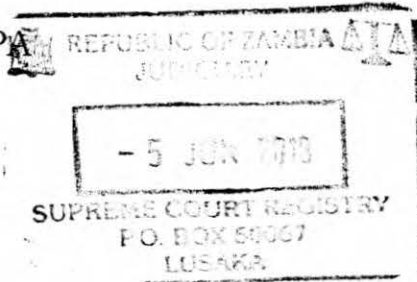


IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO. 79/2017
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

RABAN MWENI KOPA



APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Hamaundu, Kaoma and Kajimanga, JJS

On 10th April 2018 and 5th June, 2018

For Appellant: Ms. M.K. Liswaniso-Legal Aid Counsel

For Respondent: Mrs. M.K. Chitundu-Deputy Chief State Advocate

J U D G M E N T

KAOMA, JS delivered the Judgment of the Court.

Cases referred to:

1. **Shawaz Fawaz and Prosper Chelelwa v The People (1995-97) Z.R.**
2. **Nondo v Director of Public Prosecutions (1968) Z.R. 83 (C.A)**
3. **David Zulu v The People (1977) Z.R. 151 (S.C.)**
4. **Mwiya And Ikweti v The People (1968) ZR 53**
5. **Ilunga Kabala and John Masefu v The People (1981) ZR 102**
6. **The People v John Nguni (1977) ZR 376**
7. **Sinyama v The People (1993-1994) ZR 16**
8. **Bwanausi v The People (1976) ZR 103**

Statutes referred to:

1. **Penal Code, Cap 87, section 200**
2. **Criminal Procedure Code, Cap 88, section 204 (b) and (c)**

The appellant was convicted by the High Court at Mansa of the murder of five members of one family on or about 21st December 2014 at Samfya in Luapula Province and was sentenced to death.

The undisputed facts as is relevant to this appeal were that on 21st December, 2014 around 16:00hours, the appellant was drinking home brewed beer with late Robinson Chibesa, PW1 and other people at the house of PW2 in Lembo village in Samfya. The appellant differed with Robinson Chibesa and a fight erupted between them but PW1 and other people managed to stop the fight. The evidence showed that the appellant was the aggressor.

Thereafter, the appellant was heard by PW2, outside her house say that for him whoever provoked him, the fight did not end and that that day he was going to blow some explosives. The appellant then went to PW4's shop across the road and bought two boxes of matches known as 'elephant'. This was around 17:00hours.

Later that night, a fire burnt down Robinson Chibesa's house as he slept with his wife and three children. They all suffered third degree burns in the fire. Concerned villagers who broke down a portion of the wall rescued them from the burning house. Sadly,

Robinson Chibesa and two of the children died that day while his wife Eunice and son Robby were admitted to Mansa hospital.

PW7 visited the crime scene the next day. He found the burnt bodies of Robinson Chibesa, Musonda Chibesa and Theresa Chibesa. He carefully searched the scene for any clue of what could have caused the fire. He found a used matchstick near the entrance to the house and a box of matches about seven metres away. He also learnt that Robinson Chibesa had earlier fought with the appellant at a drinking place but he failed to find the appellant because he had gone into hiding in the bush. He advised relatives to bury the bodies in marked graves and left word with the villagers, to apprehend the appellant if seen and surrender him to the police.

Later, PW3 and his wife (a sister to the appellant) were told by their children that the appellant had asked for some food as he was hungry. They prepared food for him so that they could apprehend him. PW3 called the appellant from the bush and alerted other villagers so that they could assist to apprehend the appellant.

Whilst the appellant was eating in the house, PW3 called out to him, asking if he had finished so that they could take him to the police. The appellant came out with a plate of nshima and

threatened to hit PW3 with it, even as he attempted to run away. PW3 grabbed him but he slipped out of his leather jacket, leaving it in PW3's hands. However, the villagers managed to apprehend him. A box of matches was found in his jacket. He was handed over to the police together with the jacket and the box of matches.

The next day, PW7 collected the appellant from Mwewa Police Post and had him detained in the cells at Samfya Police Station between 19:00hours and 20:00hours. An hour before that, PW6 had been detained in the same cells for a traffic offence. He had found three other detainees in the cells.

According to PW6, it was customary for a new detainee to explain to others why he was being detained. Thus, the young man that was detained after PW6, narrated that he was from Ng'umbo area. He had used a matchstick to set fire at the entrance, and at a corner of a house of a man he had differed with at a drinking place. He then stood at a distance to observe the events. When he heard the occupants of the house screaming and he saw many people gather at the burning house, he ran away. PW6 revealed that it was dark in the police cells because there was no light, and so he did not see the face of the young man, but he heard his narration.

After the appellant's detention, Robby Chibesa also died. His body was taken to Mwewa. Afterward, the bodies of the other three deceased were exhumed. Postmortems conducted on the four bodies, confirmed that they all died from the burns.

Next, PW7 visited Eunice Chibesa in hospital. She disclosed that her husband had told her of the fight he had with the appellant and the threats. That night, she woke up to a house full of smoke. She heard a voice she identified as that of the appellant saying; **“if you are a champion, wake up and come out to fight with me.”** Sadly, Eunice also died on 12th January, 2015. A postmortem conducted on her body revealed that she too died from the burns.

In his defence, the appellant denied uttering threats against Robinson Chibesa or setting fire to his house. He claimed his uncle told him about the fire the following morning. Fearing lynching by villagers, he immediately ran away from home with his uncle and their children and all his property. He said he ran away because he was innocent. He conceded that PW6's testimony was true.

There was no dispute in the court below that no one saw the appellant set fire to the house in issue. The question the court had to resolve, from the circumstantial evidence before it, was whether

the appellant, set fire to the house as alleged by the prosecution or the fire started from within the house, as claimed by the defence.

According to the court below, the evidence of PWs 1, 2, 4, 6 and 7 connected the appellant to the allegation. For convenience, the court first dealt with the evidence of PW6. The court observed that PW6 was detained for a traffic offence, which had no bearing on the offence the appellant was charged with; that PW6 did not know the appellant prior to that date; and that this was clearly a chance meeting in the darkness of the police cells. The court also found no motive for PW6 to concoct a story, merely to implicate the appellant, with whom he had not differed, particularly, that the appellant had admitted PW6's evidence as true.

Based on the foregoing, the court accepted the testimony of PW6 and found that the person who confessed to committing the offence, was the appellant who came from Samfya and took judicial notice of the fact that the common dialect in Samfya District, including Mwewa Chiefdom, is Ng'umbo.

The court also considered 'odd coincidences', which were not explained by the defence, namely: (1) PW6's evidence that the appellant confessed that he had quarreled and fought with the

deceased at a drinking place was confirmed by PWs 1 and 2. (2) The appellant was heard by PW2 uttering reprisals and threats against Robinson Chibesa. (3) PW2 saw the appellant buying matches in the shop across the road and PW4 confirmed that the appellant bought two boxes of matches known as 'elephant' from his shop. (4) PW7 recovered a used matchstick and box of matches, about seven metres from the burnt house during his investigations at the scene, whose brand was 'elephant', the same brand PW4 sold to the appellant. (5) When PW7 tried to follow up the matter with the appellant, he discovered that he had gone into hiding in the bush. The reason the appellant gave was that he feared reprisals from the villagers, but he did not explain why from all the residents of the village, villagers should single him out for reprisals. (6) When the appellant was lured from the bush with food, he tried to run away leaving behind his leather jacket where a box of matches was found. (7) No explanation was given by the appellant why his own relatives would, for no apparent reason, be in the forefront of ensuring that he was apprehended and brought to justice.

The court found the evidence overwhelming and concluded that the only reasonable inference that could possibly be drawn

from the evidence in the circumstances was that it was the appellant who set fire to the house in which the deceased were sleeping. The court found that setting fire to the house was a felony and that the appellant knew or ought to have known that he would cause grievous harm to the people who were sleeping inside. The court also found malice aforethought in terms of **section 204 (b) and (c) of the Criminal Procedure Code, Cap 88** established.

Finally, the court found that it was the appellant's guilt knowledge of what he had done, that sent him into hiding; and that this was the only reason he feared reprisals from the villagers. As a final point, the court found the appellant guilty of murder on all the five counts and gave him the ultimate penalty of death.

Aggrieved by the decision, the appellant has appealed against both conviction and sentence advancing two grounds as follows:

- 1. The trial Judge erred in law and fact when she accepted PW6's evidence that the appellant confessed to having set on fire the house of Robinson Chibesa resulting in his death and four other members of his family.**
- 2. The Judge erred in law and fact when she held that the only reasonable inference that could be drawn from the circumstances was that the appellant set fire to the house the deceased persons herein were sleeping in.**

In ground 1, the gist of the arguments by counsel for the appellant is that the trial judge erred in accepting the evidence of PW6 and making a finding that the person who confessed to committing the offence was the appellant who came from Samfya.

In support of this argument, counsel cited the following matters: (1) PW6 found three people in the police cells. Since it was dark, he was unable to identify them. (2) PW6 did not tell the court where the three people had come from or the offences they were charged with. (3) When the young man from Ng'umbo was taken to the cells, PW6 was unable to see his face as it was dark. Therefore, it could be inferred that the person who confessed was any of them. (4) No evidence was adduced by the State to confirm that PW6 was in custody the night the alleged confession was made nor did PW6 produce the receipt he got after paying the fine to the police.

Counsel for the appellant quoted the case of **Shawaz Fawaz and another v The People**¹ where it was stated that it is not sufficient for the trial court to find that the prosecution witness probably spoke the truth; and that the evidence of the witness must be accepted beyond reasonable doubt. He argued that it was not sufficient for the court to find that PW6 probably spoke the truth.

Counsel further referred us to the appellant's reply at page 77 of the record that, the evidence PW6 was giving in court was true, and argued that this did not amount to a confession as the question put to him was very broad and general, it did not specify facts of what PW6 had said, and no name was mentioned. Hence, the appellant could not be taken to have known the meaning of PW6.

In ground 2, the substance of the appellant's argument is that the respondent did not adduce any evidence to disprove accidental fire or to prove that the house had been burnt by an intentional and malicious act. It was submitted that no witnesses were called to testify that the deceased had put out their cooking fires; and that no evidence was adduced to show that there were no grass fires from which sparks might come. The case of **Nondo v Director of Public Prosecutions**² was cited as authority for this argument.

It was also argued that the fact that the appellant went into hiding did not prove that he was running away because he was guilty. That the explanation he gave was a reasonable explanation in the circumstances; and an inference of guilt was not the only one that could be drawn from the circumstantial evidence which did not satisfy the test laid down in the case of **David Zulu v The People**³.

The State mounted a joint response to the grounds of appeal. According to the learned State Advocate, the only issue to be resolved in this appeal is who set fire to the house? In the main, counsel supported the trial court's findings of fact and conclusions and the 'odd coincidences' which the court found were not explained by the appellant. It was argued that the appellant did not suggest any motive on the part of PW6 to implicate him falsely. That to the contrary, the appellant admitted the evidence of PW6.

On the appellant's argument that the person who confessed could have been anyone of the three other people in the cells, it was submitted first, that there was no other place where five people were burnt on the fateful night apart from the area the appellant came from. Second, that the appellant did not refute PW6's allegation that it was he, who confessed while in the cells. Third, that the appellant admitted that he was put in the cells at Samfya police station on the evening of 23rd December, 2014. The case of **Mwiya and Ikweti v The People**⁴ quoted by the learned State Advocate in the court below was again relied on. The relevant part of the obiter remarks by Doyle, J.A. (as he then was) were quoted in the judgment of the court below at page 98 of the record of appeal.

The kernel of the arguments on this point is that it was up to the appellant to deny that he made the confession in the cells, considering that he was legally represented throughout his trial.

According to the State Advocate, though this case hinges on circumstantial evidence, there was direct evidence from PWs 1 and 2, which in part was confirmed by PW4. Further, that PW6's testimony was consistent with that of PW7, who recovered a used matchstick and a matchbox near the burnt house whose brand, was 'elephant', the same type PW4 said he sold to the appellant. It was argued that on his apprehension, the appellant was found with only one box of matches when he had bought two boxes because the other box dropped at the scene where he had lit the house.

It was also argued that it was not a mere coincidence that after the appellant made threats against Robinson Chibesa, his house was burnt down and he and his family were burnt to death and the appellant offered no reasonable explanation in his defence. To support this argument, counsel cited the case of **Ilunga Kabala and John Masefu v The People**⁵ where it was held that odd coincidences, if unexplained might be supporting evidence and that

an explanation, which cannot reasonably be true, is in this connection no explanation.

Counsel further referred us to the statement that was made to PW7 by Eunice Chibesa while she was in hospital. In this regard, counsel cited the cases of **The People v John Nguni**⁶ and **Sinyama v The People**⁷, which dealt with the circumstances in which evidence of a statement made by a person who is not called as a witness may be admitted as part of res gestae.

In conclusion, it was submitted that the circumstantial evidence available to the court satisfied the test laid down in the case of **David Zulu v The People**³. Reference was also made to the case of **Bwanausi v The People**⁸ where it was held that where a conclusion is based purely on inference, that inference may be drawn if it is the only reasonable inference on the evidence.

We have carefully considered the evidence on record, the judgment appealed against and the arguments by counsel on both sides. As submitted by the learned State Advocate, the question the court below had to determine was who set fire to the house in which the five deceased persons were sleeping?

In ground 1, the appellant is contending that the court below erred when it accepted PW6's evidence that he confessed to having set fire to the house resulting in the death of Robinson Chibesa and his family. We have perused the record of proceedings in the court below, particularly at pages 75 to 79. We have seen the questions put to the appellant in cross-examination regarding the evidence of PW6 and his reply thereto. The relevant part of the record reads:

Q. Witness, just confirm to the court that you were detained at Samfya Police?

A. Yes my Lady.

Q. Confirm to the court again that it was around 19:30 thereabout when you were detained on the 23rd?

A. Yes my Lady.

Q. Witness just also confirm that the evidence that PW6 was giving in court is true?

A. It was true my Lady.

It is true from the above passage that PW6 was not mentioned by name during the cross-examination of the appellant. However, this aspect of the matter was not an issue in the court below. As submitted by the State Advocate, counsel throughout the trial represented the appellant. If counsel thought the question put to his client was broad and general or if the appellant did not know whom PW6 was, counsel ought to have objected but he did not.

It was also the duty of defence counsel to clarify issues raised in cross-examination, when re-examining the appellant. The fact that he did not, meant that the appellant understood the questions put to him and confirmed as true what PW6 had said in court.

Further, the fact that PW6 did not see the face of the young man from Ng'umbo who confessed to the crime was not in dispute. Again as submitted by the respondent and as put by Doyle, J.A. in his obiter remarks in the case of **Mwiya and Ikweti v The People**⁴, the issue of whether or not the appellant made a 'confession' in the police cells, was a question of fact. It was open to the appellant to deny that he made the statement alluded to by PW6 but he did not, despite that he was legally represented.

In addition, the contention by the appellant that PW6 did not tell the court where the three people he found in the police cells came from, or why they were detained and the argument that PW6 did not produce the receipt he was given after he paid the amount he was charged were not in issue in this case. What is more, it was never disputed by the defence that PW6 was detained in the police cells on 23rd December, 2014 or that he heard the narration by the young man from Ng'umbo though he did not see his face.

The court below analysed the evidence before it and found no motive for PW6 to concoct a story merely to implicate the appellant, with whom he had not differed. In contrast, the court found that the appellant admitted the evidence of PW6 which was unchallenged.

In the event, we find no basis on which to upset the findings of fact and the conclusions made by the court below which gave cogent reasons for believing the evidence of PW6 and finding that the person who confessed to the crime was the appellant who came from Samfya . Therefore, we find no merit in ground 1.

In ground 2, the grievance by the appellant is that the court should not have held that the only reasonable inference that could be drawn from the circumstances was that he set fire to the house.

We have perused the case of **Nondo v Director of Public Prosecutions**². In that case, the appellant was convicted of arson. He had quarreled with his father-in-law when the latter returned his wife's dowry and told him that the marriage was ended. The appellant got angry and threatened to burn down his father-in-law's house. That evening the father-in-law's house caught fire and the evidence, which, the court accepted was that the appellant, was seen standing near the house some twenty paces away and when a

shout was raised, he ran away. The Court of Appeal emphasised that when the prosecution fails to put forward eyewitness proof to the effect that the accused set the fire in question, it must disprove “any possibility” of accidental fire.

In this case, there was no eyewitness proof to the effect that the appellant set the fire to the house. There was also evidence that the house was not electrified and that the family was using firewood as a source of light. Nonetheless, the current case is distinguishable from the above quoted case because here there was the unchallenged evidence of PW6, which we have alluded to, which the court accepted and the numerous ‘odd coincidences’ which supported PW6’s evidence of the appellant’s ‘confession’ in the cells.

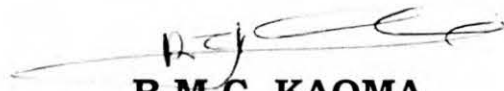
We agree with the court below that, there was strong circumstantial evidence, that the house was set on fire from outside, whilst the deceased were asleep inside. The possibility of accidental fire was disproved and there can be no doubt that the act of setting fire to the house was intentional and malicious. There was no need for the court, to refer even, to the statement made by Eunice Chibesa to PW7. The circumstantial evidence on record could lead only to an inference of guilt. Ground 2 must also fail.

As to the appeal against sentence, the appellant killed an entire family, all because of a quarrel he had with Robinson Chibesa, which he in fact provoked. He deserved the death penalty and he does not deserve parole or pardon.

The appeal fails on both conviction and sentence and we dismiss it.



E.M HAMAUNDU
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE