

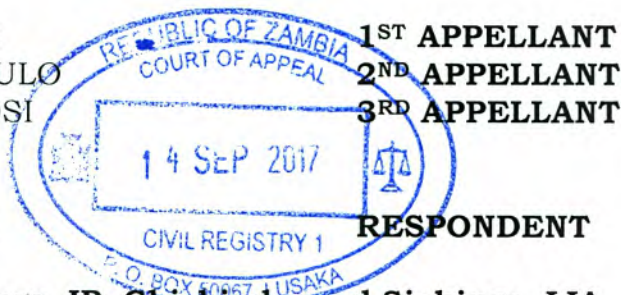
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

CAZ NO./48,49,50/2017

B E T W E E N:

LUCKY DUBE
RONNIE MAFULO
FRANK MOLOSI
AND

THE PEOPLE



CORAM : Chisanga JP, Chishimba and Sichinga JJA
On 2nd May, 2017, 3rd May, 2017 and 14th September, 2017

For the Appellants : Mr. H. M. Mweemba – Principal Legal Counsel
For the Respondent : Mrs. C. L. Phiri- Deputy Chef State Advocate - NPA

J U D G M E N T

Chishimba J.A. delivered the Judgment of the Court.

Cases Referred to:

1. The Minister of Home Affairs, The Attorney General Vs. Lee Habasonda (Suing on His Own Behalf and On Behalf of the Southern African Centre for The Constructive Resolution of Disputes) (S.C.Z Judgment Number 23 of 2007)
2. Gibrian Mweetwa Vs The People CAJ/12/2017
3. Patrick Kunda and Robertson Mulela Chisenga Vs. The People (1980) ZR 132
4. Steven Mushoke Vs. The People SCZ Judgment No. 31/2014 Appeal No. 148/2010
5. Mateko and 7 Others Vs. The People (1979) ZR 23 (SC)
6. Muyunda Muziba and Ilutumbi Sitali Appeal number 212 /2012
7. Princess Nakatindi Wina Vs. The People (1996) S.J. (S.C.)

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

This is an appeal against the High Court Judgment convicting the Appellants on two counts of the offence of Murder contrary to **Section 200 of the Penal Code Chapter 87 of the Laws of Zambia** and the sentence of death imposed.

The particulars of the offence being that Lucky Dube, Crispin Mafulo and Frank Moloso on the 16th day of April 2012 at Livingstone in the Livingstone District of Southern Province of the Republic of Zambia, jointly and whilst acting together, did Murder Serjio Valle Kattendahl and Jacob Chirwa. The Appellants were initially charged with a number of offences in the court below arising from an incident of aggravated robbery namely:

- i. Four Counts of Aggravated Robbery contrary to Section 294(1) of Penal Code.
- ii. One Count of Attempted Murder contrary to Section 215 of the Penal Code.
- iii. Two Counts of Murder contrary to Section 200 of the Penal Code.

The prosecution's evidence was that the Appellants on the 16th day of April, 2012 whilst armed with a pistol attacked patrons at Zig-Zag restaurant in Livingstone, got away with cash, a cell phone and a digital camera. In the course of the robbery a

security guard and a Caucasian male patron were murdered. Cartridge casings were recovered at the scene of crime.

In addition, a digital camera was recovered from PW2, a taxi driver, who testified that he was sold the camera by the 2nd Appellant. Further, that Police officers in the company of the 2nd Appellant had accosted PW2 and searched his house. Though PW2 had explained how he had purchased the camera from the 2nd Appellant, he was at one point detained in custody for a day and was later released.

Mr Sergio K. Kalle, a helicopter pilot, identified the recovered camera as the one belonging to the deceased, his co-worker

Silawa Vasco, a Director at Zig-Zag Lodge, testified that he did not know the identity of the attackers armed with a pistol who shot dead two people.

An employee of Zig-Zag restaurant, Steven Nkulo, testified that upon seeing three men armed with a pistol, he had run away. Upon his return, he found that a patron had been shot dead. In addition, that a woman patron had been shot in the shoulder. PW4 could not identify the assailants as they wore masks. He simply described them as tall and short.

Constable Ezekiel Phiri, a Police Officer, testified that he apprehended A3 who informed him that he had stolen tyres and duvets from a Mr. Jere. In turn, A3 identified his two accomplices.

The Managing Director of the restaurant, Lynne Mendelson, testified that she found a brass bullet casing and a bullet at the premises which she gave to the Police Officers. Further, that three suspects were brought to the premises two days later by Police Officers.

A ballistic expert witness, Mr. Nyaufuka Pius Ilunga, confirmed that the empty cartridges recovered from the scene of the crime were fired from the same firearm.

A Detective Inspector, Mr. Kelvin Shiacholi, stated that he had recorded warn and caution statements made by the two Appellants. The admission of the Confession Statements was objected to by the accused persons who alleged torture, beatings and intimidations.

A trial within a trial was held. The appellants alleged torture and threats of death by the police officers who refuted the allegations. The Learned Trial Judge delivered a ruling holding that the confession statements were made voluntarily and were

The Learned Trial Judge acquitted the Appellants on the 4 counts of Aggravated Robbery and Attempted Murder Charges.

The Learned Trial Judge convicted the Appellants on two counts of murder stating that “***the best evidence came from the confession statements of the accused persons.***”

Being dissatisfied with judgment of the lower court the Appellants advanced two grounds of appeal namely;

1. ***The learned trial Judge erred both in law and in fact when she failed to comply with the provisions of Section 169 of the Criminal Procedure Code when she delivered the ruling or judgment of a trial within a trial and the main Judgment of the matter.***
2. ***The learned trial Judge erred both in law and in fact when she allowed the admission of the confession statements and later convicted on their basis when in fact they were involuntarily obtained and without any corroborating independent evidence.***

Under ground 1, the gist of the Appellants' argument is that the trial Court did not comply with the provisions of **Section 169 of the Criminal Procedure Code** when it rendered the ruling following a trial within a trial. We were referred to the cases of ***The Minister of Home Affairs & The Attorney General Vs. Lee Habasonda (Suing on His Own Behalf and On Behalf of the Southern African Centre for The Constructive Resolution of Disputes)*** ⁽¹⁾, ***Gibrian Mweetwa Vs The People*** ⁽²⁾ and ***Patrick Kunda and Robertson Mulela***

Chisenga Vs. The People ⁽³⁾ where the Court gave guidelines on what a judgment should contain.

The Appellants argued that the Ruling of the trial Judge on the trial within a trial as well as the main judgment were not in compliance with the law. Further, that the non-compliance with the law brought a technical defect which ought to be ruled in favour of the Appellants.

It was submitted that in the premises the Court ought to allow this appeal, quash the conviction of the lower court and set aside the sentence. Further, the court was urged to acquit the Appellants.

Under ground 2, the Appellants contended that confessions relied upon by the trial court were not voluntarily obtained therefore they ought not to have been admitted into evidence. Further, that there was evidence tendered by the Appellants that they were beaten in order to procure the confessions in question. We were referred to the case of **Steven Mushoke Vs. The People** ⁽⁴⁾ where the Court stated that it was wrong for a trial Court to admit a warn and caution statement without giving proper reasons. In addition, our attention was drawn to the cases of **Mateko and 7 Others Vs. The People** ⁽⁵⁾ and **Patrick Kunda and**

Robertson Muleba Chisenga Vs. The People ⁽²⁾ where the Court cautioned against convicting solely on confession evidence.

The Appellants submitted that on the totality of the evidence, the prosecution had not proved beyond all reasonable doubt the guilt of the Appellants.

It was argued that the trial was a mistrial therefore the Court ought to allow the appeal, quash the conviction and set aside the sentence. Further, in the alternative the Court was urged to allow the appeal owing to the defective ruling and the lack of overwhelming evidence against the Appellants.

The Respondent conceded to ground one of the appeal that the Learned Trial Judge erred both in law and fact when she failed to comply with Section **169 of the Criminal Procedure Code** *vis a via* the Judgment delivered. We were referred to our recent decision in the case of **Gibrian Mweetwa Vs The People** ⁽²⁾. Our attention was further drawn to the guidelines on Judgment writing stipulated in the case of **The Minister of Home Affairs & The Attorney General Vs. Lee Habasonda (Suing on His Own Behalf and On Behalf of the Southern African Centre for The Constructive Resolution of Disputes)** ⁽¹⁾.

Counsel for the Respondent submitted that having conceded

State to respond to ground two. It was prayed that the court makes the necessary order considering the circumstances of the case.

We have considered the appeal and the Heads of arguments, the Judgment of the Court below and the authorities cited.

Section **169 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia** stipulates, in respect, of a Judgment that;

“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 point 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.”

The Appellants contend that the Judgment of the Learned Trial Judge failed to meet the requirements of **Section 169 of the Criminal Procedure Code** which prescribes the contents of a Judgment. We have perused the Judgment of the Learned Trial Judge in the Court below. The relevant decision of the Learned Trial Judge appears on pages 133 to 135 of the record of appeal, where she stated that;

“On the two counts of murders the best evidence came from the Confession Statements of the accused persons. What they told the police during investigations led to the admission of a

participated in the tragic event that occurred at Zigzag lodge in April 2012."

In respect of the Confession Statements the Learned Trial Judge stated that she was of "*the view that the Confessions of the accused persons were proved and I find that evidence to be the best.*" There was no analysis of the evidence adduced by the witnesses.

The issue, that arises, is whether the Judgment of the Learned Trial Court met the criteria of a Judgment as stipulated in **Section 169(1) of the Criminal Procedure Code.**

We are of the view that the Judgment in issue does not meet the criteria of what a Judgment must contain. There was no proper review of the evidence adduced and no findings of fact were made. In Addition no finding of facts were made in respect of the conflicting evidence between the Appellant and the Investigating Officers. Further no proper application of the law to the facts was made.

We emphasise the importance of a Judgment of a trial Court to the entire life of a Criminal case. We refer to the case of *Muyunda Muziba and Ilutumbi Sitali* ⁽⁶⁾ where the Supreme Court stated that;

"There are a number of previous decisions which clearly show how important a Judgment of a trial Court is to the entire life of a criminal case."

It is trite that a Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material placed before it.

In the cited case of *The Minister of Home Affairs, The Attorney-General Vs Lee Habasonde (Supra)* the following guidelines were laid in respect of Judgment writing namely that;

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

It is apparent from perusal of the Judgment that it is flawed and defective as it does not comply with **Section 169 of the Criminal Procedure Code**. The evidence adduced by Ezekiel Phiri appearing from page 26 of the record was that upon A3 being apprehended for stealing tyres and duvet sets from Mr Jere, he stated that his accomplices were in the bush burning Charcoal, a statement he later refuted. Further that at the main entrance of the police station A3 denied having met A1. A3 on his part alleged that the statements were not obtained freely.

The evidence by Kelvin Shiacholi that he recorded warn and caution statements from A1 and A3 in which they confessed was subject of a trial within a trial in which the court below ruled that the statements were made voluntary and were therefore admissible. Whilst the appellants denied having committed the offences in their defence.

The Learned Trial Judge did not make any findings of fact or determinations on credibility as to why she accepted the prosecution's evidence and not the Appellants'. Neither did the learned trial court caution itself on the possibility of PW2 being a witness with a possible interest of his own to serve, having at one point been detained in custody for a day in connection with the alleged offences. It is the duty of the trial court to make findings of fact in respect of conflicting evidence. As an appellate court we cannot make findings of fact as the credibility of the witnesses is in issue. There was a cavalier approach by the court below in rendering the judgment. This was a clear misdirection on the part of the learned trial court. We find merit in ground one.

The next issue is whether the conviction was safe and if not, whether the interest of justice requires that the matter be sent back for re-trial.

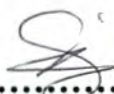
It is settled law that it depends on the particular facts and circumstances of each case whether an order for retrial should be made. It is only made when the interest of justice require it or where such an order is unlikely to cause injustice to an accused person. We refer to the Supreme Court case of ***Princess Nakatindi Wina Vs. The People*** ⁽⁷⁾. The Court of Appeal is reposed with power to order a retrial by **Section 16 (3) of the Court of Appeal Act No. 7 of 2016** which provides that;

“The Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered or, if the interest of justice so require, order a new trial.”

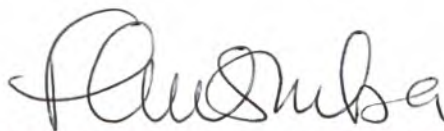
We are of the view that in the circumstances of this case, it would be in the interest of justice that the matter be sent back for retrial. This is on account of the evidence adduced in the court below which we alluded to earlier on by the prosecution and the Appellants vis a vie the conflicting evidence, and the evidence by PW3 who was once detained in custody in connection with the offences. We are of the further view that by sending back the matter for retrial no injustice would be caused to the Appellants.

For the foregoing reasons, we hereby set aside the conviction and sentence. The matter is accordingly referred back

to the High Court for retrial before another Judge. The Appellants shall remain in custody pending retrial.



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F. M. Chisanga
JUDGE PRESIDENT
COURT OF APPEAL



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F.M. Chishimba
COURT OF APPEAL JUDGE



.....
D.Y Sichinga, SC
COURT OF APPEAL JUDGE