IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 096-99/2020**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

ENOCK KAHALE	**1ST APPELLANT**
ODEN CHIMUKA	**2ND APPELLANT**
LEVISON CHINYAKA	**ACQUITTED**
MILNER MWIINGA	**ACQUITTED**

AND

THE PEOPLE

Coram: Kondolo, Makungu and Majula, JJA
On the 19th day of February, 2020 and on the 25th day of February, 2021

For the 1st Appellant: Mr. B. Banda – Legal Aid Counsel – Legal Aid Board
For the 2nd Appellant: Mr. L. Kabaso of KBF & Partners
For the Respondent: Miss V. Nsingo – State Advocate – NPA

JUDGMENT

Makungu, JA delivered the Judgment of the Court.

Cases referred to:

1. *The People v. Evaristo Banda, Zebron Mumba and Everine Kamwata (1990 1992) ZR, 194.*
2. *R v. Quinnn and Bloom (1962) 2 QB 245; (1961) 3 ALL ER 88, C.*
3. *Frank Kazovu v. The People (C.A Appeal No. 22/2016) (2018) ZMCA 361 (20 February, 2018)*
4. *Anayawa and Sinjambi v. The People (Appeal No. 143, 144/2011/2012) ZMSC 69*
5. *Ilunga Kabala and John Masefu v. The People (1981) ZR 102*
6. *Joseph Mulenga and Albert Joseph Phiri v. The People (2008) ZR 1*

7. *Mutambo and 5 Others v. The People (1965) ZR 15*
8. *David Zulu v. The People (1972) ZR 15*
9. *Peter Yotam Haamenda v. The People (1977) ZR 184*
10. *Saidi Banda v. The People (10) SCZ Selected Judgment No. 30 of 2015.*
11. *Musupi v. The People (1987) ZR 271*
12. *Bwalya v. The People (1975) ZR 125*
13. *Lameck Mwanza v. The People Appeal No. 261 A of 2014.*
14. *The Attorney General v. Marcus Kampumba Achiume (1983) ZR 1*

Legislation referred to:

1. *Penal Code Chapter 87 of the Laws of Zambia*
2. *The Evidence Act, Chapter 43 of the Laws of Zambia*
3. *Stock Disease Act Chapter 252 of the Laws of Zambia*

Other works referred to:

1. *Bryan Porter: 2017 Circumstantial Evidence is crucial for Prosecutors. Alexis.com. accessed on 24/2/2021*

1.0 INTRODUCTION

1.1. The appellants Enock Kahale and Oden Chimuka were convicted of one count of murder on 7th January, 2020 and sentenced to death by Mr. Justice K. Mulife. This appeal is against conviction and sentence. Levison Chinyaka and Milner Mwiinga who were jointly charged with the appellants were both acquitted. We shall therefore refer to Enock Kahale and Oden Chimuka as 1st and 2nd appellant respectively.

2.0 PROSECUTION EVIDENCE BEFORE THE LOWER COURT

2.1 In 1998, Abraham Hamalila (whom we shall herein after refer to as the deceased) and the 2nd appellant who were both headmen at the time had a land boundary dispute, which was settled. In April, 2017 a dispute arose between the 2nd appellant and his neighbour Noah Hamoonga (PW2) concerning the destruction of PW2's crops by the 2nd appellant's cattle. The deceased was among the witnesses called to assist in the resolution of the matter as he knew the land boundaries well. The hearing of the case did not go well as the 2nd appellant disturbed the meeting by being provocative, insulting and nearly fighting with PW2. Later, the appellant summoned PW2 to Chief Nyawa's palace for the resolution of the same dispute.

2.2 At the first meeting that took place at Chief Nyawa's palace in July, 2017 on an unknown date, PW2 told the Chief that he intended to call some witnesses who knew the land boundaries including the deceased. The 2nd appellant was disgruntled at the mention of the deceased's name. The

matter was adjourned to 27th July, 2017 so that the witnesses could be called.

2.3 On 26th July, 2017 PW3 was with his friend the deceased at Keegan shops. The 2nd appellant showed up and greeted PW3 but snubbed the deceased. PW3 had known the deceased and both appellants since 2010. The 2nd appellant discussed with PW3, his intention to buy a harrow from him and they agreed to meet at PW3's house later that day. The deceased's son PW5, also met the appellants at the shops and gave them a lift in his vehicle up to his house. When the 2nd appellant arrived at PW3's house, he found PW3 seated with the deceased. He therefore angrily stated that because the deceased was present, he would leave and return later.

2.4 Around 22:00 hours that day, PW3 and the deceased were at a funeral. PW3 decided to go back home to check on a sick child. Along the way, he met the 2nd appellant with the 1st appellant riding on the 2nd appellant's motor bike near the shops and they exchanged greetings. PW3 saw the motorbike being driven towards the funeral house he had come from. It stopped after about 100 meters and he proceeded home.

Within 30 minutes, he heard a gunshot. In less than 15 minutes, while he was at home, he heard the sound of the 2nd appellant's motorbike returning as he used to know its sound which was strange due to the defective tappets. The distance from the shops to his house was short. About ten minutes later, PW3 learnt that the deceased was shot dead at the funeral house. The funeral house was about 300 meters from the shops. It was established that there were several other motorbikes at the funeral house. PW3 had not seen either appellant with a firearm that night.

2.5 On 31st July, 2017 Principal Manchisi (PW6) bought an Ox from Coster Mwiinga which was taken to him at the abattoir by the 1st appellant and he slaughtered it. He paid the sum of K2, 566 for it. The Ox was confirmed by the police to have come from the 2nd appellant's herd as it bore a brand P2C7 which belonged to the 2nd appellant according to the stock movement form obtained from the police by the 1st appellant, and the 2nd appellant's Brand Certificate issued by the Ministry of Live Stock and Fisheries. Coster Mwiinga instructed PW6 to pay the 1st appellant K200 for the piece-

work he had done for him of taking the animal to the abattoir and he did.

2.6 PW7, a Police Officer, investigated the matter. At the crime scene, he found the deceased's body with chest gunshot wounds and he unearthed five pellets. He also found a shoe print which was traced to the 4th accused Levison Chinyaka's house which was about 500 meters away from the scene. PW7 found two sons of Chinyaka who revealed to him a pair of black and white takkies which were left there by the 1st appellant who had left the place that morning. The foot prints leading from the crime scene resembled the soles of the takkies. However, the takkies were not produced in evidence. The police recovered the 2nd appellant's shotgun from his house and according to them the deceased was shotgunned.

2.7 The 1st appellant told PW7 that on the material night he was sleeping in his house but PW7 admitted that he did not investigate the alibi.

3.0 DEFENCE EVIDENCE

3.1 The 1st appellant (DW1) testified that between 24th and 27th July, 2017 he was attending a football tournament in Mangwa.

The tournament ended around 17:00 hours on the 27th and the distance from Mangwa to Chief Nyawa's Chiefdom is about two hours cycling. From the tournament, he went straight home. On 11th August, 2017 he was apprehended by the police at an abattoir, over the murder of the deceased. He denied that he was connected to the murder by the Ox which was bought by Coster Mwiinga. He also denied having been at Keegan's shop on 26th July. He further stated that PW3 was unknown to him and so he would not possibly falsely implicate him. That he carried out piece work of driving the Ox to the abattoir for Coster Mwiinga the owner of the Ox. He also denied knowledge of the 2nd appellant stating that he only got to know him while they were incarcerated together by the police.

3.2 DW2 Levison Chinyaka Mukoke the co-accused who was acquitted by the court, had confirmed in his testimony that although he was away from home at the time that the 1st appellant left the takkies, when he returned home, he learnt from his sons that the takkies belonged to the 1st appellant who had exchanged them with one of his sons for a phone.

3.3 The 2nd appellant's testimony was that he handed himself to the police in Kalomo on 26th August, 2017 after his children informed him that he was wanted by the police. He admitted ownership of the shotgun which the police recovered from his house.

3.4 He admitted having been at Keegan's shop in Nguba around 16 hours on 26th July, 2017 with his motorbike where he met the deceased whom he gave a K20 for a drink but he denied having met PW3 there. He denied having known the 1st appellant at the time.

3.5 He stated that PW3 falsely implicated him because he refused to give him land. He admitted having sold the Ox in issue to Coster Mwiinga. He stated further that he told PW7 about his alibi of being at home with his first wife in Nguba, Chief Nyawa's area on the material night. When cross examined, he stated that he had not differed with PW2, therefore PW2 had no reason to give false testimony against him.

4.0 JUDGMENT OF THE COURT BELOW

4.1 Upon taking into account the evidence on record and submissions by counsel, the learned trial Judge found the

following facts to have been undisputed: That the deceased died of shotgun injuries and that the state relied entirely on circumstantial evidence. The learned Judge went on to analyse the circumstantial evidence and found that since PW1, PW2 and PW3 had corroborated each other as regards the 2nd appellant's resentment of the deceased, there was no evidence that they had conspired to falsely implicate him. The 2nd appellant's evidence that PW3 had falsely implicated him because he denied him land was therefore dismissed.

4.2 The court found PW2, PW3 and PW5 to be credible witnesses and not the 2nd appellant. The Judge opined that the fact that the 2nd appellant testified that he enjoyed a good relationship with PW2 dispelled any possibility of PW2 telling lies against him. The lower court further found that the 2nd appellant got annoyed about the idea of the deceased testifying in favour of PW2 in the dispute which was to come before Chief Nyawa's traditional court on 27th July, 2017.

4.3 Predicated on the foregoing, the court found that PW3 told the truth that whilst in the company of the deceased on the material day, they met the 2nd appellant at Keegan's shop and

that the 2nd appellant did not greet the deceased on that occasion. That the 2nd appellant had a grudge against the deceased arising from the land dispute which they had way back in 1998. He was also antagonistic against the deceased as he was scheduled to testify against him in his dispute against PW2 before Chief Nyawa's court. The court found that the 2nd appellant's evidence denying that he met PW3 together with the deceased at the shops on the material day, was meant to sway the court into believing that the deceased was not his enemy and therefore there was no basis for him to plot his death.

4.4 The learned Judge was satisfied that PW3 met and greeted the 1st and 2nd appellants on the material night as they were riding on the 2nd appellant's motor bike heading in the direction of the crime scene. That the assassination of the deceased was contemporaneous with the events surrounding the appellants.

4.5 The lower court further found that, the assassins were heard retreating from the crime scene shortly after the gunshot sound. PW3 knew the 2nd appellant and his motor bike prior to meeting him that night. Premised on this, the Judge dismissed the suggestion that the deceased might have been murdered

by his enemies who accused him of practicing witchcraft or the one who had an adulterous affair with his wife.

4.6 Further findings were that the 1st appellant was connected to the commission of the offence by his shoes whose prints were traced from the crime scene to the house of Levison Chinyaka. Both the 1st appellant and Chinyaka confirmed the presence of the shoes at Chinyaka's house. The 1st appellant's alibi was found to have been defeated by his shoes.

4.7 The lower court further found that the other incident linking the 1st appellant to the subject offence was the 2nd appellant's Ox which the 1st appellant sold to PW6. The court found that the Ox was payment to the 1st appellant and Coster Mwiinga for assassinating the deceased. The money that he was paid by Coster was his share of the proceeds of sale of the Ox. The 2nd appellant also supplied the duo with his firearm. Further, the assertions by the 2nd appellant that he had sold the Ox to Coster in a genuine transaction were found to be false as the transaction was so contemporaneous to the events leading to the assassination of the deceased.

4.8 Relying on the case of **The People v. Evaristo Banda, Zebron Mumba and Everine Kamwata,** [1] the court found that the attitude of the 2nd appellant towards the deceased and his hateful words against the deceased, was proof of malice aforethought.

4.9 The doctrine of common purpose as enacted in **Sections 21 and 22 of the Penal Code, Chapter 87 of the Laws of Zambia** was applied and the 1st appellant was found to be the principal offender. The lower court further found that the fact that the ballistic report does not expressly state that the pellets which were retrieved from the deceased's body during the post mortem and the ones which were recovered from the crime scene were discharged from the 2nd appellant's firearm, does not exclude the possibility that the pallets were discharged from that firearm; because the report indicated that the pellets were capable of being loaded and discharged from the same type of firearm as the one owned by the 2nd appellant.

4.10 The alleged alibis were dismissed on the ground that both appellants did not call witnesses to rebutt the strong incriminating evidence by PW3 and PW5 that they were

present within the vicinity of the crime scene on the material day and night. Therefore, the court believed the unchallenged evidence. It was found and held that the murder was premeditated and therefore there was no extenuating circumstance. That is how both appellants were found guilty as charged and given the death penalty.

5.0 1ST APPELLANT'S GROUNDS OF APPEAL

5.1 The 1st appellant raised the following three grounds of appeal:

1. *The lower court erred both in law and fact to come to the conclusion that the circumstantial evidence had taken the case out of the realm of conjecture as to attain a degree of cogency permitting only an inference of guilt when in fact there were other plausible inferences that could have been drawn from the set of facts that graced the record of the trial court.*

2. *The learned trial Judge erred both in law and fact to admit evidence of ballistic examination in the absence of the author's testimony.*

3. *The learned trial judge erred both in law and fact to hold that he had no doubt in his mind that the appellant*

was among the assailants having been seen heading to the scene of crime.

6.0 1ST APPELLANT'S ARGUMENT

6.1 According to the heads of argument, filed into court on 18th February, 2021, the 1st and 3rd grounds of appeal were argued together as follows: The two weaknesses of circumstantial evidence are that firstly, not only may the witness who swears to the evidential fact be lying or mistaken like PW2, PW3 and PW7. Secondly, even if they spoke the truth, the inferences drawn from those facts may be correct or totally incorrect. After all, inferences are nothing but application of generalization and unfortunately, there is always an odd situation in which generalization does not hold good, hence if relied upon, amounts to miscarriage of justice as was in this case before the trial court. The mere fact that the 2nd appellant owned a firearm which was found at his homestead upon searching, may not be of much significance. It would have helped if there was additional evidence such as, that he was the only one with that type of a gun in that community and was seen carrying the same that fateful night. Also that he was the only one with a motor bike at the funeral. However, in

the present case, there was evidence to the effect that the 2nd appellant was not the only one with that type of motor bike at the funeral house in question. The learned trial Judge found no direct evidence that the appellants were present at the scene of crime.

6.2 The lower court erred both in law and fact to hold that the circumstantial evidence had taken the matter out of the realm of conjecture as to attain a certain degree of cogency because there was an opportunity available to the state to avail direct evidence via the Ballistic Expert Mr. D. Banda of Force Headquarters, who could have lifted finger prints from the firearm to ascertain the true identity of the shooter. Mr. D. Banda, the author of the Ballistic Report was conveniently not called, as if that was not enough, PW4 the widow to the deceased was present the whole time immediately before, during and after the alleged shooting of her husband and yet she did not testify to having heard the motor bike sound in the vicinity. What is even worse and so strange is that PW4 testified that she heard the sound of a gunshot and yet she was not a ballistics expert or experienced in handling guns.

6.3 Counsel further submitted that the secondary nature of evidence tendered may sometimes render it so unreliable that it ought not to be admitted. He relied on the case of **R v. Quinnn and Bloom.** [2]

6.4 On the second ground of appeal, counsel firstly identified the legal issue to be; whether the ballistics report was properly admitted in evidence having been produced by PW7 and not the writer thereof. He referred to **Section (4) (1) of the Evidence Act** which provides:

> ***"(1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if :-***
>
> ***(a) the document is, or forms part of, a record relating to any trade or business or profession and complied, in the course of that trade or business or profession, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be***

supposed to have, personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied."

6.5 We were also referred to the case of **Frank Kazovu v. The People** [3] which has persuasive value upon this honourable court where the court observed *inter alia* that notwithstanding that there was no objection to the production of the report, the ballistic report was inadmissible and the trial Judge erred to admit it. Further that the ballistic expert should have been

called unless he was dead or he was outside jurisdiction or too sick to give evidence.

6.6 Following the guidance by the Court of Appeal in the above cited case, it was submitted that the ballistic report should be disallowed because PW7 gave no evidence to justify the absence of the ballistics expert at trial, hence failed to meet the threshold envisaged under the provisions of Section 4 (1) (b) of the Evidence Act cited above. It was finally submitted that the lower court erred in arriving at a verdict of convicting the 1st appellant on the charge of murder and meting out the death penalty. We were therefore urged to allow the appeal by setting aside the conviction and sentence.

RESPONDENT'S ARGUMENTS IN RESPONSE TO THE 1ST APPELLANT'S ARGUMENTS

6.7 The state advocate Miss Nsingo relied on the heads of argument dated 19th February, 2021 to counter the appellant's contentions. Premised on the case of **Saidi Banda v. The People** [10] she submitted that in order to convict based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable

of explanation upon any other hypothesis than that of the accused's guilt.

6.8 In light of the above authority, counsel stated that the testimony of PW3 clearly showed that the appellants acted together on the material night. PW3 stated categorically that he saw them riding on the 2nd appellant's motor bike towards the funeral house and stopping in 100 meters and shortly thereafter, he heard gunshots. The bike that he heard returning, was the 2nd appellant's because it had loose tappets which caused its sound to be unique.

6.9 Citing Section 22 of the Penal Code, counsel submitted that it is immaterial that no one saw either appellant carrying a firearm because the ballistics report indicated that the pellets that were retrieved from the deceased's body were fired from a shotgun with a caliber of 18.5mm; the same caliber as the shotgun owned by the 2nd appellant. Further that it was an odd coincidence that PW2 owned a gun of that caliber and was seen riding towards the crime scene where the deceased was shot a few minutes later.

6.10 Counsel further submitted that the evidence of the 1st appellant's shoe prints from the crime scene to the house of the fourth accused is incriminating. It shows that he was at the scene before or after the shooting. His alibi failed because it was an afterthought; especially that he could not avail even one of his team mates or football players from the opposing team to attest to the truthfulness of the alleged alibi.

6.11 Counsel stated that in this case, the appellant's failure to call a witness to support his alibi and his shoe print found at the crime scene should be held against him. Relying on the case of **Ilunga Kabala and John Masefu v. The People,**[5] she submitted that the unexplained odd coincidences should be considered as supporting evidence; and any explanation which cannot reasonably be true in this regard, should be considered as no explanation at all.

6.12 In support of this submission, we were referred to the Supreme Court case of **Anayawa and Sinjambi v. The People** [4] where the court upheld the trial Judge's comment on the fact that the 2nd appellant did not call his wife as a witness to support his alibi stating that it did not amount to shifting of the burden of proof to him but a mere observation which the

learned judge was entitled to make, in view of the seriousness of the charge which the 2nd appellant was facing.

6.13 Further arguments were that the trial court had properly directed itself when it convicted both appellants on the basis of the circumstantial evidence which pointed to only one inference which is that they acted together to assassinate the deceased. Counsel contended that the said evidence had removed the case from the realm of conjuncture.

6.14 As regards the second ground of appeal, she argued that the appellant's counsel was free to call the ballistics expert if he thought evidence from him would support his clients defence. Instead he did not object to the production of the ballistics report by PW7. She relied on the case of **Joseph Mulenga and Albert Joesph Phiri v. The People** [6] to argue that leaving incriminating assertions unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial. She finally submitted that the conviction and sentence of the 1st appellant be upheld and the appeal be dismissed.

7.0 2ND APPELLANT'S GROUNDS OF APPEAL

1. *The trial Court erred in law and fact when it convicted the 2nd appellant of murder and sentenced him to death in the face of extremely weak evidence.*

2. *The trial court erred in law and fact when it convicted the 2nd appellant of murder when it relied on a ballistic report which conclusively stated that the appellant's shotgun which was tendered before the trial court was found not to have been used as a weapon for murder.*

3. *The trial court erred in law and fact when convicting the appellant despite having an alibi and that the prosecution did not take the necessary steps to negate the truthfulness of the Appellant's alibi.*

7.1 On the first ground of appeal, learned counsel for the 2nd appellant submitted that none of the prosecution witnesses actually saw the appellant herein commit the prohibited act of unlawful killing. It was the duty of the prosecution to prove the two main elements of murder; *actus reus* and *mens rea. Actus reus* was not proved. He went on to submit that on page

5 of the Judgment, from line 17, the learned trial Judge stated as follows regarding PW2:

"His version of events following the meeting that was convened by Pw1 is the same as that of PW2 save to add that he was told by the Agricultural Officer who attended the mentioned meeting that A3 (now 2nd appellant) had threatened blood shed during the meeting with PW1."

7.2 Counsel stated that the record of appeal at page 41 from line 23 onwards, shows that the statement concerning the threat of blood shed was made by Johnson Chanda the Agricultural Officer to PW2 and it was alleged that it was the 2nd appellant who made it and the Agricultural Officer was not called as a witness to testify to the truthfulness of PW2's assertions. Counsel contended that it was unreliable hearsay evidence. Therefore the trial court misdirected itself when it relied on that evidence. He fortified this argument by citing **Mutambo and 5 Others v. The People** [7] where it was held that:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object

of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish the fact that it was made..."

7.3 It was counsel's further contention that the trial court erred when it found that the 2nd appellant harbored feelings of enmity against the deceased since 1998 when in fact PW1 stated that he had resolved the matter then. The court erred in fact when it convicted the 2nd appellant on the ground that the deceased was supposed to testify against him in the dispute against PW2 before Chief Nyawa's Court. The said meeting never took place for PW2 to assert that the deceased would have testified against the appellant. In fact, there were a number of other witnesses who would have testified for or against the 2nd appellant such as PW1, PW2 and the Agricultural Officer. Therefore the basis of the court's finding in this regard was too weak to secure a conviction.

7.4 Counsel further submitted that PW2 was a witness with an interest to serve because of the dispute he had with the 2nd appellant. The reason why PW2 picked up a fight with the 2nd appellant was not highlighted. PW2 possibly wanted the 2nd

appellant to be convicted at all costs as he believed the 2nd appellant's cattle had grazed his crops. Therefore, the lower court should not have relied on PW2's evidence.

7.5 We were referred to PW3's evidence at page 43 of the record that he saw the appellant's on a motor bike going towards the Northern direction. That he was walking towards the South and, in less than 30 minutes, he heard a gunshot from the eastern direction whilst he was in the comfort of his home. 15 minutes later, he heard the sound of the same motor bike coming from the Western direction the shops.

7.6 Counsel contended that when PW3 stated that the appellant's were riding the bike towards the Northern direction, he did not describe the direction where the funeral house was in relation to the point at which he allegedly met the duo. If that is what PW3 perceived, then the appellants were not the ones who shot the deceased. Counsel's further contention was that the one who went and informed PW3 about the murder that night, might have been the assassin who rode a motor bike towards the East. Counsel relied on the case of **David Zulu v. The People** [8] to support his submission that PW3's circumstantial evidence did not take the case out of the realm of conjecture

so that it attained such a degree of cogency which could permit only an inference of guilt. He further submitted that PW3's testimony required corroboration.

7.7 Counsel went on to submit that PW3's evidence was that he met the appellants around 22:00 hours whilst PW4, who was sleeping next to the deceased stated that the deceased was killed shortly after 20:00 hours. The question that begs an answer is; what is shortly after 20:00 hours? Counsel contended that logically, shortly after 20:00 hours cannot be 22:00 hours as 22:00 hours is way beyond 20:00 hours. Therefore, even if PW3 met the appellants, PW4's account casts a doubt as to whether indeed the appellants are the ones who killed the deceased. There is a material contradiction between the evidence of the two witnesses which would lead to an inference that the deceased was already assassinated by the time that PW3 met the appellants.

7.8 As regards the issue of the Ox, it was submitted that it is clear from the testimony of PW6 that the 1st appellant was hired to drive the Ox from Nguba village to Kalomo Abattoir in consideration of K200 and not that the 2nd appellant paid the 1st appellant the Ox for the murder of the deceased. That

evidence on record indicates that there was a stock movement permit issued to the 1st appellant who had driven the Ox initially belonging to the 2nd appellant from the village to PW6's abattoir for slaughter, **Section 2 of the Stock Diseases Act Chapter 252 of the Laws of Zambia** under which the said stock permit was issued, provides that, *"owner" in relation to any stock, includes the person for the time being having the management, custody or control of such stock.* Therefore, it is not surprising that the 1st appellant who applied for the permit was indicated as the owner of the Ox. It is clear that the seller was Coster Mwiinga and he was the actual owner who hired the 1st appellant to drive the Ox and paid him K200 for the job.

7.9 Counsel contended that there was no evidence adduced by the prosecution to indicate that indeed the 2nd appellant did not sell the said Ox to Coster Mwiinga.

7.10 In contract law the lack of documentary evidence between the seller and a buyer of any item does not entail that the transaction did not take place as parties may contract even orally. To conclude that lack of a written contract of sell for the Ox between the 2nd appellant and Coster Mwiinga meant

that there was no such sale would not be in the interest of justice especially that the transaction occurred in a village set up. The prosecution failed to prove that the Ox was a payment in consideration of the murder of the deceased.

7.11 The Court below's finding that the 2nd appellant hired the 1st appellant and Coster Mwiinga to assassinate the deceased was based on speculation. Since the objection to the evidence of PW7 to the effect that the 1st appellant confessed to having been hired together with A4 to kill the deceased, was sustained and therefore the court's findings of hiring was groundless. PW7 did not even demonstrate that there was a plan to assassinate the deceased.

7.12 On the 2nd ground of appeal, it was contended that the failure by the prosecution to call Mr. D. Banda the Forensic Ballistics Expert who authored the ballistics report was a dereliction of duty which should operate in favour of the 2nd appellant. Counsel argued at length on the contents of the ballistics report and submitted that the report did not state that the exhibited shotgun was the murder weapon and as such the court misdirected itself when it relied on the report.

7.13 As regards the third ground of appeal concerning the 2nd appellant's alibi, counsel pointed out that the 2nd appellant on the day of his arrest told the arresting officer PW7 that he was sleeping at home with his wife in Nguba in Chief Nyawa's chiefdom at the material time. He referred to the case of **Ilunga Kalaba and John Masefu v. The People** [5] where it was held *inter alia* that:

"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The prosecution takes a serious risk if they do not adduce evidence from the witnesses who can discount the alibi unless the remainder of the evidence itself is sufficient to counteract it."

7.14 The same case placed the duty on the accused person or to give details of his witness to the alibi to the police. He went on to submit that the police were guilty of dereliction of duty for not investigating the alibi and this should operate in favour of the appellant and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty. On this point, we were referred to the case

of **Peter Yotam Haamenda v. The People**. [9] Counsel finally prayed that the appeal be allowed and that the 2nd appellant be found not guilty and acquitted.

8.0 RESPONDENT'S ARGUMENTS IN RESPONSE TO THE 2ND APPELLANT'S ARGUMENTS

8.1 In opposing the first ground of appeal, Miss Nsingo in her heads of argument filed on 19th February, 2021 stated that the court rightly directed itself on the circumstantial evidence. To fortify this, she relied on the cases of **David Zulu v. The People** [8] and **Saidi Banda v. The People.** [10]

8.2 Prosecution witnesses 1 – 3 all testified about the appellant's show of enmity and express feelings of hatred towards the deceased and their evidence was rightly accepted by the lower court. Miss Nsingo elucidated that the purported inconsistencies in the evidence of PW3 concerning the directions from which the sound of the 2nd appellant's motor bike was heard from as follows: the motor bike stopped, which means that the riders got off and started walking. Since PW3 did not see where they went, they may have gone east. PW3 did not tell the court the direction of his house at the point

where he was headed south. It is possible that he branched off to the Western direction and then entered his house. Therefore, there are no inconsistencies as to the directions as the witness and the appellants on the motor bike did not remain stationary after the meeting. It was therefore possible for the appellants to have fired the shot from the western direction.

8.3 Counsel argued that it is an odd coincidence that the 2nd appellant owned a shotgun of 18.5mm caliber and a similar gun was said to have been used in the commission of the crime according to the ballistics report. The odd coincidences referred to above lend credence to an inference of guilt as they implicate the appellant. To fortify this submission, she relied on the case of **Ilunga Kalaba and John Masefu v. The People.**[5]

8.4 It is clear from the evidence of the 2nd appellant that he enjoyed a cordial relationship with PW2 and PW3. He even went to PW3's house to negotiate the purchase of a harrow. Therefore, PW2 and PW3 has no reason to falsely implicate him. As such both of them were not suspect witnesses. She

relied on the case of **Musupi v. The People** [11] where it was enunciated that:

"The critical question is not whether the witness does in fact have an interest to serve but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence."

8.5 Considering the 2nd appellant's counsel's lengthy submissions as to the court's reliance on evidence that the 2nd appellant threatened bloodshed, which evidence was objected to and the objection was sustained; Miss Nsingo submitted that the lower court merely restated that evidence on page 5 of the Judgment but did not in any way rely on it in convicting the appellant.

8.6 As regards the second ground of appeal, Miss Nsingo submitted that the trial court did not state that the ballistics report conclusively stated that the appellant's shotgun was found not to have been used as a murder weapon but rather that the possibility that the pellets that killed the deceased were discharged from the said gun, had not been excluded. Miss Nsingo's further arguments concerning the ballistics

report were a repetition of the ones made in her submissions against the 1st appellant's appeal.

8.7 Coming to ground three, Miss Nsingo submitted that the trial court did not err in law or fact when it disregarded the alibi raised by the appellant. The record of appeal on page 49 indicates that the 2nd appellant in his testimony stated that he travelled to Kapri Mposhi with his first wife. The fact that he was a polygamist made it absolutely essential for him to give more details such as the name of the wife and the address where he allegedly spent the night. Under the circumstances the police had insufficient information to enable them investigate his alibi and were not in dereliction of their duty. In support of this submission the cases of **Bwalya v. The People** [12] and **Lameck Mwanza v. The People.** [13] were cited.

8.8 In light of the foregoing, she finally prayed that the appeal be dismissed for lack of merit.

9.0 OUR DECISION

9.1 We have read the record of appeal and considered the arguments made by all parties concerned. We note that the

grounds of both appeals are homogeneous as they raise three questions:

1. *Whether the circumstantial evidence on record was sufficient to warrant the convictions.*

2. *Whether the appellants' alleged alibi's should have been sustained by the lower court.*

3. *(a) Whether the Ballistics Report was rightly produced by the prosecution.*

   (b) Whether the Ballistics report proved that the shotgun belonging to the 2nd appellant was the one which was used to kill the deceased.

9.2 We shall therefore analyse the appeals together, starting with the third issue: In its Judgment, the lower court referred to the ballistics report which was produced by PW7 who was not the author thereof. We accept the submissions by learned Counsel for the 1st appellant that the production of the said report was contrary to the provisions of **Section 4 (2) (1) (b) of the Evidence Act** not withstanding that there was no objection to it. The said provisions of statute are clearly mandatory and therefore if the outlined conditions are not

met, any such document should not be entertained. In this case, the ballistics report having not been produced by the author, ought not to have been admitted in evidence and considered by the trial court. We will therefore place no reliance on it.

9.3 To answer the first question stated above, we have identified some threads of circumstantial evidence and odd coincidences in this matter which connect both appellants to the commission of the offence and they are as follows:

1. The 2nd appellant showed animosity towards the deceased for being the witness whom PW2 intended to call as a witness at the hearing before Chief Nyawa, of the dispute concerning PW2's crops that were grazed by the 2nd appellant's cattle. We accept the 2nd appellant's advocate's disputation that the case between PW2 and the 2nd appellant in 1998, where the deceased stood as witness regarding the land boundaries was resolved and should not be considered as a factor against the 2nd appellant. That is because in our view, that incident occurred nineteen years before the murder in question and that's a very long time. There was no indication in

the evidence that the 2nd appellant was disgruntled by the resolution of that dispute or that he ever referred to that particular dispute in July, 2017. It is possible under the circumstances that, that incident does not relate to this matter. Therefore, the finding made by the trial Judge that the antagonism arose in 1998 and festered until 2017, was farfetched and, we hereby set it aside. However, the lower court aptly applied the authorities of **Evaristo Banda**[1] and the **David Zulu**[8] to the facts of this case.

2. There was no evidence that the deceased had any other enemy apart from the 2nd appellant. On the material day, the 2nd appellant had shown to PW2 that he resented the deceased.

3. Both appellants were seen by PW3 and PW5 within the vicinity of the crime scene. PW3 and PW5 both got along well with both appellants. PW3 had known both appellants for about ten years and could not have mistaken their identities that night as he even greeted them as they rode the 2nd appellant's motor bike towards the crime scene (the funeral house). We therefore cannot

fault the lower court for relying on the evidence of the said witnesses.

4. The issue raised by the appellant that the evidence given by PW3 regarding the different directions from which he heard the sound of the 2nd appellant's motor bike, was well answered by the respondent's counsel whose submissions we accept, rather than the appellant's advocates submissions. The respondent's counsel's submission that the killer possibly got off the motor bike at a certain point and walked to the funeral house, is sustainable as that is a reasonable inference that can be drawn from the available evidence. This is supported by the 1st appellant's takkies which were traced from the shoe prints at the crime scene which is an indication that he probably walked to and from the crime scene.

5. It was an odd coincidence that the deceased was shot a few minutes after the appellants were seen headed towards the crime scene and the 2nd appellant owned a shotgun. We therefore cannot fault the lower court for its finding at J.32 that *"the assassination was*

contemporaneous to the events surrounding the people PW3 saw heading towards the crime scene."

6. PW7's testimony was that he traced shoe prints from the crime scene to the 4th accused's house which was about 500m away from the crime scene and, when he compared the prints to the sole of the appellant's takkies, they resembled. Although the shoes where not produced in evidence and no pictures of the shoe prints were taken, the lower court rightly found PW7's evidence in this regard, to be credible. In our view, the 1st appellant in his testimony said nothing about the shoes, which entails that he admitted that the shoes were his.

9.4 This evidence strongly indicates that the 1st appellant was at the crime scene and disproves his defence. The case of **Joseph Mulenga and Albert Joseph Phiri** [6] applies.

9.5 Although nobody saw either appellant with a shotgun at the material time; "circumstantial evidence should be thought of not as a chain, where the breaking of one link causes the entire chain to fail. Instead, a better metaphor is a rope. A rope is made of hundreds of threads, and even if one thread

fails, the rope itself is still strong because of the hundreds of other threads that comprise it. **(Justice matters with Bryan Porter circumstantial evidence is crucial for Prosecutors - Alexandria Time - Alextimes. com).** We adopt Bryan Porter's analogy as it is sound. In this case therefore, the circumstantial evidence remained strong despite the fact that no one saw either appellant with a shotgun and lack of forensic evidence that the fatal shot came from the 2nd appellant's gun is neither here nor there. We take it that circumstantial evidence should not be considered to be a synonym of weak case.

9.6 The lower court's finding that the 1st appellant was hired by the 2nd appellant to assassinate the deceased was unsupported by the evidence on record and therefore we set it aside. However, we uphold the finding that they acted in concert.

9.7 As for the timing of the murder, there is no material difference between the evidence of PW3 and the widow, PW4. We say so because PW4 had clarified under cross examination that she had been sleeping and had no watch and therefore she was uncertain about the time of the killing.

9.8 On the issue of the statement of bloodshed purportedly made by the 2nd appellant, we accept Miss Nsingo's submission that the lower court did not rely on that evidence in its analysis of the evidence. However, we must point out that the learned Judge erred to restate it in the summary of facts as it was withdrawn by the prosecution.

9.9 The finding by the court that the Ox was payment to the 1st appellant by the 2nd appellant for killing the deceased was also not supported by the evidence on record. That is because there was evidence that the Ox was sold by the 1st appellant to Principal Machisi, PW6 on 31st July, 2017 and it was the third time that he had bought an animal from the 1st appellant. Further, the explanation by the 1st appellant that the owner of the Ox Coster Mwiinga, hired him to drive the Ox from the village to the abattoir and paid him K200 for the piece-work was reasonably probable since the 1st appellant was in the business of driving other people's cattle to the abattoir. We therefore set aside that finding of fact following the case of **The Attorney General v. Marcus Kampumba Achiume.**[14]

9.10 This takes us to the second issue of the alleged alibis. Although both alibis were raised early enough during the

investigations and, were not investigated, the lower court was on firm ground when it dismissed the 1st appellant's alibi as his presence at the crime scene was confirmed by his shoe prints and other evidence.

9.11 The 2nd appellant's alibi could not stand because the lower court was on firm ground when it found that at the material time, he was one of the assassins predicated on the circumstantial evidence. We however, do not accept Miss Nsingo's argument that the 2nd appellant did not give sufficient detail of his first wife because if the police had visited his home at the address which he had given them, they would have simply asked for his first wife and most likely found her and found out her name. In our view, he had given them sufficient details to enable them investigate the alibi. Despite the lack of investigation of the alibis, the remainder of the evidence is sufficient to rebut the alibis. See **Ilunga Kabala and John Masefu v. The People.**[5]

10.0 CONCLUSION

10.1 All in all, the circumstantial evidence took the case out of the realm of conjecture such that it attained such a degree of the

cogency which could only permit an inference of guilt. See the **David Zulu case.** [8] For the foregoing reasons, we find no merit in any of the grounds of appeal and dismiss the appeal.

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M.K. KONDOLO
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE