IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 001,002,003
HOLDEN AT NDOLA 004,005,006/2018
(Appellate Jurisdiction)

BETWEEN:

EVELYN MUSAMA	**1ST APPELLANT**
EVELYN CHIBALE MWAPE	**2ND APPELLANT**
GIFT CHAMATENTE CHIRIBAYA	**3RD APPELLANT**
KENNEDY KATONGO	**4TH APPELLANT**
BWALYA KATONGO	**5TH APPELLANT**
OSWARD KATONGO	**6TH APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Mulongoti, Sichinga and Ngulube JJA**
On 22nd May 2018 and 21st August 2018

For the Appellants: *Mrs. S.C. Lukwesa, Senior Legal Aid Counsel -Legal Aid Board*

For the Respondent: *Mrs. A. Kennedy Mwanza, Senior State Advocate-National Prosecutions Authority*

JUDGMENT

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. **Njovu v The People (2011)2ZR 358**

2. **Barrow and Young v The People (1966)ZR 43**
3. **Dorothy Mutale and another v The People (1997)S.J 51**
4. **George Musupi v The People (1978) ZR 271 (SC)**
5. **Simon Malambo Choka v The People (1978) ZR 243 (SC)**
6. **Machipisha Kombe v The People (2009) Z.R 282**
7. **Yokoniya Mwale v The People SCZ Appeal No. 285/2014**
8. **Francis Mayaba v The People SCZ Judgment No. 5/1999**

The appellants Evelyn Musama, Evelyn Chibale Mwape, Gift Chamatente Chiribaya, Kennedy Katongo, Bwalya Katongo and Osward Katongo were arraigned in the Kitwe High Court on one count of murder contrary to **section 200 of the Penal Code**. The particulars alleged that on the 30th day of December 2014, the appellants did murder Kalamba David Mwasha at Kitwe in the Kitwe District of the Copperbelt Province of Zambia.

The appellants pleaded not guilty and the matter proceeded to trial. After trial, they were convicted of murder and sentenced to death.

The evidence upon which they were convicted was that on 30th December, 2014 the deceased (David Mwasha) and his brother Joseph Chama (PW1) decided to go to David's plot located in

Ipusukilo township, to bury a ditch that was on the plot. PW1 also lived in Ipusukilo.

According to PW1 when the deceased was in the ditch, Evelyn Musama the 1st Appellant approached them and inquired as to what David was doing. David said it was his plot and he was burying the ditch. Evelyn Musama commanded David to stop what he was doing and leave immediately or else he would die. She insulted David and threw a stone at him while he was still in the ditch. Then she shouted ***"prostitute"!*** and her children the 2nd Appellant (also named Evelyn) and Gift (the 3rd appellant) came and started beating David.

Then David came out of the ditch and Evelyn Musama and her children continued beating him.

Later the Katongo siblings namely Kennedy Katongo(4th appellant), Bwalya Katongo (5th appellant) and Osward Katongo (6th appellant) who were coming from the police station at riverside where they had

dragged their father over differences regarding the plot in question, appeared on the scene and joined in the beating.

Kennedy Katongo got a hoe with which he wanted to strike the deceased but PW1 and others grabbed it from him. Then Kennedy Katongo and Oswald Katongo started beating PW1. At which point PW1 saw the deceased, (David), running to his (PW1's) house.

PW1 also ran away and when he got home he heard people shouting that his relative had been killed. He rushed outside and found David lying on the mat saying ***"Father forgive them they do not know what they are doing"***. They rushed to the police but unfortunately David died whilst at the police. PW1 was issued with a medical report for being assaulted by Kennedy Katongo and Osward Katongo for which they were each convicted and sentenced to three years imprisonment.

PW2 Mary Mwamba the sister to PW1 and David testified that on the fateful day, around 07:00 hrs, she was on her way to Kapoto

compound when she met a lady who told her that her brother was being chased by people who were shouting that he was a prostitute.

PW2 then decided to go to her brother PW1's home and upon arrival, she heard shouts of prostitute and she rushed to go and check only to find David seated at certain house looking dirty and tired. She called out his name but he did not respond.

People assisted her to lift him. They took him to PW1's house and later to the police station and hospital where he was pronounced dead.

When called upon to defend themselves all the appellants denied assaulting the deceased.

Evelyn Musama, the 1st appellant, testified that the deceased was alone when she questioned him at the ditch. She advised him to stop burying the ditch and to wait for Mr. Katongo, then her daughter the 2nd appellant came to the scene. Later Kennedy,

Bwalya and Osward Katongo (4th to 6th appellants) and other people appeared at the scene.

Kennedy Katongo told David to stop working on their plot but he refused. Kennedy Katongo grabbed David and ejected him from the plot.

According to the 1st appellant she only saw PW1 after the Katongo family appeared on the scene. She said no one assaulted David.

The 2nd appellant's testimony was similar to that of her mother Evelyn Musama.

According to the Gift Chamatente Chiribaya he saw two men at the ant hill (Plot) and told his mother Evelyn Musama about them. Then his mother and his sister the Evelyn Chibale Mwape went to talk to the two men. Then the Katongo family arrived at the scene. The 4th appellant grabbed a hoe from David and others grabbed a slasher from PW1. He (3rd appellant) rushed there with a plank then

the Kennedy Katongo grabbed David and removed him from the plot. There was no fight and no one was beaten.

When cross examined Gift Chamatente Charibaya testified that he had a plank because he was chopping firewood at the time.

DW4 a Crime Preventive Officer-Ipusukolo testified that he was on patrol when he heard noise and rushed to the house where the noise was coming from.

He found David trying to bury the ditch and he ordered him to leave then the 4th appellant grabbed David and pulled him out of the plot/house.

Later David returned to collect his hoe then children shouted thief! and then he (David) ran away. DW4 later learnt of David's death.

Kennedy Katongo testified of differences with their father over the anthill. They went to the police at riverside to find out about the plot/anthill. When they returned home, they saw David burying the

ditch at the anthill whilst Evelyn Musama and her daughter the 1st and 2nd appellant were asking him to stop. He too told him to stop but to no avail. He grabbed David's hoe and threw it. Then grabbed David, held him on his shoulder and removed him from the anthill. He took him to the roadside where he left him.

Then later the Crime Preventive Officer picked him and his siblings Bwalya and Osward Katongo. They were then charged for the murder of David.

Bwalya Katongo's testimony was the same as of that of Kennedy Katongo. Osward Katongo opted to remain silent.

After analysing the evidence, the trial Court found that both David and PW1 were at the anthill before the fracas as testified by Gift Chamatente Charibaya (the 3rd appellant). Furthermore, that the duo was confronted by Evelyn Musama and her daughter (2nd appellant) who queried their presence at the plot/anthill. This resulted in some physical altercations. Later Kennedy, Bwalya and

Osward Katongo appeared on the scene and joined in the assault of David and PW1.

The Judge accepted the testimony of PW1 in its entirety as he was corroborated by others and the post mortem report. The post mortem revealed the cause of death as intracranial haemorrhage with brain damage.

The trial Judge found that the injuries which were the cause of death were consistent with assault and that PW1 had positively identified all the accused as he knew them prior to the incident.

She reasoned that though PW1 and PW2 were related to David, they were not witnesses with an interest to serve in the circumstances of the case.

The trial Judge rejected the accused persons' version of events that they did not assault David. The case of **Njovu v The People**[1] was cited at page J21of the Judgment that ***"where there is evidence of assault followed by death without novus actus interveniens, a court is***

entitled to accept such evidence as an indication that the assault caused death."

She concluded that the appellants assaulted the deceased in a severe manner and thus had intentions to kill or cause grievous harm.

The appellants were convicted of murder and sentenced to death.

Discontented with the Judgment, the appellants have appealed to this court on the following grounds:

1. ***The learned trial Court erred in law and fact in convicting the appellants when the prosecution's case was not proved beyond all reasonable doubt.***
2. ***The learned trial Court erred in law and fact in convicting the appellants on the uncorroborated evidence of a relative to the deceased.***

In support of the two grounds, learned counsel for the appellants, Mrs. Lukwesa, also filed heads of argument. It is argued that the evidence from PW2's testimony shows that she saw a lot of people screaming ***'prostitute, prostitute'*** after leaving PW1's house; the noise PW2 heard came from the same

direction where the deceased David was. There is also evidence that both the David and PW1 ran from the place where the ditch was, even though PW1 alleged that he ran after being beaten. There is contrary evidence from PW3 who confirmed that DW4 (crime preventive officer) had told PW3 that no one beat up the deceased.

Therefore, two inferences could be drawn. The first being that the appellants beat the deceased David to death. The second is that David was actually beaten up by other people, especially the crowd which was found where he lay restless and dirty after shouts of thief and or prostitute accompanied by him running away. As to who shouted thief or prostitute, PW1 stated that it was Evelyn Musama (the 1st appellant). It is submitted that this evidence was not supported by any other witnesses. The rest of the witnesses both the prosecution (PW2) and defence witnesses refer to other people screaming thief or prostitute. According to counsel, we should find that it was unidentified people that were screaming prostitute or thief as this is the position favourable to

the appellants as guided by the case of **Barrow and Young v The People**[2].

And in the case of **Dorothy Mutale and another v The People**[3] where it was held that:

> ***"Where two or more inferences are possible, it has been always been a cardinal principle of criminal law that the court will adapt one, which is more favourable to an accused if there is nothing in the case to exclude such inference."***

It is learned counsel's view that in the present case the inference favourable to the appellants is that an unidentified group of people beat up the deceased and caused his death.

It is the further submission of counsel that the trial Court stated that DW4's mention of the children chasing the deceased had the implication that it was the children that beat up the deceased, is an assumption of the Court not supported by any evidence. DW4 clearly testified that he did not know what happened to the deceased or where he went and he only learnt that the deceased had died later on. The trial court believed that the appellants also

beat the deceased, and yet there was a high possibility of *novus actus interveniens* due to the presence of the crowd screaming prostitute where the deceased was and the crowd also found surrounding the deceased who was lying dirty and restless, more so that there was no evidence to show that any of the appellants were part of the crowd.

Furthermore, that the direct evidence with regard to who beat up the deceased came from PW1, his brother. There was contrary evidence by PW3 and defence witnesses that there were other people that were watching what was unfolding at the scene.

It is evident therefore, that there was also a crowd that could have possibly beat the deceased as they shouted prostitute and or thief. PW1 only implicated the people that the deceased had verbal differences with. Thus, the appellants' defence is reasonably possibly and casts doubt on the prosecution's case to warrant an acquittal.

Turning to ground two, it is argued PW1 whose testimony the trial Judge accepted, gave direct evidence which was not corroborated by any other independent testimony. DW4 an independent witness gave testimony which the trial court did not believe. The trial Court observed that, if indeed, DW4 did not see the appellants beat the deceased he should have notified the police accordingly, instead DW4 went ahead and apprehended the Katongo siblings (4th to 6th appellants.)

According to counsel, the reliance of the evidence of PW1's uncorroborated evidence fails to meet the standard set by the law that such a person should be treated as a suspect witness with an interest of his own to serve and their evidence should not be used to convict the appellants.

The case of **George Musupi v The People**[4] was relied upon that:

> "(iii) ***Once in the circumstances of the case it is reasonably possible that the witness has motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe."***

It is counsel's contention that PW1 being the brother to the deceased, who religiously escorted the deceased to various offices with regard to the piece of land and also went ahead to assist the deceased to go ahead to bury the ditch despite the chairman advising to the contrary as well as his act of beating up the 2nd appellant as she was being apprehended, places him in a category of witnesses that may have developed an ill motive to give false evidence and thus there is a danger of false implication in line with **George Musupi** case and the conviction cannot be said to be safe.

In addition, counsel was fortified by the decision in the case of **Simon Malambo Choka v The People**[5]which held that:

> ***"A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on evidence of the suspect witness."***

In the present case, the evidence on record does not show something more to remove the danger of false implication, neither is there corroboration of PW1's testimony to warrant a conviction of the appellants on PW1's testimony.

Mrs. Mwanza, the senior state advocate, who appeared for the respondent filed respondent's heads of argument. In respect to ground one, it is argued that the trial Court addressed its mind to the evidence on record and inevitably found that the prosecution had proved its case beyond all reasonable doubt. In the Judgment, the lower court gave reasons for the decision and provided specific points for determination. The lower court evidently addressed its mind to the appellants' defence and whether it raised any doubt. In enquiring into the issue the trial Court stated as follows at page J20 of the Judgment:

> ***"The second scenario as portrayed by the defence is that the deceased left the plot in good health as no one assaulted him. The suggestion by the defence that the deceased was assaulted by young children aged between 3-7 years who had chased him that he was a thief of a plot. I have considered this line of defence and find it to be untrue and an afterthought."***

The learned senior state advocate further pointed out that at page J21 the reasoning the trial Court adopted in addressing the issue of reasonable doubt and why the explanation by the appellants was found to be without merit, is clearly shown.

The trial Court assessed in detail the claim by each of the appellants. After analysis of the evidence, the trial Court concluded that the appellants failed to adduce evidence in support of their defence as observed in line 25 of page J20 that:

> ***"I do not therefore accept DW4's evidence that the deceased was chased by young children aged between 3-7 years and by implication that it was these children who beat up the deceased to death. I also do not accept the accused person's evidence that no assault took place at the plot. The truth of the matter is that the six accused persons beat up the deceased and he died shortly thereafter."***

This, it is contended, clearly shows that the trial Court made findings of fact which were supported by the evidence on record. The only inference that could be drawn from the evidence that was before the lower court was that the appellants beat up the deceased to death.

The 1st appellant, when crossed examined on how the events unfolded on that day, conceded that the deceased agitated her and that she raised her voice as they were arguing. The 5th appellant Bwalya Katongo also admitted, that they were angry when they found the decease at the anthill. The 3rd appellant equally shed some light on the mood at the scene when which he testified that he thought a fight had erupted and that he jumped from where he was with a plank in his hand. It is contended that none of the appellants dissociated themselves from the scene of crime. The 1st appellant clearly stated that they were nine of them with the deceased for about 20 minutes before the deceased ran away.

Counsel argued that it is therefore, implausible that people who were agitated, angry and most affected by the deceased's action and stood to lose would stand by, watch him, and exchange pleasantries for the entire 20 minutes.

In conclusion, it is submitted that the trial Judge drew the only reasonable inference of guilt after examining the evidence and

making a finding of fact which inevitably led her to convict the appellants. There was proof beyond reasonable doubt connecting the appellants to the commission of the offence.

Reliance was placed on the case of **Machipisha Kombe v The People**[6]that:

> ***"Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account...."***

In *casu,* it is odd that the deceased who was involved in an altercation with the appellants over a plot was shortly found badly beaten, which beatings led to his untimely death. It is inconceivable that people with no motive and nothing to lose could assault him, yet those with a motive merely watched him infuriate them for over 20 minutes. In counsel's view the appellant's explanation is an explanation which cannot be reasonably true and is, in this connection no explanation.

In ground two, it is contended that the lower court was aware of its duty and obligation to treat PW1's evidence with caution and the need to warn herself against any danger of false implication. Proof

of this analysis is found on pages J18 to J20 of the Judgment as follows:

> ***"I am satisfied that PW1 is a reliable witness and I find no motive whatsoever as to why he would falsely implicate the accused persons in this matter."***

The case of **Yokoniya Mwale v The People**[7] was cited as authority. And that in that case, in reference to the earlier authorities on the subject of witnesses with a possible interest to serve, the Supreme Court stated as follows:

> ***"We ought to however, stress, that these authorities did not establish, nor where they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than the near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This, in our view would be to severely circumscribe the criminal justice system by asphyxiating the courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may in particular circumstances ascertainable on evidence, have a bias or have an interest of***

their own to serve, or a motive to falsely implicate the accused. Once this was discernible and only in those circumstances, should the court treat those witnesses inthe manner we suggested in the Kambarage case."

According to counsel, in *casu*, nothing ascertainable on the evidence which places PW1 in the category of suspect witnesses. His evidence was clear and concise. If his intention was to implicate everyone who was at the scene of crime, he would have implicated Mr. James Katongo as well, since he was also present at the scene. PW1 merely told the Court what he saw. Gift Chamatente Charibaya confirmed that PW1 was at the scene and so did the Bwalya Katongo who categorically stated that PW1 was in a position to clearly see what was happening. Therefore, the lower court properly relied on the evidence of PW1.

The facts of the case as proffered by the evidence on record positively excludes the adoption of a less severe inference against the appellants.

We have considered the submissions by counsel and Judgment of the lower court.

The pertinent issue this appeal raises, in our view, is whether the appellants attacked the deceased with malice aforethought. Key to the issue is the question whether it is clear from the evidence as to which one of the appellants delivered the fatal blow that caused the injuries that led to the deceased's death?

We will consider the two grounds of appeal simultaneously.

We wish to state from the outset that we find no merit in the arguments by the appellants. As observed by Mrs. Mwanza, the appellants did not dispute being at the scene. They equally admitted that there was a quarrel over the plot in question, which David insisted was his. Gift Chamatente Charibaya testified that he was armed with a plank and they all alluded to the fact that the 4th appellant almost hit David with a hoe. PW1 was equally placed at the scene by the Gift Chamatente Charibaya who said he was the first to see David and PW1 at the said plot and alerted his mother the 1st appellant.

The Katongo brothers who arrived a little later also placed PW1 at the scene. It was not disputed that everyone was upset with David for being at the plot. Thus, PW1 cannot be said to be a witness with an interest to serve as elucidated in the case of **Yokoniya Mwale** case, supra. PW1 testified as to what he perceived at the scene. The defence witnesses placed him at the scene. They all testified about the quarrel over the plot. We find that the trial Judge was on firm ground when she rejected the appellants' version of events. From the evidence the people who were shouting thief or prostitute were children aged 3-7. The trial Judge considered this evidence. She rejected it on the basis that there was no evidence that PW2 found the children beating the deceased. Instead PW2 found the deceased seated at a certain house and already beaten, hence the sitting down. Additionally, the trial Judge found that this defence was an afterthought as both the deceased and PW1 were assaulted at the scene.

We are of the considered view that the trial Judge properly reasoned and analysed the evidence. She was on firm ground that there was no intervening act from the time that the appellants assaulted the

deceased to when he died. Her findings of fact were in this regard supported by the evidence on record. All the appellants were at the scene, and quarrelled with the deceased over the plot. These facts were acknowledged by the appellants. Kennedy Katongo almost struck the deceased with a hoe and dragged him out of the plot. The 1st and 2nd appellants were the first to quarrel with David. The Judge accepted, rightly so, the testimony of PW1 that the 1st appellant hit the deceased with a stone. Then her children (the 2nd and 3rd appellants) joined her in assaulting David and eventually the Katongo siblings. We cannot fault the trial Judge for the findings she made.

However, we are inclined to interfere with the conviction of murder. In the case of **Francis Mayaba v The People**[8] the Supreme Court guided that:

> ***"In a case of mob instant justice and where there is no evidence to show who delivered the fatal blow that caused the injuries that led to death, the conviction should be of manslaughter and not murder.***

In *casu*, it is unclear as to who delivered the fatal blow that caused the injuries that led to the deceased's death. Guided by **Francis Mayaba** case, we quash the conviction for murder and substitute it with that for manslaughter.

It follows that we must interfere with the sentence of death, having substituted the murder conviction with manslaughter. We therefore, set aside the death sentence, and substitute it with custodial sentences of 20 years imprisonment with hard labour for the 3rd, 4th, 5th and 6th appellants. The 1st and 2nd appellants to serve the 20 years with simple imprisonment.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE