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IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 129/130/2017**
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

BETWEEN:

FEBIAS HABAYUMBE **1ST APPELLANT**

OBVIOUS HABAYUMBE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Makungu, Chishimba and Kondolo J.J.A
On 6th June, 2017 and 27th September, 2017.

For the Appellants: *Ms. G.N. Mukulwamutiyo, and Ms. K.M. Chitupila - Senior Legal Aid Counsels from Legal Aid board*

For the Respondent: *Ms. N.T. Mumba - Deputy Chief State Advocate of National Prosecutions Authority*

JUDGMENT

C.K. MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Benard Chisha vs. The People (1980) ZR 36 (S.C)*
2. *Mwambona v. The People (1973) ZR 28 (C.A)*
3. *Zulu v. The People (1973) ZR 326 (S.C)*
4. *Henry Cossam Lungu v. The People SCZ Appeal No. 9 of 2016*
5. *Yokoniya Mwale v. The People - Selected Judgment SC 285/2014*
6. *Daka v. The People Appeal No. SCZ/Appeal No. 333/2013 ZMSC 28*

7. *Patford Mwale v. The People CAZ 2017*
8. *Sakala v. The People (1980) ZR 205*
9. *Goba v. The People (1966) ZR 113*
10. *Chitalu Musonda v. The People SCZ Appeal No. 138 of 2014*
11. *Kahilu Mugochi v. The People Appeal No. 58 of 2016 (CAZ)*
12. *Kalunga v. The People (1988/ 89) ZR 90*
13. *Webster Kayi Lumbwe v. The People (1986) ZR 98*
14. *Sammy Kambilima, Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v The People SCZ Judgment no. 14 of 2003*

This is an appeal against conviction and sentence. The trial court tried, convicted and sentenced both appellants to life imprisonment for the offence of murder.

It was alleged that Febias Habayumbe and Obvious Habayumbe on 21st February, 2016 at Choma in the Choma District of the Southern Province of the Republic of Zambia jointly and whilst acting together, did murder one Herbert Habayumbe. The prosecution called seven witnesses.

In brief, the evidence in support of the prosecution's case was that the deceased and the accused were brothers who had a long running feud amongst them over an ox which belonged to their late father's estate. The deceased happened to be the administrator of the estate and he had kept the ox to himself which the others also wanted.

On the material date i.e. 21st February, 2016 the deceased was accused of having committed adultery with the wife to Geofrey in Njongolo village. That morning, a meeting was held between the deceased, Geofrey and Kebby in Njongolo village to resolve the issue of adultery. The deceased got the 1st appellant's bicycle and cow and gave them to Geofrey as compensation following an agreement to have him compensated. Thereafter, the deceased went back home which was about 10 km away from that village. That night around 21:00 hours, the deceased was in the house of his second wife Vivian Muchindu (PW3). PW3's son Muntanga Twambo (PW2) who was sleeping next door was awakened by the screams of his mother. He therefore went out to witness what was happening. It was also in evidence that PW3 was awakened by dogs barking and she found that the house was on fire. She awakened her husband before opening the door and found both appellants armed with axes and sticks. PW3 then ran outside where the 2nd appellant hit her with an axe on the left side of the forehead where she consequently sustained a swollen eye and fell down outside. Soon after that she ran into the 1st wife's house and her husband followed her.

The 1st appellant followed the deceased inside the house and attacked him over the cow and bicycle which he had given away without the owner's permission. A fight ensued as the deceased fought back with an axe. Eventually the deceased ran outside. The fight took a while until the 1st appellant held the deceased from behind while the 2nd appellant axed him on the forehead and at the back of the head, killing him instantly. Thereafter,

both appellants left the scene. The axe they had used remained at the scene. PW3 then went and reported the matter to her brother in law Harry Hamayumbe (PW4). Thereafter, the matter was reported to the police who went and picked up the body and the axe the following day.

The 2nd appellant was apprehended by Warren Sikalobaya (PW5) the following day. He had not attended the funeral but went out to herd cattle instead. It was also in evidence that the appellants and their siblings look alike.

The 1st appellant's evidence was that on 21st February, 2016 around 19:00 hours he learnt from his wife that the deceased who was his step brother had taken his bicycle and a cow and paid it as compensation for adultery which he had committed. He then went alone to the deceased's house and found him outside with his two wives. He confronted the deceased about his property which he had taken in his absence. A fight ensued and the deceased threw an axe at him. He dodged and ran behind the house to avoid a fight. The deceased chased him with an axe. The appellant then hit the deceased's axe with his axe and it dropped. He then hit the deceased and axed him with another axe. When he fell down, he ran back home.

The 1st appellant pleaded self defence saying he had to fight back. His further evidence was that he saw the deceased's 2nd wife Vivian (PW3) getting a log of fire and running into the house and that was how the house caught fire. He complained of the

deceased having not given him and the 2nd appellant their shares of the estate. That he wanted to be an administrator but some people did not allow him. He also told the court that the deceased hated the 2nd appellant and showed his hatred by refusing to pay his school fees.

The 2nd appellant's evidence in the court below was that on 22nd February, 2016 between 08:00 and 09: 00hrs, he was going home after releasing his cattle for grazing when he learnt from Purity Muchimba and Harry (PW4) that his brother Herbert Habayumbe had passed away. He was told about the police involvement in the matter and the burial. The following day, he went to herd cattle again. That day he was summoned to the police station and was accused of having murdered his brother Herbert which charge he denied. He also denied having been present at the scene on the fateful night. His further evidence was that people mistake him for his brother (1st appellant) because they look alike. He said he also looks like his other three siblings.

He raised an alibi that on 21st February between 19 and 23 hours he was with his mother at home 200m from where the deceased used to live. He said he was with Mudenda's mother, Harry's mother and Kebby's mother and that he told the police about it. The police beat him up and did not ask him whom he was with. He said the deceased had kept an animal belonging to their father's estate. The appellant has raised one ground of appeal contending that the learned trial judge erred in law and in

fact when he failed to treat PW2 and PW3's evidence with caution, as they were suspect witnesses.

At the hearing of the appeal on 6th June, 2017 the 1st appellant abandoned his appeal. It was therefore dismissed. Thereafter, the 2nd appellant's advocates filed heads of argument in support of the sole ground of appeal which they relied on. Their written submissions are to the effect that the only incriminating evidence against the 2nd appellant was given by PW2 a boy aged 12 years and that of his mother PW3. They argued that the trial court's findings at page 10 of the judgment (p.52 of the record) were flawed as there is no independent evidence on record to show that the 2nd appellant participated in the commission of the offence. The court in analysing the evidence focused only on discounting the possibility of mistaken identity.

The findings referred to are from line 4-15 as follows:

> ***"The claim by the first accused that he killed the deceased alone is not true. PW2 and PW3 testified that the two fought and axed the deceased to death together. A1 was holding the deceased and A2 got an axe and axed the deceased until he fell down and died. A2 claimed he was not there when A1 fought and killed the deceased. However, there is not truth in what A1 and A2 have testified in this case, because according to PW2 and PW3 it was A2 who axed the deceased while***

A1 was holding and restraining the deceased so that A2 could axe him."

"I considered the possibility of PW2 and PW3 mistaking A2 for another person however I find that PW2 and PW3 knew A2 well and there was enough light and opportunity to observe A1 and A2 when they fought and axed their brother to death."

Further submissions by the appellants advocates were that, PW2 and PW3 were suspect witnesses by virtue of their relationship with the deceased on one hand and the 2nd appellant on the other. PW3 was an unreliable witness because she concealed evidence of her husband's adultery episode which was confirmed by PW7 at page 31 of the record. Therefore PW2 and PW3's evidence required corroboration. It was stated that the trial court failed to consider the testimony of A1 appearing on page 49 of the record lines 15-18 to the effect that the deceased hated A2 and used to deny him money for school fees and that was one of the reasons why they used to quarrel as their father had left property of which the deceased as the eldest son was the administrator. They contend that naturally the animosity between the 2nd appellant and the deceased could be imputed to PW2 and PW3. Thus PW2 and PW3 had the motive to falsely implicate the 2nd appellant for the subject offence so that they could continue having charge over the estate that was previously administered by the deceased.

They went on to rely on the case of **Benard Chisha v. The People**[1] where it was observed that, a child due to immaturity of mind is susceptible to the influence by third parties and as such their evidence requires corroboration.

In light of the **Benard Chisha case** they contend that PW3 falls in the category of persons that may influence PW2. PW3 is a suspect witness whose evidence cannot solely be relied upon as a basis of conviction.

To fortify this, they relied on the case of **Mwambona v. The People**[2] where it was held that:

> ***"(i) A witness with a bias is not to be regarded as a witness with a purpose of his own to serve, but his evidence should be treated with caution and suspicion.***
>
> ***(ii) Where a witness might have a purpose of his own to serve, the court must make a specific finding as to whether he is so regarded.***
>
> ***(iii) The failure to regard as such a witness with possibly a purpose of his own to serve and another with a possible bias, is a misdirection which will result in the conviction being quashed unless the appellate court can apply the proviso."***

They argued further in light of the above cited case that in *casu,* the court neither cautioned itself nor made a specific finding as to whether he regarded PW2 and PW3 as suspect witnesses when

considering their evidence. That failure was a misdirection which should result in the second appellant's conviction being quashed.

In developing their submissions, the appellants' advocates argued that the 1st appellant maintained that the 2nd appellant did not participate in the commission of the offence. However, the trial court exhibited bias towards the prosecution and neglected to conduct a proper analysis of the totality of the evidence including the appellant's defence. They said the court below should have attached weight to the 1st appellant's evidence that he was alone at the scene on the material night.

They summed up by stating that the trial court convicted the 2nd appellant in the absence of proof beyond reasonable doubt. The conviction in all circumstances of the case was unsafe. The trial court erred to convict the appellant in the absence of corroborative evidence to exclude the dangers of false complaint and false implication. They therefore prayed that the conviction and sentence be quashed.

In addition to the written submissions and in answer to a question posed by the court as to whether the *voire dire* concerning PW2 was properly conducted, Ms. Mukulwamutiyo submitted that the *voire dire* contains only one question i.e. How old are you boy? The rest are answers and one wonders whether all the responses were made to that question. She said whereas the Ruling of the court on the *voire dire* addressed both limbs as required by the amendment to the Juveniles Act, the means by

which the court arrived at the ruling was flawed and therefore the *voire dire* was defective, the domino effect being that the evidence of PW2 should be disregarded. She further contended that finger print evidence should have been adduced to prove that the axe that was produced was the one which the 2nd appellant used to hack the deceased. The fact that the 2nd appellant did not attend the funeral of his brother was most likely because of the animosity that existed between them. Therefore the court wrongly assumed that the 2nd appellant was at the crime scene at the material time participating in the commission of the offence.

Miss Mumba responded *viva voce* as follows; A court conducting a *voire dire* is required to indicate the questions and answers as established in the case of **Zulu v. The People**[3]. Unfortunately the record only discloses one question from which a detailed response arose. In the absence of evidence that other questions were asked, it is possible to conclude that the witness gave a lengthy response to that question as indicated in the record. Therefore, it is not possible to outrightly conclude that the court asked other questions. However, the answer shows that the child witness was possessed of sufficient intelligence and that he understood the need to tell the truth. In the circumstances, the *voire dire* was not defective. She contended that some children give detailed answers to only one question.

She further contended that the evidence of PW2 and PW3 was sufficiently corroborated justifying the conviction. PW2's evidence was corroborated by the evidence of the first accused as to how the case unfolded. She said there was evidence from PW5 and PW6 confirming PW2 and PW3's evidence as to the extent of the injuries suffered by the deceased and the means by which they were inflicted. PW2 and PW3 graphically explained to the court how the axing was done and how many times. The deceased sustained 3 cuts at the back of the head and one on the forehead as shown in the report on postmortem examination.

She said in addition to the said supporting evidence, the record shows odd coincidences that support PW2 and PW3's evidence which are as follows: Firstly A2 failed to attend his brother's funeral although it has been submitted that a number of reasons might have led to his failure to attend. The record shows that no other possibilities were alluded to by the 2nd appellant whose evidence at page 40 of the record shows that he just opted not to. He was not even surprised upon learning about the death. After the fact, he proceeded to the bush and went back home for lunch. The only reasonable inference that can be made therefore is that he was involved in his brother's death. PW2 and PW3 clearly identified A2 as one of the murderers because they knew him very well and they saw him that night.

She went on to submit that at page 59 of the record, lines 15-20 the trial court discounted provocation as a defence. The court found that A1 and A2 acted in concert and should have foreseen

that their action of axing their brother would result in his death. She relied on the case of **Henry Cossam Lungu v. The People**[4] where the court found that the dispute over land which existed between the appellant and the deceased and the appellant having gone there early in the morning amounted to something more, supporting the prosecution evidence.

In developing her arguments, she submitted that the trial judge's failure to warn himself of the dangers of false implication is not fatal to the case because in the case of **Yokoniya Mwale v. The People**[5] the Supreme Court held that a court can convict on uncorroborated evidence of witnesses with their own interests to serve especially in case of a fatality in the family where all the eye witnesses might have an interest to serve.

She further submitted that the trial judge at page 9 of the judgment considered the issue of corroboration in the second paragraph where he said:

> "***A1 and A2, then left the place for their respective houses. The evidence of PW3 the deceased's junior wife was corroborated by that of PW2 Twambo Muntanga who also witnessed the two accused fight and axe the deceased to death.***"

She concluded by stating that the judge also considered motive on page 10 of the judgment. The fact that the trial judge did not say he was warning himself, is of no consequence. She addressed

the appellant's advocates submission that PW3 was untruthful because she concealed her husband's adultery by contending that there is no evidence on record that PW3 had prior knowledge of the adultery. On the totality of her submissions she prayed that the appeal be dismissed.

In reply, Miss Mukulwamutiyo submitted that the case of **Zulu v. The People**[3] was decided prior to the amendment to the Juveniles Act. She then referred us to a recent case relating to the amendment Act, **Daka v. The People,**[6] and another case of **Patford Mwale v. The People**[7]. She submitted further that whereas these authorities talk about the content of a ruling that follows a *voire dire*, the appellate courts have not yet pronounced themselves on the procedure that trial courts are supposed to follow when investigating the suitability of a child witness to give evidence in accordance with the amended Juveniles Act. She therefore urged us to hold that the means of arriving at a ruling are just as significant as the ruling itself given that appellate courts deal with matters on record.

She further submitted that as shown on page 37 of the record line 4, PW3 knew about her late husband's adultery but tried to conceal it.

Having read the record of appeal including the judgment and having considered the written and oral submissions made by both advocates we will firstly address the issue of the *voire dire* concerning PW2. The case of **Zulu v. The People**[3] is still good

law even though Section 122 of the Juveniles Act [1] has since been amended. That case clearly sets out the correct procedure under Section 122 of the Juveniles Act. In the same case the Supreme Court stressed once again as they had in **Sakala v. The People**[8] that not only must the record show that a *voire dire* has been conducted, but also the questions asked, the answers received and the conclusions reached by the court.

In the present case the *voire dire* is defective in that there is only one question recorded with several answers and the court's conclusion. This makes it difficult for us to assess whether the child answered the question or questions he was asked by the court properly. From that we deduce that the child was asked more than one question by the court. As rightly pointed out by Miss Mukulwamutiyo, the means of arriving at the ruling in a *voire dire* and the conclusion itself are equally important. In ***Goba v. The People*** [9] the Supreme Court held that:

> **".....When no proper voire dire is carried out, the evidence of the witness should be discounted entirely."**

We shall therefore disregard totally the evidence of PW2. We shall now consider whether the remainder of the evidence sufficiently supported the conviction. What remains on record as evidence against the 2nd appellant is now mainly the evidence of PW3. It is clear from the judgment that the trial judge did not make a finding as to which category of witnesses PW3 belongs; whether she as the deceased's wife is a suspect witness in that she has a bias, or has an interest of her own to serve. The judge

did not even warn himself of the dangers of false implication of the 2nd appellant by this witness.

In the case of **Chitalu Musonda v. The People**[10] the Supreme Court had the opportunity to discuss extensively the law regarding suspect witnesses. At page J21 they stated that:

> **"In the Kambarange case we regarded the witnesses who were friends and relatives of the deceased as having a possible bias and with a possible interest of their own to serve, not merely because they were friends and relatives of the deceased, but because they fell into the category of witnesses who were friends and relatives of the deceased and who were the subject of a complaint lodged by the appellant."**

The Supreme Court further stated:

> **"As we explained in the Mwambona Case in regard to an employee ....."**
>
> **"Regarding a witness who is an employee of a suspect witness as a suspect witness, would be taking the matter too far. Although an employee may; in appropriate cases, be regarded as a witness with a possible bias, just as one might so regard a close relative, and in such cases one would approach his evidence with caution and suspicion, but this is not to**

say that one would not normally convict on such evidence unless it were corroborated."

The court went on to say that "**Quite clearly, being relatives, and in the case of PW3, a friend to the deceased, these witnesses fell under the category of suspect witnesses whose evidence required circumspection, not necessarily corroboration, before being relied upon."**

The Supreme Court further stated that "**A court is duty bound to consider the circumstances of each case in determining whether the evidence of a witness is suspect and to what extent, if any, such evidence would require to be corroborated, and to make, a specific finding.** On this point the guidance given by the Court of Appeal in the **Mwambona case** remains instructive. There, the Court of Appeal stated that:

> **"In approaching the evidence of the witnesses, we wish to point out that the court must approach the evidence as a whole and make a specific finding as to whether the testimony of the witness is to be regarded with the same caution as that of an accomplice.....failure to regard witnesses as such is a misdirection."**

In the recent case of **Kahilu Mugochi v. The People**[11] we have also said at page10 of the judgment that:

".....The case of Yokoniya Mwale v. The People does not depart from the Supreme Court's earlier position on who is a witness with a possible interest of his own to serve. It simply restates the law by clarifying that a relative is not automatically a suspect witness, it is the circumstances of the case that can render a relative to be a suspect witness."

We therefore find that the evidence of PW3 did not require corroboration because she was not a witness with a possible interest to serve. Having regard to all the circumstances of this case, we are of the view that PW3 by virtue of being married to the deceased can indeed be regarded as a witness with a possible bias but not as a witness with her own interest to serve nor as an accomplice. In fact the 2nd appellant was her brother in law, that makes it difficult to condemn her as a biased witness. We are therefore of the view that the trial judges failure to warn himself of the dangers of false implication does not at all affect the conviction of the 2nd appellant because the evidence of PW3 did not require corroboration.

Furthermore, the trial judge's findings at page 10 of the judgment alluded to by the appellant's advocate were made on the basis of credibility of the witnesses. In addition to what counsel for the appellant quoted from the judgment, the judge further found on the same page that:

"The two had a common design to cause death of their brother as A1 claims the deceased got his ox and bicycle and that the deceased never looked after A2 well although he was the administrator of their deceased father's estate. Both A1 and A2 had motives to murder the deceased because of the differences they had with him."

It is therefore clear to us that PW3's evidence was corroborated. The issue of finger prints having not been taken from the axe that was exhibited before the lower court can best be tackled by looking at the case of **Kalunga v. The People** [12] where the Supreme Court held *inter alia* that:

"Failure to lift finger prints is a dereliction of duty by the police which raises a presumption that such finger prints as there were, did not belong to the accused. The presumption is rebuttable by overwhelming evidence of identification.'

In the present case there is ample and incontrovertible evidence of identification of the appellant which in our view rebuts the presumption that the finger prints that were on the axe did not belong to him. The appellant herein obviously had a grudge against his brother which made him not to even attend his funeral and as rightly pointed out by the state advocate he was not surprised that his brother had died because he was involved

in his murder. The 2nd appellant's evidence is therefore unreliable.

In the case of **Webster Kayi Lumbwe v. The People**[13] the Supreme Court held that:

> **"An appellate court will not interfere with a trial court's finding of fact on the issue of credibility unless it is clearly shown that the finding was erroneous."**

The trial judge in the case before us was entitled to accept the evidence of PW3 and reject that of both accused albeit to a limited extent that of the 1st accused. Whether or not PW3 tried to conceal the adultery that was committed by the deceased does not go to the root of the matter and does not affect the conviction.

We are also of the view that although the trial judge did not warn himself, he treated PW3's evidence with caution. In the case of **Ngati and Others v The People**[14] it was held that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity is eliminated.

It is abundantly clear under the circumstances of this case that the 1st appellant was merely shielding his younger brother the 2nd appellant from being incarcerated for the murder which they had committed together. They intended to use the axes which they carried when they went to the deceased's house and therefore the trial judge rightly found that they had malice

aforethought. The evidence of the 1st appellant shows that there were three axes at the scene. The 1st appellant was in our view definitely an untruthful witness because the body and axe as shown in the pictures on record were found in front of the house and yet he said he hacked the deceased behind the house. The 1st appellant's evidence that it was PW3 who set the house ablaze is fanciful as she had no motive to burn her own house. Under the circumstances, it was the appellants, who had ventured out to punish the deceased, who could have set the house on fire.

The judgment of the lower court is sound, therefore it is upheld. Conviction and sentence are also sustained.

Dated this 27th **day of** September **2017**

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

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F.M.CHISHIMBA
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE