IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 65/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JOSEPH KAYOMBO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS.
On 9th January 2018, 10th April, 2018 and 7th August, 2018.

For the Appellant: *Mr C. Siatwiinda, Legal Aid Counsel, Legal Aid Board.*

For the Respondents: *Mrs R. N. Khuzwayo Chief State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **David Zulu v The People (1977) ZR 151.**
2. **Ilunga Kabala and John Musefu v The People (1981) ZR 102.**
3. **Saluwema v The People (1965) ZR 4.**
4. **Jack Chanda and Kennedy Chanda v The People (2002) ZR 124.**
5. **Yokoniya Mwale v The People, S.C.Z. Appeal No. 205 of 2014.**
6. **Guardic Kameya Kavwama v The People, Appeal no. 84 of 2015.**

Legislation referred to:

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

The appellant was convicted by the High Court at Kitwe of one count of murder in that he, on the 4th January, 2014 at Kasempa, shot dead one Mailoni Nkombalume also known as Masuntu. He was sentenced to death. The appellant was initially jointly charged with Albert Mulunga and Lawrence Kaputula. The two were, however, discharged after a *nolle prosequi* was entered. The appeal is against both the conviction and sentence.

The conviction of the appellant was based on circumstantial evidence which established that the deceased was shot through the head and killed while in his hut on 4th January, 2014 around 21:00 hours at Saidini village in Kasempa. No one saw the person who shot the deceased. PW3 Joyce Saidini, a niece to the deceased who lived in the same homestead in the village heard three gunshots in the night around that time. Later, Police recovered three spent cartridges besides the deceased's body. Two bullet projectiles were also dug up from the floor of the hut beneath where the head of the deceased lay.

Other circumstantial evidence was that the appellant had earlier in the day on the 4th January, 2014, been in the company of a man called Jisomona of Kaminzekenzeke in Kasempa who was alleged to be the father of a child that was killed through suspected

witchcraft. Later, in the afternoon around 17:00 hours, the appellant visited the deceased on the pretext that he was a relative although they did not know each other. This was after he had made inquiries as to who the deceased was and where he lived from several people in the locality who included PW2, an acquaintance of the appellant of three years. The deceased, at the time, was recovering from a beating he had received at Jisomona's village in Kaminzekenzeke from the "moving coffin" of the child in a funeral procession called "kikondo". During this visit the appellant sat and chatted with the deceased in the latter's hut and was seen by PW3 and PW5 Felistus Muchanga.

Further circumstantial evidence was that on 20th January, 2014 the appellant was apprehended late in the night in a raid mounted by Police and Zambia Wildlife Authority (ZAWA) officers at a homestead in an area called Kandeke within Kasempa. A rifle and 17 rounds of ammunition were recovered from a nearby house to which the appellant led the Police in which Davison Lutoba reputed to be the owner of the homestead was sleeping. The appellant was later charged with the offence of being in unlawful possession of the firearm and ammunition and appeared in the

Kasempa Magistrate's Court where he admitted the charge and was convicted. He never appealed against the conviction.

The three spent bullet cartridges and the two projectiles recovered from the deceased's hut as well as the rifle and the 17 rounds of ammunition recovered from Davison Lutoba's house were later examined by a Police Forensic Ballistics Expert (PW9) at Lusaka. The expert testified orally and rendered a report in which she stated that the three empty cartridges, the two projectiles and the 17 rounds of ammunition which she found to be live were all of the 7.62mm calibre and that the rifle was a full automatic Alexander Kalashnikov rifle of the 1947 model (otherwise known by the acronym "AK47"), capable of loading, firing and ejecting cartridges (bullets) of the same 7.62mm calibre. She stated that after test firing two of the live ammunition (recovered at Kandeke) and comparing the spent cartridges and the projectiles recovered in the deceased's hut, she **"observed strong identical individual characteristics of the firing pin impression, ejector and projectile impression marks on both the exhibits which indicated that they were fired from the same firearm"**. She then opined that the AK47 rifle (in respect of which the appellant was convicted for being in possession of in the Subordinate Court)

was the same one that loaded, fired and ejected the three empty cartridges and projectiles picked from the scene of the crime. She concluded that the AK47 rifle and the 17 cartridges were dangerous military weapons capable of causing fear, injury or death to any animal or human target when challenged or fired upon. The foregoing was the circumstantial evidence.

The prosecution led evidence from PW1, PW2 and PW3 to show that the appellant's visit to the deceased in the afternoon of 4th January, 2014 was not innocent but in connection with allegations that the deceased had killed, through witchcraft, Jisomona's child in whose company he had been that same day. That Jisomona had hired the appellant to kill the deceased whom he paid money for the assignment

The prosecution also called PWs 6, 7, 8, 10 and 11, all of them police officers to establish that the firearm and the ammunition which were alleged to have been used to commit the crime were supplied by Albert Mulunga, a police officer based at Kasempa Police Station, who had been in charge of the Armoury. Another person connected to the supply of the firearm and ammunition was Lawrence Kaputula also known as "Shilole". These are the two former co-accused of the appellant.

Evidence was led from PW3 and her daughter PW5 also to show that after the appellant was apprehended he was taken back to Saidini village were in response to questions by the police he demonstrated how he returned to the village in the night, accessed the deceased's hut and shot him. An attempt to have self-incriminating statements allegedly made by the appellant admitted through the testimony of PW8 who led the raid on the homestead where the appellant was apprehended as well as that of PW12 who witnessed the postmortem conducted on the body of the deceased and PW13 the arresting officer were resisted by the defence and rejected by the court below after a trial-within-a-trial.

The appellant's defence was that on 4th January, 2014 he learnt from his wife about the deceased's illness which prompted him to visit the deceased. He did not know the deceased at all. He stated that after leaving the deceased he returned home. In the night around 04:00 hours, he travelled to Kitwe on a mission to collect bales of second hand clothing known as "salaula" and returned to Kasempa on 14th January, 2014. He said that when he was apprehended on 20th January, 2014 he did not even see the rifle until he was taken to the police station. He said Lawrence

Kaputula was a business associate while Albert Mulunga, the police officer, was only his good friend.

The appellant explained that his interaction with Jisomona was in connection with maize trading that they were doing; that he in fact gave Jisomona money to buy him maize. He denied having gone to look for the deceased in connection with allegations that he was a witch. He said also, contrary to what he had said earlier, that he was informed by the deceased's son that his father (the deceased) was sick.

The learned trial judge found that although no one saw the appellant shoot the deceased, there was ample circumstantial evidence and evidence of odd coincidences that it was the appellant who did so. The circumstantial evidence and odd coincidences were that the appellant had been together with Jisomona before the deceased was shot and they exchanged money; the appellant had been looking for the deceased whom he did not know and located him; the deceased was shot within a few hours after the appellant had visited him; the appellant was found in (constructive) possession of the AK47 rifle and ammunition in respect of which he was subsequently prosecuted in the Magistrate's Court and was convicted upon his own admission;

and that the deceased was killed by a bullet from an AK47 rifle. The trial judge drew an inference from the appellant's collaboration with Jisomona that he was hired to kill the deceased or that the duo being close friends had agreed that the deceased did not deserve to live because he was believed to have bewitched Jisomona's son. The learned judge did not believe the explanation that money exchanged was for maize; that in fact, there was no maize. She concluded that the rifle and the ammunition belonged to the appellant otherwise he could have told the police that it was for Davison Lutoba who should have explained to police where he got the items from; and also in the light of the admission of guilt in the Magistrate's Court. She assumed that the firearm and ammunition were supplied by Mulunga.

The learned judge found corroboration for the evidence of PW3 and PW5 who were related to the deceased in the evidence of the appellant as well as that of PW2 and PW8. The trial judge was satisfied that the danger of false implication and honest mistake were ruled out. She found malice aforethought present and convicted the appellant.

The appeal is on two grounds, namely: (1) that the trial court erred in law and fact when it found that there was ample

circumstantial evidence that it was the appellant who murdered the deceased without fairly evaluating the evidence before it and failing to find the appellant's explanation as being reasonably possible; and (2) that the trial court erred in law and fact by failing to find that there were extenuating circumstances and, therefore, should not have passed the death sentence.

It was submitted on behalf of the appellant in respect of ground one that while it is agreed that the evidence against him was circumstantial, the court failed to guard against drawing wrong inferences from the evidence and did not take into account that the explanations given by the appellant were logical and reasonably possible. Reliance was placed for the submission on the cases of **David Zulu v The People**[1], **Ilunga Kabala and John Musefu v The People**[2], and **Saluwema v The People**[3].

It was contended that the odd coincidences found by the trial court were ably explained by the appellant in his defence which the prosecution did not discredit or rebut. It was submitted that the appellant explained the purpose of his visit to the deceased on 4th January, 2014; that he had received information from his brother in marriage through his wife that the deceased was not feeling too well after being beaten in the kikondo procession. On

the relationship between the appellant and Jisomona, it was explained that the two were together because of the maize business and not that of going to kill someone. Further, that the AK47 rifle was found hidden under the bed in the house of Davison Lutoba and yet the state neglected to call this potential witness who was initially apprehended with him but later released. Further still, that his admission to the charge in the Magistrate's Court at Kasempa in relation to his alleged possession of the firearm and ammunition was on account of being beaten by police and the continued threat to beat him if he denied the offence; that the fact that his admission was not freely given is supported even by the finding by the trial court in the trial-within-a-trial before that court that the appellant was subjected to cruelty, intimidation, humiliation and oppression when he was taken to the police station (upon being apprehended) while handcuffed and almost naked.

On the issue that the ammunition might have been supplied by Mulunga, it was submitted that there was no evidence of that as the firearm and ammunition were not proved to belong to the Zambia Police Service. It was reiterated on the foregoing bases that the court below fell into error by dismissing the appellant's

explanations as lies when they were logical and reasonably possible.

Ground two was argued in the alternative. It was submitted to the effect that there was ample evidence of witchcraft accusation from the evidence of PW1 and PW2 that the appellant was one of the people sent to look for a witch called Masuntu. That there is evidence of witchcraft which is discernible on the record which should have been taken to amount to extenuating circumstances. The case of **Jack Chanda and Kennedy Chanda v The People**[4] was cited in which it was held, among others, that evidence of witchcraft accusation can amount to extenuating circumstances. We were urged to uphold the ground of appeal and quash the sentence of death and give any other sentence.

In response to the foregoing submissions, it was submitted on behalf of the respondent, in respect of ground one, that the court below did not err in convicting the appellant; that although the evidence was circumstantial, it was cogent and removed the prosecution's case from the realm of conjecture leaving only the irresistible inference that the appellant was guilty as determined, among other things, in the case of **David Zulu v The People**[1]. It was submitted that the court below properly and fairly evaluated

the evidence before convicting the appellant; that the evidence on record shows that the appellant had the opportunity to commit the offence using the firearm which he had; that he was in the proximity of the deceased on the fateful day.

It was submitted that the explanations on the odd coincidences by the appellant were not reasonable but that there was opportunity and the odd coincidences which linked the appellant to the offence. That it is the law that unexplained odd coincidences amount to supporting evidence and in this case the appellant tried but failed to reasonably explain the situations the lower court found to be odd coincidences. That the appellant's explanation for visiting the deceased cannot be reasonably true because they were not related or known to each other; the reason for the exchange of the K700 cannot be reasonably true as there was no evidence of maize being sold or bought by the appellant. Therefore, that the explanation that the appellant's presence in the village was not to kill the deceased cannot equally be reasonably true. Lastly, that the explanation that Mulunga was not the supplier of the (firearm and the) ammunition cannot also be reasonably true; that they had met on the fateful day and Mulunga was an Armourer at Kasempa Police Station where the evidence

showed that he had been involved in fraudulent drawing of arms and ammunition from the Armoury. That the lower court was on firm ground when it rejected the explanation given by the appellant.

We were urged to disregard the submission relating to the admission of guilt in the Magistrate's Court. It was pointed out that the appellant did not inform the Magistrate that he was beaten or threatened. Further, that the High Court's ruling after the trial-within-a-trial has no relationship to the admission in the Magistrate's Court. We were implored to confirm the lower court's acceptance of the evidence that the appellant readily admitted his guilt in the Magistrate's Court; that if the plea was equivocal the appellant would by now have appealed.

Turning to ground two, the submission was that there is no evidence that the appellant believed in the practice of kikondo; that he was not personally aggrieved by the death of Jisomona's child and had no excuse for avenging the child's death; that he did not even admit that he killed the deceased; that we should find in effect that the appellant was merely a hired assassin and cannot benefit from a principle that is meant to benefit ordinary members of the community in which the offence occurs. We were urged to dismiss

the second ground of appeal and ultimately the entire appeal and confirm the conviction and sentence.

We have considered the appeal along with the evidence adduced in the High Court, the judgment of the court and the submissions by counsel before us. The learned advocates are agreed in relation to ground one that the appellant was convicted on the basis of circumstantial evidence, as it were. In the case of **David Zulu v The People**[1] cited in this case the following guidelines were echoed concerning the approach to this type of evidence:

> **(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.**
>
> **(ii) It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial 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.**

In the case of **Ilunga Kabala and John Masefu v The People**[2] cited above we also held that-

> **It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.**

In the case of **Saluwema v The People**[3], however, we held that-

> **If the accuser's case is reasonably possible; although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.**

There is no dispute in this case that no one saw the person who shot the deceased to death. The question to resolve is whether the circumstantial evidence at the disposal of the court was so cogent as to allow the one and only inference that it is the appellant who shot and killed the deceased as found by the trial court.

It is clear from the judgment of the trial court that before making the impugned inference the learned judge took into account the totality of the evidence in this case which the court was entitled to do. We are satisfied that this evidence showed that the deceased was suspected of killing Jisomona's child through witchcraft, the reason for which he was assaulted during the kikondo funeral procession at Jisomona's village at Kaminzekenzeke. This evidence was given by PW3 who said in response to a question while being cross-examined that Mr Nkombalume had been beaten by the relatives of Jisomona's child who had died and she was never challenged on her assertion.

There is no dispute that earlier in the day on the 4th January, 2014 the appellant and the deceased were together. The appellant's explanation was that they were together because they were involved in maize trading in pursuit of which he gave Jisomona K700 to buy maize for him. We have considered whether this explanation is reasonably true. PW2's evidence was that he met the appellant at around 17:00 hours and he (appellant) told him that he had been sent by the chief in Kaminzekenzeke to look for a witch called Masuntu who was staying at Saidini village. This evidence was not challenged. It clearly shows that whatever else that he may have been doing, the appellant was on a mission to locate the deceased whom he was told was a witch. In these circumstances the explanation by the appellant that he was with Jisomona for the sole purpose of maize trading cannot be reasonably true.

As for the suggestion that the visit to the deceased was on the compassionate basis of seeing a sick relative, the appellant gave two conflicting accounts of how he learnt of the deceased's illness, one during his evidence in chief and the other when he was being cross-examined. His accounts as recorded in the evidence in defence were as follows:

> **On 4th January, 2014 I remember that my wife informed me that my brother in marriage had a father who had just fallen ill. My brother I mean the son to the late Musuntwe married a woman from the same family that I married from ... That person who was sick was Mr. Mailoni Musuntwe.**

And then

> **He had phoned me to say his father was sick. He told me that his father had just shifted to Kamusongolwa so as I was concerned and went to visit him. After visiting the deceased, I went back to Kasempa turn off.** (sic)

These accounts show that at first the appellant told the court below that he was told by his wife about the deceased's sickness. Secondly, he told the court that it was the deceased's son who told him about the deceased's condition. It is obvious that the appellant simply forgot what he had earlier told the court. In the face of this conflicting evidence and also in the light of the appellant's mission to locate the deceased, we agree that the explanation given by the appellant for his visit to the deceased cannot be said to have been reasonably true.

Other explanations made by the appellant related to Davison Lutoba in whose house the firearm and ammunition were found, that Lutoba should have been called as a witness for the State to shed light on why the firearm and the ammunition were found in his house and that failure to do so amounted to dereliction of duty

which should be resolved in favour of the appellant; that the admission to the charge of unlawful possession of the firearm and ammunition for which he was convicted should not be relied upon because he was threatened to be beaten and was in fact beaten by police as confirmed by the trial court's finding in the trial within a trial.

These explanations clearly have no substance in them. The fact is that the appellant admitted the charge in the Magistrate's Court and has never appealed against the conviction which is the proper mode of challenging the conviction. It is irregular that the appellant and his counsel should attempt to challenge a valid conviction in this way.

The evidence of PW3 and PW5 which was not challenged also confirmed that the appellant was taken by police to the deceased's hut where he demonstrated how he accessed and shot him dead. We agree that being related to the deceased, the evidence of PW3 and PW5 had to be approached with caution and the trial judge clearly was alive to this. We do not, however, agree that the evidence of PW3 and PW5 was corroborated by the appellant and PW2 and PW8. The evidence that needed to be corroborated was that relating to the allegations by both PW3 and PW5 that when

the appellant was taken to the deceased's homestead, he demonstrated how he got to the deceased's hut, accessed the deceased and shot him. The appellant, PW2 and PW8 cannot be said to have provided the corroborating evidence of those matters. The judge did not say how the three availed the corroboration. The appellant did not say anywhere that what PW3 and PW5 said about him after he was taken back to the deceased's homestead was true. PW2 and PW8 did not say anywhere in their testimony that they were present at the occasion and saw what the two witnesses were alleging. It is obvious that the learned judge approached the evidence of the two witnesses on the basis that she had to find corroboration for it before she could rely on it. In the recent case of **Yokoniya Mwale v The People[6],** we explained the treatment of the evidence of witnesses who are relatives or friends to the victim of a crime in the following manner-

> **A conviction will ... be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key is for the court to satisfy itself that there is no danger of false implication.**

And in the case of **Guardic Kameya Kavwama v The People[7]**, we said-

> **... there is no law which precludes a blood relation of the deceased from testifying for the prosecution. Evidence of a blood relation can be accepted if cogent enough to rule out any element of falsehood or bias.**

The learned trial judge did not have to go out of her way looking for evidence that corroborated the two witnesses. As we said in **Yokoniya Mwale**[6] what the court needs to satisfy itself of when dealing with the evidence of witnesses who are friends or relatives of the deceased, such as the two in this case, is that the witnesses cannot be said, on the evidence available, to have a bias or motive to falsely implicate the accused or any other interest of their own to serve. In a case in which corroborative evidence is readily available, however, there is no reason why the usual standard should not be applied. Otherwise it is sufficient to exercise caution in the manner explained.

For the reasons that we have given, we do not think that the evidence of the appellant, PW2 and PW8 was capable of corroborating the two witnesses' evidence in the case before us. At the same time, however, we see nothing in their or the whole of the evidence that suggests that they may have been biased or had motives to falsely implicate the appellant. It is notable that PW3 remained emphatic even during cross-examination that "it was

him who demonstrated what he had done to the deceased". For PW5 a response was elicited in cross-examination that the appellant "showed them the route he used when he came to our village and the one he used when he left and where he stood as he shot the deceased". The two witnesses were not dislodged from their positions.

In our considered view, the evidence of PW3 and PW5 coupled with the opinion of the forensic expert that the empty cartridges and bullet projectiles recovered in the deceased's hut were fired from the same firearm as the one for which the appellant was convicted of placed the appellant at the scene of the crime. We do not think that the omission by the prosecution to call Lutoba as a witness in the matter could lead to any other conclusion. Further, the appellant's explanation that he travelled to Kitwe to collect salaula around 04:00 hours on the 5th January, 2014 cannot avail him the defence of alibi because all it does is confirm that the appellant was within Kasempa at 21:00 hours when the fatal shots were fired. Further still, the defence of alibi is not available on the evidence because although he said that he was at his home with his wife at the material time, the weight of the circumstantial evidence is such that it excludes the defence.

As for the assumption that Mulunga, the police officer who had been in charge of the Armoury at Kasempa Police Station, supplied the firearm and ammunition to the appellant, we agree that the evidence adduced did not connect the firearm and ammunition recovered in the course of investigating the case to any of the ones Mulunda was suspected of nefariously handling.

Subject to what we have said above we are not able to fault the learned trial judge's eventual conclusion that the circumstantial evidence in this case was such that only one inference that the appellant is the one who shot and killed the deceased can be inferred from it. We are satisfied that on the evidence the learned trial judge was entitled to infer that Jisomona had hired the appellant to kill the deceased because of the accusation that he had killed the child through witchcraft. We do not agree with the alternative inference that the duo being close friends had agreed that the deceased did not deserve to live because he was believed to have bewitched Jisomona's son. There was no evidence that they were close friends or that they could have agreed in the manner stated. Notwithstanding, the circumstantial evidence adduced in this case and the odd coincidences were quite overwhelming and put the matter beyond

doubt that the appellant is the one who returned to the appellant's homestead in the night and shot the deceased point blank, killing him instantly. Ground one of the appeal cannot succeed and we dismiss it for want of merit.

Turning to ground two, we agree with the argument on behalf of the respondent that there were no extenuating circumstances in this case because there was no evidence that the appellant was influenced by belief in witchcraft or was connected or related to the deceased child. Indeed, what the evidence suggested and established was that he was not aggrieved but merely hired to kill the deceased who was suspected of killing Jisomona's child through witchcraft. Section 201(1) (b) of the **Penal Code** was clearly crafted to benefit a convict who is a member of the community in which the crime has occurred and there are facts which diminish morally the degree of guilt of the convict. The appellant cannot claim the benefit in the circumstances of this case. The second ground cannot succeed and we dismiss it as well.

All in all the entire appeal has collapsed. The conviction and sentence are upheld.

.....

G.S. PHIRI
SUPREME COURT JUDGE

.....

E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....

J. CHINYAMA
SUPREME COURT JUDGE