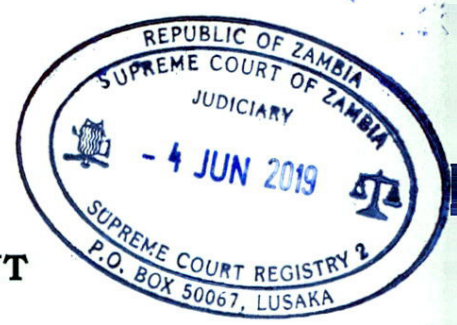
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

Appeal No. 34/2018



B E T W E E N:

SYDNEY KASWEKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Chinyama, JJS**
on 7th May, 2019 and 4th June, 2019

For the Appellant: Mrs. M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. K.I. Waluzimba, Senior State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Alimon Njovu and Felix T. Njovu vs. The People (1988/89) Z.R. 5**

The appellant was convicted of the offence of murder and sentenced to suffer the death penalty.

The facts established that on the 8th May, 2013 the deceased who was a minibus driver picked up two female passengers (PW1 and PW2) at a bus station within Kanyama Compound. The deceased knew the two women and agreed to drop them at Kanyama Clinic free of charge. Before they could proceed, a call boy arrived on the scene and demanded to be given a one kwacha loading fee. The deceased explained to him that he was dropping the two women free of charge at the clinic but this incensed the call boy who attacked the conductor forcing him to run away. The call-boy then turned to the deceased and started insulting him but the deceased did not retaliate and continued driving slowly. Suddenly, the call-boy appeared armed with a brick and hit the deceased on the head. The deceased lost consciousness and the vehicle careered off the road and went and hit into a house and toilet. The deceased was seriously injured and with the help of other minibus drivers he was rushed to the hospital together with his passengers. Unfortunately, the deceased died two days later.

The appellant was apprehended and charged with the murder of the deceased and at trial elected to remain silent. Suffice to state

that during trial, Counsel for the appellant in cross-examination of the arresting officer (PW4) brought out incriminating evidence against his client which evidence was contained in the warn and caution statement recorded from the appellant.

The issue before the trial judge was one of identification of the call-boy because an identification parade was not conducted by the police yet the appellant was identified during trial as the call-boy that hit the deceased with the brick on the material day. In the words of the learned trial judge, the courtroom identification was valueless. It was not in dispute that none of the eye witnesses knew the call-boy before. The learned trial judge found that the connecting link lay in the evidence contained in the warn and caution statement given by the appellant to the police. Although the warn and caution statement was not admitted in evidence, Counsel for the appellant in the court below in cross-examination brought out evidence which placed the appellant at the scene of crime.

Against the testimony of the three witnesses, the learned judge found that the appellant was the aggressor and that he was not

provoked or threatened by the deceased. He convicted him as charged and sentenced him to death.

In arguing the appeal, Mrs. Liswaniso learned Counsel for the appellant raised two grounds of appeal. Ground one was couched in the following terms:

1. ***The learned trial judge was on firm ground when he found as a fact that the evidence identifying the appellant as being the call boy that hit the deceased was very weak.***

At the hearing of the appeal, Mrs. Liswaniso opted to amend the above ground of appeal after it was pointed out to her that it was a finding made by the learned trial judge in his judgment. We allowed the application with no objection from her learned friend Mr. Waluzimba and she proceeded to amend ground one as follows:

1. ***The learned trial judge erred in law and fact when he convicted the appellant having found that the evidence of identification of the appellant was very weak.***

We must point out that having amended ground one of the appeal, it would have been prudent for Mrs. Liswaniso to also file fresh arguments to support the amended ground. As things stand

we find that the arguments in support of ground one are not in tandem with the amended ground of appeal.

On behalf of the respondent, Mr. Waluzimba the learned Senior State Advocate filed his heads of argument in response. We note that his arguments in response to ground one relate to the original ground one of the appeal and not to the amended ground one. Consequently, his response was rather disjointed probably because the original ground one (which we have reproduced above) is clearly not a ground of appeal. We found it difficult to relate his arguments to the amended ground one of the appeal.

In view of the confusion, ground one must fail and we dismiss it.

The second ground was couched as follows:

2. **The learned trial judge erred in law and in fact by holding that the incident that the prosecution witnesses testified to in this case was one and the same incident as the one described by the appellant in his statement to the police which statement was introduced into evidence by the appellant through his counsel.**

The issue in contention is that the trial court was only supposed to consider the specific portions of the appellant's warn and caution statement that PW4 was specifically referred to and the answers given. It was argued that the conviction of the appellant on a charge of murder based on his warn and caution statement to the police was unsafe.

Further, Counsel contended that the appellant may have been wrongly tried for killing another person. This is because PW4 the investigating officer kept referring to the deceased as Nickson Mwale or Nickson Masa yet the postmortem examination report referred to the deceased as Nickson Masasa.

Alternatively, we were invited to consider the warn and caution statement and take note of the mitigating factors namely: that the appellant had picked a quarrel with the deceased and that he was the one who stoned the appellant. In support of this argument, we were referred to the case of **Alimon Njovu and Felix T. Njovu vs. The People**[1] where we held that when an accused's confession is used against him, the mitigating factors mentioned in

the confession should weigh in his favour unless such factors are specifically disproved.

In response, Mr. Waluzimba in his filed heads of argument submitted that the learned trial judge did not err when he found that the incident described by PW1 and PW2 were one and the same incident. He contended that the appellant's conviction was based on the identification of PW1, PW2 and PW3 which evidence was supported by evidence from portions of the warn and caution statement of the appellant which was introduced in evidence by his own Counsel in the court below in cross examination of the arresting officer.

In relation to the mix-up in the names of the deceased, it was submitted that the evidence on record shows that the arresting officer charged the appellant with the murder of Nickson Masasa. That although the arresting officer referred to the deceased as Nickson Masa, he corrected himself. That it is not possible that the appellant was tried for the murder of another person. It was submitted that the information which was read out to the appellant

referred to the deceased as Nickson Masasa and the postmortem report produced in the court below was for Nickson Masasa.

Mr. Waluzimba rejected the alternative argument that the appellant be found guilty of the offence of manslaughter on ground that the evidence on record shows that he was the aggressor without provocation; that although the appellant insulted the deceased he did not retaliate but attacked him with a brick causing serious injuries leading to the death of the deceased. It was submitted that there are no mitigating factors in this case and the appellant cannot be found guilty of manslaughter in view of the circumstances of this case as described by the three eye witnesses. Counsel prayed that we dismiss the appeal and uphold the conviction and sentence.

We have considered the arguments by Counsel for the parties. The issue for our determination is whether the learned trial judge was wrong to consider the incriminating evidence brought out by Counsel for the appellant in the court below as he cross-examined the arresting officer. Mrs. Liswaniso's argument is that the learned trial judge erred in holding that the incident referred to by the eye

witnesses was one and the same incident described by the appellant in his warn and caution statement. She insisted that the trial court should have based its decision on the specific portions in the warn and caution statement referred to by his Counsel.

We have considered the arguments on this ground. The record speaks for itself. We find it necessary to produce an excerpt of the judgment of the lower court and this is what was stated:

> **"The other witnesses, PW1 to PW3 all gave courtroom identification of the accused as being the call-boy. I need not restate the principle that courtroom identification is valueless. There was no evidence of how the accused came to be apprehended. In this case, none of the witnesses said that they had known the call-boy before. Therefore, the identification of the accused was not a mere case of recognition. There was need, therefore, to adduce evidence as to how the accused came to be linked to the call-boy. In this regard, when the accused was apprehended, there was need for the witnesses to identify him at an identification parade. As matters stand, the evidence identifying the accused as being the call-boy that hit the deceased is very weak.**
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> **The question now therefore is, is there any other evidence that links the accused to this offence? To answer that question I have examined the arresting officer's evidence, especially in cross-examination. During cross-examination of this witness, Counsel for the accused introduced into the evidence, the statement which the**

accused made to the police. A portion of that cross-examination reads as follows:

Q: And witness it is also correct that you recorded a warn and caution statement from the accused?
A: Yes I did

Q: And it is correct that in that statement the accused explained to you that he had picked up a quarrel from Nickson Masasa? (sic)
A: He didn't my Lord

Q: My Lord I beg leave of court to refer this witness to the accused person's statement which is on record. It says the statement was recorded on 22nd of May, 2013, it is listed in the deposition, my Lord

Counsel for the accused then went on to refer the witness and the court to some passages in that statement. The description of the incident given by the accused in that statement matches in a material particular with the incident described by the prosecution witnesses in this case. Therefore, I am satisfied that the incident that the witnesses testified to in this case is one and the same incident as the one described by the accused in his statement to the police which was introduced into evidence by the accused himself, through his Counsel. Consequently, I further find as a fact that the accused is the call-boy that hit the deceased with a brick."

In our view, the learned trial judge cannot be faulted in that he was specific in his judgment – that he addressed his mind to the "arresting officer's evidence, especially in cross-examination". It was not in dispute that a warn and caution statement was recorded

from the appellant on the 22nd May, 2013. It is common cause that it was Counsel for the appellant in the court below who solicited for the incriminating evidence from the arresting officer which evidence would not have been brought out since the appellant opted to remain silent. However, once the incriminating evidence found itself on the record, the learned trial judge could not ignore it. The incriminating evidence placed the appellant at the scene of crime thereby causing him to be identified as the call-boy who hit the deceased with a brick.

In fact, even the line of cross-examination of PW3 (the mini bus conductor) by Counsel for the appellant in the court below also placed the appellant at the scene as Counsel kept insisting that the appellant wanted to stone the deceased because he had quarreled with him and that there was an exchange of words between the two.

The learned trial judge accepted the evidence of the witnesses who were total strangers to the appellant and obviously had no ill-motive but to narrate their ordeal at the hands of the appellant who, for just K1 (one Kwacha) was prepared to seriously injure another human being. It was a miracle that the two women who

had boarded the bus escaped unhurt since the bus hit into a house and a toilet.

On the issue of the possibility that the appellant may have been tried for the murder of a wrong person, this issue was not raised before the trial court and we do not see why it should be raised before us. Nevertheless, we agree with Mr. Waluzimba that it was crystal clear before the trial court that the deceased was Nickson Masasa from the following: the indictment right from the Subordinate Court before Committal to the High Court; the information; the evidence of PW3 the conductor and cousin to the deceased referred to the deceased as Nickson Masasa; and Counsel for the appellant in the court below was aware and also kept referring to the deceased as Nickson Masasa. This argument has not found favour with us.

We now address the invitation by Mrs. Liswaniso that we should consider finding the appellant guilty of manslaughter based on the contents of the warn and caution statement. We find this argument rather strange because on one hand, Mrs. Liswaniso attacked the learned trial judge for considering portions of the warn

and caution statement and on the other hand, she's urging us to consider it hoping that the appellant will end up with a lesser charge. This is untenable at law. The warn and caution statement was not produced in evidence before the trial court. Only portions of it were referred to PW4 in cross-examination and these are the portions that placed the appellant at the scene of crime. We can go no further than that. Indeed, as the learned trial judge found, the appellant was the aggressor who attacked the deceased without provocation. At the time of the attack, the deceased was driving at a snail's pace and obviously unarmed. The appellant had the intention to cause grievous harm and should have known that throwing a brick at the deceased would cause grievous harm and it did, thus establishing malice aforethought in terms of Section 204 (a) and (b) of the Penal Code.

This was a senseless murder of a mini-bus driver over a paltry K1. The appellant as a call-boy seemed to think he had a right to harass the two women in the bus, the conductor and the driver. Such lawlessness should not be tolerated in our country and we call upon local authorities and law enforcement agencies to ensure

that citizens are protected from wanton attacks at bus-stations and on the streets to avoid senseless deaths like in the case in *casu*.

In sum, we also find no merit in ground two. We uphold the judgment of the lower court and dismiss the appeal.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE