IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

ZULU KAPUTULA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
On the 4th December, 2018 and 10th December, 2018

For the Appellant: **Ms. K. Chitupila, Senior Legal Aid Counsel**

For the Respondent: **Mr. F. M. Sikazwe, Senior State Advocate**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chimbini vs. The People (1973) Z.R. 171**
2. **Ernest Mwaba and Others vs. The People (1987) Z.R. 115**
3. **Love Chipulu vs. The People (1986) Z.R. 73**
4. **Nyambe vs. The People (1973) Z.R. 228**
5. **Green Nikutisha and John Mwakishala vs. The People (1979) Z.R. 261**
6. **Fawaz and Chelelwa vs. The People (1995 – 1997) Z.R. 3**
7. **Nzala vs. The People (1976) Z.R. 221**
8. **Abedinegal Kapesh and Another vs. The People SCZ selected Judgment No. 35 of 2017**

The appellant was tried and convicted on a charge of **Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.** The particulars of the offence alleged that the appellant, between 9th and 10th June, 2013 at Solwezi in the North Western Province of the Republic of Zambia, did murder Joseph Kamanda.

The prosecution's case was anchored on the evidence given by five witnesses, two of whom were eyewitnesses who were present at the scene of crime both before and after the felony was committed. The two eyewitnesses were PW1 and PW3.

The deceased was brutally assaulted by a group of four assailants who came out of a car which failed to drive over a sandy speed hump which the deceased erected on a public road passing through his compound. When the car failed to go over the speed hump, its four occupants came out and began to dismantle the speed hump. As they did so, the deceased who stood nearby queried why they were dismantling the speed hump when other drivers had managed to go over it. The appellant and his friends responded by seizing and assaulting him with kicks, stones; and

finally with a blow to his head using a plank. The deceased became unconscious. The assailants then drove away, but returned a short while later with more stones; only to find that the deceased was taken away from the scene. The deceased was admitted to the Solwezi General Hospital overnight until he succumbed to his injuries the next morning. The cause of death was fractured skull with hemorrhage.

There was evidence from PW1 and PW3 that the attack on the deceased took place under clear visibility between 1700 hours and 18.00 hours and that they both saw the assailants' faces clearly and were able to describe their features and the role played by each one of them during the attack. According to PW3, he was equally assaulted by the gang members when he tried to intervene in order to save the deceased from the beatings. He identified the appellant as the person who hit him with a stone during the assault.

There was a police identification parade at which PW1 and PW3 identified the appellant as one of the participants in the assault. This evidence was, however, discounted by the learned trial Judge on the ground that the parade was improperly

conducted in that the appellant was the only participant out of ten men constituting the parade who had long hair which the two identifying witnesses described.

In his defence, the appellant denied the charge and raised an alibi. He stated that he went to his farm on the 8th of June, 2013 to check on his charcoal kiln with his wife and a child and returned to his house on the 10th of June; and that he was apprehended on the 28th June, 2013 at Green Park Night Club where he had a trading stand. When cross-examined, he narrated that while at the farm, he was assisted by one Patrick Kaumba and one Moses Chinyama to prepare the charcoal kiln, and that he left his wife at the farm when he returned to his house in Solwezi town. When asked why he did not tell the police officers who apprehended him that he was at the farm from 8th to 10th June, 2013; his answer was that he was at his house in Solwezi town on 9th June, 2013, but he had offered to take the police to a place called Muzabula to investigate his alibi because they could not drive to the farm and the people he was with at the farm had left for their homes. When asked to clarify what he meant, the appellant conceded that he did not give the names of the

people he was with at the farm to the police because the police officers merely asked him where he stayed, and he offered to take them to his home.

The learned trial Judge found as a fact that the appellant was properly identified by PW1 and PW3 at the scene of the crime despite the discounted evidence of the police identification parade which was conducted at the police station. She also found as a fact that the appellant took part in assaulting the deceased with a plank on the head and with stones all over his body leading to his death a day later. She also found as a fact that the use of the plank to the deceased's head was consistent with medical evidence shown in the postmortem examination report to the effect that the cause of death was a fractured skull. The learned trial Judge further found that PW1 and PW3 had no motive to falsely implicate the appellant; and that their strong evidence of identification discredited the appellant's alibi that he was not at the scene of the crime. It was also the trial Court's conclusion that the appellant's alibi, which was raised during his defence, was not only inconsistent, but was also a clear afterthought. Thus, it was found that the appellant and

his accomplices intended to kill the deceased or to cause grievous harm to him by the use of weapons.

The learned trial Judge placed reliance on the authority of this Court's decisions in the cases of **Chimbini vs. The People**[1] **and Ernest Mwaba and Others vs. The People**[2], which made pronouncements on identification evidence and on the criminal culpability of joint adventurers in a common scheme, and found the appellant guilty as charged. Thus, the appellant was convicted and sentenced to 30 years imprisonment with hard labour on account of extenuating circumstances. We will deal with the issue of the sentence separately from the grounds of appeal.

Dissatisfied with the conviction, the appellant launched his appeal in this Court advancing two grounds, as follows:

(1) The learned trial Court misdirected itself when it convicted the appellant based on identification evidence of PW1 and PW3.

(2) The trial Court misdirected itself when it convicted the appellant despite the dereliction of duty of the arresting officer when he neglected to investigate the appellant's alibi.

In support of the two grounds of appeal, the learned Senior Legal Aid Counsel filed written heads of argument on which she relied. In support of ground one, it was submitted that the attack on the deceased occurred under traumatic circumstances where PW1 and PW3 were equally threatened and PW3 was beaten. Considering that these two witnesses had never seen the assailants before, they could not be said to have had a good look at them as they only had a glimpse when they approached the assailants before they were chased from the scene. It was also argued that PW3 could not have had ample time to observe the faces of the assailants because he was hit on one of his arms which became paralyzed. PW3 was therefore clearly in pain and in a state of shock and could not have had the time to observe the assailants in spite of the clear visibility that prevailed. In support of this proposition, we were referred to the case of **Love Chipulu vs. The People**[3] where we stated that:

> **"Where the circumstances of an attack are traumatic and there is only a fleeting glimpse of an assailant, the fact that an appellant had been patronizing the same bar, as an accused for the past nine months does not render identification safe".**

Our attention was also drawn to what we said in the case of **Nyambe vs. The People**[4], that:

> **"There is perhaps no area in which there is a greater danger of honest mistake than in the area of identification, particularly, where the accused was not known to the witness prior to the occasion on which he is alleged to have been seen. The question is not one of credibility in the sense of truthfulness, but of reliability and the greater care should be taken to test the identification. It is not enough for the witness simply to say that the accused is the person who committed the offence. The witness should be asked to specify by what features or unusual marks if any, he alleges to recognize the accused, what was his built, what clothes he was wearing and so on. And the circumstances in which the accused was observed in the state of the light, the opportunity for observation, the stress of the moment, should be carefully canvassed".**

According to Ms. Chitupila, PW1 and PW3 did not specify what features or unusual marks helped them to identify the appellant; and what clothing the appellant wore on the material day. It was submitted that these two witnesses merely gave a general description that the appellant was dark in complexion with braided hair; which cannot rule out the possibility of an honest mistake.

It was further argued that the quality of identification in the present case was poor, and there was no other supporting evidence to show that the possibility of an honest mistake had been ruled out. In support of this proposition, the learned Senior Legal Aid

Counsel cited the cases of **Green Nikutisha and John Mwakishala vs. The People**[5] and **Fawaz and Chelelwa vs. The People**[6]. We do note that the rest of the appellant's arguments in the written heads of arguments dwelt on the evidence of the police identification parade. We find no value in recasting those arguments and their supporting case precedents, because the learned trial Judge expressly discounted the evidence of identification through the police identification parade on the ground that it was not properly constituted, as the appellant was the only participant who had very long hair.

In reply to the first ground of the appeal, Mr. Sikazwe equally relied on the authority of the cases of **Love Chipulu vs. The People**[3] and **Chimbini vs. The People**[1], as well as **Nyambe vs. The People**[4] which were all cited by the learned Senior Legal Aid Counsel. Mr. Sikazwe's counter argument was that this was not a case of fleeting glimpse because the attack took between 20 to 30 minutes in its duration, in broad daylight and in close proximity with the assailants. It was submitted that PW1 and PW3 had ample opportunity to observe the appellant at the scene of the crime; that

they did give a description of the appellant's complexion and his unusually long plaited hair. It was argued that the appellant's unusual description was the very reason why the evidence of identification from the police identification parade was discounted. We agree with Mr. Sikazwe. There is no evidence which suggests that this was a case of fleeting glimpse. Duration of 20 to 30 minutes cannot be said to have offered a fleeting glimpse to PW1 and PW3 who clearly were active participants in the daytime events that led to the deceased's death. They were both extensively cross-examined over their evidence of identification and they never failed the tests. They consistently gave answers which satisfied the trial Court, leading to the conclusion that their evidence of identification was clear and satisfactory beyond reasonable doubt; and, therefore that it did not require any corroboration or supporting evidence, as would be required of weak evidence of identification. We do not find any merit in the first ground of appeal.

The second ground of appeal alleged that there was dereliction of duty on the part of the investigating police officer who failed to investigate the appellant's alibi to the effect that he was not at the

scene of the crime as alleged. The respondent's counter-argument is that the appellant admitted during his examination that he did not give PW5 sufficient details for the alibi to be investigated; that he only gave the names of the people he was allegedly with during his defence. It was therefore submitted that the lower Court was on firm ground when it dismissed the suggested alibi.

The benchmarks of the defence of alibi have been settled in numerous decisions of this Court. One such decision is the case of **Nzala vs. The People**[7] which pronounced that:

> **"Where an accused person on apprehension or arrest puts forward an alibi and gives the police detailed information as to witnesses who could support that alibi, it is the duty of the police to negative it".**

In the present case the appellant admitted, on the record, that he did not put forward his alibi to the police at the time of apprehension or arrest; and, regarding the details of the alibi, he admitted that he did not provide the names to the police on apprehension. His explanation was that the police did not ask him to do so. Further, when tested on his alibi during examination at his trial, he first claimed that he was at his farm from 8th June, 2013 to attend to his charcoal kiln and returned to his home in

town on the 10th of June. When cross-examined, he said he was at his house in town on the 9th of June. Clearly, the appellant failed to give the police detailed information in support of his alleged alibi. We therefore, do not accept the argument that there was dereliction of duty by the arresting officer when he failed to investigate the appellant's alibi. We find no merit in the second ground of appeal. The net result is that both grounds of appeal have failed and we dismiss the appeal.

There is one more issue which we must quickly address in this case. The appellant was sentenced to 30 years imprisonment with hard labour on account of extenuating circumstances. This lesser sentence was preceded by a submission made by the appellant's Counsel, in mitigation, to the effect that the deceased had illegally erected a speed hump on the road making it impossible for the appellant and his friends to drive through the road. According to the learned Counsel, this may have provoked the appellant and his friends; even though the defence of provocation was not canvassed by the appellant. The trial Court was urged to consider this fact as an extenuating circumstance attracting a lesser sentence. The

learned trial Judge agreed with this submission and accepted that the offence was committed under extenuating circumstances. Hence the 30 year sentence. The learned Senior Legal Aid Counsel urged us to accept this finding. On the other hand, the learned Senior State Advocate argued that there were no extenuating circumstances in this case to warrant the departure from the mandatory sentence as provided under **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.** We agree with Mr. Sikazwe. In our considered view, the approach adopted by the learned trial Judge in determining the appellant's sentence was a complete misdirection because the appellant did not plead the defence of provocation, and, therefore, this defence was not an issue at the appellant's trial. This misdirection requires our intervention in the manner we did in the case of **Abedinegal Kapesh and Another vs. The People[8],** as the sentence of 30 years imprisonment is wrong at law and comes to us with a sense of shock.

We accordingly invoke this Court's inherent powers under **Section 15(4) of the Supreme Court Act, Chapter 25 of the Laws**

of Zambia and vacate the 30 year sentence and impose in its place the mandatory sentence of death. The appeal is dismissed and the sentence is increased in accordance with **Section 15(4) of the Supreme Court Act, Cap 25 of the Laws of Zambia.**

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE