1st appellant to produce proof in the form of her passport or other document to confirm that she was out of the country. She initially failed to do so.

The appellants allege that there was dereliction of duty on the part of the investigators in failing to investigate the *alibi* given by the 1st appellant.

The position of the law is as was stated in the case of **Valentine Shula Musakanya v. The Attorney-General**[8] in a passage which we quoted earlier on in this judgment. Where it is shown that the *alibi* put forth by an accused person is plainly false in light of other credible evidence indicating the contrary position, the person putting forth the *alibi* will not be justified to complain that the *alibi* was not investigated or properly considered by the court.

We have already alluded to the fact that the 1st appellant had not given sufficient information to the police at the time she first raised the issue of the *alibi*. In those circumstances the police could not be faulted for failing to conduct immediate investigation on such *alibi*. It behoves an accused person who wishes to avail himself or herself of the benefit of an *alibi* to promptly provide the investigators with sufficient details to enable them undertake the necessary investigations. The court's view on the duty to investigate an *alibi* as stated in the **Nzala v. The People**[14] should be understood in the context of this qualification.

Eventually, when the 1st appellant provided the investigators with the requisite information, the prosecution had the *alibi* investigated. The evidence of Senior Investigations Officer, Given Musamba, who testified as PW32, however, dealt a severe blow to the 1st appellant's defence of *alibi*. PW32's evidence discloses that the stamps in the 1st appellant's passport were demonstrably not genuine and moreover, that the electronic data kept in the Immigration Security System did not show that the 1st appellant had gone out of the country to South Africa on the 19th April as she claimed.

Furthermore, the learned High Court judge, after an assessment of the evidence, rejected the *alibi* as false. That assessment of the evidence appears in the trial court's judgment at pages J146 to J151. Among other things, the trial court stated that:

> **"As for A1's *alibi*, the first rejection of the *alibi* is in the form of direct evidence from PW3 who confirmed that A1 was in the country before and after 22nd April, 2007. There is also direct evidence from PW1 to the effect that he was in constant phone contact with A1 long before the 22nd April and 22nd April, itself. It should be noted**

that PW3 confiscated two cell phones from A1 on the morning of the 23rd April when he apprehended her from Ibex Hill. PW1 provided proof that his call records were in contact with A1's two cell phone lines which he identified in court.

Further, one of the deceased's cell phones stolen from the deceased was a Siemens (Exhibit 'P36'). The phone handset was recovered by police from A3 in Luapula Province; far away from Lusaka where it was stolen from the deceased. Electronic evidence has established that the Siemens phone had been in active communication with A1's phones after it was stolen; and in all the communications, Zambian Cell Sites were used..."

To us, it is clear that the *alibi* itself was an afterthought and could not succeed. If the prosecution, as happened in the present case, can lead positive evidence which fixes the accused at the crime scene, the *alibi* collapses. The learned trial judge had properly directed himself on the evidence bearing on this issue. He cannot be faulted. We accordingly accept the submission of the learned counsel for the respondent on this point.

We now turn to the second ground of the appellants' home grown grounds of appeal which alleges that the learned trial judge failed to take into account extenuating circumstances.

In the case of **John Musonda Mwanamwenge**[16] we defined an extenuating circumstance as:

> **"The mitigating circumstance or fact or situation that does not justify or excuse a wrong act or offence but reduces the degree of capability and this may reduce the damage (in case of a civil case) or the punishment (in a criminal case) the fact or situation that does not bear on the question of the defendant's guilt but that is considered by the court in imposing punishment and especially in lessening severity of the sentence."**

In the present case, therefore, if the appellants had shown any extenuating circumstances, the court was obliged to consider those facts which bear on the commission of the crime and reduce the moral blameworthiness of the appellants as opposed to their legal culpability. In the case of **Jack Chanda and Kenneth Chanda v. The People**[17] we stated *inter-alia* that:

> **"A failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances."**

Whether or not the situation here presents an extenuating circumstance which the trial judge ought to have taken into account at the time of sentencing the appellants, depends in our

view, on two factors. First, the evidence as marshaled by the defence ought to point to some situation suggesting extenuation. In other words, the defence advanced must tend to show one of the factors that we referred to in **Jack Chanda and Kenneth Chanda v. The People**[17]. And here, we well understand the predicament faced by an accused person who denies the *actus reus* as his line of defence if he has to rely on extenuating circumstances as a mitigation. It in a way amounts to reprobation and approbation of the charges. Second, and more importantly, whether the facts fit in the interpretation of the Penal Code (Amendment) Act No. 3 of 1990 which introduced provisions which allowed the imposition of a lesser sentence than that of death following a conviction for murder.

Section 201 of the Penal Code as amended now provides as follows:

> **"201(1) any person convicted of murder shall be sentenced –**
>
> **(a) death; or**
>
> **(b) where there are extenuating circumstances to any sentence other than death provided that paragraph of this sub-section shall not apply to murder**

committed in the course of aggravated robbery with a firearm under section 294.

(2) for purposes of this section -

(a) an extenuating circumstance is ant fact associated with the offence which diminishes morally the degree of the convicted person's guilt;

(b) in deciding whether or not there are extenuating circumstances the court shall consider the standard of behaviour of an ordinary person or class of the community to which the convict belongs."

The learned trial judge in the present case found that there were no extenuating circumstances on the facts before him. Indeed, much as it is easy to gather from the background facts of this case that the 1st appellant had endured, for over a decade, a marriage which was anything but happy, and that she may have sincerely believed, or even proved that the deceased was a significant factor in her emotional torment, this evidence was not laid before the trial court for the court to make a determination on whether it could amount to extenuation in respect of the 1st appellant and the rest of the appellants. Although the evidence of PW2 was that the 1st appellant had, just before the shooting of the

deceased, said something to the effect that "you prostitute, today is your last day, and I am suffering because of you," this cannot be taken, without more, as evidence of an extenuating circumstance.

Having carefully considered the reasoning of the learned trial judge on the issue of extenuation, we are perfectly satisfied that the sentence imposed for the despicable murder of the deceased and for the callous attempt at taking the life of PW2 was, in the circumstances, appropriate. The meticulous planning that was deployed and the *modus operandi* in the commission of the murder make extenuation a far fetched consideration. If it were relevant for us to say it here, we would state that there was aggravation rather than extenuation. This ground cannot succeed either.

On a proper conspectus of all the evidence before the trial court, it is beyond argument that the prosecution did successfully managed to patch together, sufficient evidence that told the prosecution's story of the appellants' involvement in the crimes, beyond a reasonable doubt. The use of improved communication facilities in investigating the two crimes in the present case

enhanced the quality of investigations. It is for all these reasons that we find the whole appeal to be without merit and we dismiss it accordingly. The death sentences imposed on the appellants on the first count as well as the life sentences imposed on each of them in respect of the second count shall be served.

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E. C. N. Muyovwe

SUPREME COURT JUDGE

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M. Malila, SC

SUPREME COURT JUDGE