

**IN THE COURT OF APPEAL OF ZAMBIA**

**HOLDEN AT KABWE**

*(Criminal Jurisdiction)*

**Appeal No. 7,8/2018**

**B E T W E E N :**

AMOS SIAPIBWE  
ENOCK MATAMBO



**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**AND**

THE PEOPLE

**RESPONDENT**

**CORAM : Mchenga DJP, Chishimba and Majula, JJA**  
**On 23<sup>rd</sup> May, 2018 and 10<sup>th</sup> August, 2018**

For the Appellant : Mrs. M. Marabesa-Menya – Legal Aid Counsel  
For the Respondent : Mrs. A. K. Mwanza – Senior State Advocate - NPA

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

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**CHISHIMBA, JA, delivered the Judgment of the Court**

CASES REFERRED TO:

1. **George Milupi Vs. The People (1978) Z.R. 271 (S.C.)**
2. **Simon Malambo Choka Vs. The People (1978) ZR 243 (S.C.)**
3. **Emmanuel Phiri and Others Vs. The People (1978) ZR 79 (SC)**
4. **Boniface Chanda Chola and Others Vs. The People 1988-1989) Z.R. 163 (S.C.)**
5. **Ilunga Kalaba and John Masefu Vs. The People (1981) Z.R. 102 (S.C.)**
6. **Katebe Vs. The People (1975) Z.R. 13 (S.C.)**
7. **Muwowo Vs. The People (1976) ZR 91 (CA)**
8. **Kalonga Vs. The People (1972) Z.R. 124**
9. **Chabala Vs. The People (1976) Z. R. 14 (S.C.)**
10. **Saluweme Vs. The People (1965) ZR 4 (CA)**
11. **Yokonia Mwale Vs. The People SCJ Appeal No. 285 of 2014**
12. **Nsofu Vs. The People (1973) Z.R. 13**

13. **Winfred Sakala Vs. The People (1987) Z.R. 23 (S.C.)**
14. **Chinyama and Others Vs. The people (1977) Z.R. 426**
15. **Hanfuti Vs. The People (1972) Z.R. 240**
16. **Tapisha Vs. The People (1973) Z.R. 222**
17. **Haonga and Another Vs. The People (1976) Z.R. 200**
18. **Mutale and Phiri Vs. The People (1997) ZR 51**
19. **Kanyanga Vs. The People Appeal No. 145 of 2011**
20. **Mbinga Nyambe vs The People SCZ No. 5 of 2011**
21. **David Zulu vs The People (1977) ZR 151.**
22. **Bwanausi vs The People (1976) ZR 103**
23. **Wamundila vs The People (1978) ZR 151**
24. **Chitalu Musonda vs The People (SCZ) Appeal No.138 of 2014**

LEGISLATION AND OTHER WORKS REFERRED TO:

**1. The Penal Code, Chapter 87 of the Laws of Zambia**

The Appellants herein were charged for the offence of murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of the offence allege that on 2<sup>nd</sup> February, 2016 in Maamba in the Sinazongwe District of the Southern Province of the Republic of Zambia jointly and whilst acting together with another person unknown did murder Daniel Dubulika.

The facts are that the deceased and the Appellant had protracted quarrels over a piece of land. The dispute was reported to the police as well as the village hierarchy but could not be resolved. PW1 a relative of both the deceased and Appellant

testified that on the material day, he heard a gunshot. Subsequently, he saw fire from the direction of the deceased's village, which was about a kilometre and a half away from his. Shortly thereafter, the deceased's son came to inform him that his father had been shot dead. At the scene, he saw that the deceased body had been burnt and was in a pool of blood. PW1 informed the police about what had happened.

In respect of the whereabouts of the Accused, PW1 stated that the 1<sup>st</sup> Appellant's wife informed him that the 1<sup>st</sup> Appellant was in Sinazongwe at the time that the deceased was shot.

PW2 testified that the 1<sup>st</sup> Appellant is her step father. On the material day, the 1<sup>st</sup> Appellant was visited by the 2<sup>nd</sup> Appellant and another person whom she did not know. Though they held a discussion with the 1<sup>st</sup> Appellant, she did not hear what was discussed. The 1<sup>st</sup> Appellant left for Sinazongwe while his visitors remained at his home.

The 2<sup>nd</sup> Appellant and the unknown other person asked PW2 to take them to the deceased's house. PW2 eventually led the 2<sup>nd</sup> Appellant and the other person to the deceased's house. According

to PW2 when they got there, the unknown person who had been in the company of the 2<sup>nd</sup> Appellant produced a gun and shot the deceased. When PW2 attempted to run away, the unknown person threatened to shoot her if she ran away or told anyone. The unknown man set the deceased's house on fire. Thereafter, the 2<sup>nd</sup> Appellant and the unknown man run away.

PW2 stated that though she had been detained by the police in connection with the murder of the deceased, she was not involved in the murder. In respect of her relationship with her step father, she was in good terms with the him. As regards the gun used to kill the deceased, PW2 stated that the gun that had been concealed by the gunman and she only saw it when he produced it to shoot the deceased.

Solomon Dubulika (PW3), the deceased's son stated that he went to his father's house after he heard a gunshot and saw flames of fire. He found the house on fire. He pulled the deceased out of the burning house and noticed that he had blood on his shirt. He reported the matter to PW1 who in turn later reported to the police station after viewing the scene.

PW3 confirmed that there was a land dispute between the 1<sup>st</sup> Appellant and the deceased which had been on-going. According to PW3, the deceased was killed on the instruction of the 1<sup>st</sup> Appellant. Though PW3 was related to the 2<sup>nd</sup> Appellant they were not on friendly terms.

The arresting officer, Detective Sergeant Chiyenda Muzala (PW4) testified that upon receiving a report of a murder on 3<sup>rd</sup> February, 2016, he visited the scene and found the deceased in a pool of blood. The deceased's body had been burnt and had many punctured wounds in the chest. He also noticed that the deceased had what appeared to be gunshot wounds on his body. An informer at the scene told PW4 that the 1<sup>st</sup> Appellant must have been involved in the murder of the deceased. Investigations revealed that the 1<sup>st</sup> Appellant had gone out of town and was later apprehended by neighbourhood watch officers.

According to PW4, when the 1<sup>st</sup> Appellant was interviewed he admitted having hired some people to kill the deceased. The 1<sup>st</sup> Appellant led PW4 to the 2<sup>nd</sup> Appellant's house. The 2<sup>nd</sup> Appellant

was not found at home. The 2<sup>nd</sup> appellant told PW4 that he was there when the deceased was shot by a person called Benny.

A post-mortem was later conducted. Pellets were retrieved from the deceased body and sent for ballistics investigations and a report was generated. The Appellants were warned and cautioned before they denied the charge.

The Appellants gave evidence on oath. In his defence, the 1<sup>st</sup> Appellant testified that he had gone to Sinazongwe to visit his grandchild who was not well and only returned on 5<sup>th</sup> February, 2016 to the news that the deceased had been murdered. The land dispute between him and the deceased had been resolved prior to the murder of the deceased. The 1<sup>st</sup> appellant denied knowing the 2<sup>nd</sup> Appellant before they were charged for the subject offence.

The 2<sup>nd</sup> Appellant in his defence testified he had gone to his other wife's house on 8<sup>th</sup> February, 2016. When he returned the following day he found his household goods had been scattered. He reported this to the village head man who informed him that police officers had been looking for him. The 2<sup>nd</sup> Appellant was later detained.

According to the 2<sup>nd</sup> Appellant, PW2 had also been in police custody in connection with the murder of the deceased. He stated that while he refused to falsely testify against the 1<sup>st</sup> Appellant; PW2 agreed and was released. He denied any involvement in the murder of the deceased. He reiterated that he did not know the 1<sup>st</sup> Appellant prior to the death of the deceased. He only met the 1<sup>st</sup> Appellant for the 1<sup>st</sup> time in Court when the two were charged for the subject offence.

The trial Court found as a fact that the 1<sup>st</sup> Appellant had hired the 2<sup>nd</sup> Appellant and another person to kill the deceased. The Court found that the evidence by PW2 compelling as PW2 confirmed that the 1<sup>st</sup> Appellant was visited by the 2<sup>nd</sup> Appellant and another person unknown to her. PW2 later escorted the 1<sup>st</sup> Appellant's visitors to the deceased's house where she witnessed the murder of the deceased. The Court further found that despite the fact that the 1<sup>st</sup> Appellant had been out of the village at the time that the deceased was murdered there was sufficient circumstantial evidence on record that connected the 1<sup>st</sup> Appellant to the murder of the deceased.

The trial Judge held that the Appellants having taken part or aided the murder of the deceased in line with **Section 21 of the Penal Code, Chapter 87 of the Laws of Zambia**, were liable for the death of the deceased. The court consequently convicted the Appellants for the subject offence and sentenced them to 25 years imprisonment.

The Appellants being dissatisfied with the Judgment of the lower Court now appeal against both conviction and sentence fronting three grounds of appeal couched in the following terms;

- 1. The lower Court erred in law and in fact when it convicted the appellants on uncorroborated evidence of an accomplice witness.***
- 2. The lower Court erred in law and in fact when it convicted the appellants when they tendered a defence of alibi which was not challenged by the prosecution.***
- 3. The lower Court erred in law and in fact when it convicted the accused persons based on the fact that they had lied on a material fact.***

The Appellants filed heads of argument dated 22<sup>nd</sup> May, 2018. It was submitted that the direct evidence of PW2 ought to have been treated with caution, PW2 having not seen any gun when she escorted the 2<sup>nd</sup> Appellant to the deceased house coupled with the fact that she was arrested in connection with the death of the



deceased and was only released from custody having given a statement that implicated the Appellants. It was further argued that PW2 had the motive to falsely implicate the Appellants. The Appellants gist of argument being that the dangers of false implication were not ruled out as there were no independent evidence to corroborate PW2's evidence. We were referred to several Supreme Court decisions on the treatment of the evidence of a suspect witness or one with an interest to serve and that such evidence requires corroboration. The cases referred to are; **George Milupi Vs. The People** <sup>(1)</sup>, **Simon Malambo Choka Vs. The People** <sup>(2)</sup>, **Emmanuel Phiri and Others Vs. The People** <sup>(3)</sup> and **Boniface Chanda Chola and Others Vs. The People** <sup>(4)</sup>.

The Appellants contended that the record indicates that the 1<sup>st</sup> Appellant had no ill feelings against the deceased as their wrangle was resolved sometime in 2015 and the land subject of the dispute was returned to the 1<sup>st</sup> Appellant. It was further argued that the 1<sup>st</sup> Appellant having raised an alibi the prosecution ought to have discounted the alibi as guided in the case of **Ilunga Kalaba and John Masefu Vs. The People** <sup>(5)</sup>. For the proposition that it is a dereliction of

duty on the part of an investigating officer not to make investigations of an alleged alibi the Appellant referred us to the case of ***Katebe Vs. The People*** <sup>(6)</sup>.

It was submitted and argued that there was no evidence before the trial court that the 1<sup>st</sup> Appellant hired people to murder the deceased. Further, that the alleged confession statement made to PW4 was issued without a warn and caution. In addition, that the alleged confession statement was not produced before the trial Court. Therefore, PW4's evidence was hearsay. We were referred to the case of ***Muwowo Vs. The People*** <sup>(7)</sup> where the Court stated that the prosecution discharges its burden that a confession was 'voluntary' if there is proof that it was made voluntarily or after a caution. The Appellants argued that the statement was not made voluntarily to PW4 in the absence of a caution.

The Appellants contended that PW4 admitted that he did not interview the 1<sup>st</sup> Appellant's relatives otherwise he would have found out where the 1<sup>st</sup> Appellant had gone during the period that the deceased was murdered. Further, that the 2<sup>nd</sup> Appellant's action

of reporting himself to the police as admitted by PW4 was an indication that he was not guilty of the subject offence.

It was contended that the 2<sup>nd</sup> Appellant denied leading the police officers to the scene but testified that it was in fact the police officers that led him to several places while he was seated at the back of the police vehicle. Further, that should the Court be of the view that the 2<sup>nd</sup> Appellant led the police officers to the scene of crime, then the Court ought to find that the leading was done without a caution.

It was argued that the Appellants gave explanations, in their defence, that are reasonably possible to raise doubt. We were referred to the cases of ***Kalonga Vs. The People*** <sup>(8)</sup> and ***Chabala Vs. The People*** <sup>(9)</sup> where the Court discussed what constitutes a reasonable explanation by an accused person in his defence to warrant an acquittal. It was further contended that the Appellants in their defence raised doubts therefore, the prosecution did not prove its case to the required standard. To buttress this argument the Appellants referred us to the case of ***Saluweme Vs. The People*** <sup>(10)</sup> and ***Kalonga Vs. The People*** <sup>(8)</sup> where the Courts stated that where

reasonable doubt exists the prosecution cannot be said to have discharged its burden. The Appellants urged the Court to allow the appeal.

The Respondent filed into Court heads of argument dated 22<sup>nd</sup> May, 2018. In response to ground 1 the Respondent argued that PW2 did not automatically become a suspect witness because she was detained in connection with the subject offence. Further that, the totality of the evidence on record did not reveal that PW2 had anything to gain by implicating the Appellants. We were referred to the case of **George Milupi Vs. The People** <sup>(1)</sup> where the Supreme Court stated that;

***“The tendency to use the expression ‘witness with an interest ... of his own to serve’ carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.”***

The Respondent contended that the evidence on record did not show that PW2 had an ill motive so as to categorise her as a suspect witness. Further that, the 1<sup>st</sup> Appellant in his evidence did

not disclose that PW2 had any ulterior motive save to state that the PW2 was his step daughter. We were referred to the case of **Yokonia Mwale Vs. The People** <sup>(11)</sup> in which the Supreme Court emphasised the need for the courts to discern from the evidence before deciding on the issue of whether or not to treat a witness as a suspect witness. The trial Court at page J10 of its Judgment found that PW2 was a credible witness. Further that, the 2<sup>nd</sup> Appellant confirmed to PW4 that he had been at the scene of the crime although he stated that a person called Benny is the one who shot the deceased. According to the Respondent, PW4's testimony corroborated PW2's evidence. To support this proposition the Respondent cited the case of **Nsofu Vs. The People** <sup>(12)</sup> where the Court described what constitutes corroboration.

In response to ground 2, the Respondent argued that despite the Appellants having raised the defence of alibi the trial Court convicted the Appellants on the basis that the 1<sup>st</sup> Appellant had a land wrangle with the deceased and that both had threatened each other with death. The trial Court relied on the evidence tendered by PW2 regarding how the 1<sup>st</sup> Appellant was visited by the 2<sup>nd</sup>

Appellant and another person. It was added that despite acknowledging the fact that the 1<sup>st</sup> Appellant was not at the scene of the crime, he was convicted on the basis that he had 'aided' the commission of the crime. We were referred to the case of **Winfred Sakala Vs. The People** <sup>(13)</sup> where the Court discussed the import of **Section 22 of the Penal Code** relating to offences committed by joint offenders in prosecution of a common purpose.

Regarding the argument by the Appellants that PW4 did not administer a warn and caution statement before the alleged confession, the Respondent argued that the Judges Rules, 1964 provide that a warn and caution statement should only be administered at the point at which the arrest is made. The case of **Chinyama and Others Vs. The people** <sup>(14)</sup> was cited in support of this proposition.

The Respondent contended that the Appellants at the time the issue of the confession statement came up, ought to have raised the issue of the voluntariness of the confession in order for a trial within a trial to be conducted in line with the guidance of the Court in the cases of **Hanfuti Vs. The People** <sup>(15)</sup> and **Tapisha Vs. The People**

(16). The Respondent argued that the Appellants, despite being represented by Counsel, did not object when the issue of the confession was raised. On the totality of the evidence before the lower Court there was enough evidence to prove the guilt of the Appellants beyond reasonable doubt.

In response to ground 3, the Respondent argued that the lower Court was on firm ground when it did not believe the Appellants version of events having lied on a material fact. We were referred to the cases of **Haonga and Another Vs. The People** (17) and **Mutale and Phiri Vs. The People** (18) to buttress this argument. The Respondent further urged the Court not to reverse the findings of fact made by the lower Court, the same having not been perverse or made in the absence of any relevant evidence. As authority the case of **Kanyanga Vs. The People** (19) was cited in which the Court discussed instances when an appellant Court may reverse findings of fact made by a trial Court. We were implored to dismiss the appeal.

We have considered the appeal, the evidence adduced in the lower court, the authorities cited and the arguments advanced by respective Counsel. The undisputed facts are that there was a

raging land dispute between the 1<sup>st</sup> Appellant and deceased. Death threats were issued by both of them against each other. The threats were eventually reported to the Police, resulting in the deceased being charged and an admission of guilty charge paid. It is further not in issue that at the time of the murder, the 1<sup>st</sup> Appellant was away in Sinazongwe.

We shall first deal with the 1<sup>st</sup> Appellant's conviction. The evidence against the 1<sup>st</sup> Appellant is based on circumstantial evidence namely, the land dispute between him and the deceased, the death threats issued by both against each other. There is further the evidence by PW2 that she saw the 1<sup>st</sup> Appellant, her step father with A 2 and unknown man having discussions the day before the murder.

In addition, the arresting Officer (PW4) testified that the 1<sup>st</sup> Appellant in the course of the interview, admitted procuring some people to kill the deceased due to the land disputes and witchcraft. In cross examination at page 38 of the record, PW4 stated that he only ***warned the accused after they had confessed to the offence of sending people to kill***.



The learned trial Judge held that the circumstantial evidence against A1 showed that the killing of the deceased was a common purpose mooted out by A1 who is the master mind. He found the evidence against A1 cogent and compelling. See page 68 of the record. Further that the Appellants lied that they never knew each other.

It is trite that it is competent for a court to convict based on circumstantial evidence provided that the evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt. See the case of ***Mbinga Nyambe vs The People*** <sup>(20)</sup> and ***David Zulu vs The People***. <sup>(21)</sup>

The issue is whether the circumstantial evidence against A1 had attained a degree of cogency and taken the case out of realm of conjecture, permitting only the inference of guilt.

We are of the view that the circumstantial evidence against A1 on the totality of the evidence was not cogent to a degree that can permit only an inference of guilt. We do not find the circumstantial evidence of the existence of the land dispute and the visit by A2 and unknown person to the 1<sup>st</sup> Appellant's home to be so cogent and

strong for the court below to have drawn only one reasonable inference that the 1<sup>st</sup> Appellant was involved in the murder.

The 1<sup>st</sup> Appellant's explanation that he was away in Sinazongwe is reasonable. This evidence was undisputed. PW2 also admitted that the 1<sup>st</sup> Appellant left his home for Sinazongwe District a day before the incident. Therefore an inference of guilt ought not to have been drawn unless it is the only inference which can reasonably be drawn from the facts. We refer to the case of ***Bwanausi vs The People*** <sup>(22)</sup> in which it was stated that;

***“Where a conclusion is based purely on inference that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation.”***

We accordingly find merit in the appeal against the 1<sup>st</sup> Appellant. The conviction and sentence meted out by the learned trial Judge is hereby set aside.

In respect of the 2<sup>nd</sup> Appellant, there was direct evidence adduced by PW2, who stated that the 2<sup>nd</sup> Appellant and unknown man asked her to take them to the deceased house. Whilst there the unknown man produced a gun, shot the deceased, and set

ablaze his house. The unknown man threatened to kill her if she run away.

It is not in dispute that PW2 was at one point detained by the Police in connection with the murder of the deceased. The contention by the 2<sup>nd</sup> Appellant is that her evidence should be treated as suspect and ought not to have been admitted without corroboration. The evidence implicating the 2<sup>nd</sup> Appellant is by an accomplice or person with possible interest to serve.

It is not in issue that PW2 was an accomplice. The courts' approach in the treatment of evidence by an accomplice and witnesses with interest of their own to serve is the same. The evidence of the above witnesses requires corroboration. In the cases of **Simon Malambo Choka vs The People**<sup>(2)</sup> and **Wamundila vs The People**,<sup>(23)</sup> the Supreme Court stated in the latter that;

***“where there is no corroboration of the evidence of an accomplice or witness with an interest of his own to serve, it is not safe to convict on that evidence unless there is some reason for accepting it other than the belief in the truth of evidence based simply on the demeanour of the witness and the plausibility of his witness”.***

The Supreme Court in the later decision of **Chitalu Musonda vs The People**<sup>(24)</sup> explained and made clear that;

**“Quite to the contrary, a conviction will be safe if it is based on the uncorroborated evidence of a witness with a possible bias or interest to serve, provided the court warns itself of the dangers of false implication and satisfies himself or herself that the danger is eliminated.”**

The learned trial Judge at page 67 of the record considered and warned itself on the danger of false implication. The court stated that it saw **“no reason for PW2 to create a false story in the circumstances against A1 and his visitors, PW2 has implicated A2 in the killing of the deceased.”** The court found PW2’s evidence to be credible direct evidence against A2. The court stated that PW2 had given her evidence clearly showing that she knew A2 very well and described how they went to the deceased’s house and how the other man shot dead Dubulika and set his house on fire.

The court stated that it believed the evidence by PW2 that “A2 and another man visited A1, before she took them to the deceased’s house.”

We hold the view that the learned trial Judge was on firm ground by convicting the 2<sup>nd</sup> Appellant based on the evidence of an accomplice without corroboration. The learned trial Judge ruled out the danger of false implication by a suspect or accomplice witness’s evidence.

The court found the evidence reliable and excluded the danger of false implication.

We cannot therefore fault the lower court in holding that the 2<sup>nd</sup> Appellant committed the murder.

As to the issue of malice aforethought, we are of the view that it was established as defined in Section 204 of the Penal Code. The post-mortem report shows that the deceased was shot and his house set ablaze. He suffered burns aside from the gunshot wounds. A fact clearly A2 knew would cause death.

The last ground of appeal assails the finding of fact by the lower court when it held that the Appellants had lied on a material fact. The lower court stated that it did not believe the evidence of the Appellants because they told lies. Namely that A1 and A2 pretended that they never knew one another until they were apprehended, those were lies.

The issue is whether the above findings of fact are perverse or were made upon a misapprehension of facts to warrant the appellate court to overturn.

We are of the view that the above findings of fact are not perverse. They were not made upon a misapprehension of fact or findings which a reasonable court presented with the same set of facts, would not make.

This is in view of the evidence by PW2, which the court found to be credible, to the effect that A2 and another man visited A1 before she took them to the deceased's house. A2 was known to PW2.

We equally find no merit in ground three. We accordingly uphold the conviction against the 2<sup>nd</sup> Appellant.

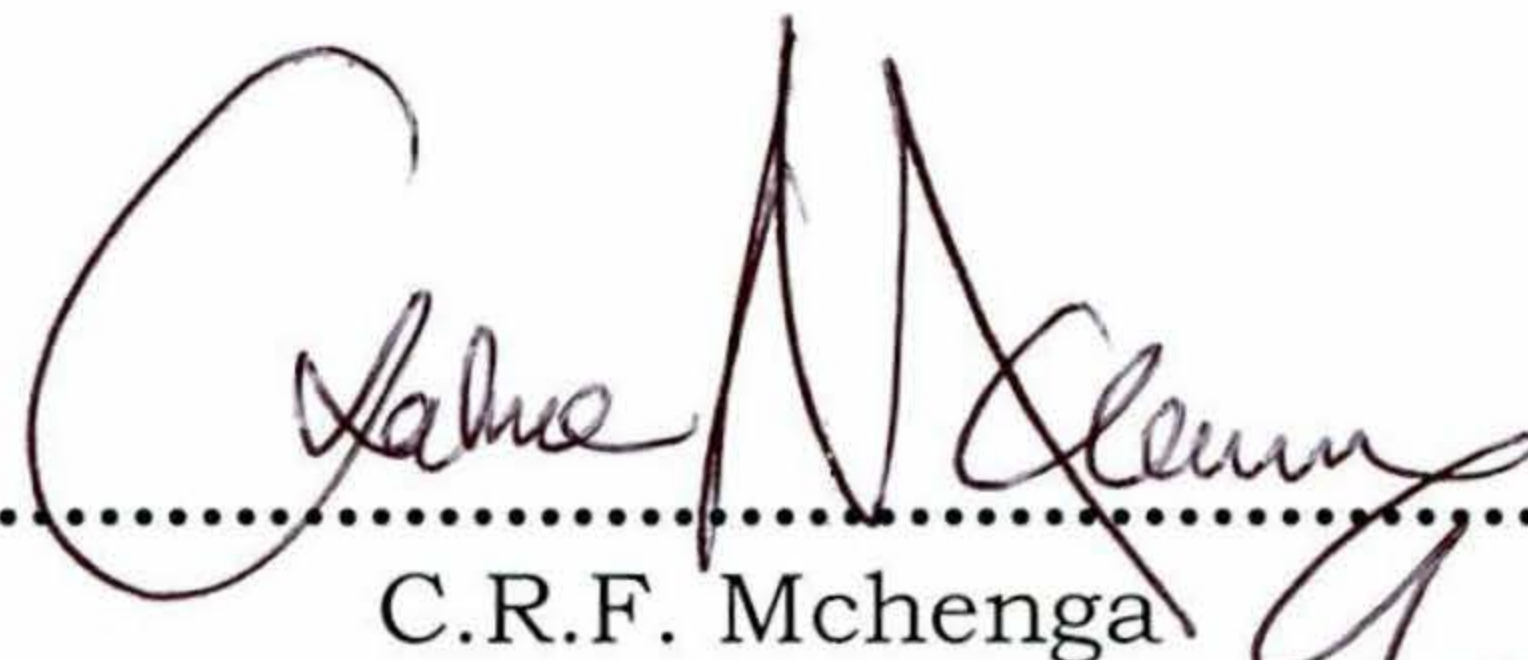
In respect of the sentence imposed of 25 years, we are of the view that the same is wrong in principle. The offence of murder prescribes a death sentence unless there are extenuating circumstances.


We do not find any extenuating circumstances in respect of the 2<sup>nd</sup> Appellant which would be considered in imposing a less severe punishment or that which would diminish the degree of the 2<sup>nd</sup> Appellant's guilt. In the circumstances, we will revisit the sentence.

In sum, we uphold the 2<sup>nd</sup> Appellants' conviction and set aside the sentence of 25 years and substitute it with the death penalty.

As regards the 1<sup>st</sup> appellant, we hereby set aside the conviction and sentence imposed by the lower court and acquit him accordingly forthwith.

**Dated the 10<sup>th</sup> day of August, 2018**

  
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C.R.F. Mchenga  
**DEPUTY JUDGE PRESIDENT**  
**COURT OF APPEAL**

  
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F.M. Chishimba  
**COURT OF APPEAL JUDGE**

  
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B. M. Majula  
**COURT OF APPEAL JUDGE**