SCZ. Appeal No. 251,252/2014

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

ADAM BWEUPE — **1ST APPELLANT**
DENNIS BWEUPE — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram : **Phiri, Muyovwe and Malila, JJS**
On 13th January, 2015 and 14th May, 2020

For the Appellant: **Mr. D.M. Chakoleka of Messrs Mulenga Mundashi Legal Practitioners**

For the Respondent: **Ms. M. Kawimbe Deputy Chief State Advocate, NPA**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Dorothy Mutale and Richard Phiri vs The People SCZ Judgment No. 1 of 1997**
2. **David Zulu vs The People (1977) ZR 151.**
3. **Maxwell Nyambe Sikweti vs The People (1978) ZR 162.**
4. **Mutambo and five others vs The People (1965) ZR 15**
5. **Bornface Chanda Chola and 2 others vs The People (1988-1989) ZR 163.**
6. **Nzala vs The People (1976) ZR. 221**
7. **Kuyewa vs The People (1995/97) ZR 126**

Legislation referred to:

1. **Penal Code, Chapter 87 of the Laws of Zambia, Section 200 & 25 (2)**
2. **High Court Act, Chapter 27 of the Laws of Zambia, Section 33**

The delay in rendering this judgment is deeply regretted.

This is an appeal against the judgment of Madam Christine B. C. Phiri J, delivered on the 18th of December, 2013 by which judgment the two appellants, who are brothers, were convicted of the felony of Murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**, and sentenced to suffer the death penalty. The victim was their biological father aged 75 years.

The brief facts established at the trial were that the deceased lived at his farm with PW1, his wife, who is the appellant's step mother. At the material time the appellants were not staying with the deceased and PW1 at their farm house in Kabangwe area Lusaka. On the fateful day, PW1 left the farm on a visit and left the deceased at home on the farm. She returned around 19:20 hours and found the farm house locked. PW1 then decided to wait in the farm garage as she did not have the keys to the house. As PW1 waited for her

husband (the deceased) she saw the two appellants who came and entered the gate while carrying an axe, a hoe and a shovel. PW1 talked to the appellants who informed her that the deceased had gone to the roadside with a friend. They all looked for the keys but did not find them. PW1 decided to spend the night in the garage. While resting, PW1 observed the two appellants who broke the kitchen door. She became alarmed and went to Kabangwe Police Post to report a case of Malicious damage to property.

PW1 returned to the farm house with a Police Officer (PW2) from Ngwerere Police and found the two appellants at the scene. PW1 and PW2 also found that the farm house had been broken into and searched. They also observed that some items were stolen, these included the deceased's documents, his National Registration Card (NRC) and his driver's license. As PW1 and PW2 made their observations at the farm house, the two appellants disappeared from the farm. PW1 and PW2 returned to Kabangwe Police Post where she reported a case of a missing person in respect of her deceased husband who did not return to the farm.

The next day Police Officers led a search party on the farm and discovered a freshly dug shallow grave in which the deceased's body was buried. The body had horrific multiple injuries. Medical evidence presented to the trial court indicated the cause of death as multiple traumatic injuries and a blunt head injury. The appellants disappeared from the area.

Three days later, PW5 Detective Sergeant Boniface Fundulu led a Police team to DW4's house 10 miles (16 kilometres) away where the two appellants were found sleeping. DW4 was Fredrick Phiri who hosted the appellants when they left the deceased's farm. PW5 warned and cautioned the appellants after which he found the 1st appellant in possession of the deceased's NRC, travel document, voter's card, driver's license and hospital documents which he stated were given to him by his father, but he did not specify when he was given those documents. The farm implements i.e an axe, a hoe and a shovel, which PW1 had seen the appellants carrying were recovered from the deceased's house. They had soil mixed with blood stains on them.

According to PW5, the deceased had earlier reported the 1st appellant to the Police Post for theft of property but later withdrew the criminal complaint on condition that the two did not visit the farm. PW5 arrested the appellants and charged them for murder.

The appellants denied the charge and claimed an alibi for which they called DW4 who was their host at the house where Police apprehended them. According to DW4 on the fateful day he was in the company of the two appellants and ate with them, but the appellants left him alone between 16:00 hours and 18:00hours. Later they all went to sleep between 20:00hours and 21:00hours in different houses. DW4 did not know where the appellants went to after he went to sleep; and there was a piggery in between their houses. He also did not know that the appellants had been apprehended by the Police during the night. He came to know of it the following morning. This was the nature of the evidence before the trial court.

The learned trial Judge found as a fact that the appellants led the Police to where their father's body was buried at a distance of between 50 and 70 meters from his house. It was also found as a

fact that both appellants ran away from their father's farm soon after PW1 and the Police officer (PW2) arrived at the farm house to view the break-in. The trial court also disbelieved the alibi because it was not raised during the Police interviews and during the trial. The trial court also found that DW4 who gave both appellants a place to hide lived at a distance from them and, therefore, he could not know what the appellants did during the fateful night after he (DW4) went to sleep. The trial court concluded that the appellants killed the deceased with malice aforethought and buried him in a shallow grave before they entered his house where they stole his personal documents which were found on them by the Police. On the basis of these findings the trial court found the appellants guilty and convicted them as charged.

Dissatisfied with the convictions, the appellants launched this, appeal before us canvassing ten (10) repetitive grounds. These grounds can be summarized as follows:-

1. **The learned trial Judge erred in law and in fact when on her own motion and without any application from the prosecution decided that she needed to verify the truth of what the 2nd Appellant was testifying about in cross**

examination by visiting the scenes at 6 miles, 10 miles and the crime scene during the defence stage; thereby denying the appellants a fair trial due to her failure to be impartial and her emotional involvement in the trial.

2. **The trial Judge erred in law and fact when she held that the appellants led the Police to the scene of the crime when there was no such evidence.**
3. **The learned trial Judge erred in law and in fact when she dismissed the alibi which the appellants supported with evidence; which the Prosecution failed to rebut or challenge.**
4. **The learned trial Judge erred in law and in fact when she held that the appellants ran away and were in hiding.**
5. **The learned trial Judge erred in law and in fact by holding that the appellants killed their father; and erred in imposing the death penalty.**

In support of ground one, it was submitted that the trial court's decision to visit the scene on its own motion after asking the 2nd appellant some questions reflected biasness during the trial and went beyond the acceptable standards warranting the reversal of the appellants conviction.

In support of ground two, Mr. Chakoleka submitted that the finding of fact that the appellants led the Police to the scene of crime

and demonstrated how they killed the deceased was not supported by the evidence.

In support of ground three of the appeal, it was submitted that the appellants were not obliged to reveal their alibi at the time they were arrested as this would shift the burden of proving their guilt from the prosecution. It was argued that the evidence of DW4 provided an airtight alibi as he confirmed that he was with the appellants the whole day on the material day and the Police had an opportunity to interview him but they neglected to do so. It was submitted that this rendered the appellants' convictions unsafe.

In support of grounds 4 and 5 of the appeal, it was argued that there was no evidence to prove that the appellants ran away and went into hiding because they lived with DW3 at his evidence and that in fact DW3 led the Police to his place where they were apprehended from. According to Mr. Chakoleka, the court's finding of fact merits interfering with as it was not factual. It was further submitted that the court's finding that the appellants' killing of their father was premeditated was without evidence. Counsel further complained that the Police failed to produce the occurrence book in which the

deceased's earlier criminal complaint against the appellants was entered and that the soil and stains on the exhibited implements recovered at the deceased's house were not examined to confirm whether they had the deceased's blood on them; and that this left many possible inferences to be drawn in favour of the appellants. In support of this point the case of **Dorothy Mutale and Richard Phiri vs The People**[1] was cited.

It was argued that the circumstantial evidence against the appellants did not take the case out of the realm of conjecture that would attain a degree of cogency which only allowed the inference of guilt as pronounced in the case of **David Zulu vs The People**[2]

In response to the first ground of appeal, Ms. Kawimbe submitted that **Section 33 of the High Court Act, Chapter 27 of the Laws of Zambia** gives the High Court power to conduct an inspection which may be material to the determination of a dispute; and, therefore, the trial court was on firm ground to visit the scene of crime and the allegation of bias were unsupported by affidavit evidence in line with the holding in the case of **Maxwell Nyambe Sikweti vs The People**[3].

With regard to ground 2 of the appeal, Ms. Kawimbe submitted that the totality of the evidence established that the appellants visited the scene of crime in the company of Police officers where they demonstrated the events that took place; and therefore, that it was incorrect for the appellant to only refer to an isolated statement from the record of appeal in order to support the allegation that the appellants did not lead the Police to the scene of crime.

With regard to the issue of the alibi, Ms. Kawimbe submitted that even though the burden of proof was on the Prosecution the appellants failed to mention their alibi at the first opportunity with the Police leading to the conclusion that the alibi was an afterthought; and that the evidence of DW4 revealed that the appellants were left alone both before DW4 went to his own quarters to sleep and after they parted company to go and sleep at the house in which they were accommodated, away from DW4's house.

Regarding ground four which assailed the trial court's finding that the appellants ran away from the crime scene and went into hiding, Ms. Kawimbe submitted that the evidence was clear from PW1 and PW2 to the effect that the appellants did disappear after their

step mother returned to the deceased's house with a Police officer after she reported a case of malicious damage to property against the appellants.

Regarding ground five of the appeal, Ms. Kamwibe's response was that the appellants were seen at the deceased's house carrying implements which they used to break into the deceased's house; which implements were later recovered with stains of what appeared as blood; and that when the appellants were apprehended, the 2nd appellant, who was the older of the two brothers, was found in possession of the deceased's personal items. Ms. Kawimbe submitted that the circumstantial evidence against the appellants was overwhelming. We were urged to uphold the convictions.

We have examined the evidence on the record of the appeal and the judgment of the court below. We have also considered the submissions made by both sides. A scrutiny of the ten (10) grounds of the appeal which we have compressed to five (5) grounds reveal that these are all related. They all raise questions on the lower court's findings of fact and the issue of whether the evidence that was before

the trial court was sufficient to sustain a conviction on the charge of murder.

Regarding the first ground of appeal which questions the trial court's decision to visit the scene of crime, our quick view is that this is a very elementary aspect which should not really raise any issues because it is common knowledge that the court has power, during the trial, to visit the scene of crime, or indeed any scene which it considers to be relevant to the case on the courts own motion, to inquire into any issue raised during the trial in order to ascertain the truth. As to the admission of such evidence, it is settled law that a trial Judge should exercise his discretion to exclude admissible evidence only when it appears clearly that the evidence has an unfair prejudicial tendency against the accused out of proportion to the probative value [see **Mutambo and five others vs The People**[4]]. In the present case there is no apparent prejudicial tendency or bias in the court's decision to visit the scene of crime. In any case, **Section 33 of the High Court Act, Chapter 27 of the Laws of Zambia** gives power to the court, in its discretion, to conduct inspections in the following terms:

> **"In any cause or matter, the court may make such order for inspection by the court, the parties or witnesses of any real or personal property the inspection of which may be material to the determination of the matter in dispute, and may give such directions with regard to such inspection as the court may seem fit."**

We find no merit in ground one of the appeal.

With regard to ground two (2) of the appeal which alleges that there was no evidence of leading during the investigation, this evidence came from PW5, the Police officer who visited the scene of crime before the appellants were apprehended. However, it is conclusively evident from the evidence of PW1 and PW5 that the appellants were taken to the scene which the Police had already visited. This type of evidence was held to be unreliable in the case of **Bornface Chanda Chola and 2 others vs The People**[5]. We agree that the trial court misdirected itself when it took into account the evidence of leading as being incriminating evidence. We discount this conclusion on the part of the trial court. Nevertheless, this was not the only incriminating evidence against the appellants. We find no merit in the second ground of appeal.

With regard to ground three of the appeal which alleged that the trial court ignored the appellant's evidence of alibi, we note that the alibi was raised by the appellants during trial and by DW4. We also

note that DW4 who is alleged to have supported the alibi, failed to fully account for the appellants' movements while they lodged near DW4's house; while the appellants acknowledge that they did not raise the alibi during the investigation. It is settled law that it is the duty of the Police to investigate an alibi given by an accused on apprehension or arrest [see **Nzala vs The People**[6]], but where there is no evidence to support such alibi, or where no sufficient details are given to the Police, there is no obligation by the Police to investigate such alibi. While there is no onus on the accused person to establish his alibi, such accused person has the onus to give details sufficient to enable the Police to investigate.

In the present case the trial court rightly found that the alibi lacked sufficient details and was an afterthought. We find no merit in ground three of the appeal.

With regard to ground four (4) of the appeal, we agree with Ms. Kawimbe that there is evidence from PW1 and PW5 that the appellants broke into the deceased's house prompting her to go and report the incident to the nearest Police Post, and when she returned in the company of a Police officer, the appellants who were found at

the scene, disappeared soon after and were not seen again in the area until their arrest. In any event, the evidence of running away was not on its own conclusive evidence of guilt. The trial court correctly considered it in the totality of the other various pieces of incriminating evidence [see **Kuyewa vs The People**[7]]. We find no merit in ground four of the appeal.

Regarding ground five (5) of the appeal, we note that the trial court did acknowledge, correctly so, that the circumstantial evidence was overwhelming against the appellants. This conclusion was arrived at after due consideration of the totality of the evidence received. Both appellants, who were no longer living at their father's farm house, were seen by PW1 carrying implements which they used to break into the deceased's house, ransack it and disappear. One of them, i.e the 2nd appellant was found with the deceased's personal documents including clinic card and NRC within a few hours after the killing. Further, the implements they used to break into the house, were recovered at the scene with stains of what looked like blood. If the appellants were not connected to their father's murder they would not have broken into his house and robbed it. They would

have been glad to cooperate with the Police in their investigations into their father's disappearance from his farm house. The appellants conduct added to the weight of the Prosecution's evidence. We find no merit in ground five (5) of the appeal.

In the process of his arguments in support of ground 5 of the appeal (which was split into ground 10 in the filed Heads of argument) Mr. Chakoleka stated that the 2nd appellant was under the age of 18 years when he committed the offence and, therefore, he should not have been sentenced to death. We agree with Mr. Chakoleka. Our own computation of the 2nd appellant's age shows that he was under the age of 18 years when he committed the offence on 8th October, 2011. He was tried as an adult because he was jointly charged with the 1st appellant who was an adult.

Section 25 (2) of the Penal Code, Chapter 87 of the Laws of Zambia provides how a juvenile, such as the 2nd appellant, should be punished for the offence of murder as follows;

> **"S. 25 (2). Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that, at the time when the offence was committed, he was under the age of 18 years; but in lieu thereof, the court shall sentence him to be detained during the President's pleasure; and when so sentenced,**

he shall be liable to be detained in such place and under such conditions as the President may direct."

The provisions of the law as stated is mandatory. We therefore quash the sentence of death passed on the 2nd appellant and in its place, we order that he be detained during the President's pleasure. The net result is that we dismiss the appeal.

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G.S. Phiri
SUPREME COURT JUDGE

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E. C. Muyovwe
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE