

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 209/2015
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

BENNY MUNANKWENKA

V

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Phiri, Muyovwe and Hamaundu, JJS

On 2nd February, 2016 and 9th July, 2019

For the Appellants : Ms S.C. Lukwesa, Legal Aid Board
For the State : Mrs R. N. Khuzwayo, Deputy Chief State
Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **George Musupi v The People (1978) ZR 271**
2. **D.P.P v Kilbourne (1973) 1 All E.R. 440**
3. **Mutale and Phiri v The People (1995-1997) ZR 227**

The appellant appeals against his conviction by the High Court on one count of aggravated robbery and one count of murder. In November, 2013 the appellant stood charged with the said offences

before the High Court during sessions held at Mazabuka. The story that the prosecution presented to the court below was this:

On 15th March, 2013 the appellant left Namwala and went to Mazabuka. In Mazabuka the appellant lived with his nephew, John Chidwayi (PW3). On 29th March, 2013, the appellant went into town. At a taxi rank, he first approached a taxi driver named Moffat Mulenga Chirwa (PW2) for a lift to a place called **PAMA**. However, while the appellant was still in a shop known as **JUST FOOD**, some other people hired Moffat Chirwa to Monze. The appellant subsequently hired another taxi driver named Peter Chilekwa, (the deceased), who took him into the Zambia Sugar Company estates. There the appellant stabbed the taxi driver to death, dumped him in the fields and then drove the vehicle in the direction of Monze.

In the meantime, Heather Malambo (PW4), a teacher at Manyana Primary School in Magoye Forest was expecting her young sister, Eunice Chilala (PW5), also a teacher of Chikankata, who was coming to visit her. Between 15:00 hours and 16:00 hours, Eunice called Heather to tell her that she had arrived at the roadside. Heather went to the roadside to meet her sister. While they were by the roadside, a motor vehicle headed in the direction of Monze moved to their side of the road, hit into Eunice's luggage and came to a stop.

Displeased with the manner in which the vehicle had been driven, Heather confronted the driver of the vehicle, who was the appellant, as to his manner of driving. The appellant responded that he was going to Monze and that the vehicle had just run out of fuel. The appellant then took a plastic container, locked the vehicle and headed back in the direction of Mazabuka to buy fuel. The two sisters noticed that the clothes that the appellant was wearing appeared to be soiled with blood. This raised their curiosity. When the appellant had left, they went to the motor vehicle where they saw blood stains, both inside and outside. There was also a pool of blood and a blood-stained knife inside the vehicle. They called some people within the area, and told them to call the police. Soon, a crowd gathered around the motor vehicle.

Meanwhile, around 14:00 hours the body of Peter Chilekwa had been found in the sugar estates and had been picked by the police.

The appellant bought fuel and then went back to the spot where he had left the vehicle. Upon finding a crowd, he dropped the container of fuel and ran into the Magoye Forest. The police in Mazabuka, who were by now aware that the motor vehicle could be the subject of Peter Chilekwa's murder, responded to the call from Magoye and went to the scene. They did not find the appellant. They

contacted Derrick Sinkala (PW1), the owner of the vehicle, who confirmed that it was his vehicle. He provided a spare key and the motor vehicle was driven back to Mazabuka. He also confirmed that Petter Chilekwa was the driver that he had employed to drive the vehicle as a taxi.

The appellant stayed hidden throughout the night. He only appeared at his nephew's house early the following morning. He took off the clothes that he was wearing and hid them. He then confessed to his nephew that he was the one who had killed the taxi driver.

Detective Chief Inspector Ng'andwe (PW9) took charge of the investigations. He received information from some informants which was pointing to the house of John Chidwayi (PW3) in Kabobola compound. Later that day, the informers took him to Kabobola compound. On the way, they met John Chidwayi, the appellant and another friend of theirs named Cliff. The three bolted. However, John Chidwayi was apprehended after a short run. At John Chidwayi's house, the motor vehicle's key was found in a sweater which the appellant had worn the previous day. Detective Chief Inspector Ng'andwe later apprehended Cliff. Cliff called the appellant who requested him to collect a black bag and the car keys in the sweater.

Both items according to the appellant were in John Chidwayi's house. The appellant then arranged to meet Cliff at a place in Monze. The black bag was found where the appellant had hidden it. It contained the appellant's national registration card, a brown wallet and a pair of blood-stained trousers. The police officers then took Cliff to Monze with the black bag. When Cliff met the appellant, the police pounced on the latter. They apprehended and detained the appellant at Monze Police Station. Moffat Mulenga Chirwa (PW2), Heather Malambo (PW4) and Eunice Chilala (PW5) all identified the appellant at Monze Police Station. Heather Malambo and Eunice Chilala further identified the blood-stained pair of trousers and the sweater, among other items, as the clothes that the appellant was wearing on the day that they met him.

The appellant was then arrested and charged for aggravated robbery and murder.

The appellant did not provide the court with his side of the story because he elected to remain silent.

The court accepted the prosecution's version in its entirety and used it as findings of fact to arrive at its verdict. From the prosecution's version, the court found sufficient evidence of identification. The court also found that the appellant's recent

possession of the vehicle linked him to the offence. Further, the court also deduced a "*guilty mind*" on the part of the appellant from his conduct, namely that he fled on two occasions; that is to say that the first time, he fled into the Magoye Forest, and the second time he fled from the police in Kabobola compound.

Strangely, the court below rejected the confession made by the appellant to John Chidwayi, a person who was not in authority over the appellant, on the ground that it had not been established that the confession was made voluntarily! However, this appeal does not turn on this point. Hence, we will pursue the issue no further.

The court convicted the appellant on both counts. He was sentenced to 25 years imprisonment for the offence of aggravated robbery while he was sentenced to death for the murder.

Before us, the appellant has advanced two grounds of appeal.

These are:

- 1. That the court below erred in law and fact when it failed to consider that there were inferences other than that of guilty which warranted the acquittal of the appellant, and :**
- 2. That the court below misdirected itself when it found that the appellant was properly identified inspite of several flaws in the identification evidence by the witnesses which raised the possibility of a mistaken identity.**

The arguments by the appellant in the first ground of appeal are in two respects. First it is the appellant's argument that John Chidwayi (PW3) had spent two to three nights in custody as a suspect. Relying on the definition of the expression "*witness with an interest (or purpose) of his own to serve*" as stated in the cases of **George Musupi v The People**⁽¹⁾ and **D.P.P v Kilbourne**⁽²⁾, Ms Lukwesa, Legal Aid Counsel, on behalf of the appellant, argued that the court below should have found John Chidwayi to be a witness in such category; so that even his allegation that the appellant made a confession to him was merely designed to save himself from the crime. We must point out here that the court below actually rejected John Chidwayi's testimony on the alleged confession, so that it did not form part of the reasoning of the court below in arriving at its verdict. Since there is no ground of appeal regarding the rejection of the confession, any argument on it is moot. However, we think that the appellant's grievance with John Chidwayi's testimony is its general tendency to lay the blame for the crime on the appellant: And this brings us to the second aspect of the appellant's arguments in this ground.

Counsel for the appellant argued that all the incriminating items, that is, the black bag, the blood-stained trousers, the sweater

containing the car keys were found in John Chidwayi's house; so that there was a possibility that they belonged to John Chidwayi, and not the appellant. She went on to argue that two of the informants who were said to have led to the appellant's arrest, namely one named Michelo, and another named Cliff, were not brought to court as witnesses; and that the explanation given by Detective Chief Inspector Ng'andwe for failing to bring them was not satisfactory as either of them were at places from which they could easily have been collected. Counsel argued that, in the circumstances, two inferences arise: first, that the appellant may have committed the crime. Secondly, that the crime could have been committed by any of the other three, that is Cliff, John Chidwayi or Michelo. We were urged to apply our decision in **Mutale and Phiri v The People**⁽³⁾ and give the appellant a benefit of doubt. We said in that case that, where two or more inferences are possible, the court will adopt the one which is more favourable to an accused, if there is nothing in the case to exclude such inference.

In the second ground, learned counsel for the appellant submitted that Moffat Mulenga Chirwa's identification of the appellant was unreliable because he had had merely a brief encounter with the appellant when the latter sought to hire the

former's taxi. As regards the identification evidence by the two sisters, Heather Malambo and Eunice Chilala, the learned counsel contended that their testimony on the issue seemed to have been rehearsed, so that, even though they claimed to have identified the appellant through certain features, such as a gap in the teeth and a scar on the forehead, these were just features which the police would have told them about. To buttress her argument, counsel pointed to a discrepancy in the testimony of Eunice Chilala (PW4) and Inspector Inambao Limbambala (PW7), the officer who conducted the identification parade: Eunice Chilala said that she had asked all those on the parade to laugh (presumably for the purpose of seeing their teeth). Inspector Limbambala, on the other hand, said that he did not hear Eunice Chilala tell the participants to laugh. With those submissions, counsel argued that the risk of honest mistake had not been ruled out. Infact counsel went further to argue that all the witnesses were told by the police who to point at. For this reason, we were urged to allow the appeal on the second ground as well.

Mrs Khuzwayo, the learned Deputy Chief State Advocate, on behalf of the State, supported the conviction. She argued that the appellant was linked to this offence by strong circumstantial evidence. She pointed out several circumstantial pieces of evidence,

namely; that the appellant had had recent possession of the motor vehicle which had bloodstains on it and in which there was a knife stained with blood; that the appellant had recently possessed the keys of the same vehicle; that there was the evidence of identification by PW4 and PW5 who met and spoke with him when the vehicle ran out of fuel and that these two witnesses identified the appellant by some features such as a scar on the forehead and a gap in the teeth; and that, if the identification evidence was weak, there was the unsolicited confession by the appellant to his relative John Chidwayi (PW3). As for this last argument, we have said that this appeal does not turn on the alleged confession because no ground of appeal has been raised on the trial court's rejection of the said confession. Hence the argument is moot.

We have considered the arguments.

The appellant's second aspect of the arguments in the first ground of appeal overlooks the testimony of the two sisters, Heather Malambo and Eunice Chilala. These witnesses saw the appellant wearing the blood-stained clothes on the day of the crime. It is immaterial whether the clothes belonged to the appellant or John Chidwayi. The point is that, at about the time that the robbery and the murder were committed, the clothes were being worn by the

appellant; and they were blood-stained. This placed him in the position as the most likely person to have killed Peter Chilekwa. Hence, we find no merit in the first ground of appeal.


As regards the arguments in the second ground of appeal, the evidence of identification was not the only piece of evidence in this case. We have considered in the first ground of appeal another crucial piece of evidence; that is, the fact that the appellant was seen wearing the blood-stained clothes by the two sisters. The appellant has suggested connivance between the police and the witnesses to implicate him. While John Chidwayi may have had a motive to extricate himself from the crime, we do not see anything that could have motivated the two sisters to connive with the police to implicate an innocent man. Further, the evidence of the prosecution still stands that the appellant was apprehended in Monze after he had told Cliff to bring him the car keys, the jersey and the black bag in which the blood-stained trousers were. No amount of conjecture can suggest any other reasonable inference which explains why the appellant had arranged to meet Cliff in Monze on the day that he was arrested. Now all these pieces of circumstantial evidence are strong enough to convict the appellant, without the evidence of identification. However, we do not see circumstances which support

the appellant's contention that there was connivance between the police and the witnesses as regards identification. We are satisfied that the identification was without fault. Consequently, the identification evidence was very strong and reliable. So, we find no merit in the second ground of appeal as well.

All in all, this appeal fails. It stands dismissed.




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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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E. M. Hamaundu
SUPREME COURT JUDGE