IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 39/2016**
HOLDEN AT NDOLA
(Criminal Appellate Jurisdiction)

BETWEEN:

KENNEDY CLERIS SIKAPIZYE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Chisanga, JP, Chashi and Mulongoti, JJA

On 7th and 9th February, 2017 and 13th April, 2017

For the Appellant: Mr. K. Muzenga, Deputy Director, Legal Aid Board

For the Respondent: Mrs. R. N. Khuzwayo, Chief State Advocate

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J U D G M E N T

***Mulongoti, JA**, delivered the Judgment of the Court*

Cases referred to:

1. ***Wilson Mwenya v. The People (1990) S.J SCZ***
2. ***Nelson Banda v. The People (1978) ZR 300***
3. ***Jackson Kayuni and Another v. The People Appeals No. 251 & 252 of 2011***
4. ***Chipango and Others v. The People (1978) ZR 304***
5. ***Simon Malambo Choka v. The People (1978) ZR 243***
6. ***Yokoniya Mwale v. The People SCZ Appeal No. 285 of 2014***
7. ***Kambarage Mpundu Kaunda v. The People (1990-1992) ZR***

8. ***Boniface Chanda Chola v. The People (1988-1989) ZR 163 215***

9. ***Wamundila v. The People (1978) ZR 51***

10. ***Mwambona v. The People (1973) ZR 28***

11. ***Machobane v. The people (1972) ZR 101***

12. ***Angel Chibesa Lengwe and Abel Banda v. The People SCZ Appeal No.45 of 2015***

The appellant was arraigned in the Kasama High Court on one count of murder contrary to section 200 of the Penal Code. He was convicted and sentenced to death.

The appellant now appeals against the conviction. The conviction was anchored on the testimony of PW1 who according to the trial judge was corroborated by PW4. The evidence presented by the state in support of its case is summarised below.

On 10th January, 2014 around 19:00 to 20:00 hours, PW4 saw the appellant who was armed with an axe, chase his ex wife Beauty and two young men he found at Beauty's house. He suspected one of the young men named Chris to be having an affair with Beauty. Around 21:00 hours PW1 who was pushing his bicycle ten metres ahead of his brother the deceased, met the appellant. After he passed the

appellant, PW1 turned after he heard his brother shouting that he was dying. He saw the appellant running into the bush.

In cross examination, PW1 testified that he worked for a Chinese company and that he worked at night. When further cross examined, he said he was not working on the 10th of January, 2014. When it was put to him that he was lying since he had earlier said that he was working, he admitted that he was not working on that day. When asked why he wanted the Court to believe his story by advancing lies, PW1 stated that he was telling the truth. That he made a mistake when he agreed to having told a lie. PW1 denied the assertion that there was a struggle between his brother and the appellant. He further denied that they were three of them when they met the appellant. He insisted that they were just the two of them.

The appellant who pleaded not guilty placed himself at the scene. He stated that he met three and not two people as testified by PW1. That one of the two people who did not have a bicycle accosted him. He grabbed his axe, leading to a struggle with him. The man fell together with the axe, at which point he (appellant) decided to run away. As he did so, he heard the sound of an axe which hit him on his boot. He turned, picked it up and continued running.

We do not intend to traverse, the evidence in detail, suffice to state that significant contradictions emerged in the evidence of the appellant. Of paramount importance are the contradictions between the evidence he gave in court and his statement to the police, which was admitted in evidence. In his statement to the police, he said that the man grabbed his axe and tried to hit him with it. However, he managed to dodge and in the process the man with the axe hit his friend in the stomach.

After analysing the evidence, the trial judge accepted the evidence of PW1 as a true account of what happened that night. She reasoned that having heard and observed his demeanour and upon analysing his evidence, she found nothing that would render him a witness with a possible interest to serve. The trial judge further found that PW1 had no motive on his part to make him falsely implicate the accused on his account of the events of that night. The court found that PW1 was about ten metres away from his brother when he heard his brother shout in agony. He turned and saw the man who carried an axe run into the bush. And that he (PW1) testified that there was no conversation between the appellant and the deceased.

The trial judge was alive to the contradictions in the appellant's evidence. She noted that the appellant gave two different versions of the same incident.

According to the trial judge, the question that begged an answer was, 'why would the appellant give two different versions of the same incident?' She reasoned that it was because the two versions are fabrications of his own imagination that he told to save himself. Guided by the Supreme Court decision in **Wilson Mwenya v. The People**[1] that "*evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the crime*", the trial judge, found that the evidence of PW4 corroborated PW1's testimony as to the description of the accused. Both testified that he wore an orange top and gum boots. Furthermore, PW4 testified that the appellant chased the young men he found at Beauty's house with an axe but did not catch up with them. Following the Supreme Court decision in **Nelson Banda v. The People**[2] that "*there is no rule in our law that the evidence of more than one witness is required to prove a particular fact*", the trial judge accepted the evidence of PW1 as a true account and that the evidence of the appellant that the axe fell with the deceased and injured him could not stand. The trial judge found that the appellant hacked the deceased with the axe and then

ran away into the bush. She concluded that by hacking the deceased with an axe and causing the injuries that resulted in the deceased's death soon thereafter, the appellant had the intention to cause death or grievous harm to the deceased. Thus, he had malice aforethought as defined in section 204 of the Penal Code.

The learned trial judge also considered whether there were any possible defences available to the appellant such as self defence or provocation to justify the killing of the deceased. She noted that the appellant's testimony that three men accosted him on his way home and one of them tried to grab his axe and in the process fell down and was injured by the fall and the axe, seemed to suggest that the appellant acted in self defence. The trial judge found that there were only two men (PW1 and deceased) as testified by PW1 contrary to the appellant's story. Additionally, that there was no conversation between PW1, his brother (deceased) and the appellant.

The trial judge noted that PW4 testified that the appellant chased two young men he found at Beauty's house with an axe but they managed to get away. PW4 also testified that the appellant was angry as he thought that Beauty was cheating on him. The trial judge found therefore, that when he left Beauty's house to go home, the appellant was enraged and his attack on the deceased was premeditated and

totally unprovoked. And that since there was no struggle between the appellant and the deceased, the defence of self defence was not available to him.

Regarding provocation, the trial judge reasoned that no provocation arises if there is no material evidence suggesting it. She found that there was also no evidence on record to suggest that the deceased provoked the appellant. However, the evidence of PW4 was that the appellant chased two young men, one of who he suspected was flirting with Beauty. That sadly, PW1 and the deceased were not the young men who were at Beauty's place earlier. Thus, on his way home, the appellant had no moment of unexpected anguish that would justify him hacking the deceased to death. Taking the above into consideration, the trial judge therefore, found that no defence was available to the appellant. The appellant was found guilty of murder and sentenced to death.

Mr. Muzenga, who appeared for the appellant raised two grounds of appeal. First, that the learned trial judge misdirected herself in law and in fact when she relied on the evidence of PW1, a witness with a possible interest to serve, in rejecting the appellant's defence without satisfying herself that the dangers of false implication had been ruled out.

Second, that the learned trial judge misdirected herself in law and in fact when she rejected the appellant's explanation as it could be reasonably true since the evidence against him was circumstantial.

Mr. Muzenga argued in relation to ground one that PW1's testimony was that he was about ten metres in front of the deceased when he passed the appellant, he only turned after he heard the deceased scream. Accordingly, there was no eye witness save for the explanation by the appellant. Learned counsel contends that PW1 was a witness with a possible interest whose evidence required corroboration.

The case of **Jackson Kayuni and Another v. The People**[3] in which the Supreme Court followed its decision in **Chipango and Others v. The People**[4] was relied upon that "*the only eye witness to the said beating was a biological son of the deceased. As such he can properly be classified as a witness with an interest of his own to serve. Such a witness should be treated as if he were an accomplice*".

Furthermore, that in **Simon Malambo Choka v. The People**[5] the supreme court held that "*a witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of*

his evidence. That something more must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness".

According to counsel, there was no corroborative evidence or something more to support PW1's denials, that there was a struggle or fight between the deceased and the appellant and that the deceased was the aggressor. It is argued that although the trial judge was alive to the fact that PW1 was a witness with a possible interest to serve, the approach she took was wrong because once a witness falls in this category, the issue of demeanour or his credibility or absence of motive is immaterial.

That the trial judge should not have rejected all of the appellant's story since he placed himself at the scene of crime, was consistent in saying that there was a struggle and his story can be reasonably possible as it explains the motive for his action. Learned counsel also argues that since there was a struggle/fight and since the deceased was the aggressor, the offence he should have been convicted of is manslaughter and not murder.

Additionally, that if manslaughter failed then murder with extenuating circumstances would have been appropriate on account

that the deceased's aggression amounted to provocation in light of the struggle.

The learned chief state advocate, Mrs Khuzwayo, who appeared for the respondent, argued in relation to ground one that the lower court warned itself before accepting the evidence of PW1 and found that he had no motive to falsely implicate the appellant. The supreme court decision in the case of **Yokoniya Mwale v. The People**[6] was cited as authority that relatives or friends of the deceased should not out rightly be barred from testifying on that point, but that when the court warns itself and deems the witness to be a truthful and reliable one, then the evidence of such a witness should be accepted. She argued that there are several points of corroboration on the evidence as the record reveals. The first was from PW4 who stated that the appellant who was armed with an axe chased PW1 and the deceased from Beauty's house. Second, the appellant who placed himself at the scene informed the court that he was carrying an axe on the day in question. He also stated that he had engaged in a struggle with the deceased.

Accordingly, that this admission brings out the fact that he had an opportunity to commit the offence. It was further argued that PW1's testimony that the deceased was hacked near his neck was

corroborated by the postmortem report which indicates that the deceased had a penetrating wound to his chest; which confirms that an axe was used to inflict the injury that led to the death of the deceased. Finally, that the act of fleeing of the appellant from the town where the incident happened to another town where he was apprehended, is conduct not consistent with an innocent person.

In relation to ground two, she argued that the trial judge did not err by not accepting the explanation given by the appellant. That PW1 and PW4 testified that only two people were chased by the appellant and that at the moment immediately before the death of the deceased, PW1 was only with the deceased. Therefore, it could not be true that the appellant was accosted by three men. And that it is not possible that the deceased suffered the penetrating wounds to the chest by a falling axe. She went on to argue that if it were true that the axe accidentally fell and hit the deceased, it would have hit him on the lower limbs and not on the position shown on the postmortem report.

In conclusion, counsel argued that a sane person who hits another with an axe on the chest ought to know that such an act would result in death or injury. Being a sane person, the appellant intended to cause death or injury to the deceased, satisfying section 204 of the Penal Code. Therefore, the lower court was on firm ground for not

accepting the appellant's explanation as it could not be reasonably true.

In reply, Mr. Muzenga stated that PW4 never stated that the appellant chased the deceased and PW1, as stated by the learned chief state advocate. That the record is clear that the two people that were being chased were different from PW1 and the deceased. Mr. Muzenga also argued that the case of **Yokoniya Mwale v. The People**[6] cited by the respondent's counsel, did not change or overrule the earlier supreme court decisions which consider friends and relatives as falling within the categories of witnesses with a possible interest to serve. That in the recent case of **Jackson Kayuni v. The People**[3], the supreme court elucidated that a relative should be treated the same as an accomplice. Therefore, PW1 being a brother to the deceased is such a witness, who even admitted to lying in cross examination at pages 10 and 11 of the record of appeal.

In response to a question from the Court about the accused placing himself at the scene, learned counsel submitted that this shows that the appellant was honest and credit should be given to him despite the two different statements he gave in court and at the police. That his evidence must be accepted because it could reasonably be true, even if the court does not believe it, ordinarily the court must accept it.

Responding to a question on the issue of the axe falling on the deceased, counsel argued that the version that the axe fell on the ground and the deceased fell on it and if the court said that it was not possible, then the other statement is possible, that, during the struggle in order to defend himself, he could have used the axe that he had to hack the deceased. If the court inferred that the appellant was lying because of the two statements then there is no other evidence against him because PW1 did not see what happened.

We have considered the arguments of both counsel and we shall deal with the two grounds together as they are inter related. The pertinent issue this appeal raises is whether the inferences and verdict of the trial judge are consistent with all the facts proved and as such exclude any other reasonable inference other than that the appellant is the person who committed or perpetrated the crime. Key to the issue is the question whether PW1 as a brother to the deceased is a witness with a possible interest to serve as argued by the appellant's counsel or whether even though he was such a witness, his evidence was corroborated and is safe to rely on as contended by the chief state advocate.

The Supreme Court pronounced itself on this issue recently, in its judgment in **Yokoniya Mwale v. The People**, supra. The Supreme Court observed thus:

"The consistent position of this court has been that in criminal proceedings, relatives and friends of the deceased may all be witnesses with an interest to serve or may be merely biased. In Kambarage Mpundu Kaunda v. The People[7], we stated that as relatives and friends of the deceased maybe witnesses with an interest to serve, it was incumbent upon a court considering evidence from such witnesses, to warn itself against the dangers of false implication of the accused by the evidence of such witnesses, and that the court should go further to exclude such danger. A genre of cases have now consistently established that the evidence of a witness with a bias or a possible interest of his own to serve and that of an accomplice, ought to be treated on the same footing."

The Supreme Court also referred to its decisions in **Boniface Chanda Chola v. The People[8], Simon Malambo Choka v. The People[5]** and **George Wamundila v. The People[9]** , to the effect that the evidence of a witness with a bias or possible interest of his own to serve falls on the same footing as for accomplices and that it is

necessary to examine the circumstances to ensure the danger of false implication is excluded before a conviction can be held to be safe.

The Supreme Court went on to stress that:

"These authorities did not establish, nor were they cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always to be treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for want of corroboration...a conviction will be thus safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim provided the court satisfies itself that on the evidence before it, these witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve".

It is clear to us that the position of the law is that friends or relatives of the deceased or victim are not always to be treated as witnesses with an interest to serve, whose evidence routinely requires corroboration. Thus, much as we agree with Mr. Muzenga that the

case of Yokoniya Mwale did not change the position in the earlier decisions, the Supreme Court stressed that it is not automatic that just because a witness is a relative or friend of the deceased or victim then their evidence requires corroboration. The Supreme Court guided further that "***the point in all these authorities is that these category of witnesses, may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernable and only in those circumstances should the court treat those witnesses in the manner we suggested in the Kambarage case...***"

On the evidence on record; it was undisputed that the appellant was armed with an axe on the fateful day. It is also a fact that the appellant encountered PW1 and the deceased later that day and that PW1 was pushing his bicycle. It is further common cause that earlier he was seen by PW4 chasing Beauty and two young men, armed with the axe. And that he wore an orange top and gum boots. These facts were stated by PW1 and PW4 and the appellant confirmed them except he contradicted himself as we shall show later.

We would therefore not discern from the evidence that PW1 was a witness with a possible interest or bias as correctly determined by the trial judge.

Indeed the trial judge needed to have satisfied herself that on the evidence before her PW1 could not be said to have had a bias or motive to falsely implicate the accused or any other interest of his own to serve or if he was, that his evidence was corroborated and safe to rely on.

The learned trial judge observed at J11 to J12, following the Supreme Court decisions in **Kambarage Mpundu Kaunda v. The People**, supra and **Mwambona v. The People**[10] that:

"Having heard PWI and having observed his demeanour and upon analysing his evidence before this court. I do not find anything that would make me regard him as a witness with a possible interest to serve. I further find no motive on his part that would make him want to falsely implicate the accused on his account of events of that night".

We find that the trial judge was on firm ground when she found there was nothing on the evidence to make her regard PW1 as a witness with a possible interest to serve. However, having relied on the demeanour of PW1, the trial Judge needed "something more" than a

belief in the truth to satisfy herself that his evidence was safe to rely on as argued by Mr. Muzenga and in line with the case of **Simon Malambo Choka v. The People,** supra.

In *casu* other than PW1's demeanour, the trial judge accepted that PW1 was with the deceased and was about ten metres ahead of him pushing his bicycle when he saw the appellant going in the opposite direction and carrying an axe on his shoulder. That after the appellant passed him, PW1 turned when he heard his brother scream and he saw the appellant running away. It is clear even to us that PW1 did not exaggerate his testimony as he testified that he did not see the appellant hack the deceased. His testimony was concise and precisely that he only turned after his brother screamed and he saw the appellant running away. The trial judge was on firm ground when she found no motive on his part to falsely implicate the appellant. There was therefore, 'something more', other than demeanor and the court's belief in his testimony.

In these circumstances we are inclined to agree with her. It is settled law that lack of motive to falsely implicate an accused amounts to something more as elucidated in cases such as **Machobane v. The People**[12]**.** It was stated in that case that

"The court can convict on the uncorroborated evidence of a witness with a* possible *interest of his own if there are special and compelling grounds to do so such as lack of motive to lie...there was something more though not constituting corroboration which satisfied the court that the dangers of convicting without corroboration had been excluded...This is the meaning of special and compelling grounds.."

The trial judge properly reasoned when she found that apart from his demeanour, PW1 had no motive to falsely implicate the appellant. She properly analysed the evidence and found that though PW1 is a brother to the deceased, on the evidence before her she found nothing to make her regard him as a witness with a possible interest, she found his evidence safe to rely on as the danger of false implication were excluded. Clearly, PW1 was at the scene with his brother and he testified as to what he perceived. He testified that the appellant was armed with an axe which was confirmed by PW4 and appellant himself. We are therefore, not persuaded by the appellant's counsel's arguments that the trial judge misdirected herself in law and fact when she accepted the evidence of PW1, a brother to the deceased and thus a witness with a possible interest to serve. We are guided by the Supreme Court decisions referred to. Just because PW1 is a brother to

the deceased is not sufficient reason to consider him as a witness with a possible interest of his own to serve.

We are equally not persuaded by Mr. Muzenga's arguments that by placing himself at the scene and his explanation that there was a fight/struggle, the appellant was truthful and his explanation reasonably possible. In rejecting his explanation the trial judge reasoned that the appellant gave two different versions in court and to the police, to save himself. She found that PW1 was only about ten metres away from his brother when he heard him shout in agony. She also found that PW1 was corroborated to an extent by PW4. PW4 had earlier seen the appellant chase Beauty and two young men whilst armed with an axe. Then a few hours later he encountered the deceased and PW1 whilst still armed with the axe. Both stated that he wore an orange top and gum boots, which the appellant confirmed.

We can only surmise that he placed himself at the scene knowing that others like PW4 had seen him with the axe chasing Beauty and two young men, one of who he suspected was having an affair with Beauty, his ex wife. It was PW4's testimony, which appellant confirmed, that Beauty ran to the neighbour's house and he chased the two men. However, he gave two versions in court and to the police,

which to us shows that he was a lying witness. The trial judge rightly rejected his explanation. And as argued by the learned chief state advocate PW1's testimony that the deceased was hacked near his neck was corroborated by the post-mortem report which indicated that the deceased had a penetrating wound to his chest. There by confirming that an axe was used to inflict the injury that led to his death, instantly.

In the circumstances of this case, we are of the view that the trial judge was on firm ground when she convicted the appellant of murder and sentenced him to death. She analysed the possible defences and found that none were available to the appellant. The Court drew the correct inferences on the evidence and cannot be faulted. The suggestion that the deceased fell and injured himself cannot be regarded as a reasonable inference to be drawn on the facts. As contended by Mrs Khuzwayo, it is not possible that the deceased suffered the penetrating wounds to the chest by a falling axe and that were that true it would have hit him on the lower limbs. The appellant's version coupled with the contradictions, taken in light of the prosecution witnesses testimonies especially the undisputed facts, for instance that the appellant met PW1 and the deceased while armed with the axe that he picked from Beauty's house and had earlier

chased her and two young men, are a clear after thought. The contradictions in his statement to the police and his evidence in court, were so material as to be fatal to his defence. He told the police that the deceased was hit in the stomach by one of his friend during the struggle for the axe and in court he said the deceased fell with the axe and injured himself. Clearly, showing that he was a lying witness.

His version must be evaluated in light of all the evidence and not in isolation. We opine that it is not a correct approach to consider an accused's testimony in isolation and then conclude that it may be reasonably possible. His testimony must be considered on the totality of the available evidence. Therefore, when all of the evidence is taken into account, it overwhelmingly points to the guilt of the appellant.

We note the appellant's counsel's argument that PW1 lied and admitted to doing so in cross examination. However, the record is clear that he agreed that he lied but he later stated that he made a mistake. We also note that the issue on which he admitted lying about is immaterial and thus not fatal to the prosecution's case. Whereas the appellant's contradictions were of material significance and fatal to his defence.

We therefore confirm the conviction and sentence. The trial judge was correct in finding the appellant guilty as charged. She found as a

fact that there was no fight/struggle. We do not see any reason to interfere with this finding as it was consistent with the evidence before her. We also do not see any extenuating circumstances to justify the imposition of a lesser sentence and we are not persuaded by Mr. Muzenga's arguments that the appellant be found guilty of manslaughter. It is a fact that the deceased and PW1 were not the young men that the appellant chased from Beauty's house, in a rage as he believed one of them was having an affair with Beauty, as correctly pointed out by his counsel and erroneously stated to be the same young men by the State. On the contrary, the circumstances of the case justified the death penalty. The learned trial judge had proper regard to the gravity of the offence and the facts before her. We can find no basis that she misdirected herself.

We also must state that we find merit in Mrs. Khuzwayo's argument that the act of fleeing the place where the incident occurred by the appellant is consistent with a guilty person. We are fortified by the Supreme Court decision in the case of **Angel Chibesa Lengwe and Abel Banda v. The People**[13] that the act of the appellants fleeing the area a day after the death of the deceased without trace for 10 months speaks volumes and points to their guilt knowledge. The appellant

here fled after the incident and was only apprehended a week later in Chipili, a different district from where the incident occurred.

In the net result, we find no merit in the two grounds of appeal. The appeal is accordingly dismissed. The conviction and sentence are upheld.

F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

J. CHASHI
COURT OF APPEAL JUDGE

J.Z MULONGOTI
COURT OF APPEAL JUDGE