

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA/LUSAKA**  
(Civil Jurisdiction)

**APPEAL NO. 67/2020  
HN/08/2018**

**BETWEEN:**

**RONALD CHISHALA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

***Coram: Kondolo SC, Chishimba and Sichinga, JJA***

***On 10<sup>th</sup> November, 2020, 20<sup>th</sup> January, 2021 and 26<sup>th</sup> March, 2021***

*For the Appellant: Ms. E.I. Banda, Senior Legal Aid Counsel*

*Ms. N.T. Mumba, Chief State Advocate*

*For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate*

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## **JUDGMENT**

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**Sichinga, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *R. v. Bradrey (1852) 2 Don Cr 120*
2. *The Minister of Home Affairs, The Attorney-General v. Lee Habasonda suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes SCZ Appeal No. 23 of 2007*
3. *Muyunda Muziba and Ilutumbi Sitali v. The People SCZ Appeal No. 212 of 2012*
4. *Muvuma Kambanja Situna v. The People (1982) ZR 115*
5. *Gibrian Mweetwe v. The People CAZ No. 12 of 2017*
6. *Sikota Wina and Princess Nakatindi Wina v. The People (1996) SCZ No. 8*
7. *Ilunga Kabala and John Masefu v. The People (1981) ZR 102*

8. *Zambia Breweries Plc v. Lameck Sakala SCZ Appeal No. 173 of 2009*

**Legislation referred to:**

1. *The Penal Code, Chapter 87 Laws of Zambia*
2. *The Criminal Procedure Code, Chapter 88 Laws of Zambia*
3. *The Electronic Communications and Transactions Act, Act No. 21 of 2009  
Laws of Zambia*

## **1.0 Introduction**

1.1 The appellant, Ronald Chishala, was charged with one count of the offence of Aggravated Robbery, Contrary to **section 294 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence were that on 17<sup>th</sup> June, 2017, at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, the appellant did steal cash money amounting to K2,500.00 the property of Shadreck Chate and immediately before or immediately after the time of such stealing did use or threatened to use actual violence to William Shapi in order to obtain or retain the said property.

1.2 The appellant was also charged with one count of the offence of murder, contrary to **section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.** The particulars of the

offence were that the appellant, on the 17<sup>th</sup> day of June, 2017 at Mufulira in the Mufulira District of the Copperbelt Province of the Republic of Zambia, did murder William Shapi.

## **2.0 Summary of evidence**

2.1 In brief, the prosecution's evidence at trial was that William Shapi, hereinafter referred to as the deceased, a security guard working at Chate garage was found murdered and his body was concealed in a manhole. The appellant was apprehended as a suspect after it was reported that he was seen spending exorbitant sums of money at a bar.

2.2 On the morning of 18<sup>th</sup> June, 2017, PW1, Shadreck Chate, the proprietor of Chate Garage, received a call around 05:45 hours from PW2, Haggai Bwalya, his employee informing him that he had reported for work but the deceased was nowhere in sight to open the gate. PW2 was instructed to mount the wall fence and jump into the company's yard. Whilst in the yard PW2 searched for the deceased, to no avail. He was later joined by PW1 and a large search party. The search party were soon alerted by the barking of dogs which led them to a 1.5m deep

manhole, where the deceased's body was discovered. PW1 also discovered that his office had been broken into and the cashing of the previous day was missing.

2.3 Earlier, on 17<sup>th</sup> June, 2017, between 23:00 hours and midnight, PW3, Francis Mofya, a taxi driver, met the appellant at Kamuchanga Safari Night Club. The appellant bought PW3 some drinks. He then requested to use PW3's taxi, proposing to return it the following day. PW3 declined. Thereafter, the appellant revealed to PW3 that he had some money. He asked PW3 to keep about K1,500 of it. PW3 requested another patron to witness the receipt of the money, but the man declined. PW3 and the appellant went to PW3's taxi and the appellant counted his money. Suspicious of these circumstances, PW3 began secretly recording his conversation with the appellant. The appellant told PW3 to keep K1, 500 for him. He explained to PW3 that he obtained the money after beating a person who fainted. That he sustained a cut on his hand and buttocks whilst struggling with the said

person. The appellant told PW3 that if he was arrested PW3 could take food for him to prison.

2.4 Whilst at Kamuchanga Safari Night Club, the appellant met PW4, Jackline Chilufya, who joined their company. Together, the trio went to Angels Pub where PW3 was introduced to Jackline's friend. Later, the four left Angels Pub for Kamuchanga Hotel where the appellant paid for two rooms in the hope that PW4 would spend the night with him whilst PW3 spent the night with PW4. However, PW4 refused to spend the night with the appellant and left with her friend. The appellant equally left the hotel. PW3 remained at the hotel and slept throughout the day. He was apprehended the following day after the appellant led the police to him. PW3 remained in police custody for five (5) days during which period he revealed the contents of the conversation he recorded between the appellant and himself.

2.5 In her testimony at trial, PW4 confirmed that on the material day she had been in the company of PW3 and the appellant at Safari Club and that they were later joined by her friend,

Bridget, whilst at Angels Pub. She told the court that the appellant was spending money recklessly and as she was concerned she asked PW3 to talk to him to stop removing his money in large sums. She stated she parted company with the appellant in the early hours of the morning after she declined spending the night with him.

2.6 PW5, Chisamba Ng'andwe testified that on 18<sup>th</sup> June, 2017 between 06:00 hours and 07:00 hours, the appellant showed up at her house and gave her K150 of which he said K120 was to be paid to his landlord and K30 was for the support of his child, whose mother was PW5's young sister.

2.7 PW6, Susan Mukuka, a bus ticket sales person at Likili Motorways testified that around 08:00 hours on 18<sup>th</sup> June, 2017 the appellant bought a bus ticket to Mansa. However, he was apprehended before he boarded the bus.

PW7, Detective Sergeant Mubiayeta Lukando, a scenes of crime officer produced an album of pictures capturing the scene and the discovery of the deceased's body.

2.8 PW8, the arresting officer, narrated the occurrences of 17<sup>th</sup> June, 2017 as told by the prosecution witnesses, who he had interviewed. He then produced the recording made by PW3 on his phone. PW8 told the court that the appellant led police to the recovery of a metal bar allegedly used to hit the deceased and to 17 brown envelopes which had contained the stolen money. His testimony was that only K200 was recovered.

2.9 In his defence, the appellant's testimony was that he was at his home at the material time on 17<sup>th</sup> June, 2017. He narrated that the following morning he was operating his friend's taxi, and whilst refueling he was accosted by three men who informed him that PW1 wanted to see him. He obliged and went to see PW1 at his garage. Whilst there he was apprehended by the police who subsequently tortured him. He denied stealing from the garage or killing the deceased. He denied having any scratches as portrayed by PW3. He denied purchasing a ticket to Mansa as stated by PW6. He denied buying drinks for people as stated by PW3. He also denied knowing PW3 or being with him on the material

day. He ultimately denied that the voice on the recording was his. He said that PW1 lied about working with him for two years because he had in fact worked for PW1 for five years.

### **3.0 Decision of the court below**

3.1 The learned trial Judge, having considered the evidence found that the injuries were inflicted on the deceased in order to obtain or retain the sum of K2,500.00 the property of PW1 which was stolen. The court found that the said injuries clearly showed that the attacker either intended to kill or cause grievous harm to the deceased or he knew that his actions were likely to cause death or grievous harm. In identifying the appellant as the perpetrator of these offences, the learned Judge relied on the evidence of PW3 who recorded the appellant's confession on his phone. The court relied on the case of **R v. Baldrey**<sup>1</sup> to the effect that where a confession is proved it is the best evidence that can be produced.

3.2 The court convicted the appellant on both counts. On the first count, the learned Judge sentenced the appellant to life



imprisonment. On the second count, the appellant was sentenced to death.

#### **4.0 The grounds of appeal**

4.1 Being dissatisfied with the Judgment of the court below, the appellant has raised the following grounds of appeal –

1. The learned trial court erred and misdirected itself both in law and in fact when it failed to fully analyse and evaluate the evidence.
2. The trial Judge erred both in law and in fact when he allowed the admission of the alleged confession recording and convicted based on it without following proper procedure.

#### **5.0 Appellant's submission**

5.1 Ms. Banda learned Senior Legal Aid Counsel filed the appellant's heads of argument on 20<sup>th</sup> January, 2021. She relied on them entirely.

In ground one, it was argued that the trial court did not comply with the provisions of **section 169 of the Criminal Procedure Code**<sup>2</sup> when it rendered its judgment. The case of the *Minister of Home Affairs, The Attorney-General v. Lee Habasonda, suing in his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes*<sup>2</sup> was cited where the Supreme Court held that:

*“Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, a reasoning of the court on the facts and the application of the law and authorities, if any, to the facts.”*

5.2 It was contended that the Judgment of the court below did not meet the criteria of what a judgment must contain. However, counsel conceded that there was a review of the evidence adduced in the court below by the learned Judge from pages 227 to 236 of the record of appeal and that some brief findings

of fact were made. Nonetheless, it was argued that there was no reasoning by the court below on the conclusion it had reached that the appellant was guilty of the alleged offences. It was submitted that there was no further analysis of how the court concluded that the appellant was guilty.

5.3 Further, it was argued on the first ground that the court below did not make any findings as to the issues of credibility of witnesses in the face of conflicting evidence of witnesses particularly PW1 and PW3. We were referred to the case of ***Muyunda Muziba and Ilutumbi Sitali v. The People***<sup>3</sup> where the Supreme Court stated that:

***“...there are a number of previous decisions that this court has made which clearly show how important a judgment of a trial court is to the entire life of a criminal case.”***

5.4 To buttress the submission on this point, we were also referred to the Supreme Court case of ***Muvuma Kambanja Situna v. The People***<sup>4</sup> where it was stated that:

***“A Judgment of the trial court must show on its face that adequate consideration has been given to all the relevant***

*material that has been placed before it, otherwise an acquittal may result where it is not merited.”*

5.5 We were urged to uphold the first ground of appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

5.6 On the second ground of appeal, counsel contended that the lower court erroneously allowed a phone recording without following laid down procedure on admission of electronic communications. Reference was made to **Section 8 of the Electronic Communications and Transactions Act<sup>3</sup>** which provides as follows:

*“(1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message in evidence -*

*a) On the mere grounds that it is constituted by a data message; or*

*b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.*

*(2) Information in the form of a data message shall be given due evidential weight.*

***(3) In assessing the evidential weight of a data message, regard shall be to –***

- a) The reliability of the manner in which the data message was generated, stored or communicated;***
- b) The reliability of the manner in which the integrity of the data message was maintained;***
- c) The manner in which its originator was identified;***  
***and***
- d) Any other relevant factor.***

***(4) A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of such person, shall o its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, be admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy printout or extract.”***

5.7 It was submitted that no foundation was laid before the recording was played in contravention of the law, and that despite defence counsel’s objection, the learned Judge ignored the law and concluded he would allow the state to rectify the error. It was counsel’s argument that in doing so the learned Judge shifted from being an umpire and assumed the role of the prosecutor to the detriment of the appellant. It was

submitted that since the appellant denied ever making such recording, it was important that the authentication of the recording be proved since PW3 was a suspect witness. That since electronic communications were prone to manipulation it was important for a proper foundation to have been laid, and in this case a proper foundation would have been the calling of someone from the phone service provider to speak to phones sold in their shops. It was submitted that for this reason the court misdirected itself in allowing the recording.

5.8 It was ultimately submitted that at page 239 of the record of appeal the trial Judge stated that “*fortunately PW3 had a divine premonition and recorded his confession which all of us heard with ears,*” and in doing so ignored the appellant’s assertion that he was not the one on that recording. That the learned trial Judge assumed the role of an expert in voice recognition. Counsel contended that the nature of the evidence contained required to be corroborated and thus the conviction was unsafe. We were urged to uphold the appeal on this

ground, quash the conviction, set aside the sentence and set the appellant at liberty.

## **6.0 Respondent's submissions**

- 6.1 Ms. Mumba, learned Chief State Advocate filed submissions on behalf of the state on 20<sup>th</sup> January, 2021. She equally entirely relied on the filed heads of argument.
- 6.2 In ground one, the learned Chief State Advocate conceded that the trial court did not fully analyse and evaluate the evidence on record before convicting the appellant. She further conceded that the trial court did not make any findings on credibility of witnesses in the face of the conflicting evidence of the witnesses, particularly PW1 and PW3.
- 6.3 Counsel submitted that in the absence of sufficient findings of fact by the learned Judge, it is difficult for this court to reflect on the said findings of fact and come up with a judgment of the evidence on record. She argued that although there was evidence on record which would justify a conviction in *casu*, the state preferred that the matter was sent back to the lower

court for a re-trial. In line with the submission, the learned Chief State Advocate referred us to the case of **Gibrian Mweetwe v. The People**<sup>5</sup>.

6.4 Ms. Mumba submitted that since the trial of the appellant was flawed on a technicality, it was in the interests of justice that the matter is sent back to the High Court for retrial. To support this preposition, we were referred to the case of **Sikota Wina and Princess Nakatindi Wina v. The People**<sup>6</sup> where it was held that:

***“A re-trial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interest of justice.”***

6.5 Counsel urged this court to refer the matter to the High Court for re-trial in the interest of justice.

6.6 In respect of ground two, it was submitted that the trial court was on firm ground when it allowed the admission of a phone recording which PW3 produced. Counsel argued that the prosecution laid the proper foundation for the admission of the recording in issue. It was submitted that PW3 was capable of



producing the recording in issue since he was the creator or author of the said recording which he recorded on his phone. The nature of PW3's evidence was that he described the features of his phone and the name of the phone, the same being an ITEL phone. PW3 stated he was able to pick out the recording by the number of the message being 00013, which he mastered, as well as the time it was recorded. The witness identified the phone device he used, the recording mechanism of the phone and how messages were saved on his phone.

6.8 It was submitted that from the above evidence the prosecution had laid a sufficient foundation for the production of the recording in issue. For these reasons counsel submitted that the trial court could not be faulted for allowing the video recording to be submitted into evidence.

6.9 Reference was also made to **Section 8 of the Electronic Communication and Transactions Act** *supra* which provides as follows:

***“8 (1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message in evidence -***

***(b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form...”***

6.10 It was counsel's further submission that the admission of the recording in issue was not prejudicial in view of other evidence on record which connected the appellant to the commission of the offence. Such as the leading evidence on record where the appellant led the police to the recovery of empty envelopes which PW1 identified as being similar to the envelopes in which the money stolen on the material day was. It was submitted that the appellant leading the police to the recovery of the said envelopes was an odd coincidence that provided corroboration to the evidence of PW3. That the stated odd coincidence showed that the appellant was connected to the commission of the offence in *casu*. To support this proposition we were referred to the case of ***Ilunga Kabala and John Masefu v. The People***<sup>7</sup> where it was held *inter alia* that:

***“It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection no explanation.”***

6.11 Counsel concluded with the prayer that save for the reasons set out in response to ground one, the state would have urged this court to dismiss the appellant's appeal in ground two.

## **7.0 Decision of the Court on appeal**

7.1 We have considered the appeal, the Judgment appealed against, the evidence adduced in the court below and the arguments advanced by learned counsel for the parties. In the first ground, the appellant has raised the issue of the judgment not meeting the standard of what a judgment must contain. **Section 169 (1) of the Criminal Procedure Code** provides as follows:

*“169. (1) The judgment in every trial in any court shall, except as otherwise expressly provided by this code, be prepared by the presiding officer of the court and shall contain the points or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”*

7.2 From pages 238 to 239 of the record of appeal, the learned Judge outlined the ingredients in the first count, of the offence

of aggravated robbery as enacted pursuant to **Section 294 (1) of the Penal Code** *supra*. Similarly for the second count of the offence of the murder he cited the law as provided by Section 200 of the Penal Code. These were the points of law under consideration.

7.3 The learned Judge set out his decision and his reasons as follows:

*“After considering every piece of evidence before me and the conduct of the Accused on that fateful night and the events that ensued in the morning after, I have come to the inescapable conclusion that this was premeditated murder. The Accused had embarked on executing a well thought out and carefully planned robbery which was to be carried out at all cost and no one was to stand in his way. The Accused planned and knew how he would gain access into the garage by jumping over the wall fence. He also planned and knew how to eliminate the security guard using an iron bar and where to dump his body so that it was not found. The Accused equally knew where the money was and how to gain entry into the office by breaking the door using the said iron bar and after stealing it he knew where to dispose of the envelope.”*

7.4 The appellant submitted that the judgment did not meet the criteria of what a judgment must contain. In the case of

Court held as follows:

***“Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, the findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts.”***

7.5 The judgment of the lower court does reveal a review of the evidence. It equally makes a summary of the arguments and submissions. It further makes findings of fact as to what the appellant did on the material day.

7.6 The judgment, albeit briefly shows the reasoning of the facts and the application of the law and authorities to the facts. The judgment has several paragraphs including the particulars of the offences, a summary of the evidence of each witness, a discussion of the evidence relied upon by counsel, the elements of the offences and findings and conclusions arrived at by the learned judge.

7.7 We would not call the judgment unreasoned within the meaning the Supreme Court gave in the case of ***The Minister***

***of Home Affairs, the Attorney-General v. Lee Habasonda suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes*** *supra* as submitted by Ms. Banda, and conceded by Ms. Mumba. We have not found any merit in this ground because the lower court did give its reason after considering every piece of evidence before it. Infact, it was not in dispute that PW1 was robbed of cash money amounting to K2,500, or that actual violence was occasioned to William Shapi. There was no dispute that William Shapi met his death in a gruesome manner and that his remains were concealed by the perpetrator/s in a manhole. The photographic album clearly reveals that undisputed fact. The only issue in dispute was the identity of the perpetrator/s, which on the evidence of PW3 the trial court found implicated the appellant. For these reasons, we uphold the learned trial Judge on the first ground of appeal, and dismiss it.

7.8 As regards the second ground of appeal on the issue of whether the alleged confession ought to have been admitted,

the evidence of PW3 was such that he recorded the appellant's confession on his ITEL phone, which he described by its features. He went on to show the court the phone's recording mechanism and the number he identified the recording by page 79 of the record of appeal refers.

7.9 The evidence of PW3 clearly shows that a foundation was laid before he switched on the phone, identified the number of the recording – 0000013 and the time and date of the phone. We cannot fault the learned Judge for admitting the recording evidence in light of the provisions of **Section 8 of the Electronic Communications and Electronic Communications and Transactions Act** which provides that:

*“8 (1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of data message in evidence –*

*(b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on grounds that it is not in its original form...”*

7.10 We are alive to the fact that other than the recording this was a case based on circumstantial evidence. That there were

other odd coincidences connecting the appellant to the commission of the offence including – the evidence of PW2 who observed that the appellant had bruises on his neck; the testimony of PW4 who told the court the appellant spent a lot of money buying beer at Safari Night Club and Angel's Night Club; and the testimony of PW8 who told the court the appellant led police to the recovery of empty brown envelopes, identified by PW1 as being similar to the envelopes from which the money was stolen.

7.11 However, the main evidence was that of PW3 who testified to being with the appellant on the material night and that the latter confessed to committing the offences. PW3 was a suspect witness as he was apprehended in connection with the same offences. His testimony required corroboration, which was provided by the recording he made of the appellant confessing the offences. After listening to the said recording, the learned trial Judge as the trier of fact in issue came to the conclusion that the voice on the recording was that of the appellant. The confession thus provided the best evidence



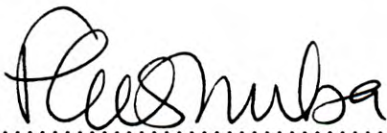
available. For the foregoing reasons we dismiss the second ground of appeal.

## 8.0 Conclusion

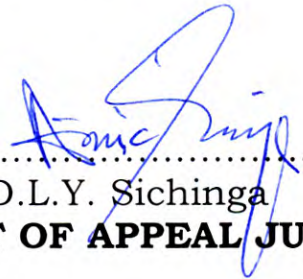
8.1 We do not find merit in grounds one and two of the appeal. They accordingly fail. In the net result the appeal is dismissed for lack of merit. We uphold the convictions and sentences meted out by the lower court.



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M.M. Kondolo, SC  
**COURT OF APPEAL JUDGE**



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F.M. Chishimba  
**COURT OF APPEAL JUDGE**



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D.L.Y. Sickinga  
**COURT OF APPEAL JUDGE**